

RECONCILING THE PARADOX OF TRIBAL SOVEREIGNTY: THREE FRAMEWORKS FOR DEVELOPING INDIAN GAMING LAW AND POLICY*

Steven Andrew Light † & Kathryn R.L. Rand‡

*Wow, man – Indians have it good! – Eric, upon arriving at the “Three Feathers” casino, on Fox television’s “South Park”*¹

I. INTRODUCTION

Indian gaming,² perhaps more so than any issue facing tribes in the last half-century, is a subject of ever-increasing public fascination and policy debate. In tribal gaming’s second decade of rapid expansion across the country, the popular media’s depiction of contemporary Native Americans appears to center on a widespread stereotype of wealthy gaming tribes and rich Indians. On an episode of the popular television series “Malcolm in the Middle,” an Alaskan Native opens a casino in her home and immediately cashes in at the expense of her white customers.³ The long-running Fox series “The Simpsons” depicted tribal casinos as being run by mystical yet practical Native people who wear traditional headdresses and espouse platitudes in stereotypical accents

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† Steven Andrew Light is an Assistant Professor of Political Science and Public Administration at the University of North Dakota and is the Co-Director of the Institute for the Study of Tribal Gaming Law and Policy (<http://www.law.und.nodak.edu/NPILC/tglpi.html>). He teaches in the areas of American government, civil rights and civil liberties, and public administration, and has published articles on Indian gaming, voting rights, and race law and policy.

‡ Kathryn R.L. Rand is an Associate Professor at the University of North Dakota School of Law and is the Co-Director of the Institute for the Study of Tribal Gaming Law and Policy (<http://www.law.und.nodak.edu/NPILC/tglpi.html>). She teaches in the areas of constitutional law, civil rights and civil liberties, and Indian gaming law, and has published articles on Indian gaming, race law and policy, and feminist jurisprudence.

¹ *South Park: Red Man’s Greed* (Comedy Central television broadcast, Apr. 28, 2003).

² “Indian gaming” is a legal term of art that is firmly embedded in the mainstream lexicon. Throughout this article, we refer interchangeably to Indian gaming and tribal gaming, as well as to Native Americans and Native people. We also refer to “federal Indian law” and its concomitant terms of art, while recognizing that to some, each of these terms is laden with potentially problematic connotations.

³ *Malcolm in the Middle: Cliques* (Fox television broadcast, May 5, 2001).

while micromanaging the bottom line.⁴ In one thread of a “Sopranos” episode, mob boss Tony Soprano and his crew were surprised to discover that the CEO of a Connecticut tribe’s casino – who “discovered” his Native heritage when the casino opened – wears an expensive suit, looks “white,” and displays a cutthroat, borderline corrupt “I’ll scratch your back if you’ll scratch mine” business savvy.⁵ And a particularly pointed recent episode of Comedy Central’s animated “South Park” series, entitled “Red Man’s Greed,” depicts virulent white community backlash against a tribe due to its intent to purchase and demolish a town to construct a superhighway leading to the tribal casino’s door.⁶

These storylines reveal both the place of Indian gaming at the forefront of popular discourse and the common fundamental misapprehension of tribal gaming. Only federally recognized tribal governments may open casinos and, for casino-style gaming, only after a protracted negotiation process with state government.⁷ Some tribal casino managers may, at times, don ceremonial dress, but none would likely do so in the workplace. Most tribal members are just as unrepresentative of Indian stereotypes as are most Italian Americans unlike Mafiosos. And, of course, Native Americans are not “red men,” they do not seek to use Indian gaming as a form of vengeance against “the white man,” and they are unable to simply buy and destroy a city. Yet, although easily discredited in academic circles, these and other misperceptions and overgeneralizations about tribal gaming appear to influence both public opinion and public policy.

Indian gaming provides a clear lens through which to view current public policy issues facing tribes and the interrelationships among federal, state, local, and tribal governments. Many accounts of Indian gaming, however, overgeneralize due to ahistoricism,⁸ a single-discipline approach to the topic,⁹ or overre-

⁴ *The Simpsons: Bart to the Future* (Fox television broadcast, Mar. 13, 2000); *The Simpsons: Dude, Where’s My Ranch?* (Fox television broadcast, Apr. 27, 2003).

⁵ *The Sopranos: Christopher* (HBO television broadcast, Sept. 29, 2002). *But cf. American Indians 5, Sopranos 0 – But With Honors*, INDIAN COUNTRY TODAY (Oct. 7, 2002), available at <http://www.indiancountry.com/article/1033953427> (last visited Jan. 20, 2004) (asserting the episode “left a long way to go in how Indians are portrayed in media but it hit a lot of good points.”).

⁶ *South Park*, *supra* note 1.

⁷ Federal law requires a tribe to enter into a “Tribal-State compact” – an agreement between the tribe and the state governing, among other things, the state’s jurisdiction over the tribal gaming operation – before the tribe may operate casino-style gaming on its reservation. *See* 25 U.S.C. §§ 2703(8), 2710(d) (2000); *see also infra* text accompanying notes 83-85.

⁸ Journalistic accounts of Indian gaming rarely contextualize current events within the history of relations among the United States, the tribes, and the states. For example, in *Time* magazine’s December 2002 cover story on tribal gaming, scant attention was paid to the history of federal Indian policy. *See* Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, *TIME*, Dec. 16, 2002, at 44 (setting forth a short timeline of federal Indian law and policy).

⁹ Many accounts of Indian gaming are based on economic analysis. Although we recognize the importance of calculating gaming’s economic benefits to both tribes and non-Native interests, we believe that the economics of Indian gaming may be understood more broadly through our third referential framework, the intersections of law and policy, which captures the idea that tribal gaming’s economic impacts also have a social component. *Cf.* Katherine A. Spilde, Jonathan B. Taylor & Kenneth W. Grant II, *Social and Economic Analysis of*

liance on anecdote.¹⁰ In this article, we seek to overcome these shortcomings. One cannot adequately understand Indian gaming, we posit, without situating it within the context of three frameworks of reference: (1) federal Indian law and policy, revolving around changing concepts of tribal sovereignty; (2) the law of Indian gaming, particularly the 1988 Indian Gaming Regulatory Act ("IGRA"),¹¹ a complex federal statutory scheme governing the regulation of tribal gaming at three levels of government – tribal, state, and federal; and (3) the intersections of law and policy, as the realities of Indian gaming are shaped as much by politics as by applicable law.

A. Federal Indian Law and Policy

Indian gaming is different from any other form of gambling in the United States because it is grounded in the exercise of tribal sovereignty, a legal and political doctrine embedded in more than 200 years of byzantine federal Indian law and policy.¹² Many academic accounts take as their starting point the Supreme Court's 1987 decision recognizing tribal gaming as a sovereign right in *California v. Cabazon Band of Mission Indians*,¹³ failing to properly contextualize both that case and resultant law and policy. We argue that tribal sovereignty is the key variable driving Indian gaming, yet its realization is paradoxical: sovereignty fundamentally informs federal Indian law and policy, but it is also effectively undercut by that same law and policy. Perhaps surprisingly, however, tribal sovereignty may hold a practical solution to the paradox, an argument we develop in the Article's concluding Part.

B. The Law of Indian Gaming

One cannot understand the practicalities of Indian gaming without understanding IGRA, a complex and comprehensive federal statutory scheme governing the regulation of tribal gaming and thus embodying the paradox of tribal sovereignty. In addition to shaping the role of tribes, IGRA creates and defines the role of state law and state actors,¹⁴ thus providing the framework for resultant outcomes regarding Indian gaming across the country.

Tribal Government Gaming in Oklahoma, 34 n.59 (2002), available at <http://www.ksg.harvard.edu/hpaied/docs/OIGA%20Report%207.1.pdf> (last visited Jan. 20, 2004) ("Certain critically relevant social impacts [of Indian gaming] cannot be captured by standard economic models . . . alone.").

¹⁰ See, e.g., Michael Rezendes, *Big-Money Draw Spurs Corruption: Tribal Casino Operations Make Easy Criminal Targets*, BOSTON GLOBE, Dec. 13, 2000, at A1 (reporting on potential criminal activity while acknowledging "[t]o be sure, tribal gaming authorities and federal law enforcement officials insist there is no evidence of widespread infiltration of Indian gambling by organized crime").

¹¹ 25 U.S.C. §§ 2701-21 (2000).

¹² See *infra* Part III.A.

¹³ 480 U.S. 202 (1987).

¹⁴ See *infra* Part IV.A.

C. *Intersections of Law and Policy*

The public policies governing Indian gaming are shaped as much by politics as by applicable law.¹⁵ Indeed, following the Supreme Court's 1996 invalidation of one of IGRA's enforcement mechanisms,¹⁶ Indian gaming policy has evolved through political compromise as much as through litigation and law reform.¹⁷ By recognizing the politicized intersections of law and policy, one may overcome the paradox of tribal sovereignty.

