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FEDERAL LABOR LAW AND THE MASHANTUCKET PEQUOT: UNION ORGANIZING AT FOXWOODS CASINO

*Derek Ghan**

I. Introduction

The Mashantucket Pequot's gaming enterprise has allowed the Pequot Reservation to reemerge with a definable cultural identity. Given how close this once powerful presence came to extinction, the Tribe has been active and aggressive in exercising its sovereign right to retain complete autonomy and control over its gaming enterprises.

It should come as no surprise that in 2008, the Tribe was less than enthusiastic to find itself in the midst of an organizing campaign at Foxwoods Casino — one in which the National Labor Relations Board, the federal labor relations administrative agency, declared it had the jurisdiction to regulate the Casino's workforce. The D.C. Circuit Court of Appeals established federal jurisdiction over labor relations on reservations two years earlier in *San Manuel Indian Bingo & Casino v. NLRB*;¹ however, the distinctively central role that tribal casinos play in the survival and cultural development of most tribes calls for a specialized and coherent policy that recognizes and addresses the idiosyncrasies of labor organizing campaigns at tribal casinos. The United Auto Workers ("UAW") campaign at Foxwoods illustrates the possibilities and pitfalls of such a campaign.

During the UAW Foxwoods campaign, the Pequot perceived a threat to the Casino as a threat to the Tribe's very survival. The campaign at Foxwoods revealed tension between a tribe that fought an uphill battle to achieve economic sustainability and a workforce looking for a respectable wage, job security, and a healthy work environment. Balance can be achieved between these competing interests — the interest of the workforce and that of tribal sovereignty. Federal regulators, however, missed an opportunity to strike this balance by not crafting an explicit policy in this emerging intersection of labor and tribal law.

* J.D. University of Connecticut School of Law 2012, B.A. Seattle Pacific University 2005. I would like to thank Professor Bethany Berger for her guidance as well as my peers at the University Connecticut School of Law, particularly Elizabeth Kreick for her valuable contributions and editorial eye. I would also like to thank my wife Adriana for her patience and support. Finally, I am grateful for the editorial support from the staff of the American Indian Law Review.

1. 475 F.3d 1306 (D.C. Cir. 2007).

The most apparent symbol of the Tribe's departure from its troubled past² is the massive gaming complex it has constructed. As you drive east on Route Two and slowly reach the crest of a small incline, you see the trees open up for the monument to the Tribe's economic success. The Foxwoods Resort Casino stands like a metropolitan oasis in the forested area of southeastern Connecticut.³ It has been described as the largest casino resort in the Western Hemisphere.⁴ The Casino is the product of an aggressive campaign to rehabilitate the disappearing Tribe. A small cadre of Pequots initiated that campaign in the early 1970s, led by the grandson of one of the last remaining members on the reservation.⁵

Since the launch of the gaming enterprise, the Tribe's on-reservation population has grown exponentially. Economic success drew members back to the reservation whose families had left in the nineteenth and twentieth centuries in search of better wages than could be offered by the Tribe.

As the Casino brought prosperity, the Tribe focused its attention on the study of the Mashantucket Pequot's culture and ethnohistory. This new focus developed in tandem with the reemergence of the Tribe's on-reservation population, serving the dual purpose of educating the non-Native public as well as the newer generation of the Pequot community.

This Article will analyze how the Mashantucket Pequot Tribe ("Tribe" or "Pequot"), the pro-union campaigners, and the National Labor Relations Board ("NLRB" or "the Board") responded to the 2008 union organizing campaign at Foxwoods Casino in light of the Casino's role in the Tribe's survival and cultural reemergence. To better understand the Tribe's contemporary decision making, it is necessary to first examine the historical context in which the Tribe evolved.

Part II will survey the historic relationship of the Pequot with the State of Connecticut as well as the federal government. Part III will address some modern milestones in the Tribe's development that set it apart as a unique case study from other native nation's rebuilding stories. Part IV will introduce the labor organizing campaigns beginning in 2007, focusing on the campaign conducted with the help of the UAW Union on behalf of the Foxwoods table game dealers.

2. See *infra* Part II.

3. Michael Sokolove, *Foxwoods Is Fighting for Its Life*, N.Y. TIMES MAG. (Mar. 14, 2012), <http://www.nytimes.com/2012/03/18/magazine/mike-sokolove-foxwood-casinos.html?pagewanted=all>.

4. *Id.*

5. *Id.*

Finally, Part V will evaluate the tribal, union, and federal agencies' responses to the organizing campaign in light of the inimitable cultural re-emergence and economic development of the Tribe. The Tribe's evolution greatly influenced how the Tribe viewed the organizing campaign as well as how it strategically responded. Additionally, this section will examine the response of both the union and the NLRB and evaluate the two organizations' roles. This article argues that the NLRB missed an opportunity to develop crucial labor regulation policy at tribal casinos; however, by simply acknowledging the unique history and circumstances of the Pequot, the union was better able to produce substantive results that appealed both the organizing employees and the Tribe.

II. A Brief History of the Mashantucket Pequot: From First Contact to the 1970s

The story of the Mashantucket Pequot Tribe, like many other stories of native tribes after Anglo contact, is one laden with tragedy. During pre-colonial and the early colonial eras, the Pequot held significant economic influence in the region due to the Tribe's control over the wampum trade.⁶ Wampum, a small tubular bead made from a specific crustacean, acted as the preferred currency among tribes in the southern New England region.⁷ Indeed, European colonials, particularly the Dutch and English, quickly recognized the importance of wampum in the fur trade.⁸ They created a trade triangle, first exchanging manufactured European goods for wampum in the coastal regions, then sailing inland to exchange the wampum for furs, which they then sold for enormous profits in Europe.⁹ The Tribe was strategically positioned between the inland fur traders and the weaker coastal bead-makers, making the Pequot the de facto "mintmasters" of the southern New England wampum trade.¹⁰

The spike in trade activity after the arrival of the European colonists shoved the Pequot into the economic spotlight, making the Tribe one of the most rich and powerful groups in the region. Noted nineteenth-century

6. See Lynn Ceci, *Native Wampum as a Peripheral Resource in the Seventeenth-Century World-System*, in *THE PEQUOTS IN SOUTHERN NEW ENGLAND: THE FALL AND RISE OF AN AMERICAN INDIAN NATION* 48, 59 (Laurence M. Hauptman & James D. Wherry eds., 1990) [hereinafter *THE PEQUOTS IN SOUTHERN NEW ENGLAND*].

7. *Id.* at 48-49.

8. *Id.* at 55-58.

9. *Id.* at 58-59.

10. *Id.* at 59-60.

historian John De Forest¹¹ characterized the Tribe as “the most numerous, the most warlike, the fiercest and the bravest of all the aboriginal clans of Connecticut.”¹² The earliest accounts of European contact with the Pequot date as far back as 1614, but it was not until the early 1630s that the Pequot had regular interactions with both the Dutch and English.¹³

The Dutch were the first to establish trade relations with the Pequot.¹⁴ In 1633, the Dutch purchased a small tract of land along the Connecticut River from the Pequot, and sought to establish it as a safe haven for trading in the river valley, free from harassment and violence.¹⁵ Soon after the Dutch established this safe trade zone, the Pequot violated Dutch terms by killing members of a rival tribe in the area.¹⁶ This act so incensed the Dutch that the Dutch carried out their own brand of justice by executing the Pequot Grand Sachem Wopigwooit and several of his men.¹⁷ A brief war between the Dutch and Pequot ensued, severing the trade ties between the two groups.¹⁸ De Forest attributes the later doomed relationship between the Pequot and English Puritan settlers to the execution of Wopigwooit and the subsequent war with the Dutch.¹⁹

Tales of a flourishing and prosperous fur trade in the Connecticut Valley persuaded the English settlers in the Massachusetts colonies to petition then Governor Winthrop to send a contingent to the area to establish a trade relationship.²⁰ Winthrop, however, was hesitant to oblige, having heard that the tribes in the area were not easily pacified and the landscape offered little

11. Anglo accounts of tribal histories are often prone to misconceptions of tribal culture; however, for the purpose of this article, it is important to understand European conceptions of the Tribe.

12. JOHN W. DE FOREST, *HISTORY OF THE INDIANS OF CONNECTICUT FROM THE EARLIEST KNOWN PERIOD TO 1850*, at 58 (Hartford, Wm. Jas. Hamersley 1851). The indigenous tribes' pre-contact warfare was very different from the type of war that historians such as De Forest would have known. Because tribes had small, dispersed populations and could not afford many deaths, tribes only waged war in order to settle boundary disputes, expand territory, or avenge insults. Men fought the wars and women and children were usually spared. Michael Freeman, *Puritans and Pequots: The Question of Genocide*, 68 *NEW ENG. Q.* 278, 285 (1995).

13. William A. Starna, *The Pequots in the Early Seventeenth Century*, in *THE PEQUOTS IN SOUTHERN NEW ENGLAND*, *supra* note 6, at 33, 34.

14. DE FOREST, *supra* note 12, at 71-73.

15. *Id.* at 72.

16. *Id.* at 73.

17. *Id.* “Sachem” is the term that area tribes used for their head or chief. *Id.* at 30.

18. *Id.*

19. *Id.*

20. *See id.* at 74-76.

in natural defenses.²¹ Winthrop eventually relented and the first English settlement set out from Massachusetts in the early 1630s.²² A rift in the relationship between the Pequot and English occurred when the English settlers arrived in the Connecticut River Valley escorting a tribal chief the Pequot had exiled after conquering the chief's tribe.²³ At that moment, the English settlers had unintentionally hurled their first insult at the Pequot.²⁴

The relationship continued its downward trajectory when the English refused to recognize Pequot title²⁵ to the territory.²⁶ De Forest opined that this may have been a result of the English settlers' negative view of the Pequot as intruders and thieves.²⁷ His alternative theory was that the Dutch had previously acknowledged Pequot title to the land, but the English settlers had to deny title to give the appearance of denying Dutch authority in the area.²⁸ Returning with the exiled chief, refusing to acknowledge Pequot title to the land, and the execution of Wopigwooit combined to fuel the flames between the Pequot and the English.

