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THE PAVING PRINCIPLE OF GOOD INTENTIONS? CALLS FOR REFORM OF THE INDIAN GAMING REGULATORY ACT AND THE PRIVATE GAME THEORY EQUILIBRIUM OPPOSING THEM

JOHN C. KUZENSKI, J.D., PH.D.*

Indian gaming has become a multi-billion dollar industry in the United States since passage of the Indian Gaming Regulatory Act of 1988 (IGRA);¹ the Act itself was passed by Congress in the wake of several key and bitterly-fought judicial contests in which the interests of Indian tribes and states of the union clashed.² Since that time, the IGRA has produced a number of public regulatory and private interest organizations in its wake.³ It has also produced a great deal of controversy over public policymaking, which has, in turn, spurred a considerable body of professional legal and journalistic literature concerning itself with how—and perhaps more importantly *why*—the Act should be amended to be “fairer” to either state governments or the tribes.⁴ While the contributions of this literature have been useful for furthering public debate on issues implicit in Indian gaming, the authors have almost universally felt obligated to begin discussion and

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1. Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (2008).

2. See *infra* notes 21, 28, 41 and accompanying text.

3. See, e.g., The National Indian Gaming Commission (NIGC), <http://www.nigc.gov> (last visited Feb. 13, 2008) (The IGRA created the NIGC as the primary federal oversight agency created by IGRA. It is comprised of a Chairman and two Commissioners, each of whom serves on a full-time basis for a three-year term. The Chairman is appointed by the President and must be confirmed by the Senate. The Secretary of the Interior appoints the other two Commissioners. At least two of the three Commissioners must be enrolled members of a federally recognized Indian tribe, and no more than two members may be of the same political party). See also, The National Indian Gaming Association (NIGA), <http://www.indiangaming.org> (last visited Feb. 13, 2008) (NIGA, on the other hand, is the collective political/lobbying arm of over 150 tribes involved with or having interests in casino gambling.).

4. See generally, Brad Jolly, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273 (1997) (discussing an analysis of the provisions of the IGRA, the congressional intent behind it, and a discussion of the contemporary issues pertaining to the IGRA and state desires to regulate Indian gaming).

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criticism of IGRA from the position that there is something profoundly wrong with the way it has shaped public policy.⁵

In this essay, I seek to review some of the more interesting works in the area from recent years, the relevant provisions of IGRA, and some of the paramount cases that have shaped the contemporary Indian gaming debate. After reviewing these materials, I suggest that they miss the more practical mark of finding an empirically (and legally) satisfying basis from which the two principals in the current debate—Indian tribes and the states—can work cooperatively to maximize their own interests. Ironically, this basis is not grounded in dramatic reformation of IGRA. It is instead grounded—borrowing a few basic principles from classic game theory⁶—in the idea that IGRA remains an appropriate and workable legislative response to the tribal-state conflict over the utility of Indian gaming operations. Courts may be required to continue to provide minor and incremental clarifications to keep the balance between the major players, but the legislation has otherwise “shaken itself out” into a pragmatic framework for the future. In short, there have been far too many calls in the recent literature with specifics for *how* we should change IGRA.⁷ My argument is that the more compelling issue, which has not yet been adequately addressed, is *why* we should change it at all.

A BRIEF HISTORY OF INDIAN GAMING

Extensive histories of Native American gaming are available from a number of scholarly articles on the subject,⁸ so for the purposes of this paper a more concise history on the background of gaming is provided. This history will allow analysis of the bigger question about where Indian gaming is heading and why it has become such a contentious political and legal issue. Gregory Elvine-Kries’ work in the history of Indian gaming is particularly noteworthy,⁹ it traces a strong gaming tradition among Indians back to a time far before Europeans landed in North America. The games were divided into two types—

5. See, e.g., Daniel Twetten, *Comment: Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made Into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317 (2000).

6. See Discussion *infra* pp. 20-21 and note 95.

7. See, e.g., Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should “Fix” the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL’Y & L. 396 (2006).

8. See e.g., Gregory Elvine-Kreis, *The Effect of the Indian Gaming Regulatory Act on California Native American’s Independence*, 35 SAN DIEGO L. REV. 179 (1998); Edward P. Sullivan, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107 (1995); Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798 (1999).

9. Elvine-Kreis, *supra* note 8, at 179-82.

those of (a) skill and dexterity and (b) chance and gambling—with both playing important parts in tribal ceremonies or celebrations.¹⁰ With the arrival of European settlers, Elvin-Kries notes, the natives' agrarian and hunting civilizations were eliminated or modified, whole tribes were moved to reservations and, in something of a polemical opening to his article, he concludes that in order to "overcome these travesties, gaming has evolved into another mechanism used by Native Americans for survival, cultural preservation and replenishing impoverished economies."¹¹

The history of legal gaming in the United States, both Indian and non-Indian, has been marked by dramatic swings between prohibition and popularity.¹² "During at least three points in this nation's history, lawmakers and their constituents have hailed legal gambling as a magic elixir to relieve economic pressure. After each of these waves of legalized gambling, extended periods of prohibition have followed"¹³ The last great wave of prohibition, in the 1960s, saw many forms of gaming prohibited in most, but not all, states.¹⁴ In Nevada, the state legislature decided to rescue and revive the gaming industry from the perilous clutches of organized crime with the passage of the Corporate Gaming Act in 1969, which allowed publicly traded corporations, such as major hoteliers, to hold gaming licenses for the first time in the state's history.¹⁵ In 1976, New Jersey voters authorized casino gambling in the limited location of Atlantic City, and between 1978-1988, efforts were made in several other states¹⁶ to take advantage of what was quickly and obviously becoming a major alternative source of state revenue through legalization and taxation of gaming establishments. In 1988, the stage was set for the "rapid expansion of casinos and casino-style gaming . . . [with congressional passage of] the Indian Gaming Regulatory Act (IGRA) that defined the relationship of states to tribes in regulating Indian gaming within their borders."¹⁷

Prior to passage of IGRA, the "modern version" of Indian gaming "dates back only two decades. Its legal roots lie in Florida, where in 1979 the Seminole Tribe opened one of the nation's first high-stakes

10. Elvine-Kreis, *supra* note 8, at 182-83.

11. Elvine-Kreis, *supra* note 8, at 183.

12. Goldin, *supra* note 8, at 805 (quoting 5 West's Encyclopedia of American Law *Gaming* 129 (1998)).

13. *Id.*

14. See William R. Eadington, *The Economics of Casino Gambling*, 13 J. ECON. PERSP. 173, 174 (1999).

15. *Id.* at 175.

