

THE INDIAN GAMING REGULATORY ACT AND VIOLATIONS OF TRIBAL  
SELF-DETERMINATION POLICIES

A Capstone Experience Manuscript

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## Literature Review

The gaming industry, and with that the Indian gaming industry, has been studied by scholars across many disciplines using different methods. The literature used in this paper encompasses tribal history, personal interviews by anthropologists and journalists, economists' interpretations of gaming operations, statistical data, and government documents (laws, congressional hearing testimonies, and Supreme Court decisions). The combination of numerical data, personal experience, and interviews supplies a diverse group of resources that provide a fairly complete image of the Oglala Sioux and Mashantucket Pequot enterprises and their reservations' economic health.

### General Framework for Evaluating Gaming's Success

The book *What Can Tribes Do?: Strategies and Institutions in American Indian Economic Development*, edited by Stephen Cornell and Joseph P. Kalt (two scholars whose work has been cited in numerous other articles on the same topics), particularly their article "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," is an extremely valuable resource for examining the institutional factors that contribute to the success or failure of tribally operated enterprises. While other sources in the economic development canon focus on industry or Tribe-specific problems, Cornell and Kalt approach the issues in general terms and use both data derived from direct contact with some Tribes and other established numerical data for 67 other reservations (Cornell and Kalt 1992, 5) distilling down the diverse information into a set of factors that carried significance in "what it takes for *self-*

*determined economic development*—development that meets tribal goals—to be successful...without losing political or social sovereignty” (Cornell and Kalt 1992, 5). This resource provides a general framework for investigating the factors that have contributed to the success of Foxwoods and the failure of the Prairie Winds Casino operated by the Oglala Sioux, by providing a base of common institutions in which both operations can be compared and contrasted, and allows the obvious problem of geographical advantage to take a lesser role in the analysis of the political and cultural effects of the establishment of a gaming operation.

#### Issues of Tribal Sovereignty

A common theme throughout the literature has been the role of tribal sovereignty in determining economic success of casino operations. The scholars writing on the subject have some obvious differences in their own particular political or economic philosophies, but these differing opinions only provide for a wider variety of material and strategies to incorporate into a unique view. Ronald N. Johnson’s article “Indian Casinos: Another Tragedy of the Commons,” in the book *Self-Determination: The Other Path for Native Americans*, edited by Terry L. Anderson, Bruce L. Benson, and Thomas Flanagan, takes a decidedly pro-free market view towards casino operations. The book has many examples of scholars advocating for privatization and changes in tribal government to limit the number of sovereigns involved in the creation of economic enterprise. Johnson’s article advises that Tribes assert their sovereignty by working towards property rights that work in the Tribe’s favor in order to reduce “rent seeking” by state and local governments (Anderson, Benson, and Flanagan 2006, 214). He also critiques the revenue sharing that many Tribes practice as an overall detriment to development of the Tribe

(Anderson, Benson, and Flanagan 2006, 235). Paul Boyer in his article “Tribal Sovereignty Beats Roulette for Building Tribal Wealth and Nations” states that casinos can fail and that the one thing ensuring economic development and prosperity for Tribes is to assert their sovereignty to “prime the pump of economic development by creating a political and legal climate that attracts and reassures investors,” (Boyer 2007, 56-57). Steven Light and Kathryn Rand take the approach of applying indigenous ideas of tribal sovereignty and their effects on casino operations. They argue that:

in practice...tribal sovereignty, from the indigenous perspective of inherent self-determination, clearly is compromised in the context of Indian gaming: the decision to open a casino is an exercise of a Tribe’s sovereign right; yet Federal law requires a tribal casino to submit to Federal and state regulation, circumscribing that Tribe’s sovereign right” (Light and Rand 2005, 36).

These scholars disagree on what constitutes an expression of tribal rights or tribal sovereignty, but these disagreements are valuable in the application of a case study method between the Mashantucket Pequots who attempted to establish themselves as a corporation before they applied for Federal recognition of the Tribe, and the Oglala Sioux who have been fighting against Federal encroachment since the U.S. Army forced them off of their land and waged brutal campaigns against the Tribe during the Indian Wars.

#### History and Modern Situation of the Mashantucket Pequots and Oglala Sioux

There are a number of resources that give rich histories of both the Mashantucket Pequots and the Oglala Sioux. Jeff Benedict’s *Without Reservation*, and Brett Duval Fromson’s *Hitting the Jackpot* give extensive and detailed histories of the modern Mashantucket Pequot Tribe. They are not unique in their appeal for Federal recognition

of their Tribe in the early 1980s, but as mentioned, they stand in direct contrast to the Oglala Sioux who have never needed to apply for recognition from the Federal government. These two books both show the growth of the Mashantucket Pequot Tribe over the past 25 years and the growth of their gaming enterprise from a small bingo hall to the largest and most profitable casino in the western hemisphere. The book *On the Rez* by Ian Frazier is more a memoir than a scholarly text, but nonetheless gives a keen insight into the day-to-day living conditions on the Pine Ridge Reservation and how the Oglala Sioux deal with their crushing poverty. There is little mention of their Prairie Winds Casino, but it provides a brief history of other failed industries. The text that does provide insights into how the Oglala Sioux feel about the emergence of a gaming industry on their tribal land does come up in James Fenelon's article "Indian Gaming: Traditional Perspectives and Cultural Sovereignty." It establishes that there is a cultural basis for allowing gambling onto the Pine Ridge Reservation, but through personal interviews with tribal elders and others, shows the degradation of family relationships and some elements of traditional tribal culture being eroded. These four resources show the contrast between the two Tribes and show themes that can be used to compare success outside of geography.

#### Empirical Data on the Effects of Tribal Gaming Enterprises

Finally, the success of Indian gaming operations has been described in both quantitative and qualitative terms. Julie H. Topoleski's dissertation entitled "The Social and Economic Impact of Native American Casinos" uses data derived from reports published by the Bureau of Indian Affairs and reports issued from the Bureau of Economic Analysis to create an econometric model that describes the effects to both

Tribes and surrounding communities after the opening of a reservation casino. Her model is difficult to understand for anybody with little knowledge of statistical modeling; however she provides analysis of her own data in terms of general economic activity (employment, etc.), bankruptcies, crime, and mortality (Topoleski 2003, 80-87). Light and Rand expand this analysis in *Indian Gaming and Tribal Sovereignty* by analyzing quality of life on reservations, and the effects of a casino opening on the state and local economies surrounding the reservation. A *New York Times* article entitled “For Poorest Indians, Casinos Aren’t Enough,” by Peter T. Kilborn reports on the ineffectuality of the Oglala Sioux gaming operations. The data and analysis presented by Topoleski and Light and Rand provide an excellent framework for the health of the Indian gaming industry in the United States, but there is a dearth of useful numerical data regarding the effects of the Prairie Winds Casino on the Pine Ridge Reservation, however the resources already mention provide anecdotal evidence of the economic health of the Oglala Sioux Tribe.

#### Federal Legislation, Congressional Hearings, and Supreme Court Decisions

Documents from the Federal government show the legal boundaries that Tribes must work within to establish their gaming operations. The Indian Gaming Regulatory Act sets the scheme of regulation between the Federal, state, and Tribal governments. IGRA dictates what types of gaming operations are legal, how the revenue from these operations may be used, and what influence the state has on Tribal affairs related to gaming. The limitations of this law and its implications on Tribal political sovereignty will be discussed in depth in this paper. There are a number of other laws, including Public Law 280 and the Indian Self-Determination and Education Assistance Act of 1975 that are important to understand the historical and legal context for the current problems

with Tribal gaming. The U.S. Supreme Court decisions in the cases *California V. Cabazon Band of Mission Indians* (1996), and *Seminole Tribe of Florida V. Florida* (1987) show how constitutional issues surrounding Tribal gaming have been interpreted.

