FEDERAL LAW, STATE POLICY, AND INDIAN GAMING

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Indian tribes have been something of an enigma in the federal Constitutional scheme for more than 200 years. In *Worcester v. Georgia*, Chief Justice John Marshall indicated that federal law and treaties contemplated "Indian territory as completely separated from that of the states."[1] Although the Supreme Court now recognizes that "ordinarily" Indian reservations are considered part of the territory of states,[2] conceiving them so can be misleading. Indeed, in the 1973 case of *McClanahan v. Arizona State Tax Commission*, the Supreme Court described Indian reservations as "separate, although dependant nations" and recognized that, with some exceptions, "state law could have no role to play within the reservation boundaries."[3] A discussion of Indian gaming is particularly appropriate for a symposium on cross-border issues because the Indian gaming industry's very existence can be traced to an important "cross-border" issue: the applicability of state gaming laws on Indian reservations.

When *McClanahan* was decided, most states prohibited gambling, or at least restricted gaming activities to very low stakes or charitable events.[4] Although *McClanahan* was a tax case, the sweeping language in the opinion, and in other opinions handed down during the same era, emboldened tribes, many of which faced dire economic circumstances. To take advantage of the federal protection that *McClanahan* provided to Indian tribes on their own lands, several tribes initiated gaming operations on Indian lands that, outside of Indian reservations, would be prohibited by state law. Tribes also decided to allow non-Indian patrons to participate, a decision that made the enterprises far more lucrative, yet far more controversial.

State governments opposed tribal efforts to initiate gaming enterprises and were particularly unhappy that tribes aggressively encouraged state citizens to patronize the operations. The sweeping language in *McClanahan* did not faze the state governments. In light of non-Indian state citizen participation, state officials believed they had a legitimate interest in the activity and a solid justification on which to assert jurisdiction. Where states saw a controversial cross-border issue and lawyers saw an interesting legal question, Indian tribes saw opportunity.

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[1] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

[2] *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (Indian territory is now ordinarily considered part of a state's territory).

[3] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973).

[4] *See, e.g.*, Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981) (describing Florida's charitable gaming laws).

Neither Indian tribes, nor Nevadans for that matter, have any particular native talent in running gaming operations; rather, they have a unique jurisdictional circumstance. Both Indian tribes and states are sovereigns within a greater sovereign. They possess sovereign governmental authority over certain discrete business activities and may choose the substance, method, and scope of regulation of those activities within their respective jurisdictions. In Indian country, this governmental authority is described by the legal/political phrase, "tribal sovereignty."[5]

For Indian tribes, the exercise of tribal sovereignty to operate and regulate gaming enterprises, while coupled with the fact that, on the other side of the reservation boundary, state governments exercise their own sovereign powers to adopt a highly restrictive approach toward gaming, has produced a tremendous opportunity. In exploiting the opportunity created in part by tribal sovereignty, Indian tribes have collectively created a $14.5 billion Indian gaming industry in the United States.[6]

It is important to recognize that this gaming opportunity has arisen not from tribal sovereignty alone. Many jurisdictions, including foreign countries, have a greater quantum of "sovereignty" than Indian nations in the United States.[7] While sovereignty is thus a necessary condition to the tribes' ability to be successful in the Indian gaming industry, it is not a sufficient condition. Indeed, although tribal sovereignty allows Indian tribes to authorize and regulate casino gaming (within some limits that are discussed in greater detail below), it is not tribal sovereignty or even federal law that makes Indian gaming successful. In an ironic twist on historical federal Indian policy, it is state law that makes Indian gaming successful.

Indian gaming is profitable only because states have created and preserved state legal regimes that maintain the Indian tribes' monopolistic power in the gaming market place. Because states have maintained strict restrictions or prohibitions on commercial gaming outside of Indian country, consumers flock to Indian casinos, which are, in effect, tribal islands of gaming permissiveness in state oceans of gaming intolerance. Put another way, by preventing gaming consumers from being able to find lawful gaming opportunities near their own neighborhoods, state governments force these consumers to seek out and visit Indian casinos, sometimes traveling several hours to play.

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[5] States have some quantum of sovereignty too. Perhaps because the extent of state sovereignty in the federal structure is more apparent on the face of the Constitution, state officials do not, as a practical matter, spend as much time talking about it. Indian tribal sovereignty is also apparent from the Constitution, though implicit, and it has often been encroached upon by states and the federal government, leaving Indian tribes far less secure in their sovereignty. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

[6] Indian tribes have also sometimes exploited "cross-border" differences in regulatory tax schemes by offering tobacco products and even gasoline at more attractive tax rates than states offer. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (dealing with gasoline); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (dealing with tobacco).

[7] In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 2 (1831), Chief Justice Marshall famously asserted that Indian tribes are not foreign nations, but instead are "domestic dependent nations," a term that was not defined or even mentioned in the Constitution or other federal law, thus giving Marshall maximum flexibility in crafting the legal status of Indian tribes.

If states adopt more permissive attitudes toward the gaming industry in general, and allow citizens and businesses to offer commercial gambling widely within the state, Indian casinos will no longer constitute islands of permissiveness that draw consumers, but landlocked casinos in inconvenient locations that will have difficulty competing with more advantageously placed casinos.

