ENACTMENT OF THE INDIAN GAMING REGULATORY ACT OF 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?

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The history of contact between Anglo-American settlers and Indian tribes constitutes nothing less than a virtually unending story involving the transfer of valuable resources, like land, gold, coal, oil, timber, uranium, and even the very sovereignty of Indian peoples, from native control to non-Indian ownership or control. That process of colonialism constitutes the central story of the often asymmetrical meeting of these culturally disparate peoples. Beginning several decades ago, however, something very different, something very new, and something with profound economic and political revolutionary potential appeared on the horizon. Rising like a sunrise in the east, bringing a promise of a new economic day for Indian country and its peoples, Indian gaming came over the horizon with a promise of new prosperity for some well-positioned Indian nations. For some, it seemed the buffalo finally had returned to Indian country.

Twenty years ago, on October 17, 1988, Public Law 10-497, the Indian Gaming Regulatory Act (IGRA), entered into force.[1] This Act culminated a decade of intense debate about emergent gaming industry in Indian country, then mostly commercial bingo centered. With the benefit of hindsight, it is easy and self-evident to claim that for the tribes which benefited from

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1. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721 (2006) and 18 U.S.C. §§ 1166–1168 (2006)).

Indian gaming (and only a minority of all federally recognized tribes have done so) this legislation heralded and enabled the first sustained economic development their members had seen since they first had any contact with and their major resources were taken by Anglo-American settlers. But historical hindsight is always better than foresight!

At the time IGRA entered into force, not all of the affected Indian tribes heralded this new development. Whether the enactment of IGRA, those black specks on the horizon rising from Washington D.C., constituted the return of the buffalo to Indian country or another federal reincarnation of Custer's 7th Calvary bent on limiting Indian economic resurgence was not immediately apparent. Having been economically and politically oppressed by decades of new federal initiatives, many Indians saw the legislation as a major curtailment of their gaming opportunities and as another federal usurpation of their sovereignty. According to one of their lawyers, the New Mexico tribal lobbying delegation, which had vigorously fought enactment of the legislation, thought the final enactment of IGRA meant "the game was over."[2] The late Chairmen Wendell Chino and Roger Jourdain, the strong leaders of the Mescalero Apache Tribe and the Red Lake Band of Chippewa respectively, were so incensed by the legislation that they secured approval from their respective nations for federal litigation challenging the constitutionality of IGRA. The resulting short-lived, little remembered litigation—*Red Lake Band of Chippewa Indians v. Swimmer*[3]—constituted the first major broadside assault on the claimed plenary power of Congress in the field of Indian affairs since *Lone Wolf v. Hitchcock*[4] was decided over eighty-five years before they filed suit. As in *Lone Wolf*, the Red Lake Chippewa Indian Tribe and the Mescalero Apache Indian Tribe were unsuccessful in their efforts to speak constitutional truth to raw federal assertions of superior power.

Clearly then, enactment of IGRA was not widely hailed in Indian country as the economic salvation it later became for some Indian nations. This article explores the reasonableness of the tribal responses to IGRA in 1988. Given the situation at the time, were tribal leaders reasonable and correct in seeing IGRA as simply another in a long line of federal usurpations of tribal authority, or did they profoundly misread the situation by looking too optimistically at some of their then recent Indian gaming

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2. Interview in Albuquerque, NM with Kevin Gover, Professor, Sandra Day O'Connor College of Law (July 26, 2007).

3. Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990).

4. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (the infamous *Dredd Scott* of federal Indian law, holding that Congress had power to unilaterally abrogate Indian treaties and appropriate treaty-guaranteed Indian lands).

litigation victories? A subsidiary objective of this article also involves exploring two more issues. Did the enactment of IGRA, as sometimes claimed, constitute a response to the tribal victory on Indian gaming in the famous decision of the United States Supreme Court in *California v. Cabazon Band of Mission Indians*?[5] Instead, were these events simultaneous, somewhat independent, and coincident culminations of judicial and legislative responses to the then developing gaming industry growing in Indian country?

While hindsight is sometimes valuable, it generally does not constitute a productive or even accurate method of interrogating history. Thus, the historical perspective of this article is not the way lawyers too frequently view history—history as seen from today—but, rather, the perspective from and situation in 1988 when IGRA was enacted. This article, therefore, does not seek to evaluate the tribal perspective anachronistically from the standpoint of what we know today, but, rather, to assess the tribal response from the situation which Indian leaders understood at the time of the enactment of IGRA. It further explores the reasonableness and rhetoric of that effort.

To explore these questions, this article is divided into four sections. The first section will explore the early pre-IGRA growth of Indian commercial gaming, a story best divided between the very earliest efforts and responses in the late 1940s and early 1950s and the later growth of Indian bingo from the late 1970s beginning with the Florida Seminoles and other tribes. The second section will critically analyze the pre-IGRA judicial and legislative responses during the 1980s to the growing Indian commercial gaming operations that followed the Florida Seminole activities. The third section will carefully examine the legislative history of IGRA and the resulting legislation. Finally the article will conclude by examining whether IGRA expanded or curtailed Indian commercial gaming opportunities, i.e., whether it brought an economic return of the buffalo to Indian country or usurped tribal sovereignty over Indian commercial gaming in Indian country.

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

I. JUDICIAL REACTION TO THE EMERGENCE OF COMMERCIAL GAMING IN INDIAN COUNTRY

A. Early Efforts

Gaming is nothing new for most Indian nations. Culturally, many Indian tribes had games, races, and other recreational activities at social or cultural events on which wagers frequently were placed.[6] While such Indian wagering sometimes might have occurred between tribal communities, Indian gaming as a commercial venture began after World War II.[7]

The reason why Indian gaming constituted an attractive economic development opportunity is obvious and intuitively simple given the economic position in which most Indian tribes found themselves. As a result of colonialism, most Indian communities were left with little of their original lands, few resources, and virtually no businesses on the reservation. Non-governmental jobs were scarce in Indian country and unemployment extraordinarily high.[8] The obvious solution to these economic problems involved creation of new businesses in Indian country. But businesses require investment capital, which few tribes and even fewer of their members then had. In non-Indian counties, the solution to scarcity of investment capital involves financing, often through loans. Such loans generally are backed by collateral. In Indian country, however, a major capital deficit existed since Indian tribes were legally prohibited from mortgaging their major asset, their land, without express Congressional approval.[9] Thus, what Indian nations clearly needed to facilitate their economic development was a repetitive capital stream from outside the reservation that could be developed incrementally at little or no cost. After early efforts to use cigarette and tobacco sales to supply that need were substantially thwarted by multiple adverse judicial decisions,[10] Indian

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6. KATHRYN GABRIEL, GAMBLER WAY: INDIAN GAMING IN MYTHOLOGY, HISTORY, AND ARCHAEOLOGY IN NORTH AMERICA (1996).

7. ROD L. EVANS & MARK HANCE, LEGALIZED GAMBLING: FOR AND AGAINST 6 (1998).

8. KENNETH WILLIAM TOWNSEND, WORLD WAR II AND THE AMERICAN INDIAN 194–210 (2000).

9. 25 U.S.C. § 177 (2006).