In this Article's first Part, we clarify what Indian gaming is and briefly examine its growth as an industry. In the following three Parts, we set forth and discuss each of the three frameworks of reference. Underlying each of these frameworks is tribal sovereignty. Throughout, we argue that tribal sovereignty provides the necessary basis for informed and effective policymaking in the area of Indian gaming. In the latter Parts of the Article, we use tribal sovereignty as the theoretical foundation for understanding the empirical realities of Indian gaming. Applying the frameworks to compare and contrast contemporary examples, from the Pequots to the Plains Tribes, we further the move toward an explanatory account of Indian gaming from a law and policy perspective. In the Article's final two Parts, we first revisit popular criticisms of Indian gaming. Rather than asking what appear to be the two standard questions that are the starting point for most discussions – "Who is benefiting from Indian gaming?" or, more simplistically, "Is Indian gaming good or bad?" – we ask, "Does Indian gaming embody the exercise of tribal sovereignty?" We argue that in large part, it does – or, at least, it can. We then set forth a proposal for building effective law and public policy on the foundation of tribal sovereignty that has broad applicability for current and future issues facing Native Americans, ranging from regulation of Indian gaming to federal recognition of tribes.

II. WHAT IS INDIAN GAMING?

As the above-mentioned "Malcolm in the Middle" episode indicates, some Americans – at the very least, those who write network sitcoms – seem to believe that any person of Native American heritage has the "right" to open a

¹⁵ Our work elsewhere consistently reflects this argument. See generally Kathryn R.L. Rand, *There are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAPMAN L. REV. 47 (2002) [hereinafter Rand, *There are No Pequots*]; Kathryn R.L. Rand, *At Odds? Perspectives on the Law and Politics of Indian Gaming*, 5 GAMING L. REV. 297 (2001) (introducing special issues on Indian gaming) [hereinafter Rand, *At Odds*]; Steven A. Light & Kathryn R.L. Rand, *Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin*, 5 GAMING L. REV. 351 (2001) [hereinafter Light & Rand, *Are All Bets Off*]; Kathryn R.L. Rand & Steven A. Light, *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota*, 5 GAMING L. REV. 329 (2001) [hereinafter Rand & Light, *Raising the Stakes*]; Kathryn R.L. Rand & Steven A. Light, *Do 'Fish and Chips' Mix? The Politics of Indian Gaming in Wisconsin*, 2 GAMING L. REV. 129 (1998) [hereinafter Rand & Light, *Do 'Fish and Chips' Mix?*]; 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) [hereinafter Rand & Light, *Virtue or Vice*].

¹⁶ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). See *infra* text accompanying notes 86-87.

¹⁷ See *infra* Part IV.B.

casino.¹⁸ This, of course, could not be further from the truth. As defined by IGRA, “Indian gaming” is gaming conducted by an “Indian tribe” on “Indian lands.”¹⁹ What sets tribal gaming apart from commercial casino gambling is not racial or ethnic heritage; rather, it is the fact that Indian gaming is conducted by tribal governments, making Indian gaming more akin to state lotteries than to the casinos lining the Las Vegas Strip.

Since Congress passed IGRA in 1988, Indian gaming has expanded exponentially. By 2000, tribal gaming revenues increased from \$212 million to nearly \$10 billion.²⁰ Although the growth rates for both commercial gambling and Indian gaming have slowed somewhat in recent years, tribal gaming revenues have consistently grown at a faster rate than have commercial casino revenues.²¹ Today there are roughly 200 tribes operating more than 320 gaming facilities of all types, whose annual gross revenues approach \$13 billion.²²

Although popular media accounts tend to lump tribes together, providing a pan-Indian account of tribal gaming, there is considerable variation among tribes and tribal experiences with casino-style gaming. Many tribes have chosen to comport with IGRA’s provisions in order to exercise their sovereign right to own and operate casinos. Today, about eighty-five percent of the 225 or so tribes in the forty-eight contiguous states conduct some form of gaming operations on their reservations.²³ However, many other tribes have decided *not* to pursue casino-style gaming or, in some cases, any form of gaming. Only

¹⁸ If anecdote provides any evidence, such perceptions may be widespread. Following a recent talk before a student group in which one of the authors discussed the myths surrounding Indian gaming – highlighting the fact that tribal governments own and operate their casinos, *see* Steven A. Light, *Who Regulates Indian Gaming?* (Apr. 15, 2003) (unpublished manuscript, on file with authors) – one student nevertheless asked whether he could open his own casino if he were a Native American. *Cf.* Karl J. Karlson, *Permit Snag Not Stopping Casino Plan*, PIONEER PRESS, June 28, 2003, available at <http://www.twincities.com/mld/pioneerpress/news/local/6188818.htm> (last visited Jan. 20, 2004) (describing quirky entrepreneur Albert Leo LaFontaine – in 1959, he tried to sell much of North Dakota to the Soviet Union for \$2 million – and his effort to open a tribal casino in St. Paul, Minnesota, based on self-avowed affiliation with “a dozen tribes” in the non-federally recognized “Grand National Council of Confederated Nations”).

¹⁹ 25 U.S.C. § 2703(4)-(5) (2000).

²⁰ NATIONAL INDIAN GAMING ASSOCIATION, *The Economic Development Journey of Indian Nations*, available at <http://www.indiangaming.org/library/newsletters/index.html> (last visited Jan. 20, 2004) [hereinafter NIGA, *Economic Development*].

²¹ NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT 6-1, 6-2 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/6.pdf> (last visited Jan. 20, 2004) [hereinafter NGISC FINAL REPORT].

²² These figures represent all gaming operations; that is, Class II (bingo) as well as Class III (casino-style) gaming. We discuss IGRA’s distinctions among gaming classes in Part III, below. *See infra* text accompanying notes 71-75. Although staggering, Indian gaming revenues remain less than ten percent of the gaming industry’s total. NATIONAL INDIAN GAMING ASSOCIATION, *Indian Gaming Facts*, available at <http://www.indiangaming.org/library> (last visited Jan. 20, 2004) [hereinafter NIGA, *Indian Gaming Facts*].

²³ STEPHEN CORNELL ET AL., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 11-12 (1998) available at http://indiangaming.org/library/studies/1004-erg_98rept_to_ngisc.pdf (last visited Jan. 20, 2004).

about one-third or so of the 554 federally-recognized tribes in the United States conduct casino-style gaming on their reservations.²⁴

For those tribes that have chosen to open casinos, however, the impetus has been relatively consistent: socioeconomic adversity. Reservations historically have exemplified many of the worst living conditions in the United States.²⁵ To date, many reservation residents are poor, unemployed, and living in overcrowded and inadequate housing in communities with minimal government services.²⁶

Gaming revenue has begun to rebalance the equation in many tribes' favor.²⁷ As the National Gambling Impact Study Commission concluded in 1999, "[G]ambling revenues have proven to be a very important source of funding for many tribal governments, providing much-needed improvements in the health, education, and welfare of Native Americans on reservations across the United States."²⁸

Non-tribal jurisdictions also benefit from tribal casinos. The roughly thirty states with Indian gaming operations, as well as numerous non-reservation communities located near tribal casinos, have realized extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged.²⁹

Due in large part to the vast sums of money changing hands, the lingering perception that gambling is a vice, and tribes' complicated status as semi-sovereign nations, tribal gaming is at the forefront of public discourse today concerning Native Americans, having prompted federal, state, and local policymakers and the popular media to pay attention to tribes' actions to a degree far greater than at any time in recent history. Not all of this attention is positive. Indeed, despite what appears to some observers to be a demonstrable, even stunning, public policy success,³⁰ Indian gaming is more controversial than ever.³¹ To understand how best to address these controversies and to formulate sound law and public policy governing tribal gaming, we turn to our three frameworks.

²⁴ NGISC FINAL REPORT, *supra* note 21, at 6-2.

²⁵ See CORNELL ET AL., *supra* note 23, at 24-26; see also Rand & Light, *Virtue or Vice*, *supra* note 15, at 394.

²⁶ See Rand, *There are No Pequots*, *supra* note 15, at 53.

²⁷ See, e.g., NGISC FINAL REPORT, *supra* note 21, at 6-2; CORNELL ET AL., *supra* note 23, at 77-78.

²⁸ NGISC FINAL REPORT, *supra* note 21, at 6-2.

²⁹ See, e.g., Jonathan B. Taylor, Matthew B. Krepps & Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* 5-15 (2000), available at <http://www.ksg.harvard.edu/hpaied/docs/PRS00-1.pdf> (last visited Jan. 20, 2004); NIGA, *Indian Gaming Facts*, *supra* note 22.

³⁰ See, e.g., CORNELL ET AL., *supra* note 23; Joseph P. Kalt, *Statement Before the National Gambling Impact Study Commission* (Mar. 16, 1998), available at <http://www.ksg.harvard.edu/hpaied/docs/98-1.pdf> (last visited Jan. 20, 2004); see also Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311 (2001).

