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American Indian Sovereignty and Gaming

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Few Americans are aware that there are three governments and three court systems in the United States. In addition to the state and federal governments, Indian Nations are the third form of sovereign entity in the United States. There are about 570 federally recognized Indian Tribes and about 300 Indian reservations in the U.S. Tribal governments own about 56 million acres of land, with the United States being the legal owner, and individual Indians own another 11 million acres of land, with the U.S. being the legal owner. Millions of acres more are owned by tribes, individual Indians, and non-Indians in fee simple and are located in "Indian Country" and are often subject to tribal regulation, taxation, zoning, and judicial jurisdiction.

American Indian Nations existed as sovereign governments long before the United States or state governments. Tribes do not acquire their sovereign existence or governmental authority from the federal or state constitutions or from the compacts and agreements of those groups of citizens. Instead, as the U.S. Supreme Court long ago recognized, Tribes predate the U.S. Constitution, were not subject to it until 1968, and receive their sovereign authority from sources other than state and federal constitutions.[1]

Europeans were well aware of the separate existence of Indian Tribes as governments from the beginning of colonization. European countries always dealt with Native governments as sovereign entities, that is, as governments that had authority over their citizens and territories. Especially in the area of the present day United States, the European powers interacted with American Indian governments through official diplomatic means. Starting with England as early as 1620, and France, Spain, Russia, and Holland, the European powers negotiated with Indian Tribes through official government-to-government council sessions and by treaties which recognized tribal governmental control over their territories and people.[2]

Our Founding Fathers and the new United States also followed this tradition of dealing with Indian Tribes as sovereign governments. From the very beginning of its existence, the U.S. dealt with tribes on a governmental and treaty making basis. In fact, the United States government and early Presidents were heavily involved in negotiating

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[1] Talton v. Mayes, 163 U.S. 376 (1896).

[2] I DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 13-14 (Vine Deloria, Jr. & Raymond J. DeMallie eds. 1999); Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 19-20 (2006).

and dealing with tribes. The United States ultimately negotiated, signed and ratified more than 400 treaties with Indian Tribes and most of these treaties are still valid today.[3]

The question of who had the authority to deal with Indian Tribes, the state or federal governments, was a very important and contentious issue in early America. Many commentators note that this question caused major problems for the Articles of Confederation Congress and led to calls by many, James Madison in particular, for a new constitution and a stronger federal government that would exercise exclusive authority in Indian affairs.[4]

Madison then drafted what we know as the Interstate Commerce Clause, or the Indian Commerce Clause, which provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[5] The simple fact that tribes are included in this list of governments demonstrates that the Founding Fathers saw Indian Tribes as governments.

The United States Supreme Court has interpreted this language to mean that Congress was granted the exclusive right and power to regulate trade and affairs with the Indian Tribes. The very first U.S. Congress under our new Constitution immediately assumed this power and in the first five weeks of its existence it enacted four statutes concerning Indian affairs. In 1789, the new Congress, for example, established a Department of War with responsibility over Indian affairs, set aside money to negotiate Indian treaties, and appointed federal commissioners to negotiate treaties with tribes.[6] In July 1790, the first Congress enacted a law which forbids states and individuals from dealing with tribes and from buying Indian lands.[7] This law is still in effect today.[8]

Indian Tribes are also impliedly referred to in Article VI of the Constitution where it is stated that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the Land . . . ."[9] In 1789, the United States had entered about twenty-two treaties with countries around the world and had also entered nine treaties with Indian Tribes. Consequently, this provision of the Constitution

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[3] Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165 (2001); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991).

[4] Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133 (1993).

[5] U.S. CONST. art. 1, sec. 8.

[6] *See, e.g.*, Act of August 7, 1789, ch. 7, 1 Stat. 49; Act of August 20, 1789, ch. 10, 1 Stat. 54.

[7] Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 15 (Francis Paul Prucha ed., 3d ed. 2000).

[8] 25 U.S.C. § 177 (2006).

[9] U.S. CONST. art VI.

states that the federal government's treaties with Indian Tribes before and after the Constitution are the supreme law of the United States.