16. Florida, New York, Colorado, Minnesota, Ohio, Pennsylvania and Massachusetts, among others. *Id.* at 175-76.

17. *Id.* at 176.

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bingo parlors on its reservation near Fort Lauderdale.”¹⁸ While Florida allowed limited low-stakes charitable bingo at the time, the Seminole operation was clearly outside the parameters of that type of operation: the tribe was paying out dramatic jackpots and generating large profits with the operation. Florida ultimately attempted to shut it down by using its “Public Law 280” jurisdiction. Public Law 280 was a federal law passed in 1953 as “an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards.”¹⁹ The law effectively granted to certain states—including Florida—limited civil and a broader range of criminal jurisdiction over Indians and their reservations within the state, while retaining the federal trust status of Indian land.²⁰

In *Seminole Tribe v. Butterworth*,²¹ the Fifth Circuit of the United States Court of Appeals drew a distinction between “criminal/prohibitory” laws, over which states could exercise limited jurisdiction against tribes, and “civil/regulatory” laws, over which they could not.²² In the case of the latter, such laws fell under the ambit of Congress’ plenary power to regulate Indian tribes and reservations as sovereign internal nations.²³ Writing for the majority, Judge Lewis Morgan noted that the crux of the court’s rationale was that while the Florida legislature was ambiguous with respect to whether the regulation of bingo was a regulatory or prohibitory provision in the law,²⁴ the language of the statute nevertheless indicated that the game of bingo was not against the public policy of the State of Florida per se:

Bingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses. Where the state regulates the operation of bingo halls to prevent . . . money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed.²⁵

18. Goldin, *supra* note 8, at 810-11.

19. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 537 (1975).

20. Public Law 280 was also notorious for failing to please Indians *and* the states with respect to the power-sharing agreement between Congress and the states that it legislated; Indians themselves saw the continued transferability of their ‘sovereign status’ between groups of white men as unconscionable. See DAVID H. GETCHES ET AL., *Cases and Materials on Federal Indian Law* 488-504 (4th ed. 1998).

21. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (Former 5th Cir. 1981).

22. *Id.* at 312-13 (citing *Bryan v. Itasca County*, 46 U.S. 373, 390 (1976)).

23. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

24. FLA. STAT. § 849.093 (repealed 1991) (*repealed by* FLA. STAT. § 849.0931 (2008)).

25. *Seminole Tribe v. Butterworth*, 658 F.2d at 314-15.

Relying on earlier Supreme Court precedent which questioned the ability of states to tax the proceeds of Indian gaming,²⁶ the Fifth Circuit's

restrictive interpretation of Public Law 280's grant of criminal jurisdiction in the context of tribal gaming profoundly impacted the future of both legal gambling and Indian economic self-determination. *Seminole Tribe* expanded a narrow charitable gambling law into a legal loophole for high-stakes, profit-generating Indian bingo. Following the Fifth Circuit's lead, at least seven other federal courts upheld the right of tribes to conduct [gaming] for profit in other states that barred general commercial gambling.²⁷

While the early cases in this vein were largely centered around bingo and similar types of games, the impetus for casino gaming in particular emerged with the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*.²⁸ In that seminal case, the Court ruled that the regulatory/prohibitory construct was consistent, and in so ruling found that in "light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."²⁹ Applying a "balancing test" of state versus tribal interests articulated by earlier decisions, the Court concluded that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government."³⁰

In the wake of *Cabazon*, and in response to increasing pressures from states to provide for some means of state control over the gaming process, Congress passed IGRA.³¹ The Act also served as a partial response to Indian tribes' request for protection of their federally-granted rights to engage in gaming as a form of economic development.³² The Act classifies Indian gaming as falling into three potential categories:

- *Class I*—includes "social games" for prizes of limited value and those games that comprise what could fairly be defined as tradi-

26. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

27. Goldin, *supra* note 8, at 812.

28. 480 U.S. 202 (1987).

29. *Id.* at 211.

30. *Id.* at 211-22.

31. See Jolly, *supra* note 4 (discussing post-*Cabazon* congressional action).

32. *Id.*

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tional tribal gaming; such games are subject solely to the jurisdiction of the tribe.³³

- *Class II*—includes bingo, lotto, punch boards and other bingo-like games, in addition to card games which are legal within the state and which are not played against the house (thus excluding the high-money games of blackjack and baccarat).³⁴ These games are regulated by the tribe in conjunction with the NIGC.³⁵ They are subject to state regulations involving hours of operation, as well as wagering and pot size limitations, and tribes may conduct them only if they occur in “a State that permits such gaming for any purpose by any person,” which is an admittedly broad limitation.³⁶
- *Class III*—includes all other gambling, including high-stakes card games against the house, casino (table) games, slot machines and the like.³⁷ This class of gaming may be conducted by a tribe only if licensed to do so “in a State that permits such gaming,” subject to “an allocation of regulatory authority between the state and tribe set forth in a tribal-state compact.”³⁸ The compact may “provide for enforcement of agreed rules and regulations . . . tribal taxes equal to those of the state, and procedural remedies for breach of the compact.”³⁹

It is fair to say that neither states nor Indian tribes were completely happy with IGRA once it was enacted. While both principals in the conflict received some of the policy positions they favored, neither obtained the bulk of what they had hoped to receive from it. A host of legal squabbles ensued. In particular, a number of states were distressed by a perceived Eleventh Amendment violation written into the IGRA which subjected them to suit in federal court by tribes for failure to negotiate “in good faith”⁴⁰ with the tribes to arrive at a workable compact. The situation resulted in a further Supreme Court determination—in *Seminole Tribe of Florida v. Florida*⁴¹—that Congress cannot use powers derived from either the Interstate Commerce Clause or the Indian Commerce Clause of the constitution, to abrogate state sovereign immunity from lawsuits, as the Eleventh Amendment provides.⁴² In so holding, the majority overturned its ruling in a state sovereign immunity case that was only six years old at the time.⁴³

33. 25 U.S.C. §§ 2703(6), 2710(a)(1) (2008).