These sources do not provide enough data or evidence to present an ethnographic image of the effects of gaming on a tribal community, but they provide a framework of both political and cultural influences necessary to investigate what has caused contrasting successes of the gaming operations of two Tribes with wildly different histories. These primary and secondary sources, when combined, give a picture of the effect of tribal gaming laws on tribes' political sovereignty, and their implications for federal Indian policy.

## Introduction

Before the late 1970s, gambling on American Indian reservations was a phenomenon known only by tribal members and the people that lived in the communities surrounding reservations. The movement for Tribes to pursue gaming as an economic development strategy began with some Tribes opening low-stakes bingo halls or poker rooms on their reservations to supplement the income from other tribal enterprises or government transfer payments, but none of these operations were on the scale seen today. Tribal gaming has grown to an industry with over 200 casinos and bingo halls in 30 states that generates billions of dollars for some of the most poverty stricken communities in the country. However, the enormous profits that have been realized by Tribes after the establishment of gaming operations comes with a heavy price in terms of the erosion of tribal political sovereignty. Tribal gaming was legalized in 1987 with the California V. Cabazon Band of Mission Indians (1987) Supreme Court decision, and the federal government put a standard regulatory scheme by enacting the Indian Gaming Regulatory Act (IGRA) as a reaction to the growth of the tribal gaming industry and inconsistent state-to-state regulation. The act, while passed with the intention of protecting the tribes that take advantage of this potentially very successful economic development strategy from organized crime and corruption, has instead become an instrument for states to erode tribal sovereign rights that violates the federal policy of tribal self-determination. Two tribes, the Mashantucket Pequot Tribe of eastern Connecticut, and the Oglala Lakota (Oglala Sioux) of South Dakota have both pursued tribal gaming as a strategy to provide revenue to fund tribal governments and reservation public services. The financial success of their gaming operations could not be more different. Foxwoods is the largest and most

profitable casino in the western hemisphere, and the Oglala Sioux's Prairie Winds casino is small and offers meager jackpots. However these two tribes do share a bond in that they were forced by IGRA to relinquish elements of their political sovereignty in order to enter into a favorable regulatory relationship with the state. Gaming as a development strategy has proven to increase employment, improve tribal services, and reduce tribal dependency on the Federal government. However, the laws that govern tribal gaming have become detrimental to its success unless tribes are willing to cede elements of their sovereignty. The law that governs tribal gaming stands at odds with the Federal government's policy of tribal self-determination and support for reservation economic development. In order for gaming to become a widespread tool for tribal economic success, federal policies must change to address the problem of often oppressive tribal-state compacts and and reflect the Federal government's stated goals for tribes to achieve a "measure of self-determination essential to their social and economic well-being" (*Indian Self-Determination and Education Assistance Act of 1975*).

## Gaming As a Development Strategy for Indian Tribes

Indian gaming has become widespread and controversial over the past 30 years.. It has been a boon to many Tribes that have opened high-stakes bingo parlors and “Las Vegas style” operations. Since the opening of the first high-stakes bingo parlor on the Seminole reservation in Florida in 1973, more than 382 gaming operations have been established by over 200 tribes in 28 states in 2007 according to data published by the National Indian Gaming Commission (National Indian Gaming Commission 2008a). The industry has grown from a mere \$212 million in 1989 (Topoleski 2003, 2) to over \$26 billion in 2007(National Indian Gaming Commission 2008a). The establishment of a tribally owned casino has proven to improve economic conditions on reservations. Gaming creates jobs on impoverished Indian reservations, increases the per-capita incomes of tribal members, improves public services by adding to tribal budgets, and improves the health of tribal members. It also has the effect of increasing the ability for tribes to act as sovereign States by reducing tribal dependence on government transfer payments in the form of public assistance, retirement and disability payments, social security benefits, and medical benefits. There are critics of the Indian gaming industry who decry it as a means to further erode tribal sovereignty due to the regulating laws imposed on it by the Federal government or due to a “tragedy of the commons” type of situation that develops when tribes enter into compacts with the States. However, proponents see Indian gaming as not only an expression of sovereignty by capitalizing on their independence from the states to establish profitable gaming operations where they otherwise could not exist, but also a powerful and successful development strategy.

For many tribes, the issues of most importance on their reservations are often related to economics. On many reservations poverty has become pervasive. The Oglala Lakota Nation's Pine Ridge Reservation, which encompasses Shannon County, South Dakota, is an example of the depressed economic conditions that exist on some reservations. In the year 2000 at \$12,191 Shannon County has one of the lowest per-capita personal incomes in the United States (Bureau of Economic Analysis 2008), 45.1% of families live below the poverty line, and the rate of unemployment for those in the labor force was over 33% (U.S. Bureau of the Census 2000). Transfer payments make up more than 30% of the total income in Shannon County (Rural Policy Research Institute 2006). While the Pine Ridge Reservation is an extreme example of the abysmal economic situations that exist on tribal reservations, the situation of many other tribes is not much different. The priority for most tribal governments then becomes overcoming these crushing conditions by developing industries that provide jobs and income to tribal members, revenue to support public services, and to do so in a manner that encourages long-term economic development and stability for tribes.

Tribes are often criticized for planning their development projects only for the short-term, relying on projects that the government will fund or what outside investors bring to them (Cornell and Kalt 1992, 14). Gaming operations have not been excluded from these criticisms. Critics see gaming as an industry that can be profitable in the short-term, but that it is not an industry that can create prolonged economic growth. However gaming has the advantage in becoming a sustainable development strategy because it does not require a large initial investment, it does not rely on access to natural resources or skilled labor, and the competitiveness of the industry cannot be encroached upon by

direct state taxation, and can also serve as a means to fund further development strategies. Taxation for other industries, however, is at the discretion of the state, and problems that arise for non-tribally owned enterprises that operate on reservation can eliminate the competitive advantage that attracts outside investors. This can lead to disinvestment and relocation of operations off the reservation, taking with it jobs and leaving behind shuttered factories or environmental problems. In an interview with the anthropologist James V. Fenelon, a member of the Mdewakanton Sioux said this of the nuclear power project built near the Prairie Island Indian Community in Red Wing, Minnesota:

The nuclear facility gave us jobs when we needed them. Now we have to fight the above-ground storage of the radioactive waste. They made a deal without an agreement with us. The best way to resist that is through our council. We must use our sovereign rights to determine our own future, and to resist the destruction and exploitation of our lands. Casino profits give us more resources for that struggle and less dependence on the nuclear power plant jobs and money. (Fenelon 2006, 393)

A tribally owned and managed operation, like a casino or bingo hall, secures employment for its membership and a steady source of income by making business decisions that directly benefit the tribe.

When compared with other development projects pursued by tribes such as manufacturing or natural resource harvesting, gaming operations require little capital investment. Because private investors perceive tribal governments as being unstable they are often wary to invest in reservation industrial infrastructure due to a fear of tribes failing to honor their agreements, outside funding for capital intensive industries is often difficult to find (Cornell and Kalt 1992, 214-5). The noncapital-intensive nature of gaming operations allows tribes to take on these ventures by themselves (Cornell and

Kalt 1992, 215) by taking advantage of pre-existing tribally owned structures on reservations or by self-funding these projects.

