ARTICLES

INDIAN GAMING AND NATIVE IDENTITY

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PART I. INTRODUCTION

Indian gaming is a twenty-six billion dollar a year industry.[1] Between 2006 and 2010, revenues from Indian gaming increased by more than six percent even as many states where Indian gaming is conducted suffered from severe budgetary crises in the wake of a general economic downturn.[2] Amidst this background of Indian gaming's apparent profitability and states' declining fortunes, a growing controversy has risen regarding the effects of Indian gaming, which in turn has placed into question the sovereign status of tribes and the role of gaming as a strategy for tribal self-sufficiency. Opponents of Indian gaming are quick to cite the staggering success of a few tribes, such as the Mashantucket Pequots, in concluding that all tribes benefit from gaming, and that gaming tribes prosper at the expense of states.[3] But this conclusion tends to be fraught with assumptions and perceptions that in large part play out within a politicized atmosphere of competing tribal, state, and federal interests; interests that form no less in the context of self-determination, identity formation, and race relations, than in the prism of capitalist-based, sometimes morally infused calculations of who should get what and why.

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1. National Indian Gaming Commission, Gaming Revenues 2005-2009, http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited July 9, 2011).

2. *Id.* Gaming tribes reported total gross gaming revenue ("GGR") of $24.9 billion in 2006 and $26.5 billion in 2009, an increase of $1.6 billion over four years.

3. *But see* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 327 (3d ed. 2002) ("A study conducted by the University of Connecticut Center for Economic Analysis found that the Pequot casino . . . saved the economy of southern Connecticut from financial ruin following the downturn of the area's manufacturing and defense industries").

In the increasingly polarized debate over Indian gaming, we may witness a rehearsal of society's perception of Native Americans, and identify and examine the extent to which the politics of Indian gaming are also the politics of race and identity. Indian gaming, then, presents a unique opportunity to study the dynamics of identity politics and the legal structures which participate in the formation of identity and community through the vocabulary of rights. It also, and more importantly, provides an exemplar of law's partiality and points up the necessity for law students, jurists, and others alike, to develop a critical perspective of law in general and Indian law in particular.

By addressing the issues confronting Native Americans today, and especially, those intensified and made more visible by gaming (and its attendant controversy), it is thought that the greater part of the work here will support the conclusion that a discussion of Indian gaming cannot be undertaken without a view to tribal sovereignty and self-sufficiency. Indeed, only when the discourse of Indian gaming reflects and gives voice to indigenous perspectives can that discourse properly balance the interests of tribes, states, and the federal government. As long as the history of Native peoples, and the special relationship of Indian tribes to the United States, are elided in conversations about Indian gaming, no fair account may be had of whether gaming is a beneficial mode of achieving self-sufficiency, of building and retaining cultural identity, or of realizing other similarly significant aspirations which for many tribes have remained largely unattainable.

Mindful of the disparate means of approaching this subject, each with its own benefits and drawbacks, the methodology adopted here signifies an attempt to at least survey and highlight the essential structures, both legal and non-legal, which factor into any minimally thorough conversation about Indian gaming and its consequences. First, the importance of proceeding historically in any study of Indian gaming will be emphasized. Second, the events leading to the adoption of the Indian Gaming Regulatory Act ("IGRA") will be explained, followed by an analysis of the Act and its operation post-*Seminole Tribe*. Third, the legal and political environment in which Indian gaming occurs in California will be examined, with a focus on Tribal-State compact negotiations and public responses to casino gaming in that state. Finally, an attempt will be made to establish the degree to which Indian gaming politicizes identity formation and impinges upon tribal sovereignty, and therefore problematizes any attempt to answer whether gaming is categorically "good" or "bad." As with any writing on Indian gaming, concrete answers are not forthcoming to many of the policy and law-related questions that In-

dian gaming raises, and to that extent, an effort will be made to identify possible answers, if not further questions.

II. THE IMPORTANCE OF HISTORICAL PERSPECTIVE

Throughout the history of the United States, tribal nations have been subject to a "pendulum-swing" of policies, at the one end assimilation, at the other termination or extinction.[4] These policies invariably have been the product of a shifting temperament of non-Native society, the legislative and executive branches accountable to it, and the federal courts deciding matters of importance to Indian country. From at least the point of Christopher Columbus' "discovery" of America to the current era of Indian gaming, tribes have been undermined or assisted on the basis of their relationship to other sovereigns.[5] This fact continues to inform the experience of tribes, such that no issue of Indian law, inclusive of Indian gaming, can be considered apart from the relational context in which tribal governments function. A comprehensive approach to Indian gaming therefore cannot be ahistorical, and always must include a recognition of the changeable attitude, as reflected in law and policy, of the United States towards tribes and, more generally, towards Native Americans as a whole.[6]

Indian law historically has defined the parameters in which tribes have been able to fulfill the various purposes of communal, tribal life. Its developments strongly have correlated (and continue to correlate) with the range of possible Native outcomes, a conclusion that becomes evident in the context of Indian gaming. By subjecting to popular, external perceptions the rights that

4. *Id.* at 4.

5. *Id.* On the issue of "discovery," one commentator provocatively asks "whether, had the Cherokees sailed to Spain in 1492, historians would credit them with having discovered Europe."

6. Sumi Cho and Gil Gott evaluate the origins of sovereign power in *The Racial Sovereign*. They propose that "foundational legal principles in the United States developed homologously with the structures of societal racial formation." SUMI CHO & GIL GOTT, *The Racial Sovereign, in* SOVEREIGNTY, EMERGENCY, LEGALITY 182, 190 (Austin Sarat ed., 2010). They credit non-Native efforts to control tribal resources with the federal judiciary's early (if not ongoing) preoccupation with reading and valorizing race. They cite the doctrines of title by conquest and domestic dependent nationhood as examples of racially contingent expressions of sovereign power, owing to a judiciary that throughout certain periods of U.S. history has shown pliancy to prevailing political and social attitudes concerning Native Americans. Cho and Gott convincingly argue that U.S. sovereignty may be understood "as the self-referencing logos of a series of racial projects for control of land, labor, and resources, through which sovereign power over life and death is exercised and legitimized in conjunction with the territorialized line-drawing of racial Othering." *Id.* at 226. Cho and Gott's study of tribal sovereignty and its close relationship to federal and state expansionism draws critical attention to the relationship between law and the structural processes of identity formation (at the individual, group, and national level) in the institutionalization of social and political inequality.

tribes enjoy, including many of the more important ones, such as self-governance and self-determination, Indian gaming ensures that tribal rights, and the identity formed with reference to those rights, necessarily will be political. This leaves tribes and Native Americans at a tenuous juncture between law and identity politics—one whose features will become clearer as we begin to analyze the laws applicable to Indian gaming.

III. THE INDIAN GAMING REGULATORY ACT OF 1988

Indian gaming is a relatively recent phenomenon having its origins in the "bingo halls and card [clubs] [of] the 1970's and early 1980's."[7] With the enactment of the Indian Gaming Regulatory Act in 1988 following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,[8] Indian gaming has progressed from the relatively low earning games such as traditional bingo, to the more lucrative, and hence controversial, Las Vegas-style games, such as slot machines, banked card games, and parimutuel betting.[9]

Currently, there are 233 tribes participating in some form of gaming regulated by IGRA.[10] Of the 419 tribally owned facilities, 71 casinos, collectively representing 17 percent of all operations, account for 69 percent of nationwide Indian gaming revenues. A further half, or 209 operations, earn 29 percent of revenues, while the bottom 33 percent, consisting of 139 operations, see less than two percent of total gross gaming revenues.[11] Since 2005, the field of Indian gaming has developed to include 27 additional operations in the 28 states where it is conducted. Nationwide revenues have climbed nearly four billion dollars, or seventeen percent, to $26.5 billion in 2009.

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7. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 17 (2006).

8. 480 U.S. 202 (1987).

9. A banked card game is "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R § 502.11 (2010). *See also* Bulletin No. 95-1 (Apr. 10, 1995), All Banking Card Games Fall Within Class III Gaming, National Indian Gaming Commission, http://www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1995-1.aspx. Baccarat, chemin de fer (a variant of baccarat), and blackjack are examples of banked card games. Banked card games are class III games. Nonbanked card games, such as poker, are class II games.

10. Senate Indian Affairs Committee Oversight Hearing, NIGC Chairwoman Tracie Stevens (July 29, 2010), http://www.indian.senate.gov/public/_files/TracieStevensTestimony0.pdf. This number represents 41 percent of the 564 federally recognized tribes.

11. Over the last five years, an average of 17 percent of operations retained 71 percent of revenues, while 48 percent took in 27 percent of revenues, and a final 35 percent realized less than two percent of all income generated from Indian gaming. National Indian Gaming Commission, Gaming Revenues 2005-2009, http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited July 9, 2011).

As an industry, Indian gaming has enjoyed year-over-year growth for fourteen out of the last fifteen years with the pace of growth slowing from ten percent in 2006 to two percent in 2008 to negative growth in 2009. In 2009, gaming revenues contracted by $256 million, or less than one percent, as 58 percent of operations reported a decrease in revenues from the previous year.[12] Taken together, the data suggest that recessionary pressures in the overall U.S. economy have impacted gaming revenues, and that a minority of tribal operations continues to account for the majority of Indian gaming revenues.[13]

The development of Indian gaming from a small, largely unregulated phenomenon to a sizeable, intensely policed industry can be attributed to two significant legal developments—the U.S. Supreme Court's decision in *Cabazon*, and Congress' passage of IGRA. *Cabazon* effectively shored up the sovereignty of tribes while simultaneously creating a power gap. States were denied, by reason of federal pre-emption, any input into a tribe's decision of whether to conduct gaming on tribal land. This led states to lobby Congress for comprehensive gaming laws that would place tribes under state regulation.[14] In response, tribes, "generally opposed state regulation and lobbied for exclusive tribal regulation."[15] Congress struck a balance somewhere in the middle by enacting IGRA, which provides for the classification of gaming into three categories with different jurisdictional consequences. While legislative proposals on Indian gaming were in the works prior to *Cabazon*, the Supreme Court's holding added urgency to an otherwise general call for reform.[16]

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12. Press Release, National Indian Gaming Commission, 2009 Indian Gaming Revenues Remain Stable (June 11, 2010), http://www.indiangaming.com/istore/Jul10_NIGC.pdf. Decreases in revenues tended to be mild among the more than 130 affected operations, with over half of that number seeing less than a ten percent decline. At the same time, 39 percent of operations enjoyed increased revenues. Operations in the NIGC's Portland and Oklahoma City regions, together encompassing part of Oklahoma and all of Alaska, Idaho, Oregon, Texas, and Washington, accounted for the majority of growth in GGR.

13. These statistics counsel skepticism in the face of claims that Indian gaming is the "new buffalo." Certainly, gaming's effects are not distributed equally throughout Indian country; some tribes remain poor despite gaming, while many have achieved modest improvement in tribal life. Still others—an exceptional few—have become fabulously wealthy.

14. STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 42 (2005).

15. *Id.*

16. *See* RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 7, at 31 ("The Supreme Court's decision in *Cabazon*, however, 'threw the ball into Congress's lap to do something, fast,' catalyzing proponents of both state and federal regulation"). *See also* RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 87 (2005) ("Before *Cabazon*, members of the U.S. House and Senate had been concerned enough about Indian gaming to hold hearings on the topic. However, it was not until the Supreme Court delivered the

At the time of *Cabazon*, California law allowed bingo to be played in the state but only if prizes were capped at $250 per game, profits were kept in special accounts to be drawn upon for charitable purposes only, and games were staffed by unpaid members of designated charitable organizations.[17] In contravention of state law, the Cabazon and Morongo Bands of Mission Indians, federally recognized tribes, operated bingo operations on their reservations in Riverside County, California. The Cabazon Band also owned a card club where draw poker and other card games could be played.[18] Aware of the Bands' activities, the state sought to enforce California Penal Code section 326.5, which restricted but did not prohibit the types of gaming activities the Bands operated. In addition, Riverside County sought to draw the tribes into compliance with two of its local ordinances, one of which regulated bingo, the other of which prohibited draw poker and other card games.[19]

In Federal District Court, the Bands sued Riverside County seeking a declaratory judgment that the County lacked authority to apply the ordinances to gaming conducted on tribal lands. The State intervened in the suit and the District Court granted summary judgment in favor of the Bands. The State and the County appealed to the Ninth Circuit Court of Appeals, which affirmed the lower court's decision. When the State and County appealed to the U.S. Supreme Court, certiorari was granted to resolve whether (1) Public Law 280 allowed California to enforce its bingo laws on tribal lands; whether (2) the Organized Crime Control Act ("OCCA") of 1970 delegated to states the power to enforce federal law; and whether (3) Congress had pre-empted state action.[20]

The Court recognized that the primary purpose of Public Law 280, which gave to six states, including California, criminal jurisdiction over reservation land, was to "combat[ ] lawlessness on reservations."[21] As the Court noted, "[Public Law 280] was not intended to effect total assimilation of Indian tribes into mainstream American society."[22] In this way, the Court reasoned that civil jurisdiction over Indian lands never has been a right enjoyed by states, and therefore in each case where a state "seeks to enforce a law within an Indian reservation under the authority

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Cabazon decision that legislators were sufficiently spurred to action and forced to make law.").

17. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 205 (1987).
18. *Id.*
19. *Id.* at 205–06.
20. *Id.* at 202–221.
21. *Id.* at 208. *See* 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006).
22. 480 U.S. at 208.

of [Public Law 280] . . . it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation . . . or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."[23]

The Court determined that California Penal Code section 326.5 was civil/regulatory in nature and not criminal/prohibitory. In support of its holding, the Court found informative the fact that California substantially participated in gambling through its state lottery.[24] It found unpersuasive California's argument that the Bands' bingo operations attracted organized crime due to their size and unlimited per game prizes, and it found equally unconvincing the State's contention that because violation of state gaming laws constituted a misdemeanor offense, they therefore were criminal in nature and not regulatory. Furthermore, the Court declined to extend civil jurisdiction to states over tribes where Congress had not thought to do so. The Court warned that such a broad grant of authority to states "would result in the destruction of tribal institutions and values."[25]

In respect of the State and County's second contention, that OCCA constitutes an implicit authorization of state and county enforcement of state laws and county ordinances, the Court ruled that "enforcement of OCCA is an exercise of federal rather than state authority."[26] It went on to say that "[t]here is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect."[27] OCCA therefore leaves the task of enforcing its provisions to the federal government, and does not reflect an intent by Congress to transfer to the states the business of regulating tribal gaming activities.

Notwithstanding the inability of Public Law 280 and OCCA to repose in states authority to enforce civil/regulatory laws on tribal lands, and notwithstanding dicta to the effect that a county probably never can enforce its laws against tribes since Public Law 280 speaks of states, not political subdivisions thereof, the Supreme Court did not find state authority over tribal activities on tribal lands to be limited to only those circumstances envisioned by Public Law 280.[28] Rather, the Court found that in cer-

23. *Id.*
24. *Id.* at 211 ("In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, . . . California regulates rather than prohibits gambling in general and bingo in particular.").
25. *Id.* at 208.
26. *Id.* at 213.
27. *Id.* at 213–14.
28. *Id.* at 214.

tain contexts, state laws might apply to tribes, as where a tribe runs a smoke shop for the sole purpose of marketing an exemption from state sales tax.[29] With this in mind, the Court concluded that the case "turn[ed] on whether state authority is pre-empted by the operation of federal law."[30] State jurisdiction is pre-empted whenever " 'it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' "[31] The Court observed that "Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development" must guide any pre-emption enquiry.[32]

Finding California's interest in deterring organized crime less compelling than the interest of tribes and the federal government in promoting the self-sufficiency and economic viability of tribal nations, the Court held states to be pre-empted from applying their gaming laws to Indian tribes.[33] The Court looked to federal policies and actions to conclude that a strong federal intent to pre-empt state action existed in the area. Moreover, the Court noted that unlike in the smoke shop cases, the Bands were not marketing merely an exemption from state sales taxes. It observed that "the Cabazon and Morongo Bands [were] generating value on the reservations through activities in which they have a substantial interest."[34] Finally, the Court reasoned that although the "Federal Government has the authority to forbid Indian gambling enterprises," federal policy "continue[d] to support . . . tribal enterprises, including those of the [Cabazon and Morongo Indian Tribes]."[35]

After *Cabazon*, Congress rushed to enact comprehensive gaming legislation. To that end, IGRA was passed on October 17, 1988. The main innovation of IGRA over previous proposals is its unique jurisdictional scheme. IGRA separates gaming into

29. *Id.* at 215 ("[Under] certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.") (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983)).

30. *Id.* at 216.

31. *Id.* (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-334 (1983)).

32. *Id.*

33. *Id.* at 221–222 ("[T]he 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, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club.").

34. *Id.* at 220.

35. *Id.* at 221.

three types—class I, class II, and class III. Class I gaming includes "social games [played] solely for prizes of minimal value" and "traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[36] Class II gaming means bingo, regardless of whether facilitated by an electronic aid or played in the traditional manner,[37] and non-banked card games[38] "explicitly authorized by the laws of the State."[39] Class III gaming includes everything not falling under class I or class II gaming—that is, banked card games, parimutel betting, slot machines, and other Las Vegas-style games.[40]

IGRA reserves to tribes the power to regulate class I gaming. It also exempts class I gaming from the Act's licensing, audit, and revenue allocation requirements. In effect, tribes are assured of complete autonomy in the oversight and management of class I gaming. However, since such gaming does not generate significant income for tribes, it receives little attention within the wider discourse of Indian gaming. Thus while important to cultural preservation and tribal sovereignty, the jurisdictional concession of section 2710(a)(1), by itself, fails to vest tribes with an economically valuable right.

By contrast, the ability to conduct class II gaming on Indian lands is economically valuable. IGRA allows for class II gaming within a regulatory environment that introduces National Indian Gaming Commission ("NIGC") oversight. Class II gaming remains within the jurisdiction of tribes, but tribes are permitted to conduct class II gaming only in states that permit gaming of that type, and only after the tribe adopts (and the Commissioner approves) an ordinance or resolution addressing the construction and maintenance of gaming facilities, the use of gaming funds, the process by which applicants are screened for employment, and the conditions under which the tribe agrees to provide outside audits to the Commission.[41]

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36. 25 U.S.C. § 2703(6) (2006). At least one plausible reading of the statute is that class I gaming is not limited to prizes of *de minimis* value, provided that such games are traditional forms of Indian gaming, and even then, traditional to Indian tribes as a whole, and not to any particular tribe.

37. *Id.* § 2703(7)(A)(i).

38. *Id.* § 2703(7)(B)(i).

39. *Id.* § 2703(7)(A)(ii)(I).

40. *Id.* § 2703(8). "The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming." *Id.*

41. *Id.* § 2710(b)(2). IGRA conditions the lawful operation of class II and class III gaming on a state's regulatory tolerance or legislative acceptance of the proposed gaming activity. The rule functionally preserves state policy interests in gaming by granting to tribes the authority to operate only games which are available to non-tribes in addition to games specifically offered to tribes under state law. California, for example, permits commercial and Indian bingo establishments, but limits slot

Under IGRA, tribal resolutions must limit the use of gaming revenues to five purposes: (1) funding tribal government operations; (2) providing for member and tribal welfare; (3) promoting tribal economic development; (4) contributing to charitable organizations; and (5) funding local government.[42] In addition, a tribe may make direct per capita payments to its members if it has a plan of allocation, approved by the Secretary of the Interior, and if such payments are subject to federal income taxation, and minors and legally incompetent members are assured of a method of distribution protective of their interests.[43]

Tribal resolutions may provide for management contracts. A management contract allows a non-tribal entity to perform the day-to-day business of a tribal gaming operation, subject to the approval of the NIGC Chairperson.[44] As part of its review of management contracts, the NIGC receives information about the financial condition and gaming experience of each person or organization having a financial interest or management responsibility in the tribal gaming facility.[45] Provided the management contractor does not pose a risk to the "regulation and control of gaming," the NIGC Chairperson will approve the contract whenever six statutory requirements aimed at protecting tribal interests are met.[46] The approval process is designed to guarantee that

machines, banked card games, and lotteries (other than the California State Lottery), to tribal gaming establishments. When California voters passed Proposition 1A in March of 2000, tribes gained an exclusive right to conduct class III gaming in California, subject to the requirement that they separately conclude a Tribal-State compact.

42. *Id.* §§ 2710(b)(2)(B)(i)–(v). The limitation of revenues to five purposes applies to both class II and class III gaming. *See* §§ 2710(b)(2)(B) (limiting uses of class II gaming revenues), (d)(1)(A)(ii) (applying standard of § 2710(b)(2)(B) to class III gaming).

43. § 2710(b)(3)(A)–(D).

44. *Id.* § 2711(a)(1).

45. *See id.* §§ 2711(a)(1)(A)–(C).

46. To be approved, a management contract must contain provisions for: (1) establishing accounting procedures and providing monthly financial reports to the tribe; (2) maintaining tribal access to the gaming operations; (3) guaranteeing creditor-subordinated payments to the tribe; (4) limiting repayment of development and construction costs; (5) defining the contract's duration (five years, unless otherwise approved by the NIGC Chairperson, in which case no more than seven years); and (6) terminating the contract. *See id.* §§ 2711(b)(1)–(6) (class II); § 2710(d)(9) (class III). *See also* §§ 2711(c)(1)–(2) (payment of a percentage of net gaming revenues); §§ 2711(e)(1)(A)–(D), (e)(2)–(4) (circumstances requiring disapproval). Complicating the approval process is the question of whether an agreement constitutes a management contract or a financing agreement. The distinction is important because an unapproved management contract is void *ab initio*. Thus, if a financing agreement is determined to be an unapproved management contract, then the agreement, along with its terms, including any waiver of tribal sovereign immunity, will be without legal effect. *See* Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp., 677 F.Supp.2d 1056, 1062 (2010) (finding that a financing agreement allowing bondholders to exercise control over management of tribal gaming facility is an ineffective management contract). At present, the NIGC has not published regulatory guidance

"Indian tribes (rather than outside parties) are the primary beneficiaries of Indian gaming and . . . that Indian gaming is shielded from organized crime and other corrupting influences."[47] Since 1993, the NIGC has approved 64 management contracts, enabling tribes to benefit from the experience and, in some cases, the name recognition of outside managers, such as Harrah's, in the promotion and operation of tribal gaming facilities.[48]

Regardless of whether a tribe conducts gaming through a management contract, IGRA establishes a process by which tribes may become substantially "self-regulated."[49] After a tribe maintains a gaming establishment for at least three years without violating any provisions relating to audits, licensing, and revenue allocation, the tribe may "petition the Commission for a certificate of self-regulation."[50] The Commissioner then must make a determination that the tribe has overseen gaming activity in such a way as to support a conclusion that the tribe has (1) effectively and honestly accounted for all revenues; (2) safely, fairly, and honestly operated its gaming facility; and (3) generally remained free of "evidence of" criminal or dishonest activity.[51] Additionally, the Commissioner must find that the tribe has adopted "adequate systems" for (1) accounting for revenues; (2) investigating, licensing, and monitoring employees involved with gaming activity; and (3) investigating, enforcing, and prosecuting violations of tribal gaming ordinances and regulations.[52] Lastly, the Commission must conclude that the tribe has "conducted the operation on a fiscally and economically sound basis."[53] If the Commissioner's findings favor the tribe, then the tribe will be issued a certificate of self-regulation. The certificate entitles the tribe to displace the monitoring functions of the NIGC, but it is

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on how to evaluate these two types of agreements, making it standard practice to submit all such agreements to the NIGC to obtain review and a declination letter. The declination letter is not binding upon the Chairperson, but may be accorded deference in actions involving the Agency. *See* Lawrence Roberts, NIGC General Counsel, Remarks to the 8th Annual Northwest Gaming Law Summit, The Seminar Group (Dec. 2, 2010) (on file with author).

47. Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 GAMING L. REV. 333, 333 (2004).

48. National Indian Gaming Commission, Approved Management Contracts, http://www.nigc.gov/Reading_Room/Management_Contracts/Approved_Management_Contracts.aspx (last visited July 9, 2011). The Harrah's brand is associated with tribal gaming in Arizona (Ak-Chin Indian Community of the Maricopa Indian Reservation), California (Rincon Band of Luiseño Mission Indians), Kansas (Prairie Band of Potawatomi Nation), North Carolina (Eastern Band of Cherokee Indians of North Carolina), and Washington (Upper Skagit Indian Tribe of Washington). *Id.*

49. 25 U.S.C. § 2710(c) (2006) (stating that the self-regulation process of section 2710(c) applies to class II gaming, but not class III gaming).

50. *Id.* § 2710(c)(3)(B).

51. *Id.* § 2710(c)(4)(A)(i)–(iii).

52. *Id.* § 2710(c)(4)(B)(i)–(iii).

53. *Id.* § 2710(c)(4)(C).

revocable for cause by a majority vote (two members) of the Commission after an opportunity for hearing.[54]

Unlike class II gaming, class III gaming cannot be conducted in the absence of a Tribal-State compact.[55] IGRA attempts to balance federal, state, and tribal interests by affording states a meaningful role in a tribe's decision to engage in Las Vegas–style gaming. The Act makes class III gaming unlawful when a tribe fails to meet three substantive requirements. These requirements examine (1) whether the tribe has authorized the gaming activity; (2) whether state law permits the type of proposed gaming activity; and (3) whether a valid compact has been entered into by the tribe and the state.[56] Only if the state in which a tribe intends to run a class III gaming outfit "permits" the type of gaming proposed may a tribe engage in class III gaming. Questions then arise with respect to what constitutes "permits." In the Ninth Circuit at least, the Court has distinguished cases of "patent bootstrapping"—where the compact on its own meets both the compact requirement and the "permits" requirement—from cases where a law external to the compact permits the type of gaming in question.[57]

Often the meaning of "permits" is litigated, with federal courts splitting over the proper application of the "permits" requirement when a state has authorized a class of gaming, but not the operation of a specific game. One view reads the requirement to include games which, although not specifically permitted under state law, nonetheless form part of the same class of games of which permitted games are a member. A less expansive interpretation, which applies to class III gaming in California, limits tribes to specifically permitted games.[58]

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54. *See id.* §§ 2706(b)(1)–(4); § 2710(c)(6).

55. *See* HARDY MYERS, AMERICAN INDIAN LAW DESKBOOK 416 (Clay Smith ed., 3d ed. 2004) ("The statute is based on a legislative conclusion that class III gaming should occur as an ordinary matter only pursuant to a tribal-state compact").

56. 25 U.S.C. §§ 2710(d)(1)(A)–(C) (2006).

57. *Id.* §§ 2710(d)(1)(C) (compact requirement), (B) ("permits" requirement). The Ninth Circuit's decision in *Artichoke Joe's California Grand Casino v. Norton*, clarifies that a state permits gaming if there is a basis in state law, independent of a Tribal-State compact, for concluding that the state has authorized the gaming activity. California's Proposition 1A is such a basis. *See* Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 720–721 (9th Cir. 2003) ("Proposition 1A [the referendum effecting state constitutional change to permit Las Vegas-style gaming by tribes] distinguishes the present controversy from the 'bootstrapping' cases. . . . Thus, there is law—separate from the compact itself—that 'permits such gaming' in certain circumstances.") (quoting 25 U.S.C. § 2710(d)(1)(B) (2003)).

58. In the Ninth Circuit, for example, a categorical approach is used to assess a state's policy concerning class II gaming, such that if the state permits any form of class II gaming, then it will be held to permit every game within that class. *See* Sycuan Band v. Roache, 54 F.3d 535, 535 (9th Cir. 1994). Class III gaming is to be distinguished. Whether a state permits a class III game will depend upon the state's policy concerning the specific game (viz. parimutuel betting versus live banking and

Provided state law permits class III gaming and a tribe has passed a resolution authorizing class III gaming, that tribe may require the state to negotiate a Tribal-State compact.[59] The statutory framework for the negotiation, approval, and enforcement of compacts is detailed and complex. IGRA imposes upon states a general duty to negotiate in good faith.[60] If a state fails to negotiate in good faith, then the affected tribe may sue the offending state in federal court.[61] But before the state incurs such an obligation, the tribe first must request the state to "enter into negotiations."[62] If, through negotiation with the state, a tribe is successful in obtaining a compact, then the compact becomes effective when the Secretary of the Interior publishes a notice of approval in the Federal Register.[63]

Although IGRA empowers states to bargain for the conditions under which class III gaming will be conducted, states do not enjoy boundless discretion in negotiating Tribal-State compacts. States are precluded from obtaining certain concessions from tribes in exchange for class III gaming rights, and violations of the Act by a state acting in bad faith give rise to a cause of action under the Act. To fence in the negotiations between states and tribes, IGRA lists types of provisions that may be included in Tribal-State compacts. Among the permissible provisions are those relating to the extension of criminal and civil state laws to Indian lands for the purpose of policing gaming activity, the remedies available to either party in the case of breach, the cost of regulating tribal gaming activity, and any other subjects which are "directly related to the operation of gaming activities."[64] Although IGRA recognizes as legitimate a state's interest in defraying regulatory costs, the Act does not permit the imposition of a "tax, fee, charge, or other assessment" on gaming activities.[65]

To ensure that the Act's mechanism of achieving government-to-government parity in negotiations between states and tribes functions as intended, Congress created a tribal right of action in the federal district courts against a state which refuses

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percentage card games). *See also* Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1994) ("IGRA does not require a state to negotiate over one form of [c]lass III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity . . . then it also must allow Indian tribes to engage in that same activity . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.").

59. 25 U.S.C. §§ 2710(b), (d)(1)(A)(ii) (2006).
60. *Id.* § 2710(d)(3)(A).
61. *Id.* § 2710(d)(7)(B)(i).
62. *Id.* § 2710(d)(3)(A).
63. *Id.* § 2710(d)(3)(B).
64. *Id.* § 2710(d)(3)(C)(vii).
65. *Id.* § 2710(d)(4).

to enter into negotiations over class III gaming, or which, having accepted a tribe's invitation to deal, later fails to negotiate in good faith.[66] A state presumptively negotiates in bad faith where it seeks to impose upon a tribe as a condition of operating a class III gaming facility a tax, fee, charge, or similar assessment.[67] A state also negotiates in bad faith if its decision not to pursue tribal gaming cannot be linked to considerations of the "public interest, public safety, criminality, financial integrity, [or] adverse economic impacts on existing gaming activities."[68]

Upon a finding of bad faith, IGRA requires the district court in which an action is brought to order the state and tribe to "conclude . . . a compact within a 60-day period."[69] If the sixty-day period expires and the state and the tribe have not concluded a Tribal-State compact, then the court appoints a mediator, who then must select from two compacts, which together constitute each party's last best offer.[70] The mediator then must notify the parties as to which compact was selected, whereupon the state may consent to the selection within sixty days of the compact's submission to the mediator.[71] If the state does not consent to the mediator's selection within the prescribed time, then the mediator notifies the Secretary of the Interior, who then crafts an Administrative compact allowing the tribe to engage in class III gaming notwithstanding the state's disapproval.[72]

In any case, the resulting compact, whether Tribal-State or Administrative, must be approved by the Secretary of the Interior and published in the Federal Register.[73] A compact may be disapproved if it violates any of IGRA's provisions, any federal law unrelated to jurisdiction over gaming on Indian lands, or if it contravenes "the trust obligations of the United States to Indians."[74] Where the Secretary of the Interior takes no action on a submitted compact for more than forty-five days, the compact automatically enters into force, but "only to the extent the compact is consistent with the provisions of [IGRA]."[75] And as with class II gaming, a tribe may enter into a management contract for the operation of class III facilities.[76]

66. *Id.* § 2710(d)(7)(A)(i).
67. *Id.* § 2710(d)(4).
68. *Id.* § 2710(d)(7)(B)(iii)(I).
69. *Id.* § 2710(d)(7)(B)(iii).
70. *Id.* § 2710(d)(7)(B)(iv).
71. *Id.* § 2710(d)(7)(B)(vi).
72. *Id.* § 2710(d)(7)(B)(vii).
73. *Id.* §§ 2710(d)(8)(A),(C).
74. *Id.* §§ 2710(d)(8)(B)(i)–(iii).
75. *Id.* § 2710(d)(8)(C).
76. *Id.* § 2710(d)(9).

In the years following IGRA's passage, tribes sought to utilize IGRA's federal cause of action to bring recalcitrant states in line with IGRA's carefully articulated compromise. But when states raised the issue of state sovereign immunity from suit, the issue became one for the U.S. Supreme Court to resolve. In *Seminole Tribe of Florida v. Florida*,[77] appealing from an unfavorable Eleventh Circuit decision, the Seminole Tribe of Florida raised the question of whether Congress could abrogate state immunity under the Indian Commerce Clause, and if so, whether IGRA properly expressed such an intent.[78]

The Court in *Seminole Tribe*, overruling its prior holding in *Pennsylvania v. Union Gas Co.*,[79] which held the Interstate Commerce Clause to be a sufficient constitutional ground for Congressional limitation of state sovereign immunity, concluded that IGRA reflected an unequivocal expression by Congress of its intent to abrogate state sovereign immunity in the limited area of Tribal-State compacts.[80] However, in addressing the Indian Commerce Clause's grant of authority, the Court ruled that the Eleventh Amendment was not susceptible of limitation under the Indian Commerce Clause.[81] The Court additionally found that the *Ex parte Young*[82] exception did not apply, since it was clear from IGRA's detailed scheme of enforcement that Congress intended suits to originate only in respect of states, not state officials acting in their respective capacities as state officials.[83] The Court's holding leaves tribes at a particular disadvantage, preserving the requirement that they negotiate over class III gaming

77. 517 U.S. 44 (1996).

78. *Id.* at 44.

79. 491 U.S. 1 (1989).

80. 517 U.S. at 56 ("Here, we agree with the parties, with the Eleventh Circuit in the decision below . . . and with virtually every other court that has confronted the question that Congress has in *§ 2710(d)(7)* provided an 'unmistakably clear' statement of its intent to abrogate.") (footnote omitted) (quoting 25 U.S.C. § 2710(d)(7)(A)(i) (1996)).

81. *Id.* at 72 ("In overruling *Union Gas* today, we 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.").

82. 209 U.S. 123 (1908) (holding that federal courts may enjoin state officials from enforcing state laws without offending the Eleventh Amendment's bar to private-party suits against states, whenever those officials have a general or statutorily imposed duty to enforce a law which violates the U.S. Constitution.)

83. *Id.* at 75-76 ("Congress does not have authority under the Constitution to make the State suable in federal court under *§ 2710(d)(7)*. Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under *§ 2710(d)(3)*.").

rights, yet depriving them of any means by which to enforce the Act against non-compliant and non-consenting states and state officials.