34. 25 U.S.C. § 2703(7)(a).

35. 25 U.S.C. § 2701.

36. 25 U.S.C. § 2710.

37. 25 U.S.C. § 2703.

38. 25 U.S.C. § 2710.

39. Getches et al., *supra* note 20, at 749.

40. 25 U.S.C. § 2710 (d)(3)(A).

41. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

42. *Id.* at 68.

43. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

The Court declared in *Seminole Tribe* that in overturning the earlier case:

[W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.⁴⁴

Thus the stage was set, post-*Seminole Tribe*, for a conflagration to erupt between states and Indian tribes that ultimately—through the normal process of judicial review—could only be referred back to the United States Government. Justice Stevens made this point in his dissent when he said that if both the tribe and the state are entrenched in their respective positions over the future of gaming on the tribal reservation,

[T]he maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution [under] 25 U.S.C. § 2710(d)(7)(B) . . .

[T]his final disposition is available even though the action against the State and its governor may not be maintained.⁴⁵

Federal and state courts subsequently muddled the doctrinal waters even further by ruling that the Secretary of the Interior's approval of a compact to which the state objected resulted in a contract that was not valid or binding under the IGRA.⁴⁶ A court ruled that the state need not negotiate a compact that includes certain higher-stakes casino-type games *unless* those exact games are otherwise allowed by state law.⁴⁷ Finally, in the case of the compacts already negotiated with Indian tribes in New Mexico, those compacts are *not* legally binding under the state charitable lottery statute, which prohibits casino gaming.⁴⁸

THE CONTEMPORARY CONTROVERSY OVER IGRA

In one of the more in-depth and useful case studies of why the modern debate over IGRA (and the call for its amendment) is such a bitterly-fought contest between parties, Julian Schriebman has noted that the boom in Indian gaming “has depended on tight federal and

44. *Seminole Tribe of Fla.*, 517 U.S. at 72-73.

45. *Id.* at 99. See also Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 3-4 (1997).

46. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

47. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). See also *Rumsey Indian Rancheria v. Wilson*, 41 F. 3d 421, 427 (9th Cir. 1994).

48. *New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995).

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state limits on other forms of gambling. The loosening of restraints on innovative gambling venues may stifle this boom."⁴⁹ Focusing on the Mashantucket Pequot Indians of Connecticut and their legendarily lucrative Foxwoods Casino in Ledyard, Connecticut,⁵⁰ Schriebman notes that the destiny of Indian gaming is:

intertwined with the fate of its non-Indian counterparts for two reasons. First, an increase in non-Indian gaming could jeopardize the Indian gaming boom. Second, because gambling often substantially affects interstate commerce, non-Indian gaming, like Indian gaming, involves considerations of the appropriate balance between federal and state regulatory powers . . . State and federal regulation of non-Indian gambling determines the competition that tribal casinos face.⁵¹

Among the non-Indian gaming operations that present the most direct threat to the profitability of tribal casinos, the Internet is perhaps the least well-defined legally. Internet gambling is also the most explosively growth-laden economically, as it allows patrons—albeit admittedly often with house advantages which are significantly higher than traditional casino operations—to gamble from the comfort of their own homes, without having to incur travel, lodging, or other related expenses of visiting an Indian reservation.⁵² Internet gambling is in its infancy at the dawn of the new century. While it is likely to provide an additional layer of complexity to both Indian and non-Indian gaming policy issues in the future, it is currently not as much of a peril to Indian casino revenues as is the threat of state legislatures loosening state regulations to provide for more non-Indian gaming interests to enter a given state.⁵³ In this regard, Indian casinos may have brought to the public policy table the seeds of their own fate, since states which are required to negotiate in good faith with Indian tribes for gaming operations under the IGRA feel a certain amount of pressure to loosen the restrictions on legal non-Indian gaming within their jurisdiction.⁵⁴

Understanding this pressure is relatively simple in the form of an extended syllogism. States which would otherwise not have wished to have *any* forms of large-scale gaming within the jurisdiction are preempted by federal law and required to negotiate with Indian tribes under IGRA to permit gaming nevertheless.⁵⁵ If the state is recalci-

49. Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 YALE L. & POL'Y REV. 353, 359 (1996).

50. Foxwoods is legendarily lucrative because it is the most profitable single casino in the Western Hemisphere, regularly grossing over one billion dollars annually. *Id.* at 361.

51. *Id.* at 358.

52. *Id.* at 358-59.

53. *Id.* at 359.

54. *Id.* at 358-60.

55. *Id.* at 356-57.

trant or refuses to negotiate in good faith,” the United States Department of the Interior has power to intervene in favor of the Indian tribe seeking the compact and dictate a settlement.⁵⁶ States are thus forced to acquiesce to tribal gaming in some form,⁵⁷ because if they attempt to hold a hard-line position against Indian gaming, they are likely to get it anyway—and then cannot tax or otherwise derive any revenue from it. It is logical, therefore, for state legislatures to loosen restrictions on non-Indian gaming operations from commercial entities which do not benefit from the federal protections afforded Indian tribes. Non-Indian operations, after all, can be taxed and regulated through the normal state apparatus. Moving toward the embrace of non-Indian gaming operations threatens to cut significantly into the Indian gaming monopoly in many states, and it is one of the few state actions—absent a tribal-state agreement—of which the “casino tribes” must take notice. It threatens the monopoly’s profit margin, and therefore is a sufficient weapon wielded by the state to urge tribal casino interests to the negotiating table. If one must embrace one’s enemy, to put a twist on an old proverb, it is an interest-maximizing strategy to embrace the enemy of that enemy as well to keep any party from getting a little too comfortable with their own control of the politics of the negotiation.