Not only do capital-intensive investments require large initial investments, specialized manufacturing or natural resource harvesting operations often require the “importation” of managers and skilled workers from outside of the tribe (Cornell and Kalt 1992, 11) often leaving only unskilled, low-wage jobs for tribal members and an outflow of money from the reservations. The economist Eduardo E. Cordeiro states that,

most agreements between Tribes and management groups give Indians at least 51 per cent of...profits, but not much more. While Tribes receive a majority of the receipts, in many cases they are paying a great deal of money for management services. In some cases, Tribes have been completely dependent on outside managers to calculate revenues and profits, and have seen little of either one. (Cornell and Kalt 1992, 215)

Revenue from these enterprises is directed in part back to the tribe in the form of rents or licensing fees, but the majority is retained by the non-tribal companies operating on these reservations.

Tribes that attempt to attract outside investors or companies to operate on reservation land can find themselves in these sorts of exploitive relationships where profits are taken off of the reservation, and the threat of disinvestment by companies that take their business—and jobs and rent payments—off the reservation if their exemption from taxation is eroded by state laws. Gaming operations that are tribally managed and owned avoid these problems. The way that states can regulate them is clearly defined by the IGRA, they can be established with little or no outside investment, and tribal

management can set wage rates and control hiring practices to keep employment and income within the tribe.

According to the IGRA ownership of gaming operations must be retained by the tribe, establishing the tribe as the main beneficiary of the profits earned. The exploitative relationship that can develop with other industries is circumvented by Federal law. IGRA also dictates that the profits from gaming operations must be redirected back to the tribe in six ways, “(1) to fund tribal government operations or programs; (2) to provide for the general welfare of the Tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; (5) to help fund operations of local government agencies; and (6) to make per capita payments to tribal members,” (Light and Rand 2005, 46). Tribes with gaming operations are legally bound to provide for their members with the proceeds from their bingo hall or casino, unlike other industries that are not as closely monitored or regulated. IGRA does not completely eliminate the possibility of corruption by tribal leaders or an unequal distribution of the wealth generated, but it does narrow the ways that these incidents can occur.

In macro terms gaming is a viable development strategy because it keeps control and profits within the tribe. In micro terms it influences the improvement of quality of life on reservations. Anecdotal claims by both tribal members and policy researchers report the many benefits experienced after tribes established gaming operations. The former chairman of the Bay Mills Band in the Upper Peninsula of Michigan of the state of his tribe in the 1950s before they built their thriving casino, "There was nothing here...back in those days it was, 'Well, we got two dollars and twenty cents in the bank.' That was the treasurer's report, you know," now the tribe has new tribally owned homes,

a health center, and a community college (Boyer 2007). The Wisconsin Policy Research Institute reported that after the Oneida Nation of Wisconsin built a casino that the tribe “is enjoying its first generation of prosperity in more than two centuries...the gaming franchise has been more successful than all previous anti-poverty programs,” (Light and Rand 2005, 99). The benefits of a gaming operation are not only economic and material; the profits from gaming operations also foster a mindset of empowerment and a return to tribal unity, the former president of the Ho-Chunk Nation in Wisconsin, Jacob LoneTree, lauded his tribe’s casino saying “gaming has provided a new sense of hope for the future among a Nation that previously felt too much despair and powerlessness...The economic development generated by gaming has raised our spirits and drawn us close together,” (Light and Rand 2005, 99). The benefits of gaming have been two-fold. Gaming has enabled tribal governments to provide services to their tribes and it has also empowered members to return to tribal reservations and reassert their tribal identity and rediscover elements of tribal culture that had been lost in decades of economic desperation (Light and Rand 2005, 100).

Along with the significant amount of anecdotal evidence from commentators and tribal members about the social and economic situations on reservations, a study conducted by Julie H. Topoleski provides empirical data that shows the improvements in employment, reservation populations, and the health benefits that follow increased economic activity. Topoleski uses data collected by the Bureau of Indian Affairs on all tribes within the lower 48 states that operate bingo halls or casinos to create an econometric model to show the effects of the creation of a gaming operation on the tribe and surrounding community over a 4 year period after the gaming operation was first

established. While Topoleski's data and analysis do not continue past the year 1999, her findings illustrate the immediate benefits of the creation of a gaming operation and can be extrapolated to explain the general effects that a gaming operation has on a community.

Her analysis shows that in four or more years after a gaming operation is opened the positive effects are drastic. Topoleski's study finds that between 1989 and 1999 employment on reservations increased by 26%, and the fraction of working poor fell 14% (Topoleski 2003, 52). Studies of specific tribes have shown similar results. After the Seminole tribe opened its high-stakes bingo hall reservation unemployment fell from over 60% to less than 20% (Light and Rand 2005, 42). Reservation populations increased by 12% over the same time period, with "prime-aged" populations returning to reservations in search of work (with a 15% increase in the population between 16 and 64) and bringing their families with them (with a 19% increase in the population of those under 16) (Topoleski 2003, 52-3). In communities surrounding casinos there is a marked increase in economic activity as casinos foster the creation of other businesses like gas stations, hotels, and other entertainment areas, and also employing non-Indians in larger casinos. Foxwoods, though an extreme example as it is the largest casino in the United States, is estimated by researchers at the University of Connecticut to employ 13,000 people directly and another 30,000 jobs that have grown out the creation of the casino (Topoleski 2003, 80-1).

The success of gaming on Indian reservations has not been a regional phenomenon. Geography in the macro sense is not a factor that influences tribal gaming success; it is no less likely for a casino in California to see some success in a gaming endeavor than in South Dakota or Michigan. Even in the smallest region (Kansas,

Oklahoma, and Texas) measured by the National Indian Gaming commission tribal casinos saw over \$2 billion in revenue (National Indian Gaming Commission 2008b). The only geographical factor that influences the success of a gaming operation is its proximity to a population and the lack of competitors. This factor, however, only influences the size or scale of a tribe's gaming operation. Topoleski's study found that the only variable that influenced the creation of a casino was the surrounding population, she states that "within 50 miles of the tribal headquarters... Tribes with fewer people living near the casino are less likely to open a casino," (Topoleski 2003, 55). Smaller populations or areas that have are dense with other gaming operations (tribal or otherwise) will draw smaller revenues, and thus affect the attainable scale of the tribe's operation.

It is true that some tribes will benefit from a gaming operation more so than others due to their geographical location or the attitude of the state towards Indian populations, according to Topoleski's study, but if a tribe realizes the attainable scale of its gaming operation and plans accordingly, and if it maintains tribal management and employment, it can lead to a long-term profitable venture that at the very least can prove to be a source of income outside of the government transfer payments they now receive. This income can then be reinvested in the community to educate tribal members, improve infrastructure, and nourish further economic development on reservations.

Gaming is not legal in all states, but for those tribes whose reservations are within states that do allow it, it is an industry that does not require a supply of natural resources to exploit, or an investment to establish manufacturing or to draw tourists. Gaming relies on access to a population willing to engage in gambling as a form of entertainment (a population that is in no short supply), and a tribe's own sovereignty. Aside from an initial

investment (possibly from outside of the tribe) to establish a gaming operation, the benefits of a casino or bingo hall are far-reaching and require little from the tribe. The benefit of increased private revenue leads to an improvement of tribal services, increases in employment, and an ability to reassert tribal identity and reclaim of cultural sovereignty.