This Article will set forth the legal authorization and the economic success of Indian gaming by asking and answering two rhetorical questions: "What makes Indian gaming lawful?" and "What makes Indian gaming successful?" This Article will conclude with the observation that Indian gaming exists almost entirely at the mercy of state governments. It will argue that, while Indian gaming began as a cross-border issue, it no longer has those features. Indeed, it has been transformed into the very antithesis of a cross-border issue, a political issue that is addressed almost entirely in the sphere of state political processes. The issue no longer spans borders, but is an internal state political issue. This Article will then explain the ramifications of this transformation both for federal Indian law and policy and for those who wish to study the development and resolution of cross-border problems.

I. Q: WHAT MAKES INDIAN GAMING LAWFUL? A: STATE LAW

The history of Indian gaming is the history of a cross-border issue: the unsuccessful, then successful, and now somewhat uncertain attempt by state governments to extend their gaming laws into Indian reservations. The history is now familiar.[8]

Indian gaming began modestly in the 1970s with high stakes bingo operations in California and Florida. Although more limited forms of bingo were lawful in each of those states, state and local officials raised stronger and louder objections, as Indian bingo operations grew larger and more successful. Local officials in California believed that they had a particularly strong basis for challenging the Indian bingo operations because, in 1953, Congress had enacted a law popularly known as Public Law 280 that recognized state criminal jurisdic-

[8] The history of Indian gaming has been documented far more thoroughly elsewhere. *See, e.g.*, Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 RACE & ETHNIC ANC. L.J. 7 (1998); Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205 (1997); Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711 (1996); Karen S. McFadden, Note, *The Stakes Are Too High to Gamble Away Tribal Self-Government, Self-Sufficiency, and Economic Development When Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807 (1996); Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381 (1997); Sherry M. Thompson, *The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada*, 11 ARIZ. J. INT'L & COMP. L. 521 (1994); Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51 (1995); Kevin J Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic,"* 1996 BYU L. REV. 407. Briefly touching on the history is useful in revealing the extensive power states may exercise over Indian gaming.

tion over Indian reservations within California and several other states.[9] Because Public Law 280 had dramatically changed the federal common law of Indian nations, the sweeping language of *McClanahan* had far less force in these states. Thus, from the perspective of state governments, California was a good place for a test case.

From the state officials' standpoint, Indian gaming was not a "cross-border" issue. Particularly in California, state officials believed that state gaming laws extended into Indian reservations. When local law enforcement officials in California repeatedly threatened criminal prosecution, an Indian tribe sought federal declaratory relief that the threats were invalid. The case reached the Supreme Court in 1987, resulting in *California v. Cabazon Band of Mission Indians*.[10]

A. California v. Cabazon Band of Mission Indians

In *Cabazon*, the Court construed Public Law 280 to recognize that Congress had given California the authority to apply its criminal laws and to exercise civil *adjudicatory* jurisdiction on Indian reservations, but had not given California the authority to exercise *regulatory* authority on Indian reservations.[11] In other words, while Indian tribes must submit to state criminal authority and civil adjudicatory jurisdiction, civil regulatory power over Indian activities remained within the exclusive domain of tribal governments.

If the state possessed criminal authority, but the tribe possessed exclusive regulatory authority, the immediate question was whether high stakes Indian bingo was an activity subject to criminal authority or regulatory authority. The State of California argued that the gaming activity was squarely within its grant of criminal jurisdiction because the activity clearly violated two provisions of the California Penal Code.[12]

To the dismay of California and other states,[13] however, the Court rejected this argument. It used a broader approach in analyzing the nature of the authority that the state sought to exercise. The Court explained that California's approach to gambling in general, and bingo in particular, was better characterized as regulatory, rather than prohibitory, thus Indian gaming activities were within the regulatory domain over which California had not been granted authority.[14] As for the criminal provisions in the state penal code cited by California, the Court explained that even though "an otherwise regulatory law is enforceable by criminal as well as civil means [that] does not necessarily convert it into a criminal law within the meaning of [Public Law 280]."[15]

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[9] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (codified as amended at 18 U.S.C. § 1162 (2000), 25 U.S.C. §§ 1321-26 (2000), and 28 U.S.C. § 1360 (2000)). *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

[10] 480 U.S. 202 (1987).

[11] *Id.* at 210.

[12] *Id.* at 211.

[13] Arizona, Nevada, New Mexico, Washington, Wisconsin, Minnesota and Connecticut signed on as amici curiae on behalf of California for reversal. *Id.* at 204.

[14] *Id.* at 211-12.

[15] *Id.* at 211.

For Indian tribes, the *Cabazon* decision spurred grandiose plans for economic development on Indian reservations across the country. For state and local governments, the decision caused tremendous frustration. After *Cabazon*, California, and any other state with Public Law 280 authority over Indian tribes, had the theoretical power to prohibit Indian gaming altogether by simply adopting strict prohibitions on *all* forms of gaming and making the prohibitions criminally enforceable. Such action would render gaming a subject of state criminal-prohibitory law, rather than tribal-regulatory law. Thus, after the *Cabazon* decision, Indian gaming was lawful only if the state allowed some form of gaming. State governments, however, were not willing to end all charitable gaming simply to stop Indian gaming. From the states' standpoint, Indian gaming became a cross-border problem, largely because of the states' own political constraints. As a result, Indian reservations that were located entirely within state borders generally remained unhampered by state gambling laws.