³¹ Rand, *There are No Pequots*, *supra* note 15, at 55-59 (describing recent vociferous criticism of Indian gaming).

III. FEDERAL INDIAN LAW AND POLICY AND THE PARADOX OF TRIBAL SOVEREIGNTY

A. *What Is Tribal Sovereignty?*³²

Indian gaming is fundamentally different from most forms of gambling – from church bingo nights to the slots at Las Vegas's MGM Grand Casino – because it is conducted by tribal governments as an exercise of their sovereign rights. Tribal sovereignty – a historically rooted doctrine recognizing tribes' inherent rights as independent nations, preexisting the United States and its Constitution – is the primary legal and political foundation of federal Indian law and policy and, thus, Indian gaming. Yet tribal sovereignty is perhaps the most misunderstood aspect of Indian gaming.

Prior to the arrival of Western colonizers, Native American tribes were sovereign nations living in the territory that became the United States.³³ Although recognizing the sovereign status of the tribes, the colonizers believed that tribal sovereignty rightly was limited both by settlers' "manifest destiny" and the perceived primitiveness of indigenous societies.³⁴ The foundation of the modern doctrine of tribal sovereignty, which governs relationships among tribes, the federal government, and the states, reflects these early colonial conceptions. The doctrine was established by Chief Justice John Marshall in the United States Supreme Court's infamous "Marshall trilogy," handed down in the early 1800s.³⁵ In the trilogy, the Court held that all tribes were incorporated into the United States through the "doctrine of discovery," through which "civilized" Western colonizers had rights that trumped those of the "savage" tribes of America.³⁶ Tribes were thus "domestic dependent nations," possessing only limited sovereignty subject to Congress's plenary power.³⁷

The Marshall trilogy came during the first post-Constitution stage of federal Indian policy, the hallmarks of which were forced relocation and land cessions.³⁸ After halting treaty-making with the tribes in 1871, the United States adopted a policy of forced assimilation designed to eradicate Native traditions and culture.³⁹ During the 1920s and 1930s and throughout the middle of the twentieth century, federal Indian policy reflected the termination and allotment era, in which tribal lands were sold to non-Natives and Native Americans were provided incentives to move off-reservation.⁴⁰ After the Civil Rights Movement, the federal government promulgated a new policy of tribal self-determi-

³² For a thorough treatment of the legal doctrine of tribal sovereignty, see DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997); see also WILLIAM CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (1998); Rand & Light, *Virtue or Vice*, *supra* note 15, at 385-96.

³³ See generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 47-59 (1982).

³⁴ *Id.*

³⁵ See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 20 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

³⁶ *Johnson*, 21 U.S. (8 Wheat.) at 572-92; *Worcester*, 31 U.S. (6 Pet.) at 544.

³⁷ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

³⁸ See generally COHEN, *supra* note 33, at 62-92.

³⁹ See generally *id.* at 128-44.

⁴⁰ See generally *id.* at 130-38, 145-77.

nation.⁴¹ By the 1970s and 1980s, this policy prompted cuts in federal assistance to the tribes while encouraging tribal economic self-sufficiency.⁴² Leveraging limited reservation resources to promote economic growth and development proved extremely difficult, however, and many tribes faced the continuing realities of crushing poverty and other social ills.⁴³ As discussed below,⁴⁴ tribes soon hit upon casino-style gaming as a viable economic development strategy to compensate for lost federal revenue.

Tribes today have a special status in the American federal system that is defined and circumscribed by the historical development of the legal and political doctrine of tribal sovereignty. In essence, the modern doctrine means that the United States recognizes tribes as independent sovereign nations, and their location within the boundaries of a state does not subject them to the application of state law, yet they are subject to Congress's plenary power and bound by the trust relationship between the federal government and tribes.⁴⁵ Tribes therefore have a unique semi-sovereign status and, accordingly, may be regulated by Congress.⁴⁶

⁴¹ See generally *id.* at 180-204.

⁴² See Rand & Light, *Virtue or Vice*, *supra* note 15, at 385-96.

⁴³ See CORNELL ET AL., *supra* note 23, at 24-26; see also Rand & Light, *Virtue or Vice*, *supra* note 15, at 394.

⁴⁴ See *infra* text accompanying note 53.

⁴⁵ Rand & Light, *Virtue or Vice*, *supra* note 15, at 382. See generally DAVID E. WILKINS, *AMERICAN INDIAN POLITICS AND THE POLITICAL SYSTEM* 41-62 (2002).

⁴⁶ As federal Indian law scholar Alex Tallchief Skibine observes, Congress "can, theoretically, abolish the tribes' right to self-government overnight." Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 4 UTAH L. REV. 1105, 1107 (1995).

The circumscribed nature of tribal sovereignty is also clearly demonstrated by how many modern tribal governments were constituted. Although the United States Constitution does not restrict tribal authority to select a form of government or to create political institutions, federal Indian policy has had a dramatic effect on tribal organization. During the treaty era, for instance, the federal government often grouped separate Native American nations sharing common languages into a single "tribe," sometimes designating an otherwise nonexistent "chief" to facilitate land giveaways or reservation administration. As a practical matter, the federal Department of the Interior's Bureau of Indian Affairs (BIA) usurped the traditional governing authority of many tribes throughout the 1800s. By the 1920s, when federal Indian policy was aimed at breaking up tribes, tribal self-government was at its nadir. See CANBY, *supra* note 32, at 57-58.

In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. § 476 (2000), which granted to tribes the right to adopt a constitution, subject to BIA approval. Many tribes quickly pursued this option. Given the truncated version of self-determination promulgated by the federal government, the preexisting difficulties faced by tribes, and the designated role of the Secretary of the Interior, virtually every tribal constitution mimicked a standard template produced in Washington. Although many tribes subsequently exercised their sovereign right to revise their constitutions, westernized governing structures generally prevail for tribes throughout the nation. See *id.* at 58-59.

Most tribal constitutions provide for an elected tribal council empowered to pass tribal resolutions and ordinances; however, such actions remain subject to BIA review. Either the council or tribal members elect a tribal chair (sometimes called president or governor) whose duties typically are not set forth in the constitution and thus vary by tribe. Most tribes have tribal courts whose judges are either elected or appointed, and whose criminal and civil jurisdiction varies contingent upon federal law, whether the parties are Native Americans, and where the events took place. See *id.* at 60-64.

B. *The Paradox of Tribal Sovereignty*

As the law and policy of Indian gaming is delimited, the peculiarities of this situation are relatively obvious, but infrequently noted. In theory, tribal governments' right to conduct gaming on reservations stems from their status as pre-Constitutional sovereign nations. Although IGRA is often erroneously identified as the source of tribes' right to open casinos,⁴⁷ it actually creates a set of limitations to tribes' sovereign rights. In particular, under IGRA, tribes that choose to game must submit to federal and, for casino-style gaming, state regulation.⁴⁸

In practice, then, tribal sovereignty is a paradox in the context of Indian gaming: the decision to open a casino is an exercise of a tribe's sovereign rights, as recognized by the Supreme Court; yet under federal law, a tribal casino must submit to federal and state regulation, circumscribing that tribe's sovereign rights. Thus, tribal casinos represent tribes' agreement with, or at least acquiescence to, Congress' mandate to compromise their tribal sovereignty in order to pursue gaming as a strategy for economic development.⁴⁹ But far beyond Congress' intentions as represented by IGRA, subsequent legal developments have dramatically increased the political power that states wield over tribal gaming, as discussed below.⁵⁰ This has heightened the paradox of tribal sovereignty, making gaming tribes' sovereign rights more vulnerable to state power.

IV. THE LAW OF INDIAN GAMING

IGRA's complex and comprehensive regulatory scheme grew out of a federally mandated compromise between state and tribal rights. In the landmark *Cabazon* decision, the Supreme Court recognized tribes' sovereign right to conduct gaming on reservation lands free from state regulation.⁵¹ Following *Cabazon*, Congress quickly exercised its plenary power over tribes and, through IGRA, delegated regulatory authority to states over casino-style gaming on tribal lands.⁵² In this section, we provide a brief overview of *Cabazon* and IGRA's key provisions.

A. *Tribal Gaming versus State Regulation: Cabazon*

In the late 1970s and early 1980s, spurred by the federal government's policy of tribal self-determination in the face of severe cutbacks in federal aid, several tribes explored various tools of reservation economic development,

⁴⁷ See, e.g., Iver Peterson, *Reluctantly, a Tribe Starts to See Casinos as Being Imperative*, N.Y. TIMES, May 9, 2003, at A1 (inaccurately referring to "the [tribes'] federally granted right to sponsor gambling").

⁴⁸ See *infra* Parts III.B, IV.A.