## History of Laws Relating to the Regulation of Tribal Gaming Operations

Until 1988 and the passage of the Indian Regulatory Gaming Act, gaming on tribal reservations existed in legal limbo. The first gaming operations were established in the early 1970s, but did not grow as a phenomenon until the success of a gaming operation was made apparent by the Seminole tribe of Florida and their “high-stakes” bingo halls. Before this the games were small with very small pay-outs made by tribes, but the Seminole bingo halls created an operation that issued million dollar pay-outs and drew crowds by the hundreds from the surrounding area. It became a phenomenon that attracted national attention and calls from the states where operations were created for regulatory measures. There have been a series of important laws and court decisions that has led to the current legal situation of gaming and its implications on the sovereignty of tribes that own and manage reservation gaming operations. These laws are essential in examining the reasons why some Indian gaming operations fail while other succeed, and define how gaming can be used as an expression of political sovereignty by tribes or a repression of sovereignty by the states.

The Supreme Court case that first established tribes’ legal right to operate gaming operations was the California V. Cabazon Band of Mission Indians in 1987. The Cabazon Band of Mission Indians Tribe operated a public bingo hall and a card room where draw poker and other card games were played (by mostly non tribal members). The state of California had enacted legislation that made bingo legal only if it was a part of an event that was staged by a recognized charitable organization that is staffed by unpaid volunteers. The legislation limited payouts to \$250 and required that the money

collected from bingo games be placed in special accounts that could be used only for charitable purposes. Their reservation also fell within the limits of Riverside County which had its own ordinances that regulated bingo and banned the playing of draw poker and the other card games that the Cabazon Band of Mission Indians offered in their card room. After Riverside County attempted to impose its regulations on the reservation gaming operations the tribe sued the county in Federal District Court. California intervened, and stated that they had the power to regulate bingo and other games of chance on the state's Indian reservations because of Public Law 280 (*California V. Cabazon Band of Mission Indians* 1987).

The Federal legislation Public Law 280 of 1953 sought to combat lawlessness on reservations, and granted 6 states:

jurisdiction over offenses committed by or against Indians in the areas of Indian country...to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State. (*State Jurisdiction over Offenses Committed By or Against Indians in the Indian Country of 1953*)

California was one of these states. Public Law 280 not only extended jurisdiction to the state to prosecute crimes committed by both Indians and non-Indians on reservation lands, but also extended jurisdiction to the state for private civil litigation involving Indians in state courts. However, the law did not extend the state power to apply general civil regulation on reservations. In *California V. Cabazon Band of Mission Indians* (1987) the state asserted that because violations of the state laws regarding bingo were considered a misdemeanor the law was criminal in nature and thus under Public Law 280 could be

enforced on the Cabazon reservation. However, the United States Court of Appeals for the Ninth Circuit ruled that because the law was generally regulatory in nature and that “federal and tribal interests in tribal self-determination and economic development preempted state law regulating bingo operations as applied to tribal on-reservation bingo operations” (Light, Rand, and Meister 2004) so California’s bingo laws and regulations could not be enforced on the state’s Indian reservations (*California V. Cabazon Band of Mission Indians* 1987). This decision established tribes’ legal rights to run gaming operations on tribal land free of state regulation.

After the Court’s decision in *California V. Cabazon Band of Mission Indians* (1987) the Federal government recognized tribes’ legal right to run gaming operations on their tribal land and moved to enact legislation to regulate it. In a hearing before the senate’s Select Committee on Indian Affairs, the chairman of the committee Senator Daniel K. Inouye expressed the government’s motivation to enact this legislation, testifying that a law was necessary to “address the perceived need to provide a regulatory scheme that protects tribes and public, while at the same time assuring the integrity of tribal sovereignty” (U.S. Senate 1987, 1). The Federal government’s main concern with the spread of tribal gaming was to ensure that both tribes and states in which there were tribal gaming operations were shielded from the threat of corruption and organized crime. The bill S.555 entitled “a bill to regulate gaming on Indian lands,” which came to be known as the Indian Gaming Regulatory Act, was introduced by Senator Inouye in 1987 which divided types of gambling into 3 classes of gambling. As defined by IGRA, these classes range from low-stakes, low-income games, to high-stakes, house-backed forms of gambling. Each class was established with a differing jurisdictional scheme, split

between existing tribal and state regulatory bodies, and with the Federal National Indian Gaming Commission created as part of IGRA. The law also dictates that tribes must “have the sole proprietary interest and responsibility for the conduct of any gaming activity,” and under section 2710 (2)(b)(i-v) of the U.S. Code (IGRA) that revenue from the gaming operation must be redirected back into the tribe for no other purposes other than

(i) to fund Tribal government operations or programs; (ii) to provide for the general welfare of the Indian Tribe and its members; (iii) to promote Tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. (*Indian Gaming Regulatory Act of 1988*)

Class I gaming is defined as “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations” and is regulated solely by the tribe, and is exempt from the provisions of IGRA (*Indian Gaming Regulatory Act of 1988*).

Class II gaming is defined as bingo for cash or other prizes, and provided that bingo is legal in the state where the reservation is located the tribe retains jurisdiction over the operation and its operations are regulated by the tribe and by the National Indian Gaming Commission, with no state interference or regulatory authority.

Class III gaming includes all other types of gaming not covered by Class I and Class II regulations. “Las Vegas” style casinos with “house-backed” card and table games, slot machines, and other forms of gambling fall within this category. Class III operations are only allowed if the state already allows these types of activities in any form, and IGRA requires that tribes enter into tribal-state compacts to govern these

operations. According to section 2710 (d)(3)(C)(i-vii) of the U.S. Code (IGRA) these compacts are agreements between the tribe and that state for:

(i) the application of the criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian Tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian Tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities (*Indian Gaming Regulatory Act of 1988*).

These compacts define the types of gaming that a tribe may offer in their Class III operations and what regulatory guidelines that tribes must submit to in order to operate a Class III establishment. Tribal-state compacts are one of the most important elements that determine whether or not a tribal gaming operation will be successful.

After the passage of IGRA the process of defining the extent of the law in the Supreme Court began most notably with the *Seminole Tribe of Florida V. Florida* case of 1996. This decision began the trend of the erosion of the rights afforded to tribes by the law with court decisions that favored states' rights. The Seminole Tribe of Florida, as mentioned above, operated a highly successful "high-stakes" bingo parlor on their reservation near Hollywood, Florida, and sought to establish a Class III casino on their reservation (Cornell and Kalt 1992, 212). However, when the tribe petitioned Florida for a gaming compact, the state refused to bargain despite IGRA's stipulations that they must.

IGRA required that states “negotiate in good faith” with tribes seeking compacts, and grants U.S. district courts jurisdiction over actions by a tribe against a state for failure to enter into negotiations or to negotiate in good faith” (*Indian Gaming Regulatory Act of 1988*), but in 1996 the *Seminole Tribe of Florida V. Florida* (1996) case essentially voided this clause of the law. When the state of Florida and its Governor refused to negotiate a tribal compact with the Seminole tribe they exercised their right afforded by IGRA and attempted to sue both in Federal court. The District Court in which the case was tried held that the state must negotiate, but the Supreme Court overturned the District Court’s decision in appeals.