Seminole Tribe marked an end to tribe-initiated suits against non-consenting states.[84] The loss of IGRA's main compromise mechanism thus engendered a new negotiating environment for Tribal-State compacts. In the absence of federal judicial review, states are free to ignore tribal requests pertaining to class III gaming rights. Alternatively, states can drive hard bargains and wrest significant concessions from tribes knowing that a tribal cause of action will not survive a state's assertion of sovereign immunity. These concessions range from "a share of gaming profits to relinquishment of centuries-old treaty rights."[85] As one commentator suggests, "without recourse to the federal courts, the tribes ha[ve] little choice but to seek resolution at the bargaining table or by pressing their case in the court of public opinion."[86]

Due to IGRA's severability provision, federal courts have been left with the question of how the compact process operates post-*Seminole Tribe*.[87] Most courts agree that "not only d[oes] the tribal-state compact requirement survive, but that the Interior Secretary's power to issue an administrative 'compact' provides a tribe recourse when a state fails to negotiate in good faith and refuses to consent to suit."[88] Most courts, excluding the Fifth Circuit, would hold as well that the rules and regulations issued by the Department of the Interior prescribing procedures "to permit [c]lass III gaming when a [s]tate interposes its immunity from suit by an Indian tribe in which the tribe accuses the state of failing to negotiate in good faith," are valid and enforceable.[89]

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84. California has consented to suit. *See* Cal. Gov't. Code § 98005 (2010) ("if the tribe in its discretion seeks to compel execution of the Gaming Compact through court action, the State of California hereby submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to execute the Gaming Compact . . . upon a tribe's request therefor."). *Seminole Tribe* ended tribe-initiated suits against non-consenting states but did not affect the power of the federal government, through the U.S. Attorney General, to sue states in federal court.

85. LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE, *supra* note 14, at 58.

86. *Id.* at 58–59.

87. *See* 25 U.S.C. §2721 (2006); RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 7, at 96.

88. RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 7, at 97.

89. Class III Gaming Procedures, 64 Fed. Reg. 69,17536 (Apr. 12, 1999) (to be codified at 25 C.F.R. pt. 291). *See* 25 C.F.R. § 291 (2008). *Cf.* State of Texas v. United States, 497 F.3d 491, 511 (5th Cir. 2007) ("The Secretarial Procedures violate the unambiguous language of IGRA and congressional intent by bypassing the neutral judicial process that centrally protects the state's role in authorizing tribal Class III gaming. Congress, to be sure, could omit states entirely from Class III gaming

Yet despite cases that support Administrative compacts, such compacts are rare—the field of Indian gaming in the aftermath of *Seminole Tribe* increasingly is modeled upon states' newfound power to bargain outside of good faith and government-to-government parity. This unequal legal structuring of privileges and rights, which tilts in favor of states, has led to what scholars Kathryn Rand and Steven Light describe as the "increasing politicization of Indian gaming," a politicization that potentiates the undermining of tribal sovereignty, self-sufficiency, and cultural independence.[90] Whereas prior to *Seminole Tribe*, tribes could rely upon an independent factfinder to referee the oftentimes contentious process of compacting, now they are forced to participate in a high-stakes political gamble in which the principal element of chance is public opinion. These circumstances yield the conclusion that as long as class III gaming remains the primary means by which most tribes achieve economic and cultural self-sufficiency, the politicization of the compacting process ultimately influences the range of possible outcomes for tribes, and by extension, Native Americans. In the following section, this conclusion will be tested in the context of California, a state which, because of its population and number of tribes operating casinos within its borders, typifies the greater discourse of Indian gaming.

IV. INDIAN GAMING IN CALIFORNIA

In California, perhaps more than in any other state, Indian gaming is a controversial and highly political issue. California lays claim to the most expensive referendum on Indian gaming, Proposition 5, which led to a series of litigation and to the passage, by California voters, of Proposition 1A.[91] Former governor

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regulation"). *But see id.* at 513 ("When Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute") (Dennis, J., dissenting).

90. LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE, *supra* note 14, at 51.

91. Tribes and special interest groups spent over $92 million on Proposition 5 media campaigns. Popularly referred to as the "Indian Self-Reliance" initiative, Proposition 5 passed by 62.4 percent of the vote. It set forth model Tribal-State compacts and amended California law to enable class III gaming. In *Hotel Employees & Restaurant Employees International Union v. Davis*, the California Supreme Court determined that Proposition 5 was unconstitutional because then-article IV, section 19(e), of the State Constitution prohibited "'casinos of the type currently operating in Nevada and New Jersey,'" and class III gaming was found to be within the scope of the prohibition. 981 P.2d 990, 990 (Cal. 1999) (quoting CAL. CONST. art. IV, § 19, subd. (e), added by initiative, Gen. Elec. (Nov. 6, 1984)). *See also* League of Women Voters: Proposition 5 (Feb. 16, 1999), http://www.smartvoter.org/1998nov/ca/state/prop/5/; NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES,

Arnold Schwarzenegger ran on the promise that he would make California gaming tribes pay "their fair share" of taxes.[92] The "fair share" argument proved particularly important in getting Proposition 68 on the ballot in the 2004 election, a measure which, although rejected, would have expanded non-tribal commercial gaming and authorized the renegotiation of compacts to obtain a 25 percent draw on all class III revenues.[93] More recently, candidate David Peters ran a campaign for the District 37 Republican State Senator seat in which he highlighted the "need to force Indian casinos to pay for [the] opportunity [to conduct gaming.]"[94] What these anecdotes reveal is the extent to which the success of California gaming tribes has kept Indian gaming at the interstices of law and politics.

Indian gaming's visibility in the political and cultural makeup of California is due in part to the public's role in effecting legislation, such as Propositions 5 and 1A. It also is a reflection of the state's significant interest in exacting lucrative revenue sharing agreements from tribes and, conversely, tribes' historic resistance to the imposition of external restrictions from other sovereigns.[95] When a tribe negotiates a compact in California, interests such as county boards, citizen action groups, and Nevada casino organizations bear on the process. This is not to imply that third-party involvement is undesirable; indeed, such participation may yield better, community-minded results than without such involvement, as when tribes and counties develop mutually beneficial and sustainable relationships built upon an honest and shared commitment to each other. But, one should be present to the possibility that the infusion of localized interests into intergovernmental affairs may complicate and further politicize tribal sovereignty to the detriment of tribal institutions and values.

LAWS, AND DOCUMENTS 14-15 (Bryan H. Wildenthal ed., 2003). Within seven months after *Hotel Employees*, California voters passed Proposition 1A, which had the effect of amending the State's Constitution to permit class III gaming through Tribal-State compacts. As with Proposition 5, Proposition 1A enjoyed strong support (64.4 percent of votes cast). *See* League of Women Voters, Proposition 1A (Apr. 13, 2000), http://www.smartvoter.org/2000/03/07/ca/state/prop/1A/.

92. LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE, *supra* note 14, at 72.

93. League of Women Voters California Education Fund: Proposition 68 (Dec. 15, 2004), http://www.smartvoter.org/2004/11/02/ca/state/prop/68/. At the time of the election, a majority of California tribes paid into the SDF and RSTF pursuant to the 1999 compacts. The 1999 compacts use a progressive rate schedule for SDF contributions between zero and thirteen percent. Fixed per device license fees are paid into the RSTF at a rate ranging from zero to $4350.

94. *See* David Peters, *Indian Gaming Revenue*, League of Women Voters (Apr. 23, 2008), http://www.smartvoter.org/2008/06/03/ca/state/vote/peters_d/paper1.html.

95. *See* JEFF CORNTASSEL & RICHARD C. WITMER II, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 33 (2008).

Local reactions to tribal sovereignty, often elicited in response to a tribe's decision to pursue gaming, may belie historically anti-tribal and anti-Native attitudes that, while pre-dating Indian gaming, find new vitality in a decade of increasingly plausible Native viability. These attitudes are not merely interesting for the sake of study, nor because they are locatable in the discourse of gaming as a partial consequence of the financial interests involved, but, importantly, because they contribute to (and are reflected in) the formation of law and policy. The point may be ordinary; certainly law and policy are a creature of public will at some level. But in the post-*Seminole Tribe* climate, to discount the effect of public opinion on tribal outcomes, or conversely the effect of legal outcomes on public perceptions, is to miss the mark altogether.

When Arnold Schwarzenegger won the 2003 recall election over Grey Davis, "[r]ich Indian images . . . were instrumental in his new policy agenda as governor."[96] Within months after taking office, the Governor began to renegotiate compacts with California tribes.[97] As part of the renegotiation, five tribes were made to pay higher licensing fees and fund a billion-dollar bond in exchange for expanded tribal gaming rights.[98] In subsequent years, nine other tribes agreed to similar increases in revenue sharing and licensing fees. When the Sycuan Band of the Kumeyaay Nation, for example, renegotiated its compact, it incurred an obligation to pay more than $20 million annually into state funds. The

96. *Id.* In the month preceding the California gubernatorial recall election, then-candidate Arnold Schwarzenegger appeared in a political advertisement in which he accused tribes of making billions of dollars without paying taxes to the state. *See* Joe Mathews, *Arnold Schwarzenegger Ad Watch*, L.A. TIMES, Sept. 24, 2003, *available at* http://www.bluecorncomics.com/stype39j.htm. *See also* Jeff Corntassel, *Indigenous Governance Amidst the Forced Federalism Era*, 19 KAN. J.L. & PUB. POL'Y 47, 51 (2009).

97. *See* Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1024 (9th Cir. 2010) ("Instead of requesting funds to help defray the costs of gaming, or to benefit Indian tribes, the State[,] [under Governor Schwarzenegger,] demanded that [the] Rincon [tribe] pay a significant portion of its gaming revenues into the State's general fund.").

98. The tribes' individual contributions to the state under section 4.3.3(a) of the amended compacts range from $17.4 million to $33.8 million per year. *See* California Gambling Control Commission, Ratified Tribal-State Compacts (Apr. 4, 2011), http://www.cgcc.ca.gov/?pageID=compacts. *See also* Hollywood Park Land Co. v. Golden State Transp. Fin. Corp., 178 Cal. App. 4th 924, 929 (Cal. App. 3d Dist., 2009) ("Governor Schwarzenegger and five of the tribes agreed to amend their compacts to allow the tribes, upon the payment of substantial fee increases, to operate more than 2,000 slot machines . . . the five tribes are required to pay the State, among other payments, $100 million per year for 18 years."). Excluding per device licensing fees, the five tribes, consisting of the Pauma Band of Luiseño Mission Indians, Pala Band of Luiseño Mission Indians, Rumsey Indian Rancheria of Wintun Indians, United Auburn Indian Community, and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians, are responsible for annual payments totaling $93.6 million.

Sycuan Band compact is typical of other Tribal-State compacts under Governor Schwarzenegger.

The first compact between the Sycuan Band and California was signed in 1999.[99] It limited class III gaming devices to 350 and required a license for each additional device up to a maximum of 2,000 devices. Issuance of a license was conditioned upon payment of a fee commensurate with a rate schedule established in the compact.[100] All of the license fees were to be paid into a Revenue Sharing Trust Fund ("RSTF"), which would distribute tribal gaming revenues to non-compact tribes in the order of $1.1 million per tribe.[101] In addition to the license fees, the Sycuan Band was required to pay into a Special Distribution Fund ("SDF") a percentage of its net wins ranging from seven percent to thirteen percent, based upon the number of devices the Band operated. In 2006, Governor Schwarzenegger and the Band renegotiated the 1999 compact. In pertinent part, the compact enables the Band to operate 3,000 additional class III devices in exchange for its becoming obligated to pay $20 million annually and fifteen percent of net wins generated from all devices in excess of 2,000.[102] The Band also is liable for quarterly contributions of $750,000 to the RSTF.[103]

The amended Sycuan Band compact reflects the hammering out of three key legal issues in the area of Tribal-State compacts: namely, (1) the constitutionality of Propositions 5 and 1A under the Fifth and Fourteenth Amendments; (2) the propriety of revenue sharing agreements; and (3) the effect of IGRA on tribal sovereignty generally. Each of these legal questions invites discussion about the allocation of rights under federal law—an allocation which presupposes certain views about Native Americans and tribes. Among these views are that tribal nations are political

99. The "1999 compact" is the model compact for 57 Tribal-State compacts entered into by Governor Gray Davis and the tribes in September of 1999. The 1999 model compact capped the number of class III gaming devices at 2,000 per tribe.

100. *See* Compact, Tribal-State Compact Between the State of California and Sycuan Band of Mission Indians (1999), http://www.cgcc.ca.gov/documents/compacts/original_compacts/Sycuan_Compact.pdf. For 351 to 750 devices, the annual fee per device was set at $900. For 751 to 1250 devices, the annual fee per device increased to $1950. Finally, for 1251 up to a maximum of 2000 devices, the annual fee per device was $4350.