⁴⁹ We initially developed this argument in Kathryn R.L. Rand & Steven A. Light, *Staking Sovereignty on Indian Gaming: Three Frameworks for Understanding Indian Gaming* (May 28, 2003) (unpublished paper presented at the 12th International Conference on Gambling and Risk Taking, Vancouver, B.C., Canada, on file with authors).

⁵⁰ See *infra* text accompanying notes 87-93.

⁵¹ See *infra* Part IV.A.

⁵² See *infra* Part IV.B.

including gaming.⁵³ With low start-up costs and high rates of return on investment, bingo halls soon proved profitable, and tribes expanded their gaming outfits by offering bigger prizes and longer hours.⁵⁴ The Cabazon and Morongo Bands of Mission Indians in California offered high-stakes bingo on their reservations, in contravention of state regulations limiting jackpot amounts.⁵⁵ California asserted that its gambling laws applied on Indian reservations, but in *California v. Cabazon Band of Mission Indians*, the Supreme Court held that states could not regulate reservation gaming enterprises.⁵⁶

Using the prohibitory-regulatory doctrine to analyze California's statute, the Court reasoned that if a state did not prohibit a specific type of gambling altogether, the state could not regulate that type of gambling on an Indian reservation.⁵⁷ The Court sought to balance competing interests: tribal and federal interests in tribal self-sufficiency and reservation economic development, weighed against the state's interest in regulating gambling to prevent the infiltration of organized crime.⁵⁸ The Court concluded that California's interest was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case."⁵⁹ The *Cabazon* decision was an unexpected victory for tribes, but as Congress had already identified Indian gaming as a potential regulatory problem,⁶⁰ the victory was short-lived. Congress passed IGRA in 1988, shortly after the Court issued its decision in *Cabazon*.

B. The Indian Gaming Regulatory Act (IGRA)

After *Cabazon*, competing interests turned to Congress to enact a regulatory scheme for Indian gaming. The tribes were largely opposed to state or federal regulation on sovereignty grounds, but in the face of pending legislation, preferred federal regulation to state regulation.⁶¹ Both the federal government and the tribes wanted to preserve Indian gaming as a means of reservation economic development and tribal self-sufficiency.⁶² The states, along with other non-Native gaming interests, called for state regulation of Indian gaming.⁶³ IGRA was a compromise among these competing interests: those of the

⁵³ See CORNELL ET AL., *supra* note 23, at 9.

⁵⁴ Rand, *There are No Pequots*, *supra* note 15, at 51; CORNELL ET AL., *supra* note 23, at 9.

⁵⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204-06 (1987).

⁵⁶ See *id.*

⁵⁷ *Id.* at 210-11.

⁵⁸ *Id.* at 208-12, 216-22.

⁵⁹ *Id.* at 221.

⁶⁰ See Sioux Harvey, *Winning the Sovereignty Jackpot: The Indian Gaming Regulatory Act and the Struggle for Sovereignty*, in INDIAN GAMING: WHO WINS? 18 (Angela Mullis & David Kamper eds., 2000). By the mid 1980s, Congress had begun to explore regulatory schemes for Indian gaming on reservation lands. *Id.*

⁶¹ *Id.* at 22 (citing the National Indian Gaming Association's perception that the federal government had the responsibility to "protect Indians from state interference").

⁶² *Id.* at 21-22. States cited the state interest in preventing the infiltration of organized crime into gaming. See I. Nelson Rose, *Commentary, The Indian Gaming Act and the Political Process*, in INDIAN GAMING AND THE LAW 4-5 (William R. Eadington ed., 2d ed. 1998).

⁶³ *Id.* at 22. Both the State of Nevada and its commercial casino industry were particularly concerned that any incidence of organized crime at a tribal casino would trigger a federal crackdown on state-licensed gaming as well. Rose, *supra* note 62, at 4-5.

tribes and the federal government, and those of the states and non-Indian gaming interests.⁶⁴

As an extension of contemporary federal Indian policy, IGRA's stated purpose includes "provid[ing] 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."⁶⁵ IGRA mandates far more stringent regulation of casino-style gaming conducted by tribes than by any other entity – church group, Donald Trump, or any commercial enterprise on the Las Vegas Strip – in the United States.⁶⁶ Unlike any other type of gaming, Indian gaming is regulated at three levels: federal, state, and tribal. Agencies at each level often have coextensive and simultaneous regulatory and enforcement functions.⁶⁷

As we note above,⁶⁸ IGRA defines "Indian gaming" as gaming conducted by an "Indian tribe" on "Indian lands." An Indian tribe is defined as a tribe or other organized group that is eligible for federal Indian programs and services and has been recognized as possessing powers of self-government.⁶⁹ IGRA provides that a tribe can exercise the sovereign right to regulate gaming activity if that activity is not prohibited by federal or state law.⁷⁰

One of IGRA's key innovations was its categorization of tribal gaming for purposes of regulation.⁷¹ Pursuant to IGRA, the type, or "Class," of gaming determines regulatory jurisdiction. Tribes have exclusive regulatory jurisdiction over "Class I" gaming, consisting of social games and traditional tribal gambling.⁷² With federal oversight by the National Indian Gaming Commission, tribes also have authority to regulate bingo and non-banking card games, or "Class II" gaming.⁷³ "Class III" gaming, or casino-style gambling, includes all types of gaming not in Class I or II, such as slot machines, electronic facsimiles of games, and banking card games.⁷⁴ As discussed below,⁷⁵ before a tribe may conduct Class III gaming, the tribe must enter into an agreement with the state.

⁶⁴ See Harry Reid, *Commentary, The Indian Gaming Act and the Political Process*, in INDIAN GAMING AND THE LAW 15, 19 (William R. Eadington ed., 2d ed. 1998).

⁶⁵ 25 U.S.C. § 2702(1) (2000).

⁶⁶ NATIONAL INDIAN GAMING ASSOCIATION, *Regulation of Indian Gaming*, available at <http://www.indiangaming.org/info/pr/presskit/regulation.shtml> (last visited Jan. 20, 2004).

⁶⁷ See 25 U.S.C. § 2710(b) (2000) (allocating regulatory jurisdiction of Class II gaming to tribes with federal oversight); 25 U.S.C. § 2710(d)(4) (2000) (preserving tribes' right to regulate Class III gaming, concurrent with state regulation).

⁶⁸ See *supra* text accompanying note 19.

⁶⁹ 25 U.S.C. § 2703(5) (2000).

⁷⁰ *Id.* § 2701(5).

⁷¹ United States Senator Harry Reid (D-Nevada) was one of several members of Congress who were instrumental in developing IGRA's regulatory framework. See Reid, *supra* note 64, at 18 (discussing "two basic questions" faced by policymakers: "how should different types of gaming operations be categorized or classified, and what is the appropriate level of regulation for each class of gaming?").

⁷² 25 U.S.C. §§ 2703(6), 2710(a)(1) (2000).

⁷³ *Id.* §§ 2703(7)(A), 2710(b).

⁷⁴ *Id.* §§ 2703(8), 2703(7)(B).

⁷⁵ See *infra* text accompanying notes 83-84.

Through IGRA, Congress authorized the creation of the National Indian Gaming Commission ("NIGC"), an independent federal regulatory agency within the Department of the Interior, with overarching regulatory authority over tribal gaming.⁷⁶ The NIGC is comprised of a chair appointed by the President and two associate members appointed by the Secretary of the Interior.⁷⁷ It is extensively empowered to monitor gaming activities, hold hearings, and promulgate regulations.⁷⁸

In addition to regulating gaming practices, IGRA conditions how tribes may use gaming revenue, ostensibly due to Congress's concerns about organized crime.⁷⁹ Net revenue may not be used for purposes other than to fund tribal government or programs, provide for the general welfare of the tribe or its members, promote economic development, donate to charity, or fund local agencies.⁸⁰ If the tribe wishes to distribute per capita revenue payments to its members, it must meet several conditions, including receiving federal approval by the Secretary of the Interior and subjecting payments to federal taxation.⁸¹ The vast majority of tribes use gaming revenue to fund essential government services, improve reservation infrastructure, and pursue economic development.⁸²

While the legal doctrine of tribal sovereignty provided the foundation for the *Cabazon* decision and IGRA, both the law of Indian gaming and its judicial interpretation can be read as reflecting a compromised version of sovereignty, revealing the paradox of tribal sovereignty. We turn now to a discussion of the resultant politicized intersections of law and policy.

V. INTERSECTIONS OF LAW AND POLICY

Through IGRA, Congress carefully crafted a balance of power between states and tribes in requiring government-to-government negotiation of "tribal-state compacts" regulating casino-style gaming. That balance, however, was

⁷⁶ 25 U.S.C. §§ 2704-06, 2710-16 (2000) (detailing the powers of the NIGC).