In the summer of 1633, Captain John Stone, a slaver and privateer, sailed up the Connecticut River, forever altering the course of Pequot history.²⁹ History has not looked kindly on Stone's legacy. De Forest, for one, described Captain Stone as "dissolute" and "intemperate."³⁰ Following his arrival in the river valley, the Pequot killed Stone and his crew, claiming it was necessary in order to rescue two kidnapped Pequots Stone had captured and forced to pilot his vessel up the river.³¹

21. *See id.* at 75.

22. *Id.* at 74-75.

23. *See id.* at 76.

24. *Id.*

25. For a discussion of aboriginal title and the Discovery Doctrine, see Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases* 36 AM. INDIAN L. REV. 253, 269-70 (2011-2012) and Blake A. Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title*, 15 LEWIS & CLARK L. REV. 995 (2011).

26. DE FOREST, *supra* note 12, at 76.

27. *Id.*

28. *Id.* In their quest to appropriate new lands under the guise of legal legitimacy, it likely behooved the English colonists refused to acknowledge Dutch authority to recognize or confer title to land.

29. *Id.* at 77.

30. *Id.* Other historians have been even less kind in their accounts of Captain John Stone, describing him as a rogue who was kicked out of Plymouth before he could be tried for other crimes. *See, e.g.*, Freeman, *supra* note 12, at 286-87.

31. DE FOREST, *supra* note 12, at 77-78.

The deaths of Captain Stone and his crew caused open war. The Pequot were pitted against the English and other lesser tribes that allied with the English in order to prevent Pequot expansion of authority throughout the river valley.³² The ensuing war peaked in a bloody battle that decimated the Pequot population. On May 26, 1637, a contingent of English soldiers accompanied by their Narragansett and Mohegan allies surrounded the Pequot fort in Mystic and set fire to the wigwams therein.³³ Some Pequots died in the fort at the hands of their enemies or from the flames; others fled the burning fort to a line of hostile musket fire from the enemy contingencies.³⁴

The death toll varies from account to account, but the general consensus is that less than a score of the Fort Mystic Pequots survived the attack.³⁵ Following the Fort Mystic campaign, the Pequot fled west to escape English attack.³⁶ This retreat concluded the war and ended just as violently with an estimated 700 Pequots dead.³⁷ Among the dead was the last great Chief of the Pequot, Sassacus, as well as thirteen of the twenty-six remaining chiefs.³⁸ About 300 total surviving Pequots — mostly women and children — were sold into slavery throughout the English colonies.³⁹ In 1638, 200 of the Pequot that had not been sold into slavery to the British American and Caribbean colonies were divided among or willingly fled to live with the Mohegan and Narragansett.⁴⁰ The land formerly owned by the Pequot was to become the property of the English colonists; and the Pequot were to become Mohegan, Narragansett, and Eastern Niantic.⁴¹ They did not live in their ancient land nor identify with their ancient name.⁴² De Forest concludes his account of the Pequot War with this summation: “Such was the peace which closed the famous Pequot War; and thus, for a time, was the national existence of that brave though savage people extinguished.”⁴³

32. Freeman, *supra* note 12, at 288.

33. *Id.*

34. DE FOREST, *supra* note 12, at 131-33.

35. *See id.* at 133; Freeman, *supra* note 12, at 288-89.

36. DE FOREST, *supra* note 12, at 152.

37. *Id.*

38. *Id.*

39. Michael L. Fickes, “They Could Not Endure That Yoke”: *The Captivity of Pequot Women and Children After the War of 1637*, 73 NEW ENG. Q. 58, 61-62 (2000).

40. DE FOREST, *supra* note 12, at 160.

41. *Id.*

42. *Id.*

43. *Id.*

Pequot history subsequent to the 1637 war is best described by ethnohistorian Jack Campisi: “Two themes run through Pequot history: a tenacious persistence to maintain the tribal identity and an unswerving struggle to hold on to tribal land.”⁴⁴ By 1650, most Pequots held in captivity as slaves or as tributes to the other tribes had managed to find a way to escape from living under their direct control and re-establish some semblance of autonomy.⁴⁵ Notably, some of the tribes tasked with taking custody of the captives following the war either gave their Pequot wards great latitude in self-determination or assimilated them as part of their own tribe.⁴⁶ Two specific groups regained their independence, the Western (Mashantucket) Pequot, originally under control of the Narragansett, and the Eastern Pequot, originally under control of the Mohegan.⁴⁷ The English colonists established four Indian towns, two for the Western Pequot and two for the Eastern Pequot.⁴⁸

By the end of the seventeenth century, the English colonists had assumed the position of trustee/protector over the Pequot, a role typical of the federal government after the birth of the new nation.⁴⁹ The colonial governor officially recognized the East and West Pequot as two distinct tribes.⁵⁰ They developed as “two separate social and political entities” with autonomous, albeit similar, cultural identity.⁵¹ The Connecticut colony granted a 2000-acre tract of land in the town of Ledyard, known as Mashantucket;⁵² but the Western Pequot were insistent on a land grant at the headwater of Mystic River requested by their leader, Cassacinamon.⁵³ Because the Western Pequot were insistent on the grant of a different tract of land, few initially

44. Jack Campisi, *The Emergence of the Mashantucket Pequot Tribe, 1637-1975*, in *THE PEQUOTS IN SOUTHERN NEW ENGLAND*, *supra* note 6, at 117, 117.

45. Fickes, *supra* note 39, at 73.

46. *Id.* at 76-77.

47. Campisi, *supra* note 44, at 118.

48. *Id.*

49. *See id.* at 119-20; *see also* John Fredericks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 107-21 (1989) (discussing the federal government’s role as the fiduciary over tribal land and investments).

50. Campisi, *supra* note 44, at 119-20.

51. *Id.*

52. RICHARD RADUNE, PEQUOT PLANTATION: THE STORY OF AN EARLY COLONIAL SETTLEMENT 158 (2005).

53. KIM ISAAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD’S MOST PROFITABLE CASINO 42 (2002).

occupied Mashantucket; but by the time of Cassacinamon's death, most of the Western Pequot had migrated to Mashantucket.⁵⁴

In 1722, the Tribe's state-appointed overseer accused the heirs of John Winthrop, Jr. of stealing 500 acres of Mashantucket land.⁵⁵ While the allegations were never completely substantiated, the English, who wanted land title, made a compromise in 1732 with the Mashantucket Pequot, who sought to retain their land in its entirety.⁵⁶ The compromise divided the land in half, making half available for lease to the English colonists, while the Pequot retained the right to use the other half.⁵⁷ The compromise did little to quell the growing resentment of the English colonists who wanted underlying title to this leased land.⁵⁸ In 1761, the colonists were finally successful in securing title and extinguishing any future claims the Pequot might have had under the act.⁵⁹ The 1761 campaign reduced the Mashantucket Pequot reservation to 989 acres, less than half of the original grant.⁶⁰

Over the next two centuries, the Pequot population dwindled while illegal land sales increased.⁶¹ A 1774 census recorded 151 Pequot living on Mashantucket; however, the number fell to less than fifty by the 1800s, as members left the reservation to pursue other financial ventures.⁶² The acreage of Mashantucket diminished at the hands of the Tribe's overseers. In 1855, the Connecticut General Assembly passed a law that allowed newly appointed overseers to sell nearly 80% of the Mashantucket land, leaving only 180 acres of the reservation intact.⁶³

While the sale of the tribal land served as a source of funding for the Tribe, the absence of any viable economic development at Mashantucket

54. *See id.*

55. Campisi, *supra* note 44, at 120.

56. *Id.* at 121-22.

57. *Id.*

58. *Id.*

59. Campisi believes the success of 1761 campaign was successful because many Pequot men had died as a result of the Tribe's involvement in the French and Indian War. Thus, the remaining Pequot population dwindled and weakened due to the loss of the labor force available to produce food for the Tribe. *Id.* at 123-24.

60. *Id.*

61. The alienability of Indian land was first governed by the Royal Proclamation of 1763 and subsequently by the Non-Intercourse Act passed in 1802. *See* Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005) (providing a detailed survey of how Connecticut and other states violated the law of the time to exploit Indian territory).

62. Campisi, *supra* note 44, at 125.

63. *Id.* at 132.

forced members to leave the reservation in search of more sustainable work. Many Pequot men joined whaling ventures out of New England or went to mine granite in Rhode Island with the Narragansett.⁶⁴ By 1935, a state commission census put the on-reservation population at a mere nine, with a remaining forty-two in the surrounding area.⁶⁵

Throughout the first half of the twentieth century, limited funding — despite the income generated by the 1855 land sale — prevented the on-reservation members from maintaining their households. The Tribe's main source of income at the time was the interest generated by the principle from the Tribe's trust fund, which was deteriorating almost as quickly as the on-reservation population.⁶⁶ On the other hand, the Great Depression brought members in search of new livelihoods back to the reservation.⁶⁷

By the 1941, the state Department of Welfare took authority over the Mashantucket Pequot affairs.⁶⁸ Through a series of tactics designed to divest the Mashantucket Pequot of their land and undermine the Tribe's sovereignty, nearly all of the remaining Pequots living on the Mashantucket Reservation were forced to move off the land.⁶⁹ Two Pequot women, Elizabeth George Plouffe and Martha Langevin Ellal, were the last remaining Pequots on Mashantucket, and both women knew the importance of protecting the remnants of their once-great nation.⁷⁰ Before George Plouffe died in 1973, she urged her grandson, Richard "Skip" Hayward and the rest of his generation "to hold on to the land" and bring the Tribe back to Mashantucket.⁷¹

64. Interview with Dr. Jason Mancini, senior researcher at the Mashantucket Pequot Tribal Museum (notes on file with author), at the Mashantucket Pequot Museum and Research Center on Mar. 23, 2012.. The Pequot worked side-by-side with the Narragansett and other area tribal members in Rhode Island, cultivating one of the earliest Pan-American Indian movements in New England, which likely played an important role in the area tribes' efforts to re-establish sovereignty and autonomy. *Id.*

65. Campisi, *supra* note 44, at 133.

66. *Id.* at 133-34.

