1998

What's in the Cards for the Future of Indian Gaming Law

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Comments

WHAT'S IN THE CARDS FOR THE FUTURE OF INDIAN GAMING LAW?

"If there is one eternal verity which emerges from Indian law, history, and policy, it is that like little Alice [in Wonderland], we are never certain of the 'Rules of Battle.' Consistently, the rules have changed, often for reasons that have little to do with Indian concerns or needs."¹

Chief Justice Rehnquist described the unique relationship between recognized Indian tribes and the United States government as one involving "domestic dependent nations."² While this status affords particular rights and privileges exclusively to Indian populations and reservation law, the most publicized outcome of this status has been the entry of Indian reservations into a great American past-time: gambling.³ In 1979, the Seminole Tribe of Florida became the first tribe to open a large scale bingo operation that has blossomed into approximately one-third of 330 Indian reservations presently conducting high stakes gambling.⁴ As tribes gained eco-

³ Gambling is now embedded in American culture. See William E. Horwitz, Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?, 14 CARDOZO ARTS & ENT. L.J. 153, 155-56 (1996). Gambling in America dates back before the Revolutionary War when governments used state lotteries as a source of state revenue to supplement tax bases. See id. at 156. Citizens and state legislatures both supported and renounced legalized gambling throughout our nation's history. See id. at 156-57. The latest societal and government trend supporting legalized gambling, stemming from the establishment of Atlantic City and Las Vegas as bastions of gambling, has affected a fundamental change resulting in mainstream America accepting gambling. See id. at 157-58. In fact, state governments both allow and actively encourage gambling through lotteries to promote state revenues. See id. at 158.
⁴ See Brian M. Greene, The Reservation Gambling Fury: Modern Indian Uprising or Unfair Restraint on Tribal Sovereignty?, 10 BYU J. PUB. L. 93, 93 (1996). Gambling provides economic independence and power and is a financial windfall to the majority of the tribes that have entered the trade. See id.

(129)
nomically, states questioned their role in regulating reservation gambling.

The result of the tension between the states and the reservations was the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. While state legislatures hoped the Act would settle the rising tensions between the sovereignty of reservations and the authority of the states, IGRA sparked continuing controversy. Recently, this controversy culminated in the Supreme Court ruling in favor of state sovereignty in Seminole Tribe v. Florida.

This comment discusses various 1996 and 1997 court interpretations of IGRA and also predicts what the future holds for the Act. Section I discusses the passage of IGRA and the impact of Seminole regarding interpretation of the Act. Section II examines recent cases that have affected the interpretation of IGRA. Section III discusses the social impact of IGRA and how economic success under IGRA may not produce social harmony or societal advancement for the tribes. Section IV discusses the future of IGRA and the resulting impact on the tribes. This comment concludes with

5. 25 U.S.C. §§ 2701-2721 (1994). Congress included three objectives in passing IGRA: (1) promoting tribal economic development; (2) promoting tribal independence; (3) promoting independent and stable tribal governments. See id. § 2702. While the Legislature's intentions were to promote tribal sovereignty and economic independence, a corresponding objective was undoubtedly to relieve the government from financially supporting the tribes.

6. See S. Rep. No. 100-446, at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3073. "However, in the final analysis, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands." Id. The legislature intended to have the best of both worlds with full authority given to both the reservation and the state.

7. 116 S. Ct. 1114 (1996) (5-4 decision). The Court struck down an IGRA provision that allowed the tribes to sue in federal court if the state failed to negotiate over gambling rights in good faith. See id. at 1133. The Court struck down this provision as a violation of the Eleventh Amendment's sovereign immunity doctrine and thus provided states with the upper hand in dealing with Indian gambling in their jurisdiction. See id. However, Seminole renders state-tribal negotiations as meaningless because the tribe has no recourse if the good faith requirement is not met. See id. For a further discussion of Seminole, see infra notes 42-62 and accompanying text. See also Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions, 96 COLUM. L. REV. 2213, 2244 (1996).

8. For a discussion of the legislative history of IGRA and the impact of the Supreme Court's holding in Seminole, see infra notes 12-62 and accompanying text.

9. For a discussion of recent cases interpreting IGRA after the Court's holding in Seminole, see infra notes 63-126 and accompanying text.

10. For a discussion of the social impact on the tribes as a result of the passage of IGRA and gaming in general, see infra notes 127-70 and accompanying text.

11. For a discussion of the future of IGRA, see infra notes 171-93 and accompanying text.
the suggestion that IGRA needs further interpretation and a re-balancing of power toward Indian sovereignty.

I. BACKGROUND

The passage of IGRA allowed Indian gaming the ability to expand under the permission and promotion of state and federal government. The Supreme Court's holding in Seminole impacted the expansion and operation of Indian gaming by disabling the federal government from requiring the state government to negotiate in good faith with the tribes.

A. The Indian Gaming Reservation Act

1. Legislative History

Congress passed IGRA in the shadow of the Supreme Court's holding in California v. Cabazon Band of Mission Indians. Cabazon held that if a state allowed some forms of gambling, such as a lottery, a tribe could engage in gambling activities without the threat of state prohibition or punishment.

As stated in the first section of IGRA, the purpose of the statute is to promote tribal economic development and simultaneous self-sufficiency. Additionally, IGRA was intended to protect the tribes from organized crime and corruption, and to establish federal standards and authority. Legislative history reveals that states previ

12. 480 U.S. 202 (1987). The California tribe attempted to run a bingo and draw-poker casino on its reservation. See id. at 205. California responded by threatening the tribe with state criminal prosecution under statutes regulating bingo and poker card games. See id. On appeal, the Supreme Court held that because the state operated a state lottery, horse racing and bingo, the games on the reservation were not contrary to California's public policy. See id. at 210. On this basis, the Court concluded that California gambling law was regulatory rather than prohibitory and therefore the state could not assert jurisdiction over the gambling operations. See id. at 213. For a further discussion of this holding, see Greene, supra note 4, at 97-98.

13. Cabazon, 480 U.S. at 202. The holding in Cabazon was an extension of the earlier holding by a federal court in Seminole Tribe v. Butterworth, 658 F.2d 310 (Former 5th Cir. Oct. 1981). In Butterworth, the Seminole Tribe contracted for a limited partnership to build and operate the first reservation large-scale bingo gambling hall. See id. at 311. The court held in favor of Seminole Tribe because the state could not assert jurisdiction over the tribe's bingo operations under Florida law. See id. at 316. As was the case eight years earlier in Butterworth, the holding in Cabazon rested on the conclusion that the gambling law of the particular state was regulatory rather than prohibitory. Id.

14. 25 U.S.C. § 2702(1) (1994). The first section of policy declaration states: "The purpose of this chapter is - (1) 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 . . . ." Id.

15. Id. § 2702(2), (3). The purposes of the statute are further defined as:
ously involved in promoting gaming strongly opposed IGRA. As a result, IGRA was the compromise between states, the federal government, the tribes and the gaming industry. Congress also considered the possible intrusion of the judiciary into this area as another reason to balance the competing interests.

2. Classes of Gaming Under IGRA

IGRA divides gambling into three classes that correspond with different levels of state regulation. Class I gaming includes social games for nominal prizes. This class of gaming is within the exclusive control of the tribes and is exempt from state control and IGRA regulations or prohibitions.

Class II gaming is more explicitly defined as including bingo, cards and lotto. Congress also made clear which games are specif-

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to ensure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Id.

16. See S. Rep. No. 100-446, at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3073. Congress was concerned that if reservations were allowed to run gambling operations and were not forced to comply with state regulations, the result would be an unfair competitive advantage against state gambling and result in a loss of tax and income revenues. See id.

17. See id. Congress considered law enforcement concerns on reservations and addressed the need to accommodate the differing public policy concerns generally held by the tribes. See id.

18. See id. This view of Indian regulation belonging to Congress and not the judiciary is proper in light of previous decisions by the Supreme Court. In Santa Clara Pueblo v. Martinez, the Court held that “Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.” 436 U.S. 49, 72 (1978).

19. See 25 U.S.C. § 2703(6) (1997). The statute specifically defines class I gaming: “the term ‘class I gaming’ means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.” Id.

20. See id. § 2710(a)(1). The statute reads “[c]lass I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.” Id. The federal government determined that it is important for tribes to be free of regulation where traditional notions of tribal sovereignty are in question. See id.

21. See id. § 2703(7)(A). The statute defines class II gaming as:
ically not included in class II gaming. 22 Class II gaming, while also under the exclusive tribal jurisdiction and beyond state control, 23 differs from class I gaming in that the tribes that engage in gaming must meet federal standards under IGRA. 24 However, tribes are prohibited from freely using class II gaming funds. 25

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith):

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or
(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on or pot sizes in such card games.

Id.

22. See id. § 2703(7)(B). "The term 'class II gaming' does not include - (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Id. The statute continues in subsections (C) - (F) to further define which card games in particular states are defined as class II gaming and the retroactive nature of the statute. See id. § 2703(7)(C)-(F).

23. See 25 U.S.C. § 2710(a)(2) (1994). While states cannot directly control gambling that is run by Indians on the reservations, a state can prohibit class II gaming if the state bans all gaming from its jurisdiction. See id. § 2710(b). IGRA reads:

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if-

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization, or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

Id.

24. Id. § 2710(a)(2). IGRA reads "[a]ny class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter." Id.

25. See id. § 2710(b)(2)(B). The statute reads:

(B) net revenues from any tribal gaming are not to be used for purposes other than-

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;
Class III gaming is defined under IGRA as simply "all forms of gaming that are not class I gaming or class II gaming." \(^{26}\) For example, all electronic versions of class II games are class III gaming. \(^{27}\) Further examples of class III gaming are types typically found in Las Vegas and Atlantic City casinos, including slot machines, blackjack, roulette, off-track betting and lotteries. \(^{28}\) Regulation of class III gaming is crucial because class III gaming provides the majority of Indian gaming profits \(^{29}\) and typically involves larger stakes that require closer regulation. \(^{30}\) For a tribe to offer class III gaming, the tribe must meet the proper authorization requirements under IGRA and form a Tribal-State compact. \(^{31}\) One author linked the

(iv) to donate to charitable organizations; or
(v) to help fund operations of government agencies.