⁷⁷ *Id.* § 2704. At least two Commission members must be enrolled members of a tribe, and no more than two Commission members may be members of the same political party. *Id.* § 2706 (2000). The Commission's current members, appointed in December 2002, are Chair Philip N. Hogen and Commissioners Cloyce V. Choney and Nelson W. Westrin. Hogen, formerly U.S. Attorney for the District of South Dakota and Associate Solicitor for the Department of Interior's Division of Indian Affairs, is an enrolled member of the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota. Choney served as the FBI's Chief Executive Officer for Indian Territory Investigations and is a member of the Comanche Nation of Oklahoma. Westrin was the Executive Director of the Michigan Gaming Control Board. See NATIONAL INDIAN GAMING COMMISSION, *Commissioners*, at http://www.nigc.gov/nigc/nigcControl?option=ABOUT_COM (last visited Jan. 20, 2004).

⁷⁸ 25 U.S.C. §§ 2705, 2706, 2710-2716 (2000).

⁷⁹ See *id.* § 2702(2) (declaring congressional policy of shielding tribal gaming "from organized crime and other corrupting influences" and ensuring "that the Indian tribe is the primary beneficiary of the gaming operation").

⁸⁰ *Id.* § 2710(b)(2)(B).

⁸¹ *Id.* § 2710(b)(3). While many observers assume that most tribes are dishing out healthy per capita payments to their members, this is not the case. Roughly one-quarter of gaming tribes distribute per capita payments. NIGA, *Indian Gaming Facts*, *supra* note 22.

⁸² See NIGA, *Indian Gaming Facts*, *supra* note 22; Rand, *There are No Pequots*, *supra* note 15, at 53-54.

upset by the Supreme Court. As a result, states – ordinarily without authority over tribal affairs – have wielded political power to shape and in some cases prohibit Indian gaming within their borders. With this increased politicization of tribal gaming, issues at the forefront of public debate are more likely to be decided through the political process – via compromise or coercion – than through judicial interpretation of existing law.

A. *Tribal-State Compacts and Seminole Tribe*

Class III gaming necessitates a special agreement, a “Tribal-State compact” governing the specifics of tribal casinos, which is subject to approval by the Secretary of the Interior.⁸³ IGRA requires states to negotiate with tribes in good faith toward reaching a tribal-state compact.⁸⁴ Under IGRA, if a state fails to negotiate in good faith, the tribe can then sue the state in federal court.⁸⁵ In *Seminole Tribe of Florida v. Florida*,⁸⁶ however, the Supreme Court held that Congress did not have the power to authorize such an action against a state. *Seminole Tribe* was widely regarded as a significant curtailment of the tribes’ ability to actualize IGRA’s intended purposes.⁸⁷

As noted above, following *Cabazon*, IGRA’s great compromise was that it effectively extended to states the opportunity to regulate tribal casinos through the tribal-state compacting requirement. Indeed, many commentators agree that Congress enacted IGRA as a safeguard for the states against economic competition.⁸⁸ By strengthening states’ bargaining power at the expense of tribes, *Seminole Tribe* set the stage for the increasing politicization of Indian gaming.

⁸³ 25 U.S.C. §§ 2703(8), 2710(d)(3)(B) (2000). A tribal-state compact may include provisions concerning application of state law, allocation of jurisdiction between the state and the tribe, payments to the state to cover regulation costs, taxation, remedies for breach of contract, operating standards, and “any other subjects that are directly related to the operation of gaming activities.” The tribe retains the right to concurrent regulation of its gaming activities as long as that regulation is not inconsistent with or less stringent than the state’s regulation under the compact. The Secretary of the Interior will approve the compact unless it violates IGRA, federal law, or federal trust obligations to the tribes. 25 U.S.C. § 2710(d)(3) (2000).

⁸⁴ *Id.* § 2710(d)(3)(A).

⁸⁵ *Id.* § 2710(d)(7).

⁸⁶ 517 U.S. 44 (1996).

⁸⁷ Rand & Light, *Virtue or Vice*, *supra* note 15, at 401 n.118. “Original constitutional objections to IGRA by tribes involved violation of sovereign prerogatives to conduct affairs on their own lands. They thus objected to tribal-state compacts, because matters concerning commercial activities involve federal law rather than state law. But now, post-*Seminole Tribe*, tribes are squeezed from the other side, for IGRA has no teeth to compel negotiation on the part of states.” *Id.* (internal citations omitted). Recent federal regulations issued by the Secretary of the Interior, however, set forth procedures for creating Class III gaming regulations if there is no valid tribal-state compact. See Class III Gaming Procedures, 25 C.F.R. pt. 291 (1999).

⁸⁸ See, e.g., Eddie Tullis, *Observations from Tribal Leaders*, in *INDIAN GAMING AND THE LAW* 99, 99-100 (William R. Eadington ed., 2d ed. 1990).

B. *The Politicization of Indian Gaming*

Post-*Seminole Tribe*, due to the various policy imperatives states perceive from the rapid growth of tribal casinos located within their borders – casinos often seen by state policymakers as within their regulatory jurisdiction – states have significantly expanded the regulatory authority of their gaming commissions or gaming boards, or have created new ones.⁸⁹ As IGRA's policy implications have played out in the form of tribal-state compact negotiations, states have wielded ever-increasing political, economic, and legal clout over tribes.⁹⁰

Despite their lack of constitutionally granted jurisdiction over reservation-based tribes, states also appear to be taking note of how IGRA's tribal-state compacting model allows them to leverage state regulatory power over tribes in other contexts. States have pushed tribes to abrogate aspects of tribal sovereignty, including treaty rights,⁹¹ while encouraging tribes to make annual revenue payments in return for a compact agreement.⁹² Some states have even refused to negotiate compacts, effectively precluding tribal gaming.⁹³

After *Seminole Tribe*, the increased clout of the states has disconnected the public debate over tribal gaming from the frameworks of federal Indian law and policy and the law of Indian gaming. Alongside the types of criticisms levied at Indian gaming that we discuss in the following Part and further below, the intersections of law and policy, revealed by states' increasing political clout vis-à-vis tribes, suggest that state agendas reflect public opinion and a zealous promotion of state interests more than an understanding of tribes' place within the American political and legal systems or current law governing tribal gaming. As we have asserted elsewhere,⁹⁴ the views of the public and policymakers alike have been shaped in large part by the disproportionate attention paid to a handful of gaming tribes, particularly the Mashantucket Pequots of Connecticut, masking the wide variation of tribal experiences related to Indian gaming.

VI. THE FRAMEWORKS APPLIED: FROM THE PEQUOTS TO THE PLAINS⁹⁵

The nearly unparalleled economic success of the Foxwoods Resort Casino has made Connecticut's Mashantucket Pequots the most intensely scrutinized

⁸⁹ California's state Gambling Control Commission, for example, assumed additional duties under the 1999 Tribal-State compacts, as authorized by Governor Gray Davis. See Exec. Order No. D-31-01 (Mar. 13, 2001), available at <http://www.cgcc.ca.gov/execorderd3101.html> (last visited Jan. 20, 2004).

⁹⁰ See, e.g., Rand, *At Odds*, *supra* note 15; Light & Rand, *Are All Bets Off*, *supra* note 15; Kevin Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 430 (2001).

⁹¹ See generally Rand & Light, *Do 'Fish and Chips' Mix?*, *supra* note 15.

⁹² Light & Rand, *Are All Bets Off*, *supra* note 15, at 360.

⁹³ Rand, *There are No Pequots*, *supra* note 15, at 52; Washburn, *supra* note 90.

⁹⁴ See Rand & Light, *Raising the Stakes*, *supra* note 15; Rand, *There are No Pequots*, *supra* note 15.

⁹⁵ In this Part, we draw extensively upon Rand & Light, *Raising the Stakes*, *supra* note 15, at 330-39, and Rand, *There are No Pequots*, *supra* note 15, at 60-78, where we have further contrasted the experience of the Pequots to the experiences of the Plains Tribes. In *Raising the Stakes*, we introduced the "Plains Model" of Indian gaming and presented tribal sovereignty as a measure of success of tribal gaming. *There are No Pequots* contrasted the "Pequot Model" and the "Plains Model" to highlight the wide variation among gaming

and highly criticized tribe in the nation. Here, we revisit the oft-recounted story of the Pequots and their rise from a nearly extinct tribe to the owners of arguably the most successful casino in the world. In contrast to the Pequots, we posit the experiences of the Plains Tribes. The Plains Tribes are often cited as exemplifying the failure of Indian gaming: despite the tribes' casinos, many of their members continue to experience extreme poverty. The Pequots are illustrative of the dozen or so highly successful gaming tribes in the United States, while the Plains Tribes exemplify the experiences of the majority of tribes with modestly profitable casinos. In each account, we use the three frameworks of reference and the foundation of tribal sovereignty to reexamine both the experiences and criticisms of the Pequots and Plains Tribes.