B. The Indian Gaming Regulatory Act (IGRA)

Even before the Supreme Court decided *Cabazon*, state and local governments had approached Congress about Indian gaming issues and Congress held hearings regarding those issues.[16] The *Cabazon* decision provoked additional activity on Capitol Hill. In response to intense lobbying from numerous interested parties, Congress enacted the Indian Gaming Regulatory Act in the fall of 1988,[17] which, among other matters relevant to this discussion, clarified the role of states with regard to Indian gaming. In a delicate political environment, in which Congress had tremendous difficulty pleasing the diverse interests, Congress purported not to be altering the legal rule set forth in *Cabazon*,[18] but merely to be providing "a statutory basis for the operation of gaming by Indian tribes."[19]

In IGRA, Congress indicated that Indian tribes may engage in, or license and regulate, bingo and similar games (called Class II gaming)[20] in any state in which bingo is lawful, for any purpose, by any person, organization, or entity.[21] Thus, if a state allowed charitable bingo games by churches and fraternal orga-

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[16] Activity on Indian gaming in both houses of Congress began in earnest in 1986. *See* MORRIS K. UDALL, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, ESTABLISHING FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES, H.R. REP. NO. 99-488 (1986), *and* HON. MARK ANDRES, SELECT COMM. ON INDIAN AFFAIRS, TO ESTABLISH FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES, S. REP. NO. 99-493 (1986).

[17] Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-21 (2000)).

[18] 25 U.S.C. § 2701(5) (2000).

[19] 25 U.S.C. § 2702(1) (2000). This language was perhaps somewhat disingenuous. Tribes likely did not feel that they needed a "statutory basis" for gaming when they already had a solid federal common law basis for gaming that was recognized by the United States Supreme Court. In enacting IGRA, Congress nevertheless planted its own flag in Indian gaming. Yet, because the issue is fraught with such political peril – one or more important constituency will be angered by any significant amendment to the law – Congress has since been unable to seriously re-examine its legislation.

[20] 25 U.S.C. § 2703(7)(A) (2000); 25 C.F.R. § 502.3 (2002).

[21] 25 U.S.C. § 2710(b) (2000).

nizations, Indian tribes could conduct bingo without regard to the specific limitations set by the state.[22] As a result of this federal legal structure, tribal bingo continues to exist at the sufferance of state governments. For Class II gaming, Congress thus preserved the *Cabazon* principle that tribes may engage in this activity as long as states do not prohibit it.

In enacting IGRA, Congress thus seemingly clarified the cross-border issue by further elucidating the scope of the state's authority over Indian bingo. Nevertheless, even bingo has continued to cause substantial "cross-border" controversy after the enactment of IGRA. The provisions defining bingo and similar games are extensive, but the most controversial aspect is the inclusion of alternative forms of bingo, such as "instant bingo" and "pull-tabs."[23] These games, when played in electronic format, resemble slot machines in some respects. As a result, a state that has thoroughly prohibited all forms of casino gaming, but has continued to allow charitable bingo, may find so-called "Class II" slot machines on Indian reservations within the state. A tremendous amount of litigation has confirmed that this issue continues to exist and bears many of the hallmarks of a cross-border issue.[24] Though states may prohibit Indian bingo, states continue to see Indian bingo as a "cross-border" issue because the scope of Class II gaming is not entirely clear. Nevertheless, because even electronic forms of Indian bingo are authorized only in states where bingo gaming is lawful in some form, states also theoretically have the power to prohibit Indian bingo.[25]

State governments may also see a cross-border issue related to enforcement of unlawful gaming by a tribe. Tribal sovereign immunity makes an Indian tribe immune from any legal action by a state government.[26] States are prohibited from bringing an action against a tribe even for flouting an absolute state prohibition on the conduct of bingo. Without any independent means of enforcing the legal right to prohibit Class II gaming, a state that wishes to take action to stop unlawful Class II gaming by a tribe is limited to seeking voluntary compliance from the tribe or asking the United States to take legal action.

So-called "casino style" gaming is another matter entirely. Under IGRA provisions, states have far greater authority over casino style gaming on Indian lands, described in IGRA as "Class III gaming."[27] In contrast to Class II gaming, where Congress effectively left the cross-border issue intact by giving the states the right to prohibit Indian bingo only if they prohibited all charitable

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[22] *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1026-27 (2d Cir. 1990) (for an early interpretation of these provisions in the related context of Class III casino-style gaming).

[23] *See* 27 U.S.C. § 2703(7)(A) (2000); 25 C.F.R. § 502.3 (2002).

[24] *See, e.g.*, Seneca-Cayuga Tribe of Indians v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003); United States v. Santee Sioux Tribe of Neb., 324 F.3d 607 (8th Cir. 2003); Diamond Gaming Enters., Inc. v. Reno, 230 F.3d 365 (D.C. Cir. 2000).

[25] Bingo, for example, is strictly prohibited in the State of Utah, and thus even Indian bingo is unlawful in that state. *See* UTAH CODE ANN. § 76-10-1101, 1102 (2001).

[26] Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1239 (11th Cir. 1999).

[27] Class III gaming is defined by federal law at 25 U.S.C. § 2703(8) (2000), and more specifically in federal regulations at 25 C.F.R. § 502.4 (2002). The definition includes any house banking card games, baccarat, blackjack, pai gow, roulette, craps, keno, slot machines, sports betting, pari-mutuel and lotteries.

bingo, Congress sought to solve all cross-border issues in Class III gaming by requiring tribes and states to come to an agreement on any such gaming.[28] Under IGRA, tribes may conduct Class III gaming only if state law does not prohibit such gaming and only when the state has entered into a "gaming compact" with the tribe that authorizes and governs the specific gaming activities.[29]

The requirement of a tribal-state compact gave states a large role in determining the legality of Indian gaming by making state cooperation a prerequisite for lawful Class III Indian gaming. Thus, IGRA was a clear attempt to resolve cross-border problems in gaming by forcing the interested jurisdictions to negotiate with one another.