10. *See* Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 75–76 (1994) (holding a federal statute conferring on the Commissioner of Indian Affairs authority to make rules and regulations with respect to the sale of goods to Indians on reservations did not preempt state regulation reasonably necessary to the assessment or collection of lawful state taxes); Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11–12 (1985) (holding California had the right to require the Tribe to collect an excise tax on cigarettes sold to non-Indian purchasers, even though the state statute did not expressly require that the tax be

nations ultimately focused on gaming to supply that need. While this brief overview explains the needs that Indian gaming fulfilled, it fails to supply the rich history behind that gradual development.

Post-World War II Indian commercial gaming did not begin with the enactment of IGRA, or even with the development of Indian bingo halls by the Florida Seminoles and others, as many believe. Rather, the legal saga of modern Indian *commercial* gaming probably began with Richard Sosseur, an entrepreneurial enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians.[11] Sosseur approached his Tribal Council with a gaming proposal, and the Lac du Flambeau Band Tribal Council awarded Sosseur a gaming franchise and license.[12] Neatly skirting the precise purpose of the franchise, the license issued by the Tribal Council authorized Sosseur to "place on Indian lands . . . any type of coin operated device licensed or taxed by the United States Government."[13] Of course, the type of coin operated device that is taxed by the federal government everyone had in mind was a gambling device.[14]

Gaming license in hand, Sosseur purchased nine slot machines, paid a federal tax of $100 on each machine, and opened two sites utilizing the machines.[15] He installed five of the machines in his own place of business on his Wisconsin reservation and the other four on the premises of a fellow tribal member, Hannah Maulson.[16] Thus, Richard Sosseur opened the first modern Indian commercial gaming facilities, presumably catering to local residents and the seasonal tourist trade in their beautiful section of northern Wisconsin. He relied, not unreasonably, on the fact that Wisconsin criminal law, including its laws against commercial gambling, did not then apply to any Indians for activities in Indian country, and there was then absolutely no federal law expressly prohibiting Sosseur's actions, so long as he paid

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passed through to the ultimate purchaser, where the incidence of the tax fell upon purchasers); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154–58 (1980) (holding that the State could require the Tribes to collect cigarette tax from non-members); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976) (balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians; precedent about state taxation of Indians is not controlling because "this [collection] burden is not, strictly speaking, a tax at all"). *But see* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991) (holding tribal sovereign immunity barred states from using court processes to collect cigarette taxes owed by tribe).

11. United States v. Sosseur, 87 F. Supp. 225, 226 (W.D. Wis. 1949), *aff'd and rev'd in part*, 181 F.2d 873 (7th Cir. 1950).

12. *Id.* at 227.

13. *Id.*

14. *See Sosseur*, 181 F.2d at 874.

15. *Sosseur*, 87 F. Supp. at 227.

16. *Id.*

the required federal wagering taxes, which he did.[17] In short, Richard Sosseur did what all enterprising businessmen do, he found a crack in the legal system that he could exploit and in the process sought to make some money through his discovery. Since he sought and secured the legal approval of his tribe, he thought, and would later claim in court, that only his tribal law governed his conduct and only the tribal court had any jurisdiction over his actions.[18]

Richard Sosseur, of course, was not the only enterprising figure relying on local law at precisely the same time seeking to develop a gaming enterprise. Students of the development of the Las Vegas Strip and Nevada gaming history will immediately recognize that Richard Sosseur's small scale casino in northern Wisconsin coincided temporally with the creation by Benjamin "Bugsy" Siegel, and his organized crime associates, of Las Vegas' first luxury casino-hotel, The Flamingo.[19] Like Sosseur, Bugsy Siegel exploited, for profit, differences in the local laws on gambling. The difference, of course, was that Bugsy Siegel and his organized crime associates had money, and therefore political clout, while Richard Sosseur only had nine licensed slot machines on which he had paid $900 in federal taxes and held a tribal franchise.

As any good litigator will tell you, jurisdictional or venue disputes often mask underlying and more fundamental questions involving whose law actually governs a particular transaction. So it was for Richard Sosseur. Needless to say, his very small slot machine operation attracted attention and, ultimately, opposition from Charles H. Cashin, then the United States Attorney for the Western District of Wisconsin.[20] Despite the fact that Richard Sosseur had fully paid his federal taxes and otherwise fully complied with all known federal laws expressly dealing with gambling, enterprising federal authorities indicted Richard Sosseur under the then recently amended Federal Assimilative Crimes Act (ACA)[21] for violating Section 348.07 of the Wisconsin Statutes which prohibited keeping or using gambling devices.[22] Since the Federal Assimilative Crimes Act, by its express terms, had never applied to Indian country until an unfortunate generic broadening of its coverage language in the 1948 revision of the

17. *Sosseur*, 181 F.2d at 875–76.

18. *Id.*

19. SALLY DENTON & ROGER MORRIS, THE MONEY AND THE POWER: THE MAKING OF LAS VEGAS AND ITS HOLD ON AMERICA, 1947–2000, at 49–58 (2001) (Benjamin "Bugsy" Siegel oversaw the creation of The Flamingo hotel and casino which opened December of 1946).

20. *See Sosseur*, 87 F. Supp. at 225.

21. 18 U.S.C. § 13 (2006). This statute was applied to Indian country through 18 U.S.C. § 1152 (2006).

22. *Sosseur*, 87 F. Supp. at 227.

United States Criminal Code,[23] the law could not have been clearer that Section 348.07 of the Wisconsin Statutes did not apply to Sosseur's activities on his reservation since Wisconsin had no jurisdiction over such conduct. Since Sosseur had been very careful to fully comply with all applicable federal tax laws, one can only imagine Sosseur's shock when he was indicted by *federal authorities* for violating a state law he knew did not apply to him. Not only was he being prosecuted by federal authorities when he had carefully complied with all then existing federal tax laws on wagering, but he was being charged with a violation of state law, which of its own force had no application to him. Worse still, the federal statute that the enterprising United States Attorney claimed applied did not expressly mention Indian country and, at least before 1948, had expressly indicated the federal enclaves to which it applied and Indian country had never been included in the list. In fact, Richard Sosseur's case probably constituted the first ever *federal* prosecution of an Indian under state law for crimes occurring on his own reservation.

To say Richard Sosseur had no real notice that his actions might constitute a crime would be an understatement of considerable magnitude. All he was trying to do was precisely what Bugsy Siegel was simultaneously doing in Las Vegas—exploiting the structure of local law for commercial advantage by creating a lawful gaming operation near a consumer market where there could be little competition due to the structure of the gaming laws in the adjacent jurisdiction. In short, both were relying on existing legal structures to assure a continuing market for their gaming businesses.