101. The RSTF provides a maximum benefit of $1.1 million per non-compact tribe, defined as any tribe, including non-gaming tribes, operating less than 350 devices. *See* Fort Independence Indian Cmty. v. California, 679 F.Supp.2d 1159, 1164 (C.D. Cal. 2009).

102. Amendment to the Tribal-State Compact Between the State of California and the Sycuan Band of the Kumeyaay Nation §§4.3.1(b)(i)-(ii), California Gambling Control Commission, Ratified Tribal-State Compacts (2006), http://www.cgcc.ca.gov/documents/compacts/amended_compacts/sycuan_2006_amendment.pdf.

103. *Id.* at §4.3.2.2.

entities and not ethnic or racial groups, and that some quantum of sovereignty is inherent to tribes.

The constitutionality of Propositions 5 and 1A was decided by the Ninth Circuit in *Artichoke Joe's California Grand Casino v. Norton*,[104] a case involving California card clubs and charities prohibited under state law from offering casino-style gaming. The clubs challenged the amendment to the California Constitution pursuant to Proposition 1A which permitted casino-style gaming on Indian lands. Their argument, grounded in equal protection claims under the Fifth and Fourteenth Amendments, was rejected by the Court, which cited *Morton v. Mancari*[105] for the proposition that legislation that affects tribes differently than non-tribal entities is not racially-based and will not be disturbed where it "'can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'"[106]

In reaching a decision favorable to tribes, the Court visited the issue of whether California permitted gaming.[107] The Court distinguished California from other jurisdictions where the state had "bootstrapped" the "permits" requirement, by noting that California voters had voted for Propositions 5 and 1A, thus creating law external to the compacts, which could meet the "permits" requirement without simultaneously satisfying the compact requirement.[108] Despite this finding, the Court was unable to discern in the legislative history of IGRA or in any case covering the issue whether the permits requirement enfolded an understanding of what states allow on non-Indian lands, an issue raised by the card clubs. If the permits requirement were read to mean "what states allow on non-Indian lands," then it would disallow the legislation at issue. Because the Court could not interpret IGRA to arrive at a settled meaning of the permits requirement, it applied the trust doctrine—a canon of construction requiring courts to construe statutes enacted for the benefit of tribes liberally in favor of tribes.[109]

Finding that IGRA "is undoubtedly a statute passed for the benefit of Indian tribes,"[110] the Court concluded that California

104. 353 F.3d 712 (9th Cir. 2003).

105. 417 U.S. 535 (1974).

106. *Id.* at 732, Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 732 (9th Cir. 2003) (quoting 417 U.S. at 555).

107. RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 7, at 105.

108. 353 F.3d at 721 ("Proposition 1A distinguishes the present controversy from the 'bootstrapping' cases").

109. Also known as the *Blackfeet Tribe* Presumption. *See id.* at 729 (Whenever ambiguity exists as to the proper interpretation of federal law enacted for the benefit of tribes, the *Blackfeet Tribe* presumption directs federal courts to resolve the ambiguity in favor of the tribes).

110. *Id.* at 730.

permitted casino-style gaming. The court noted that its adoption of the Tribes' argument was not "because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes."[111] The Court additionally held that the two exceptions to the trust doctrine—deference to agency interpretation and avoidance of constitutionally doubtful interpretations of a statute—did not compel a different result.[112]

In deciding the card clubs' equal protection claims the court embarked on a two-part enquiry: (1) whether "the distinction between Indian and non-Indian gaming interests is a political or a racial classification," and (2) whether "legitimate state interests justify the grant to Indian tribes of a monopoly on class III gaming."[113] Under the first prong, the Court held that a more deferential standard of review than strict scrutiny applied to the constitutionality of IGRA and Proposition 1A. The Court observed that preferential treatment of Indian tribes for purposes of gaming under IGRA and Proposition 1A was justified in respect of tribes' political, rather than racial, composition. The Court concluded that IGRA therefore bears a rational relationship to Congress' trust obligations toward Indian tribes.[114] Specifically, it held that:

> IGRA is rationally related to Congress' stated purposes of encouraging tribal autonomy and economic development . . . IGRA and the Tribal-State compacts further that goal by authorizing gaming. Congress recognized that the revenue generated from pre-IGRA tribal gaming operations 'often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.'[115]

As to the card club's contention that Proposition 1A was unconstitutional, the Court first outlined California's stated reasons for the legislation before concluding that Proposition 1A represented a constitutional expression of legitimate state interests.[116]

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111. *Id.* at 730.

112. *Id.* ("Neither of the two exceptions to the application of the *Blackfeet* presumption causes us pause.").

113. *Id.* at 731.

114. *Id.* at 735.

115. *Id.* at 736 (quoting S. Rep. No. 100–446, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072).

116. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 737 (9th Cir. 2003) ("California has two legitimate interests to which Proposition 1A bears a rational connection. The first is the regulation of 'vice' activity—a function that lies at the heart of state's police powers—by permitting certain forms of gambling only on the lands of sovereign tribal entities that enter into government-to-government compacts with the State. The second is to promote cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency.").

In finding Proposition 1A constitutional, the Court recognized both the interests of tribal nations and California in enacting comprehensive gaming legislation, and cleared the last legal impediment to the operation of class III gaming under Tribal-State compacts.[117] The decision thus signaled the beginning in earnest of tribal gaming in California.

In the same year as *Artichoke Joe's*, the Ninth Circuit heard the case of *Coyote Valley Band of Pomo Indians v. California*.[118] *Coyote Valley* involved a challenge to the revenue sharing and labor relations provisions of California's Tribal-State compacts. The Court astutely observed at the outset of its decision that "[t]he passage of IGRA did not end the fight over Indian gaming in California."[119] The Court then went on to find no merit in the Tribe's contention that Proposition 5 represented a tax prohibited by IGRA because California had offered meaningful concessions in return for requiring tribes to contribute to the RSTF and the SDF. While the Court allowed for the possibility that revenue sharing and labor relations provisions could be made to violate IGRA, it nonetheless held that as constituted, the provisions did not fall outside of what IGRA allows.

The decision makes clear that states (within the Ninth Circuit) may exact significant concessions from tribes that will not be disturbed by a reviewing court. These concessions include labor relations provisions that apply state labor laws to Indian lands, provisions that require tribes to pass fire and safety laws that parallel state building and health codes, and provisions that require gaming tribes to support non-gaming tribes through funds established and managed by the state. As can be inferred, *Coyote Valley* validates states' substantial power to limit tribal sovereignty for those tribes that choose to pursue class III gaming.

Following *Coyote Valley*, whatever uncertainty existed over the sovereignty of gaming tribes was settled in part by the Ninth Circuit's opinions of *Lewis v. Norton*[120] and *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*.[121] In *Lewis*, the

117. *Id.* at 741 ("It is rational for Californians to be willing to recognize the separate sovereign interests of the tribes and to allow the tribes to make a different moral and economic choice than is made by the State as a whole. By executing the Tribal-State Compacts, California has sought to bring about a 'new era of tribal-state cooperation in areas of mutual concern' . . . California's decision to grant to tribes a monopoly on class III gaming activities is rationally related to both the State's interest in protecting its citizens from the particular harms associated with large-scale gaming operations *and* the State's interest in fostering relations with tribes as separate sovereigns").

118. 331 F.3d 1094 (9th Cir. 2003).

119. *Id.* at 1098.

120. 424 F.3d 959 (9th Cir. 2005).

121. 602 F.3d 1019 (9th Cir. 2010).

Court reaffirmed tribal sovereignty in cases involving tribal membership disputes. Citing the U.S. Supreme Court decision of *Santa Clara Pueblo v. Martinez*[122]—finding tribes to be "'independent political communities'"[123] with "'original natural rights' in matters of local self-government"[124]—the Ninth Circuit determined that questions of tribal enrollment were committed to tribes in the exercise of inherent sovereignty.[125] The Court refused to interpret IGRA as a "broad waiver of sovereign immunity" providing a federal right of action whenever a tribe fails to enroll new members, and looked to IGRA and federal regulations in concluding that "tribal immunity bars suits to force tribes to comply with their membership provisions, as well as suits to force tribes to change their membership provisions."[126] Although the U.S. Supreme Court had advanced a strong conception of tribal sovereignty in the narrow area of tribal membership as far back as 1978, *Lewis* reframes and revitalizes that view in the context of the modern-day "economically valuable premium on tribal membership."[127]

In 2010, five years after *Lewis*, the Ninth Circuit addressed tribal immunity from state taxation. In *Rincon*, the State of California sought to reverse an unfavorable lower court decision in which the court ruled that state insistence upon general fund revenue sharing in Tribal-State compact negotiations violates IGRA's prohibition on state taxation of gaming revenues[128] and its tandem requirement that class III negotiations be conducted

122. 436 U.S. 49 (1978).

123. *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. 515, 559 (1832)).

124. *Id.* (quoting Worcester v. Georgia, 31 U.S. 515, 559 (1832)).

125. 424 F.3d at 963.

126. *Id.* at 961.

127. *Id.* at 963. The articulation—first by the U.S. Supreme Court, then by the Ninth Circuit—of the effective bounds of tribal sovereignty in matters affecting tribal membership demonstrates what one scholar has styled the "spatial impression" of the "American sentiment of colonial antitribalism." KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS 171–172 (2007). Kevin Bruyneel explains that "[t]he spatial impression is that indigenous tribes can express sovereignty, if at all, only as narrowly conceived internal self-governance, severely bounded as to geographical and demographic reach." *Id.* at 172. To some extent, both the Supreme Court and the Ninth Circuit acknowledge a robust, if not absolute, role for tribes in the propriodescriptive process of membership determination. However, both courts, by way of Bruyneel's "spatial impression," "exceptionalize" that role within a jurisprudential tradition marked by the active restraint and cordoning off of tribal sovereignty whenever tribal ambition conflicts with important non-Native interests. Because tribal membership has few serious implications for non-tribal actors, it remains, as a function of tribal governance, free from federal and state encroachments of the kind associated with gaming. *See* 424 F.3d at 961 (framing tribal self-governance over "local" concerns as an exception to the legal doctrine that tribes are domestic dependent sovereigns).

128. 25 U.S.C. §§ 2710(d)(3)(C)–(d)(4) (2006).

in good faith.[129] The factual predicate for the litigation involved the renegotiation of the Rincon Band of Luiseño Mission Indians' 1999 compact. Having developed a successful gaming operation on its reservation near San Diego, the Tribe requested additional gaming devices in March of 2003. Negotiations began with Governor Gray Davis, but "quickly assumed a decidedly different tone" when in November of that year Arnold Schwarzenegger became governor.[130] Under the new governor, expanded gaming rights were conditioned upon significant contributions to California's general fund.[131] The Tribe resisted general fund payments on the grounds that they constituted a tax on gaming activities, and filed a bad faith lawsuit compelling the State to negotiate or, failing that, to submit to IGRA-type "baseball arbitration."[132] The District Court granted summary judgment in favor of the Tribe and the State appealed.

The appeal returned the Ninth Circuit to the imperfectly defined boundary between revenue sharing and state taxation. Earlier, in *Coyote Valley*, the Court had opined that revenue sharing, as a means to offset the negative externalities of gaming, conformed to IGRA's express purposes because "the tribes themselves suggested [the funds], and were willing to pay into them in exchange for the 'meaningful concession' of constitutional exclusivity."[133] The Court explained that, under *Coyote Valley*, reve-

129. *Id.* § 2710(d)(3)(A).

130. Rincon Band of Luiseño Mission Indians v. Schwarzenegger, 602 F.3d 1019, 1024 (9th Cir. 2010). *See also* Frank Buckley & Kimberley Osias, *Gov. Schwarzenegger Hits Ground Running*, CNN Politics (Nov. 18, 2003), http://articles.cnn.com/2003-11-17/politics/elec04.schwarzenegger_1_entire-political-climate-car-tax-maria-shriver?_s=PM:ALLPOLITICS.