Id. Additionally, if the tribe wishes to use the money to make per capita payments to members of the tribe, the tribe may only do so if:

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);
(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and
(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

Id. § 2710(b)(3).

26. Id. § 2703(8).

Any electronic version of bingo or lotto would be considered class III gaming. See id.


29. See Hearings on the Impact of the U.S. Supreme Court’s Recent Decision in Seminole Tribe v. Florida to the Senate Comm. on Indian Affairs, 104th Cong., 2nd Sess. (1996) (statement of W. Ron Allen, President of National Congress of American Indians). “Of total (Indian gaming) revenue (of $2.6 billion), Class III gaming revenues represented the majority of dollars earned with...$2.16 billion in 1995.” Id.

31. With regard to class III gaming, IGRA provides that:
(1) Class III gaming activities shall be lawful on Indian lands only if such activities are -
reason for the heightened standards for the class III gaming to the adversarial relationship between gamblers and the house that is unique to class III gambling.  

3. **Forming the Tribal-State Compact**

For a state to allow a reservation to conduct class III gaming, the state and the reservation must form a Tribal-State compact. The compact is a specific agreement between the particular state and the tribe that describes not only the types of games that the state will permit in the casinos, but also the condition under which casinos may operate the games. This requirement is significant because, prior to IGRA, states had no authority over any manner of gaming unless a tribe violated a state criminal or prohibitory gambling law. Under IGRA, the Secretary of the Interior is assigned

(A) authorized by an ordinance or resolution that -
   (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
   (ii) meets the requirements of subsection (b) of this section, and
   (iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.


32. See Marks, supra note 27, at 168. Marks writes:
Class II and Class III gaming are differentiated based upon the player’s relationship with the house. The house does not care who wins or loses when it operates Class II games; it merely regulates the operation of the games and will make a profit as long as the games are played. In Class III gaming, for example, blackjack, players play against the house; thus, the house has an interest in who wins or loses.

Id. Thus, it is this interest in winning by the house, or in this case the reservation, that could bring the prospect of interference and corruption through organized crime. See id. at 165.

Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Id.

34. See id. For example, a compact might define games such as blackjack or roulette that the reservation casino could lawfully operate. Any games a reservation casino operated not specifically defined in the compact would be illegal. See id.

35. See McFadden, supra note 28, at 813. For a further discussion of the Indians’ immunity from any state regulation of gaming prior to the adoption of IGRA, see Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981) (holding that Wisconsin’s bingo laws were civil regulations and therefore Wisconsin had no
to approve the Tribal-State compacts and has the discretion to disapprove the compact if it violates IGRA or any other federal laws.\(^{36}\)

In addition to the power vested in the Secretary of the Interior, IGRA vests the federal district courts with jurisdiction over disputes resulting from a state’s refusal to negotiate a compact with a tribe in good faith.\(^{37}\) IGRA places the burden of proof on the State to prove that it negotiated with the Indian tribe in good faith.\(^{38}\) If a jurisdiction over regulation of Indian gaming). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987) (holding that reservation bingo games were not criminal acts and thus were immune from any state regulation by California).

This type of immunity from the state in the gambling forum did not apply to all Indian activities. For example, 18 U.S.C. § 1162 and 28 U.S.C. § 1360 granted jurisdiction to Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin from the federal government over criminal acts committed on reservations. See also The Assimilative Crimes Act, 18 U.S.C. § 13 (1994) (allowing state courts to apply state criminal laws to crimes committed by non-Indians on Indian lands).

   (A) The Secretary is authorized to approve any Tribal-State Compact entered into between an Indian Tribe and a State governing gaming on Indian lands of such Indian tribe.
   (B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates -
      (i) any provision of this chapter
      (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian land, or
      (iii) the trust obligations of the United States to Indians.
   (C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

Id.

37. 25 U.S.C. § 2710(d)(7)(A) reads:
   (A) The United States district courts shall have jurisdiction over -
      (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
      (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
      (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

Id.

38. 25 U.S.C. § 2710(d)(7)(B)(ii) reads:
   (ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that -
      (I) a Tribal-State compact has not been entered into under the paragraph (3), and
      (II) the state did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the
court finds an absence of good faith negotiations between the tribe and State, the statute instructs the court to order that a concluded compact be reached in sixty days.\textsuperscript{39} If the State and tribe then fail to enter into a compact within sixty days, the parties must submit their offers to a court-appointed mediator who selects the best compact under IGRA and federal laws.\textsuperscript{40} If the State fails to consent to the selected compact within the following sixty day period, the Secretary of the Interior assumes the role of the State and prescribes the procedures under which the class III gaming will be conducted.\textsuperscript{41}

\textsuperscript{39} 25 U.S.C. § 2710(d)(7)(B)(iii) reads:
If, in any action described in subparagraph (A)(i), the court finds the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of the gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court -
(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

\textsuperscript{40} 25 U.S.C. § 2710(d)(7)(B)(iv) reads:
(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of the gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.
(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

\textsuperscript{41} See id. It is this assumption of state power by the Secretary of the Interior that the states challenged. By allowing a federal official rather than a state governor or other state official to negotiate with the tribes, the federal government could introduce tribal gaming into a state where the elected officials opposed gambling. See id.
B. Seminole Tribe v. Florida

In 1996, the Supreme Court held that sections of IGRA violated states' Eleventh Amendment immunity by authorizing Indian tribes to enforce and compel Tribal-State compacts. In September 1991, the Seminole Tribe sued the State of Florida and alleged that the state had refused to enter into negotiations for inclusion of gaming activities in a Tribal-State compact in violation of the good faith negotiation requirement in 25 U.S.C. § 2710 (d)(3). The district court denied the State’s motion to dismiss, but on interlocutory appeal, the Court of Appeals for the Eleventh Circuit reversed the district court’s holding that the Eleventh Amendment barred the tribe’s suit against Florida. The Eleventh Circuit held that Congress did not have the power to abrogate a state’s Eleventh Amendment immunity from suit and therefore concluded that there was no jurisdiction over the tribe’s suit against Florida. Additionally, the circuit court relied on Ex parte Young.

42. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Herbert Hovenkamp writes that the text of the Eleventh Amendment can be interpreted in four possible ways:
1. The Amendment barred diversity actions brought by a citizen of one state against another state.
2. The Amendment (plus any penumbra) barred both diversity actions and federal question actions by a citizen of one state against another state, unless Congress made clear that the federal statute at issue was designed to abrogate state sovereign immunity.
3. The Amendment (plus any penumbra) barred both diversity actions and federal question actions by any citizen against any state, including the citizen's own state, unless Congress made clear that the federal statute at issue was designed to abrogate state sovereign immunity.
4. The Amendment (plus any penumbra) barred both diversity actions and federal question actions by any citizen against any state, including the citizen's own state, and the immunity may not be abrogated by a congressional act.

Hovenkamp, supra note 7, at 2239.

44. See Seminole Tribe v. Florida, 801 F. Supp. 655, 656 (S.D. Fla. 1992), rev'd, 11 F.3d 1016 (11th Cir. 1994). The respondents moved to dismiss the claim arguing that the suit violated a state's sovereign immunity from suit in a federal court. See id.
45. See Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994). The circuit court agreed that the Act had been passed pursuant to Congress’ power under the Indian Commerce Clause. See id.
46. See id. at 1019.
47. 209 U.S. 123 (1908).
and found that an Indian tribe is not permitted to compel good faith negotiations by suing the governor of a state.48

The Seminole Tribe appealed two issues to the Supreme Court.49 First, did the Eleventh Amendment prevent Congress from passing legislation authorizing Indian tribes to sue states in federal courts? Second, did the doctrine of Ex parte Young permit Indian tribes to bring suits against state governors to enforce IGRA's good faith bargaining requirement? The Court held that the Eleventh Amendment precluded Congress from authorizing suits by Indian tribes against the states; that Ex parte Young precluded suit against the Governor of Florida; and held that, due to a lack of jurisdiction, the suit was barred by the Eleventh Amendment.52

The majority opinion, authored by Chief Justice Rehnquist, overruled the plurality opinion in Pennsylvania v. Union Gas Co. and re-instituted the concept of state sovereignty under the direction and authority of the Eleventh Amendment. In holding that a state's Eleventh Amendment immunity may not be abrogated by congressional acts, Chief Justice Rehnquist wrote that the Eleventh Amendment is significant "not so much for what it says, but for the presupposition . . . which it confirms." Thus, despite Congress' 48. See Seminole, 11 F.3d at 1028. The court found that it lacked subject matter jurisdiction and remanded the case to the district court with directions to dismiss the Tribe's suit. See id. at 1030.

49. See Seminole, 116 S. Ct. at 1122.

50. See id.

51. See id.

52. See id. at 1133. The Court further stated in its holding that:

[W]e have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under Ex parte Young strongly indicates that Congress had no wish to create the latter under § 2710(d)(3). Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.