67. *Id.*

68. Robert L. Bee, *Connecticut's Indian Policy: From Testy Arrogance to Benign Bemusement*, in *THE PEQUOTS IN SOUTHERN NEW ENGLAND*, *supra* note 6, at 195.

69. Interview with Dr. Jason Mancini, *supra* note 64; *see also* Bee, *supra* note 68, at 194-95 (explaining that the "'people concerns' of welfare involved economic need, not the preservation of Indian ethnic identity").

70. JOHN J. BODINGER DE URIARTE, *CASINO AND MUSEUM: REPRESENTING MASHANTUCKET PEQUOT IDENTITY* 44 (2007).

71. *Tribal History*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <http://www.mashantucket.com/tribalhistory.aspx> (last visited May 22, 2013).

III. Economic Development and Mashantucket Pequot Cultural Identity

A. Federal Recognition and Early Economic Development

Most researchers agree that a land base is often an essential element to the continuity of tribal culture.⁷² In the case of the Mashantucket Pequot, opportunity and incentive were necessary to bring the Pequot back to the reservation and to re-establish a tribal community that preserves Pequot identity.

Hayward and the few remaining Pequots, dedicated to this purpose, heeded Elizabeth George Plouffe's words and began a new campaign in the 1970s aimed at revitalizing the Tribe. The first step in the Tribe's campaign became possible following the Supreme Court decision in *Oneida Indian Nation v. County of Oneida*.⁷³ The 1974 decision declared that the Indian Non-Intercourse Act protected tribal lands in the original colonies.⁷⁴ Armed with this new precedent, the Tribe aimed to negotiate a settlement for the disputed land, improve state/tribal relations, and earn federal recognition.⁷⁵

In addition to federal recognition and re-securing reservation land, the Tribe's other specific goals were economic self-sufficiency and establishing adequate housing⁷⁶ in order to attract members back to the reservation. Economic opportunity would be the draw, and the housing would be necessary to both quarter the returning members and re-build an on-reservation community. Hayward led the first attempt to rebuild the reservation after securing a small housing grant from the Federal Housing and Urban Development agency.⁷⁷ Using the modest grant fund, he commissioned a small housing complex as well as a hydroponic greenhouse

72. See, e.g., Bee, *supra* note 68, at 195 ("As Indian groups have argued for years, both the land base and the cultural heritage are vital for preservation of Indian Identity."); Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 47 (2000) ("Tribes that still occupy their homeland have made these places sacred in their creation stories and subsequent history or myth. Relocated tribes do not have this connection, but generations of births and deaths make new places sacred."); Mary Lawlor, *Identity in Mashantucket*, 57 AM. Q. 153, 160 (2005) ("In particular, the historicization of the tribal homeland as the ground to which the tribal population belongs in an autochthonous relation enables the Pequots to shape a counter experience to alienation and the loss of cultural articulation.").

73. 414 U.S. 661 (1974).

74. *Id.* at 670.

75. Campisi, *supra* note 44, at 184.

76. Anne-Marie d'Hautesserre, *Foxwoods Casino Resort: An Unusual Experiment in Economic Development*, 74 ECON. GEO. 112, 114 (1998).

77. James D. Wherry, *Afterword to THE PEQUOTS IN SOUTHERN NEW ENGLAND*, *supra* note 6, at 213, 214-17.

to grow and sell local produce.⁷⁸ Unfortunately, the Tribe suffered several false starts before finding its industrial strengths. The hydroponic greenhouse venture failed to produce any significant returns, and various other undertakings including maple syrup manufacturing, hog farming, and cutting and selling cordwood were equally unsuccessful.⁷⁹

Despite the Tribe's early, underwhelming economic ventures, by the end of the 1970s and into the early 1980s,⁸⁰ the Tribe successfully lobbied both for federal recognition through an Act of Congress⁸¹ as well as improved relations with the State of Connecticut under Governors Meskill and Grasso.⁸²

The Tribe's success in receiving federal recognition is largely attributable to its land claim suits, and in particular, the settlement of these claims and future claims.⁸³ With federal recognition came the opportunity to take advantage of federal programs made available to help revive tribal economies. Although its hydroponic greenhouse failed to produce viable financial results,⁸⁴ new funding sources through programs such as the Indian Government Tax Status Act⁸⁵ provided the Tribe some economic sustainability while it worked to become self-sufficient.

The Tribe's first economic success came shortly after it received federal recognition. Thanks to a Connecticut law that allowed charitable bingo operations, the Tribe made its first foray into on-reservation gambling.⁸⁶ The Tribe enjoyed modest success with its high stakes bingo operation.⁸⁷ With the help of a Supreme Court decision that "affirmed the inherent, sovereign rights of Indian tribes to engage in their chosen paths to

78. *Id.*

79. *Id.* at 215-16; *see also* BODINGER DE URIARTE, *supra* note 70, at 44.

80. It is also important to note here that during this time, there was a shift in Federal policy as well as public sentiment that favored greater sovereignty and more opportunities for economic development for native tribes. *See, e.g.,* d'Hautesserre, *supra* note 76, at 114.

81. Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (2006).

82. *See* Bee, *supra* note 68, at 198-207. The Mashantucket Pequot path to federal recognition was a unique one. Rather than petitioning with the Bureau of Indian Affairs, a process the Tribe believed would likely be unsuccessful, members successfully lobbied Congress for federal legislation in the 1970s. After President Reagan vetoed the initial legislation in 1982, the Tribe managed to lobby for a new version of the Act in 1983, which was signed by the Reagan administration. Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 853 (1983).

83. *See* Wherry, *supra* note 77, at 216.

84. *Id.*

85. Pub. L. 97-473, 96 Stat. 2605 (1982).

86. Wherry, *supra* note 77, at 218-19.

87. BODINGER DE URIARTE, *supra* note 70, at 46.

economic development,” the Tribe resisted state political pressure aimed at undermining its new venture.⁸⁸ Connecticut eventually entered into a gaming compact with the Tribe to secure its stake in the gaming enterprise.⁸⁹

B. Foxwoods Casino and Contemporary Economic and Cultural Development

1. Foxwoods Casino

The passage of the Indian Gaming Regulation Act (“IGRA”)⁹⁰ in 1988 marked the beginning of a new era of economic development for the Mashantucket Pequot and other similarly situated tribes. The Act paved the way for the Tribe’s gaming compact with the state, which, in turn, allowed for its expansion into Class III gaming. Class III gaming is defined by the IGRA as “all forms of gaming that are not [C]lass I gaming or [C]lass II gaming.”⁹¹ The gaming industry generally acknowledges that a Class III gaming license is required to operate a casino with the full array of gaming options. In the context of the Mashantucket Pequot, the Tribe needed the license to transform its bingo hall into a full-fledged gaming enterprise.⁹² By 1987, the Pequot bingo enterprise was generating more than \$10 million annually in gross sales with the Tribe netting \$2.6 million.⁹³ At the same time, the Tribe was successful in increasing its real estate holdings to more than 1600 acres.⁹⁴

As the Tribe’s on-reservation economy began to show signs of life, the initial goals set by Hayward — economic self-sufficiency and bringing members back to the reservation — took hold. The Tribe’s on-reservation population increased to more than 300 members.⁹⁵

88. Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgement*, 31 LAW & SOC. INQUIRY 313, 321 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

89. *Id.*

90. Pub. L. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2006)).

91. 25 U.S.C. § 2703(8).

92. See Kathryn R. L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 Chap. L. Rev. 47, 50-53 (2002).

93. d’Hauteserre, *supra* note 76, at 116.

94. *Id.*

95. Sam Libby, *Who Is an Indian and Who Decides*, N.Y. TIMES (Jan. 14, 1996), <http://www.nytimes.com/1996/01/14/nyregion/who-is-an-indian-and-who-decides.html?pagewanted=all&src=pm>.

On February 15, 1992, the Mashantucket Pequot Tribal Nation welcomed the public to the Foxwoods Casino.⁹⁶ The Casino was backed by a \$60 million investment from a Malaysian enterprise that pioneered destination casino experiences. At a quarter of a million square feet, the casino became the largest gaming destination on the Eastern seaboard.⁹⁷ It even dwarfed the largest Las Vegas Casino, the MGM Grand, by 75,000 square feet.⁹⁸ When its doors first opened, Foxwoods employed 2300 workers.⁹⁹ By 1996, that number had more than quadrupled to 11,300 employees.¹⁰⁰ Over the course of the next three decades, the Mashantucket Pequot Tribal Nation went from toeing the line of obsolescence to becoming one of the most significant economic presences in the region.

2. *The Cultural Impact*

The impact the Casino had on Pequot culture cannot be overstated. While the Tribe had become federally recognized and began exercising its sovereignty in the 1970s, the Casino was the true catalyst that brought members back to Mashantucket. The on-reservation population of the Tribe is higher today than it has been at any point since the establishment of the reservation.¹⁰¹ In addition to drawing members back to the reservation, the Casino's revenue created an opportunity for the tribe to re-educate its members on the history and culture of the Tribe that has been largely lost. The clearest manifestation of this effort is the Mashantucket Pequot Museum and Research Center,¹⁰² however, the effort is by no means limited to the work at the research center or the museum exhibits. The difficult task of recovering a cultural identity lost to oppressive assimilation requires a multifaceted approach.

In addition to the museum, the Tribe has either hosted or participated in a series of powwows in southern New England.¹⁰³ The powwows are part of an effort to fuel the pan-Indian movement by bringing different tribal

96. d'Hautesserre, *supra* note 76, at 116.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Sam Libby & Hilary Waldman, *Family With Pequot Ties Finds Roots Run to Deep*, HARTFORD COURANT (Aug. 28, 1995), http://articles.courant.com/1995-08-28/news/9508280013_1_tribe-mashantucket-pequots-foxwoods-resort-casino.