In Richard Sosseur's case, he argued, like many tribal sovereignty advocates who followed him, that only tribal authorities had lawful authority over Indian gaming on the reservation.[24] Thus, he argued that federal prosecution was inappropriate and the application of state law to Indians was inconsistent with federal policy. Quoting *Rice v. Olson*,[25] Sosseur argued that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," and

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23. 18 U.S.C. § 13(a). The relevant text of the statute states:
> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

24. United States v. Sosseur, 181 F.2d 873, 875–76 (7th Cir. 1950).
25. Rice v. Olson, 324 U.S. 786, 789 (1945).

therefore argued that "[w]e find it difficult to concede that the recodification which resulted in the Assimilative Crimes Act has achieved a reversal of that principle."[26] Obviously, Richard Sosseur did not deny the facts claimed in the indictment. His case really constituted the first test case for commercial gaming in Indian country. Since the question in dispute in the prosecution of Richard Sosseur involved purely a legal question, he waived jury trial. Notwithstanding the logic of Sosseur's policy argument and the lack of any explicit reference to Indian country in the coverage formula of the Assimilative Crimes Act, Sosseur was convicted by the district court on a set of stipulated facts.[27] His slot machines were seized, he was fined the sum of $250, and he was sentenced to six months in jail, which was conditionally suspended.[28]

Ultimately, the Seventh Circuit rejected his appeal,[29] holding, for probably the first time, that the recodification of the Assimilative Crimes Act in the 1948 federal criminal code revision process rendered state criminal legislation applicable to Indians in Indian country by adoption under that law despite the inconsistency of that ruling with prevailing federal Indian policy.[30] Despite the fact that the Seventh Circuit conceded that "[w]ith the exception of the laws relating to lottery, not here involved, gambling, and the maintenance and operation of gambling devices, have never been declared offenses under the laws of the United States,"[31] the court nevertheless found that the Assimilative Crimes Act adopted the applicable Wisconsin gambling prohibition and applied it to Indian conduct in Indian country through the jurisdictional hook of the General Crimes Act—a contorted form of double derivative jurisdiction.[32]

As we all know, Bugsy Siegel's efforts were wildly successful in helping to create a major tourist destination based casino business in Las Vegas, while Richard Sosseur was convicted of a crime by federal authorities and his operations closed. In the late 1940s, organized crime won and Indians lost, all with the full backing of federal authorities. Had *Sosseur* been

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26. Brief of Appellant at 16, United States v. Sosseur, No. 10069 (7th Cir. Jan. 27, 1950).
27. *Sosseur*, 181 F.2d at 874.
28. *Id.*
29. *Id.* at 876.
30. From 1825 until 1948, Congress periodically re-enacted the Assimilative Crimes Act, adopting the state laws in existence at the time of the re-enactments. Act of Apr. 5, 1866, ch. 24, § 2, 14 Stat. 13; Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; Act of Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145; Act of June 15, 1933, ch. 85, 48 Stat. 152; Act of June 20, 1935, ch. 284, 49 Stat. 394; Act of June 6, 1940, ch. 241, 54 Stat. 234. The statutes always specified the precise federal enclaves to which they applied and never expressly included Indian country. The 1948 revision adopted a more generic reference that *Sosseur* held included Indian country.
31. *Sosseur*, 181 F.2d at 874.
32. 18 U.S.C. § 1152 (2006).

decided the other way, might we have witnessed the simultaneous growth of the Nevada, and later New Jersey, gaming industry with competing operations in Indian country? Instead Indian competition with the Nevada and New Jersey legal monopolies would be delayed almost four decades by the operation of federal law, during which the Nevada gaming interests amassed considerable wealth and political clout based on the legalized monopoly which the federal prosecution in *Sosseur* helped assure. Thus, *Sosseur* equipped federal authorities with the first arrow in their quiver to keep Indian commercial gaming at bay—adoption of state gaming laws for Indian country through the combined and tortured reading of the Assimilative Crimes Act and the General Crimes Act.

The prosecution of Richard Sosseur and the simultaneous growth of gaming interests in Nevada may have alerted federal authorities to the slender reed on which their anti-gambling efforts rested when it came to commercial gaming in federal enclaves or Indian country. Congress moved quickly in 1951 to fill that hole by enacting the Johnson Act,[33] now found as amended at 15 U.S.C. §§ 1171–1178. As originally enacted, the Johnson Act did two things. First the legislation made it illegal to transport in interstate or foreign commerce any "gambling device" unless the destination of the shipment was a jurisdiction that had "enacted a law providing for the exemption . . . from the provisions of this section."[34] Under the legislation, a gambling device was defined to include any slot machine, any other machine or mechanical device, whether employing a drum or wheel or coin operated, that was used for a game of chance entitling the winner to receive any money or property, or any subassembly or essential part thereof.[35] Thus, the transportation provisions of the Johnson Act constituted a classic example of cooperative federalism in which federal law closes the channels of interstate and foreign commerce to trade products whose use is rendered illegal by local law.[36] It was, in essence, originally a local option statute in which a local jurisdiction could exempt itself from coverage. The legislation also contained provisions for registration of gaming machine manufacturers and the marking and labeling of their shipments to facilitate enforcement of the transportation ban.[37] While any state or "subdivision of a State" that sought to legalize such

33. Johnson Act, Pub. L. No. 81-906, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. §§ 1171–1178 (2006)).

34. Johnson Act § 2 (codified as amended at 15 U.S.C. § 1172(a) (2006)).

35. Johnson Act § 1 (codified as amended at 15 U.S.C. § 1171(a) (2006)).

36. One of the earliest examples of this technique also involved gaming—the federal lottery act, the constitutionality of which was sustained by the Supreme Court in *Champion v. Ames*, 188 U.S. 321 (1903).

37. Johnson Act § 3 (codified as amended at 15 U.S.C. § 1173 (2006)).

gambling devices could opt out of the legislation by statute or ordinance,[38] no such option was offered to Indian tribes or certain other described enclaves.

Second, in addition to the transportation provisions, the Johnson Act also prohibited possession, use, manufacture, or repair of gambling devices within federal enclaves.[39] Section 5 of the original version of the Johnson Act made it unlawful "to manufacture, recondition, repair, sell, transport, possess, or use any gambling device" within "Indian country as defined in section 1151 of title 18 of the United States Code."[40] This prohibition also applied to the District of Columbia, any possession of the United States, and areas within the maritime or territorial jurisdiction of the United States.[41] During the House hearings on the legislation, Congress completely ignored tribal concerns, and no tribal representatives testified.[42] The Senate Report for the legislation justified it primarily in anti-crime terms, never mentioning the impact on Indian country.[43] Even the detailed analysis of section 5 contained in the Senate Report never mentioned Indian country and only claimed that the affected areas were areas "where the Federal Government is primarily responsible for law enforcement."[44] The more detailed House Report is similarly silent on the impact of the legislation on Indian economic development opportunities.[45] Thus, Congress expressly curtailed Indian gaming opportunities without even bothering to hear from Indian country or expressly considering the ramifications of the prohibition contained in section 5.