The growth in state lotteries of the mid-to-late 1980s, for example, originated as a state response to federal grant cutbacks.⁵⁸ As more neighboring states adopted lotteries, states without them felt pressured to lean toward adoption of such games as a way of stemming the loss of gaming revenue from among their own residents.⁵⁹ Since passage of IGRA and the time of the *Seminole Tribe* case, states have accelerated the welcoming of a host of non-Indian, and therefore taxable, gaming into their territories with unprecedented glee.⁶⁰ Six states—Louisiana, Mississippi, Missouri, Illinois, Indiana and Iowa—now have non-Indian riverboat casinos and each of the fifty-plus such entities in those states employs an average of 800 people and generated \$3.2 billion in revenues in 2003.⁶¹ The number of states allowing

56. 25 U.S.C. § 2710 (d)(3)(A).

57. In classic game theory, much less common language, this is what is known as a “use it or lose it” strategy; in this case, however, it would be more appropriately labeled a “negotiate for it on favorable terms or you’ll get it on their terms” arrangement.

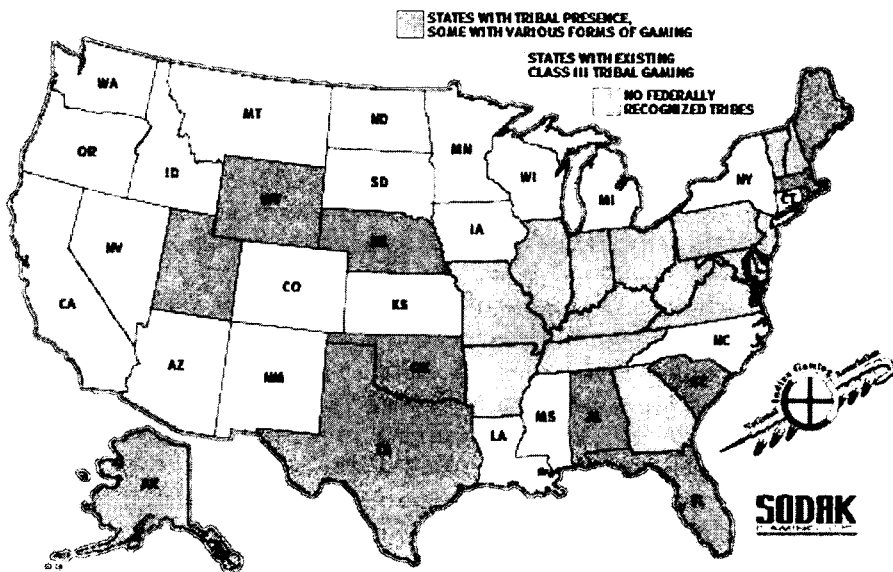
58. See Lacy Maddox and Thad L. Beyle, *New Federalism and the 1982 Recession in North Carolina*, 13 PUBLIUS 65 (1983). See also, *inter alia*, Jeff Sense, *Oregon State Lottery: Executive Summary*, <http://www.eou.edu/ogsp/fsp/jdense01.doc>, Martin Tolchin, *States Take Up New Burdens to Pay for ‘New Federalism,’* NEW YORK TIMES, May 21, 1990.

59. See Laura J. Schiller, *The Lottery in United States v. Edge Broadcasting Co.: Vice or Victim of the Commercial Speech Doctrine?*, 2 VILL. SPORTS & ENT. L.J. 127 (1995).

60. See JobMonkey: Casino Riverboat Jobs at http://www.jobmonkey.com/casino/html/riverboat_casinos.html (2003) (discussing the riverboat casino employment industry).

61. *Id.*

FIGURE 1
STATES WHICH CURRENTLY HAVE FEDERALLY
RECOGNIZED INDIAN TRIBES AND INDIAN
GAMING OPERATIONS



In at least one other case study, which focused specifically on the loss-of-revenue issue from the state's perspective, Gary C. Anders, Donald Siegel, and Munther Yacoub tested the hypothesis that the introduction of Indian casinos caused a statistically significant change

63. National Indian Gaming Association Indian Casino Directory, <http://www.indiancasino.org>. (last visited Feb. 16, 2007).

in the formation pattern of Arizona state revenues.⁶⁴ Their findings suggest that Indian casinos divert state funds from taxable to non-taxable (under IGRA) sectors, but the general growth in tax revenue that states enjoyed during the "boom economy" of the 1990s largely masked these displacement effects.⁶⁵ However, Anders, Siegel and Yacoub note, "given the trend toward increasing the proportion of state funds from sales taxes, a diminution in the rate of economic growth could have serious implications for future state budgets."⁶⁶

The construct Schriebman suggests for understanding the current status and likely outcomes of the tribal-state compact process is helpful. While he does not specifically frame the major issues in terms of formal game theory, he uses a form of it to expound upon the likely resolution of gaming issues in the future.⁶⁷ For example, states that have been excluded from taxing Indian casinos under IGRA are by no means helpless to sit back and watch their tax base continue to erode.⁶⁸ The "big stick" they wield to bring Indian tribes to the negotiating table is the ability to legalize alternative non-Indian forms of gambling; it is rational for the tribes to acquiesce to reasonable revenue payments to the state and oversight by state authorities in exchange for a certain degree of protection of their gaming monopoly within the jurisdiction.⁶⁹ This is precisely what happened in the controversy between the Pequots and the State of Connecticut when Connecticut began courting larger commercial casino operators such as Mirage Resorts in the late 1990s.⁷⁰ "Thus the state's legislative power gives tribes incentives to agree to provide cash payments as long as other casino gambling in the state is illegal. Tribes will subsequently use such compacts, which are enforceable in federal court, to dissuade states from legalizing further off-reservation gambling."⁷¹

Should this dynamic of state pressure be used to attempt to force Indian tribes to the bargaining table? Should the federal government allow Indian gaming in the first place? These are but two of the important unresolved questions that have invited and received critical attention in the professional literature of the past several years. Various schools of thought are split on the utility of gaming within the Indian communities of the United States. For example, Elvine-Kreis writes about the constitutional duty the federal government owes to

64. Gary C. Anders et al., *Does Indian Casino Gambling Reduce State Revenues? Evidence From Arizona*, 16 CONTEMP. ECON. POL'Y 347 (1998).