But, while Congress required states to negotiate Class III gaming compacts with Indian tribes as long as such gaming is lawful in the state in any respect,[30] IGRA simultaneously denied any incentive for states to negotiate: it refused to authorize states to tax such gaming.[31] From the perspective of state officials, the act of negotiating, even under legal compulsion, may appear to voters like cooperation or capitulation. Such negotiations might therefore be politically untenable to state elected officials. To address the lack of a positive incentive and the possible existence of a political disincentive, Congress created an elaborate scheme in which a tribe could ultimately sue a state for refusing to negotiate in good faith toward a compact.[32] However, eight years after IGRA's enactment, the Supreme Court found this tribal remedy to be unconstitutional in *Seminole Tribe of Florida v. Florida*.[33]

Thus, although the compact requirement placed what was effectively a veto power in the hands of state governments to stop Indian gaming,[34] tribes now lack any mechanism for testing the legitimacy of any such "veto." As a result, following *Seminole Tribe*, it is not clear whether the compact requirement continues to exist; thus states may no longer have an effective veto.[35] As for Class II gaming, because of tribal sovereign immunity and other obstacles,

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[28] *Compare* 25 U.S.C. § 2710(b)(1)(A) (2000) *with* 25 U.S.C. § 2710(d)(1)(C) (2000).

[29] 25 U.S.C. § 2710(d)(1)(B)-(C) (2000).

[30] 25 U.S.C. § 2710(d)(3)(A) (2000) ("[T]he State shall negotiate with the Indian tribe in good faith to enter into such a compact.").

[31] *Id.* § 2710(d)(4).

[32] *Id.* § 2710(d)(3)-(7).

[33] 517 U.S. 44 (1996).

[34] As noted by numerous commentators, the compact requirement has never been very effective. *See, e.g.*, Gatsby Contreras, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487 (2002); Gary W. Donohue, *The Eleventh Amendment: The Supreme Court's Frustrating Impediment to Sensible Regulation of Indian Gaming*, 45 WAYNE L. REV. 295 (1999); Joe Laxague, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77 (1999); Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47 (2002); Wolf, *supra* note 8.

[35] At least one federal court has refused to allow an action to proceed against a tribe for gaming without a compact where a state was refusing to negotiate. The court would have allowed the action if the government had successfully established that the state's refusal was justified by state law making the gaming illegal. United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998).

states have no real ability to enforce their "veto" if tribes conduct gaming without state consent.[36]

To some degree, then, the cross-border problem of Indian gaming is not fully resolved, leaving Indian gaming in a gray area of the law. If, from the state perspective, Indian gaming is viewed as a cross-border problem in which states seek to extend their laws across the borders of Indian reservations, *Cabazon* is evidence that states initially failed in that endeavor. However, states have succeeded to a much greater extent, at least in the area of casino-style gaming, after Congress intervened. IGRA extends state law across reservation borders (even in states without Public Law 280 authority on Indian reservations). Because of the uncertainty of the compact requirement after *Seminole*, Indian gaming has continued to present cross-border problems that are difficult to address in a legal forum. Thus, Indian gaming issues sometimes seem similar to international cross-border issues that are also fraught with practical problems such as enforcement and forum selection.

The legal ambiguities that continue to exist are problematic not only for states, but have also harmed some tribes that sought and failed to obtain financing for new gaming operations.[37] Reputable financial institutions are understandably disinclined to lend financial support to ventures of uncertain legality. As a result, despite continuing uncertainty as to whether a compact is required, tribes have sought compacts and most states have obliged.[38] Tribes have used financial resources, political clout, or both, to obtain cooperation from state governments. In other words, tribal and state governments have bargained around the legal uncertainties.

To sum up, the cross-border issue that lies at the heart of Indian gaming – that is, the question as to the applicability and enforcement of state law – is not a simple matter. It remains clouded by the uncertainties surrounding Class III gaming compact requirements and issues as to the scope of Class II machine gaming. Nevertheless, the seemingly simple question of "What makes Indian gaming lawful?" has two clear principles. First, some form of Indian gaming is lawful if state law allows at least some forms of gaming. Second, Indian gaming is entirely unlawful where state law strictly prohibits all gambling. Thus, one simple answer to the question of what makes Indian gaming lawful is "state law." To a great extent, even when gaming is sanctioned by the federal common law of Indian nations[39] and confirmed in statutory law,[40] a state can prohibit Indian gaming of either the Class II or the Class III variety by simply

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[36] Generally, states must ask the United States (acting through its law enforcement arm, the United States Department of Justice or the National Indian Gaming Commission (NIGC)) to take action to shut down Indian casinos that operate without a gaming compact. Since the United States has its own independent political interests, resource allocation priorities, and legal responsibilities, it may not always be willing to assist the states in shutting down Indian casinos.

[37] *Cf.* Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 74 & n. 205 (2002). *See also* Kevin K. Washburn, *Recurring Problems in Indian* Gaming, 1 WYO. L. REV. 427, 429-30 (2001) (noting that tribal-state gaming compacts had been entered in 24 states).

