How the Anti-Gaming Backlash is Redefining Tribal Government Functions

Audrey Bryant Braccio
SPECIAL FEATURES

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Table of Contents

Introduction ........................................... 172
I. The Narrowing of Tribal Government Functions ................ 173
   A. Commercial Activities Were Treated as Tribal Government
      Functions Pre-IGRA .............................. 174
   B. As Gaming Picked Up, Cases and Enactments Began to Carve
      Out Commercial Activities from the Governmental-Activities
      Sphere .............................................. 176
         1. The Ninth Circuit Frames the Category ................. 177
         2. Other Courts Follow the Lead ....................... 179
         3. Some Courts Resist ................................ 181
   C. The NLRB and D.C. Circuit Move to Cement the
      Distinction ........................................ 184
II. Antipathy Toward Indian Gaming Is the Most Likely Explanation
    for the New Distinction ............................... 186
   A. The Governmental-Commercial Distinction Subjects Tribal
      Government Activities to Debilitating Limitations Not Imposed
      on States ............................................. 187
      1. Many Tribal Activities Are Excluded Where State Activities
         Are Included ....................................... 187
      2. Gaming Is Essential to Tribal Self-Government .......... 189
   B. Attitudes Toward Indian Gaming Have Grown Less Favorable Since
      the Passage of IGRA .................................. 191
   C. Language in Cases and Acts Suggests This Underlying Concern . 193
   D. The Governmental-Commercial Distinction Is Not Otherwise
      Supported by Congressional Intent or Supreme Court Decisions ... 195

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171
Introduction

The majority of U.S. states today have tribal gaming enterprises, all of which came into existence in the last few decades. As reservation gaming operations have expanded, these entities have been attacked on multiple fronts—some straightforward and some more subtle. One area of major change and significance is the gradual infringement on the tribal governmental sphere through a redefinition of what constitutes tribal government functions.

The classification of government functions is significant for several reasons. Primary among these is that “areas traditionally left to tribal self-government have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, include Indians and their property interests.” The question of what is a government function has become crucial because of a recent push to expand increasing numbers of federal statutes and regulations to include tribal activities. Additionally, the Supreme Court established in Montana v. United States that the sovereignty doctrine specifically prohibits state action that impairs the ability of a tribe to exercise traditional government functions. Finally, several federal statutes explicitly exempt governmental activities from their reach.

The definition of governmental activities has always been a shifting one. But with respect to the tribes, this movement has taken a path divergent from

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5. See Internal Revenue Service, What Are “Essential Services” or “Essential Government Functions?,” http://www.irs.gov/govt/tribes/article/0,,id=180911,00.html (last visited Nov. 23, 2009) (stating that, in the excise-tax context, “[e]ssential government functions are functions that a tribal government would normally perform in its daily operation. The statutory interpretations . . . have continued to evolve, with court cases addressing these concepts.”).
the definition as applied to the states and other government entities. Now, tribal commercial activities are excluded where state commercial enterprises are treated as governmental. This veering-off of the definition as applied to tribes has coincided with the rise of anti-gaming sentiment, and a concern with tribal gaming is reflected in each stage of the change. The timing and suggestive language, combined with the fact that no Supreme Court precedent or expression of congressional intent supports the change, indicate that the anti-gaming movement has emboldened this narrowing. The result of this unjustified mutation is to "derail[] tribal economic development" and "thwart[] the ability of the tribes to provide for their members."  

It is true that in some other contexts commercial activities have been singled out as being non-governmental. For example, the commercial-activities exception to foreign sovereign immunity states that when a foreign government acts like an ordinary commercial actor, it is subject to tort liability. But these exceptions assume the rule—that governments do not cease to act as governments when they engage in commercial activities for the purpose of raising funds to provide essential services.

This comment argues that anti-gaming sentiment has fueled a mutation in the definition of traditional tribal government functions that is not founded on congressional intent, Supreme Court precedent, or logic. Part I tracks the evolution of the governmental-functions concept as it applies to tribes, noting the significant change that has occurred in the last twenty years, coinciding with the widespread establishment and expansion of Indian gaming enterprises. Part II argues that this change has resulted in significant part from animosity toward Indian gaming, as evidenced by its timing and by language in the cases and statutes suggesting these concerns. Part III considers possible solutions to this problem and argues that recent controversies may present an opportunity to return the definition to a more principled meaning.

I. The Narrowing of Tribal Government Functions

This Part tracks the evolution in the definition of tribal government functions through court cases, congressional enactments, and agency decisions. Section I-A examines the conception of tribal government functions


7. Id. at 205.

prior to the Indian Gaming Regulatory Act (IGRA), when tribes were treated for the most part like other governments. Section I-B describes the second, post-IGRA stage, where court decisions and congressional enactments began to draw a line between governmental activities and commercial operations performed by tribes. Section I-C then examines the recent San Manuel Indian Bingo & Casino v. National Labor Relations Board decision in the District of Columbia Circuit and the National Labor Relations Board (NLRB) decision in Foxwoods Resort Casino, which make the final jump to rule that tribal commercial enterprises are not traditional government activities eligible for the privileges granted to other governments.

A. Commercial Activities Were Treated as Tribal Government Functions Pre-IGRA

For thirty years prior to the rise of Indian gaming, the definition of tribal government functions remained fairly consistent. It was assumed that tribal commercial activities were part of the activities of government and that tribes could regulate the on-reservation activities of non-members associated with the tribes, even when those individuals were employees in tribal enterprises. This definition of government functions was played out mostly in the context of whether federal statutes of general applicability included particular tribal activities. The approach taken was that “[c]ourts and other decision-making bodies have traditionally been reluctant to apply statutes of general applicability to tribes absent unequivocal evidence of congressional intent.”

Labor statutes are frequently at the center of the dispute over the application of general statutes. During the pre-IGRA period, the NLRB “consistently held that Indian tribes and their self-directed enterprises located on Indian reservations were implicitly exempt, as governmental entities, from the [National Labor Relations Act's] jurisdiction.” This assumption remained

10. 475 F.3d 1306 (D.C. Cir. 2007)
14. Richard, supra note 6, at 207 (citing Fort Apache Timber Co., 226 N.L.R.B. 503, 506 (1976)).
15. Rob Roy Smith, If You Think Tribal Casinos Do Not Have to Comply with the NLRA,
in place until the Board's San Manuel decision in 2004. The earlier NLRB decisions placed emphasis on geography, counting as governmental all those enterprises that were based on the reservation. Those decisions founded their reasoning on the assumption that tribal governments were to be treated like any other governments in this context. For example, in one 1976 decision, "[i]n deciding not to assert jurisdiction over the enterprise, the NLRB held that the dispositive consideration was the fact that the Indian tribe is a government, and that government enterprises were explicitly exempted from the NLRA."