65. *Id.*

66. *Id.*

67. Schriebman, *supra* note 49, at 360.

68. *Id.* at 360-61.

69. *Id.* at 361-62.

70. *Id.* at 360-62.

71. Schriebman, *supra* note 49, at 362-63.

Indians as the conquerors and inhabitants of their land, before noting that legalized gaming “has proven to be a catalyst for social change as well as for new ideas, which will facilitate the development of Native American tribes that choose to delve into the world of gaming. [It has] also been a catalyst for improvements to surrounding non-Native American communities.”⁷² His most forceful criticism of IGRA is that the way IGRA has been written by Congress is “inconsistent with past court decisions in allowing states to interfere with integral tribal relations,” and that “transferring decisional power to the states was contradictory to federal law, and the IGRA now needs to be rectified.”⁷³

This admittedly passionate position is nevertheless a somewhat standard polemic, beginning with the proposition that the states are—and perhaps should be—powerless in controlling gaming operations contained and conducted within their own borders. Presumably, this should be the case even where Congress, the source of plenary powers over Indian tribes, has determined that it is sound federal policy to allow the states some leverage through the conciliatory provisions of IGRA. The author’s attempt at reconciling the state and tribal interests extends to a recommendation for adoption and ratification of either a federal or a series of state constitutional amendments that provide for complete Indian autonomy over their own current lands.⁷⁴ This, however, is an impracticable solution at best.

From the federal perspective alone, the notion of complete Indian autonomy flies in the face of almost two hundred years of reasonably stable Supreme Court precedent extending back to *Johnson v. M’Intosh*,⁷⁵ and would create a host of other public policy problems for the American federal system insofar as there would then be three constitutionally-recognized, autonomous units of governance: state-governments, tribal governments and the federal government. States, too, would be put at a decided disadvantage in such a tripartite system, given the voluminous body of constitutional law and precedent that constrict and control *them* but not the Indian tribes. This is hardly a practical or easily-adaptable construct, despite the strong case one may otherwise be able to make in favor of the proposition that Native Americans have often received the short-end of the American judicial stick over the history of the Republic.

The creation of new federal or state constitutional provisions regarding absolute Indian sovereignty is also one which is not likely to

72. Elvine-Kreis, *supra* note 8, at 201-03.

73. *Id.* at 207-08.

74. *Id.* at 210.

75. *Johnson*, 21 U.S. (8 Wheat.) 543.

meet with congressional approval, since the members of Congress must face the voters of their states to protect their re-election opportunities. Non-Indian voters continue to have substantial misgivings about legalized gambling in their states, as well as the sheer amount of money Indian casinos rake in on a daily basis. Native Americans, in turn, are a disproportionately small ethnic minority in most states⁷⁶ that have not as yet been able to mount a considerable political lobby to go on the counter-offensive.⁷⁷

The "Indian sovereignty" argument is nevertheless a powerfully appealing basis to argue for an overhaul of IGRA in the tribes' favor from humanistic, democratic and/or moralistic perspectives. Kathryn R.L. Rand has joined this camp by suggesting that

sovereignty, rather than net profits, provides the necessary foundation for assessing whether tribal gaming is successful . . . If Indian gaming strengthens tribal governments, then even modest economic success may be expected to result in healthier reservation communities, and in increased likelihood that tribes will be able to pursue avenues of economic development outside of gaming.⁷⁸

What Rand does differently—and appreciatively so—from other similar arguments, is to assess the opposition argument carefully, drawing her own conclusions about the welfare of Indian tribes.⁷⁹

Addressing recent criticisms of the social impact of Indian gaming published by the Associated Press (AP) and the Boston Globe, Rand notes that these stories emphasized that even in the presence of the alleged panacea of legalized gambling, Indian reservations still suffered from dramatically higher levels of ills such as alcoholism, unemployment and other social ills.⁸⁰ The articles had an immediate and dramatic impact on policymakers, with numerous Representatives and Senators characterizing Indian gaming as a corruptible and corrupted system that did little to nothing to help Indians as IGRA had in-

76. According to the U.S. Census Bureau Factfinder WWW module at <http://factfinder.census.gov/> (follow "People" hyperlink; then follow "Race and Ethnicity" hyperlink; then follow "Ranking of Population Who Are American Indian or Alaska Native Alone" hyperlink) only Alaska has over ten percent "Native American and Alaskan Natives" as a proportion of the total state population. States in which Native Americans make up between five and ten percent of the population are Arizona, Oklahoma, Montana, New Mexico, North Dakota and South Dakota. Seven other states have Indian populations of between 1.2- 2.3 percent, but they have comparatively little representation in Congress, save North Carolina. The remaining thirty-six states have Indian populations of around one percent or less.

77. Notwithstanding the efforts of groups like NIGA to promulgate the "benefits" of Indian gaming on non-Indian populations and communities that surround their facilities. See <http://www.indiangaming.org> (website for the National Indian Gaming Association).

78. Kathryn R. L. Rand, *There Are No Pequots On The Plains: Assessing the Success of Indian Gaming*, 5 CHAPMAN L. REV. 47, 49-50 (2002).

79. *Id.*

80. *Id.* at 53.