[38] Washburn, *supra* note 37.

[39] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[40] *See* 25 U.S.C. § 2710(b) (2000).

prohibiting all gaming within the state.[41] In other words, the legality of Indian gaming in every state is at the mercy of individual state governments.

Though stark, these observations are not particularly earth shattering. A casual look at *Cabazon*, IGRA, and relevant case law illustrates that, on the one hand, the lawfulness of Indian gaming lies ultimately in the hands of states and, on the other, it is subject to a great deal of continuing uncertainty. Accordingly, this discussion will now move to an observation that is not as apparent from the face of the federal statutes and case law and that presents slightly more nuance.

II. Q: WHAT MAKES INDIAN GAMING SUCCESSFUL? A: STATE LAW

Even given the complex, idiosyncratic, and dysfunctional legal regime underlying Indian gaming, the question of what makes a particular business *legal* is not nearly as interesting or important as the question as to what makes such a business *profitable*. It is to that question that this discussion now turns.

Because of the first three rules of real estate,[42] Indian tribes enter most consumer-oriented enterprises with a distinct disadvantage related to geography and demographics. Indian tribal businesses generally are located on Indian reservations, most of which are remote from large urban populations. To be successful in a normal competitive business environment, then, an Indian tribe must usually overcome a distinct competitive handicap: its remote location. It is for this reason that the average consumer-oriented business on an Indian reservation suffers from a competitive disadvantage when compared to non-Indian businesses that offer similar or identical products.

Under federal law, Indian casinos may be located only on Indian lands.[43] The key to a successful Indian gaming operation, in the words of the Supreme Court, are the "patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying . . . comfortable, clean and attractive facilities and well-run games."[44]

A commercial, non-Indian casino entrepreneur who established a lawful casino in a more advantageous location might quickly obtain a competitive advantage over even those Indian casinos that are relatively close to major metropolitan areas. Only a handful of tribes possess advantageous business locations.[45] If (or when) states adopt more permissive attitudes toward gaming and

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[41] United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998).

[42] The first three rules of real estate, the common phrase asserts, are "Location, location, location."

[43] 25 U.S.C. §§ 2703(4), 2710(b)(1). If an Indian tribe wishes to open a gaming operation elsewhere, it may do so only to the extent that gaming is authorized by state law. One Michigan tribe, for example, is involved in commercial gaming with a ninety percent ownership interest in the Greektown Casino in Detroit, Michigan. Such gaming is not "Indian gaming" as the term is defined by federal law. During the past two centuries, tribes have generally been reluctant to subject themselves to state jurisdiction and have thus tended to shy away from businesses outside of Indian lands.

[44] *Cabazon*, 480 U.S. at 219.

[45] Of more than 300 Indian gaming operations in the nations, a few Indian casinos have excellent locations in metropolitan areas such as Albuquerque, Milwaukee, Palms Springs, or Phoenix, but these are the exceptions. Most are located at least forty-five minutes from a major metropolitan area, and often further.

allow non-Indian commercial casinos to compete directly with Indian casinos, tribal casinos will suffer. Indeed, what is now an opportunity – the right to conduct gaming on Indian lands – will become the limitation that Indian gaming can occur only on Indian lands. In most places, a market entrant without the Indian land limitation may well be able to obtain a far more advantageous business location for a casino.

What, then, makes Indian gaming profitable? Or, to ask the question in a more provocative manner, what has enabled aggregate Indian gaming revenues to exceed, by a large margin, the gaming revenues from the Atlantic City and Las Vegas markets combined?[46] The answer is, once again, state law. In particular, restrictive state gaming laws that prevent competition with Indian tribes have made Indian gaming profitable.[47] Thus, the tribal casinos' success can be attributed primarily to the failure of states to adopt a broader permissive attitude toward gaming.

As noted above, many states restrict gaming substantially. Indeed, in many states, gaming may be available only to charitable groups, such as churches and fraternal groups and may be highly restricted as to time, place and manner, such as stakes. Despite these restrictions, tribes can compact for Class III casino style gaming and can offer whatever gaming the compact authorizes. In virtually every state with successful Indian casinos, state laws prohibit commercial gaming or restrict it to distinct forms, such as dog or horse racing, that do not compete directly with Indian gaming.[48] Indian casinos in those states can be characterized, as noted above, as islands of gaming permissiveness in an ocean of gaming intolerance. In those circumstances, Indian casinos are attractive to gaming patrons because they are the only option. In contrast, in those states in which casinos operated by non-Indians are lawful and regulated, tribes are generally not successful participants in the market.[49]

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[46] Recent estimates place Las Vegas gaming revenues at $5 to $7 billion and Atlantic City revenues at slightly more than $4 billion. The most recent statistics from the NIGC suggest that the Indian gaming industry produced $14.5 billion in gaming revenues in the most recently completed audit period, which included any tribal fiscal years ending in 2002. *See* Nat'l Indian Gaming Comm'n website *at* http://www.nigc.gov/nigc/tribes/revenue.jsp (last visited Jan. 19, 2004).

[47] Henry J. Lischer, Jr., *United States Taxation of Native American Indian Gambling Activities: The Hunt for the Modern Buffalo?*, 65 GEBURSTAG 701, 707 (Ulrich Hübner & Werner F. Ebke eds., 1999) (Festschrift für Professor Bernhard Grossfeld zum) (recognizing that the commercial non-Indian casinos in the United States generally face more competitive markets than Indian casinos) (on file with author).