Supreme Court decisions also supported a robust definition of tribal government functions. In finding tribal taxing authority to be an essential government function, the Court recognized the tribe as a government with the same taxing privileges that state governments enjoy. That decision lends support to the idea that other tribal activities that bring in revenue to support government are also essential functions. Additionally, in California v. Cabazon Band of Mission Indians, the major gaming decision prompting the passage of IGRA, the Court supported gaming as an expression of tribal sovereignty, further boosting a logical assumption that gaming operations by tribes were inextricably linked to those tribes' self-governance.

16. Id.; see discussion infra Part I-C.
18. Id. at 168-69.
20. McClatchey, supra note 17, at 169; see also Fort Apache, 226 N.L.R.B. at 506 (stating that "Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary").
21. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137-38 (1982). "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." Id. at 137.
22. Id. at 138. "Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government." Id.
23. See infra Part II-D.
B. As Gaming Picked Up, Cases and Enactments Began to Carve Out Commercial Activities from the Governmental-Activities Sphere

As Indian gaming became more popular and more profitable, and after Congress passed IGRA to deal with the new reality of tribal gaming, the language regarding tribal government functions began to change. Post-IGRA cases picked up on earlier Ninth Circuit language and began to suggest that some commercial activities do not fit into the "government functions" category. Additionally, the Pension Protection Act and Indian Tribal Government Tax Status Act, as enforced, further began to carve tribal activities into two distinct groups: purely governmental and commercial.

Tribes began to experiment with gaming as a means of reservation economic development in the 1970s and 1980s, and this effort attracted wide attention. The first major victory for tribal gaming arose out of the controversy surrounding a bingo operation on the Cabazon Band reservation in California. California sought to limit the on-reservation activities to charitable gaming in accordance with state law, but the Court ruled that the gaming enterprise fell within the realm of tribal self-determination, and thus state regulation was impermissible. This decision led to a rapid expansion in Indian gaming.

IGRA was passed in response to Cabazon in 1988 to provide a limiting framework for the gaming trend. It is reasonable to infer that the Act was in part prompted by "a fear that Indians, being free from most or all of the constraints placed upon existing gaming activities, would have an unfair competitive advantage against non-Indian gaming." But still, "Congress made clear that the purpose of the Act was to benefit Indian tribes," and

27. Cabazon, 480 U.S. at 204-05.
28. Id. at 205.
29. Id. at 221-22.
31. See Matthew L.M. Fletcher, Bringing Balance to Indian Gaming, 44 HARV. J. ON LEGIS. 39, 50 (2007) ("The Act was a compromise between the interests of Indian tribes that had been recognized and validated by the Supreme Court and the interests of the state and local governments.").
33. Fletcher, supra note 31, at 51.
IGRA contained language supporting tribal economic-development activities as being vital to sovereignty. The asserted purpose of the Act was in part "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."\(^{34}\) This language acknowledged the close connection between gaming and tribal governmental activities. Additionally, IGRA required that gaming proceeds be used for tribal governmental activities, among five possible uses.\(^{35}\)

1. The Ninth Circuit Frames the Category

After the passage of IGRA, several circuit courts of appeals, led by the Ninth Circuit, began to adjust the breadth of the tribal self-government sphere. These courts relied on what is arguably dicta from the 1960 Supreme Court decision in *Federal Power Commission v. Tuscarora Indian Nation*, where the Court stated that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."\(^{36}\) Although the opinion narrowly addressed the question of whether reservation land may be taken as part of the Power Commission's eminent-domain powers,\(^{37}\) courts have interpreted this decision as creating a broad rule applying general federal statutes to tribes.\(^{38}\) Expanding on *Tuscarora*, some courts have adopted a narrow view of which tribal government activities are protected from these statutes, concluding that statutes of general applicability include tribes unless the situation meets one of three exceptions, with one such exception being where the activity "-touches 'exclusive rights of self-governance in purely intramural matters.'"\(^{39}\)

The Ninth Circuit led the charge to narrow the sphere of tribal government functions, building off its pre-IGRA *Coeur d'Alene* decision,\(^{40}\) where the court dealt with the application of the Occupational Safety and Health Act (OSHA) to a farm wholly owned and operated by the Coeur d'Alene Tribe. In analyzing whether the statute could extend to the Tribe's activities, the court found that *Tuscarora* had established a general rule of applicability and

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35. Id. § 2710(b)(2)(B)(i)-(v).
37. Id. at 110.
38. *See*, e.g., Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).
39. Id. at 1116 (quoting United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), superseded by statute, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467, as recognized in United States v. E.C. Invs., Inc., 77 F.3d 327, 330 (9th Cir. 1996)).
40. Id.
articulated three exceptions to that rule. The first exception, the court said, is that "[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters.' The court further clarified to say, "We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . . ."

_Coeur d'Alene_ thus outlined and potentially limited the self-government exception by defining it not necessarily to include all aspects of self-government, but only including those aspects that the court finds are "purely intramural." The court then found that "[b]ecause the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government.' To find that OSHA did not apply to the Farm "would bring within the embrace of 'tribal self-government' all tribal business and commercial activity," presumably a result undesired by the court.

The effort of the court in _Coeur d'Alene_ to separate out commercial activities from self-government was somewhat strained. The court noted that "the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises," but then later argued that federal regulation of those same enterprises does not imply "exclusive rights of self-government." A 1991 case expanding on the new separation and applying OSHA to a tribal timber mill also exhibits this inconsistency. The court there recognized that the business "[was] critical to the tribal government," but in the same sentence declined to include it within the _Coeur d'Alene_ self-government exception.

41. _Id._ at 1115-16.
42. _Id._ at 1116 (quoting _Farris_, 624 F.2d at 893).
43. _Id._
44. _Id_; _see also_ Sac & Fox Indus., Ltd., 307 N.L.R.B. 241, 244 (1992) (noting that courts consider several factors in making this evaluation, including "whether the tribal enterprise is a normal commercial enterprise operating in interstate commerce, and whether it employs non-Indians as well as Indians").
45. _Coeur d'Alene_, 751 F.2d at 1116 (quoting _Farris_, 624 F.2d at 893).
46. _Id._
47. _Id._ at 1115.
48. _Id._ at 1116 (quoting _Farris_, 624 F.2d at 893).
49. U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 184 (9th Cir. 1991).
50. _Id._
In 2004, the Ninth Circuit signaled the cementing of the commercial-activities distinction in a case finding that the Fair Labor Standards Act did not apply to tribal law-enforcement officers. The court gave a new elucidation of the intramural standard, saying it is met "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." The opinion further made sure to "distinguish between what is a governmental function and what is primarily a commercial one." The court was influenced by the fact that law enforcement does not "provide primary benefits to persons with no interest or stake in tribal government." It further stated that the fact that some employees were not tribal members is not relevant where "all the officers work on the reservation to serve the interests of the tribe and reservation governance." Nowhere does the Ninth Circuit explain why gaming would not also fulfill these criteria or why "[t]ribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural," but some activities that are likewise run by tribal governments, such as gaming, are not.