53. 491 U.S. 1 (1989) (finding that Interstate Commerce Clause granted Congress authority to abrogate state sovereign immunity). For a further discussion of Union Gas Co., see Pat Smith, Point: Seminole Tribe of Florida v. Florida, A Victory For States' Rights; Indian Gaming Act Caught In the Crossfire, MONT. LAW., July-Aug. 1996, at 21, 23 (stating subsequent appointments to Court were seen by minority in Union Gas Co. as opportunity to reverse decision that interfered with states' rights).

specific intent under IGRA to subject state Indian suits to federal courts, Congress simply lacked the authority to abrogate the states' immunity.\textsuperscript{55}

The Court additionally held that plaintiffs can not bring suits under IGRA against state officers, rather than the state itself.\textsuperscript{56} The Supreme Court held, in \textit{Ex parte Young}, that when state law is violated by a public official, the state officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."\textsuperscript{57} Thus, while Congress can impede on state's rights to uphold federal and constitutional laws, acts that are purely discretionary are outside of this Eleventh Amendment exception.\textsuperscript{58} However, the Supreme Court held that the present situation was different than \textit{Ex parte Young} because the state governor is forced to negotiate with a tribe and has no real discretion under IGRA.\textsuperscript{59} Additionally, the Court concluded that when there is a remedial scheme of enforcement of a particular right, the courts have refused to consider \textit{Ex parte Young} in addition to that particular right.\textsuperscript{60} Under IGRA, the remedial scheme preventing the court from applying \textit{Ex parte Young} existed in 25 U.S.C.

\textsuperscript{55} The dissent sharply disagreed with the majority's view of federalism. \textit{See id.} at 1134. Justice Stevens characterized Rehnquist and the majority's view as "profoundly misguided" and wrote:

The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.

\textit{Id.}

\textsuperscript{56} \textit{See id.} at 1132. Relying upon \textit{Ex parte Young}, 209 U.S. 123 (1908), the Seminole Tribe contended that they could bring an action against a state official for failing to comply with IGRA, instead of suing the state directly. \textit{See Seminole,} 116 S. Ct. at 1132.

\textsuperscript{57} \textit{Ex parte Young,} 209 U.S. at 160.

\textsuperscript{58} For a further discussion of this Eleventh Amendment exception and its relation to Indian gaming, see Keith D. Bilezerian, \textit{Ante Up or Fold: States Attempt to Play Their Hand While Indian Casinos Cash In,} 29 \textit{Nw. Eng. L. Rev.} 463, 483-91 (1995).

\textsuperscript{59} \textit{See Seminole,} 116 S. Ct. at 1133. The majority noted that in comparison to \textit{Ex parte Young}, IGRA contained only a modest set of sanctions against state officials. \textit{See id.} In \textit{Ex parte Young}, a state official was exposed to the full remedial powers of the court. \textit{See id.}

\textsuperscript{60} \textit{See id.} The Court also noted that when Congress has provided adequate remedial mechanisms for constitutional violations, the Court has refused to create additional remedies. \textit{See id.} (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).
The Court concluded by holding that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida and therefore is barred by the Eleventh Amendment and dismissed due to lack of jurisdiction.

II. **Significant Indian Gaming Decisions After Seminole**

Following the *Seminole* decision, Indian tribes filed numerous suits attempting to increase their ability to participate in gaming. As evidenced in the following cases, the result has been virtually a unanimous move, at both the district and circuit court levels, to further limit the ability of tribes to engage in gambling or expand existing casinos.

A. *Pueblo of Santa Ana v. Kelly*

The Court of Appeals for the Tenth Circuit upheld the dominance of the state over Indian gaming and invalidated the compacts under which a tribe in New Mexico was operating class III gaming in *Pueblo of Santa Ana v. Kelly.* In New Mexico, Indian gaming was such a controversial topic that the Governor's election centered on how New Mexico would handle tribal gambling. In the new Gov-

Relying on this precedent in *Seminole*, the Court held that because Congress prescribed a detailed remedial scheme for the enforcement of a statutorily created right against a state, a court should hesitate before ignoring the limitations and permit an action against a state officer under *Ex parte Young*. *Seminole*, 116 S. Ct. at 1132.

61. For the language of 25 U.S.C. § 2710(d)(3), see *supra* note 33. For the language of 25 U.S.C. § 2710(d)(7), see *supra* notes 37-41. One example of the intricate remedial scheme in IGRA referenced by the Court is the 60 day period given for a state and tribe to negotiate a compact where the state has previously failed to negotiate in good faith. *See Seminole*, 116 S. Ct. at 1132. For a further discussion of IGRA's remedial measures, see *supra* note 31.


63. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (holding Secretary of Interior could not revive invalid Tribal-State compact); *New York v. Oneida Indian Nation*, 90 F.3d 58, 59 (2d Cir. 1996) (holding against tribe and directing alleged violation of compact to court rather than arbitration); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996) (holding state may intrude and conduct search and seizure on Indian gaming operations); *Miami Tribe v. United States*, 927 F. Supp. 1419 (D. Kan. 1996) (holding bingo facility could not be constructed because land was not Indian land). For a discussion of *Kelly*, see *infra* notes 64-84 and accompanying text. For a discussion of *Oneida*, see *infra* notes 85-93 and accompanying text. For a discussion of *Crow*, see *infra* notes 94-114 and accompanying text. For a discussion of *Miami Tribe*, see *infra* notes 115-26 and accompanying text.

64. 104 F.3d 1546 (10th Cir. 1997).

65. *See id.* at 1550. The court wrote in dicta that Indian gaming was a significant campaign issue in the 1994 gubernatorial campaign and that the incumbent was defeated by Gary Johnson because Johnson had publicly committed to signing
ernor’s first year in office, thirteen tribal compacts took effect. Relying on these assurances by state and federal officials, many of the tribes in New Mexico spent vast sums of money improving or constructing new casinos.

Two cases decided by the New Mexico Supreme Court severely impacted the status of Indian gaming in New Mexico. First, in *New Mexico ex rel v. Johnson*, the court ruled that the Governor lacked the authority to sign Tribal-State compacts on behalf of New Mexico. The court held that the Governor's proper role was not the creation, but the execution, of the law. After examining the virtually

Tribal-State compacts if elected governor. *See id.* This same election witnessed voter approval of a constitutional amendment authorizing a state lottery and legalizing video gambling. *See id.*

66. *See id.* Governor Johnson appointed Professor Fred Ragsdale to negotiate compacts with thirteen Indian tribes, and on February 13, 1995, Johnson signed 15 identical compacts. *See id.* In March and April, the Secretary of the Interior approved all 13 of the compacts and published the approval notice in the Federal Register. *See id.* The tribes received letters from the defendant that stated: The execution, approval and publication of your tribe’s compact should bring it into compliance with applicable federal law. In any event, the approval of the compacts constitutes a change in circumstances warranting termination of the non-prosecution letter. . . . The letter of non-prosecution shall afford the tribe no protection with respect to conduct occurring after the date of termination.

*Id.*

67. *See id.* The Court provided figures of the vast amounts of money spent by tribes to establish and improve casinos in New Mexico:

[T]he pueblo of Santa Ana spent $1,265,275.00 to expand their existing gaming facility, along with $2,786,950.00 for furnishings and equipment for the expanded facility. . . . [T]he San Filepe Gaming Enterprise incurred $17,266,869 in debt for the construction and expansion of a gaming facility, of which $16,723,869 was borrowed in reliance on the tribal-state compact.” The Pueblo of Tesuque committed approximately $4.1 million “to construction and equipment after Governor Johnson’s inauguration and the approval of the Compact.” The Pueblo of Isleta spent over $20 million in connection with the construction of a resort/gaming/hotel complex. The Pueblo of Pojoaque borrowed or spent over $15 million dollars [sic] to renovate and expand gaming and horse-racing facilities. The Pueblo of Acoma borrowed $3.5 million to purchase class III gaming equipment and casino furnishings. The Pueblo of San Juan “invested approximately $2 million in buildings, furniture, fixtures, and equipment . . . and has entered into various contracts exceeding $5 million for goods, services, and gaming devices for the operation of class III gaming under the Compact.”

*Id.* at 1550 n.6 (citations omitted).

68. 904 P.2d 11 (N.M. 1995). The New Mexico Supreme Court held that the compacts and agreements authorized more forms of gaming than New Mexico law permitted under any circumstances. *See id.* at 25. The court reached this conclusion after examining the state constitution and other statutory authority and held that no source gave Governor Johnson the authority to enter into the tribal compacts for gaming. *See id.* at 25-26.

69. *See id.* at 26. The Court’s analysis thus rested on determining whether the entry into a compact is a creation or execution of law. *See id.* at 29-30.
ally irrevocable right to conduct gaming under the agreement, the
disruption of legislative authority, and the historical role of a Gover-
nor, the court concluded that the Governor was acting beyond his
power in entering into the tribal compacts. With the lack of statu-
tory authority allowing the Governor to assume such broad power
in the realm of Indian gaming, the court held that the Governor
was unable to properly authorize the compacts.

Second, in Bingo, Ltd. v. Otten, the New Mexico Supreme
Court held that electronic video gambling devices violated New
Mexico law and public policy. More importantly, the court stated
that New Mexico has a policy against gambling. The court also
stated that “video, electromechanical, and computer forms of spe-
cifically authorized games are against public policy.”

With Clark and Bingo expounding New Mexico’s laws and public
policy against gaming, the Kelly court examined the grant of
summary judgment for the State by the district court and affirmed
the lower court’s holding. The Tenth Circuit held that:

(1) IGRA imposes two separate requirements—the State
and the Tribe must have “entered into” a compact and the
compact must be “in effect” pursuant to Secretarial ap-
proval—before class III gaming is authorized; (2) state law

70. See id. at 34-35. The court, in finding that the Governor had exceeded his
authority, noted that the tribe’s right to conduct gaming under the compact was
seemingly perpetual. See id. at 31. The authorization to allow the tribes to engage
in any forms of casino-games directly contravened the legislatures’ specific and
expressed aversion to commercial gambling. See id. at 24.

71. See id. at 34-35.

72. 910 P.2d 281 (N.M. 1995). The specific issue before the Otten court was
whether a hand-held electronic device known as “Power Bingo” was a permissible
piece of gaming equipment under New Mexico’s Bingo and Raffle Act. See id. at
281.