By negotiating hundreds of treaties with tribes, and returning to individual tribes over and over again for more treaties, the U.S. Supreme Court noted that the United States has recognized tribal governments as sovereign entities capable of governmental relationships and the authority and power to enter treaties.[10] It is worth noting too that the United States did not give Indian Tribes anything in these treaties. Instead, these treaties were formal government-to-government negotiations regarding sales of land and property rights that the tribes owned and that the United States wanted to buy, and to control trade and diplomacy, and to maintain peace.[11] The Supreme Court stated in 1905 that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."[12] Thus, while tribal governments sold some of their lands and resources to the United States for money, goods, and promises of peace and security, tribes held onto and reserved other lands and property rights that they did not sell. The word "reservation" comes from this very idea. In addition, the Supreme Court has likened Indian treaties to "a contract between two sovereign nations."[13]

Individual Indians are also mentioned in the Constitution in Article I and again in the Fourteenth Amendment which was ratified in 1868. In counting the population of the states to determine how many representatives a state could have in the House of Representatives, Indians were expressly not to be counted unless they paid taxes.[14] In effect, Indians were not considered to be federal or state citizens unless they paid taxes. After the Civil War when citizenship rights were extended through the Fourteenth Amendment to ex-slaves and to "[a]ll persons born or naturalized in the United States,"[15] that Amendment still excluded individual Indians from citizenship rights and excluded them from being counted for congressional representation purposes unless they paid taxes. This demonstrates that Congress still considered Indians to be citizens of other governments even in 1868. This view was correct because most Indians did not become United States citizens until 1924 when Congress passed a law making all Indians U.S. citizens.[16] For many years after 1924, states were still uncertain whether Indians were also citizens of the state where they lived and in many states Indians were not allowed to vote in state elections.[17]

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[10] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[11] Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133, 151-58 (1993).

[12] United States v. Winans, 198 U.S. 371, 381 (1905).

[13] Washington v. Washington Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

[14] U.S. CONST. art I, § 2.

[15] U.S. CONST. amend. XIV, § 2.

[16] Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(a)(2)).

It is worth noting the fundamental principles of federal Indian law and the Marshall Trilogy.

Chief Justice John Marshall drafted three seminal cases that still provide the basic formulations of federal Indian law. In 1823, the Court was faced with the question of what property rights Indian Nations possessed after the arrival of Europeans and how Euro-Americans could buy Indian property rights. In *Johnson v. M'Intosh*,[18] the Court adopted the international law principle that today we call the Doctrine of Discovery.

In *Johnson*, the Court surveyed the history of how European countries used Discovery to justify their dealings with the Natives and American Indian Tribes in North and South America. Under this principle, the first European country to discover an area could claim the territory for its own. This did not mean that Natives lost the right to live on the land or to farm and hunt on it but it did mean that Natives could only sell their land to the one European country that "discovered" them and that they should only deal politically and commercially with that one European country. The audacity of one country "discovering" and claiming lands already occupied and owned and rights over other humans came from the idea that Christian Europeans were superior to other races and religions.[19]

The Supreme Court adopted these ideas and held that the United States had acquired from England, Spain, and France the sole right to buy lands from Indian governments under the Doctrine of Discovery. Tribes continued to have the right to use and occupy their lands but their governmental sovereign powers were restricted in that they could only sell their lands to the United States.[20] "Conquest gives a title which the Courts of the conqueror cannot deny . . . ."[21]

In 1831 and 1832, attempts by Georgia to control the Cherokee Nation's sovereignty led to the other cases of the Marshall Trilogy. In *Cherokee Nation v. Georgia*[22] and *Worcester v. Georgia*,[23] the Court laid down several principles that endure

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[17] Harrison v. Laveen, 196 P.2d 456, 463 (Ariz. 1948); Montoya v. Bolack, 372 P.2d 387, 390-91, 394 (N.M. 1962); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 372 (1st Cir. 1975).

[18] 21 U.S. (8 Wheat) 543 (1823).

[19] ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 3-5, 9-24 (University of Nebraska Press 2008).

[20] *Johnson*, 21 U.S. at 573-74.

[21] *Id.* at 588.

[22] 30 U.S. (5 Pet.) 1 (1831).

[23] 31 U.S. (6 Pet.) 515 (1832).

to this day. Indian Nations are "domestic dependent nations" and "distinct political communities, having territorial boundaries within which their authority is exclusive . . . [and] distinct, independent political communities, retaining their original natural rights . . . . The Cherokee nation, then, is a distinct community, occupying its own territory with boundaries accurately described in which *the laws of Georgia can have no force . . . .*"[24] Consequently, tribes are sovereign governments with extensive control over their territories and the people found there and there is no room for state law or jurisdiction.