131. The State's initial offer permitted 900 gaming devices beyond the 1600 already in operation. The State also assured the Tribe of non-tribal exclusivity in the Tribe's gaming region—a concession of little value because the State Constitution and the 1999 compacts already provided for non-tribal exclusivity. In exchange for additional devices and "exclusivity," the State expected to receive fifteen percent of the net win on the additional devices and a fifteen percent annual fee determined with reference to the Tribe's 2004 total net gaming revenues. The Tribe countered with a proposal of per device fees, but insisted that payments be made to the RSTF and SDF, not the general fund. The State held firm to its demand for general fund revenue sharing, but offered to reduce the annual fee to ten percent and to extend the compact for five years. The Tribe rejected the State's proposal. The last and final offer, which the Tribe similarly dismissed, reduced the number of additional devices to 400 and required the Tribe to make a two million dollar annual payment to the RSTF and to credit the State's general fund twenty-five percent of the Tribe's net win on the 400 devices. The last offer included an analysis by California's financial expert finding the projected benefit to the Tribe to be two million dollars per year while the anticipated gain to the State would be thirty-eight million dollars per year; the Tribe thus would pay California ninety-five percent of new revenue (over its existing operation) and retain only five percent of the same. *See* 602 F.3d at 1024–1026.

132. *See* 25 U.S.C. §§ 2710(d)(7)(B)(iii)–(vii) (2006).

133. 602 F.3d at 1033 (quoting In re Indian Gaming Related Cases v. California, 331 F.3d 1094, 1112-15 (9th Cir. 2003).

nue sharing would be proper if it (1) limited the expenditure of funds to uses "directly related to the operation of gaming activities[;]"[134] (2) was compatible with the purposes of IGRA;[135] and (3) was the product of a "meaningful concession."[136]

Applying the three-part standard to Rincon's negotiations with the State, the Court determined that general fund revenue sharing "has undefined potential uses [and] . . . [t]herefore, . . . cannot be said to be directly related to gaming."[137] It further held that general fund revenue sharing, when motivated by state budget deficits, exceeds what IGRA allows, as the only protectible state interests in compact negotiations are those pertaining to organized crime and game integrity.[138] Lastly, the Court observed that general fund revenue sharing cannot constitute adequate consideration for exclusive tribal gaming rights since California tribes "already fully enjoy[ ] that right as a matter of state constitutional law."[139]

The Ninth Circuit's opinion reigns in state excesses in compact negotiations by preserving tribal immunity from state taxation. *Rincon* importantly reinforces the distinction, however slight, between permissible revenue sharing and impermissible taxation. It also reverses policy under Governor Schwarzenegger in which compact negotiations were viewed as opportunities to grow the State's general fund. Reading the decision, it is clear that Congress intended tribes, not states, to be the primary beneficiaries of Indian gaming, and that, notwithstanding Congress' devolution of power in the area of class III gaming, tribes retain attributes of sovereignty unaffected by IGRA. As with *Lewis*, *Rincon* supports a limited conception of tribal sovereignty; essentially, whatever is not carved out by IGRA and Tribal-State compacts is retained by the tribes.

The above snapshot of California gaming tells the story of competing sovereigns working together within a federal formula to advance state and tribal agendas. California sees in Indian gaming the promise of fulfilling its obligation to its citizens through rate structures that shift part of gaming revenues directly to the state. By contrast, tribes find in gaming an opportunity to broom reservation poverty and unemployment with revenues generated from gaming operations. In the abstract, these objectives need not contradict one another; certainly, states and tribes

134. 602 F.3d at 1033.
135. *See* 25 U.S.C. § 2702 (2006).
136. 602 F.3d at 1033.
137. *Id.*
138. *Id.* at 1034 ("The only *state* interests mentioned in *§ 2702* are protecting against organized crime and ensuring that gaming is conducted fairly and honestly").
139. *Id.* at 1037.

gain when the latter is profitable. But economic results alone cannot account for the whole effect of Tribal-State compacting in California. Indeed, the bargain tribes have made in the up-and-up era of Indian gaming may be less easily accepted now that revenues are in decline.[140] In the following section, the non-economic costs to tribes of Indian gaming will be assessed with an underlying assumption that sovereignty serves as a critical foundation for tribal and Native American identity.

V. INDIAN GAMING AND THE POLITICIZATION OF NATIVE IDENTITY

Indian gaming can take on two primary roles within any study of Native identity and, more broadly, identity politics. First, it may be deployed as an optic with which to discover whether and to what extent the dominant society holds certain views of Native peoples. In this sense, Indian gaming performs a function equivalent to capturing those views that otherwise would go unexpressed in the absence of agitation. To some degree, this approach—of Indian gaming qua optic—is artificial in the way that it presupposes the latency of specific perceptions in the absence of gaming. It may be that Indian gaming rather than amplifying perceptions, actually creates new perceptions, in which case its value as an analytic device diminishes in proportion to the degree to which it becomes causally determinative of the effects it purports to magnify. Certainly, that possibility cannot be ignored. Second, a more straightforward approach would attach to Indian gaming the significance of a historical fact—no more than any other event in U.S. history, gaming results from an economy of Native and non-Native interests. Under this approach, gaming can be treated as both a product and cause of competing interests and views. This approach has the benefit of being less artificial than the previous method.

In this study, a blend of the two approaches has been used with the result being that a number of observations may be made. First, Indian gaming is a site for the interaction of Native

140. Nationwide Indian gaming revenues fell by $256 million in 2009, the first time in fifteen years. *See* Press Release, 2009 Indian Gaming Revenues Remain Stable, *supra* note 12. It remains unclear whether this setback represents a temporary response to U.S. economic troubles or instead signals a structural shift in the industry. What is certain is that the decline of gaming revenues has precipitated a rise in credit defaults, leading to tighter lending standards and reduced tribal access to funding. *See* Gale Courey Toensing, *Mashantucket's Bond Ratings Downgraded*, Indian Country Today (Mar. 13, 2010), *available at* http://vcnaa.com/native/content/view/1319/2/. *See also* Gale Courey Toensing, *Mashuntucket Financial Meltdown Resonates Through Indian Country*, Indian Country Today (Dec. 31, 2009), *available at* http://www.standupca.org/news/mashantucket-financial-meltdown-resonates-through-indian-country.

and non-Native interests. Second, Indian gaming produces real, non-theoretical, gains for tribes, which in turn creates new subject positions for Native Americans understood in relation to a general theory of identity politics. Third, Indian gaming introduces substantial non-Native influence into the process of tribal government and therefore enacts a social and political cost to tribes. Lastly, Indian gaming ensures that tribal identity will continue to be constructed dialectically, and that external and internal perceptions frequently will differ on such vital issues as sovereignty and authenticity.

The identity politics implications of Indian gaming have been well-studied by Eve Darian-Smith, whose work *New Capitalist: Law, Politics, and Identity Surrounding Casino Gaming on Native American Land*, examines the public responses to the Santa Ynez Band of Chumash Indians' planned casino expansion. The Chumash casino is near the small, wealthy community of Santa Barbara. The casino opened in 1994 and soon became "extremely successful."[141] Darian-Smith notes that the casino "dramatically altered [the Chumash Tribe's] status of deprivation and hardship."[142] In 2002, the tribe sought to continue its success by building a luxury resort hotel and expanding its casino floor.[143]

As the tribe made its plans public, "bitter opposition" arose among locals.[144] This opposition, notes Darian-Smith, is not explained by a general resistance to change, nor by a type of class warfare existing between wealthy Santa Barbara residents and typically poorer casino patrons.[145] The conflict over casino expansion, Darian-Smith argues, is in part a racial one. She writes that:

> What makes local opposition to the Chumash Casino unique, and gives it a slightly different spin from the ongoing socioeconomic class battles present in almost all Southern California towns, is that local resistance is often couched in implicit and explicit racist terms particular to Native Americans. The Chumash were tolerated in the Valley as long as they were subdued and played no role in local community relations and politics. Now that they are demanding a right to participate as a sovereign nation, many of the stereotypes [historically attrib-

141. EVE DARIAN-SMITH, NEW CAPITALISTS: LAW, POLITICS, AND IDENTITY SURROUNDING CASINO GAMING ON NATIVE AMERICAN LAND 71 (2004). *See also* Chumash Casino Resort, http://www.chumashcasino.com/Home.aspx (last visited July 9, 2011).

142. DARIAN-SMITH, *supra* note 141, at 76.

143. *Id.* at 71.

144. *Id.* at 81.

145. *Id.*

> uted to Native Americans] have surfaced in talk by non-Indians about the casino and its success.[146]

Although tribes and Native Americans legally do not belong to a race, since such a conclusion would nullify much of Title 25 of the United States Code, the fact does not preclude racial politics in the area of Indian gaming.

Beyond race-based opposition, tribes are met with opposition framed in terms of five main stereotypes. These stereotypes hold that: (1) Native Americans are cunning and crafty; (2) Native Americans are uncivilized and indifferent to law; (3) Native Americans do not belong in corporate America; (4) Native Americans have a special relationship with land and nature that is threatened by economic development; and (5) Native Americans are poor.[147]

In the case of the Chumash Indians, local citizen action groups and the Santa Barbara county development board claimed that the Chumash, in desiring expansion, had "lied about their intentions to expand the facility."[148] Darian-Smith suggests that these claims infer that the Chumash "do not want to work together with others in the community," a claim which, she notes, "shifts the blame onto the Chumash for an unwillingness to be part of a larger community, and so glosses over the long-standing attitudes of the past 200 years whereby the wishes of the Chumash were openly denigrated and ignored by the surrounding white population."[149] This type of opposition relies on an erroneous belief that Native Americans are "scheming and cunning people who operate through stealth and deception."[150]

A second type of claim recurrent in anti-expansion protests is that the Chumash are not law-abiding citizens and cannot be trusted to maintain a sense of order in the community.[151] Darian-Smith relates this attitude to the "long-established Anglo term *Indian giver*, meaning 'not-for-keeps' and backing out on one's promises."[152] She also aligns this with nineteenth century colonial rhetoric which holds that "Native Americans still do not really belong in our civilized society, since they do not recognize the common rules that govern law-abiding Americans."[153]

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146. *Id.* at 82.
147. *Id.* at 88–93.
148. *Id.* at 89.
149. *Id.*
150. *Id.*
151. *Id.* at 90.
152. *Id.*
153. *Id.*

A third class of opposition claims that tribal governments do not make competent and efficient business choices.[154] This claim proceeds from an assumption that "Indians do not really belong in corporate America; they are still unsophisticated, irrational, primitive, lazy, and greedy, and they should be happy with what they have."[155] Yet another stereotype surfaces in relation to an environmental consciousness that all Native Americans are said to possess. Advocates of this stereotype seek to use tribal development on reservation land as evidence of a tribe's inauthenticity—as if a tribe's assumed "spiritual affinity with nature" necessitates undeveloped reservations.[156] Darian-Smith comments that "[t]his kind of straw-man argument, which conflates Indian business practices with their relationship to land, is unfair and underhanded, particularly given the huge building developments that have sprung up [as a result of non-Native efforts] over the past decade."[157]

A final class of opposition holds that "if Native Americans are involved in business practices and politics, they will lose their culture and what makes them, in fact, 'Indian.'"[158] Darian-Smith attributes this belief to a romanticization of Native Americans as "remnants of a prehistoric age—spiritual, communal, untouched and unblemished by the corruption of modern society."[159] The impetus for this kind of romanticization may stem from a "general sense among many people living in the United States today . . . that the capitalist-driven pace of living is too fast, that we are consumed by materialist values, and that notions of community and family are being compromised in the process."[160] In short, the pace of modern living provides reason for perpetuating a culturally constructed narrative of Native American life that sets its subjects in "another world," in which they remain unaffected by capitalism, exemplifying responsible, communal, and environmentally-friendly lifestyles. The attractiveness of narrative of this sort lies with its power to "help non-Indians feel better about themselves and their future in a turbulent and fast-changing world."[161]