73. See id. at 282. The court interpreted narrowly the terms of the Bingo and
Raffle Act and noted that “[w]ith limited exceptions, gambling is a crime in New
Mexico.” Id. at 283. The court expounded on this view of gambling in New Mex-
ico and stated:

We take judicial notice of recent newspaper references to “the Las Vegas-
night law” applicable to charities. While the record before this Court
does not reveal whether gambling devices traditionally found in casinos
have in fact been used in this state for gratuitous amusement or even to
make bets, we find no statutory authorization for any “Las Vegas-night”
gambling in New Mexico. We are cited to no authoritative use of the
term “lottery” to include casino-style gaming.
Id. at 283 n.2.

74. Id. at 287.

75. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1553 (10th Cir. 1997). The
court reviewed de novo the grant of summary judgment and drew all inferences in
favor of the party against whom the judgment was granted. See id. at 1552.
determines the procedures by which a state may validly enter into a compact; and (3) in determining whether the State and the Tribes have entered into compacts, valid and binding under New Mexico law, we agree with and follow the New Mexico Supreme Court’s decision in Clark.76

In examining the “entered into” and “in effect” requirements, the court examined the language of IGRA to determine whether the requirements were separate or whether Secretarial approval of the compacts was the only necessity under IGRA.77 The court looked to the legislative history of IGRA and stated that it was clearly the intent of the drafters to attempt to accommodate both tribes and the states.78 In examining precedent where a particular state representative lacked authority to enter into the compact, the court noted that the district courts almost uniformly found that a compact entered into by an agent without authority to bind the state is void, regardless of the Secretary’s approval.79 In dismissing the remaining claims of the tribe, the court held that a valid compact was necessary for class III gaming, that there was no real danger of indefinite collateral attack, and that there need be more than mere Secretarial approval of the compact.80

With regard to whether federal or state law governed the validity of the compact, the Tenth Circuit held that both state and federal law apply. While IGRA is a federal statute that presented

76. Id. at 1555.

77. See id. The court noted that the language of the statute suggests that the “in effect” requirement establishes the date when the compact becomes effective under IGRA, but arguably says nothing about whether a state has validly entered into a compact. See id. at 1554.

78. See id. The legislative history quoted by the court states that “this legislation is intended to provide a means by which tribal and State governments can . . . work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.” S. Rep. No. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.

79. See id. at 1555. See also Narragansett Indian Tribe v. Rhode Island, No. 94-0618, 1996 WL 97856, at *2 (D.R.I. Feb. 13, 1996) (holding that compact signed by Governor who lacked authority to sign is void and given no legal effect); Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 47 (D.D.C. 1993) (holding because Governor signed compact without authority, state did not enter compact and compact was invalid).

80. Kelly, 104 F.3d at 1556. While the court was sympathetic that the tribes would lose millions of dollars if the compact was voided, the court stated that the Indian tribes must bear some of the blame. See id. The court stated that the tribes were aware, as evidenced by concessions during oral argument, that most commenced gaming before the compacts were approved and signed. See id.
federal questions to federal courts, state law must determine if the state has validly bound itself to a compact.81

The final issue resolved by the court was whether the Governor of New Mexico had the authority under the state constitution or statute to bind the state to any compacts.82 Rather than reinvestigate the issue, the Tenth Circuit accepted the New Mexico Supreme Court's holding in Clark that the Governor lacked the authority to bind the state to a tribal compact.83

The result of the Tenth Circuit's holding in Kelly was highly deferential to the interests of the state. While the tribes spent millions of dollars updating and building casinos, the Tenth Circuit displayed no hesitation in striking down the compact, thereby destroying the investment and futures of those Indian tribes that had wrongly assumed the compact was valid.84 Thus, Kelly followed the lead of Seminole in holding the state's interest paramount against Tribal-State gaming compacts and Indian opportunity.

B. New York v. Oneida Indian Nation

The Court of Appeals for the Second Circuit addressed an exclusionary clause of an arbitration provision contained in a tribal gaming compact in New York v. Oneida Indian Nation.85 The Second Circuit held against the Tribe and ordered that the alleged violation of the compact by the Tribe go to court rather than arbitration.86 In 1993, New York State and the Oneida Indian Nation of New York executed a compact that included [in the back index] a list of approved games.87 The Nation followed by making a request

81. For an example of applying state and federal law, see Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (discussing transfer of civil and criminal jurisdiction over Indian lands to state).

82. See Kelly, 104 F.3d at 1558-59.

83. See id.

84. See id. at 1556. The court notes that there are three other appeals involving the identical issues that will be determined by the outcome of this case: Apache Tribe of the Mescalero Reservation v. New Mexico, No. 96-2156; Apache Tribe of the Mescalero Reservation v. Reno, No. 96-2199; and Jicarillo Apache Tribe v. Kelly, No. 96-2192. See id. at 1548 n.2. It can safely be presumed that all the tribes in these cases on appeal will also be out a financial fortune due to the Tenth Circuit's holding.

85. 90 F.3d 58 (2d Cir. 1996).

86. See id.

87. See id. The compact was approved by the Acting Assistant Secretary of Indian Affairs of the United States Department of the Interior as required under 25 U.S.C. § 2710(d)(3)(B). See id. To amend the back appendix and add a new game, the new specifications were required to be submitted in writing under the terms of the compact. See id. The State was given 15 days to notify the Nation if it accepted the amendment. See id.
to include "Instant Multi-Game" and received instant approval from the New York State Racing and Wagering Board.88

The compact contained provisions for arbitration89 but specifically stated that "[a] claim by the State that the nation is conducting a class III gaming activity not authorized by this Compact is not subject to mandatory arbitration."90 The Second Circuit examined the exclusionary clause because it recognized that all clauses in a contract must be given meaning.91 In conclusion, the court held that the State's claim fell under the exclusionary clause and that it was not the proper role of the court to stretch clear language and defeat the intent of the contracting or compacting parties.92

The result in Oneida is typical of the post-Seminole cases. Again, it was the tribal nation that suffered from a misinterpretation of the arbitration agreements under IGRA. The overall theme in Oneida, and under IGRA generally, is that if the State's interest is somehow implicated, whether it be an affirmative use of authority or a purposeful intent to deny approval of an amendment, the court will side with the state if the arguments are equally weighted.93

C. Crow Tribe of Indians v. Racicot

Similar to Oneida, in an appeal before the Court of Appeals for the Ninth Circuit, the power of the state to intrude upon the land and gaming operations of an Indian tribe was upheld.94 In March 1993, the Crow Tribe and the State of Montana executed a Tribal-State compact authorizing class III gaming on the Crow Reserv-

88. See id. The Nation received the approval almost immediately and began to offer the game until the State brought this action. See id. The Second Circuit had jurisdiction under § 28 U.S.C. 1291. See id. The court specifically addressed the holding in Seminole and stated that Seminole did not affect the current appeal. See id.

89. See id. at 61. The arbitration provision reads "[e]xcept for disputes concerning the games and activities permitted under this Compact, all disputes concerning compliance with and interpretation of any provisions of the Compact shall be resolved by binding arbitration in accordance with the procedures set forth below." Id.

90. Oneida, 90 F.3d at 58.

91. See id. at 63. The lower court held that the exclusionary clause was inapplicable because the State's complaint did not on its face claim that the Instant Multi-Game was not authorized under the compact. See id. The Second Circuit held that the lower court's interpretation of the arbitration clause rendered the exclusionary clause nearly meaningless, if not applied in the present context. See id.

92. See id. at 64.

93. See id.

94. See Crow Tribe of Indians v. Racicot, 87 F.3d 1039 (9th Cir. 1996).
The approved compact permitted the Absaloka Casino Enterprise (ACE) to own and operate the Little Bighorn Casino located within the Crow Indian Reservation. ACE filed declaratory judgment with the Crow Tribal Gaming Commission requesting a determination of whether mechanical slot machines were authorized under the compact. The Commission held a hearing and issued an order declaring that ACE could lawfully operate mechanical slot machines under IGRA and the compact. On June 18, 1994, state and federal agents entered the casino with a search warrant and seized the slot machines. The Crow filed suit in district court and the court granted summary judgment against all six of the Crow's claims. On appeal, the Ninth Circuit held that the Commission's order allowed the State to allege that the compact precluded the use of slot machines; that the use of slot machines was not permitted under the compact; and that the lower court properly granted summary judgment against the Fourth Amendment and Due Process claims.

1. The State Is Not Estopped

To determine the powers of the Commission, the court examined both the Tribal-State compact and the Tribal Gaming Ordinances. The direct impact of the Seminole holding in this case is not an issue because the State and Crow had already adopted a Tribal-State compact. However, the ultimate holding here is consistent with Seminole in that the power of the State to interpret and regulate the existing compact was held superior to that of the tribe.

ACE. Absaloka Casino Enterprise, Inc. (ACE) is a tribally chartered corporation wholly owned by the Crow.

The members of the tribe delegated to the Crow Tribal Gaming Commission the authority to regulate class III gaming and issue regulations implementing that authority. The Commission passed regulations governing the administrative proceedings relating to class III gaming. Final decisions of the Commission could be appealed to the Crow Tribal Court.

The State, represented by Governor Racicot, chose not to appear at the hearing and sent a letter to the Commission stating that the Commission's interpretation of the compact would not be binding on the State. Governor Racicot sent another letter repeating that the Commission's order was not binding on the State; the compact did not provide for the use of slot machines; and that the use of slot machines would be a failure by the Tribe to perform its part of the compact.

The State did not attempt to seek relief from the Commission's order in the Crow Tribal Court.

The Crow's claims were for declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. The Crow's claims consisted of violations of Equal Protection, Due Process and Fourth Amendment rights as well as State violations of the Crow's right to regulate class III gaming.

See Crow, 87 F.3d at 1042. The State did not attempt to seek relief from the Commission's order in the Crow Tribal Court. See id.