Considerable litigation has occurred over tribal and Indian rights and the desire of state and local governments to encroach upon these rights and to acquire tribal assets. Generally, states resent the implications of tribal jurisdiction which is outside their control yet occurs within state borders. In fact, the Supreme Court statement that the laws of Georgia could have no effect in Cherokee territory was modified a bit in a 1973 case but it is still the rule in most circumstances.[25] Thus, Indian Nations are the primary government with regulatory control and jurisdiction over most events and persons found within a tribe's territory.[26]

The three fundamental principles of federal Indian law that have developed from the Marshall Trilogy and from over two hundred years of federal law and Indian policies are:

1. Congress has plenary (nearly absolute) power over Indian Nations and people;[27]

2. Tribes are diminished sovereigns. They retain all aspects of their historical sovereignty that have not been abrogated by a federal statute (Congress exercising its plenary power) or which the tribe gave up by treaty (tribe surrendered) or which has been lost due to their dependent status;[28]

3. The United States has a trust or fiduciary responsibility for Indian Nations and peoples as the trustee or guardian of the Indian wards.[29]

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[24] *Cherokee Nation*, 30 U.S. at 17; *Worcester*, 31 U.S. at 557, 559, 561.

[25] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

[26] Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 16 (1987); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973).

[27] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); Lone Wolf v. Hitchcock, 187 U.S. 553, 551-52, 565 (1903); United States v. Kagama, 118 U.S. 375, 381-83 (1886).

[28] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[29] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Gaming

American Indians are the poorest racial or ethnic group in the United States.[30] Indian reservations continue to suffer today from the highest rates of poverty in the U.S., the highest unemployment rates (from 20-90%), and the highest substandard housing rates found in the United States.[31] Almost all tribal governments lack a viable tax base and struggle to find funding to operate governmental services and social welfare programs. It is no surprise, then, that tribes and the federal government, just like the states, began to look at gaming as a resource in the 1970s. And the results have been nothing short of spectacular for some tribes! Indian gaming has grown since its humble modern-day beginning with one tribe in 1979 to 231 federally recognized Indian tribes conducting gaming at 366 locations in thirty states in 2005.[32] The National Indian Gaming Commission also reports that gross receipts have grown exponentially from $200 million in 1988 to more than $26 billion in 2007.[33]

Since tribes are sovereign governments with jurisdiction and political authority over their territories, they assumed they could operate gaming on their reservations free of state control. In 1979, the Seminole Tribe of Florida opened what was probably the first tribally sponsored bingo hall. The Sheriff of Broward County, however, took exception to the Seminole bingo hall and threatened to make arrests on tribal lands for any violations of Florida's gambling laws. The Tribe filed suit for a declaratory judgment that the state law did not apply on its reservation.[34]

The Sheriff relied on Congress' plenary authority in Indian affairs and argued that state gaming laws applied on the Seminole Reservation. The Sheriff pointed to a federal law enacted in 1953, known as Public Law 280, that had extended some states' criminal and civil laws to Indian Country. Florida had used P.L. 280 to apply its laws to Indian County in its state, and thus Broward County alleged that Florida's "criminal" laws on gaming applied in Indian Country and prevented the Seminole Tribe from offering high stakes bingo that would have been illegal elsewhere in Florida.

If the state's gambling laws were truly criminal laws, they would have applied in Indian Country because of P.L. 280. But the Fifth Circuit, in 1981, had to decide whether Florida's bingo statute was a criminal law that prohibited all gaming in Florida or

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[30] Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed*?, 80 OR. L. REV. 757 (2002).

[31] Robert J. Miller, *American Indian Entrepreneurs: Unique challenges, unlimited potential*, __ ARIZ. ST. L.J. __ (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153708.

[32] KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 6 (2006).