The court established that because the Eleventh Amendment stated that the “judicial power of the United States shall not be construed to extend to any suit...against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State” (U.S. Constitution, Amend. 11, sec.1) that Florida could not be sued by the Seminole tribe in order to force negotiations. The sovereign immunity afforded to states by the Eleventh Amendment precluded tribes from suing states in Federal courts unless the state first acquiesced to the suit, or in specific instances, their sovereign rights were formally revoked by congress under to the Interstate Commerce Clause of the Constitution or the Fourteenth Amendment. The Supreme Court ruled that in this case that although “the Congress shall have power . . . To regulate commerce...among the several states, and with the Indian tribes” (U.S. Constitution, sec. 8, cl. 3) did not allow congress to abrogate Florida’s immunity from suit unless the state had given Congress plenary power to regulate commerce (*Seminole Tribe of Florida V. Florida* 1996). This

Supreme Court decision has essentially precluded the Seminole Tribe and all other tribes from finding a legal outlet to force states to negotiate compacts.

Understanding the major court decisions and laws regarding Indian gaming are essential in understanding how tribes can create successful gaming operations and the limits of their ability to express political sovereignty through the economic empowerment that the casinos offer. The legislation enacted to regulate Indian gaming was passed by congress with the intention to give both tribes and states equality at the bargaining table; however this equality has been transformed into a highly biased and unfair exercise by the way that the legislation has been interpreted by the Supreme Court and manipulated by states.

## The Effects of Tribal-State Compacts on Tribal Sovereignty

The condition demanded by IGRA that carries the greatest influence on both the success of a Class III gaming operation as an economic development strategy, and on the dissolution of tribal sovereign rights is the tribal-state compact. IGRA gives states opportunity to gain broad powers to regulate Indian gaming within their borders, often to the detriment of Indian economic development efforts. The Class III gaming operations that are regulated by tribal-state compacts have the potential to be the most profitable for tribes, but these operations come with the danger (and often reality) of states infringing upon tribes' sovereign rights. The degree to which gaming compacts favor tribes is (in the case of the Oglala Sioux and the Mashantucket Pequots, along with many other tribes) predicated upon the amount of sovereignty the tribe is willing to relinquish to the state. The surrender of tribal sovereignty by the Oglala Sioux and the Mashantucket Pequots appears in the form of the imposition of state jurisdiction over both criminal and civil infractions, state regulation of gaming operations, and de-facto taxation through revenue-sharing agreements (as in the case of Connecticut and the Mashantucket Pequots). Both the Oglala Sioux and the Mashantucket Pequots in an effort to improve the economic conditions of their tribal members have become victims of this erosion of political sovereignty through signing these federally mandated compacts.

In 1953 the Federal policy towards Indians became that of "termination." The House Concurrent Resolution 108 (HCR-108) was passed on August 1<sup>st</sup>, 1953 and asserted that the policy of the United States would not only be to end Federal protection of tribal rights and sovereign immunity from state regulation and taxation, but also to

move to revoke entirely the recognition of tribes' legitimacy as sovereign entities, stating in HCR-108 that:

It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitles to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship. (U.S. House 1953, HR 108)

Public Law 280 was passed on August 15<sup>th</sup>, 1953 and became the first law to be passed that gave this new termination policy the ability to be immediately imposed on the “lawless” Indian lands in 6 states (California, Nebraska, Alaska, and most reservations in Oregon, Minnesota, and Wisconsin). Public Law 280 gave authority to states to supersede Federal and tribal criminal jurisdiction over reservations by allowing state and local police forces to operate on reservations and to try Indians in state rather than Federal courts.

Although the popularity of the policy in the executive branch waned in the late 1960s and many tribes became successful in resisting HCR-108 and Public Law 280's effects on tribal sovereignty without further Federal legislation, the policy did not officially end until 1975 and the passage of Public Law 93-638 or the Indian Self-Determination and Education Assistance Act, where Congress stated that the goals of the Federal government because

the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the

true needs of Indian communities. (Indian Self-Determination and Education Assistance Act of 1975)

The new Federal policy would become that of a

commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy... [by] supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities. (Indian Self-Determination and Education Assistance Act of 1975)

This act returned many of the sovereign rights that had been stripped by the termination policy and impelled the Federal government to provide more support for tribal economic development and prosperity.

When criminal jurisdiction was transferred from the Federal and tribal governments to states, the ability for tribes to maintain any autonomy from states was in part nullified. It is impossible for an entity to remain sovereign and autonomous if they are subject to the authority of another power. This fact was recognized by the Federal government by the passage of the Indian Self-Determination and Education Assistance Act of 1975 and their ending of any action to deny tribes their right of immunity from state jurisdiction. However, when IGRA was passed it again opened the opportunity for states to impose their authority in criminal and civil jurisdiction over reservations.

The Indian lands in Connecticut and South Dakota were never subject to Public Law 280. The Mashantucket Pequot and Oglala Sioux reservation land remained under tribal and Federal jurisdiction up until the point of these two tribes' seeking a Class III gaming compact. Any imposition of state rather than tribal or Federal jurisdiction over reservation land should be viewed as a violation of tribal political sovereignty, and it is

now the case that the Mashantucket Pequots and the Oglala Sioux are both subject to some criminal jurisdiction by the state. In the case of the Mashantucket Pequots, because of their need for the revenue that a Class III gaming operation would draw and the tribe's inability to effectively police the reservation, the tribe voluntarily relinquished criminal jurisdiction to the state in their compact. In the case of the Oglala Sioux, however, the tribe was forced to relinquish some civil and criminal jurisdiction in order to gain a lenient regulatory measure that would most benefit the tribe.

The jurisdictional conflict that arose out of the Mashantucket Pequot's compact is much different from that of the Oglala Sioux in that they voluntarily subjected themselves to a transfer of authority. At the time of the first negotiation between Connecticut and the tribe, tribal leaders sought help to maintain order on the reservation (Fromson 2003, 107). Mickey Brown, the President and CEO of Foxwoods testified in a congressional oversight hearing 3 years after the Mashantucket Pequot's compact negotiation in 1994 that "the tribe was willing to accept, and in fact encouraged, a substantial state role in helping to regulate gaming on the reservation...pursuant to the compact, the Connecticut State Police have jurisdiction to enforce all Connecticut criminal laws on the reservation, including enforcement within the casino" (U.S. House 1993b, 360). In the early 1990s the tribe's law enforcement situation was dire enough that the tribe withdrew its sovereign right, and despite over a decade of continual improvement to reservation public services, the current compact between the Mashantucket Pequots and the state of Connecticut maintains the complete transfer of criminal jurisdiction to the state. Section 4 of their compact outlines the extent to which the state may enforce laws on the Mashantucket Pequot reservation and what powers the

tribal police force retains despite the state police presence. Section 4(a) and 4(c), here are two relevant sections of the compact:

4(a)

The State of Connecticut shall have jurisdiction to enforce all criminal laws of the State which may prohibit any form of Class III Gaming on the Reservation against any person engaged in Class III Gaming on the Reservation unless such person is engaged in a form of Class III Gaming listed in section 3(a) of this Compact and conducted by the Tribe. The State of Connecticut shall also have jurisdiction to enforce all other criminal laws of the State which are consistent with the provisions of this Compact on the Reservation, including enforcement within the gaming facilities” (Connecticut 1991, sec. 4(a), 12-13).

4(c)

Law enforcement officers of the Mashantucket Pequot Tribe may exercise concurrent authority with that of law enforcement officers of the state of Connecticut to maintain public order and public safety and to enforce the applicable ordinances of the Tribe and to make arrests for violation of applicable criminal laws of the State; provided, that persons arrested by officers of the of the tribal law enforcement agency for violations of criminal laws of the State shall be transferred as promptly as may be feasible to the jurisdiction of State law enforcement officers and the tribal law enforcement agency shall comply with all reasonable requirements of State law enforcement officers and agencies in order to assist in the prosecution of such offenders (Connecticut 1991, sec. 4(c), 13).