102. See BODINGER DE URIARTE, *supra* note 70, at 5.

103. See Ann McMullen, *Soapbox Discourse: Tribal Historiography, Indian-White Relations, and Southeastern New England Powwows*, PUB. HISTORIAN, Fall 1996, at 53, 56-57.

cultures together to celebrate common ancestries and practices as well as display the distinct aspects of different tribes.¹⁰⁴ The largest gathering at Mashantucket, the Green Corn Powwow, features dance contests, displays of traditional art, and an anthropological presentation of pre-contact culture.¹⁰⁵

When the Tribe's population was driven off the reservation land, members scattered to all different parts of the country.¹⁰⁶ Upon their return, few of these members had anything in common with on-reservation members, other than their ancestral lineage.¹⁰⁷ The general public's growing adverse sentiment toward the Tribe's economic boom created a sense of urgency to educate its returning members of their common history and culture,¹⁰⁸ unity was necessary.

Historically, the Mashantucket Pequot and the surrounding communities have not enjoyed an amenable coexistence. This tension likely results from an adversarial relationship between the Tribe and its state overseers.¹⁰⁹ The Tribe has never been reticent in challenging the actions of the colonial, state, and federal governments.¹¹⁰ When state and local officials consistently refused to aid the Tribe during its darkest hours, on-reservation members responded by treating those officials as trespassers when they came to enforce ordinances, state laws, or regulations. For example, the town of Ledyard continually refused to provide basic public services to the reservation. This prompted the few remaining members to remedy their situation through other forms of self-help.¹¹¹

104. McMullen, *supra* note 103, at 57.

105. For more details on the Green Corn Powwow, see MASHANTUCKET PEQUOT TRIBAL NATION, SCHEMITZUN: FEAST OF GREEN CORN & DANCE (2012) (promotional brochure), available at <http://www.schemitzun.com/uploadedFiles/Brochure.pdf>.

106. Lawlor, *supra* note 72, at 156.

107. *Id.* (“[Members] hailed from different parts of the country, from different social and political classes, and they still maintain a variety of political and religious orientations. In addition to being Pequot, they present a broad range of ethnic backgrounds.”); see also Kirk Johnson, *Tribe's Promised Land Is Rich but Uneasy*, N.Y. TIMES (Feb. 20, 1995), <http://www.nytimes.com/1995/02/20/nyregion/tribe-s-promised-land-is-rich-but-uneasy.html?pagewanted=all&src=pm>.

108. See generally BODINGER DE URIARTE, *supra* note 70, for an in depth analysis of the Mashantucket Pequot Tribe's trials and efforts to cultivate a contemporary cultural identity, and the attempts made by outside groups to dictate the terms of tribal identity, often times for ulterior profit-driven motives.

109. Campisi, *supra* note 44, at 126-27.

110. *Id.*

111. *Id.* at 137-38.

The tension between the state and the Tribe likely grew when the Tribe's gaming enterprise became successful. When the Mashantucket Pequot fled the reservation, and moved to different parts of the nation, they returned with a plethora of ethnic, socio-economic, political, and religious backgrounds. The public then viewed the returning tribal members as insufficiently "Indian" to legitimately take advantage of the IGRA or invoke tribal sovereignty.¹¹² Furthermore, the returning members had diminished knowledge of Mashantucket Pequot culture and history. Thus, the only public symbol of community and tribal unification was the Casino.

In response to the public sentiment as well as the Tribe's cultural survival, the tribal government devoted a significant portion of its newfound wealth to building the Mashantucket Pequot Museum and Research Center¹¹³ as well as funding initiatives to re-connect with Pequot culture and encourage community involvement among tribal members. The wealth generated by Foxwoods Casino has, thus, played an intricate role in reviving Mashantucket Pequot culture. Indeed, the very survival of the Tribe is largely attributable to the success of the Tribe's gaming enterprise.

3. The Current Financial Uncertainty of the Mashantucket Pequot Gaming Enterprise

The old English adage "all good things come to an end" rang true in 2007 when the U.S. housing market slumped. In 2006, the Tribe began construction on the MGM Grand Tower, an ambitious endeavor for any business enterprise.¹¹⁴ The Tribe — like most other developers across the country — found itself buying into the hype that bubble markets do not burst. Rodney Butler, the current Chairman of the Mashantucket Pequot Tribal Council, reminisced,

Every consultant, every analyst and every banker on the planet encouraged us to keep getting bigger. . . . If it wasn't for that, I'd say, Jeez, maybe we're just idiots. But these were smart people. Then we opened the doors at the MGM Grand, and five months later, Lehman crashes and the world falls apart.¹¹⁵

The completion of the MGM Tower was the moment that finally launched the Tribe into its current financial tailspin.¹¹⁶ The Casino's

112. See Cramer, *supra* note 88, at 325-27.

113. The price tag of the impressive museum is over \$200 million.

114. Sokolove, *supra* note 3.

115. *Id.*

116. *Id.*

financial crisis forced the Tribe to implement austerity measures. It was in this context of financial uncertainty that the UAW organizing campaign commenced.

IV. The United Auto Workers Organizing Campaign at Foxwoods

Table game dealers at Foxwoods Casino began collaborating with the UAW and in July of 2007 the union initiated a signature campaign with casino table dealers in a bid to organize the three thousand workers.¹¹⁷ The faltering economy and the Tribe's precarious financial position spread uncertainty and fear among the non-member employees.¹¹⁸ Employees were particularly concerned that the new austerity measures would drive members to take the tip-lucrative dealer jobs in the Casino. The Mashantucket Pequot Native-employee-preference law only exacerbated those concerns.

In September of 2007, the UAW petitioned the NLRB on behalf of the dealers to certify them as a collective bargaining unit and force an election at Foxwoods.¹¹⁹ Union officials claimed that the signature campaign started that summer had culminated in supermajority support.¹²⁰ The Casino took a public stance opposing the unionization of the workers.

By the time the UAW filed its petition with the NLRB, the Mashantucket Pequot had its own labor law in the tribal statutes. The Mashantucket Pequot Labor Relations Law ("MPLRL") was enacted in August of 2007, mere months before the NLRB ruled on the UAW petition.¹²¹ In its initial form, the MPLRL borrowed modestly from the National Labor Relations Act ("NLRA") with similar protective mechanisms for both workers and the employer; however, it contained several punitive measures targeted at employees.¹²² These measures included levying attorney's fees against

117. John Christoffersen, *UAW Files Petition for Union at Foxwoods Casino*, USA TODAY (Sept. 28, 2007, 12:03 PM), http://www.usatoday.com/money/companies/2007-09-28-foxwoods-uaw_N.htm.

118. Only about one-third of one percent of the Casino workforce consists of tribal members. Foxwoods Resort Casino, No. 34-RC-2230, 2007 N.L.R.B. Reg. Dir. Dec. LEXIS 285, at *4 (Oct. 24, 2007).

119. Joan Silvi, *UAW, Pequots Forge Agreement*, UAW.ORG, <http://uaw.org/story/uaw-pequots-forge-agreement>

120. John Christofferson, *Petition Filed to Form Union at Foxwoods Resort Casino*, OJLWE NEWS, Oct. 1, 2007, available at <http://reflections.mndigital.org/cdm/compound/object/collection/p16022coll12/id/23705/rec/41>.

121. *Foxwoods*, 2007 N.L.R.B. Reg. Dir. Dec. LEXIS 285, at *15.

122. *Id.* at *15-*16.

employees who advanced “frivolous lawsuits” and withdrawal of union recognition for employees that committed prohibited practices.¹²³

Additionally, the dispute resolution mechanism raised the question of whether the Tribe could be an impartial adjudicator when labor disputes arose.¹²⁴ Perhaps, most importantly, the 2007 statute prohibited union security agreements and an additional right-to-work statute freed employees from the obligation of paying union dues, regardless of representation.¹²⁵ The 2007 law’s purpose was to “provide tribal employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between the Tribe as an employer and tribal employee, and to promote the health, safety, political integrity and economic security of the tribe.”¹²⁶ Union organizers were not convinced.

The MPLRL was passed partly in response to the D.C. District Court of Appeals holding in *San Manuel Indian Bingo & Casino v. NLRB*.¹²⁷ With the blessing of D.C. Circuit Court of Appeals, the NLRB declared its jurisdictional reach to regulate labor issues on reservations.¹²⁸ Prior to the *San Manuel* decision, the Supreme Court mandated in *Federal Power Commission v. Tuscarora Indian Nation* that “statutes of ‘general jurisdiction’ apply to conduct and operation, not only of individual Indians, but also of Indian tribes.”¹²⁹ That holding was, however, tempered by the interpretive canon also adopted by the Supreme Court that “(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.”¹³⁰

The Board’s reasoning differed somewhat from that of the Court of Appeals. The NLRB endorsed the *Tuscarora* application of federal law, provided that Congress did not have a clear intention otherwise; but it also

123. *Id.* at *16-*17.

124. *Id.*

125. See 28 MASHANTUCKET PEQUOT TRIBAL LAWS §§ 1-5 (Supp. 2007), available at <http://www.mptnlaw.com/laws/2007%20Supplement.pdf>; 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 9(c) (2008), available at <http://www.mptnlaw.com/laws/Titles%2024%20-%20End.pdf>.

126. 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 3.

127. 475 F.3d 1306, 1311 (D.C. Cir. 2007).

128. *Id.* at 1315.

129. 362 U.S. 99, 116 (1960) (reasoning that the government has the power of eminent domain over tribal land under the same terms as non-tribal land because Congress had not explicitly carved out an exemption for Indians).

130. *San Manuel*, 475 F.3d at 1311.

adopted three exceptions to this general application, which was first introduced by the Ninth Circuit:

(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations”¹³¹

In making its determination, the Board found that none of the three *Coeur d’Alene* exceptions applied to on-reservation casino operations.¹³² The decision effectively overturned thirty years of Board precedent that treated on-reservation tribal enterprises as arms of their respective tribal governments outside the NLRB’s jurisdictional reach.¹³³

The Court of Appeals departed completely from the *Tuscarora-Coeur d’Alene* analysis, instead applying its own test to determine whether federal labor law should extend to on-reservation activity.¹³⁴ It determined that the “operation of a casino is not a traditional attribute of self-government,” and concluded that the NLRA’s jurisdictional reach would have a negligible impact on tribal sovereignty and did not warrant “a need to construe the statute narrowly against application to employment at the Casino.”¹³⁵

Publicly, the Mashantucket Pequot seemed unconcerned by any lasting effects the *San Manuel* decision might have on its authority to pass and regulate employment and labor laws. The Tribe’s general counsel Jackson King told the New York Times (after the board decision but before the appeal) that he believed the decision would be challenged in court and that the Tribe would “continue to focus on keeping [its] employees satisfied and happy and make sure their benefits are in line, and hopefully get to the point where they wouldn’t seek representation.”¹³⁶ Unfortunately, the Tribe’s dire financial situation following the MGM Grand Tower project

131. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quotations omitted).

132. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1060 (2004).

133. *Id.*

134. *San Manuel*, 475 F.3d at 1315.

135. *Id.* at 1314-15.

136. Jeff Holtz, *Worth Noting: Unions Allowed to Organize on Indian Reservations*, N.Y. TIMES (Jun. 13, 2004), <http://www.nytimes.com/2004/06/13/nyregion/worth-noting-unions-allowed-to-organize-on-indian-reservations.html>.

became the Tribe's focus at the cost of many benefits that King had hoped would pacify employees.

When employees at Foxwoods began showing signs of interest in organizing to collectively bargain in 2006, the Mashantucket Pequot Tribal Council found it necessary to pass its own labor statute. The "Findings" section of the statute broadcasted the Tribal Council's view on the *San Manuel* decision:

Given its inherent authority over employment and labor relations on the Reservation, the tribal regulation of employment on the Reservation, and the longstanding federal policy protecting tribal self-government and promoting tribal self-sufficiency, the Tribe finds that the NLRA does not apply to the tribal government as an employer. Application of the NLRA to the tribal government as an employer would substantially impair the ability of the Tribe to exercise its sovereign authority, including undermining tribal employment laws, subjecting the tribal government to the threat of strikes, and disrupting the tribal government's ability to provide essential services to the community.¹³⁷

In effect, the Tribe codified its belief that the NLRA does not apply to tribal government enterprises, and insisted that, regardless of what federal courts may say, the Mashantucket Pequot Gaming Enterprise ("MPGE") was an "arm of the tribal government" — and thus outside the jurisdictional reach of the NLRB.¹³⁸

The UAW, on behalf of the Foxwoods dealers, initially ignored tribal law and instead petitioned the NLRB.¹³⁹ Because no union has ever sought to organize under tribal law, it is safe to assume that the UAW's hesitance to do so was a strategic decision to litigate the issue in a familiar forum. Additionally, the punitive measures directed at employees and union

137. 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 2(g) (2008), available at <http://www.mptnlaw.com/laws/Titles%2024%20-%20End.pdf>.

138. See *id.* ch. 1 § 2(g)-(i) (finding the MPGE to be an arm of the government is of particular importance). The NLRA does not consider "wholly owned government corporation[s] . . . or any state or political subdivisions thereof" to be employers as defined by the act. See 29 U.S.C. § 152(2) (2006).

139. Daniel Schwartz, *UAW Lands Soft Punch in Battle for Union Recognition at Foxwoods Casino*, CONNECTICUT EMPLOYMENT LAW BLOG (Oct. 24, 2007) <http://www.ctemploymentlawblog.com/2007/10/articles/uaw-lands-first-soft-punch-in-battle-for-union-recognition-at-foxwoods-casino/>.

representatives in the 2007 MPLRL made the tribal system a less favorable forum to litigate the issue, if litigation became necessary.¹⁴⁰

The issue of a labor strike, an economic action sanctioned under the NLRA, also weighed heavily on the Tribe. In the initial NLRB petition decision, the NLRB rejected the tribal counsel's argument that strikes constituted a direct threat or effect on the political integrity or economic security of the Tribe.¹⁴¹ In *Montana v. United States*, the Supreme Court held that tribal civil jurisdiction did not generally extend to regulation of non-members. The Court did, however, specify two exceptions to this limiting rule: where "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or where "the conduct of non-Indians on fee lands within its reservation . . . conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹⁴² The Board distinguished the consensual commercial relationship¹⁴³ — described in *Montana* — from the employment relationship issues in this case finding it inapplicable.¹⁴⁴ It also held that the *Montana* "political integrity" exception did not apply to organizing campaign at Foxwoods, taking a moment to voice its full-throated skepticism of the Tribe's economic concerns:

I find particularly unpersuasive the Employer's claim, unsupported by record evidence, that "a strike against the Tribal Gaming Enterprise would severely disrupt the Tribe's continuing ability to provide essential services" to its constituent members. As previously indicated, the Employer has annual gross revenues in excess of \$ 1 billion, and approximately 98% of the Tribe's

140. See 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 §§ 5-10.

141. Foxwoods Resort Casino, No. 34-RC-2230, 2007 N.L.R.B. Reg. Dir. Dec. LEXIS 285, at *25-*30 (Oct. 27, 2007).

142. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

143. In *Montana v. United States*, the Supreme Court listed examples that included contractual relationships, commercial dealings, leases or "other arrangements," in a list derived from a string of previous case law that held tribes retained jurisdictions over certain activities of non-members. *Id.* The Board, however, viewed the employment relationship as out of the scope of the Supreme Court's list. It specified that the *Montana* exception applied to the "commercial' relationships arising out of business that operate on tribal lands through the contractual relationships with the tribe." With no evidences that a contractual relationship existed between the employer tribe and the casino workers, the Board held the exception to be inapplicable to the Foxwoods case. *Foxwoods*, 2007 N.L.R.B. Reg. Dir. Dec. LEXIS 285, at *25-*30.

144. *Id.* at *25-*30.

revenues are derived from the operation of Foxwoods. Thus, approximately 2 percent of the Tribe's annual income, at least \$ 20,000,000, is derived from outside sources. The record does not indicate the Tribe's capital reserves, or the amounts needed to fund any of its essential services. Therefore, even if the Employer were to face a protracted strike, there is no evidence that it would have insufficient revenues and/or capital to provide the Tribe's 900 members with any essential public service.¹⁴⁵

The Board certified the Foxwoods dealers as a bargaining unit and ordered a secret ballot election.¹⁴⁶ In November of that year, the bargaining unit voted for the UAW to represent them to Foxwoods.¹⁴⁷

Following the Board's initial decision favoring the UAW's petition on behalf of the Foxwoods dealers, various unions sought to capitalize on Board precedent. In April of 2008, the International Union of Operating Engineers successfully petitioned to force an election for 310 engineering and support employees.¹⁴⁸ The next month, the UAW petitioned the NLRB to recognize thirty-eight Racebook writers as another bargaining unit.¹⁴⁹ In 2010, the UAW petitioned the United Food and Commercial Workers Union on behalf of servers and bartenders.¹⁵⁰ In each case, the Mashantucket Pequot had an increased sense of urgency to escape the jurisdictional reach of the NLRB.

In the April 2008 petition, the Tribe made essentially the same arguments it did in opposition to the initial UAW petition in 2007; however, this time, it expanded on its financial concerns.¹⁵¹ The Tribe attempted to clarify its precarious financial position in the event of a strike by submitting evidence of its unusual debt structure. The Board again dismissed the economic claim as "particularly unpersuasive."¹⁵² It stated that there was "insufficient evidence to establish that [the Tribe] would lack

145. *Id.* at *30-*31 (citations omitted).

146. *Id.* at *33.

147. *Connecticut: Casino Dealers Vote to Unionize*, ASSOCIATED PRESS, Nov. 26, 2007, <http://www.nytimes.com/2007/11/26/nyregion/26mbrfs-FOXWOODS.html>.

148. *See Mashantucket Pequot Gaming Enterprise*, No. 34-RC-2251, 2008 N.L.R.B. Reg. Dir. Dec. LEXIS 88, at *1 (Apr. 1, 2008).

149. *See Mashantucket Pequot Gaming Enterprise*, No. 34-RC-2261, 2008 N.L.R.B. Reg. Dir. Dec. LEXIS 112, at *1 (May 2, 2008).

150. *See Mashantucket Pequot Gaming Enterprise*, No. 34-RC-2392, 2010 N.L.R.B. LEXIS 462, at *2 (Nov. 3, 2010).

151. *Mashantucket*, 2008 N.L.R.B. Reg. Dir. Dec. LEXIS 88, at *38.

152. *Id.*

sufficient revenues and/or capital to provide [its] 900 members, as well as employees . . . with any ‘essential’ public services” in the event of a strike.¹⁵³ Again the UAW petitioned in May 2008, this time on behalf of a small group of Racebook writers, and again the Board certified the bargaining unit making a finding identical to the April petition.¹⁵⁴

While the Board continued to certify petitions to establish bargaining units and order elections, the Tribe held on tightly to the belief that the NLRB did not have jurisdiction over it; or, in the alternative, that the Board should decline jurisdiction as a matter of discretion because exercising jurisdiction would significantly infringe on the Tribe’s sovereignty.¹⁵⁵ In September of 2008, the UAW filed another petition, this time alleging that the Tribe committed an unfair labor practice by refusing to bargain with the newly certified dealers bargaining unit.¹⁵⁶ The Board again rejected the Tribe’s argument, ordering Foxwoods to bargain with the local union.¹⁵⁷

Soon after the Board’s order, the UAW and Foxwoods announced in a joint statement that both sides would consider bargaining under the Mashantucket Pequot labor law.¹⁵⁸ Around the same time of the announcement, the Tribe amended its Right to Work and Labor statutes to make an exception to union security agreements made between bargaining units certified under tribal law and tribal employers.¹⁵⁹ The amended statute retained many of the standard protections found in the NLRA and also addressed concerns union organizers and employees had about the Tribal

153. *Id.* at *36-39.

154. *See generally Mashantucket*, 2008 N.L.R.B. Reg. Dir. Dec. LEXIS 112. The finding was literally identical — the Board merely attached the finding for the April petition to support its May petition decision. *Id.*

155. Letter from Jackson T. King, General Counsel, The Mashantucket Pequot Tribal Nation, to Julie Kushner, Assistant Director, Region 9A UAW (Jul. 10, 2008), *available at* <http://www.ctemploymentlawblog.com/foxwoods791.pdf>

156. *Mashantucket Pequot Gaming Enterprise*, No. 34-CA-12081, 2008 N.L.R.B. LEXIS 334, at *1 (Sept. 30, 2008).