[33] http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx

[34] Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. Unit B Oct. 1981).

whether it was really just a civil law that only regulated bingo activities.[35] This was necessary because the Supreme Court had narrowly interpreted the P.L. 280 grant of state civil law application in Indian country in *Bryan v. Itasca County*.[36] The Court held in *Bryan* that the application of state civil law did not mean that all of the general civil laws of the state for taxation and zoning, for example, applied on reservations. The application of state "civil laws" only meant that Indians and non-Indians in the P.L. 280 states could use the state courts for individual law suits and could apply the general common law of the state, such as tort and contract law, to those private suits. Consequently, if Florida's gaming law was only a civil law, a law that only regulated bingo, then it would not apply in Indian Country under *Bryan*.

The Florida county argued that the state statute provided jail sentences for violations and that made it a criminal law. But of course many, many state laws that no one would ever argue are "criminal laws" do provide for prison time if a person continues to violate them. Hence, the federal appeals court relied on a test the Ninth Circuit had developed to determine whether a law is a "criminal" law or a "civil" law for P.L. 280 purposes.[37] The Ninth Circuit had defined a criminal law under P.L. 280 as being one that completely prohibited certain conduct, and a civil law as being laws that just regulated while still allowing the conduct. After applying this test, the Fifth Circuit held that Florida's laws on bingo allowed and only regulated that conduct and thus they were not criminal laws because they did not completely prohibit the conduct. Under *Bryan v. Itasca County*, then, Florida's bingo laws were civil laws that did not apply in Indian Country. The Seminole bingo hall could operate.[38]

Many tribes then began to jump on the bingo bandwagon. In fact, between 1979 and the mid-1980s, the U.S. Department of the Interior and the Bureau of Indian Affairs began funding many tribal bingo facilities. States did not like this competition for their lotteries and other gaming operations and perhaps they did not like to see these independent sovereigns operating gaming operations in the middle of their states and flaunting state laws. States were also worried about organized crime becoming involved in high stakes tribal bingo. This issue finally reached the United States Supreme Court in a case out of another P.L. 280 state in 1987, *California v. Cabazon Band of Mission Indians*.[39]

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[35] *Id.* at 312-14.

[36] 426 U.S. 373 (1976).

[37] United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977).

[38] *Butterworth* was not the only case to come to this conclusion. In that same year, a federal court held that Wisconsin's bingo laws were regulatory only and not prohibitory/criminal and thus could not be applied on the Oneida Reservation. Oneida Tribe of Indians v. Wisconsin, 518 F.Supp. 712 (W.D. Wis. 1981).

[39] 480 U.S. 202 (1987).

In *Cabazon*, the U.S. Supreme Court adopted the Ninth Circuit's criminal/prohibitory, civil/regulatory analysis and affirmed the Ninth Circuit decision that California gaming laws did not apply on the Cabazon Reservation. The Court also used a public policy test in its analysis and concluded that tribal bingo was not against the public policy of California since the state allowed bingo, hundreds of card rooms, a state lottery, and pari-mutuel horse racing. California could not with a straight fact claim that its public policy did not allow gaming.

After *Cabazon*, tribal gaming was apparently legal in all states including the P.L. 280 states to which Congress had granted special jurisdictional powers in Indian Country (unless the gaming violated a state's public policy or was conducted in a P.L. 280 state whose criminal laws absolutely prohibited gaming). Tribes were delighted with this legal victory and its affirmation of their sovereignty. Most states though were dismayed at the prospect of an enormous expansion of Indian gaming.

1. Indian Gaming Regulatory Act

Indian gaming was expanding rapidly even before *Cabazon* was decided. The Department of the Interior estimated in 1985 that about 80 tribes were offering gaming on their reservations and that some tribes were grossing nearly $1 million a month.[40] Several bills were introduced in Congress from 1983 forward to regulate Indian gaming, and hearings were held.[41] States urged Congress to control Indian gaming to protect state interests and to prevent organized crime in Indian Country; while many tribes opposed any federal or state regulation of tribal gaming.[42]

Many tribal advocates worried that the *Cabazon* decision would favor states so pre-*Cabazon* some tribes supported the idea of federal regulation of tribal gaming in place of state regulation.[43] After *Cabazon* was decided in favor of the tribes, however, most tribes did not support even federal regulation. In contrast, the states clamored for a solution to what they saw as a mistake by the *Cabazon* Court. Congress listened to the states, and in line with what it had been considering for several years, Congress enacted the Indian Gaming Regulatory Act (IGRA)[44] on October 17, 1988. The IGRA represents a compromise between tribal, state, and federal interests. In light of the tribal victory in *Cabazon*, though, IGRA looked like a defeat for tribal interests, a rollback on the *Cabazon* decision, and a compromise that favored states.