The Crow's claims were for declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. See id. The Crow's claims consisted of violations of Equal Protection, Due Process and Fourth Amendment rights as well as State violations of the Crow's right to regulate class III gaming. See id.
nance, which was adopted by the Crow Tribal Council.\textsuperscript{102} The court stated that allowing the Commission to interpret the compact would undermine the jurisdiction of the United States district courts to enjoin gambling on lands not permitted under a compact.\textsuperscript{103} If the Commission were permitted to interpret the compact and that interpretation was made final after an appeal to the Tribal Court, it would not be reviewable in federal court.\textsuperscript{104} Thus, to give a state a remedy in federal court, and to give substance to the parties' intentions, the court held that the Commission lacked authority to interpret the compact and that the State could argue that the compact did not permit the operation of mechanical slots.\textsuperscript{105}

2. The Tribal-State Compact Does Not Permit Mechanical Slot Machines

One of the three requirements under IGRA for class III gaming to be permitted is that the gaming must be conducted in accordance with the Tribal-State compact.\textsuperscript{106} The court held that the compact did not permit the use of mechanical slot machines, therefore this requirement was not met.\textsuperscript{107} The court examined appendix F of the compact to determine if slot machines would be

\begin{itemize}
  \item 102. See id. at 1043. While the compact provided little insight into the scope of the Commission's power, the Tribal Gaming Ordinance provided a better understanding of the scope of the Commission's regulatory powers to the court. See id. The Gaming Ordinance provides:
    \begin{quote}
    [t]he Crow Tribe is authorized to operate, license and regulate class III gaming on Indian Lands, as defined at 25 U.S.C. § 2703(4)(b) within the State of Montana, provided it has entered into, and operates Class III gaming consistent with, a compact entered into between the Tribe and the State of Montana.
    \end{quote}
  
  Id. While the ordinance created the Commission and granted it powers from licensing and inspection to continuous study of class III gaming, what was notably absent from the powers of the Commission was the authority to determine and interpret what types of gaming the compact permitted. See id.

  \item 103. See id. The court quoted IGRA which reads, "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." Id. (quoting 25 U.S.C. § 2710(d)(7)(A)(ii)). For a further discussion of this IGRA section, see supra note 37.

  \item 104. See Crow, 87 F.3d at 1044. See also Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (holding unless federal court determines tribal court lacked jurisdiction, proper deference to tribal court system precludes relitigation of issues raised and resolved in tribal court).

  \item 105. See Crow, 87 F.3d at 1044. See also Lyng v. Payne, 476 U.S. 926, 937 (1986) (holding agency power no greater than that delegated by legislature).

  \item 106. 25 U.S.C. § 2710(d)(1) (1997). For a further discussion of this section, see supra notes 26-32 and accompanying text.

  \item 107. See Crow, 87 F.3d at 1044.
\end{itemize}
allowable.108 The Crow argued through expert testimony and case law that a lottery encompassed any game with elements of prize, consideration and chance.109 The State argued that the history behind the current compact, including the fact that two other compacts referring specifically to slot machines were rejected, and the intent of the parties clearly illustrated that the State objected to the tribes operating slot machines in their casinos.110 The court agreed with the State and held that although lotteries may include slot machines, in this instance, the parties' intention was not to include slot machines under the compact.111

3. The Fourth Amendment and Due Process Claim

With regard to the Fourth Amendment claim, the Tribe claimed that there was no probable cause to search the casino and that the magistrate issuing the search warrant was misled by misrepresentations and omissions of fact.112 The court concluded that because there was a substantial basis for probable cause and no omission or misrepresentation of facts, there was no resulting violation of the Fourth Amendment.113 The Ninth Circuit also held that

108. See id. Appendix F of the compact reads:

I. Definitions:

"Lottery Games." The term "Lottery Games" means any procedure, including any on-line or other procedure using a machine or electronic device, by which one or more prizes are randomly distributed among persons who have paid for a chance to win a prize but does not include any game in which a player completes [sic] against or plays with any other person.

II. Conditions

Lottery Games may be conducted on the Reservation if such games are conducted and operated by the Tribe in a manner which provides security at least as stringent as the Montana Lottery.

Id. (alteration in original).

109. See id. at 1045-46. See also Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 64 (Mo. 1994) (stating that almost all other state courts have considered slot machines to be lotteries).

110. See Crow, 87 F.3d at 1045. The State rejected two proposed compacts by the Crow Tribe because they included wide ranges on class III gaming, specifically slot machines. See id. The State asserted that the Crow could only operate forms of gaming permitted under Montana law and slot machines were prohibited. See id.

111. See id. The court determined that while generally slot machines are included in the term "lottery," each case must be examined narrowly within the context of the particular compact at issue. See id.

112. See id. at 1046. The tribe claimed that Janet Jessup, the Administrator of the Montana Gambling Control Division, intentionally misled the magistrate in her statements to state and federal agents. See id. It was Jessup's statements that provided the probable cause for the search warrant. See id. at 1042.

113. See id. at 1046. Probable cause existed because the Crow did not have the right to interpret the compact or operate slot machines. See id. Also, the court held that the magistrate did not omit or misrepresent facts in her statements to
the district court properly granted summary judgment against the Crow's Due Process claim. The court held that the Crows had no property or liberty interest at stake due to the fact that an interest in operating the slot machines was never created, therefore there was no Due Process violation at issue. As with prior cases, Crow stands for the proposition that states will be given a great deal of latitude in describing their intent when entering into a compact.

4. Miami Tribe v. United States

The United States District Court for the District of Kansas determined that a bingo facility could not be constructed and operated on Indian land in accordance with IGRA. In 1995, the National Indian Gaming Commission (NIGC) evaluated a class II gaming management contract between the Miami Tribe of Oklahoma and Butler National Service Corporation. The NIGC invalidated the management contract. Miami Tribe challenged the NIGC rule under both the IGRA and the procedure used in reaching the decision, arguing both were improper.

a. Relying on the statement by the Department of the Interior

Miami Tribe contended that it was improper for the NIGC to rely on the legal analysis of the Department of the Interior rather

state and federal agents and that her conduct was objectively reasonable. See id. Thus, she was entitled to qualified immunity. See id.

114. See id. The court held that there was no property or liberty interest because the compact with the State of Montana did not create an interest in the operation of a mechanical slot machine. See id.

115. See Miami Tribe v. United States, 927 F. Supp. 1419 (D. Kan. 1996). This case was brought as a review of the National Indian Gaming Commission's (NIGC) decision against the Tribe. See id.

116. See id. at 1420. In this management contract, the Tribe proposed to build a bingo facility on a piece of land, known as the Maria Christiana Miami Reserve No. 35, totaling approximately 35 acres. See id. at 1421. An Indian tribe may enter into such a building contract, subject to the approval of the chairman of the NIGC, under 25 U.S.C. § 2711. See id. at 1421.

117. See id. The NIGC rejected the management contract on four bases. See id. First, the management contract was not authorized by the Miami Tribe Gaming Act (MTGA), the tribal ordinance that governed gambling. See id. Second, there was no environmental impact determination made regarding the proposed development. See id. Third, the background investigations were not complete as required by 25 C.F.R. § 537. See id. Fourth, the Tribe had not submitted proper documents or had submitted incomplete documents. See id. Though Miami Tribe appealed, the NIGC affirmed and three months later supplemented its ruling with an opinion by the Department of the Interior that the reserve was not Indian land under the definitions of IGRA. See id.

118. See id.
than following the procedures in 5 U.S.C. § 554. The court rejected this claim and held that NIGC was not obligated to comply with 5 U.S.C. § 554 and that relying on a legal opinion of the Department of the Interior was permissible and did not violate Due Process.

b. Jurisdiction of the Miami Tribe

The Miami Tribe argued that it had jurisdiction over Reserve No. 35 and its right to operate a casino. The court held that the tribe did not have jurisdiction based on both its history and membership. Under an 1840 treaty, land in Kansas was set aside for the Miami Tribe who emigrated from Indiana in 1846, and later moved from Kansas to Oklahoma. The government considered those who stayed in Kansas without the Tribe to have severed their ties with the Tribe and thus considered them United States citizens. The court held that neither the remaining members nor the history of the reservation established jurisdiction. Finally, the court held that the claims of the people who stated that they were members of the Tribe, which would have provided jurisdiction resulting from tribal membership, must also fail.

119. See id. Section 554 applies when the statute requires adjudication to be determined on the record after the opportunity for an agency hearing. 5 U.S.C. § 554(a) (1996). See also York v. Secretary of Treasury, 774 F.2d 417, 420 (10th Cir. 1985) (requiring adjudication after opportunity for agency hearing).

120. See Miami Tribe, 927 F. Supp. at 1422. The court considered Miami Tribe’s position fully briefed and that the Tribe’s participation in the process was “solicited, received, and considered.” See id. Additionally, IGRA does not entitle the Tribe to a hearing on this question. See id. Due to these facts, the court held that the Tribe had received due process. See id.

121. See id. at 1424-28. In 1840, the Tribe ceded all of its land in Indiana and agreed to move to land assigned to it within five years. See id. at 1424. The U.S. Senate set aside land in Kansas to which some of the Tribe moved to and possessed in 1846. See id. Those members of the Tribe that remained in Indiana were no longer considered to be members of the Tribe. See id. Eventually, the Tribe moved to Oklahoma and was reimbursed for the land in Kansas. See id. at 1426.

122. See id. at 1426.

123. See id. at 1427. The court examined legislative history in determining that those tribe members who remained in Kansas were not the tribe’s heirs. See id. The court held that those Miami Indians that remained in Kansas became citizens pursuant to an 1867 treaty and 1873 legislation. See id. The court also held that if there were Miami Tribe members that remained and did not become citizens under the 1873 legislation, these people became naturalized citizens under federal legislation enacted in 1924. See id. (citing Act of June 2, 1924, 43 Stat. 253). Thus, Congress abrogated the jurisdiction over Reserve No. 35 no later than 1924. See id.