157. *Id.* at *3.

158. Michael Gannon, *Casinos: Union, Foxwoods Set Talks for Possible Labor Deal Under Tribal Law*, NORWICHBULLETIN.COM (Oct. 11, 2008, 1:07 AM), <http://www.norwichbulletin.com/casinos/x1776789981/Casinos-Union-Foxwoods-set-talks-for-possible-labor-deal-under-tribal-law#axzz1sB42Hg6W>.

159. *Compare* 28 MASHANTUCKET PEQUOT TRIBAL LAWS § 3 (Supp. 2007), *available at* <http://www.mptnlaw.com/laws/2007%20Supplement.pdf>, *with* 28 MASHANTUCKET PEQUOT TRIBAL LAWS § 3 (Supp. 2010-11), *available at* <http://www.mptnlaw.com/laws/2010-2011%20Pocket%20Part%20to%202008%20Tribal%20Laws.pdf>; *see also* 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 9(c) (Supp. 2010-11).

Court's ability to remain impartial in labor disputes.¹⁶⁰ It did, however, retain the no-strike/no-lockout provision, a distinct departure from the NLRA.¹⁶¹ In this way, the end product resembled most state labor laws governing public sector collective bargaining. Unfortunately, days before the joint statement was released, the MPGE announced that Foxwoods and the MGM Grand would need to lay off 700 workers.¹⁶²

In 2010, the UAW and the Mashantucket Pequot announced that the two parties had brokered the first union contract under tribal law. The parties found common ground by agreeing to negotiate and operate under tribal labor law while retaining their respective right to seek redress in federal court.¹⁶³ The contract gave both the union and Foxwoods reason to claim victory. The unionized employees received, among other things, a 12% raise over two years, a new tip distribution system over which workers had more control, and more job security.¹⁶⁴ Perhaps more importantly, the Collective Bargaining Agreement ("CBA") established what the union viewed as a more neutral dispute resolution mechanism by giving the enforcement of the CBA to a panel of neutral arbitrators as opposed to a Tribe-appointed special master.¹⁶⁵ The MPGE did not walk away empty handed either. The contract provided for cost controls in the form of flexible staffing decisions¹⁶⁶ "at a time when gaming [had] been hard hit by

160. 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 7 (Supp. 2010-11). Specifically, the amended statute prescribed a more detailed dispute resolution mechanism that allowed for both the Tribal employer and union to appoint arbitrators with a third impartial arbitrator appointed by the other two arbitrators.

161. *Id.* at ch. 1 § 11.

162. *Id.*

163. Harriet Jones, *UAW Brokers First Union Contract Under Tribal Law*, NPR (Mar. 14, 2010, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=124625523>.

164. *Id.*

165. Collective Bargaining Agreement Between the Mashantucket Pequot Gaming Enterprise, An Arm of the Mashantucket Pequot Tribal Nation and International Union, U.A.W., AFL-CIO, art. 26 (Jan. 29, 2010 through Dec. 31, 2011) [hereinafter CBA], available at http://uawatmohegan.org/wp-content/uploads/2012/08/Foxwoods-Contract_Fin_al-proof.pdf. The CBA also limits the arbitrator's ability to interpret tribal law:

An Arbitrator does not have the authority and shall not interpret Mashantucket Pequot Tribal law. In the event that a question concerning the interpretation of Mashantucket Pequot Tribal law arises during the Arbitration proceedings, the parties may jointly request that the Arbitrator make application to the Mashantucket Pequot Tribal Court for advice on any question of Mashantucket Pequot Tribal Law.

Id. art. 26.05(f).

166. *Id.* art. 13.

the recession.”¹⁶⁷ In addition, the contract addressed the Tribe’s major concern over workforce dissonance and strikes.¹⁶⁸

But the greatest achievement from the Mashantucket Pequot Tribe’s perspective was the protection of its sovereign right to regulate labor. The media and tribal law experts touted the CBA as a deal that respected the sovereignty of the Mashantucket Pequot Tribe.¹⁶⁹ Julie Kushner, who was the assistant regional director for the UAW at the time, described to the Hartford Courant newspaper that “[w]hat we have done under this agreement is show that the inherent rights of the employee are not in conflict with the sovereignty of the tribe.”¹⁷⁰

V. A Successful Campaign, but a Lost Opportunity

The historical contours of the Mashantucket Pequot Tribe have shaped it into what it is today, and inform its modern decision-making process. The UAW labor campaign is particularly illustrative of the values the Tribe holds sacrosanct. Campisi’s description of the Tribe, “tenacious persistence to maintain the tribal identity and an unswerving struggle to hold on to tribal land” ring true in this employment context.¹⁷¹ The Tribe was not facing a literal threat to its land holdings or cultural continuity, but rather, a threat to Foxwoods Casino — the source of its financial and cultural renewal.

The Mashantucket Pequot’s tumultuous history, particularly with local and federal government authorities, has likely instilled a fundamental distrust in federal and state agencies. Additionally, the historically antagonistic relationship the Tribe had with the surrounding community undoubtedly motivated the Tribe to initially resist the non-member employees’ attempts to bargain collectively with the MPGE.¹⁷² It is, thus, a

167. Jones, *supra* note 163.

168. See 32 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 § 11 (2008), available at <http://www.mptnlaw.com/laws/Titles%2024%20-%20End.pdf>.

169. See, e.g. Eric Gershon, *Foxwoods, UAW Agree on Contract for Table-Game Dealers*, HARTFORD COURANT (Jan. 27, 2010), http://articles.courant.com/2010-01-27/business/hc-foxwoods-union.artjan27_1_contract-for-table-game-dealers-mashantucket-pequot-tribe-tribal-law; Jones, *supra* note 163; Daniel Schwartz, *Breaking News: UAW/Foxwoods – “Historic Agreement” Reached to Negotiate Contract Under Tribal Law*, CONN. EMP. L. BLOG (Oct. 31, 2008), <http://www.ctemploymentlawblog.com/2008/10/articles/breaking-news-uawfoxwoods-historic-agreement-reached-to-negotiate-contract-under-tribal-law/>.

170. Gershon, *supra* note 169.

171. Campisi, *supra* note 44, at 117.

172. The Mohegans, an offshoot of the original pre-colonial Pequot tribe, maintained a more amicable relationship with the surrounding communities, largely as a result of its

reasonable expectation that the Mashantucket Pequot would resist both NLRB jurisdiction as well as an organizing campaign of non-members on the reservation. This is certainly exacerbated by the fact that the jurisdictional reach of the NLRB and the organizing campaign implicated the Tribe's economic livelihood.

A. The NLRB Reaction to the Foxwoods Organizing Campaign

The NLRB's 2007 order invokes memories of Connecticut's Department of Welfare in the early and mid-twentieth century. At the time, the Tribe suffered from severe economic depression, and its pleas for any sort of government aid fell on deaf ears.¹⁷³ Instead, the primary government response came from the Department of Welfare's rigid enforcement of zoning and welfare regulations that the Tribe could not overcome because of its dire economic state.¹⁷⁴ The Department of Welfare's narrow focus on social welfare, while disregarding the Tribe's cultural welfare, bears a striking resemblance to the stance of the NLRB and subsequent federal court decisions. The NLRB's decision for the UAW Foxwoods organizing case reflects a similarly narrow view of the various issues that should be considered when exercising federal or state jurisdiction over Foxwoods. Its glib dismissal of the Tribe's economic concerns demonstrates its fundamental misunderstanding of the critical role that Foxwoods played in the Tribe's survival, and a fundamental misapplication of the economic security exception in *Montana*. Surely, a fuller understanding of the Tribe's tragic history and its past existence at the brink of extinction warrants a closer analysis than "they can afford it."

Additionally, the NLRB's analysis in *San Manuel* and the subsequent case law has sculpted a labor debate that reflects a general policy of placing limitations on tribal sovereignty based on the "Indian-ness" of the act or

historic alliance with English colonists (even during the Pequot war with the English). *See* DE FOREST, *supra* note 12, at 59. Today, the communities surrounding the Mohegan Sun Casino enjoy a financial community agreement with the Mohegan tribe, whereas the communities surrounding Foxwoods do not enjoy such an agreement. *See generally* Kevin Ryan, *Municipal and State Impact of Gaming*, 37 NEW ENG. L. REV. 553 (2002-2003).

173. The Mashantucket Pequot Museum offers an engaging and heartfelt account of the tumultuous years that nearly saw the extinction of the Mashantucket Pequot reservation community in the exhibit *Life on the Reservation*. The exhibit offers a more complete view of the trials and tribulations the tribe struggled through to survive years of racism and exploitation. For more information, see MASHANTUCKET PEQUOT MUSEUM & RESEARCH CENTER, <http://www.pequotmuseum.org> (last visited Mar. 13, 2013).

174. Bee, *supra* note 68, at 196.

industry in question. Using coded language such as “purely intramural,”¹⁷⁵ the NLRB and federal courts determined that only issues such as tribal membership, inheritance rules, and domestic relations are securely in the fold of a tribe’s exclusive jurisdiction.¹⁷⁶ All of these categories are subject to the unique cultural characteristics that vary from tribe to tribe, and thus, are distinctly Hopi or Pequot or Cherokee. Activities distinctly “Indian,” however, do not enjoy the same level of deference to tribal jurisdiction. For example, the Ninth Circuit Court of Appeals espoused — and the NLRB endorsed — the view that owning and managing a casino is “a typical commercial enterprise, operating, and substantially affecting, interstate commerce.”¹⁷⁷ Thus, it is ironic that the single most important issue for almost every tribe’s survival in a free market economy — economic growth — is one of the least jurisdictionally sacrosanct in the eyes of the NLRB and federal courts.