A. *The Pequots*

At one time, the Mashantucket Pequots were a powerful presence on the eastern seaboard.⁹⁶ After devastating conflicts with the English in the mid-seventeenth century and continued land encroachments by white settlers through the eighteenth and nineteenth centuries, by 1970 the Pequots were reduced to two tribal members living on a reservation of less than 200 acres near Ledyard, Connecticut.⁹⁷ In 1983, after protracted legal battles, Congress granted the Pequots federal recognition and return of a significant portion of their land.⁹⁸

The Pequots were among early tribal forays into gaming as a means of economic development.⁹⁹ By the mid-1980s, the tribe's bingo hall generated annual gross revenues of \$20 million and attracted a thousand visitors per day.¹⁰⁰ After Congress passed IGRA, the Pequots pursued casino-style gaming, despite opposition from the state and surrounding communities.¹⁰¹ In 1990, in a victory for the tribe, a federal court ruled that because Connecticut allowed limited casino-style gambling for charitable purposes, such gambling did not violate state public policy, and thus, the tribe could open a casino on their reservation.¹⁰² Although the court decision paved the way for a tribal-state compact under IGRA, the types of Class III gaming the tribe could offer remained controversial because Connecticut law prohibited slot machines.¹⁰³ The tribe eventually negotiated a deal with Connecticut for the exclusive right

tribes, and further developed the idea that tribal sovereignty should be used to assess the success of tribal gaming as public policy. Here, we demonstrate how the experiences of the Pequots and Plains Tribes evidence a specific proposal for developing effective Indian gaming law and policy.

⁹⁶ For a brief and easily accessible history of the tribe, see Mashantucket Pequots, *Tribal Nation History*, at <http://www.foxwoods.com/TheMashantucketPequots/History> (last visited Jan. 20, 2004) [hereinafter *Tribal Nation History*].

⁹⁷ Jack Campisi, *The Emergence of the Mashantucket Pequot Tribe, 1637-1975*, in *THE PEQUOTS IN SOUTHERN NEW ENGLAND* 117, 132-35 (Laurence M. Hauptman & James D. Wherry eds., 1990).

⁹⁸ See 25 U.S.C. § 1753 (2000).

⁹⁹ KIM ISAAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD'S MOST PROFITABLE CASINO 89-107 (2001).

¹⁰⁰ *Id.* at 108-10.

¹⁰¹ See *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990).

¹⁰² *Id.* at 1029.

¹⁰³ EISLER, *supra* note 99, at 130, 178-80.

to operate slot machines in exchange for a twenty-five percent state cut of the slot revenues.¹⁰⁴

Today the Pequots' Foxwoods Resort Casino enjoys phenomenal success: located within driving distance from Boston and New York City, Foxwoods attracts over forty thousand visitors each day.¹⁰⁵ As one of the world's largest casinos, Foxwoods brought in \$1.3 billion dollars in gross revenue in 1999, and the tribe paid Connecticut close to \$175 million under the terms of its tribal-state compact.¹⁰⁶ The tribe uses its casino revenue to offer a vast array of services and to make per capita payments of at least \$50,000 each year to its approximately three hundred members.¹⁰⁷ Off the reservation, Foxwoods has played a large part in revitalizing Connecticut's economy. Out-of-state visitors flock to Foxwoods, as well as to the tribe's Mashantucket Pequot Museum and Indian Research Center, spurring a boom in construction of nearby hotels and restaurants.¹⁰⁸ Foxwoods has created over forty thousand new jobs in the state and has impacted the state's economy measured in billions of dollars.¹⁰⁹

The tribe's nearly unrivaled success has been a magnet for criticism, much of it attacking the Pequots themselves: the tribe is too successful, and many of its members do not fit popular conceptions of Native Americans, as famously expressed by Donald Trump when he stated that the Pequots "don't look like Indians to me and they don't look like Indians to Indians."¹¹⁰ Two recent book-length exposés of the tribe and its casino, Jeff Benedict's *Without Reservation*¹¹¹ and Kim Isaac Eisler's *Revenge of the Pequots*,¹¹² purported to use investigative journalism to debunk the Pequots' status as a tribe. Benedict's and Eisler's books, and the national media attention they generated, fueled antagonism against the tribe.¹¹³ Local residents accused the Pequots of being "a shake-and-bake and fabricated tribe."¹¹⁴ Benedict, echoing Trump, recalled his impression upon first visiting the Pequot reservation in 1998: "I saw \$40,000 vehicles, but I didn't see an Indian tribe."¹¹⁵ Eisler concluded that the Pequots were to blame for the harsh criticism: "[i]f the Pequots and Foxwoods

¹⁰⁴ *Id.* at 148-55, 178-80.

¹⁰⁵ Micah Morrison, *Casino Royale: The Foxwoods Story*, WALL ST. J., Aug. 21, 2001, at A18.

¹⁰⁶ FRED CARSTENSEN ET AL., CONN. CTR. FOR ECON. ANALYSIS, *THE ECONOMIC IMPACT OF THE MASHANTUCKET PEQUOT TRIBAL NATION OPERATIONS ON CONNECTICUT* 1 (2000).

¹⁰⁷ Jules Wagman, *Indian Tribe Strikes Gold in Casino World*, MILWAUKEE J. SENTINEL, Feb. 25, 2001, at 6E.

¹⁰⁸ CARSTENSEN ET AL., *supra* note 106, at 2.

¹⁰⁹ *Id.* at 4.

¹¹⁰ Joseph M. Kelly, *Indian Gaming Law*, 43 *DRAKE L. REV.* 501, 521 (1994) (quoting *Federal Officials Refute Trump Allegations*, PR NEWswire, Oct. 5, 1993).

¹¹¹ JEFF BENEDICT, *WITHOUT RESERVATION: THE MAKING OF AMERICA'S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD'S LARGEST CASINO* (2000).

¹¹² EISLER, *supra* note 99.

¹¹³ See Ellen Barry, *It's a War of Genealogies*, BOSTON GLOBE, Dec. 12, 2000. Jeff Benedict subsequently founded the Connecticut Alliance Against Casino Expansion. See <http://www.connecticutalliance.org> (last visited Jan. 20, 2004).

¹¹⁴ Ellen Barry, *Lineage Questions Linger as Gaming Wealth Grows*, BOSTON GLOBE, Dec. 12, 2000, at A19.

¹¹⁵ Joel Lang, *Reading Jeff Benedict: Should You Believe His Revelations About the Pequots and the Making of the World's Largest Casino?*, HARTFORD COURANT, Dec. 3, 2000, at 5.

have been victimized by negative public attitudes, it is in part their own gaudy success that is the culprit."¹¹⁶

The Pequots and Foxwoods typify prevailing popular conceptions of Indian gaming, as reflected in the depiction of tribal gaming on television shows, ranging from "The Simpsons" to "The Sopranos."¹¹⁷ Elsewhere we have contrasted the experience of the Pequots to the experience of the Plains Tribes, highlighting the wide range of variation in tribal gaming.¹¹⁸ The Pequots fall at one end of the spectrum of gaming success, marked by the perceived intersections of tribal authenticity and newfound wealth. On the other end are the Plains Tribes, exemplified by North Dakota's tribes, where tribal authenticity is not likely open to serious challenge and relative wealth is a virtual non-issue.

B. *The Plains*

In the heart of the Great Plains of Middle America, North Dakota's five reservations encompass nearly five million acres and are home to approximately thirty thousand tribal members of the Standing Rock Sioux, the Spirit Lake Nation Sioux, the Sisseton-Wahpeton Sioux, the Three Affiliated Tribes, and the Turtle Mountain Band of Chippewa.¹¹⁹ Each of the state's five tribes operates a casino on reservation lands in North Dakota.¹²⁰

North Dakota's tribes share several commonalities that define and shape their contemporary experiences, including those related to tribal gaming. First are the tribes' long history of government-to-government relations with the United States: as "treaty tribes," they have a strong and long-standing tradition of tribal sovereignty that continues to shape the tribes' priorities and interactions with state and federal government.¹²¹ Second, economic opportunities available to the tribes are governed in large part by the resources, natural or

¹¹⁶ Kim Isaac Eisler, *Why I Wrote a Book About a Tribe that Hit the Jackpot*, HARTFORD COURANT, Feb. 25, 2001, at C1.

¹¹⁷ See *supra* notes 1, 3-6 and accompanying text.

¹¹⁸ See Rand, *There are No Pequots*, *supra* note 15; Rand & Light, *Raising the Stakes*, *supra* note 15.

¹¹⁹ See generally MARY JANE SCHNEIDER, NORTH DAKOTA INDIANS: AN INTRODUCTION (1994).