124. See id. at 1428. The court held that the record of legislation by the federal government, including ordinances passed by the Tribe, provided that the Tribe cannot establish the existence of jurisdiction through membership of past or present owners of Reserve No. 35 in the Miami Tribe. See id. at 1427-28.
Thus, the court affirmed the NIGC’s determination that Reserve No. 35 was not Indian land pursuant to 25 U.S.C. § 2703 (4). 125 The significance of this decision is that in holding for state power over the tribes, courts will view the boundaries of Indian land narrowly in light of the intricate web of past federal government treaties with each individual tribe. 126

III. THE EFFECT OF GAMING ON INDIAN TRIBES AND AMERICAN SOCIETY

It is necessary to examine the recent interpretations of IGRA along with the manner in which IGRA has affected Indian tribes and populations as a whole. Today, in America, gambling is a $30 billion industry and is legal in every state except Utah and Hawaii. 127 In 1992, State lotteries alone provided the states with $11.5 billion. 128 While the vast amount of revenue that gaming generates annually has sparked debate among congressmen and sociologists, Indian gaming has been targeted as a primary factor in pushing gaming into mainstream society. Ironically, Indian gaming amounted to less than five percent of the United States’ $30 billion gambling profits in 1992. 129 The impact of IGRA has affected not only certain tribes’ economies, but also tribal traditions and cultures.

A. Tribes Before IGRA

American Indian reservations are notable for their extreme and persistent poverty. In fact, reservation Indians were the poorest minority group in America with twenty-seven percent of all

125. See Miami Tribe, 927 F. Supp. at 1428.

126. For a present example of this particular aspect of state power, see Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165 (W.D. Wis. 1996) (holding that there was no improper influence by officials in violation of IGRA in preventing Wisconsin tribes from acquiring property “outside of reservation lands” for establishment of casino). Again, the ideas furthered by the State were held paramount to the Tribe’s request to establish casino gaming. See id.


129. See Mezey, supra note 128, at 712.
Native American households falling below the poverty line. Of course, this high poverty rate is partially the result of the tremendous unemployment prevalent on the reservations. The national average unemployment rate on Indian reservations was forty-six percent in 1989, while the 1989 national average unemployment rate for all races in the United States was only five percent. Due to the high unemployment and corresponding poverty prevalent among the reservations, there is also a high dependence on public assistance and government programs. While certain aspects of gaming provide some tribes with economic stability and political power, these “fortunate” tribes have also experienced the negative social repercussions of legalized gambling.

B. The Economics of Indian Gaming

Tribal gaming solves some of the economic problems faced by reservations throughout America. Revenue from tribal gaming leads to additional and better reservation schools, water and sewer systems, and health clinics. Successful reservations can reduce unemployment virtually to zero and thereby reduce the tribe’s dependence on federal and state funding. Some tribes are so suc-

130. See Gary Fields & Linda Kainamine, Indian Data Shows 27% Live in Poverty, USA TODAY, Nov. 17, 1994, at A3 (citing 1994 Census Report). Some tribes far exceed this number, such as the Navajo Tribe where more than 45% of the families live in poverty. See Mezey, supra note 128, at 714.

131. See Mezey, supra note 128, at 714 (citing Stephen Cornell & Joseph P. Kalt, Malcolm Wiener Ctr. For Social Policy, Where’s the Glue? Institutional Bases of American Indian Economic Development (Harvard Project on Am. Indian Econ. Dev., Report No. 52, 1991)). The national average of unemployment on reservations in 1989 was 46%. See id. Included in the average were ranges of seven percent unemployment on the Jicarilla Apache Reservation in New Mexico to an astounding high of 90% unemployment on the Rosebud Reservation in South Dakota. See id.

132. See id. Additionally, of the 67 reservations surveyed by the Bureau of Indian Affairs in 1989, 29 had unemployment rates of at least 50% or higher with the Rosebud Reservation in South Dakota at 90% unemployment. See id.

133. See id. (citing BUREAU OF THE CENSUS, U.S. DEP’T OF COM., 1990 CENSUS OF POPULATION: CHARACTERISTICS OF AMERICAN INDIANS BY TRIBE AND LANGUAGE tbl. 6, at 182 (1994)).

134. See Mezey, supra note 128, at 715. IGRA is not an across the board wealth transfer because only those tribes that choose to open gaming operations, and then only those whose operations are profitable, actually benefit. See id. The Indian tribes operate, capitalize on gaming and receive public assistance separately and independently of each other. See id.


136. Gov. Engler and Tribal Leaders Sign Compact, PR NEWSWIRE, Sept. 25, 1995, at 1. This articles reports that 34% of Indian Gaming operations employees collected public assistance before they began working for the gaming enterprises, 38% were unemployed and 17% went from part-time to full-time work when hired
cessful that their prosperity spills over to the surrounding communities in the form of higher employment and additional revenue for surrounding areas. Successful casinos mean that a state can recapture the funds that constituents would spend in out of state casinos.

One tribe that has benefitted from IGRA is the Mashantucket Pequot Indians in southeastern Connecticut. After being declared extinct in Connecticut in the 1970s, the tribe became officially recognized in Connecticut and currently runs the single most profitable casino in the country. The tribe has used the massive revenue to raise the standard of living on their reservation. In exchange for their good fortune, the tribe pays the state of Connecticut over $100 million annually to protect its current monopoly on slot machines in Connecticut. Additionally, the tribe has con-

by the gaming operations. See id. The Tribal Chairman of the Pokagon Band of Potawatomi Indians who entered a compact in Michigan stated “[w]e’ve seen in Michigan how tribal gaming has helped . . . promote self-sufficiency . . . . Tribal gaming has enabled tribes to provide jobs, housing, education, health care and, especially care for the elders.” Id.

137. See Modern Pilgrims Turn to Indians for Money, Jobs, REUTERS BUS. REP., Sept. 29, 1995, at 1. This article provided the terms of a compact between Massachusetts and the Wampanoag Tribe which included $90 million shared revenue payments to the state annually for six years, and two percent of the casino’s net revenues spent to “establish programs to aid compulsive gamblers.” Id. Additionally, the casino agreed to employ 3,000 people to build the casino and another 5,400 workers to operate the casino. See id.

138. See Jason D. Kolkema, Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to Approval of Gaming on Off-Reservation Sites, 73 U. DET. MERCY L. REV. 361, 370 n.60 (1996) (citing DELoitte & Touche, Economic Impacts of Casino Gaming on the State of Michigan (1995)). A recent study found that Michigan was expected to leak approximately $1.6 billion per year in gambling funds spent by Michigan residents in other states. See id. The study further reported that the expansion of gaming in Michigan would result in nearly 100% recapture of almost $700 million a year from gaming in Canada. See id. Additionally, gaming can contribute to state economies by inducing spending in other sectors of the economy and increasing out-of-state visitation. See id.

139. See Kirk Johnson, Tribe’s Promised Land Is Rich But Uneasy, N.Y. TIMES, Feb. 20, 1995, at A1. In 1994, the Foxwoods Casino brought in gross profits of over $800 million, twice the amount as the most profitable casinos in Atlantic City and Las Vegas. See id.

140. See Mezey, supra note 128, at 725. Every member of the tribe is guaranteed a house on the reservation or in town and a job with an average annual salary of $50,000 to $60,000 a year. See id. Even single parents who stay home to raise their children receive a salary. See id. Every member of the tribe is also guaranteed a paid education from preschool through a doctorate degree in the field of their choosing. See id.

141. See id.
tributed $10 million, the largest gift ever received, to the Smithsonian Museum for an American Indian Building.142

While some tribes like the Pequots have profited as a result of IGRA, there are also economic consequences that simultaneously disadvantage both states and other tribes. The first problem tribes face is that relatively few tribes engage in gaming operations. Of the 550 federally recognized tribes, only ninety-nine of them operated high-stakes gaming operations in 1994.143 Thus, the other tribes who are unable to obtain the large loans needed to establish casinos, are simply unable to enter the market and reap the gaming rewards.144 The second problem for the tribes is the instability of the casino gaming market. Existing casinos will have to compete not only with other tribes but also with states, which may continue to lessen their gaming restrictions and further saturate the market.145 A third problem, suggested by Paul Samuelson, a Nobel prize-winning economist, is that legalized gambling is economically questionable.146

142. See id. Charitable giving is not unique to the Pequots among Indian tribes involved in gaming. The Barona Band of Indians donated over $1 million to local charitable organizations and specifically donated $500,000 to Sharp Healthcare to establish the Barona Casino Cardiac Research and Education Endowment Program. See Sharp Healthcare Dedicates Barona Casino Research & Education Suite, PR Newswire, Aug. 28, 1995, at 1.

143. See Ben Campbell, Indian Gaming Is No Economic Panacea, DENV. POST, Dec. 26, 1994, at 7B. Campbell states that the media portrays Indian gaming revenues to be far more excessive than actual revenues. See id.

144. See Mezey, supra note 128, at 736. Where some scholars and experts recommend that gaming and non-gaming tribes pool their resources together to obtain the loans to build and operate casinos, the trust status of tribal lands makes obtaining loans difficult. See id. Additionally, others recommend that tribes that are currently involved in gaming make loans to non-gaming tribes. See id. However, as Mezey suggests, it is unlikely that gaming tribes will provide loans to other tribes to establish casinos because of the threat of competition. See id.

145. See id. There already exists intense competition between casinos. Those casinos that are not in densely populated areas must be dependent on seasonal and sometimes erratic tourism. See id. For a further discussion, see William R. Eadington, Casinos Are No Economic Cure-All, N.Y. Times, June 13, 1993, at F13 (stating that market levels will inevitably level out).


There is a substantial economic case to be made against gambling. It involves simply sterile transfers of money or goods between individuals, creating no new money or goods. Although it creates no output, gambling does nevertheless absorb time and resources. When pursued beyond the limits of recreation . . . gambling subtracts from the national income.