2. Other Courts Follow the Lead

Under the Ninth Circuit's approach, "any conduct that affects interstate commerce or involves the employment of non-Indians is not deemed to constitute a purely intramural matter or implicate tribal self government." Other courts began to pick up on this view in the post-IGRA period, further limiting the contours of the self-government sphere by helping to shrink the category of "intramural matters."

The Second Circuit, for example, applied the Coeur d'Alene approach in a 1996 case where it found that OSHA regulated a tribal business performing construction jobs on the reservation. The court acknowledged the enterprise's services to the tribe, noting that "[i]ts workers assist in the building of roads, tribal homes, and the continuing expansion of the Foxwoods High Stakes Bingo and Casino." Despite the fact that the administrative law

51. Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004).
52. Id.
53. Id.
54. Id. at 896.
55. Id.
56. Id. at 895.
57. Singel, supra note 12, at 713.
58. Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996).
59. Id. at 175.
judge had found that these constituted "governmental activities of a purely intramural nature,"60 the circuit court found that the \textit{Coeur d'Alene} test applied and that the excluded category "does not include all aspects of sovereignty," but only a limited class of intramural matters.61

The business did not fit into this class, the court said, where "it hires non-Indians and continues to work on the construction of Foxwoods, a casino clearly operating in interstate commerce."62 These activities, "taken together, doom [the tribal business's] claim that its work implicates exclusive rights of self-governance in purely intramural matters. ... When all is said and done, [the tribal business] is in the construction business; and its activities are of a commercial and service character, not a governmental character."63 These factors "result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."64

The Eleventh Circuit also adopted the \textit{Coeur d'Alene} approach in a case applying the Americans with Disabilities Act to a tribal entertainment facility.65 The court was explicit about its exclusion of commercial activities from the government-functions exception, finding that "tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes."66

The NLRB, in its first case to integrate the \textit{Coeur d'Alene} analysis,67 gave a list of factors for a court to use in determining whether a tribal activity fits the Ninth Circuit's "purely intramural" exception.68 That list included:

\begin{quote}
[W]hether the tribal enterprise is a normal commercial enterprise operating in interstate commerce, ... whether it employs non-Indians as well as Indians[, ... whether the statute ... would ... usurp[] the tribe's decision-making power, ... [and] whether the statute's effects would extend beyond the activity of the business
\end{quote}

\begin{thebibliography}{10}

\bibitem{60} Id. at 176.
\bibitem{61} Id. at 179.
\bibitem{62} Id. at 180.
\bibitem{63} Id.
\bibitem{64} Id. at 181.
\bibitem{65} Fla. Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1129 (11th Cir. 1999).
\bibitem{66} Id.
\bibitem{68} McClatchey, \textit{supra} note 17, at 170-71.
\end{thebibliography}
enterprise to regulate purely intramural matters such as tribal membership, inheritance rules, or domestic relations. 69

This stood in stark contrast to the Board’s prior decisions, which had applied the normal governmental analysis to tribal businesses. 70 By this time it was becoming apparent that “commercial enterprise[s]” were a new category of tribal government activity and could be treated differently in this new landscape carved out by gaming.

3. Some Courts Resist

Despite the appeal of the Ninth Circuit’s flexible standard, the Tenth and Eighth Circuits have not fully jumped onto the Coeur d’Alene bandwagon, and their decisions suggest a different approach. 71 In National Labor Relations Board v. Pueblo of San Juan, the Tenth Circuit addressed the issue of whether the National Labor Relations Act (NLRA) applied to prevent the tribe from setting labor standards in a tribal timber-lease agreement. 72 The court framed the question before it as “whether the [tribe] continues to exercise the same authority to enact [labor standard] laws as do states and territories.” 73 The court recognized that tribes are “‘distinct, independent political communities’” 74 with governmental powers that in fact go beyond the powers of states and thus are exempt, like other governments, from the reach of the NLRA. 75 The tribe’s authority over all economic activities occurring on the reservation is broad 76 because “[l]ike states and territories, the [tribe] has a strong interest in regulating economic activity involving its own members within its own territory.” 77 Therefore, tribal regulation of the non-member business involved in that case was “‘a fundamental attribute of sovereignty’ and ‘a necessary instrument of self-government and territorial management . . . [which] derives from the tribe’s general authority, as

69. Id. at 171 (quoting Sac & Fox, 307 N.L.R.B. at 244).
71. Richard, supra note 6, at 213-14; see also Greene, supra note 32, at 93 (“Following the passage of IGRA, confusion surrounding its interpretation led to initial court decisions favorable to tribes . . . .”).
72. 276 F.3d 1186, 1191 (10th Cir. 2002) (en banc).
73. Id.
74. Id. at 1192 (quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982), quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).
75. Id. at 1192 & n.6 (citing Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959)).
76. Id. at 1192-93.
77. Id. at 1200.
sovereign, to control economic activity within its jurisdiction."

Thus, extending a federal law to those activities would impermissibly interfere with the tribe's governmental functions.

Additionally, the Eighth Circuit found in a case involving an employment dispute between a tribe and a member employee that "[s]ubjecting such an employment relationship . . . to federal control and supervision dilutes the sovereignty of the tribe" and "interferes with an intramural matter that has traditionally been left to the tribe's self-government." Although the court did not address the situation of a dispute between a tribe and a non-member employee, the language of the decision suggests it would find that to be a matter of self-government as well. The employee was working in a tribal construction company, so the court's ruling evinced its view that tribal acts related to commercial enterprises can in fact be essential government activities that are excluded from federal regulation.

The Seventh Circuit has also supported treating tribal and state activities the same, even in this post-IGRA era. In a 1993 decision declining to apply the Fair Labor Standards Act to Indian police, the court said that even though the statute, read literally, would not include the tribe in its government exceptions, "literalists do not interpret statutes literally when doing so would produce a result senseless in the real world. . . . A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police." This analysis led the court to hold that tribal "employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act, are exempt." This seems to lean in a different direction than a 1989 decision by that court dealing with the application of the Employee Retirement Income Security Act (ERISA) to a tribal enterprise and finding that a statute will be applied "not simply whenever it merely affects self-governance as broadly conceived," but rather that the governmental protection covers a narrower realm of activity—an approach similar to that conceived by the Ninth Circuit in Coeur d'Alene.

78. Id. (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)).
80. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993).
81. Id. at 494.
82. Id. at 495.

The Pension Protection Act and the Tribal Government Tax Status Act have further helped to solidify the distinction of the commercial-activities category, although those statutes purport to draw different lines. The Pension Protection Act, which was signed into law on August 17, 2006, specifically references tribal casinos in its Committee Report. Tribal government plans are included within the term “governmental plan,” but only under certain circumstances. To be included as a governmental plan, the Act requires that (1) the plan is established by a tribal government and (2) all participants are “qualified employees,” which means an employee “all of whose services as such an employee are in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function).” The Committee Report explains that this would include a tribal government plan where all participants are teachers, but not one with employees working at a hotel, casino, or marina.