As Darian-Smith's summary of the Chumash experience with Indian gaming suggests, Native Americans and tribes are subject to the dominant society's projection of its "collective

154. *Id.* at 91. Consider the reflection of this same stereotype in IGRA. *See* 25 U.S.C. §2710(c)(4)(C) (2006).
155. DARIAN-SMITH, *supra* note 141, at 91.
156. *Id.* at 92.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 5.
161. *Id.*

fears and concerns."[162] In this way, cultural misperception and historical inaccuracy partake in the shaping of Indian law. While a reply might be that this phenomenon obtains in all law creation incident to peoples and their rights, it is especially true of Indian law. The erroneous ideas about Native peoples that have collected in two centuries of U.S. Indian law and policy have not disappeared in response to gaming. Rather, gaming has strengthened regressive cultural constructs. As tribes have prospered, they have been labeled "rich Indians," and have been regarded as somehow less authentic, less truly "Indian" than before. In building casinos they have been charged with environmental insensitivity, a violation of their perceived status as stewards of the land.[163] In funding local governments, they have been criticized for "buying" sympathy, and in participating in capitalism, they have been dismissed as outsiders.[164] In all, "the narrative tradition concerning Indian cultural deficiency," which finds expression in the debate over Indian gaming, "continues to define what we think of the Indian and Indian rights."[165]

Societal projections reflecting a dominant society's normative assumptions about Native peoples have enmeshed tribes in a complex dialectic in which tribal institutions and values as well as group and individual identity are placed in competition with external perceptions. This reality subordinates tribal objectives at least in part to political moods, legal trends, and public perceptions. While tribes might avoid this subordination by refusing gaming altogether, that choice clearly lessens the value of any retained autonomy.[166] For most tribes, some of whom possess remote, undesirable land because of nineteenth century reservation policies, gaming represents the only realistic means of achieving a meaningful measure of self-sufficiency, such that any loss of autonomy resulting from IGRA or from public pressures generally is a necessary attribute of the "casino compromise."[167]

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162. *Id.*

163. *Id.* at 31, 92. *See also* video recording: Keep America Beautiful Campaign (1971), *available at* http://www.youtube.com/watch?v=DH0U2AsyoWU.

164. DARIAN-SMITH, *supra* note 141, at 86, 91–92.

165. ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 19 (1997).

166. Autonomy includes a corresponding right of identity determination.

167. LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE, *supra* note 14, at 3. I do not intend to diminish the importance of other potentially profitable activities, such as energy development, to tribes' efforts at achieving economic self-sufficiency. Many tribes, often motivated by financial, geographic, political, or cultural concerns, have embraced alternatives to gaming. Even gaming tribes understand, as evidenced by the number and variety of tribally owned businesses, the need to diversify the investments upon which their governments rely.

Recognition of this Hobson's choice together with the dialectical component of Indian gaming should impress upon readers of Indian law the importance of deploying a more holistic, interpretive model than one that focuses on purely economic, legal, or moral factors. Indian gaming's conflicts and controversies cannot be appreciated without critically examining the sources of disharmony in the context of tribal sovereignty and more particularly, in the context of tribes' non-gaming means of achieving self-sufficiency. To be sure, a cost-benefit analysis based upon economic, legal, or moral considerations alone invariably distorts the profound interest of tribes in being restored to a position in which tribal government (in the fullest sense) is rendered practically possible.

Although we should recognize tribes' limited economic alternatives to gaming, we should be ready to acknowledge as well the role of gaming in politicizing Native identity. Indian gaming has added "rich Indians" and "real Indians" to the vocabulary of policymakers and their constituents. It has served as fodder for caricatures on television and in newspapers, such as a Family Circus comic strip depicting a cowboy-dressed child playing a modern-day "cowboys and Indians" opposite a tuxedo-clad casino operator.[168] At first blush, the Family Circus image may seem harmless, but it works, which is to say it is "funny," because it points up the incongruity of cultural perceptions. The subtext of such an image is that the tuxedo-wearing "Indian" is not really authentic, or is at a minimum less authentic than other representations of "Indian-ness."

While it may be tempting to blame Indian gaming for the politicization of Native identity, it would be foolish to claim that tribes are completely, if even partially, responsible for this development. Indian gaming did not create adverse perceptions of Native Americans or tribes so much as provide a contemporary motivation for their expression.[169] As the $94 million advertising campaign behind Proposition 5 demonstrates, controlling the image of Indian gaming is big business. In light of the interests at stake and the highly political environment in which tribes operate, tribes have a critical need of marketing their interests to a non-Native public. In California, the consent of the state to suits under IGRA may mitigate the political effects of *Seminole Tribe*, but even that concession will not eliminate or even greatly re-

168. Cartoon, *Family Circus*, THE ADVOCATE, Apr. 20, 2002, *available at* http://etd.lsu.edu/docs/available/etd-0410103-135838/unrestricted/Nasirov_thesis.pdf.

169. At a minimum, Indian gaming did not create *all* adverse perceptions of Native Americans and tribes.

duce the politics of Indian gaming, which at their Native core, are the politics of sovereignty and survival.

Naomi Mezey proposes in *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming* that the politics of Indian gaming are best understood within a distributional model. She posits that Indian gaming is a distributive mechanism of tangible and intangible "goods." Under this view, "[c]ultural identity and sovereignty . . . serve as both the justification and the effects of redistribution through gaming."[170] Indian gaming in this sense is justified because it enables "freedom" and "capacity," both "nonmaterial goods" that are crucial to "mak[ing] material goods meaningful."[171] Conversely, Indian gaming justifies, supports, or *produces* cultural identity and sovereignty.

Mezey offers three "cultural paradigms" in which to assess distributional claims—postmodern, traditional, and culture-as-negotiation.[172] Under a postmodern paradigm, gaming and materialism "do not pose a threat to culture because they constitute culture."[173] Money thus is "commensurate with cultural production."[174] Cultural identity "remains elusive and flexible," if not ahistorical. In the postmodern cultural model there survive no claims of authenticity since without a normative standard "authenticity is an empty term."[175] The concept of tribal inauthenticity therefore fails when culture itself is a commodity.[176] Mezey cites the Mashantucket Pequots as a tribe that exemplifies a postmodern cultural model, because the tribe has "accommodat[ed] itself to the market, refashion[ed] itself in the present without nostalgia for the past, reject[ed] the fetish for authenticity, and translat[ed] all values as material . . ."[177] In short, the Pequots "have fashioned group cohesion from profits."[178]

J. Anthony Paredes, in *Paradoxes of Modernism and Indianness in the Southeast*, echoes Mezey when he concedes that materiality, despite having a bad name, underlies all human culture and identity.[179] Paredes explains:

> 'Indian culture,' however locally defined, depends on the continued existence of 'Indian society.' The latter depends on

170. Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. R. 711, 716–717 (1996).
171. *Id.*
172. *Id.* at 713.
173. *Id.* at 724.
174. *Id.* at 725.
175. *Id.* at 726.
176. *Id.*
177. *Id.* at 728.
178. *Id.*
179. J. Anthony Paredes, *Paradoxes of Modernism and Indianness in the Southeast*, 19 AM. INDIAN Q. 341, 342 (1995).

> structural boundaries that both differentiate and articulate Indian communities from and to their surrounding sociopolitical medium. Furthermore, the viability of any human community—Indian or otherwise—rests on material resources, i.e., 'economy.'[180]

Profit-making activities by tribes under IGRA, in the way of postmodernism's irreverent detachment from norms, have no potential for co-opting the "foundations" of tribal, even Native, culture and identity.

Traditionalism presents a contrary position. Traditionalism is committed to norms and "to culture as coherence."[181] Traditionalism "stresses pre-contact practices and social structure, particularly linguistic and religious traditions."[182] As a model of culture and identity, it has the "benefit" over postmodernism of allowing for comparative valuation. Simply stated, Indian gaming's effects on identity may be (and are) registered at the site of normative and non-normative difference. More particularly, a tribe perceived as "x" where "x" denotes all of those features that collectively constitute identity may be called "inauthentic" or "compromised" if it *should be* "y" where "y" denotes all those features that collectively constitute identity *and which have been accepted as such.*[183] For those for whom pre-contact tribal traditions and values are ineluctable markers of authentic Indianness, Indian gaming "requires tribes to weigh nonmaterial values against the possibility of material wealth . . . an impossible task, as the material and nonmaterial are wholly incommensurable."[184] By this view, gaming tribes violate the mainstays of "authentic" Native identity, which according to traditionalists, include "a strong sense of group identity and cultural integrity, intense fidelity to the past, economic vulnerability, an appearance of being both culturally proud and culturally embattled, and a likeness to the mythic images of the Indian that [a non-Native public] tend[s] most to indulge."[185]

A middle ground between a postmodern model and traditionalism is culture-as-negotiation. Mezey describes the model as one which "sees culture as enormously resilient and adaptable, but not to the point of postmodern[ism]."[186] This model presumes that "relations of power charge most cultural interactions" and that "[c]ulture is never pure," being "always a product

180. *Id.*
181. Mezey, *supra* note 170, at 728.
182. *Id.*
183. i.e. accepted by the one perceiving.
184. Mezey, *supra* note 170, at 730.
185. *Id.*
186. *Id.* at 731.

of historical choices and compromises."[187] In the culture-as-negotiation model, gaming is not a zero sum game, nor a neutral fact without consequence, but a tribe-by-tribe compromise, in which economic development strategies are measured against the cost of non-Native incursion into Native life. The culture-as-negotiation model is a useful analytic device insofar as it serves as a foil for the two extremes of traditionalism and postmodernism. Tribes do not operate in a vacuum, in some ethnographic present.[188] Nor do they exist as rarefied abstractions.

Postmodernism, traditionalism, and culture-as-negotiation are variant lenses with which to view the process of collective identity formation in Native American groups, particularly tribal entities. These models partake in a movement that Karen A. Cerulo describes, in *Identity Construction: New Issues, New Directions*, as occurring within identity politics, a movement that seeks to transform a focus on individual formations of "me" to a concern for the collective. Within the collective hermeneutic, gender/sexuality, race/ethnicity, and class are study categories, under which analysis proceeds as to mechanics of identity establishment and change.[189]

Collective identity is defined as the "we-ness" of a group, a quality that emerges from "physiological traits, psychological predispositions, regional features, or the properties of structural locations."[190] In documenting these properties, one can proceed along one of two tracts—that of essentialism or anti-essentialism. The former looks to collective identity as internalization of group attributes that are in some way essential.[191] Essentialism has been criticized for its blindness to distributive properties of identity, and more expressly, the possibility of identity and culture as being both product and raw material. The latter presupposes that categories, even those framed for the purposes of study, actually compartmentalize, commodify, and reify identities. Modern queer theory expresses the same premise by seeking to destabilize and "queer" not only normative but non-normative

187. *Id.*

188. The ethnographic-present fallacy relates to the compression of periods and values into a monolithic, static representation of a group. *See* Paredes, *supra* note 179, at 343–346 ("In presuming to portray relatively pristine, viable cultures of uncorrupted and unconquered native peoples, no matter the scientific purpose served, the ethnographic present easily fell into becoming the standard for cultural 'genuineness.'").

189. Karen A. Cerulo, *Identity Construction: New Issues, New Directions*, 23 ANN. REV. OF SOC. 385, 386 (1997).

190. *Id.* at 386-387.

191. *See* Paredes, *supra* note 179, at 346 ("Culture as a *particular* social repertoire of ways of doing things, ways of talking, ways of thinking can easily be seen by insiders and outsiders alike as a set of essential characteristics upon which a people's existence over time depends.").

categorizations.[192] In other words, the theoretical agenda, so to speak, premises the accurate study of identity on the total dismantling of binaristic conventions.[193] Binaries replicate "cultural fictions"[194] in order to give human beings access to a meaningful role in social and political spaces.