Unlike the interstate transportation provisions, federal enclaves, including Indian country, were given no option whatsoever of opting-out of the Johnson Act gambling device prohibitions. Thus, despite the obvious tribal sovereignty implications, states and their political subdivisions were afforded the sovereign right to opt-out of the Johnson Act when they legalized gaming, as Nevada had done, while federal enclaves, including Indian country, were afforded no such option. For many federal enclaves, direct congressional governance was the norm in 1951 when the Johnson Act was enacted, rendering a local option irrelevant. By contrast, Indian

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38. Johnson Act § 2 (codified as amended at 15 U.S.C. § 1172(a) (2006)).
39. Johnson Act § 5 (codified as amended at 15 U.S.C. § 1175(a) (2006)).
40. *Id.*
41. *Id.*
42. *Gambling Devices: Hearing on S. 3357 and H.R. 6736 Before the H. Comm. on Interstate and Foreign Commerce*, 81st Cong. (1950) [hereinafter *Hearing on S. 3357 and H.R. 6736*].
43. S. REP. NO. 1482 (1950).
44. *Id.* at 4–5.
45. H.R. REP. NO. 81-2769 (1950).

country was primarily governed by tribal, not federal, law with the Tribal Council, not Congress, charting many of the major legal and policy decisions for the tribes. Nevertheless, as in *Sosseur*, federal action, this time the Johnson Act, reinforced the ability of states to create lucrative gaming enclaves by law, while expressly denying the same economic development opportunities to Indian tribes. As a consequence, thereafter federally regulated slot machines and gaming devices flowed to Nevada and, much later, Atlantic City, while Indian commercial gaming would be stymied for another thirty years.

Today, opponents of Indian gaming sometimes challenge it, often in political forums, the media,[46] and occasionally (and always unsuccessfully) in litigation,[47] for creating a claimed Indian monopoly on gaming within the state. The irony, of course, of such claims is that the reverse is actually true. Until the late 1980s, federal law, through the *Sosseur* prosecution and the Johnson Act, granted states and their subdivisions (then almost wholly controlled and run by a white power structure), a monopoly on deciding whether to economically exploit gaming as an economic development strategy, while denying the same opportunity to tribal governments. At the time of the original enactment of the Johnson Act, Nevada and two counties in Maryland had broadly legalized gaming including slot machines, while Washington and Montana permitted slot machines in private clubs.[48] The fact that initially only Nevada chose to broadly capitalize on this federally reinforced monopoly again meant that non-Indians (and in the early years of Nevada gaming, mostly organized crime) would economically benefit and Indian tribes would be denied the very same opportunity. Thus, the structure of federal gaming law and policy prior to IGRA facilitated the flow of gaming dollars to non-Indian entrepreneurs, while denying similar economic development opportunities to Indians—a reification of the systemic colonialism of federal law in assuring the flow of capital away from Indians and toward non-Indians. Las Vegas flourished while Indian

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46. *See, e.g.*, Donald L. Bartlett & James B. Steele, *Indian Casinos: Wheel of Misfortune*, TIME, Dec. 16, 2002, *available at* http://www.time.com/time/magazine/article/0,9171,1003896,00.html; Donald L. Bartlett, James B. Steele & Laura Karmatz, *Indian Casinos: Playing the Political Slots*, TIME, Dec. 23, 2002, *available at* http://www.time.com/time/magazine/article/0,9171,1003911,00.html; Donald L. Bartlett, James B. Steele & Laura Karmatz, *Indian Casinos: Who Gets the Money*, TIME, Dec. 16, 2002, *available at* http://www.time.com/time/magazine/article/0,9171,1003869,00.html.

47. *E.g.*, Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 723–24 (9th Cir. 2003); Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Board, 172 F.3d 397 (6th Cir. 1999); Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002).

48. *Hearing on S. 3357 and H.R. 6736*, *supra* note 42.

country continued to wither economically. IGRA only equalized the commercial gaming playing field, somewhat. Of course, this fairer deal at the gaming tables came forty years too late for Richard Sosseur and his tribal supporters.

B. The Development of the Indian Bingo Industry

The tribal commercial gaming setback sustained in *Sosseur* and the enactment of the Johnson Act delayed the development of the industry by almost three decades. Nevertheless, during the interim period many interests, most notably the gaming machine manufacturers, continued efforts to capitalize on the unique jurisdictional status of Indian country by proposing commercial gaming establishments to tribes. As early as 1970, the Rincon Band of Mission Indians in San Diego, California, which long had used gambling at fiestas as tribal fund raising projects, passed a tribal gaming ordinance and unsuccessfully sought to prevent the local country officials from interfering with their activities by seeking to litigate the question of whether the local San Diego country ordinances prohibited their projected gaming activities.[49] Their efforts ultimately were stymied by standing and justiciability concerns.[50]

The modern development of Indian commercial gaming, however, no doubt occurred when enterprising tribal leaders figured out how to simultaneously skirt the Johnson Act prohibitions on gambling devices while still operating a commercial gaming establishment in Indian country. That development occurred when the Seminole Tribe of Florida opened its high-stakes bingo facility.[51] As this section will demonstrate, one of the incredibly fortunate accidents of the history of Indian commercial gaming involved the use of reservations located in Public Law 280[52] states as test sites for Indian commercial gaming.

A portion of the reservation of the Seminole Tribe of Florida is located seven miles southwest of downtown Fort Lauderdale, Florida and by the

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49. Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds*, 495 F.2d 1 (9th Cir. 1974). The author was contacted several times during the 1970s to opine in his academic capacity on the lawfulness of proposals to site slot machines and other gaming facilities in Indian country.

50. *Id.*

51. *See* THOMAS BARKER & MARJIE BRITZ, JOKERS WILD: LEGALIZED GAMBLING IN THE TWENTY-FIRST CENTURY 61 (2000) ("[T]he Seminole Indians began offering high-stakes bingo . . . in 1979.").

52. 67 Stat. 588–90 (1953) (repealed in part by Pub. L. 90-284, Title IV, § 403, 82 Stat. 79 (1968)). Portions of Public Law 280 are codified as amended at 18 U.S.C. § 1162 (1953) and 28 U.S.C. § 1360 (1953).

late 1970s was surrounded by urban growth.[53] Recognizing the lucrative nearby market, the Tribe sought some way to bring the wealth of the nearby community onto the reservation and to create a monetary flow into Indian country to improve the economic conditions of their members. Settling on high-stakes bingo, the Tribe invested approximately $900,000 in the construction of a sizable bingo facility.[54] Recognizing that such a high-stakes bingo operation would clearly be illegal under Florida law if operating outside of Indian country,[55] attorneys for the Seminole Tribe filed suit against Robert Butterworth, the then elected sheriff of Broward County, where the facility was located, seeking to enjoin him from enforcing Florida's laws against the bingo facility. Having secured a preliminary injunction from the federal district court, the facility opened in December of 1979,[56] thereby inaugurating perhaps the most important decade of legal development for Indian commercial gaming. The federal district court ultimately sided with the Tribe and issued the requested final injunction, finding that the Florida gaming prohibition did not apply to and could not be enforced within Indian country, including the lands of the Florida Seminoles.[57] On appeal, the Fifth Circuit affirmed, over one dissent.[58] The court's basic analysis relied on two interrelated sources. The lands of the Florida Seminoles were governed by a federal statute, commonly known as Public Law 280 that purported to transfer certain criminal and civil jurisdiction over covered Indian reservations to the states in which they were located. Since Florida, utilizing section 7 of Public Law 280, had voluntarily assumed criminal jurisdiction over Indian reservation lands within the state, Butterworth argued that the Florida criminal prohibition on such high-stakes bingo operations applied to the Florida Seminoles.[59] The Fifth Circuit rejected that argument, relying primarily on the 1976 decision of the United States Supreme Court in *Bryan v. Itasca County*.[60]

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53. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 332 (2005) (stating that the Seminole reservation is located seven miles southwest of Fort Lauderdale); *see also* DAVID CLARK, POST-INDUSTRIAL AMERICA: A GEOGRAPHICAL PERSPECTIVE 46 (1985) (documenting that between 1970 and 1980 Florida experienced rapid urban growth).