The Tribal Government Tax Status Act additionally provides that “[a]n Indian tribal government shall be treated as a State” for certain purposes and includes provisions for tax-free bonds and exemption from excise taxes. The Act then adds “additional requirements” that for excise-tax exemptions “the transaction involves the exercise of an essential governmental function of the Indian tribal government” and that for tax-exempt bonds the proceeds of the venture must be used “in the exercise of any essential government function.” The Act uses a potentially expansive “government-functions” definition, saying that “[f]or purposes of this section, the term ‘essential governmental function’ shall not include any function which is not customarily performed by State and local governments with general taxing powers.” Additionally, the Act, at its inception in 1982, “attempted to treat tribal governments equally

86. Id.
87. Pension Protection Act § 906(a)(1), 120 Stat. at 1051 (emphasis added).
88. Id. § 7871(b).
89. Id.
90. Id. § 7871(c)(1).
91. Id. § 7871(e).
to state and local governments for certain tax purposes. The way the Act has been enforced, however, has narrowed that definition beyond what is suggested by the Act, leaving tribes uncertain as to their abilities to finance commercial activities.

C. The NLRB and the D.C. Circuit Move to Cement the Distinction

Two recent cases dealing with the NLRB’s jurisdiction over tribal gaming have made the final jump toward solidifying the categorization of commercial activities as non-governmental. These cases are built on the Ninth Circuit’s approach, to take an aggressive stance against tribal gaming activities. Taken together, these decisions have created a legal environment hostile to Indian gaming enterprises, and one in which tribes are now cautious in insisting on being treated like other government entities in their activities.

In San Manuel Indian Bingo & Casino, the NLRB reversed its own precedent and found that the NLRA applied on tribal reservations. The Board acknowledged that in the past it had declined to apply the NLRA by relying on the “principle that the location of the enterprise was pivotal,” but now found instead that because “tribal businesses have grown and prospered,” its original premise was “faulty” and thus required a “new approach.” Under this new approach, the Board found that because the activities were commercial in nature, they did not “concern critical internal matters of self-governance,” and thus the Tuscarora presumption applied to extend the scope of the statute to the Tribe.

In reaching this decision, “the NLRB has wholly abandoned its own precedents.” The Board went from treating tribes as sovereign entities whose commercial activity “is essentially governmental activity, as the activity is undertaken to fund the sovereign itself” to now treating tribal

97. Id. (citing Yukon Kuskokwim Health Corp., 328 N.L.R.B. 761 (1999)).
98. Id. at 1056.
99. Id. at 1057.
100. Id. at 1061.
101. McClatchey, supra note 17, at 168.
102. Id. (quoting Vicki J. Limas, Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 ARIZ. ST.
employers like other private-sector employers in commercial operations, stating that "the operation of a casino . . . can hardly be described as 'vital' to the tribes' ability to govern themselves or as an 'essential attribute' of their sovereignty."\textsuperscript{103}

The Tribe appealed the NLRB decision, and the D.C. Circuit affirmed.\textsuperscript{104} The court found the "strongly commercial"\textsuperscript{105} nature of the operation to be key, stating that "we use the term 'governmental' in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope."\textsuperscript{106} Using this narrow definition of government functions, the court said, "[t]he determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions."\textsuperscript{107} The court acknowledged that the casino funds tribal government programs and that it had made a substantial contribution to the welfare of a tribe that otherwise had no resources and had long depended on federal assistance.\textsuperscript{108} Nevertheless, the court still found that "the Tribe's activity was primarily commercial"\textsuperscript{109} and therefore not governmental.

The NLRB soon reinforced \textit{San Manuel} in another case where it found that the \textit{San Manuel} decision mandates Board jurisdiction over Foxwoods Resort Casino, which is operated by the Mashantucket Pequot Tribe.\textsuperscript{110} The Board noted that "approximately 98\% of the Tribe's revenues are derived from the operation of Foxwoods, which is used to fund various endeavors aimed toward promoting the Tribal community and Tribal self-government."\textsuperscript{111} But the petitioner in the case, a labor union had framed the issue as "whether the
casino is a commercial enterprise.” 112 The Board agreed with that characterization, finding that jurisdiction was warranted because “Foxwoods is an exclusively commercial venture generating enormous income for the Tribe almost exclusively from the general public who are not tribal members[,] . . . competes in the same commercial arena with other non-tribal casinos, overwhelmingly employs non-tribal members, and actively markets . . . to the general public.” 113

These two decisions have sent a clear message that profitable tribal activities—gaming in particular—will no longer be protected as part of the governmental-activities sphere. And the tribes have heard this message. Recently, in a union bid to organize at a casino on the Saginaw Chippewa reservation in Michigan, the tribe allowed an NLRB-overseen union vote without argument, assuming that the San Manuel and Foxwoods decisions made it certain that the NLRA applied to it and thus probably trying to avoid an ostensibly unwinnable legal battle. 114 The result was not favorable to the union—the housekeepers voted against unionizing, and the security guards decided to drop the vote for unexplained reasons 115—but the tribe’s decision not to contest NLRB jurisdiction shows the strength of the San Manuel and Foxwoods decisions in limiting this area of tribal sovereignty.

II. Antipathy Toward Indian Gaming Is the Most Likely Explanation for the New Distinction

The one factor persistent at every stage of the narrowing of the governmental-activities sphere is antipathy toward Indian gaming. We can see this lurking beneath the surface in the Pension Protection Act and in the way the Indian Tribal Government Tax Status Act has been applied, in the courts’ application of general statutes to tribal governments, and especially in the language of the San Manuel and Foxwoods decisions.

This Part argues that the mutation of the governmental-functions definition has been enabled by, and in significant part resulted from, the growing opposition to Indian gaming enterprises. Section II-A observes that the new definition imposes severe limitations on tribes that do not likewise burden

115. Id.
states and argues that this discrepancy is illogical because economic activities are in fact more essential for tribes than for states. Section II-B then tracks the rise in opposition to Indian gaming post-IGRA, a hostility driven both by competitive concerns and general perceptions about the tribes and gaming. Section II-C identifies this background in the language of the decisions and statutes that have contributed to the mutation, suggesting that this atmosphere of antipathy formed a backdrop enabling those decisions. Finally, Section II-D reinforces this conclusion by arguing that the encroachment into tribal self-government lacks any Supreme Court or congressional impetus.

A. The Governmental-Commercial Distinction Subjects Tribal Government Activities to Debilitating Limitations Not Imposed on States

1. Many Tribal Activities Are Excluded Where State Activities Are Included

Although states frequently operate lotteries and other commercial endeavors, these activities are not targeted as being "non-governmental" in the same way that such endeavors are for tribes. For example, state government employers are exempt from ERISA under the "governmental plan" exception. But even before the Pension Protection Act, the Ninth Circuit had stated that tribes were not included in this exemption because the application of ERISA would not interfere with self-governance. These decisions thus treated tribes differently from states under the same definition when there was no statutory basis for the distinction. Now, with the passage of the Act, this difference in treatment has been codified. The Pension Protection Act explicitly singles out tribes for treatment different from that given to states.