Pursuant to the compact, Connecticut has the same powers as the Public Law 280 states to enforce laws on the Mashantucket Pequot reservation.

Despite the fact that the success of Foxwoods has allowed the tribe to use hundreds of millions of dollars on reservation public services, criminal jurisdiction still remains with the state of Connecticut. The tribe viewed a state police presence on the reservation as a necessity to keep order, however because the state’s police presence is legitimized by the compact, the tribe must continue to endure the infringement of

sovereign authority whether or not it should choose to regain that right to tribal and federal jurisdiction.

In South Dakota, the Oglala Sioux did not completely give up their right to criminal jurisdiction; however, their maintaining that right came at the price of their tribe's economic development prospects. In 1993 and 1994 the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives held hearings to judge the success of IGRA and to review amendments to the law. During these hearings congressional members met with tribal leaders to judge the success of IGRA, and to discuss amendments to the act. In April of 1994 a hearing was held in Wagner, South Dakota for representatives to meet with leaders of the state's tribes to understand the particular problems that arose when tribes sought compacts with South Dakota. While leaders of the Oglala Sioux were not interviewed, leaders of other Lakota nations made it known to legislators that South Dakota had used the tribal-state compacts to compromise economic development efforts and Lakota Nation member's independence from state regulation.

There are many types of games that can be offered in a Class III gaming operation. Games like blackjack, roulette, craps, and others are highly profitable for tribal casinos; however the majority of any casino's profits come from its slot machines. While slot machines in large casinos may offer pay outs of over \$1 million, the profit rate for slot machines is higher than that of the other games a casino may offer. A single machine (under ideal conditions) can gross hundreds of thousands of dollars (Connecticut Division of Special Revenue 2009) or more each year for a casino. As Brett Fromson writes in his book *Hitting the Jackpot*, "the odds are rigged, of course. For every dollar the customer

puts in, the average pay out is, say eighty-six cents. That is a 14 percent return on sales. Other than cigarettes, no legal enterprise in the United States has that kind of profit margin” (Fromson 2003, 132). Class III is the only gaming class that allows for slot machines to be operated. Controlling of the number of slot machines then becomes one of the major ways that states can affect the profitability of a tribal casino. It is no surprise then that the major issue during tribal-state compact negotiations for the tribes in South Dakota was that of the number of slot machines that would be allowed by the state, and the amount of criminal jurisdiction the tribe was willing to part with. The tribes of South Dakota knew that slot machines were the key to their casinos’ success, and each tribe had to fold to the demands of the state in order to operate them in their casinos.

Between 1991 and 1993 South Dakota engaged in pattern bargaining with its tribes on their Class III compacts. The 9 compacts negotiated in this period are nearly identical in language and in the amount and type of regulation imposed by the state. Richard “Tuffy” Lunderman explained to the House of Representatives Subcommittee on Native American Affairs that the tribe he represented, the Rosebud Sioux, “was more or less coerced into negotiating a gaming compact with terms severely restricting tribal economic development,” (U.S. House 1993, 64) due to their refusal to cede sovereign rights of criminal jurisdiction to the state. The Rosebud Sioux, Oglala Sioux, and the other tribes in South Dakota entered into tribal-state compacts within 3 years of each other, and an examination of these tribes’ compacts shows that Lunderman’s critique of South Dakota’s unfair bargaining practices did not extend only to the Rosebud Sioux, but also to the state’s other tribes including the Oglala Sioux.

The Oglala Sioux's first compact with South Dakota was signed in 1993. This original compact stated that the maximum number of slot machines that could be operated by the tribe was 180. 180 slot machines was the standard maximum for South Dakota's tribes until 2001 when most of the state's compacts—including the Oglala Sioux's—were amended to allow for 250 (South Dakota 1993). In the case of the Lakota Nation members, South Dakota used slot machines as leverage to impose state jurisdiction for criminal matters on reservations. Lunderman testified that “the numbers of devices were based strictly upon the relinquishment of jurisdiction and regulatory authority” (U.S. House 1993, 64). During compact negotiations, the Rosebud Sioux were given a set of 4 alternatives from South Dakota Governor George Mickelson in a letter that was entered into evidence during these congressional hearings. The first alternative read that “This compact...would call for 180 machines with a 70-machine increment after an appropriate period of time...The civil and criminal jurisdiction would be split as set out in the Flandreau [Santee Sioux] compact” (U.S. House 1993, 74). The Flandreau compact split criminal jurisdiction between the tribe and the state. The compact stated that tribal members would be tried in tribal courts, and nonmembers would be tried in state courts (South Dakota 1991). The fourth alternative given in the letter read “In this compact the tribe would be allotted 330 machines within an increment of 183 after an appropriate amount of time...All civil actions would be in state court and the state would assume criminal jurisdiction of all persons” (U.S. House 1993, 75). All 9 tribes that entered into a Class III gaming compact in that 3 year period refused to give up complete criminal and civil jurisdiction and for that the number of slot machines that they were

allowed was capped at 180. The state forced tribes to make the choice between sovereign rights and economic development.

Slot machines were also pivotal in Connecticut's ratification of their compact with the Mashantucket Pequots, however in this instance were not used as a means to impose state jurisdiction as those rights had already been voluntarily relinquished. Instead the question of slot machines was used to impose de-facto taxation on the tribe through a revenue sharing agreement. The gaming compact between Connecticut and the Mashantucket Pequots does not restrict the number of slot machines that the tribe may operate, however in order to influence the state to allow them at Foxwoods the tribe agreed to give up 25% of the total revenue collected from slot machine play, with an initial guarantee in 1993 of \$100 million (Connecticut Division of Special Revenue 1993). This "Memorandum of Understanding" between the tribe and the state that set the amount of money the tribe would give to Connecticut annually was not included in the language of their compact and not submitted with the compact for approval by the U.S. Secretary of the Interior as is dictated by IGRA.

Tribes are solely subject to Federal taxes, as the implicit purpose of creating reservation land was for tribal self-government, which preempts state tax jurisdiction over Indians unless first authorized by Congress (Cohen 1941, 406). *California v. Cabazon Band of Mission Indians* (1987) legalized tribal gaming under the stipulation of the U.S. Constitution's commerce clause that stated that "the Congress shall have power . . . To regulate commerce . . . among the several states and with the Indian tribes" (Article I, Section 8, Clause 3), further asserting federal and tribal tax jurisdiction, rather than states. This clause dictated that tribes could take advantage of their sovereign status

by creating potentially highly profitable gaming operations unfettered by state taxation; however Connecticut used the power of slot machines as part of a gaming development strategy to extract a monthly “contribution” (Connecticut Division of Special Revenue 1993) from the Tribe. In the fiscal year 2007-2008 the Mashantucket Pequots “contributed” over \$190 million to Connecticut from its slot machine revenue for the right to create a gaming operation with the highest potential for tribal economic development success.

The current state of the gaming compacting process harms tribes. States do not negotiate compacts that would most benefit tribes and the communities that surround reservation land, but rather what serves the state’s interests the most, as Kathryn Rand states, “as a practical result [of the invalidation of IGRA's legal cause of action against a state], for a state that refuses to consent to suit, good faith may equate simply to the state's posture toward Indian gaming: what the governor is willing to negotiate, the state legislature to approve, or the state courts to uphold” (Rand 2007, 983).