¹²⁰ There are currently five tribal casino developments in North Dakota: the Four Bears Casino and Lodge near New Town, owned and operated by the Three Affiliated Tribes; the Sky Dancer Hotel and Casino in Belcourt, owned and operated by the Turtle Mountain Band of Chippewa Indians; the Spirit Lake Casino and Resort in Spirit Lake, owned and operated by the Spirit Lake Sioux Tribe; the Prairie Knights Casino and Resort in Fort Yates, owned and operated by the Standing Rock Sioux Tribe; and the Dakota Magic Casino and Hotel in Hankinson, owned and operated by the Sisseton-Wahpeton Sioux Tribe. See N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS 1 (2000) [hereinafter 2000 N.D. INDIAN GAMING ASS'N]; Rand, *There are No Pequots*, *supra* note 15. Each of the tribes belong to the North Dakota Indian Gaming Association and the regional Great Plains Indian Gaming Association, which share information and expertise, respond to media inquiries, and lobby policymakers. See generally Great Plains Indian Gaming Ass'n, at <http://gpiga.org/home.htm> (last visited Jan. 20, 2004).

¹²¹ For example, the Standing Rock Sioux Tribe in south-central North Dakota is party to a nearly half-billion-dollar judgment against the federal government over the ownership of the Black Hills. See generally EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1999).

otherwise, located on reservation land.¹²² As a result of the federal government's practice of locating reservations in areas perceived to be devoid of resources useful to white settlers, North Dakota's tribes have had little or no access to commercial enterprises on their reservations and few opportunities to market goods or services produced on-reservation to non-Native populations.¹²³ Third, as is typical of reservations in the Great Plains, each tribe's reservation consists mostly of small communities, often far-removed from urban areas.¹²⁴ In the recent past, tribal communities in North Dakota have lacked commercial development much beyond a local grocery store, and some homes have gone without electricity, running water, and telephone service.¹²⁵ As a result of such constraints, North Dakota's reservations historically have been among the nation's poorest localities.¹²⁶

In the early 1990s, North Dakota's tribes successfully negotiated tribal-state compacts with then-Governor George Sinner, allowing casino-style gaming on the state's reservations.¹²⁷ To the tribes, casino gaming had the potential to alleviate poverty, create jobs, improve and expand government services, leverage economic development, and entice tribal members to return to the reservation.¹²⁸ Although rarely discussed in lieu of more dramatic and controversial narratives like the tale of the Pequots' hugely successful Foxwoods Resort Casino, even modest casino revenues and employment can have a dramatic effect on tribes and the states in which reservations are situated. North Dakota's experiences with tribal gaming are illustrative.

From an economic standpoint, North Dakota's tribal casinos are modestly successful at best, due largely to rural locale and limited access to metropolitan markets.¹²⁹ The Plains Tribes' profits are only a small fraction of Foxwoods', yet each of the tribes in North Dakota considers its casino a success.¹³⁰ Indeed, many tribes facing dire socio-economic conditions in the 1990s opted for the

¹²² SCHNEIDER, *supra* note 119, at 155; *see also* CORNELL ET AL., *supra* note 23, at 26-27.

¹²³ SCHNEIDER, *supra* note 119, at 155.

¹²⁴ The Spirit Lake Sioux Nation's reservation is located in northeastern North Dakota, about 15 miles from Devils Lake, a city of approximately 7,200. *See* Devils Lake Population and Demographics, at <http://devilslake.areconnect.com/statistics.htm> (last visited Jan. 20, 2004). The other four reservations are further removed from the state's population centers. The Turtle Mountain reservation boasts the largest Native American community in the state: Belcourt, with a population of approximately 2,000. Rand, *There are No Pequots*, *supra* note 15, at 69-72.

¹²⁵ SCHNEIDER, *supra* note 119, at 155.

¹²⁶ Rand, *There are No Pequots*, *supra* note 15, at 73.

¹²⁷ *See* Peter Smolowitz, *Procedure for Gambling Contracts Discussed*, AP WIRE, Mar. 31, 1997, available at 1997 WL 2512705.

¹²⁸ Rand, *There are No Pequots*, *supra* note 15, at 75-78; Rand & Light, *Raising the Stakes*, *supra* note 15, at 335-38.

¹²⁹ Mark Fox estimated the Three Affiliated Tribes' casino's annual revenue at about \$3 million. Mark Fox, Guest Lecture in Indian Gaming Law and the UND School of Law (Apr. 24, 2001) (transcript on file with authors). One of the key factors impacting the financial success of a gaming operation is its proximity to potential customers; that is, the size of nearby population centers. *See* Eduardo Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 205, 234 (Stephen Cornell & Joseph P. Kalt eds., 1992).

¹³⁰ *See generally* 2000 N.D. INDIAN GAMING ASS'N, *supra* note 120.

modest increases in employment and revenue generated by gaming in a rural market.¹³¹ In North Dakota, the tribes' primary goal is job creation rather than profit margin,¹³² and in this respect, the tribes' success is clear: together, the state's five tribal casinos have directly created over two thousand jobs,¹³³ more than halving reservation unemployment rates.¹³⁴

Further, relying on even relatively modest casino revenue, a tribe may diversify economic development and strengthen the provision of government services.¹³⁵ Off the reservation, non-Indian communities and the state economy also benefit from modest Indian gaming revenue.¹³⁶ In North Dakota, tribal gaming is one of the state's top economic engines: from 1997 to 2000, the state accrued nearly \$500 million in economic benefits resulting from Indian gaming.¹³⁷ Finally, employment opportunities created by Indian gaming have enticed tribal members to return to North Dakota's reservations, as evidenced by the 2000 Census: in the last decade, the state's Native American population grew by twenty percent, while North Dakota struggled to maintain its general population.¹³⁸

Plains Tribes such as those in North Dakota see gaming not as a magic bullet that will eradicate reservation socioeconomic ills virtually overnight, but as a realistic policy option with attendant risks as well as rewards. As NIGA Chairman Ernest Stevens puts it:

Perhaps the most important point is that Indian gaming has served to build strong tribal governments, and promote tribal economic self-sufficiency. Tribes now have schools, health clinics, water systems, and roads that exist only because of Indian gaming. Tribes have a long way to go because too many of our people continue to live with disease and poverty, but Indian gaming offers hope for the future.¹³⁹

VII. TOWARD INFORMED POLICYMAKING: RECONCILING THE PARADOX OF TRIBAL SOVEREIGNTY

A. *Does Indian Gaming "Work" as Public Policy?*

Indian gaming has been controversial since its advent. Since Congress enacted IGRA, politics has proven as great a force as law in shaping the practicalities of tribal gaming.¹⁴⁰ Despite Indian gaming's successes, whether measured through tribes' strengthened self-government, economic self-sufficiency,

¹³¹ See CORNELL ET AL., *supra* note 23, at 27.

¹³² 2000 N.D. INDIAN GAMING ASS'N, *supra* note 120, at 2.

¹³³ Doreen Yellow Bird, *Researcher Says Gambling is a Net Plus on Reservations*, GRAND FORKS HERALD, Sept. 3, 2000, at 2C.

¹³⁴ N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS 5 (1998).

¹³⁵ CORNELL ET AL., *supra* note 23, at 37-40.

¹³⁶ See generally Jonathan B. Taylor et al., *supra* note 29.

¹³⁷ 2000 N.D. INDIAN GAMING ASS'N, *supra* note 120, at 7, 9.

¹³⁸ Discover ND, *Census: Population by Race 1990 & 2000*, at <http://www.state.nd.us/jsnd/Bin/lmidata.pl> (last visited Jan. 20, 2004).

¹³⁹ *Indian Gaming: Oversight Hearing on the Indian Gaming Regulatory Act Before the Senate Committee on Indian Affairs* (July 25, 2001) (statement of Ernest Stevens, Jr.), available at 2001 WL 21757798.

¹⁴⁰ Rand, *At Odds*, *supra* note 15, at 297.

or the ability to provide basic government services on the reservation, to some it may seem that the tribes can't win for losing. Others, however, argue that the tribes have simply won too much. At the very least, all perhaps can agree that tribal gaming generates public attention and political controversy, with an intensity far greater than any other policy issue affecting tribes in recent history.

Exemplifying several of the criticisms of the Pequots and Plains Tribes discussed above, a number of overgeneralizations prevail in popular media accounts of gaming tribes today:¹⁴¹ all tribes game; all members of gaming tribes are wealthy, like Connecticut's Mashantucket Pequots; tribal gaming is a policy failure because it has not lifted some tribes from poverty.¹⁴²

In the most prominent of recent media critiques, a December 2002 two-part cover story in *Time* magazine decried tribal gaming on a number of fronts. "Look who's cashing in at Indian casinos," a cover exhorted, adding, "Hint: It's not the people who are supposed to benefit."¹⁴³ *Time* labeled Indian gaming the "wheel of misfortune" and asserted that tribal casinos extensively benefit wealthy non-Native investors but provide little to the poor.¹⁴⁴ According to these articles, IGRA thus represents a policy failure of the highest level: "Imagine, if you will, Congress passing a bill to make Indians self-sufficient that gives billions of dollars to the white backers of Indian businesses and nothing to hundreds of thousands of Native Americans living in poverty."¹⁴⁵ *Time* further accused tribes of "playing the political slots" by using gaming revenues to "buy influence in Washington."¹⁴⁶ Perhaps more significantly, policymakers have echoed the popular media's call for increased regulation of tribal gaming due to its alleged policy failures.¹⁴⁷

Individual gaming tribes and NIGA have responded with reminders that tribal gaming benefits tribes and non-tribal jurisdictions alike, and regardless, is

¹⁴¹ See Rand, *There are No Pequots*, *supra* note 15 at 48-49, 55-59.