117. See, e.g., TRIBAL ADVICE & GUIDANCE POLICY, supra note 94; Clarkson, supra note 95, at 1073 (noting that the Indian Tribal Government Tax Status Act differentiates tribes from states).


119. Id. at 1293 (describing Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 685-86 (9th Cir. 1991)).

The tax-exempt-bonds context presents a further example. Although tribal use of tax-exempt bonds for commercial activities is prohibited, "non-tribal governments have issued billions of dollars in tax-exempt bonds to finance hotels and convention centers."\(^{121}\) In fact, Professor Clarkson notes in his article on tribal finance barriers that an IRS issuance advised against litigating a case where it had refused to allow tax-exempt bonds for a tribal golf course "because it would be difficult to argue that [a] Golf Course is so commercial in nature that state and local governments would not own and operate similar enterprises."\(^{122}\)

The most prominent modern example is the recent application of the NLRA to the tribes, discussed supra,\(^{123}\) making "tribal governments ... the only governments in the United States subject to the NLRA."\(^{124}\) These decisions create a situation where "[e]mployees of a state health care organization would not be able to sue the state for breaches of the NLRA or the FLSA, but tribal employees can sue their employer."\(^{125}\) In this atmosphere, "courts are forced to distinguish tribal activities, but not state activities, regardless of whether the employment offered by the state is governmental in nature or solely commercial. This difference in treatment between states and tribes is incorrect logic."\(^{126}\)

\(^{121}\) Clarkson, supra note 95, at 1055; see also ADVISORY COMM. ON TAX EXEMPT & GOV'T ENTITIES, SURVEY AND REVIEW OF EXISTING INFORMATION AND GUIDANCE FOR INDIAN TRIBAL GOVERNMENTS 12 (2005), available at http://www.irs.gov/pub/irs-tege/p4344.pdf [hereinafter SURVEY & REVIEW] (explaining that "while states and cities routinely issue tax-exempt debt for hotels and convention facilities," tribes have been obstructed in their efforts to do the same).

\(^{122}\) Clarkson, supra note 95, at 1079 (quoting IRS Field Serv. Adv. Mem. 20,024,712, at 5 (Nov. 22, 2002)).

\(^{123}\) See supra Part I-C.

\(^{124}\) McClatchey, supra note 17, at 131.

\(^{125}\) Richard, supra note 6, at 219.

\(^{126}\) Id. at 217-18; see also id. at 218-19 ("[M]aking a distinction between governmental and commercial tribal activities is inappropriate when states do not have to suffer the same scrutiny. Even if courts continue to make this distinction, the Ninth Circuit's interpretation of 'self-government' has reduced its practical application."). The Seventh Circuit agreed with this view in one case, pointing out that "the difference in treatment between these tribal law enforcement officers and state or local policemen makes no sense." Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493 (7th Cir. 1993).
2. Gaming Is Essential to Tribal Self-Government

A distinction that refuses to classify tribal commercial activities as protected government functions is illogical because these activities—gaming in particular—are truly essential for tribal governments in a way that they are not for state or local governments. For example, Foxwoods Resort Casino generates between ninety-eight and ninety-nine percent of the Mashantucket Pequot Tribe's total revenue. Many tribes lack other revenue sources to fund their governmental activities, and tribal commercial enterprises and government services are closely linked. "Tribal businesses are established not only for profit, but predominantly for the benefit of the tribal government and members." 128

Tribal tax bases are generally quite small, and "[a]s a result, the income generated from taxation is insufficient to perform necessary governmental functions." In addition, "[f]ederal funding is an extremely unreliable source of revenue for tribal government. And yet the unmet need for tribal government service projects approached $60 billion a year by the turn of the century." Given this, "[s]ubstantial economic development in Indian country will not occur without significant infusions of outside capital." The U.S. Supreme Court in Cabazon acknowledged this reality, stating that "[t]he tribal games at present provide the sole source of revenues for the operation of the tribal governments. . . . Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." Tribal government revenue-raising can take different forms depending on the particular needs and strategy of a tribe. Regardless of the form taken, "[p]romoting economic

127. Hearing Transcript, supra note 112, at 48.
128. Richard, supra note 6, at 219; see also Survey & Review, supra note 121, at 10 ("Excess revenues from tribal business operations are a critical source of funding for tribal governmental programs. . . . [T]ribal governments are the primary engine for economic development in Indian country . . . .").
129. Burge, supra note 118, at 1317; see also Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759 (2004). "Tribal governments have extreme difficulty in raising revenue; they have virtually no tax base." Id. at 771. "Indian tribes have little resort except to pursue an alternative method of raising revenue: economic development." Id. at 774.
130. Fletcher, supra note 129, at 774-75.
133. Fletcher, supra note 129, at 775 ("In operating business, Indian tribes must choose
development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.\textsuperscript{134}

This lack of other sources of government funding led to the development of tribal gaming enterprises.\textsuperscript{135} Gaming has provided vital economic development for tribes. Once reservation gaming began to expand, "[u]nemployment on reservations with gaming fell by five percent, while unemployment on non-gaming reservations decreased by half that amount."\textsuperscript{136} Indian family poverty has also decreased since the development of reservation gaming enterprises.\textsuperscript{137} Tribal gaming enterprises need the same protection as other government services because it is necessary to tribal survival that these enterprises be able to operate competitively. "Tribes are generally smaller employers and frequently lose potential employees because other entities are able to offer much better benefits."\textsuperscript{138} Additionally, revenue from gaming can be spent only on the provision of government services, aiding local governmental agencies, or donations to charitable organizations.\textsuperscript{139}

The "purely intramural" \textit{Coeur d'Alene} standard is problematic because it excludes these essential activities. The standard as it applies "conceives of
tribes as isolated units comprised exclusively of members. In reality, non-members participate in nearly all aspects of tribal life.\textsuperscript{140} This conception proves very limiting, and "[i]f more courts require the exclusive involvement of tribal members before finding that tribal conduct is 'purely intramural,' the standard will rarely, if ever, apply."\textsuperscript{141}

B. Attitudes Toward Indian Gaming Have Grown Less Favorable Since the Passage of IGRA

Between 1988 and 1996, casinos expanded their presence from two states to twenty-four,\textsuperscript{142} and that number has continued to grow. There are now casinos in forty-eight states,\textsuperscript{143} with tribally owned casinos in twenty-nine of those states.\textsuperscript{144} This rapid expansion has fueled negative attitudes toward gambling in general\textsuperscript{145}—and Indian gaming in particular.\textsuperscript{146} Those concerns particular to Indian gaming are driven by fear of unfair competition, of the

\textsuperscript{140} Singel, \textit{supra} note 12, at 714; see also Donovan \textit{v.} Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (relying in part on the fact that the Farm employed non-Indians in its decision that federal regulation of the Farm did not implicate essential government functions).