Id. (alteration in original).
Gaming activity can also hurt states because gaming diverts money that is normally spent on local goods and services.\textsuperscript{147} Because casinos do not exist in a vacuum, the money spent on gambling is money no longer spent on entertainment, recreation, restaurants, services and retail.\textsuperscript{148} With these factors in mind, one author stated that “IGRA is gambling against some fundamental economic principles.”\textsuperscript{149}

C. The Social Impact of Legalized Gambling

1. \textit{The Traditionalist Backlash}

Indian backlash is one social result of IGRA caused by Indian traditionalism.\textsuperscript{150} Traditionalists in Indian tribes embrace the tribe’s cultural heritage and reject government intrusion, state or federal, into any aspect of Indian government on the reservation.\textsuperscript{151} According to traditionalists, the community needs to be separate from external factors and centered in local decision making and political power.\textsuperscript{152} They view gaming as a violation of Indian sovereignty and an introduction of a materialistic evil that erodes cultural heritage and promotes assimilation.\textsuperscript{153} Thus, traditionalists view IGRA as simply a temptation to a poor people\textsuperscript{154} and absolutely reject IGRA and members of the tribe who would embrace such gaming.\textsuperscript{155}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{147} \textit{See} Kolkema, \textit{supra} note 138, at 370.
\item \textsuperscript{148} \textit{See} id. In a recent study, it was found that the expansion of gaming in Michigan would result in a $160.5 million per year loss to other sectors of the economy. \textit{See} id. at 371 n.67.
\item \textsuperscript{149} Mezey, \textit{supra} note 128, at 787.
\item \textsuperscript{150} \textit{See} id. at 728.
\item \textsuperscript{151} \textit{See} id. Native American traditionalists consider sovereignty fundamental to cultural integrity. \textit{See} id. The traditionalists view nationhood as the one form of true independence and because IGRA allows an outside entity, namely the state or federal government to regulate an aspect of tribal power, the traditionalists reject gaming under IGRA. \textit{See} id.
\item \textsuperscript{152} \textit{See} id. Self-government is the one item that guarantees the recognition of superior political power by the tribe. \textit{See} id.
\item \textsuperscript{153} \textit{See} id. Traditionalists consider gaming as incompatible with tribal teachings. \textit{See} id. at 728-29. While some tribes do have a history of traditional gambling practices, the traditional gaming was a means of redistributing resources in the society or promoting gifts intended to teach the threat and dangers of materialism to the tribe. \textit{See} id. at 729. Traditionalists view gaming as the final step of assimilation and annihilation of the Indian culture. \textit{See} id.
\item \textsuperscript{154} \textit{See} Mezey, \textit{supra} note 128, at 780. IGRA, according to a traditionalist, requires that a tribe weigh the past and other intangible values against the possibility of material wealth. \textit{See} id.
\item \textsuperscript{155} \textit{See} id. One example of a tribe demonstrating the internal conflict that IGRA has caused among some tribes is the Mohawks of Akwesasne. \textit{See} id. at 729. Gaming caused division in this once unified tribe and caused traditionalists to
\end{itemize}
\end{footnotesize}
Of course, not all tribes take the traditionalist perspective. Some maintain that gaming enhances a tribe's ability to re-engage its cultural heritage on the reservation. The Peqout tribe of Connecticut is one such tribe that has used gaming as a means of enacting its own cultural revival. Due to their unbridled success, the Peqout take the view that gaming has allowed them the right to earn sovereignty, cultural identity and a high standard of living. The wealth the tribe has generated gives them freedom from government programs and state interference outside of the gaming arena. It should be noted, however, that the Peqout cultural identity remains elusive and undefinable to many members of the tribe.

2. Addiction

A second social aspect of gaming is the spread of compulsive gambling through the tribes and reservations. Studies suggest that the availability of gambling increases the numbers of compulsive gamblers. As with most addictive behavior, pathological gambling is associated with a variety of social problems that support the habit, ranging from alcoholism to unemployment. Additionally, abandon the reservation and establish a separate community. See id. The separation was a result of the opening of the Mohawk Bingo Palace in 1983, which was followed by other gaming facilities. See id. Traditionalists described the gaming as "a poisoning of the spirit, an erosion of cultural integrity. It comes . . . in the form of bingo halls, cigarette smuggling, tax-free gasoline and casinos." Id. (quoting Mary Esch, Mohawks Seek to Save Language, Revive Culture, L.A. TIMES, Jan. 16, 1994, at A3) (alteration in original).

156. See id. at 727. The Pequots believe that they effectively used IGRA to benefit the tribe. See id. Because the average annual salary for a member of the tribe from gaming revenues is $50,000 to $60,000 a year, parents have the luxury of forgoing employment to raise their children, thus promoting education and cultural heritage. See id. at 725.

157. See id. at 726-27.

158. See id. at 725-26. While the Peqout need to prove that they are one-sixteenth Peqout to become a recognized member of the tribe, few Pequots are sure what belonging to the tribe signifies or means historically. See id. One Peqout confessed that the Indian paintings that decorate his home are generic while another admits that the majority of what he knows of tribal history he has learned from an anthropologist the tribe hires to investigate old reservation campsites. See id. at 726. It may be this lack of cultural identity that allows the majority of Pequouts to freely accept and integrate their enormous wealth with their Indian heritage.

159. 141 Cong. Rec. S10912-04, at 125 (daily ed. July 31, 1995). Although less than one percent of the population are compulsive gamblers, this number increases two to seven times if casinos are located near a population. See id. The greatest growth of compulsive gamblers is among teenagers and college students. See id.

160. See id. One study of problem gamblers found 23% to be alcoholics, 26% overeaters, 22% divorced and 40% fired or unemployed due to the gambling addiction. See id.
the addicted gambler may resort to acts of desperation to feed the addiction. While gambling promises fast payments to those who play, gambling attracts individuals of lower economic status and helps them remain in that lower status. Like the rest of the population in the United States, Native Americans also suffer from gambling addictions. Problem gambling rates in the Native American population, however, are two or three times greater than among the white population. Among several North Dakota tribes that operate gambling under IGRA, rates of problem gambling and addiction are even higher. As a result, problem gambling and the accompanying negative social consequences are unfortunate problems facing the tribes.

3. Crime

Where large sums of money are involved, the inevitable problem of organized crime is always an issue. The operation of legalized gambling under IGRA carries with it the possible and probable increase of organized crime. Due to the amount of money at stake in the casinos, the Indian reservation casinos are an easy target for money launderers. Political corruption is also an issue because of the ability of an organization to make un-paralleled profits with the help of government approval. Though there

161. See Kolkema, supra note 138, at 371. Typical acts of desperation may include sale of personal belongings, criminal activity and suicide. See id. About one in five problem gamblers attempt suicide, a rate higher than alcoholics or drug addicts. See id. at 371 n.76.

162. See id. at 371-72 (citing Patricia Simms, Study Says Gambling Is State Loser; Societal Costs Are High, Wis. St. J., Apr. 10, 1995, at 1A (stating that less than 15% of individuals that gamble have household incomes over $60,000 per year, while 30% have household incomes under $20,000)).


164. See id. This higher rate of problem gambling and addiction is most likely attributable to the higher number per capita of reservations and tribal gaming in the North Dakota regions.

165. See George Weeks, Engler Looks at Gambling Across U.S.: States’ Experiences With Crime, Revenue May Affect His Decision, DET. NEWS, June 26, 1995, at A1. The article quoted Frank Kelly, the Michigan Attorney General, who reported that if casino gambling were allowed to enter the state, Michigan and the other states will see the greatest increase in crime and corruption in our history. See id. Gambling has been linked to increases in: driving under the influence, forgery, prostitution, embezzlement, counterfeiting, car thefts and burglaries. See id.

166. See Kolkema, supra note 138, at 372. The Crime Commission reported to the Mayor of Chicago that organized crime will infiltrate casino operations and unions, and will be involved in loan sharking. See id. at 372 n.81.

167. See id. at 372. The following list of political corruption related to gambling was given by Frank Wolf, a representative of Virginia:
have been no reported cases of organized crime, the federal regulatory commission assigned to organized crime is a weak deterrent due to its minimal staff. As a result of the danger of organized crime, legislators have proposed the creation of a commission to study organized crime in the tribal casino setting and to recommend the level at which a state should regulate such enterprises.

IV. THE FUTURE OF INDIAN GAMING

There are two prevailing views as to the future of Indian gaming. One view is that Indian sovereignty will achieve parity with state sovereignty and result in the protection and expansion of Indian gaming throughout the United States. The second view is that states' rights will dominate Indian sovereignty and result in further restrictions and control by states over Indian gaming.

A. IGRA With a Pro-Indian Future

While recent holdings may signal a restrictive interpretation of IGRA, there is a possibility that the future of IGRA will bring Indian sovereignty with regards to tribal gaming regulation. Three possibilities for a positive tribal gaming future are: (1) an amendment re-enacting IGRA under the commerce clause of the Constitution; (2) allowing tribal gaming on newly acquired tribal lands outside of the reservation; (3) positive legislation from states and Congress as a result of the new political power obtained from the tribal gaming industry.

Seventeen South Carolina legislators were convicted of taking bribes to legalize horse and dog track racing. Six Arizona legislators pleaded guilty in 1990 for accepting bribes on a bill to legalize casino gambling. Seven Kentucky legislators pleaded guilty of bribery for the same. In 1990, a former West Virginia Governor pleaded guilty to taking a bribe from racing interests. In 1994, a West Virginia lottery director was sentenced to Federal prison for rigging a video lottery contract. Id. at 372 n.83 (quoting 141 CONC. REC. E86-02, at 6 (daily ed. Jan. 11, 1995) (statement of Representative Wolf).

168. See id. Three instances of casino management and supply companies with suspicious ties to organized crime were reported, raising doubts concerning the integrity of Indian casinos. See id. at 372 n.85 (citing James Popkin, Gambling With the Mob?, U.S. NEWS & WORLD REP., Aug. 23, 1993, at 30).