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[40] RAND & LIGHT, INDIAN GAMING LAW AND POLICY at 30.

[41] *Id.* at 29-30.

[42] *Id.* at 30.

[43] *Id.* at 30-31.

[44] 25 U.S.C. §§ 2701-2721 (2006).

In IGRA, Congress divided Indian gaming into three classes. Class I gaming is comprised of ceremonial, traditional, and social games played for low-value prizes and stakes.[45] These games are not subject to IGRA and are regulated only by the tribal government where the gaming occurs.[46]

Class II gaming is defined as bingo and similar games such as pull tabs and tip jars, and can include nonbanked card games if conducted in compliance with state law.[47] All such gaming can only be conducted if the state law otherwise permits such gaming. Thus, in Utah and Hawaii, which are the only states to ban all forms of gambling, Indian Tribes could not offer even Class II gaming.[48] So state laws play a major role even in Class II tribal gaming.

Class II gaming is directly regulated, however, only by tribal and federal governments. IGRA created the National Indian Gaming Commission (NIGC) whose primary role is to oversee, monitor, and inspect Class II operations. IGRA also limits Class II gaming to the extent that there are limits on how tribes can use the revenue generated, and how they provide for outside annual audits, contract audits, and background checks.

Class II games can be conducted with technological aids and, in fact, many Class II machines and Class II tribal casinos today are difficult to distinguish from full scale Class III casinos.

IGRA also provided for full scale casino gambling in Indian Country. Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming."[49] Class III games, slot machines, banked card games, and electronic facsimile games are of course where most of the action and the big money is found.

Congress balanced state and tribal interests in regards Class III and provided for state and tribal regulation and jurisdiction, with a minimum of federal oversight.[50] A tribe is required to enter a compact with a state to be allowed to conduct Class III gaming. Tribe can only compact for and conduct Class III gaming in states that permit such gaming. Consequently, in a state like Oklahoma that does not allow casino style gaming, all 39 federally recognized tribes in Oklahoma are limited to only offering Class II gaming.

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[45] 25 U.S.C. § 2703(6).

[46] 25 U.S.C. § 2710(a)(1).

[47] 25 U.S.C. § 2703(7).

[48] STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 8 (2005).

[49] 25 U.S.C. § 2703(8).

[50] 25 U.S.C. §§ 2705; 2710(d).

While the IGRA gave states a wide role in Class III tribal gaming, Congress also attempted to protect tribes in the compact negotiations from being held hostage by states. States are required to negotiate these compacts in good faith and tribes were given the remedy of a federal law suit against a state for a failure to negotiate or a failure to negotiate in good faith.[51] In fact, IGRA puts the burden of proof on the state to prove it has negotiated in good faith.[52]

Congress' attempt to provide tribes with a remedy to protect their rights under IGRA failed though when the Supreme Court decided in 1996 that Congress did not have the authority to waive state sovereign immunity in IGRA.[53] Thus, tribes cannot now sue states for failing to negotiate or for negotiating in bad faith. States now have the best of both worlds under IGRA; they have a large role in deciding whether tribes can conduct Class II gaming, since state law has to permit such gaming for tribes to be able to offer it, and a state can prevent Class III gaming completely, even if they allow it in their own state, just by not negotiating a Class III compact.[54]

Congress even thought far enough ahead to include in IGRA the possibility of the Secretary of Interior issuing Class III regulations for a tribe to conduct casino gaming when the lawsuit remedy of IGRA did not work.[55] To my knowledge, Congress has prevented this from happening several times by directing that no federal funds would be spent on drafting Class III regulations and now the Secretary's first attempt to promulgate regulations to allow Class III tribal gaming in the absence of state consent was rejected in the Fifth Circuit and the case is pending in the United States Supreme Court.[56]

2. Current issues

There are four current hot issues regarding Indian gaming. First, some states have attempted to address their budget problems by demanding revenue sharing agreements so that they reap extra benefits from tribal gaming. For example, California Governor Arnold Schwarzenegger infamously stated, "it's time for [tribes] to pay their fair share."[57] Second, many communities want more local control over Indian gaming issues. Third, off-reservation gaming has become a very contentious issue. And finally, the NIGC has proposed new Class II regulations that tribes vehemently oppose.