## Conclusions

When the senate drafted S.555 (the bill that would become IGRA), their intent was simple, they wanted to enact legislation that would introduce a regulatory system for tribal gaming enterprises. It was drafted and passed with noble intentions, and done so with careful consideration of the Federal government's responsibility to respect states' rights and to abide by the federal Indian policy of encouraging self-determination for tribes. Congress' intent was to protect tribes, states, and citizens from corruption and organized crime. Section 3 of S.555, which appears in the same language in the second section of IGRA, declares in clear terms the purpose of the act is to

- (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
- (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players (U.S. Senate 1987, 5)

The language of IGRA is in favor of tribal interests throughout the text of the law. There is no stipulation that favors the state, but rather the intent of the law is to put two sovereign entities—the states and the tribes—on equal standing with one another that would require both to cede some rights in order to come to an agreement that serves the interests of both parties. While this is a clear violation of tribal sovereignty, Senator Inouye, then chairman of the senate select committee on Indian affairs and the introducer of S.555, explains:

This is not the best of all possible worlds but the committee believes that tribes and States can sit down at the negotiating table as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate... I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact. (*Cong. Rec.* 1988, 134, no. 127)

The stipulation that states must “negotiate in good faith” with tribes over Class III gaming compacts is present to prevent states from unilaterally impose its power over tribal affairs.

The problems with the bill, and extending to the law after its passage, was addressed in the both the Senate and the House of Representatives during debates before the passage of the law. Numerous senators and representatives both with and without constituencies that would be affected by Indian gaming spoke about the shortcomings of the law and how it should be interpreted after its passage. Representative Coelho of California, in the House debate before S.555’s passage, stated the Congress’ intent for the law was not to become a tool for the states to infringe upon tribal sovereign rights saying:

It is important to make it clear that the compact arrangement set forth in this legislation is intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation or taxation. Nor is it the intent of Congress that states use negotiations on gaming compacts as a means to pressure Indian tribes to cede rights in any other area. Congress also assumes that the states will be reasonable in negotiating gaming compacts and not simply insist that tribes submit to complete state regulation. It is even possible that a compact may provide for no state involvement in the regulation of gaming activities on a particular reservation. (*Cong. Rec.* 1988, 134, no. 133)

However, the Federal government has allowed a law with powerful implications for tribal empowerment through economic prosperity to become another oppressive tool for non-Indians to maintain influence over the Indian minority. The reality of its implementation and interpretation by the courts has diverted from the stated intent of Congress, and has transformed it into an instrument for the deterioration of tribal sovereign rights. It has come to undermine the Federal government's policy of self-determination for tribes and their efforts to influence sustained economic growth and empowerment, and allowed states to illegally impinge on tribal sovereign rights.

The law, as stated above, was to protect states and tribes from organized crime. However the Department of Justice has found few instances of organized crime's influence over tribal gaming. Bruce G. Orr, the organized crime and racketeering section of the criminal division of the Department of Justice entered a prepared statement into the Congressional record during a hearing on the implementation of IGRA in 2001 stating that aside from isolated incidents of infiltration (that ended with successful prosecution by federal agencies) "the Department has found no evidence of a systematic infiltration of Indian gaming by elements of organized crime" (U.S. Senate 2001, 62-3). It is either the case then that IGRA has performed its intent in protecting tribes from organized crime, or tribes themselves have resisted organized crime's influence. The fact that the Department of Justice has prosecuted very few cases, and found no widespread infiltration by criminal elements lends credibility to the latter. Therefore the law itself imposes unnecessary impediments to tribal development by giving states an outlet to impose their jurisdiction on tribes, and violates federal policy to be "committed to supporting and assisting Indian tribes in the development of strong and stable tribal

governments, capable of administering quality programs and developing the economies of their respective communities” (*Indian Self-Determination and Education Assistance Act of 1975*).

What has happened specifically is that state governments have used the compacting process as a means to force tribes into revenue-sharing agreements and to submit to state criminal and civil jurisdiction where it had not existed previously. Since the Seminole decision (1996), tribes have had no legal recourse to stop states from negotiating without honest intent. Now it is the case that if tribes want to negotiate a favorable compact they must live in a state with a legislature or executive branch that is sympathetic to either tribes’ economic development, or to the gaming industry in general, however in general there are few states that would be sympathetic to both gaming and to tribes. States have used the law to protect their own “public” gaming interests and to promote some governors’ and legislatures unspoken goals of continuing the termination policy by forcing Indians to abide by the same rules as other citizens of the state.

In states where Class III-type gaming operations exist before tribes seek out compacts, as in the case of South Dakota and (in part) Connecticut, states will attempt to negotiate compacts that ensure the Class III gaming operations that tribes create will not be in a position to compete with “public” operations. What has occurred is what Senator John McCain warned before the passage of IGRA, stating that:

One important aspect of this debate which has received little attention is the non-Indian gaming industry’s fear of a new economic competition. Tribes argue that placing them under state jurisdiction will all but assure that they will be unable to compete...fear of increased criminal activity is one thing; fear of economic competition is another. (U.S. Senate 1987, 265)

During the compacting process between the Mashantucket Pequots and the state of Connecticut, as stated before, the main issue became the allowance of slot machines at Foxwoods. The agreement that the tribe and the state reached was that of revenue-sharing (arguably a form of taxation) for the tribe to have the right to operate them. Competing economic interests were at play during the compacting process. In 1992 after Foxwoods had opened, but before the casino was allowed to have slot machines, the entrepreneur Steve Wynn attempted to open a casino in Bridgeport, Connecticut (a city an hour closer to New York City than Foxwoods), that would be taxed by Connecticut, and offered huge competition to the Mashantucket Pequot's gaming enterprise (Fromson 2003, 132). While the governor of Connecticut at the time did not support an expansion of gaming in the state, the legislature supported the income that would come from the new, non-tribal casinos. Connecticut used this competing gaming interest as leverage to influence the tribe to offer an enormous amount of the slot revenue if it was given the right to operate slots, some 25% or \$100 million (Connecticut Division of Special Revenue 1993). Connecticut used its power in negotiating tribal-state compacts (and in this case agreements that amended the original) to influence the tribe to submit to a revenue-sharing agreement that directly benefited the state by taking a large portion of the revenue from Foxwoods. Slot machines would have become legal in Connecticut regardless of this agreement, Wynn carried enough political influence in Connecticut that he could have pushed a measure to legalize casino gaming in Connecticut (Fromson 2003, 133), and the tribe would then have been able to petition to include them in their compact. The deal that the state and the tribe worked out came at the price of the tribe's immunity from any form of state taxation.

In South Dakota during the compacting process for the state's 9 tribes seeking Class III gaming compacts, the state did use their power and influence in negotiations to protect its own interests in gaming within the state. The state legalized gaming in South Dakota in 1989 after the citizens of Deadwood petitioned to allow limited-stakes gaming as a way to revitalize the historic town (Ackerman 1996, 19). In the first 5 years after gambling's legalization in the state, the casinos in Deadwood contributed \$12.4 million in tax revenue to the state (Ackerman 1996, 20). South Dakota, as stated, cannot tax the tribal gaming operations, and the tribal-state Class III compacts do not have provisions for revenue sharing agreements. The contrast between the gaming operations on Indian reservations in South Dakota is extreme; as Lunderman testified "Deadwood is a community of 2,000 residents and has in excess of 2000 gaming devices. The Rosebud Sioux reservation has approximately 15,000 tribal members, is designated as one of the poorest areas in the United States, and was allotted 120 gaming devices, the least of any gaming facility in the United States" (U.S. House 1993, 70). The Oglala Sioux casino, Prairie Winds, is 111 miles away from Deadwood; The Rosebud Sioux casino, the Rosebud Casino, is 251 miles from Deadwood on the state border with Nebraska. It is clear that in this case while the economics of tribal gaming competition is part of the reason for the state's oppressive compacts, but also there are factors within the culture of the state and its government that influence the state to take advantage of the powers they hold in compacting to adversely affect tribes.