169. See id. at 372-73. While state governments may have large forces with vast resources to monitor Indian gaming, there are less than 30 federal staff members assigned to regulate and watch Indian gaming for crime. See id.

170. See id. The proposed National Gambling Impact and Policy Commission would be composed of nine members and would review the effectiveness and cost of federal and state gambling policies. See id. at 373 n.88.
1. Re-enacting IGRA Under the Commerce Clause

Congress enacted IGRA under the Indian Commerce Clause.\(^\text{171}\) While the Indian Commerce Clause has been interpreted restrictively in the past, the Interstate Commerce Clause of the Constitution provides that Congress has the power to regulate all commerce that affects more than one state.\(^\text{172}\) Because courts have interpreted the power to regulate interstate commerce broadly, and most gaming on reservations draws many out of state gamblers and money, Indian gaming would easily fall under the scope of the commerce clause; and thus is subject to Congressional control.\(^\text{173}\) Therefore, it stands to reason that the controversy surrounding tribes and states under IGRA could be resolved by amending the Act with a statement indicating that IGRA be re-enacted under the Congress’ Interstate Commerce authority.\(^\text{174}\) If Congress had conclusive authority to regulate IGRA, the tribes might receive fairer treatment than they currently receive.

2. Expansion of Gaming on Newly Acquired Lands

Currently under IGRA, gaming is not allowed on lands acquired by an Indian reservation in trust after October 17, 1988.\(^\text{175}\) This section is clearly the result of Congress’ intent to allow states to keep Indian gaming on the reservation. Because IGRA was intended to be a compromise between the states and the tribes, IGRA contains an exception to this general rule and allows gambling on after-acquired lands not on the reservation.\(^\text{176}\) With a sympathetic

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172. See id. at 113-14.
173. See id. at 114.
174. See id.
175. 25 U.S.C. § 2719(a) (1994). The statute reads “Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 . . . .” Id.
176. Id. § 2719(b)(1)(A). The statute provides an exception to the general rule and reads:
   (1) Subsection (a) of this section will not apply when -
   (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination . . . .

Id.
governor, and the right Secretary of the Interior, remote tribes could prosper under current IGRA law by purchasing land near populated areas and conducting gambling operations. While limited, this exception could be the vehicle through which additional tribes enter the gaming arena. Constitutional objections by the states could be overcome by proper judicial interpretation. While some states’ rights advocates recommend amendment or abolishment of this exception, the exception is better seen as a constitutional piece of legislation furthering economic development without undermining state sovereignty.

3. The Increased Political Power of the Tribes

As with any organization, vast sums of money buy political influence and protection from government intrusion. By funneling money to the state and federal governments, tribes have become politically sophisticated in protecting their futures. For instance, the Pequots of Connecticut between 1993 and 1995 ranked first in political contributions from the gaming industry by contributing $465,000 to politicians. Additionally, the tribes have enlisted professional lobbying firms that represent large corporate clients such as Exxon and Metropolitan Life Insurance Company. The Pequots have also contributed money to the state of Connecticut in order to improve state political protection and favor. With these

177. One example of a tribe that could prosper under this exception would be the Siletz Tribe of Oregon that is confined to a mountainous region near the coast. See Kolkema, supra note 138, at 368 (citing All Things Considered, Native Gambling is a Major Revenue Source, (NPR radio broadcast, July 18, 1992)). This tribal reservation is only accessible by one road that winds through the mountains and clearly makes the ability to run a gaming operation impossible. See id. at 368 n.53.

178. See id. at 390 (providing tribes have access and resources to purchase such land).

179. See id.

180. See Joseph P. Shapiro et al., America's Gambling Fever: The Nation's Favorite Pastime Comes Under Fire From Those Who Fear It Won't Help Communities and Families in the Long Run, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 55. In fact, the Pequots shared their generosity with both political parties by contributing $365,000 to the Democratic National Committee and $100,000 to the Republican National Committee. See Benjamin Sheffner, Gambling U.S.A.; Money Talks: The Gaming Industry Is Becoming a Major Force in Washington Through the Financing of Congressional Elections, BALTIMORE SUN, Nov. 26, 1995, at 1F.


182. See id. at 444. The Pequots contributed $15 million to Connecticut to balance the state’s budget. See id. (citing Jon Frandsen, Pequots’ Casino Expected to Be Good Bet for Years, GANNET NEWS SERV., Feb. 6, 1996). The tribe also contributes, under a Tribal-State compact, 25% of slot machine gross revenues equaling $124 million to Connecticut annually. See id. (citing Patrick Lakamp, Time’s Running
large donations and expenses aimed at accumulating political protection, Indian gaming as a whole will be better protected in the future from state and federal government interference.

B. IGRA with a Restrictive Tribal Future

While there may be a future for IGRA which involves expansion beyond the control of the federal government and state interference for the tribes, it is likely that the future will hold even more restrictive control of tribal gaming operations. Three areas in which the federal and state governments are likely to further control the power of the tribes are: (1) additional local control in approving tribal gaming compacts, (2) the imposition of taxes and (3) the limit of tribes acquiring new lands on which to build and operate casinos.

1. Additional Local Control Over the Approval of Compacts

Recent legislative proposals suggest that Congress intends to favor states’ rights by requiring approval of proposed Indian gaming by local officials in addition to the state governors. One proposal by the Congress empowers the city council, county commissioner and other governing bodies in the jurisdiction of the proposed gaming to approve the proposed compact along with a majority of voters.183

Other proposed legislation would require the Tribal-State compact to be approved by the legislature of the state and governor while limiting the types of class III gaming to that allowed for commercial rather than charitable organizations within the state.184 While such provisions do not allow a state to directly acquire reservation revenues, such amendments will allow states greater leverage in the compact bargaining process, thus extracting additional eco-

183. See H.R. 1364, 104th Cong. (1995). The proposed legislation provides that:

(10)(A) A Tribal-State compact may not take effect until after —
(i) the elected governing body and elected executive officials (including the city council, county commissioner, mayor, and similar positions) in the political jurisdiction in which a class III gaming activity under the compact is to occur have approved the compact; and
(ii) the compact is then approved by majority vote in a referendum held in each such political subdivision in the first general election (with respect to which the filing deadline has not passed) occurring after the date on which the compact is approved under clause (i).

Id. at 1.
nomic concessions from the tribes.\textsuperscript{185} The end result is that tribes will lose the ability to conduct gaming or will be given the privilege at a huge sovereignty and monetary cost from the state's compact "negotiations."

2. \textit{Taxing the Tribes}

Tribes have traditionally been exempt from paying federal and particularly state taxes on most items and services. Recently, however, some recent budget proposals would impose a federal tax on Indian gaming revenues.\textsuperscript{186} Due to increasing demands to reduce the federal budget, while not increasing spending or the size of government, a federal Indian casino and gaming tax would have generated an estimated $345 million for the budget.\textsuperscript{187} These plans exemplify Congress' changing view that tribal revenues provide an untapped source for federal tax dollars. Additionally, with state treasuries in need of additional funding, the federal and state governments are likely to unite and share in the tribes new found wealth. As one author has written, "when federal and state interests are aligned, federal and state governments have had no trouble in taking tribal resources."\textsuperscript{188}

3. \textit{Limiting Tribe's Acquisition of Land For Gaming Purposes}

While tribes that reside on reservations in sparsely populated and isolated areas of the country may only realistically pursue gaming by acquiring new lands near populated areas, Congress may soon eliminate this capability under the Indian Trust Land Reform Act of 1995.\textsuperscript{189} The bill proposes to differentiate between wealthy and poor tribes in granting new lands on which to operate gaming.\textsuperscript{190} The bill "would prohibit the Secretary of Interior from taking any lands located outside of the boundaries of an Indian reservation in trust on behalf of an economically self-sufficient Indian tribe, if those lands are to be used for gaming or any other commercial purpose."\textsuperscript{191} The Secretary of the Interior would deter-

\begin{itemize}
  \item \textsuperscript{185} See Worthen & Farnworth, \textit{supra} note 181, at 442.
  \item \textsuperscript{186} See \textit{id.} (citing H.R. 2517, 104th Cong. \S 13631 (1995); H.R. 2491, 104th Cong. \S 13631 (1995)).
  \item \textsuperscript{187} See \textit{id.} (citing \textit{Key GOP Senators Back Indians Against Casino Tax}, \textit{ARIZ. REPUBLIC}, Oct. 11, 1995, at CL26).
  \item \textsuperscript{188} See \textit{id.} at 443.
  \item \textsuperscript{190} See \textit{id.}
  \item \textsuperscript{191} See \textit{id.} (quoting 141 \textit{CONG. REC.} S.8822, 8833 (daily ed. June 27, 1995) (Remarks of Sen. Lieberman)).
\end{itemize}
mine such regulations and the role that gaming would play in obtaining self-sufficiency of the tribe. While this bill would seem to recognize the need for poorer tribes to enter the gaming arena, the problem is that the bill includes any commercial purpose other than gaming. The bill runs counter to any tradition behind the United States’ economic theory that would propose to punish a tribe or any other organization or business from having past successes.

V. CONCLUSION

There are two possibilities for the future of IGRA: (1) either the states will continue to gain power and control over the regulation of Indian gambling within its borders; or (2) the reservations will be given additional freedoms and autonomy by the federal government and Congress from state intervention. If Seminole, Kelly, Oneida, Crow, and Miami Tribe are any indication, Indian gaming seems to be in jeopardy from growing state intrusions and regulation. More importantly, Seminole, Kelly, Oneida, Crow, and Miami Tribe transcend the gaming arena and signify that state sovereignty currently outweighs fundamental concepts of tribal sovereignty. However, if Congress and the courts protect the tribes, refrain from interfering with Tribal-State compacts and allow the tribes without interference to seek economic viability through gaming, IGRA will continue to provide a limited window of opportunity for some tribes to regain their economic independence and as a result, true independent sovereignty.

William Bennett Cooper, III

192. See id.
193. See id. at 385.