54. William E. Horwitz, Note, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?* 14 CARDOZO ARTS & ENT. L.J. 153, 160 (1996).

55. Fla. Stat. § 849.093 (1967) (repealed 1991).

56. Seminole Tribe of Florida v. Butterworth, 491 F. Supp. 1015, 1016 n.2 (S.D. Fla. 1980).

57. *Id.* at 1020.

58. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981).

59. *Butterworth*, 658 F.2d at 311–12.

60. *Id.* at 316 (citing Bryan v. Itasca County, 426 U.S. 373, 392 (1976)).

Bryan involved a dispute between a local Minnesota county and a tribal member over whether the county's assessed personal property tax of $147.95 on a mobile home lawfully could be enforced against a member of the Minnesota Chippewa Tribe, who had placed the home on his land on the Leech Lake Indian Reservation.[61] Public Law 280 also governed that reservation.[62] When the disputed tax case reached the Supreme Court, the Court ruled that state efforts to apply and enforce the property tax violated federal law.[63] Relying heavily on (in fact appropriating the entire theory of) a then recently published article by a junior scholar at UCLA Law School, Professor Carole Goldberg,[64] the *Bryan* opinion held that the primary purpose of Public Law 280 was to deal with law enforcement in Indian country.[65] The Court concluded that civil provisions in Public Law 280 had a limited role in providing state forums for the resolution of disputes in Indian county, but were never intended to grant any state taxing or regulatory power over Indians in Indian country.[66] Consequently, since Minnesota lacked lawful authority to apply its personal property taxes to Indians in Indian country before the enactment of Public Law 280, it gained none from the enactment of that statute. As a direct result of *Bryan* and Professor Goldberg's seminal article, Public Law 280 came to be seen primarily as a statute that granted states criminal and civil jurisdiction but absolutely no regulatory or taxing powers.[67]

In *Seminole Tribe v. Butterworth*, the Fifth Circuit explored the implications of *Bryan* for the application of state gaming prohibitions to

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61. *Bryan*, 426 U.S. at 375.

62. *Id.* at 379.

63. *Id.* at 376–92.

64. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1974–75).

65. *Bryan*, 426 U.S. at 379.

66. *Id.* at 381–86.

67. *See* Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008). Professor Goldberg's 1975 article, *supra* note 64, very clearly established both the intellectual framework for analyzing Indian gaming issues and the structure ultimately indirectly adopted in the Indian Gaming Regulatory of Act of 1988. From the standpoint of legal analysis, Professor Goldberg therefore richly deserves to be called the mother of Indian gaming. Probably no single law review of the twentieth century has so greatly affected the lives and fortunes of its subjects as Professor Goldberg's 1975 work. In its own right, it constituted a great piece of legal scholarship, a fact demonstrated by the single-minded reliance of the Supreme Court on its analysis in *Bryan*. Aside from its inherent brilliance, however, its impact in spawning a multi-billion dollar industry deservedly makes Professor Goldberg's article the single most important piece of legal scholarship of the twentieth century, as judged by direct impact. The irony, of course, was that the vehicle for translating her legal theory into reliable legal doctrine was *Bryan*, a decision of the United States Supreme Court in which a total of $147.95 was at issue.

tribal commercial gaming operations in Indian country.[68] As the Fifth Circuit saw the matter, the question of whether Public Law 280 authorized application of the Florida gaming prohibition required it to decide "whether the statute in question represents an exercise of the state's regulatory or prohibitory authority."[69] Noting that the apparent absolute prohibition Florida imposed on lotteries and other games of chance was tempered by exceptions applicable to charitable groups, nonprofits, and veterans' organizations, the majority opinion concluded that "[b]ingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses."[70] Thus, the majority found that Seminole, rather than Florida, law governed the operation of the bingo facility.[71] As the Fifth Circuit majority put it, "[w]here the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed."[72]

The legal, and consequent economic, success of the Seminole Tribe of Florida literally broke a dam which had held back Indian commercial gaming development since the *Sosseur* decision in 1949. Since classic bingo did not involve a gambling device of the type prohibited by the Johnson Act, it constituted the perfect vehicle for the initial development of the Indian gaming industry. Furthermore, the fact that the initial legal contests frequently occurred in Public Law 280 meant that courts focused primarily on *Bryan* and its regulatory/prohibitory distinction, as announced in *Seminole Tribe v. Butterworth*, rather than focusing on the Assimilative Crimes Act, which had doomed Richard Sosseur's operations at Lac du Flambeau. This combination of fortunate historic facts created the perfect storm to rejuvenate Indian commercial gaming development. The Florida Seminoles had hit the jackpot, and many other tribes, most of them historically poverty ridden, quickly sought to get into the game. By 1983, approximately 180 bingo halls were opened by Indian tribes in Indian country.[73]

As a result, the decade between the opening of the Florida Seminole bingo hall in 1979 and the enactment of the Indian Gaming Regulatory Act

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68. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981).
69. *Id.* at 313.
70. *Id*. at 314.
71. *Id.* at 314–15.
72. *Id.*
73. Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387, 392 n.20 (1993).

of 1988 witnessed an explosion of tribal commercial gaming in Indian country and, with it, a predictable flood of litigation, mostly, but not completely civil, contesting the right of Indian tribes to conduct such commercial gaming that was inconsistent with the laws of the state in which the reservation was located.[74] The Reagan Administration's budget cuts for

74. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that: (1) Public Law 280 granting state criminal jurisdiction over reservation did not authorize enforcement of statute regulating bingo, since statute was regulatory, rather than criminal law; (2) application of state and county gambling laws to tribal bingo enterprises was not authorized by the Organized Crime Control Act (OCCA); and (3) state's interest in preventing infiltration of tribal bingo enterprises by organized crime did not justify state regulation of such enterprises in light of compelling federal and tribal interests supporting them); United States v. Dakota, 796 F.2d 186 (6th Cir. 1986) (holding that Keweenaw Bay Indian Community gambling business violated Michigan law and, therefore, violated the OCCA); Iowa Tribe of Indians of Kan. & Neb. v. Kansas, 787 F.2d 1434 (10th Cir. 1986) (holding that Kansas was without jurisdiction to enforce its gambling laws on tribe's reservation and that Kansas has jurisdiction over non-major state offenses committed by or against Indians on Indian reservations located in Kansas); Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985) (holding that federal, not state, government had jurisdiction over lands in question); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (holding that (1) the county and state laws governing bingo were civil and regulatory in nature and, therefore, were not applicable on the Indian reservation, and (2) since the operation of bingo games on the reservation did not violate state policy, it could not be a federal offense), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) (holding that: (1) statute permitting bingo games to be played by certain qualified organizations and subject to state restrictions is "civil/regulatory" rather than "criminal/prohibitory" and, hence, cannot be enforced against the tribe, and (2) Indians as well as non-Indians may play bingo at the tribal facility); United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert denied*, 449 U.S. 1111 (1981) (holding that a provision of OCCA proscribing gambling applied to defendants' conduct in operating large-scale gambling businesses on Indian trust land, including conduct of several defendants who were Indians and were immune from prosecution under state law); People v. Anderson, 671 F. Supp. 220 (W.D.N.Y. 1987) (holding that: (1) action was not based on treaties between Tribe and United States so as to be removable as "arising under" Federal Constitution or law; (2) action was not removable on basis of federal statute conferring federal district court with jurisdiction over actions brought by Tribe and arising under Federal Constitution or law; and (3) whether state law permitted state to enforce law of Tuscarora, with consent of Tuscarora Tribe, was question for state court); Pueblo of Santa Ana v. Hodel, 663 F.Supp. 1300 (D.D.C. 1987) (holding that: (1) approval of Secretary of Interior was required for contract between nonprofit institution of Indian tribe and Kansas businessman to construct greyhound race track, and (2) construction of dog racing facility on reservation in New Mexico that would allow pari-mutuel wagering would violate ACA); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Williquette, 629 F.Supp. 689 (W.D. Wis. 1986) (holding that state had no authority to enforce state law governing raffles against Indian tribe's sale of "pull tabs" at its bingo games); United States v. Dakota, 666 F. Supp. 989 (W.D. Mich. 1985) (holding that commercial casino gambling on federal Indian reservation located within state of Michigan was in violation of federal law); State v. Wis. Winnebago Indian Tribe, 603 F. Supp. 428 (W.D. Wis. 1985) (holding that civil forfeiture proceeding against Indian tribe to enforce Wisconsin criminal statute prohibiting commercial gambling did not fall within District Court's removal jurisdiction); Oneida Tribe of Indians of Wis. v. State, 518 F. Supp.

Indian programs and focus on promoting Indian economic development and self-sufficiency (and thereby reducing the federal program funding obligations toward tribes) greatly increased the need for such tribal economic development efforts.[75] Most of these cases followed the path plowed by the Fifth Circuit in *Seminole Tribe v. Butterworth*, analyzing the legal issue under the prohibitory/regulatory framework. Since very few states prohibited outright all gaming within the state (most having state lotteries or, like Florida, authorizing limited charitable, nonprofit, or veterans gaming),[76] courts frequently found the structure of state anti-gaming laws to be regulatory, rather than prohibitory. Thus, overall the Tribes scored significant wins in defense of their burgeoning bingo businesses during this decade.[77]

Three legal developments during this decade, however, suggested that the Tribe's string of luck might be coming to an end. First, some tribes, not content with the limited revenues afforded by their bingo operations, began to seek additional gaming amusements to attract paying gamblers to their operations. In California, for example, Indian tribe bingo operations also came to feature card parlors, since under California law, licensed commercial card parlors featuring non-banking card games[78] were then

712 (W.D. Wis. 1981) (holding that Wisconsin's regulation of bingo was a civil regulation and, thus, could not be applied to the Oneida Reservation); May v. Seneca-Cayuga Tribe of Okla., 711 P.2d 77 (Okla. 1985) (holding that: (1) suits were not barred by tribal sovereign immunity, and (2) state regulation of bingo games conducted in Indian country was permissible only if, and to extent that, the activity was shown to affect non-Indians and Indians who are nonmembers of self-governing unit); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) (holding that the Penobscot Nation was considered a "municipality" for purpose of Maine law prohibiting beano (precursor to bingo) operations, it was prohibited by statute from operating beano games and had no inherent sovereignty to conduct the games on the reservation in violation of state law, and operation of the games was not an "internal tribal matter" within meaning of state legislation enforcing the Maine Indian Claims Settlement Act).

75. PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECONS., REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES (1984), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2e/c6/1a.pdf. Ironically, while the final commission report strongly recommended *individual*, rather than tribal, models of investment and enterprise for Indian country, the final version of the Indian Gaming Regulatory Act of 1988 expressly rejected tribally licensed and regulated individually-owned gaming facilities in favor of requiring tribal ownership of such gaming operations.

76. At the time of the enactment of IGRA, at least Utah and Hawaii had absolute prohibitions on any form of gaming without exception. UTAH CONST. art 6. § 27; HAW. REV. STAT. §§ 712-1220 to -1231 (1973). The legislative history of IGRA suggests that Congress thought at least three other states then had similar prohibitions.

77. *E.g.*, *Duffy*, 694 F.2d at 1190; Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn.1986); *Oneida*, 518 F. Supp. at 720.

78. Banking card games are those in which the house has a take in the outcome and include baccarat, chemin de fer, and blackjack. Non-banking card games include traditional table poker where the house has no stake in the game. Mary Ann Liebert, *Taxpayers of*

legal.[79] Other tribes employed pull tabs or lotteries, and some tribes pushed the legal envelop so far in their efforts to diversify their gaming entertainment and thereby generate more revenue that they ran up against the Johnson Act prohibitions.[80] The explosive growth of the Indian bingo industry during this period sometimes resulted in competition from neighboring tribes, or occasionally charitable organizations, resulting in tribal efforts to broaden their gaming offerings, sometimes ignoring the existing legal prohibitions.

Second, *Seminole Tribe v. Butterworth* held that *state law enforcement authorities* could not lawfully enforce state law against Indian commercial bingo operations in Indian country.[81] The case did not hold that *federal law enforcement* had no role to play in regulating or even prohibiting Indian commercial gaming on Indian lands. Quickly, some state and federal law enforcement agencies realized that lack of state jurisdiction over Indian tribal commercial gaming might be remedied *without legislative change* by employing federal prosecutions to prevent Indian commercial gaming.

One of the first such prosecutions involved a casino that operated even before the Florida Seminoles opened their high-stakes bingo facility. Beginning in 1977, nine Indian partners, four members of the Puyallaup Indian Tribe, opened and operated highly profitable casinos on the Puyallup Reservation, just one mile from Tacoma, Washington and twenty-five miles from Seattle. Their casinos offered blackjack, poker, and dice—all games that did not involve gambling devices. Notwithstanding the fact that the defendants had carefully steered clear of the Johnson Act prohibition on gambling devices, federal authorities, in an effort to close down their operations, indicted them under Organized Crime Control Act.

Like the Assimilative Crimes Act, the Organized Crime Control Act adopts state law as part of its definition of a federal offense that has nationwide applicability. Specifically, section 1955 makes it a federal felony to conduct, finance, manage, supervise, direct, or own all or any part of an "illegal gambling business."[82] Under Organized Crime Control Act, an illegal gambling business is defined to mean a gambling business that "is

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Michigan Against Casinos and Laura Baird, State Representative in her Official Capacity, Plaintiffs-Appellants, v. The State of Michigan, Defendant-Appellee, and Gaming Entertainment, LLC, and Little Traverse Bay Bands of Odawa Indians, Intervening Defendants-Appellees, and North American Sports Management Company, Intervening Defendant, 11 GAMING L. REV. 480, 490, *30 (2007).

79. CAL. PENAL CODE ANN. § 326.5 (West Supp. 1987).

80. For a discussion of the Johnson Act prohibitions, see *supra* text accompanying notes 33–36 and 40–42.

81. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 314–15 (5th Cir. 1981).