[48] *See, e.g.*, N.Y. PENAL LAW §§ 225.00, 225.30 (McKinney 2003) (creating offenses for gambling and possession of gambling devices); N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 202 (McKinney 2003) (authorizing horse racing wagering); N.Y. TAX LAW § 1607 (McKinney 2003) (addressing state lottery).

[49] Illinois, Louisiana, Missouri, Nevada, and New Jersey are examples. Exceptions are Michigan and Mississippi, but in those states Indian gaming generally long predated the commercial casinos and operates in different geographical markets within the states. In Michigan, the state law authorizing commercial gaming protects the tribes' out of state markets with provisions that limit commercial casino gaming to cities with populations over 800,000 that are located within 100 miles of another state or country that permits gaming. The practical effect of these provisions is to limit commercial gaming to the City of Detroit, thus allowing competition with the casinos across the international border in Windsor, Canada, but limiting direct competition with the Indian casinos throughout the rest of the

In economic terms, restrictive state gaming laws create barriers to entry that provide Indian tribes with an artificial monopolistic market, or in those markets in which several tribes compete, an artificial oligopolistic market in which the only other competitors offering casino gaming are other tribes. State laws have the effect of limiting or preventing competition for casino gaming patrons and protecting strong profit margins for tribal governments.[50] Indeed, economic theory would likely conclude that the artificial barriers created by state laws actually harm gaming patrons who might obtain gambling at a lower price[51] or with greater choice in a market with greater competition.

Why have states maintained these artificial barriers to entry? The answer, of course, is not legal in nature, but rather political or, perhaps, drawn from public choice theory. One suspects that state policymakers are not acting solely out of an idealistic desire to try to protect the tribal casinos that have provided substantial resources to an underprivileged constituency group. Rather, they likely are exhibiting simple political calculation. Public choice theorists could make a far better argument than what follows, but it is likely that the increasingly politically powerful Indian tribal governments are lobbying aggressively and that tribal members and even non-Indian casino employees are voting. Together they have succeeded in inducing some state legislators to act in the interests of these tribal constituents.[52] In many states, such legislators join forces with other legislators who represent constituents who are simply opposed to gambling expansion. Although limiting gaming to Indian lands makes no more sense as a matter of public policy than limiting gaming to riverboats, gaming opponents often seek limits on any possible basis. Thus, the barriers to entry are preserved by an alliance of unlikely bedfellows in the state political process.

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state. In Mississippi, most of the gaming is along the coast in Biloxi. When the coastal gaming market developed, the Mississippi Band of Choctaw Indians already had a well-developed operation located more than 120 miles north of the coast and much closer to the principal population centers in central Mississippi, including Jackson and Meridian. Having said that, the Mississippi Choctaw seem to have been successful in maintaining a strong gaming operation despite substantial competition.

[50] In most of these states, the existence of a monopoly depends to some degree on the scope of the market industry. Customers seeking gaming entertainment have, of course, a wide variety of activities available to them, including, depending on the state, lotteries, horse and dog racing, and even internet gaming. For the customer interested in casino gaming, however, laws in most states have strongly constricted consumer choices. States have made most forms of competition to Indian casinos unlawful and thus the success of Indian gaming is due to the protection of their markets through state laws preventing competition. The extent of the monopoly is determined economically by comparing the elasticity of demand relative to the other gambling activities. Relatively inelastic demand as to price between, for example, lotteries and casino gambling means that the casino industry's monopolistic power is stronger.

[51] In practical terms, "lower price" in the gaming context actually means greater payout or less retention, or in the true jargon of the industry, "looser slots."

[52] See John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533 (2001), and DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM, (Paula D. McClain et al. eds., 2002) for insightful discussions of tribal political power in state and federal elections.

The tremendous tribal political activity in the state political process demonstrates that, while the legality of Indian gaming may present cross-border issues, the profitability of tribal casinos is not a cross-border problem at all. Indeed, state political activity by Indian tribes demonstrates that this aspect of Indian gaming is the very antithesis of a cross-border problem. Rather, it is an example of state law being used to protect an important constituency within the state: Indian tribes and their gaming operations.

III. INDIAN GAMING, FEDERAL LAW AND POLICY, AND CROSS-BORDER ISSUES

In light of the cross-border problem giving rise to Indian gaming and the preservation of restrictive state laws that have protected Indian casinos, what lessons can Indian gaming offer those interested in cross-border issues? This Article has sought, in Parts I and II, to describe the legal structure and economic success of Indian gaming in light of the state government, a competing sovereign. As observed above, the question of the legality of Indian gaming that initially pitted states and tribes against one another is, in many respects, a cross-border issue possessing continuing uncertainty.

The question of Indian casinos' profitability, on the other hand, has not unfolded as a cross-border issue at all, but rather has become an internal state political issue of enormous importance to tribes. In protecting their markets, tribes have behaved not as separate sovereigns, but as active participants in state-level politics.[53] One way of describing the outcome is that Indian tribes have taken advantage of the lack of clarity posed by the cross-border issues to build economic resources and then used these economic resources to convert the cross-border issue to an internal political issue. This account of Indian gaming leads to particular observations about both Indian law and policy and cross-border issues.