¹⁴² See, e.g., Donald L. Barlett & James B. Steele, *Playing the Political Slots*, *TIME*, Dec. 23, 2002, at 52 [hereinafter Barlett & Steele, *Playing the Political Slots*]; Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, *TIME*, Dec. 16, 2002, at 44 [hereinafter Barlett & Steele, *Wheel of Misfortune*]; Donald L. Barlett, & James B. Steele, *Who Gets the Money?*, *TIME*, Dec. 16, 2002, at 48; Ellen Barry, *A War of Genealogies Rages*, *BOSTON GLOBE*, Dec. 12, 2000, at A1; Micah Morrison, *El Dorado at Last: The Casino Boom*, *WALL ST. J.*, July 18, 2001, at A18; Sean P. Murphy, *A Big Roll at Mohegan Sun*, *BOSTON GLOBE*, Dec. 10, 2000, at A1; Michael Rezendes, *Few Are Sharing in Casino Windfall*, *BOSTON GLOBE*, Dec. 11, 2000, at A1; Michael Rezendes, *Big-Money Draw Spurs Corruption*, *BOSTON GLOBE*, Dec. 13, 2000, at A1.

¹⁴³ *Look Who's Cashing In*, *TIME*, Dec. 16, 2002 (cover).

¹⁴⁴ Barlett & Steele, *Playing the Political Slots*, *supra* note 142; Barlett & Steele, *Wheel of Misfortune*, *supra* note 142.

¹⁴⁵ Barlett & Steele, *Wheel of Misfortune*, *supra* note 142.

¹⁴⁶ Barlett & Steele, *Playing the Political Slots*, *supra* note 142, at 52. NIGA Chair Ernest Stevens responded that he found it "highly offensive that *Time* published an article belittling tribal self-government and the very positive attempts of tribal governments to overcome dispossession, poverty, and social wrongs for hundreds of years." Ernest L. Stevens, *Response to Time Magazine*, available at <http://www.indiangaming.org/info/pr/press-releases-2002/time-magazine.shtml> (last visited Jan. 20, 2004).

¹⁴⁷ See Rand, *There are No Pequots*, *supra* note 15, at 58-59.

an assertion of tribal sovereignty, "not a federal program" that is bestowed and hence can be taken away.¹⁴⁸ We concur.

Tribal sovereignty, we argue, must underlie informed discussion and effective public policy concerning Indian gaming. Current critiques of Indian gaming are flawed in their failure to recognize and consider tribal sovereignty fully. As demonstrated by the previous section's case studies, tribal gaming must be placed in the broader context of widely varied tribal experiences, from the Pequots to the Plains. These models of Indian gaming lay the foundation for examining how, despite its theoretical and practical limitations, policymakers can reconcile the paradox of tribal sovereignty.

B. Tribal Sovereignty as a Measure of Success

The widespread adoption of Indian gaming as a tribal strategy for economic development coincided with the federal government's policy of encouraging tribes to exercise their sovereignty to grow reservation economies. Indeed, one of IGRA's express purposes is 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."¹⁴⁹

Tribal sovereignty is a better indicator of success than is an economic bottom line in the context of Indian gaming. It seems clear, based on current federal policy as well as history lessons of interactions between tribes and state and federal government, that the tribes, at least as a starting point, must look to their own governments for meaningful and efficacious solutions to reservation poverty. But tribal governments may enact and implement effective policy only through the exercise of tribal sovereignty. Strong tribal governments, then, will be better able to address the needs of their communities.

It follows that if a tribe's casino reinforces tribal sovereignty and strengthens tribal government, tribal gaming should assist the tribe in seeking solutions to the problems facing its members, almost regardless of profitability. The experiences of the Plains Tribes provide empirical evidence for this hypothesis, demonstrating that even modest casino profits strengthen tribal governments and preserve or enhance tribal sovereignty. Such tribes, with large memberships and little access to metropolitan markets, are unlikely to experience dramatic economic and social rejuvenation based solely on casino revenues. Yet from the tribes' perspective, casino employment and even modest revenue fund tribal strategies to overcome reservation poverty and accompanying social ills. As tribal governments are able to use casino revenue to offer their members employment and educational opportunities, along with essential government services such as adequate housing and health care, gaming revenue has demonstrably strengthened tribal governments in North Dakota. This has helped to preserve tribal sovereignty, as tribes have the economic wherewithal to implement tribal government policy decisions and programs. Casino profits also allow tribes to diminish their dependence on state and federal programs, further reinforcing tribal sovereignty. In turn, the exercise of tribal sovereignty legitimately may be expected to result in healthier reservation communities, by a

¹⁴⁸ Stevens, *supra* note 146.

¹⁴⁹ 25 U.S.C. § 2702(1) (2000).

number of measures, as well as an increased likelihood that tribes will be able to pursue avenues of economic development outside of gaming.¹⁵⁰

Further, using tribal sovereignty as a measure of Indian gaming's success reveals more common interests and goals of tribal and non-tribal governments than does a simple economic bottom line. Beyond profits to the tribe and direct payments to the state, tribal sovereignty reveals shared jurisdictional policy goals and interests among tribes, states, localities, and the federal government, such as reducing reservation poverty and unemployment rates, creating jobs for Native and non-Native workers, stimulating local economies and leveraging economic development, increasing government revenue, reducing disbursement of public entitlement benefits, minimizing social ills associated with gambling, including crime and addiction, and facilitating stated federal goals of tribal self-determination and self-government.

C. Tribal Sovereignty as a Foundation for Success

Tribal sovereignty should provide the foundation for both public discourse and public policymaking concerning Indian gaming. If, however, as we argued at the outset of this Article, the doctrine of tribal sovereignty presents a paradox in the context of Indian gaming – the exercise of sovereignty is accompanied by its restriction through state and federal regulation – how can the doctrine reconcile this seemingly inherent paradox? That is, how can one use tribal sovereignty to transcend the doctrine's own legal and political limitations?

The answer, we believe, lies in tribal gaming. Indian gaming presents today's most significant opportunity to give practical meaning to tribal sovereignty and to reshape how sovereignty is recognized and realized through legal and political processes. Perhaps no other strategy for reservation economic development has held such potential, as demonstrated by the examples of both the Pequots and the Plains Tribes. Beyond generating tribal government revenue and alleviating reservation poverty, however, Indian gaming creates an opportunity for tribes to assert and exercise tribal sovereignty.

But politics has outpaced applicable law in shaping Indian gaming. While we concur with those who decry the politicization of Indian gaming as a further impingement of tribal sovereignty, we also believe it creates the potential for political actors to reach beyond the legal limits of the doctrine. In the context of Indian gaming, federal, state, and tribal political actors can achieve shared goals and interests while at the same time realizing those specific to each, whether political, legal, economic, or cultural – potentially a win-win outcome for all involved. Recognition of these common interests and goals reveals how the maximization of tribal sovereignty is the essential means to their achievement, and provides the key policy incentive for non-tribal governments to engage in government-to-government negotiation with tribes.

Tribes are using Indian gaming's potential win-win outcome, along with gaming revenue, to increase their political clout.¹⁵¹ In turn, the political playing field, for so long tilted in tribes' disfavor, is beginning to level as tribes exercise political influence and power at local, state, and federal levels. As

¹⁵⁰ Rand, *There are No Pequots*, *supra* note 15, at 75-76.

¹⁵¹ See, e.g., Barlett & Steele, *Playing the Political Slots*, *supra* note 142.

political and economic partners, tribes may work with non-tribal governments to pursue policy outcomes beneficial to all. In this form, the political process yields an answer to the paradox of tribal sovereignty: by pursuing compromise between sovereign governments, one may overcome the compromised nature of the doctrine of tribal sovereignty.

VIII. CONCLUSION

The three frameworks set forth in this article not only serve as contexts for examining Indian gaming policy, but also reveal the common baseline of tribal sovereignty as the appropriate foundation for each “step” in the development of Indian gaming law and policy. Current policy debate, however, is steeped in the highly politicized intersections of law and policy without sufficient grounding in either the framework of federal Indian law and policy or the framework of the law of Indian gaming. Most telling, we believe, current public debate and resultant policy outcomes appear to have become unmoored from the base of tribal sovereignty. To be truly effective, as well as socially just, future Indian gaming law and policy must be built on the foundation of tribal sovereignty.