In 2011, on the heels of the successful UAW negotiations, the Tribe petitioned the NLRB, objecting to the results of the July 2010 election for United Food and Commercial Workers Union (“UFCWU”) representation.¹⁷⁸ It alleged that the election was tainted by racial rhetoric intended to “create or inflame racial prejudice among the voters in the election.”¹⁷⁹ Statements such as “[t]ribal stipends are ending Jan. 1st, 2011. Where do you think they are going to look for jobs . . . Walmart, Home Depot . . . I think not,” were included as evidence of the racial animus that plagued the election.¹⁸⁰ The Tribe appealed an unfavorable ruling by an administrative law judge (“ALJ”) to the NLRB, claiming that the judge should have required the Union to prove the veracity of the claims made in

175. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

176. *Foxwoods Resort Casino*, No. 34-RC-2230, 2007 N.L.R.B. Reg. Dir. Dec. LEXIS 285, at *19 (Oct. 24, 2007).

177. *Id.*

178. *Mashantucket Pequot Gaming Enter.*, No. 34-RC-2392, 2011 N.L.R.B. LEXIS 103 (Mar. 17, 2011).

179. *Id.* at *3.

180. *Id.* at *3 n.3. Other statements included:

[E]very one of our jobs are on the line. They will come to work here and are going to take tipped positions like mine and yours. . . . They will come in and take your job.

It’s getting scary now to think that the tribal members are losing their checks and [our] jobs are up for grabs.

Id.

what it alleged to be racial comments.¹⁸¹ The NLRB rejected this claim stating that the comments lacked inflammatory content sufficient to substantiate a prima facie case of racial rhetoric, in which case the respondent would have to respond by proving the veracity of the comments.¹⁸² Because the issues that the comments implicated were of legitimate concern to workers, there was no evidence of intent to induce racial tensions. The NLRB upheld the election results and certified the bargaining unit over the protests of the Tribe.¹⁸³

The Tribe's ability to regulate labor campaigns is of particular importance because of the adversarial nature of the campaign, which pitted non-member employees against tribal enterprises. An organizing campaign is inherently different in the context of tribal enterprises than the more traditional campaigns. An element of "otherness" seeps into the organizing campaigns on tribal reservations, often for the strategic purpose of garnering support against the tribal employer. While the rhetoric may not have been racial as the Tribe alleged, the member/non-member dichotomy was still apparent in the Foxwoods campaigns.

The UFCWU decision illustrates the unique character of an organizing campaign on a tribal reservation. This is particularly true at Mashantucket where tribal employment law includes a preference for tribal members.¹⁸⁴ A typical organizing campaign is inherently a struggle between the laborer and the capitalist. The campaigns are usually purely economic or, in other cases, representative of a class struggle with cultural subtexts. Regardless, the typical campaign is an act of solidarity between workers to leverage a more substantial bargaining position against a historically exploitative employer class.

An on-reservation campaign with the rhetoric of the UFCWU election paints a very different picture. Campaign rhetoric is less a reflection of labor/management disputes, and more a reflection of non-member/tribal member tensions. Indeed, in one statement published in the NLRB opinion rejecting the Tribe's petition, a pro-union leaflet stated that it was not that "management has their hands tied; the Tribe makes the call. . . . All they are

181. *Id.* at *5. NLRB precedent states that the burden shifts to the party "making use of a racial message to establish that it was useful and germane." *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 72 (1962).

182. *Mashantucket Pequot Gaming Enter.*, 2011 N.L.R.B. LEXIS 103, at *3.

183. *Id.*

184. 33 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 §§ 1-13 (Supp. 2012), available at <http://www.mptnlaw.com/laws/2012%20Supplement%20to%20Mashantucket%20Pequot%20Tribal%20Laws.pdf>.

concerned about is THEIR money and lifestyles . . . not OURS!”¹⁸⁵ Statements such as these reinforce the notion that on-reservation labor campaigns are not typical organizing campaigns. The historic tragedies of tribes, which include both physical and cultural genocide,¹⁸⁶ are byproducts, albeit extreme ones, informing this modern adversarial relationship.

Given the tense undercurrents that manifest in on-reservation organizing campaigns, exemplified in the UFCWU campaign at Foxwoods, one wonders whether the purpose of the National Labor Relations Act is best effectuated by extending its jurisdictional reach to tribal enterprises with such little regard for these unique, historical complexities. Deferring to tribal labor law — when available — offers one solution to the “member versus non-member” adversarial relationship. If the NLRB refrains from exercising its jurisdiction in situations where there is a viable tribal labor statute, and the tribe is not actively engaging in unfair labor practices, non-members could organize under tribal law, and enforce their rights under the same.¹⁸⁷ If the protector of employee rights were also the tribe, non-member workers would likely view their organizing efforts as against the employing enterprise, rather than the particular tribe. If federal jurisprudence encouraged these roles rather than those whereby the tribes are pitted against non-member workforces, it could shift the paradigm of on-reservation labor campaigns away from the racial and restore the traditional labor/management dichotomy.

The NLRB’s decisions throughout the UAW organizing campaign and beyond seem to reflect an uninformed consideration of the unique circumstances surrounding Foxwoods and the Mashantucket Pequot’s reliance on Foxwoods for the Tribe’s survival. The threat of NLRB jurisdiction over tribal enterprises, however, was absolutely crucial to the

185. *Mashantucket Pequot Gaming Enter.*, 2011 N.L.R.B. LEXIS 103, at *15.

186. For a lively and sophisticated debate on the technicalities surrounding the application of the term “genocide” to the Pequot experience, compare Steven T. Katz, *The Pequot War Reconsidered*, 64 *NEW ENG. Q.* 206 (1991), with Freeman, *supra* note 12, at 285.

187. As noted previously, the Foxwoods Casino and the UAW eventually agreed to bargain under tribal law. The negotiations were a success, and lead to a first contract in 2010. At the time of this article, Foxwoods and the UAW were approaching the end of year long arbitration in the hopes of re-negotiating a new collective bargaining agreement despite continuing economic hardships. See Brian Hallenback, *Foxwoods, Union Dealers Headed to Arbitration*, *THE DAY.COM* (Apr. 3, 2012), <http://www.theday.com/article/20120403/BIZ02/304039940/1044> and Brian Hallenback, *Foxwoods Seeking to Cut 50 Dealers’ Jobs*, *THE DAY.COM* (Mar. 13, 2013), <http://www.theday.com/article/20130313/BIZ02/303139929/1044>

perceived success of the union organizing effort and an outcome respecting tribal sovereignty. It is unclear whether the NLRB had ulterior motives, but what is clear is that the looming fear of NLRB jurisdiction was an essential bargaining tool for the union organizers and supporters. Without it, the rather draconian labor statute that preceded the 2008 amended statute would likely have prevented any meaningful negotiations under tribal law.

B. The Union Strategy at Foxwoods

To the credit of the tactical prowess of the union officials and representatives in talks with the Tribe, the UAW strategy throughout the organizing campaign was to capitalize on the Tribe's resistance to federal jurisdiction. The organizing and negotiating strategy of the UAW reflected a broader understanding of how the Tribe would react to an organizing campaign at Foxwoods. While the NLRB was satisfied to scapegoat the *San Manuel* decision, the UAW recognized that collective bargaining need not exist solely in the context of federal law.

The first indications of organizing surfaced as far back as 1998.¹⁸⁸ The organizing movement did not gain traction at Foxwoods until 2006, following the *San Manuel* decision, when casino employees realized the financial woes of the Tribe threatened job security and benefits.¹⁸⁹ The goal of any organizing campaign is to establish majority support of a specified bargaining unit for union representation. When the UAW turned its attention to the plight of the Foxwoods table game dealers, workers were discontent with wages, working conditions, and the inevitable threat to employee benefits that every sector in the country faces during a recession.¹⁹⁰ Thus, a campaign was ripe for success.

Around the time the organizing campaign had reached the height of its activity among employees at Foxwoods, dealers' starting pay was \$4.50 per hour, with the bulk of their income coming from table tips.¹⁹¹ According to an UAW informational flyer, the rate was less than half of starting pay for dealers represented by the union in Detroit.¹⁹² In addition to wages, table game dealers had a number of grievances, including issues with their benefits packages, working conditions, and the ratio of full-time to part-

188. See Gershon, *supra* note 169.

189. Jones, *supra* note 163.

190. *Id.*

191. Christoffersen, *supra* note 117.

192. See "Because We're Worth It!", UAW LOCAL 2121 (Sept. 18, 2008) (flyer), available at <http://uawatfoxwoods.org/images/stories/091808Flyer.pdf>.

time employees.¹⁹³ Workplace safety also occupied a significant portion of the campaign debate. Pro-union workers argued that the Tribe had not acted in the employee's best interests to address second-hand smoke in the Casino.¹⁹⁴

The union organizing strategy at Foxwoods is best characterized as the dual threat of economic instability and erosion to tribal sovereignty. The classic economic tools deployed during an organizing campaign are picketing and striking. Under the NLRA, and the case law that has developed following the passage of the Wagner Act, employees involved in an organizing campaign have limited protections when utilizing these tools.¹⁹⁵ While picketing indeed played a public role in the UAW organizing campaign,¹⁹⁶ strikes were not utilized because such activity would have threatened the Mashantucket Pequot's tribal sovereignty — infringing on its ability to govern its economic development unfettered by federal law and regulation. The issue of sovereignty was, without question, the most significant and effective bargaining tool used by the UAW and organizing members.

Union organizers approached the table game dealers at Foxwoods a mere month after the D.C. Circuit Court's decision in *San Manuel*.¹⁹⁷ By the next year, the organizing members had alleged at least three charges of unfair labor practices against the Tribe, including attempts to bribe employees to abandon the organizing campaign.¹⁹⁸ Unfair labor practice ("ULP") charges are generally an ineffective tool for altering a participant's behavior, as the NLRB and General Council resolve most ULPs long after the conclusion of

193. *UAW Files Petition for Union at Foxwoods Casino*, UAW LOCAL 2121 — OUR HISTORY (Sept. 28, 2007), <http://region9a.uaw.org/local2121/index.cfm?action=cat&categoryID=c25afcec-18f2-47ee-85fb-41411121c84>.