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tended.⁸¹ The system and the legislation, therefore, had to be dramatically overhauled to curtail the spread of these “social vices” to the people on whom they had been visited.⁸² Rand suggests, however, that this aggregate criticism of Indian gaming overlooks the very real successes of specific tribes which have allegedly benefited dramatically from the practice. She states, “failing to adequately take into account the varying circumstances, experiences, and goals of tribes, critics are able to conclude that . . . Indian gaming works for no tribe. Yet, as the Pequot and the Plains Models demonstrate, such simplistic assessments of tribal gaming define success too narrowly.”⁸³ Focusing on the failures of Indian gaming, she concludes, risks “further compromising tribes’ abilities to address often dire social conditions on reservations throughout the United States.”⁸⁴

While this may be so, there is also a chicken-and-egg question embedded in Rand’s solution that she does not adequately address. To what extent is the presence of Indian gaming contributing to—or at least retarding the fight against—the social ills which previously plagued Native American reservations? For that matter, what might the collateral effects on surrounding non-Indian communities be, besides the already highly-touted creation of service jobs at the casino itself?⁸⁵ More significantly, Rand perhaps views IGRA specifically, and gaming regulation in general, as too much of an exclusive vehicle for social change and too little as a series of processes laden with difficult questions of electoral politics, constitutionalism and federalism. This is the entry point for opponents of expanded Indian gaming—and of an expanded federal activism in the Indian gaming controversy—to register their objections.

The anti-gaming position is represented in the literature of Nicholas S. Goldin, who focuses on the lack of oversight and regulation of Indian gaming. The “adverse economic impact of casino gambling exceeds any marginal, short-run economic benefits For every dollar that a community collects from gambling taxes, it must spend at least three dollars to cover new expenses, including additional police and criminal justice services, infrastructure repairs, social welfare and ad-

81. *Id.* at 55-60.

82. *Id.* at 55-57.

83. *Id.* at 59.

84. *Id.* at 86.

85. NIGA in particular is quick to point out on their website that Indian gaming is responsible for 300,000 total jobs, of which roughly 75% are held by non-Indians; furthermore, IGRA requires among other things that land taken into trust status on which casinos exist must not be detrimental to the surrounding community. Indian Gaming Facts, NIGA World Wide Web site at <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml>.

diction counseling services.”⁸⁶ Goldin maintains that, far “from creating new wealth for a community, a new casino ‘cannibalizes the surrounding economy. By diverting consumer spending from existing stores and services to the casino floor, the casino shifts existing jobs instead of creating new ones. . . .’ ”⁸⁷ Ultimately, Goldin concludes, a “workable” compromise can be fashioned by considering both the states’ interest in refusing to expand the reach of casino gambling within their jurisdictions and tribal interests in pre-existing gaming operations by (1) amending IGRA to limit Class III gaming specifically to those games that the state allows for commercial profit-generating purposes, and (2) allowing communities in states that ban commercial casino gambling to “override” or provide an exemption to the state restriction if they wish to keep a current gaming operation.⁸⁸

This proposed solution, however, suffers from the same lack of consideration of political realities as does Rand’s. The first proposition, for instance, puts all of the eggs squarely in the state’s regulatory basket and treats Indian tribes no differently from any private commercial gaming operation that wishes to apply to the state for permission to conduct for-profit casinos. The Cherokee and Choctaw, in effect, are treated under law no differently than Bally’s or MGM/Mirage. The status of Indian tribes as sovereign dependent nations within the United States federal legal schema, therefore, is rendered virtually meaningless. The second proposition would bring about something of a congressionally mandated “home rule” provision to be imposed upon the states, regardless of whether their own state legislatures approved. Non-Indian communities adjacent to Indian territory in the state, in effect, would themselves become semi-sovereign, semi-autonomous “dependent nations” in the limited context of being able to decide whether they wished to be subject to certain acts of the state legislature. The implications for state autonomy over its own jurisdiction are immense and problematic; further dilemmas could then be expected in the broader state legislative context, as challenges to laws that affect but do not directly address the “special opt-out privileges” of these communities come to the fore. Other representative selections from the professional literature have suggested and identified in more detail such dilemmas.⁸⁹

86. Nicholas S. Goldin, Note, *Casting A New Light on Tribal Casino Gaming*, 84 CORNELL L. REV. 798 (1999).

87. *Id.* at 834-35.

88. *Id.* at 847-48.

89. For detailed discussion of the dilemmas involving the broader state legislative context and communities adjacent to Indian territories, see Heidi McNeil, *Indian Gaming—Prosperity, Controversy*, 872 PLI/CORP. 139, 141 (1994); Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 248-49 (1997); Tobi Longwitz, *Indian Gaming: Making A New Bet*

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Still, the call to be attentive to both the economic and non-economic benefits that may accrue to an Indian tribe that is involved with the gaming industry should not be discarded simply because there are problems with other dimensions of the issue. Gaming has, for example, contributed to a resurgence of Indian ethnic pride and identity; it has also contributed to a pronounced new political activism, albeit one that is usually designed to protect the lucre of the tribe's gambling operation.⁹⁰ This raises yet another ancillary question, given the tremendous tax-exempt cash intake that current Indian gaming operations enjoy. The operations are obviously exempt from unilaterally state-imposed taxation, but should they continue to be exempt from *federal* taxation given Congress' seeming power to impose such an obligation? Stephanie Dean has suggested that traditional arguments against imposing a federal tax on Indian casinos are well-grounded from paternalistic cultural and pluralistic perspectives, but nevertheless that they do not present any type of constitutional bar against federal taxation.⁹¹ Furthermore, she suggests that federal taxation of Indian gaming would (1) more evenly distribute current tribal wealth among tribe members, as federal programs come to the aid of those Indians who do not benefit directly from their tribe's casino(s); (2) reduce the threat of backlash from and level the economic playing field with local non-Indian businesses by neutralizing some or all of the "unfair tax advantage"⁹² that tribes currently enjoy; and (3) slow the growth of Indian gaming while nevertheless maintaining its viability as a revenue source for tribes, thus providing continued income to the tribes while, "reducing some of the negative consequences that accompany this growth."⁹³

While Dean's suggestion is interesting and worthy of continued debate, it is an example of an ancillary lingering question that requires further discussion of public policy implications. It is ancillary at this juncture because it deals with a dimension of the Indian casino issue—the relationship of Congress to the Indian tribes—which has not, of late, been the crux of the controversy surrounding IGRA. The more significant combat of contemporary times has been between the states and the Indian tribes, with Congress acting as an intermediary and trying to keep the peace between these often-battling interests.