Binaries surface throughout any social entity's experience, often through "agents of socialization," viz. schools, family, popular culture and media, and most important for present purposes, law and administrative developments.[195] Agents of socialization impact binary conceptions of identity, as they in no small part contribute to or at the very least guide their formation. Law in particular sets about to eliminate definitional uncertainty and to concretize, stabilize, and control the distributive outcomes of identity formation. A ready example of this phenomenon is the federal recognition process, under which many self-identified Native Americans fail to qualify as "Indians." One might query the extent to which this practically suppresses and profoundly undercuts identity formation in individuals and groups—certainly Native Americans are the only ethnic group in the United States for which legal documentation is a precursor to acceptance.[196]

What the above discussion reveals is the extent to which Indian law privileges essentialism. IGRA applies to federally recognized Indian tribes only.[197] The federal government therefore is an arbiter of authenticity, insofar as legal consequences are

192. *See* W.C. HARRIS, QUEER EXTERNALITIES: HAZARDOUS ENCOUNTERS IN AMERICAN CULTURE 9 (2009) ("'[Q]ueer acquires its meaning from its relation to the norm. Queer is by definition whatever is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers.*'").

193. While queer theory typically operates as a rejection of essentialism and the fixed binaries it produces, not all queer theorists adopt a post-structuralist model in which identity is viewed as "inherently unstable and always and everywhere subject to radical subversion." *Id.* at 42. Commentator Steven Seidman has suggested that "[a]s disciplining forces, identities are not only self-limiting and productive of hierarchies but are enabling or productive of social collectives, moral bonds, and political agency. Although the poststructural problematization of identity is a welcome critique of the essentialist celebration of a unitary subject and tribal politic, poststructuralism's own troubled relation to identity edges toward an empty politics of gesture or disruptive performance that forfeits an integrative, transformative politic." STEVEN SEIDMAN, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 134–135 (Michael Warner ed., 1993).

194. DAVID M. HALPERIN, *Is There a History of Sexuality?*, *in* THE LESBIAN AND GAY STUDIES READER 416 (Henry Abelove et al. eds., 1993). David Halperin's theory that sexuality arises from culturally produced, ideological categories, rather than intrinsic properties may be extended to the study of Native identity, insofar as Native identity, when cast in similarly normative terms, legitimizes the policing and regulatory efforts of outsiders.

195. Cerulo, *supra* note 189, at 387.

196. George Pierre Castile, *The Commodification of Indian Identity*, 98 AM. ANTHROPOLOGIST, 743, 745 (1996).

197. *See* 25 U.S.C. § 2701(5) (2006).

concerned. The essentialism of Indian law transcends law and impacts agents of socialization. Conversely, the commodification of identity, or the crystallizing of Native identity, informs and is necessary to the creation of law. Law thrives and depends upon categorization, but categorization and commodification largely are anathema to sustainable group identity. Group identity must be fluid and responsive to "political, economic, and social forces."[198] Paredes notes that neat lines of division, as reproduced in law and the discourse of Indian gaming, "might be useful for political purposes but obscure the interplay of a multiplicity of sociocultural variables" in the cross-cultural negotiation of identity.[199]

The political currency of neat lines of division, or stable identity categories, is discussed by commentators Jeff Corntassel and Richard C. Witmer in *Forced Federalism: Contemporary Challenges to Indigenous Nationhood.* Corntassel and Witmer identify three distinctions "[h]aving little or no grounding in reality," which recur in policymaking arguments and in public opinion generally.[200] They suggest that as tribes become economically and politically powerful, they become viewed as undeserving, in a class that Corntassel and Witmer term "emerging contenders." Emerging contenders are "regarded as increasingly powerful entities . . . [who] are often characterized as 'undeserving' in terms of their political and economic power."[201] These entities, so the argument goes, must be "extensively regulate[d] . . . through taxation and revenue sharing to capitalize on their status as 'undeserving' and to keep their power in check."[202] Tribes that are perceived as economically and politically weak fall into two opposing categories—those of dependents and those of militants. Dependents are generally "non-federally recognized indigenous governments" or "urban indigenous populations."[203] By contrast, militants are "indigenous protestors" or "indigenous nations mobiliz[ed] against state politics."[204]

Corntassel and Witmer propose that "undeserving," "militant," and "dependent" are adjectives and images that serve policymakers in achieving legal outcomes. They contend that the use of these perceptions in discussions about Indian gaming demonstrates the centrality of "'[s]ocial constructions'" to the "strat-

198. Paredes, *supra* note 179, at 343.
199. *Id.* at 345.
200. CORNTASSEL & WITMER II, *supra* note 95, at 33.
201. *Id.* at 35.
202. *Id.*
203. *Id.* at 34 (citing Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993)).
204. *Id.*

egies of public officials."[205] More particularly, they argue that "[t]hese categorizations are driven by the perceptions of the policymakers, the demands of their Native and non-Native constituents, and multiple other cultural and political contexts."[206]

As Corntassel and Witmer effectively argue, categorization, commodification, and essentialism participate in the discussion of Indian gaming. They are as much products of the discussion as implements to the achievement of legal and political outcomes. A preference, whether Native or non-Native, for essentialist identity is expressed in gaming politics, a preference which, at base, organizes distinctiveness (whether Native or non-Native) by indexing values (whether authenticity or capability) according to a presumed division or incompatibility of interests. In a cartoon by Ed Stein, a couple appears driving along a desert highway. The passenger says to the driver, "[i]t's criminal what we did—giving the Indians the most godforsaken stinking deserts we could find!" The driver responds, "I'll say! How could we have known all those energy resources would be there?"[207] While the cartoon borrows from a pre-IGRA state of affairs, the overriding sentiment captures a compelling feature of today's discourse on Indian gaming. The "regrettable" position to which the cartoon and many of its ilk speak, is a perceived Native "advantage," which only is capable of being deemed "good" or "bad" because it is conceived, somewhat conveniently, within a binary of Native versus non-Native.

A binaristic conception of the politicization of Native identity, while unfortunate, does serve to explain many of the reactions to Indian gaming and the changes to tribal and Native identity consequent upon those reactions. Binaries prescribe normative conditions that are foundational to the isolation of difference. To say that a gambling tribe is inauthentic requires the holder of the belief to establish disparity, which can only ever be accomplished in relation to positions. The attitudes catalogued by Darian-Smith in relation to the Chumash illustrate this effect. Values placed upon tribal development flow from an isolation of difference in a non-Native public's conception of Native identity. To devalue Native identity in relation to tribal development, as when casinos are ascribed the power to destroy some independently existing Native identity, presumes that (1) there is a distinction between Native and non-Native; (2) there is benefit to its preservation; (3) the divide between Native and non-Native rests

205. *Id.* at 33.
206. *Id.* at 34.
207. Ed Stein, Rocky Mountain News 1979, *reprinted in* DAVID RICH LEWIS, *Still Native: The Significance of Native Americans in the History of the Twentieth-Century American West*, *in* 24 THE WESTERN HISTORICAL QUARTERLY 203, 208 (1993).

upon ascertainable qualities; and (4) the tribe at issue does not reflect those ascertainable qualities and therefore cannot be *seen* as Native.[208]

To judge tribes in this way assumes discrete categories with which to do the judging. It thereby enables other questions, whose answers reinforce the essentialist categories that make their asking possible, such as are tribes losing what makes them tribes through gaming? Does it matter whether gaming dilutes or revamps identity and for whom should it matter? Who, if anyone, should be the arbiter of what is authentic? The central, troubling feature of these questions is their underlying assumption that Native identity is a commodity. George Pierre Castile tracks through periods in U.S. history the value of Native identity in *The Commodification of Indian Identity*. He deftly summarizes the current dynamic in relation to Indian law and Indian gaming:

> [T]he game has been otherwise rigged since colonial times, and such complete freedom of choice is simply not on the menu, nor is it likely to be. While Native Americans may today have greater self-determination than ever before, they are still inextricably linked to the ebb and flow of the dominant society and its markets and are subject to the rules of its regulators. The federal government and the ticket-buying public are simply not going to buy 'we know who we are, trust us.'[209]

Castile reminds us of the complexity of Native identity in the era of IGRA. Indeed, the paradox of IGRA is that the means for achieving its purpose undercut that purpose. A tribe that gambles loses crucial aspects of sovereignty and self-determination and exposes itself to a kind of non-Native incursion typified by Schwarzenegger-type compacting and Santa Barbara-style racial politicking. This leaves tribes with the question: how much are we willing to wager in terms of cultural autonomy to be able to "afford" culture?[210]

The answer to this question, like many in the study of Indian gaming, is elusive. But however tribes respond individually, it is clear that IGRA generally creates a series of compromises. When tribes invest in class II or class III gaming operations, they compromise sovereignty in a strictly legal sense—that is, jurisdiction passes to the NIGC (in the form of oversight) in class II operations (with the exception of self-regulated facilities), and to states (or states and tribes jointly) through Tribal-State compacts in class III operations. IGRA also imposes, through Congress's

208. I stress the verb "see" because it reinforces the sense that identity can be projected and imposed.

209. Castile, *supra* note 196, at 747.

210. Relate this question to Paredes' contention that culture and identity require a material base.

failure to patch the gap left by *Seminole Tribe*, a cost to sovereignty that is political in nature. Tribes have to become sophisticated political players in order to persuade states to negotiate compacts, an observation confirmed by the battle over California's enabling propositions and the Chumash's contest over tribal expansion.

In the end, because sovereignty acts as a basis for identity, it is difficult to separate out how much IGRA impinges upon tribal sovereignty and how much it politicizes tribal and individual identity.[211] It perhaps is enough to say that tribal sovereignty and Native identity are affected by Indian gaming, but that a definitive answer to the question of whether gaming is a beneficial mode of achieving self-sufficiency and retaining cultural autonomy is outside the scope of this effort. Whatever the particular consequences of Indian gaming, the decision to conduct gaming on tribal lands should be made by a tribe, acting through its members, with states and the federal government in a respectful environment of government-to-government parity.

VI. CONCLUSION

The National Indian Gaming Association released its 2009 report on the economic impact of Indian gaming, in which Indian gaming is described as "the Native American success story."[212] In some tribes' evolution from poverty to economic self-sufficiency, we may find support for this statement. Numerous tribes benefit daily from gaming in the form of revenues that fund housing, medical care, higher education scholarships, museums, and many other member-oriented services. Even non-gaming tribes within the California model receive financial assistance to support tribal functions. In all, gaming's positive effects are difficult to overlook.

Yet despite the observable contributions of gaming to tribal self-sufficiency, there are less tangible, but nonetheless real losses incident to a tribe's decision to operate under IGRA. Identity and sovereignty are compromised at some level by Indian gaming. And because sovereignty in the context of Native American history is not simply a buzz word, but an embodiment of a compact substrate of beliefs and customs and the means for

211. As evidenced by the Reservation Period and Termination Era, sovereignty implicates a tribe's radical capacity to determine the circumstances that condition its existence.

212. NAT'L INDIAN GAMING ASS'N, THE ECONOMIC IMPACT OF INDIAN GAMING IN 2009 35 (2009), www.indiangaming.org/info/NIGA_2009_Economic_Impact_Report.

their survival, its loss, partial though it may be, is far from only incidental or theoretical.[213]

Knowing this, we as spectators or participants in the discourse of Indian gaming should bear in mind at all times the complex history of U.S. Indian law and policy and the political and dialectical nature of Native identity in this latest period of Native history. Then and only then may a rational and responsible discourse emerge which gives proper weight to the interests of tribes, states, and the federal government. Until such time, we should expect regressive cultural constructs to continue to appear in legal and cultural conflicts over the subject of Indian gaming, such that predicting the next decade of Indian law will be truly speculative employment.

213. This travels some distance in explaining the Navajo Nation's reticence to open a casino of its own. The Navajo Nation now owns a casino in New Mexico. *See* Felicia Fonseca, *Navajo Nation Opens Its First Casino in New Mexico*, USA Today (Dec. 17, 2008), *available at* http://www.usatoday.com/travel/destinations/2008-12-17-fire-rock-casino_N.htm.