A. Indian Gaming and the Rise of State Power in Indian Policy

The transformation of Indian gaming from a cross-border issue to an internal state political issue is a development of enormous consequence for Indian law and policy. For two centuries, Indian tribes had a nearly exclusive relationship with the United States and no relationship with state governments. This relationship began even before the United States came into existence[54] and became part of the federalist structure of our government. Indian tribes

[53] Indian tribes present a unique circumstance for cross-border analysis. On one hand, they are independent sovereigns with limited powers of self-government and geographical boundaries. On the other hand, they are wholly located within the borders of states, and states posses jurisdiction over non-Indians on Indian reservations. This sets up numerous potential cross-border issues. Additionally, tribal governments operate businesses and are employers of state citizens and are composed of tribal members who are citizens of state governments. Indeed, tribal members are citizens of both the tribe and the state in which they live; they are also entitled to vote in those states. *See, e.g.*, Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948); Montoya v. Bolack, 372 P.2d 387 (N.M. 1962).

[54] During the colonial period, tribes had relationships with the British monarch that largely pre-empted any relationship with the colonies. The United States adopted a similar approach, taking Indian affairs as one of the federal powers and pre-empting the states. *See*

counted on the federal government to protect them from the rapacious settlers that sought to overrun Indian lands, as well as the state governments that sanctioned such activity.[55] Tribes rarely consulted with state governments or engaged them on a government-to-government basis. Through Public Law 280 and other laws, Congress changed this exclusive federal relationship, or even terminated the relationship, but such policies were quickly rejected and widely criticized.[56]

But where the federal government once refereed cross-border issues between states and tribes with little direct dialogue between the groups, the states and the tribes are now carrying on active dialogue directly with one another and, for the most part, are bypassing the federal government. Even where one side or the other has sought federal intervention in Indian gaming issues, the federal intervention has worked primarily as a catalyst for state-tribal negotiations.

One of the most vivid examples was the compacting process in Arizona. In 1992, a team of FBI agents and U.S. Marshals were deployed to seize gaming devices at an Indian casino run by the Fort McDowell Apache Tribe in Arizona.[57] The tribe refused to surrender the gaming devices and actively obstructed the federal agents. During the ensuing standoff, the Governor of Arizona flew in by helicopter, met with the tribes, requested a "cooling off" period and, ultimately, reached gaming compacts with the tribe.[58]

A similar situation arose in California, when then-Governor Pete Wilson of California refused to negotiate with Indian tribes in the 1990s and the tribes continued gaming without compacts, threats and the filing of a complaint for forfeiture of gaming machines filed by the United States Department of Justice motivated the tribes to seek a compact that would resolve the dispute.

In both Arizona and California, tribes deftly outmaneuvered state governmental leadership by working at the grassroots level. These tribes successfully convinced state citizens to support Indian gaming directly by approving statewide voter initiatives.[59] In several states, tribal governments then succeeded in making Indian gaming indispensable to state governments through "revenue

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Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

[55] *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S (5 Pet.) 1 (1831); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973).

[56] *See generally* CAROL GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (McHaughton & Gunn, Inc. 1997).

[57] Glenn M. Feldman, *The Great Casino Controversy – Indian Gaming in Arizona*, 29 ARIZ. ATT'Y 19 (July 1993).

[58] *Id.* at 19.

[59] In Arizona, this crafty political decision by the tribe resulted in great embarrassment to the state's governor when the governor later balked at signing the compacts. In the ensuing litigation, the state supreme court held that because "both the legislators and governor are elected to serve the will of the people," the will of the people, when made apparent through the initiative process, trumps the authority of the governor or the legislature. Salt River Pima-Maricopa Indian Cmty. v. Hull, 945 P.2d 818, 825 (Ariz. 1997). The court ordered the governor to sign gaming compacts. With the tribes having beaten the governor at the ballot box and in the courts, the governor finally complied. *See id.* For a discussion of the voter initiatives on Indian gaming in California, see *In re* Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003).

sharing" agreements that provide substantial funding to state governments and give state appropriators a vested interest in continued Indian gaming.[60]

The result of this activity, prompted by IGRA, has been a paradigm shift in Indian policy in the United States. In light of aggressive state political activities, the federal-tribal relationship has given way to a state-tribal relationship that has had far greater economic importance to Indian tribes. The magnitude of tribal gaming revenues has dwarfed the appropriations that tribes receive from the federal government.[61] And the gaming compacts that tribes have entered with states might, in any other context, be called treaties.[62]

Thus, Indian gaming has transformed the nature of Indian policy in the United States from an exclusively federal issue to an important issue of state politics. From the tribal government perspective, the good news is that tribes have proven very effective at the state level. Tribal organization and financial resources have made them powerful forces within state politics. On the other hand, tribal governments are subject to state politics to a far greater extent than in the past. Jettisoning the federal-tribal relationship in favor of tribal-state relationships may not be troubling to tribal governments during a period in which many tribal governments are prosperous and can use their financial resources to exercise powerful political muscle with state policy makers. This shift may become less attractive when the success of Indian gaming begins to wane.

From an economic standpoint, Indian gaming will wane. Although economic theory posits that natural monopolies are durable, artificial monopolies such as those created by legal barriers to entry tend not to endure. Economists might thus predict that Indian gaming has a limited future.

For many tribes, Indian gaming is the most significant economic resource available. Indeed, in light of its success, it is arguably the single most effective economic development mechanism that Indian country has ever known.[63] The

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[60] Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 452 (2003).