On The Legislative And Executive Branches After IGRA's Judicial Bust, 7 GAMING L. REV. 197, 198-99 (2003).

90. Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 Am. Soc. Rev. 947 (1995).

91. Stephanie Dean, *Getting A Piece of the Action: Should The Federal Government Be Able to Tax Native American Gambling Revenue?*, 32 Colum. J. L. & Soc. Prob. 157, 178 (1999).

92. *Id.*

93. *Id.*

Viewed in this manner, the debate can be better understood by borrowing a few basic precepts of classic game theory from the social sciences, which recognizes the interests of both major players in the "casino gaming" game—the tribes and the states. For example, both players will seek to maximize their own rational self-interest throughout the process. They will seek overwhelming advantage where their opponent cannot respond adequately, but will moderate their advantage-seeking through negotiation and compromise where it is believed the other side has an ability to harm or otherwise retard their progress toward the goal of the game. Mutual satisfactory benefit will generally be more preferable to the players—from the perspective of fulfilling their interests—than gambling for fulfillment of higher profits at the risk of losing everything (or more) than they had at the beginning of the game. Alliances with other principals can turn enemies into friends, as each player begins to protect the other(s) within the alliance to protect its own interest in the compact.⁹⁴

IGRA and other judicial precedent in this game between tribes and states represent a stable presence of known norms and rules which the players have worked to maximize their own interests. Indian tribes have had the ability to engage in highly profitable gaming operations protected by these rules, and their status as "sovereign dependent nations"⁹⁵—subject only to the plenary powers of Congress—has also been preserved. The economic windfalls resulting from gaming operations have clearly produced great socioeconomic advances for many tribe members.⁹⁶ However, to the extent that social ills or vices may also result within the tribe, Congress retains the power to legislate, and both the tribal and federal courts retain the power to adjudicate, on a *per se* basis.⁹⁷ With respect to complaints, which the state may levy against the presence of Indian casinos, the IGRA gives both principals the ability—and the incentive—to negotiate with each other and work out such details to mutual satisfaction.⁹⁸ All the while, tribes are cognizant of the fact that their interest in stemming competition for the gambling dollar rests with the state legislature regardless of their federal status. States, in turn, are cognizant of the fact that

94. These are but a few of the major principles of game theory that are applicable to the Indian gaming controversy, and they are over-simplistically stated for the purposes of readability in this essay. Game theory has been a highly useful construct in the social sciences for many years, however, and it is only now beginning to find an appreciable base of support among modern legal scholars. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (Harvard University Press 1998).

95. *Johnson*, 21 U.S. (8 Wheat.) 543.

96. HARRIET GANSON ET AL., *TAX POLICY: A PROFILE OF THE INDIAN GAMING INDUSTRY* 3 (1998).

97. 41 AM. JUR. 2D *Indians; Native Americans* §§ 11, 33 (2007).

98. 25 U.S.C. § 2710(d)(3).

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heavy-handed Indian gaming regulatory policy from the state capital may result in federal preemption, which leaves the state with less control than it had at the beginning of the legislative process.

The dynamic between Indian tribes interested in gaming and the states in which those operations are based is a highly sensitive but carefully balanced one which has found a certain equilibrium since passage of IGRA. This is to be expected with the passage of time, as the principals in this predominantly two-player game learn not only the stable rules, but also consider and try to predict how the other principal will act to benefit from this stability. This behavior can facilitate a cooperative/consensus model of game play which should not be flippantly modified by either Congress or the courts.

There are two levels of sophistication in learning. One is simply to forecast how opposing players will play. However, if two people repeatedly play a two person game against each other, they ought to consider the possibility that their current play may influence the future play of their opponent.

For example, players might think that if they are nice they will be rewarded by their opponent being nice in the future, or that they can teach their opponent to play a best response to a particular action by playing that action over and over.⁹⁹

Stripped of the moralistic, ethnocentric, democratic, and/or “social ills” rhetoric that permeates the bulk of current literature on the issue, it thus becomes clearer that the public policy that is fairest to the players in the ongoing Indian gaming debate—not to mention the policy that is the most practical to implement and the least disruptive of other elements of the United States’ legislative and legal systems—is to leave IGRA largely alone for the time being, and to urge a certain amount of judicial restraint with respect to rendering court decisions that have the potential to alter the current balance of power between Indian tribes and the states. Native American leaders certainly *have* demonstrated their ability to adapt to a stable situation for the good of their tribes, and the development of the Indian gaming industry throughout the past two decades indicates that they are perfectly capable of using the advantages of their sovereign status to help and protect their peoples without much “tweaking” of the rules from Congress. State legislators, too, have demonstrated their expertise in relying on the current rules of the game to create their own agreements with Indian tribes that satisfy the signatories to the compact. Although both pro-Indian and anti-Indian gaming scholars are well-intentioned, their current advocacy of reforms to change the IGRA’s

99. DREW FUDENBERG & DAVID K. LEVINE, *LEARNING AND EVOLUTION IN GAMES* (1996), <http://levine.sscnet.ucla.edu/Papers/Essay/ESSAY7.htm>.

balance of power have yet to answer the *why* question from a more objective and empirical—as opposed to an emotional or moralistic—frame of reference.