In South Dakota, among other states, racism towards Indians is pervasive throughout the state. While not expressly present in compacting language, racism to some extent influences both those who are present during negotiations, and the police that

become present on reservations after compacts force state jurisdiction on reservations. The former governor of South Dakota, William Janklow, was known among the state's tribes as being anti-Indian. In a 2002 editorial in *Indian Country Today*, whose mission is to "is to better the lives of Indigenous peoples by delivering accurate, relevant, and culturally sensitive content," Steve Emery, the director of the Sicangu Policy Institute of Sinte Gelska University in Rosebud, S.D. and member of the Cheyenne River Sioux tribe stated that:

Throughout his career, Bill Janklow has developed state executive branch policy to fight our Sioux Nation tribal governments and inflict suffering and punishment upon our people at every point...[he] limited our tribes to 250 slot machines while the State operates 7,000 video lottery terminals...[and] demanded cash payments from our tribes if we wanted to increase our machine numbers. (*Indian Times Today* 2002)

His track record of anti-Indian policy does not end at gaming; he also opposed tribal welfare programs, tribal attempts at land acquisition, and refused to allow federal Medicare funds to be used at reservation nursing homes and hospitals (*Indian Times Today* 2002), and reflects the legislature's position towards the state's attitude towards Indians.

In 2005 HB1204, a bill to prevent the racial profiling of Indians was voted down in committee and was not considered in the state legislature. Racial profiling of Indians by police is common in South Dakota where police routinely subject them to unfair treatment in frequent stops and extensive searches (*Rapid City Journal* 2005). A white lobbyist working as a consultant to a Cheyenne River Sioux college borrowed a car with plates indicating it was from a reservation and drove it, quoted in an article as saying "I took the car, a brand new Buick, and had quite an experience. Every town I went through,

somebody followed me. You don't quite understand it until you've been through it,' he said. 'This is something that exists in this state. It does. I'm not going to forget that'" (*Rapid City Journal* 2005). Unfair treatment by police is known by every tribal member, and the unfair treatment would not end once police were on reservation land with tribes being forced to relinquish criminal jurisdiction to the state, if anything it would increase.

The gaming industry has proven to be a successful one for some tribes; investing in gaming has been proven to allow many tribes to fund tribal services and become self-sufficient, rather than rely on government employment and transfer payments. This is why the statutes that govern its regulation should be re-evaluated and amended by Congress to address the problems of its exploitation by some states. The original intent was to protect states and tribes from organized crime, but the Department of Justice has seen only isolated incidents of organized crime's influence over tribal gaming operations, and has been swiftly prosecuted. But the intent has not been the practice. States have used compacts to forward their own economic and anti-Indian policies. The ability for states do use the law this way should end, and the relationship between tribes and the federal government should be the starting point for tribal gaming regulation, and the Fourteenth amendment may be used as precedent for amendment to IGRA.

The Fourteenth Amendment of the Constitution was adopted in 1868 as measure to protect from state infringement upon individual rights, it states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

In the case of both the Mashantucket Pequots and the Oglala Sioux, tribal immunities were abridged during the compacting process by the States' imposing criminal jurisdiction over reservation land and imposing de-facto taxation in order to gain rights. The compacting process, especially in South Dakota, was not an equal one as IGRA had intended. The state has held the majority power, and denied the Oglala Sioux their privilege granted by IGRA to fair compact negotiations and equality in protection of gaming laws by favoring the "public" Deadwood casino. A federal regulatory scheme, as opposed to one that places jurisdiction solely in the hands of the state, would end this abridgement of tribal rights by reestablishing the relationship with the federal government and allow it to set the limits on the types of games, revenue sharing, and criminal jurisdiction.

At the time of IGRA's passage, there was debate between S. 555 and S. 1303, introduced by Senator John McCain of Arizona. S. 1303 had the same goals and intent of S. 555, but its regulatory scheme differed. S. 1303 gave tribes jurisdiction over all classes of gaming on their reservations, so long as those types of games were legal in the states where reservations were located (U.S. Senate 1987, S 1303), but only so long as the regulatory scheme that tribes proposed was approved by the National Indian Gaming Commission. Under S. 1303, the National Indian Gaming Commission would work in concert with state regulatory agencies to ensure that the regulatory scheme for Indian gaming would be consistent with other public operations, excluding any provisions that impose any "financial burden" on gaming activities or regulations that "are clearly inappropriate for application to Indian tribes and their operations or which would

unreasonably impair the ability of the tribe to conduct its operation” (U.S. Senate 1987, S 1303). This bill would have been compatible with federal Indian policy; however it was passed over in favor of S. 555.

While IGRA at this point probably could not be overturned in favor of a completely new regulatory scheme that would resemble the one proposed in S. 1303, there are measures that the federal government could put in place that would reduce states’ abilities to “unreasonably impair the ability of the tribe to conduct its operation.” As it stands there are no federal guidelines for the types of state agencies that conduct compact negotiations. While *Seminole Tribe of Florida v. Florida* (1996) eliminated the ability for tribes to force states to negotiate in good faith, if the federal government enacted legislation to define which state agencies could conduct negotiations, the power of certain elements that arise in negotiations such as personal attitudes or competing commercial interests could be mitigated.

The National Indian Gaming Commission should take a more active role in aiding tribes that are subjected to unfair gaming compacts by states by not approving those compacts that do impair the ability of tribes to engage in activities for economic development, and working with states to ease their positions. The federal government does not have the power to force states into court, but it still maintains the power to regulate commerce between states and tribes, and should exercise this power in the approval process for gaming compacts to favor tribes, or at least reduce states’ ability to impinge on tribal sovereignty.

The federal government should more closely monitor the extent to which states maintain criminal and civil jurisdiction. Aside from the states that Public Law 280 pertains to, ideally Bureau of Indian Affairs and tribal police forces should be given complete jurisdiction over tribal lands, but this is far from realistic. Another option would be for state police forces to maintain jurisdiction over Indian lands pursuant to tribal-state compacts, but (especially in states like South Dakota with common prejudices by police forces towards Indians) should be more monitored by federal law enforcement bodies.

Gambling is a controversial issue with those that fiercely support and fiercely oppose it as a commercial institution in this country. Regulation is a necessary part of the operation to avoid corruption and criminal infiltration in order to protect all parties involved. However, pertaining to tribes, the issue that should supersede all others in gaming is that of tribal sovereignty. The policy set forth in the Indian Self-Determination and Education Assistance Act of 1975 is being violated under IGRA. Economic development efforts are being allowed to be hampered by state regulation, and the federal government is complicit in this by doing nothing to alleviate the imposition of state authority on tribal matters. Gaming should be regulated on reservations, but it should be done so by tribes and by the federal government in order for tribes to realize the benefits that a gaming operation can afford its members. Gaming works as an economic development strategy, but if the way that it is governed continues in its current state, tribes may make money to better their membership, but they will not be able to use gaming as a way to escape the oppression they have faced since the first colonists arrived in North America

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