82. 18 U.S.C. § 1955(a) (2006).

a violation of the law of a State or political subdivision in which it is conducted," involves five or more persons, and has been in continuous operation for more than thirty days or has had a gross revenue in excess of $2,000 in any single day.[83] For the partners in the Puyallup casinos, this definition posed serious problems since the Organized Crime Control Act, if applied literally, potentially adopted the state gambling law and applied such state prohibitions to their operations even though such state laws did not apply of their own force. The Puyallup partners defended against their indictment on multiple grounds. First, they argued that this federal law simply did not apply in Indian country, a position the Ninth Circuit ultimately rejected, noting that federal laws of general application usually apply to Indians in Indian country except where they would contravene valid treaty rights, which the Organized Crime Control Act did not.[84] The Puyallup partners also argued that since state law generally did not apply to Indian activities in Indian country, their casino operations could not be "in violation of the law of a State" as required by the Organized Crime Control Act.

In the most important part of the *Farris* decision, the Ninth Circuit rejected that argument because the reason for the exemption from state law for the Puyallup defendants "was not to exempt from federal criminal liability those gambling-business operators who might be beyond the reach of a state's criminal jurisdiction, but rather to exempt from the federal statute the operators of gambling businesses that are not contrary to a state's public policy on gambling."[85] The *Farris* defendants also argued that by enacting the Johnson Act, which they had not violated, Congress had charted a gaming policy specifically applicable to Indian country which was limited to gambling devices. They claimed that decision preempted application of the more general prohibitions of the Organized Crime Control Act to Indian country. The Ninth Circuit rejected this contention, noting that the Johnson Act was enacted nineteen years before the Organized Crime Control Act and could not possibly have preempted it, thereby leaving the choice of which statute to employ to federal prosecutorial discretion. In the *Farris* case, the Ninth Circuit declined to consider what impact any Puyallup gaming ordinance might have since none was enacted until after the events leading to the federal prosecution. One judge on the Ninth Circuit panel dissented from application of the Organized Crime Control Act to the Indian defendants in the case, but was

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83. *Id.* at § 1955(b).

84. United States v. Farris, 624 F.2d 890, 899 (9th Cir. 1980), *cert denied*, 449 U.S. 1111 (1981).

85. *Id*. at 895.

quite willing to apply the Organized Crime Control Act to non-Indians who engage in an illegal gambling enterprise in Indian country, even if they do so with Indians.

The *Farris* decision, by holding that the Organized Crime Control Act applied to gaming in Indian country in violation of state law, armed federal prosecutors with a new and far more potent weapon they could use against Indian tribal commercial gaming should they chose to deploy it. Until *Farris*, if the gaming was illegal under state law, the *Sosseur* decision had permitted federal authorities to adopt state gambling laws as federal law under the Assimilative Crimes Act and prosecute tribal commercial gaming which violated that law. The penalties under the Assimilative Crimes Act, however, included only what the state statute provided. Sosseur, for example, only got a $250 fine and six months incarceration, which was suspended.[86] By contrast, if convicted under the Organized Crime Control Act, the penalty at the time of *Farris* involved imprisonment for not more than five years, a fine of not more than $20,000, or both. Thus, even if a state hypothetically set its punishment for violating its gambling prohibitions as a serious misdemeanor with a penalty of not more than one year in jail, an Indian committing the same crime in Indian country potentially could be sent to prison for up to five years if convicted of operating an illegal gambling business under the Organized Crime Control Act. Not surprisingly, federal prosecutors far more commonly employed the Organized Crime Control Act, rather than the Assimilative Crimes Act, as a vehicle for reaching illegal gambling. In fact, while still technically applicable, no further Assimilative Crimes Act prosecutions (or, at least none that resulted in reported decisions) were initiated for Indian commercial gaming in Indian country after enactment of the Organized Crime Control Act.

Perhaps the most significant such federal prosecution occurred toward the end of the pre-IGRA period. In 1984, the Keweenaw Bay Indian Community, acting pursuant to a tribal ordinance authorizing the licensing of gaming facilities, granted Frederick and Sybil Dakota, both enrolled members of the tribe, a license to operate a for-profit gaming facility within the reservation.[87] The Dakotas sought to operate a commercial casino featuring blackjack, craps, and poker at a newly constructed facility on the reservation.[88] Both federal and state authorities responded by jointly filing suit in federal district court claiming that the Dakota casino violated the

86. United States v. Sosseur, 181 F.2d 873, 876 (7th Cir. 1950).
87. United States v. Dakota, 796 F.2d 186, 187 (6th Cir. 1986).
88. *Id.*

Organized Crime Control Act.[89] The State of Michigan ultimately was dismissed from the litigation, but permitted to appear in the Sixth Circuit as *amicus*.[90] Instead of prosecuting the Dakotas, as federal authorities had done in *Farris*, federal authorities sought an injunction to close what they claimed was the Dakotas' illegal gambling business. In *United States v. Dakota*,[91] the Sixth Circuit ultimately affirmed the conclusion of the federal district court that the Dakotas' commercial casino was illegal and violated the Organized Crime Control Act of 1970. The significance of the *Dakota* decision lay, not in the result which was foreshadowed by *Farris*, but, rather, in the sweeping analysis offered by the Sixth Circuit.

Borrowing from the many successful Public Law 280 cases decided after *Seminole Tribe v. Butterworth*, the Dakotas argued that their commercial gambling operations could only be "in violation of the law of a State" as required by the Organized Crime Control Act if the state law in question was prohibitory.[92] If on the other hand, Michigan merely regulated gaming, the state gaming laws could not be applied to conduct. Michigan, of course, was not a Public Law 280 state and consequently that legislation did not apply to the Keewenaw Bay Indian Community. Significantly, the Sixth Circuit expressly rejected any application of the prohibitory/regulatory distinction to the Organized Crime Control Act developed in the cases brought by states subject to Public Law 280. The Sixth Circuit noted:

> At the outset, we agree with the government that the criminal/prohibitory-civil/regulatory test is inappropriate to an interpretation of 18 U.S.C. § 1955. As noted, the criminal/prohibitory-civil/regulatory dichotomy was originally developed to aid in the interpretation of Public Law 280, which expressly granted certain states (other than Michigan) criminal and civil jurisdiction over Indian reservations. Because Public Law 280 undermines the long-standing doctrine that federally recognized Indian tribes and their members are immune from the application of state law for on-reservation activities, the Supreme Court has narrowly construed the reach of the statute, holding that Public Law 280 does not authorize states generally to assert civil regulatory powers over Indian reservations.
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> These concerns for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory-

89. *Id.*

90. *Id.* at n.1.

91. *Id.* at 189–90; *see also* United States v. Burns, 725 F. Supp. 116, 124 (N.D.N.Y. 1989) (same holding).

92. *Dakota*, 796 F.2d at 187.