194. At the time, it was ambiguous whether Connecticut State had the jurisdictional authority to regulate tobacco smoke and usage through its gaming compact with the Mashantucket Pequot and Mohegan Tribes. See Mark Pazinokas, *State Weighs Ban on Casino Smoking*, N.Y. TIMES (Apr. 22, 2009), <http://www.nytimes.com/2009/04/26/nyregion/connecticut/26polct.html>.

195. For example, the Supreme Court held that the NLRA protected workers who staged a walkout in protest of unsafe working conditions. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962).

196. See Michael Gannon, *UAW Vows Foxwoods Protests Will Go On*, NORWICHBULLETIN.COM (May 14, 2008, 1:24 AM), <http://www.norwichbulletin.com/news/x1191419401/UAW-vows-Foxwood-protests-will-go-on#axzz1ugSWjacH>.

197. *Foxwoods*, MASSCHUSSETTS AFL-CIO, <http://www.massaflicio.org/foxwoods> (last visited Feb. 12, 2013).

198. *Id.* The NLRA prohibits employers from using promises of benefit to coerce individual employees from organizing. See 29 U.S.C. § 158(a)(1), (c) (2006).

the organizing campaign or parties reach settlement. Therefore ULP charges were not a deterrent to invoking NLRB jurisdiction. Instead, UAW officials waited until they could show a flood of support among the potential members of the table game bargaining unit to petition the NLRB. Under section 159 of the Act, labor organizations are able to petition the NLRB to force an election if they allege that a “substantial number of employees . . . wish to be represented for collective bargaining”¹⁹⁹ The petition, filed in 2007, asked the NLRB to interject and coordinate an election. More importantly, section 159 of the Act required the Board to make a ruling on whether it had jurisdiction over on-reservation labor issues, an appeal of which would likely be sustained by a federal court.²⁰⁰ The threat of a court ruling on NLRB jurisdiction over union organizing and regulation on the reservation was a significant bargaining tool that could only be effective once, thus it would have been crucial to avoid an appeal in federal court unless absolutely necessary. Shortly after the NLRB ordered a secret ballot election, employees were elected by a significant majority to be represented by the UAW.²⁰¹

With every milestone throughout the organizing campaign it became more evident that while the Tribe denied the NLRB’s jurisdictional reach,²⁰² it was more concerned with avoiding an appeal to federal courts where judicial recognition of the NLRB’s jurisdiction over Foxwoods would be all but certain.²⁰³ In the year following the election, the Tribe refused to bargain with the newly established UAW Local 2121, arguing that the election was fraught with indiscretion.²⁰⁴ After seven days of hearings, the administrative law judge rejected the Tribe’s petition and certified the election.²⁰⁵ Despite the certification, the Tribe continued to

199. 29 U.S.C. § 158 (c)(1)(A).

200. See *infra* note 238 and accompanying text.

201. *Connecticut: Casino Dealers Vote to Unionize*, N.Y. TIMES (Nov. 26, 2007), <http://www.nytimes.com/2007/11/26/nyregion/26mbrfs-FOXWOODS.html?fta=y>.

202. See *infra* Part IV.

203. While the Tribe faced the possibility of an appeal within the Second and D.C. Circuits, both Circuits had rule either directly or indirectly on the jurisdictional reach of federal agencies. In the Second Circuit, the court of appeals in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), adopted a similar test for determining whether general federal statutes — in this case, the Occupational Safety and Health Act — applied to on-reservations ventures. The holding all but guaranteed a similar conclusion of the matter of NLRA jurisdiction over Foxwoods Casino if the case had come before the court.

204. See Foxwoods Resort Casino, N.L.R.B. Case No. 34-RC-2230 (Mar. 11, 2008), available at <http://www.ctemploymentlawblog.com/foxwoodsaj.pdf>.

205. *Id.*

refuse to bargain with the Union. Spectators assumed the Tribe's refusal to bargain evidenced its intention to appeal the election certification to the federal appeals court.²⁰⁶ Indeed, following the certification of the election, the tribe announced its intention to "appeal all aspects of the case" to the appeals court.²⁰⁷ In another statement, however, general counsel for the Tribe reiterated that "[t]he union could already have a contract by now if they had followed tribal law."²⁰⁸ The Tribe continued to publicly declare its intention to appeal the case; however, when the time came to put words into action, the results reflected the reality of the Tribe's position.

On October 11, 2008, a mere eight days after the NLRB declared that the Tribe must bargain with the Foxwoods local, both the Union and Casino announced that negotiations would be conducted under tribal law.²⁰⁹ On the surface, this announcement appeared to be a victory for the Mashantucket Pequot; but a closer examination reveals the mutual benefits for the Union as well. The Union won a key strategic victory by not only forcing the MPGE to recognize it as the bargaining representative, but also by inducing the Tribe to address concerns the Union had with the objectivity of a tribal dispute resolution.²¹⁰ Additionally, both sides retained the right to enforce their rights in federal court should the situation warrant it.²¹¹

The 2008 agreement to negotiate under tribal law resulted in one of the first collective bargaining agreements of its kind. As noted above, the agreement sidestepped concerns of objectivity in the dispute resolution process by creating an alternative dispute resolution process that incorporated a neutral arbitration, rather than involving a tribe-appointed officer or the tribal court system.²¹² Perhaps more importantly for the

206. Election certifications themselves are not considered final judgments for the purposes of the Administrative Procedure Act, and thus are not appealable. It is common practice for employers to refuse to bargain after an election and certification to open a pathway to appeal in federal court. *See American Federation of Labor v. NLRB*, 308 U.S. 401, 404-07 (1940).

207. *Mashantuckets Again Defy Ruling, Set Sights on U.S. Court of Appeals*, UAW LOCAL 2121—OUR HISTORY (Jul. 4, 2008), <http://region9a.uaw.org/local2121/index.cfm?action=cat&categoryID=c25afcec-18f2-47ee-85fb-41411121c84>.

208. *Id.*

209. Press Release, UAW, Mashantucket Pequot Gaming Enterprise, UAW at Foxwoods Announce Historic Agreement to Negotiate Under Tribal Law (Oct. 31, 2008), *available at* <http://www.uaw.org/taxonomy/term/12/0?page=31>.

210. CBA, *supra* note 165, art. 26. All grievances that were not settled would be arbitrated in front of a neutral panel.

211. *Id.* at Side Letter/Memorandum of Understanding Regarding Governing Law.

212. *Id.* art. 26.

Union, the CBA included a side letter that addressed the “governing law” clause. The letter, a memorandum of understanding, declared that the CBA or any other agreement does not constitute a “waiver of any right the union may claim to have to pursue other remedies.”²¹³ The letter goes on to reiterate the Mashantucket Pequot’s stance — that the Board has no jurisdiction over its casino. It declared that by agreeing to the Union’s memorandum of understanding, the Tribe did not acknowledge that any additional remedies existed outside Mashantucket Pequot Tribal Law.²¹⁴

The success of the union organizing campaign is attributable to the organizers ability to shift the Tribe’s focus away from its immediate financial concerns and to re-focus on the greater economic issue — its retention of tribal sovereignty. In identifying and respecting the Tribe’s ultimate goal of protecting its sovereign interests in Foxwoods, the Union was able to apply a tactic of acculturation that induced the Tribe to embrace progressive labor standards and avoid an encroachment on sovereignty by the NLRB. The end result is an agreement that both sides will come to appreciate more as negotiations continue and the ominous prospects of labor unrest are replaced by an ongoing mutual appreciation for each side’s bargaining positions.

VI. Conclusion

Understanding the historical context in which indigenous tribes have shaped their contemporary cultural identity will not only breed empathy and combat adversarial relationships, but also provide valuable insight and context for situations such as the UAW organizing campaign at Foxwoods. Beyond the law, there is a history that underlies every conflict, whether legal or political. Ignoring tribal history runs the risk of repeating it, a rather unfortunate result considering the horrific past this nation has in regards to its treatment of indigenous tribes inhabiting North America prior to colonization and nationhood.

An even cursory study of the Mashantucket Pequot history can be extremely informative as to why the Tribe reacted in the way it did to the UAW campaign, the Board’s decision, and subsequent labor campaigns. The unique character of a member versus non-member labor campaign, and the interconnection between tribal enterprise and cultural survival, complicates the typical labor/management dichotomy that is more squarely in the Board’s wheelhouse.

213. *Id.* at Side Letter/Memorandum of Understanding Regarding Governing Law.

214. *Id.*

Whether it be exercising discretion and letting tribal law govern labor elections, or paying more than mere lip service to these important matters, the Board and federal courts should re-evaluate how they apply the NLRA on tribal reservations. The organizing campaign at Foxwoods represents a lost opportunity to cultivate a new labor regulation policy on tribal casinos. It was not the first campaign at a tribal casino and certainly will not be the last one consisting primarily of non-member employees. Respecting the history and sensitive tribal issues such as cultural survival will better effectuate the purpose of the NLRA, as well as be more informative in determining whether tribal labor relations should govern.²¹⁵ A reevaluation of the NLRB's policy and its perceived role in labor organizing at tribal casinos is more important now than ever.

The success of an eventual agreement under Mashantucket Pequot tribal law illustrates the possibility of respecting both the will of workers to organize for their collective good and the historic and cultural forces that guide the will of the Tribe. Both the Mashantucket Pequot Tribe and the employees at Foxwoods had much to lose as the Tribe entered a new period of financial uncertainty. The NLRB's "business as usual" demeanor, after overturning thirty years of non-interference in these types of matters, ignores the historic and cultural implications at the peril of both parties. The next time it has the opportunity to revisit these issues, the Board should take notice of the success of the 2010 UAW/Foxwoods contract and consider extending more deference to tribal labor law.²¹⁶ This means a thorough understanding of the history behind the Mashantucket Pequot — or any other tribal cultural recovery — should play a prominent role in deciding to what extent federal labor regulation applies to tribal casinos, as well as what role the Board should play in ensuring labor rights.

215. The purpose of the Act is to "promote[] the overriding goal of industrial peace." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 381 (U.S. 1998).