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[51] 25 U.S.C. § 2710(d)(7)(A)(i).

[52] 25 U.S.C. § 2710(d)(7)(B).

[53] Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[54] There were no tribal/state Class III compacts concluded for over two years after *Seminole* was decided. LIGHT & RAND, at 50.

[55] 25 U.S.C. § 2710(d)(7)(B)(vii).

[56] *See also* RAND & LIGHT, INDIAN GAMING LAW AND POLICY at 102-03; Texas v. United States, 497 F.3d 491 (5th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3471 (Feb. 25, 2008).

[57] LIGHT & RAND, at 125.

First, many states have been opposed to Indian gaming from the beginning because they see it as competition with state gambling programs and for other economic and non-economic reasons. As with most governments, states also want a share of any economic activity occurring within their borders. Consequently, states have looked to increase their return on Indian gaming.

Congress, however, states clearly in IGRA that Indian gaming is designed to benefit Indian Tribes and Indian people and that states can not tax or directly benefit from that gaming.[58] States and tribes have gotten around that obstacle by entering revenue sharing agreements in which tribes ostensibly acquire some right other than just the right to offer Class III gaming in return for the revenue they share with the state.[59] California and Connecticut, in particular, have gained enormous amounts from gaming. For example, Connecticut gets more than $260 million annually from the Mashantucket Pequot Tribe and the Mohegan Tribe.[60] The consideration for this revenue sharing is that Connecticut granted the tribes an exclusive right to offer casino style gaming in the state in exchange for revenue sharing. The NIGC approved these compacts.

Second, and related to the first, is that state and local governments want more control over Indian gaming. "NIMBY," or not in my back yard plays a role in this issue. Under *Cabazon*, of course, state and local governments had almost no control over Indian gaming but now they have quite a bit under IGRA. These governments would like even more control and have exerted that power by using their sovereign immunity shield under the *Seminole Tribe of Florida v. Florida* to not enter compacts.

Third, location, location, location. Most tribes are interested in off-reservation gaming sites if their casinos are not currently well-located.[61] Most tribes are in rural areas and have made very little off their gaming operations. The most prosperous tribes are, of course, in southern California, Connecticut, near Minneapolis, Minnesota, or close to urban locations.

Congress and the BIA have considered this issue several times in recent years and the prevailing trend is very much against tribes locating gaming facilities off their reservations. In contrast, in Oregon, for example, the Governor has already approved a tribe from rural eastern Oregon opening a casino in the Columbia River Gorge National Scenic Area, at a location that is only forty miles from Portland. The BIA is dragging its heels on approving this decision, partly because off-reservation gaming is controversial at this time and also because the decision is fraught with controversy because environmentalists are appalled at the idea of putting a casino in the Columbia River

[58] 25 U.S.C. §§ 2701(4), 2702, 2710(d)(3)(C)(iii), 2710(d)(4), 2710(d)(7)(B)(iii)(II).

[59] LIGHT & RAND, at 69-73, 86-87.

[60] http://www.hks.harvard.edu/rappaport/downloads/gambling/casino.pdf (visited July 12, 2008).

[61] LIGHT & RAND, at 63-65.

Gorge Area and because another Oregon tribe is resisting a new competitor being placed much closer to the major Oregon market of Portland.

Fourth, the National Indian Gaming Commission has proposed new federal regulations for Class II gaming. Tribes are up in arms over the restrictive nature of the new rules and the threat to their successful Class II gaming operations.[62]

3. Secondary effects

Gambling is always controversial in the United States; yet it is also of great interest to Americans and is riding a peak of popularity these days. Indian Tribes are well aware that interest in gaming could recede and saturation could limit their markets, and that active resistance could develop as states and local governments perceive adverse impacts from gaming.