\textsuperscript{141} Singel, \textit{supra} note 12, at 715.


\textsuperscript{143} NAT'L GAMBLING IMPACT STUDY COMM'N, \textit{FINAL REPORT} 1-1 (1999), available at http://govinfo.library.unt.edu/ngisc/reports/1.pdf.


\textsuperscript{145} \textit{See} P\textit{E}W RESEARCH C\textit{TR}., \textit{GAMBLING: AS THE TAKE RISES, SO DOES PUBLIC CONCERN} (May 23, 2006), http://pewresearch.org/assets/social/pdf/Gambling.pdf (showing that in 2006 seventy percent of Americans believe legalized gambling encourages people to gamble more than they can afford, up from sixty-two percent in 1989); \textit{see also} Richard L. Worsnop, \textit{Gambling Under Attack: How Serious Is the Current Backlash?}, \textit{6 CQ RESEARCHER} 769, 772-73 (1996) (describing how intense anti-gaming backlash as a result of the industry's expansion and success has led to failure of gaming-legalization laws in thirty-three of thirty-five state efforts).

\textsuperscript{146} \textit{See} Davis & Hudman, \textit{supra} note 30, at 89-91; \textit{see also} Barbara A. Carmichael & Donald M. Peppard, Jr., \textit{The Impacts of Foxwoods Resort Casino on Its Dual Host Community, in TOURISM AND GAMING ON AMERICAN INDIAN LANDS} 128, 143 (Alan A. Lew & George A. Van Otten eds., 1998) (finding that in the community surrounding Foxwoods casino in Connecticut, "[t]o the extent attitudes toward the tribe have changed, they have tended to worsen, despite the economic benefits and partnership opportunities."); Worsnop, \textit{supra} note 145, at 3 (noting that some conservatives have been anti-gaming, with one prominent columnist describing the "gambling racket . . . on glitzy reservations of phony Indian tribes" (quoting William Safire, \textit{New Evil Empire}, N.Y. \textit{TIMES}, Sep. 28, 1995, at A27).
political power that comes with economic success, and by resentment of the success of a small population that often does not seem very “Indian.”

Competitive concerns lie at the heart of much of the objection to Indian gaming. Several courts and state officials have expressed a “concern . . . that, in their commercial dealings, tribes will be able to unfairly compete with commercial, non-state actors if they are not subject to federal labor law as the non-state actors are.”147 This fear is unfounded, though, because “tribes do not, and cannot, compete with commercial gaming operators. . . . IGRA requires tribes to expend their profits on governmental needs.”148 An additional, related concern of states is that casinos take money away from local businesses and channel it to the reservation.149 The State is left without the economic benefits but with most of the social costs (in terms of its residents’ gambling debts and related problems such as bankruptcy and fraud), while the Tribe receives all of the financial rewards. When it comes time to pay the costs, the non-Indian gambler has left the reservation.150

Another concern fueling the backlash against Indian gaming is the non-“Indian” nature of these enterprises. In a study polling attitudes toward the Mashantucket Pequot Tribe since the opening of Foxwoods, researchers noted comments to the effect that tribes are not “real Indians” because they are not impoverished.151 The researchers observed that “some local residents seem to resent [the tribe’s] success with comments like ‘I think there are a number of people with little Indian blood getting all the money’ and ‘They are not real Indians, they are wealthy.’”152 Columnists and political figures have expressed

147. McClatchey, supra note 17, at 187; see also Davis & Hudman, supra note 30, at 90 (noting that competition is intensifying between tribal enterprises and state and local governments as well as other non-tribal gaming enterprises).
148. McClatchey, supra note 17, at 187.
149. See Eve Baron, Casino Gambling and the Polarization of American Indian Reservations, in TOURISM AND GAMING ON AMERICAN INDIAN LANDS 163, 164 (Alan A. Lew & George A. Van Otten eds., 1998) (“As a result of casino gambling, some reservations are now in the position of posing a threat to the surrounding states’ accumulation of revenue. . . . [T]his emerging era may . . . come to be defined by a new collective approach to American Indian political and economic autonomy.”).
150. See Melynda D. Wilcox, Gambling: More States Are Folding, KIPLINGER’S PERSONAL FIN. MAG., July 1996, at 14, 14; see also Carmichael & Peppard, supra note 146, at 138-39 (survey respondents expressed idea “that Indians have an unfair status and make no tax contributions from their successes”).
151. Carmichael & Peppard, supra note 146, at 141-42.
similar sentiments, referring to “phony Indian tribes” in what has become known as “rich Indian racism.” In this way, anti-casino voices appeal to shared cultural images of “Indianness” to gain support for their cause.

C. Language in Cases and Acts Suggests This Underlying Concern

The popular opposition to Indian gaming enterprises sets a backdrop for the court decisions addressing tribal commercial activities as government functions. There is evidence of this atmosphere in the language of the congressional acts and some of the decisions that helped to splinter-off commercial activities from the governmental-functions sphere.

The Committee Report to the Pension Protection Act explicitly acknowledges that the Act separates out commercial activities for the purpose of not including gaming operations in the governmental-plan exception to ERISA. Additionally, the Indian Tribal Government Tax Status Act, in the way it has been enforced, reveals a concern with tribal profits from commercial enterprises. One IRS tax-exempt-bond-enforcement-program officer, in discussing the commercial nature of a tribal golf course, said “I don’t think Congress ever anticipated several dozen people getting six-figure checks due to a resort financed by tax-exempt bonds.” This concern is surprising, “[g]iven the level of ‘commercial’ activity funded with tax-exempt debt by states and local governments.”

Antipathy toward profitable tribal enterprises—especially gaming—can also be discerned in the cases extending federal statutes to the tribes. In a 1991 Ninth Circuit case applying OSHA to a tribal timber mill, the court made sure to mention that the business had $33.5 million in sales. While this was not taken the form, primarily, of racialized attacks on the Mashantucket Pequot’s Indian identity.”

153. Worsnop, supra note 145, at 3 (quoting Safire, supra note 146).
154. See, e.g., RENEE ANN CRAMER, CASH, COLORS AND COLONIALISM 105 (2005). “Rich Indian racism” is the prevalent racial stereotype that “equat[es] indigeneity with primitivism and poverty” and thus backlashes against wealthy, and therefore empowered, Indians. Id. at 109.
155. Cramer, supra note 152, at 328-30. “[S]pecific ideas about Indian physical traits, social class, and culture constitute the dominant understandings of Indianness at play in much anticasino rhetoric.” Id. at 328.
156. JOINT COMM. ON TAXATION, supra note 85, at Title IX, at 244.
157. Clarkson, supra note 95, at 1074 (quoting Alison L. McConnell, Bond Lawyers: IRS Out of Order on Tribal Financings, BOND BUYER, Nov. 3, 2005, at 5, available at 2005 WLNR 18127583 (internal quotation marks omitted)); see also id. at 1073-82 (discussing “the arguably racist heritage of the essential government function test,” id. at 1081).
158. Id. at 1083.
a casino case, tribal gaming was well-developed by 1991 and certainly a specter in the background of these types of cases. This case is in keeping with the theme that when tribes make money, they are no longer acting as governments. The Second Circuit also hinted at the influence of this backdrop when it highlighted the fact that the tribal construction company at issue in a case did much of its work on a casino-expansion project and then proceeded to find that the construction activity was non-governmental.