CONCLUSION: THE IGRA IN CURRENT PRACTICE—HALF-BAD MEANS NOT HALF-BAD

The calls for reform of IGRA have been numerous, and have come from both pro-tribal and pro-state interests alike in recent years. Many of the critics who have contributed to the literature on the subject have seemingly overlooked the position that suggests neither revolutionary change to the Act, nor the dramatic problems of judicial review or federalism-gone-awry, which would accompany a power shift in the current delicate balance of roles in the game. That position, namely, is to leave the current IGRA largely intact, and to allow the three principal players in the current legal game to continue to work toward maximizing their own strategic positions under a known, established, and at least reasonably stable set of rules and norms.

In classic game theory, the players in a game are to be expected to maximize their positions under such constructs to maximize their own self-interest.¹⁰⁰ Dramatic or frequent changes to the rules reduces the reliability of predicting an opponent's play, and may work to undermine the future pursuit of the goal of maximization of self-interest, because the new rules must be learned and new strategies adapted to them.¹⁰¹ In the context of Indian gaming, changes to the rules of the game which benefit Indian tribes are merely likely to increase the ferocity of state responses in other areas of state-Indian relations, while changes which benefit states are likely to marginalize—to say nothing of further impoverishing—Native American communities. Courts attempting to make more sense of or refine case law in the controversy have often muddled the waters further and developed a series of intra-Circuit fractures.¹⁰² This has made them, in effect, a voluntary intermittent player whose actions have dramatic consequences in a game which had otherwise already stabilized between the principals. However, the effects of judicial review are not always *necessarily* destabilizing, and—this essay should not be read to propose a strict or

100. DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 19 (First Harvard University Press paperback ed. 1998).

101. *Id.* at 18-19.

102. Compare *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990) (holding that, under the Indian Gaming Regulatory Act, states have a duty to negotiate with tribes regarding forms of gambling that are banned by state law), with *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (holding that states need not negotiate with tribes regarding certain forms of gambling if the form of gambling is banned by state law).

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unyielding form of judicial restraint as such. A few cases, such as *Seminole Tribe*, can be helpful in clarifying the rules of the game that balance the distribution of power between states and tribes. For example, judicial attempts to make more sense out of (for example) the Tenth and Eleventh Amendments have “met with varying degrees of success.”¹⁰³ They have, in fact, produced so many differing opinions, Congress may ultimately have to step in and take an even more active role to bring back together what the courts have torn asunder.¹⁰⁴

Under the current construct, tribes and states may employ the known rules of play in this legal and political game to realize their own limitations, maximize their rational self-interest by wise policy choices within the boundaries of the competition, and consider seriously the options of cooperation and compromise with the other principal(s) as an attractive strategy to realize their interests. Tribes and states, for example, are both encouraged and federally authorized under IGRA to negotiate a compact to realize mutual benefit. Both parties are armed with a considerable supply of both carrots and sticks to bring to the negotiating table. Among the bigger sticks for tribes is the ability to bring an administrative adjudication action before the Department of the Interior for redress in the face of a state unwilling to bargain. States have developed a perhaps somewhat undesirable but effective “counter-stick” in their ability to allow broader non-Indian gaming within their jurisdictions to recoup lost tax revenues—which simultaneously increase the competitive pressures on Indian casinos in an otherwise free and fair public gaming market. Both parties have an incentive to negotiate and compromise rather than to fight, and the potential for a win-win outcome to the game is therefore maximized. By leaving the IGRA largely alone, except for potentially minor corrective or cosmetic changes from time to time, Congress also wins by being able to avoid a politically explosive battle between tribal interests, to whose welfare they are pledged, and state interests, to whom they owe their own electoral successes.

The ultimate balance of power between states and Indian tribes under IGRA’s current set of rules—and particularly the “negotiation of compact”¹⁰⁵ provision—encourages these actors to work together to realize mutual benefit. Tribes may continue to make money through gaming, which may then be used to promote tribal health, welfare, and standard-of-living on the reservation. States may discover a lucrative new revenue source at a time in the history of American federalism when it is most urgently needed, and perhaps exploit the

103. Sullivan, *supra* note 8, at 1129.

104. *Id.* at 1129-37.

105. 25 U.S.C. § 2710(d)(3).

presence of casinos even further by developing “niche tourism” in selected parts of the state, as many jurisdictions with Indian gaming have already done. In spite of the considerable efforts expressed previously in the professional literature, arguing from a variety of enviably appealing normative perspectives, the most practical solution to the “Indian gaming problem” in the current day may not be major legislative reform of IGRA after all. The answer instead may be to solicit and encourage continued negotiation within the context of rules and norms that the principal players have now internalized and have begun to master. The current scheme protects the legitimate basic interests of both Indian casinos and states, and it additionally pressures them to work together to protect those interests, which may be sacrificed if they play the game over-aggressively.

Lawyers and judges, of course, have a long and distinguished history of intervening when rules of law or equity require intervention to correct what the parties to a conflict cannot resolve for themselves. In the context of modern Indian gaming under IGRA, however, recent developments in tribal-state relations and the tribal-state compact process indicate that the parties have found acceptable, satisfactory, and profitable quarter with each other. Casino revenues have been and will continue to be an important part of numerous tribal budgets, and IGRA directs the use of that income while simultaneously continuing to recognize the claim of Native American tribes to a tempered right of self-determination. While minor legislative tweaking of the Act, or judicial tweaking of *stare decisis*, in this important area of law may be beneficial in future years, it is not intervention that should be pursued for the unilateral benefit of states *or* of Indian gaming interests. Such actions would interrupt a parity that tribal and state leaders have worked out for themselves under known and stable rules of the “gaming game.” Those rules acquire even more stability, and the players get better at dealing with them—as well as each other—with the passage of time and an absence of unnecessary intervention. From whatever grounds we ultimately argue for change in this type of legal dynamic—moralistic, humanistic, constitutional, paternal and so forth—more empirical and pragmatic considerations of how the dynamic works suggest that politicians, lawyers, and judges know all too well that they *can* bring about rapid legislative and judicial change through the practice of their craft; the issue of lingering significance is whether they *should* do so.