[61] Though it is sometimes difficult to make an accurate estimate of federal appropriations for Indian tribes because of difficulties in determining which numbers to include, it is probably fair to assert that federal Indian appropriations are in the neighborhood of five billion dollars. *See* Press Release, U.S. House of Representatives Committee on Appropriations, House Approves FY04 Interior Appropriations Bill (July 17, 2003) (listing $2.9 billion for Indian Health Service, $566 million for Indian Education, and $1.9 billion for Indian programs) (on file with author). Indian gaming revenues seem to be approaching three times that figure. *See supra* note 46.

[62] Under federal law, a federal official has an opportunity to review and approve or disapprove tribal-state gaming compacts. 25 U.S.C. § 710(d)(8)(C) (2000). Because a compact is deemed approved if the Secretary fails to take action within 45 days, such review is essentially optional. The Secretary has rarely disapproved such compacts, and if the state and a tribe are satisfied, it is hard to understand what federal interest would justify disapproval.

[63] Ray Halbritter, leader of the Oneida Tribe in New York, once famously defended Indian gaming against internal tribal opposition, declaring, "We had tried poverty for 200 years, so we decided to try something else." Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 568 (1994). Halbritter detailed tremendous opportunities that gaming resources have given his tribe, including reacquiring:

> more than 2,600 acres of our ancient land for our people . . . We feed our elders and are able now to conduct our ceremonies on a regular basis. The first building we built with our profits as a

fact that it exists solely at the mercy of states sends chills down the spines of many traditional Indian lawyers who are accustomed to litigating against states.

B. Lessons from Indian Gaming for Cross-Border Issues

Although Indian tribes are, in some respects, *sui generis*, Indian gaming is a business, and business has had a long and complicated relationship with law and politics. The history of Indian gaming may thus have some relevance beyond the borders of Indian reservations. Indian gaming appears to offer a handful of lessons for other cross-border issues.

First, the transformation of key issues in Indian gaming from cross-border issues to internal state political issues highlights the fact that solutions to cross-border issues will sometimes lie within the political processes of one of the interested jurisdictions. Where the cross-border problem creates economic opportunities and powerful economic forces, the likelihood of a political solution is tremendous.

In the Indian gaming context, substantial financial capital flowed "across the border" toward Indian tribal casinos while the cross-border issue – the legality of Indian gaming – remained unresolved. In building hundred million dollar casinos and hiring thousands of employees in California, for example, the California tribes created powerful vested interests in successful Indian casinos and developed substantial financial resources. Much of this growth occurred while the legality of Indian gaming was clouded by the lack of gaming compacts authorizing the activity. Despite the ambiguity, this tremendous human and financial capital empowered the tribes to operate successful Indian gaming operations and to develop substantial political power.

However, the lack of clarity caused by the existence of "cross-border" issues presented obstacles to greater growth and thus created clear financial incentives to resolve the legal ambiguities. Business abhors uncertainty. Lenders generally will not provide financing on favorable terms for investments that are legally uncertain and therefore risky. For tribes, obtaining access to capital at fair rates required resolution of an issue that otherwise might have continued to remain unresolved indefinitely. While tribes could successfully exploit the lack of clarity to initiate gaming, to be truly successful they needed certainty. Accordingly, they used financial resources to provide political pressure to obtain gaming compacts and, afterward, to maintain restrictive state laws that preserved insurmountable barriers to entry by any potential competitors.

Although cross-border issues exist in a variety of contexts, gaming is an industry with tremendous financial opportunities. To apply the lessons of Indian gaming in another gaming context, one might consider another signifi-

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nation was a council house, which is our spiritual and governmental meeting place. We have since then built a cook house, a health services center, a cultural center and museum, a recreational center, a swimming pool, a bath house, a children's playground, a gymnasium, and a lacrosse box. Using our own money we also have established scholarship programs, medical, dental, and optical services, job training and legal assistance programs, Oneida language and song classes, mental health and substance abuse programs, elder meals programs, and other beneficial services for our people. We have established a police force, paved our roads, built a septic system, consecrated a burial ground, opened a youth center, and built housing for our people. . . .

Id. at 568-69.

cant cross-border issue: the question of internet gaming. While the legality of internet gaming presents different issues and challenges, some similarities are apparent. Each moment that internet gaming activity successfully continues provides both revenue and popular support that might provide resources that market participants may use to pursue political solutions. Internet gaming vendors lack the political organization of tribal governments, the political appeal of Indian gaming for a disadvantaged community, and the physical presence and substantial employee base within the target jurisdiction. They do, however, presumably have numerous consumers in virtually every jurisdiction. And the financial capital that flows toward lucrative opportunities may well assist internet entrepreneurs in finding political solutions.

IV. CONCLUSION

Indian gaming has continued to pose significant unresolved cross-border issues. When it enacted IGRA, Congress resolved some of the cross-border issues yet created others. In creating the compact requirement for Class III Indian gaming, Congress largely replaced the exclusive federal relationship with tribes in favor of a relationship between tribes and states. Congress also, perhaps inadvertently, helped tribes transform Indian gaming from a festering cross-border issue into an active state political issue. While tribes have regularly been defeated in the courts in recent years,[64] they have been very successful in state level politics. In obtaining compacts, and in seeking to preserve their market advantages through restrictive state gambling laws, tribes have succeeded in becoming effective participants in state politics. Indian gaming has thus been transformed from a cross-border issue to a state policy or political issue.

[64] David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).