The most visible examples of the connection between the narrowing tribal-government-functions definition and anti-gaming sentiment are in the language of San Manuel and the most recent NLRB decisions. Both the San Manuel and Foxwoods decisions reflect a concern with the profitability of casinos for the respective tribes, and where they fail to find support in precedent or congressional intent, the court and Board march out these facts. This has led some commentators to suggest that these cases have arisen because organized labor is focusing on tribal employers, "banking (probably implicitly) on the themes of fear, mistrust, and broadly accepted racism that linger just beneath the surface of the Indian gaming debate." The NLRB acknowledged in San Manuel that the "increasingly important role" of tribal commercial enterprises played a part in its decision to reverse its longstanding approach and apply the NLRA to the tribes. The Board twice pointed out that these enterprises have become "serious competitors with non-Indian owned businesses." The D.C. Circuit as well, in finding that tribal gaming is not "traditional," made a point to note the economic success of the casino at issue. In that case, one commentator argues that

[p]art of the basis for the decision was that tribal commercial activity simply does not fit the model of traditional tribal functions. . . . The notion that a tribe can have commercial dealings

160. See Worsnop, supra note 145, at 772-73.
161. Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2d Cir. 1996). This same sentiment is reflected in an Eleventh Circuit case, where the court found a restaurant and gaming facility to be non-governmental in part because "the Tribe intends to profit" from the operation. Fla. Paraplegic Ass’n v. Miccosukee Tribe, 166 F.3d 1126, 1129 (11th Cir. 1999).
163. McClatchey, supra note 17, at 133.
165. Id. at 1056, 1062.
166. San Manuel, 475 F.3d at 1308.
while retaining sovereignty appears foreign to the NLRB, despite the fact that states engage in commercial dealings every day without losing an iota of their sovereignty.\textsuperscript{167}

Likewise, the Board in \textit{Foxwoods} mentioned several times the profitability of the casino for the tribe in the context of explaining why the tribe could afford to have unions in the casino.\textsuperscript{168} That fact seemed to influence the decision heavily despite it being unrelated to whether financing the government is a function of tribal self-government.\textsuperscript{169} In addition to the profit factor, the NLRB in \textit{Foxwoods} seemed to take a narrow view of the sphere of “traditional” government activities, noting that no “traditional games” are played at Foxwoods.\textsuperscript{170} These decisions are “forcing tribes to conform to the court’s vision of legitimate tribal self-government.”\textsuperscript{171}

\textbf{D. The Governmental-Commercial Distinction Is Not Otherwise Supported by Congressional Intent or Supreme Court Decisions}

There is no expression of congressional intent or Supreme Court decision suggesting the exclusion of commercial enterprises from the realm of tribal governmental activities. This further supports the conclusion that the distinction was spurred and enabled by antipathy to Indian gaming. In fact, Congress and the Supreme Court have both consistently affirmed that economic enterprises are vital to tribal self-government, which suggests inclusion in the governmental-activities category.

Congress has never expressed support for the narrowing of the self-government sphere.\textsuperscript{172} “On the contrary, the current congressional policy toward Indian tribes promotes tribal self-determination and recognizes that economic development is essential to this aim.”\textsuperscript{173} Congress has repeatedly expressed an interest in forwarding tribal development,\textsuperscript{174} and “tribes cannot

\textsuperscript{167}McClatchey, supra note 17, at 185; see also San Manuel, 475 F.3d at 1315 (“[O]peration of a casino is not a traditional attribute of self-government.”).


\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.} at 3.

\textsuperscript{171} Singel, supra note 12, at 713.

\textsuperscript{172} See Burge, supra note 118, at 1308 (noting that the “determination of congressional intent . . . was noticeably sidestepped by the court in assuming the applicability of general laws, such as ERISA, to tribes”).

\textsuperscript{173} Singel, supra note 12, at 701.

strive toward that goal if their governmental revenues are constrained by burdensome and onerous federal labor regulation.”

The Pension Protection Act is no exception. Although the Act did separate out the commercial category, and that separation may have helped to create an atmosphere in which courts like the D.C. Circuit in San Manuel and the NLRB in Foxwoods felt comfortable making this distinction, the explicit exception in the Pension Protection Act in fact supports maintaining the traditional definition. By clarifying that the exception in the Act does not extend to commercial activities, “whether or not such activities are an essential government function,” Congress is in fact saying that commercial activities can be essential government functions, but that in this particular instance they are excluded anyway.

Supreme Court precedent also does not drive the governmental-commercial distinction. The Ninth Circuit (and the courts that have recently joined its analysis) used Tuscarora as a jumping-off point for their narrowed definition, but that case does not in any way advocate the exclusion of commercial enterprises from the sphere of tribal government functions. The Court in Tuscarora said in dicta that a general applicability statute applies to Indian tribes and members. It did not discuss which tribal governmental activities would be excluded from this presumption, and it certainly did not suggest the Ninth Circuit’s “exclusive rights of self-governance in purely intramural matters” standard or any of the restrictive interpretations of that standard that have followed. The intramural-matters exception, designed by the Ninth Circuit and subsequently narrowed by it and other courts, both draws a different line than does Tuscarora and invites subjective decision-making by courts.

Other Supreme Court precedent points against a commercial-activities exception to essential government functions. The Court has consistently treated commercial activities as vital to the maintenance of tribal governments. As noted supra, in Cabazon the Court affirmed gaming as an expression of

175. McClatchey, supra note 17, at 167.
176. Joint Comm. on Taxation, supra note 85.
179. For a discussion of Coeur d'Alene's inconsistency with Supreme Court jurisprudence applying the Indian law canons of construction, see generally Bryan H. Wildenthal, How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—and Has So Far Gotten Away with It, 2008 Mich. St. L. Rev. 547.
180. See supra Part I-A.
tribal sovereignty. In *LaPlante* as well, the Court noted that “[t]ribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty.” In finding that even regulation of non-members was key to sovereignty, the Court supported the idea that activities involving such regulation, including gaming, are also connected to government.