There is a lot of speculation that casino gaming causes crime, pathological gambling, and other negative social effects. However, according to the National Gambling Impact Study Commission, which was created by Congress, there is very little "impartial, objective research" on legalized gambling.[63] A University of Chicago study of gaming, authorized by the National Gambling Impact Study Commission, stated that the presence of a casino in or near a community did not increase crime but to the contrary it appeared that crime rates reduced slightly.[64] The study further concluded that after casinos were located in communities they experienced consistent and substantial net benefits and few, if any, harms.[65] Harvard studies of this same data concluded that tribal casinos located in economically depressed communities may even reduce instead of increase crime.[66]

Any discussion of the potential downside of gaming must also review the potential upside. Indian gaming, for example, has had an enormously positive economic, social, and cultural effect for many Indian Tribes over the past three decades.[67] We are talking about beneficial economic improvements among a group of Americans with the

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[62] Jerry Reynolds, *Latest Class II gaming regulations win few converts*, INDIAN COUNTRY TODAY, Feb. 6, 2008; Jerry Reynolds, *New proposed regulations roil Class II gaming*, INDIAN COUNTRY TODAY, Nov. 9, 2007.

[63] National Gaming Impact Study Commission, *Final Report* (1999), 8-1 to 8-5, http://govinfo.library.unt.edu/ngisc/reports/finrpt.html (visited July 11, 2008).

[64] LIGHT & RAND, at 81, 97 & n.70. The federal commission hired the National Opinion Research Center from the University of Chicago to conduct this study. The study did not include any tribal communities in its sample. *Id.* at 82.

[65] *Id.* at 88.

[66] *Id.* at 97 & n.71.

[67] LIGHT & RAND, at 81-83, 91-92, 98-104.

lowest economic, health, and education levels in the United States. Tribal casinos have produced enormous benefits for many tribes and for countless Indian people and their communities. Unemployment on many reservations is now zero, college scholarships and health clinics are now available to tribal citizens, housing is being improved on some reservations, and the possibility of futures without poverty are developing for many people.[68]

States and local non-Indian communities have also seen an enormous spillover benefit from tribal casinos. Nevermind the revenue sharing agreements discussed above, Indian gaming has produced a positive economic benefit for states and local communities. More than 670,000 jobs have been created by Indian gaming and 75% of the jobs are held by non-Indians.[69] Those employees pay federal, state, and local taxes. Employed people are also better able to take care of their families and counties where Indian casinos are located have seen major decreases in welfare caseloads and costs.[70] All of these governments and communities have benefited from Indian gaming.

In conclusion, there is no question that Indian gaming is now a major part of American life and more importantly that it is a crucial part of modern-day tribal life. Some people worry that tribal gaming is just another threat to Indian cultures. But no one questions that people need to earn a living to be able to survive and to raise their families and that a community has to support itself if it is going to survive. Indian Nations and Indian people are using gaming to survive. They are using gaming as part of their sovereign and human rights to survive as governments and communities.

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[68] Richard Cockle, *Reservation shows no signs of slowing*, THE SUNDAY OREGONIAN, April 20, 2008, at B4 (quoting Alanna Nanegos, a representative of the Confederated Tribes of the Umatilla Indian Reservation's Cayuse Technologies: "My kids are going to have it better than I did. We have every right to feel good about ourselves."); Richard Cockle, *Jobs, jobs, jobs, but no homes*, THE SUNDAY OREGONIAN, April 20, 2008, at B4 (Umatilla tribal citizens anxious to move home but there is little middle-class housing available); Timothy Egan, *As Others Abandon Plains, Indians and Bison Come Back*, N.Y. TIMES, May 27, 2001, at A1 (economic opportunities and jobs are bringing Indians back to their reservations); Carson Walker, *Reservations Revive as Native Americans Return to Roots*, THE OREGONIAN, Apr. 11, 2001 at A3 (the 2000 Census shows reservation populations growing with many crediting casinos for providing jobs); Diane Brooks, *Tribes, Once Crippled by Poverty Now Realizing American Dream: Tulalips Roll Dice, Hit Jackpot with Casino*, SEATTLE TIMES, July 13, 2000, at A8 (economic activity and jobs on reservations bring people home).

[69] National Indian Gaming Association, *Indian Gaming Facts*, http://www.indiangaming.org/library/indian-gaming-facts/index.shtml (visited May 6, 2008).

[70] *See, e.g.*, Heidi L. McNeil, *Indian Gaming-Prosperity, Controversy*, 872 PRAC. L. INST. 139, 157 (1994) (reporting that in Wisconsin of the 4,500 people employed by tribal gaming, half were unemployed and 20% were on welfare before employed by the tribal casino).