Further, in the taxation context, the Court has affirmed tribes’ inherent powers to tax activities occurring on the reservation as an “essential attribute of Indian sovereignty” and “a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services.” The Court noted that “Congress has expressed the purpose of “fostering tribal self-government” and that “[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers . . . .” A clear analogy can be drawn between this affirmation of the power to tax in order to raise revenues for government services and tribal operation of commercial enterprises for the same purpose. If funding government services is an essential government function in one context, it should be in the other. In the absence of superseding precedent by the Court, these decisions exhibit the Court’s approach to gaming and tribal economic enterprises. *Tuscarora* did not disturb this tradition.

**III. Courts Must Act to Correct This Faulty Distinction**

This Part argues there is still time to return the tribal-government-functions standard to its original meaning and eliminate the uncertainty and wide

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184. Id. at 138 n.5 (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)); see also *LaPlante*, 480 U.S. at 14 (“We have repeatedly recognized the Federal Government’s longstanding policy of encouraging tribal self-government.”).
185. Id. (quoting Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 550 (10th Cir. 1980) (en banc) (McKay, J., concurring), aff’d, 455 U.S. 130 (1982)).
discretion facing courts dealing with tribal-self-government questions. Section III-A explains how the current climate has led courts to decide these cases haphazardly based on their own subjective notions of which government activities fit the new definition. Section III-B suggests that ongoing and future unionization disputes may present an opportunity for courts to reverse the trend and authoritatively return the definition to one that is consistent with that applied to states and to require a congressional statement before removing commercial activities from the government-functions sphere in a given case.

A. Under the New Formulations Courts Are Left with Little Guidance in Deciding Government-Functions Cases

Both the “attributes of self-government” and “purely intramural matters” standards provide little explanation of what those categories involve. Additionally, the Ninth Circuit Coeur d’Alene standard, even if it were clear, is not binding precedent on other circuits. The collection of haphazard decisions shows that in this current climate, courts feel free to choose on their own whim whether to respect a certain tribal government activity. Courts ask if the activity fits the “portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters,”187 and this consideration can lead to subjective decisions influenced by attitudes about Indian gaming. “The opinions that apply [the intramural matters] standard have failed to interpret the meaning of this phrase, and have instead made conclusory statements that the tribal operation of businesses affecting interstate commerce are [sic] not essential to tribal self-government.”188 The Ninth Circuit standard “invites the courts to determine the essential ingredients of tribal sovereignty on an ad hoc, ‘I know it when I see it’ basis.”189

The need for an articulable standard that can provide some consistency is apparent, and the most logical standard would be a return to the test as used for states. The IRS Advisory Committee on Tax Exempt and Government Entities has called for regulations implementing just such a definition in order to reduce this high level of uncertainty.190 Although “[t]he clearest and simplest reform” would be for Congress to include the tribes explicitly when listing

188. Singel, supra note 12, at 713.
189. Id. at 717.
190. TRIBAL ADVICE & GUIDANCE POLICY, supra note 94, at II-12; SURVEY & REVIEW, supra note 121, at 12-13.
exempt government entities in statutes and to clarify what those exemptions mean, Congress for the most part has avoided taking a stance in the debate.

Members of Congress did attempt to fix the problem in several instances. In the NLRA context, members have several times proposed tribal labor acts that would exclude tribal governments from application of the NLRA, but so far these have failed to become law. Most recent is the Tribal Labor Sovereignty Act of 2009, currently in the House Subcommittee on Health, Employment, Labor, and Pensions.

Additionally, the proposed Tribal Tax Exempt Bond Parity Act of 2007 attempted to resolve the disparity between tribes and states by defining “essential government function” in the Act to “includ[e] any function which is performed by a State or local government.” Much of the language proposed in 2007 was used in the American Recovery and Reinvestment Tax Act of 2009 in amending the Internal Revenue Code to allow for tax-exempt Tribal Economic Development Bonds, which are treated “in the same manner as if such bond were issued by a State.” Financing of gaming facilities, however, is excluded from the Amendment. Despite these efforts, the courts cannot wait for Congress to amend every statute to exclude tribal enterprises, and Congress should not have to provide these new explicit statements of exclusion when until recently it was assumed that, without an explicit statement to the contrary, Indian tribes would be excluded from statutes that affect their sovereignty.

B. Current Cases May Present an Opportunity to Correct the Problem

In the absence of congressional action, courts need to apply a consistent definition in determining when tribes are acting to provide an essential government service and resist the urge to examine the wealth of a tribe or ask why they have departed so far from “Indian” activities. The recent push by unions to organize reservation workers may present the most likely opportunity for this—in particular, the potential ongoing controversies surrounding unionization of workers on the Mashantucket Pequot and Saginaw Chippewa reservations.

191. See McClatchey, supra note 17, at 183.
192. See id. at 174 (stating that “[m]any of the most progressive acts of Congress with regard to Indian tribes have doggedly pursued avoidance as a method of dealing with tribal problems”).
197. Id. § 7871(f)(3)(B)(i).
The Foxwoods unionization case, if controversies continue, could present an excellent opportunity to stop this governmental-commercial distinction from solidifying, thus returning to a standard more supported by the case law and congressional intent. After the initial finding against the Mashantucket Pequot Tribe, the NLRB rejected the Tribe’s request for review on November 21, 2007. While San Manuel could have been a fact-specific fluke, with Foxwoods the NLRB seemed to be pushing to take the final step and make the limited-government-functions sphere the rule. The Tribe had indicated it would appeal the decision to the federal courts, but that appeal was abandoned when the tribe and the United Auto Workers reached an agreement in October 2008 to negotiate a union contract under tribal law. Nevertheless, neither party gave up its rights under federal law. If further controversies arise relating to unionization on this reservation and the Tribe does take the case to the appellate courts, those courts will have the opportunity to re-affirm the long-established and traditional concept of tribal government functions.

The unionizing attempts on the Saginaw Chippewa reservation also might present an opportunity for halting the NLRB’s push to make the distinction permanent. Although the Tribe did not object to allowing NLRB oversight of the union election, it afterward adopted an ordinance prohibiting union-organizing on the reservation. The law was repealed by the Tribe, however, after the Teamsters Union filed an unfair-labor-practice charge. Still, if the unions make another attempt, the Tribe has indicated it is committed to fighting the jurisdiction issue. This would open up another opportunity for

201. See Ranzenberger, supra note 114.
204. Id.
circuit courts, and perhaps the Supreme Court, to make a statement returning the government-functions test to its original—and logical—place.

**Conclusion**

Antipathy toward Indian gaming has created an atmosphere enabling the gradual narrowing of the category of tribal government activities to exclude economic development projects. This has allowed increasing infringements of federal law into tribal operations. Those who would benefit from federal regulation have perceived this opportunity and have pushed each step toward the splintering-off of commercial activities from the governmental sphere. The result is one built on weak or nonexistent legal theories that no court would have accepted pre-IGRA. But there is still time to reverse the trend and return the definition of tribal government functions to a defensible category that is consistent with that applied to states, and as tribal economic development continues, this issue must be resolved.