> civil/regulatory test. Under this test, while a Public Law 280 state may impose on Indian reservations state criminal laws which prohibit certain activities, the state may not so impose general civil laws which merely regulate the activity.
>
> We believe these policy reasons underlying the use of the criminal/prohibitory-civil/regulatory test in Public Law 280 cases are not applicable to the statute at issue here. Title 18 U.S.C. § 1955 is a federal statute that extends federal rather than state jurisdiction over Indian tribes. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[93]

The court also took issue with the underlying distinction, noting that "the criminal/prohibitory-civil/regulatory test requires courts to make arbitrary classifications of state laws. As states frequently pass laws that to some extent both regulate and prohibit a given activity, the test is difficult to apply."[94]

The Sixth Circuit therefore concluded that because the Dakotas' tribally licensed commercial gambling establishment violated Michigan law, the commercial gambling facility violated the Organized Crime Control Act.

In *Dakota*, the express refusal of the Sixth Circuit to incorporate the prohibitory/regulatory distinction developed in *Seminole Tribe v. Butterworth* into the interpretation of the Organized Crime Control Act potentially cast serious doubts on the legality of all the Indian gaming facilities then operating, from tribally owned bingo operations to individually operated casinos, like that run by the Dakotas. While the existing case law had demonstrated that *state* law enforcement authorities generally were powerless to interfere with tribally operated gaming facilities, except in those Public Law 280 reservations located within a state where the gaming prohibitions were truly prohibitory, those cases had not, as often thought, given Indian bingo and other gambling facilities a legal stamp of approval. Federal officials remained armed with potent criminal statutes applicable to Indian country they could deploy to interfere with Indian gaming. The most explicit, of course, involved the Johnson Act, which applied only to "gambling devices" in Indian country. Pre-IGRA casino operators, like the defendants in *Farris* and *Dakota*, carefully circumvented the Johnson Act prohibitions by avoiding reliance on gambling hardware and relying on card games, like poker, blackjack, or dice instead. Thus, *Dakota* tested whether such casino operations were

93. *Id.* at 187–88 (citations omitted).
94. *Id.* at 189.

immune from federal prosecution under the Organized Crime Control Act (and, by extension, the Assimilative Crimes Act, which had virtually been supplanted in the gaming field by enactment of the Organized Crime Control Act in 1970).[95] The *Dakota* holding constituted nothing less than a shot across the bow of the burgeoning commercial Indian gaming business that the question of the legality of its operations had not been fully resolved by the tribes' successes against state authorities. Since neither the Organized Crime Control Act nor the Assimilative Crimes Act limited the *types* of gambling businesses to which it applied, so long as they were large enough to meet the other requirements of the legislation, the holding in *Dakota*, if applied to commercial bingo operations as well as casinos, had the potential to completely shut down the Indian gaming industry that had developed since the Seminole Tribe opened its high-stakes bingo operation. *Dakota* therefore armed *federal*, as opposed to state, law enforcement officials with a weapon they could deploy to satisfy the then growing state resistance to the development of Indian commercial gaming.

The failure of federal authorities to broadly deploy their new weapon against growing numbers of Indian commercial bingo operations nevertheless facilitated continued growth in the tribal gaming sphere. Before the enactment of the Indian Gaming Regulatory Act of 1988, no reported cases indicate that federal authorities invoked the Organized Crime Control Act against tribal commercial bingo facilities despite the clear application of that statute to illegal bingo operations.[96] Rather, during the period before the enactment of IGRA in 1988, federal authorities reserved deployment of their OCCA weapon to curtail Indian efforts to expand their commercial gaming operations beyond bingo. For example, in *United States v. Bay Mills Indian Community*,[97] federal prosecutors made another effort,

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95. In *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), the Ninth Circuit did apply the then-relatively-new prohibitory/regulatory distinction to the interpretation of the Assimilative Crimes Act in a case arising out of a California reservation. Of course, California, unlike Michigan, is a Public Law 280 state, thereby predisposing federal courts to follow the distinction. Since the Ninth Circuit found that California state law regulated, rather than prohibited, bingo, it concluded that bingo was not prohibited for Indians by the Assimilative Crimes Act. *See also* United States v. Bay Mills Indian Cmty., 692 F. Supp. 777, 781 (W.D. Mich. 1988), *vacated*, 727 F. Supp. 1110 (W.D. Mich. 1989) (unsuccessful effort to invoke OCCA and ACA to enjoin operation of another Michigan Indian casino).

96. *See* United States v. Hurst, 951 F.2d 1490, 1504 (6th Cir. 1991) (affirming convictions of non-Indians under the OCCA for operating an illegal store front high-stakes bingo operation in violation of Tennessee law).

97. 692 F.Supp. 777 (W.D. Mich. 1988), *vacated*, 727 F.Supp. 1110 (W.D. Mich. 1989).

this time unsuccessful,[98] to enjoin operation of three Michigan casinos operated by the Bay Mills Indian Community, because they allegedly violated the Organized Crime Control Act (and this time federal authorities also added the Assimiliative Crimes Act). While these casinos offered bingo, blackjack, pull-tabs, poker, and craps games, federal authorities expressly excluded bingo from their challenge despite the applicability of the Organized Crime Control Act to an illegal bingo operation.

Despite possessing a potent law enforcement weapon in the form of the Organized Crime Control Act that they could deploy during this period against any and all Indian commercial gaming, federal authorities appeared highly reluctant to use it against tribal bingo operations, while moving more aggressively against any expansion of Indian commercial gaming beyond bingo. The Organized Crime Control Act draws absolutely no legal distinction between bingo and other forms of gambling. Nevertheless, with the benefit of hindsight, federal officials appear to have deployed the

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98. The federal district court rejected the federal government's application to enjoin the Bay Mills' casino operations, applying the conventional rule that courts of equity generally will not enjoin commission of a crime. Having raised the question on its own motion, the district court did not find any legal justification for departing from this conventional rule. As the court put it:

> As a general rule, a court may not enjoin the commission of a crime.
>
> The rule is based on two concerns: First, criminal prosecution generally provides an adequate remedy at law so that equitable relief is unnecessary, and, second, injunctive relief may deny a defendant the procedural rights otherwise available in a criminal prosecution.
>
> At least three exceptions to the rule that courts will not enjoin criminal activity have developed over the years. A court may properly enjoin activity that is in violation of criminal law, if 1) that activity is a widespread public nuisance, 2) a national emergency warrants departure from the rule, or 3) a statute specifically provides for injunctive relief.

Id. at 779 (citations omitted). Finding that the Bay Mills casinos did not constitute a "widespread public nuisance," the district court concluded the federal government had failed to make out any case for enjoining the commission of a crime. By resting the dismissal of the action on such a finding, of course, the district court stopped short of declaring the activities of the Bay Mills casinos lawful under either the Organized Crime Control Act or the Assimilative Crimes Act.

Rigorous application of the *Bay Mills* result, of course, left federal law enforcement officials with a difficult choice when it came to Indian commercial gaming operations. Even if the operation of such gambling businesses constituted criminal violations of both statutes, federal prosecutors either had to prosecute the owners, operators, and, potentially employees, of such operations for federal crimes to close down such operations, or they turned a blind eye to such operations. Since *Bay Mills* suggested that injunctions against illegal Indian gaming might be unavailable, most federal prosecutors chose the second alternative, recognizing that the tribal gaming enterprises funded important tribal government projects, relieved the federal government (and federal taxpayers) of some social services obligations, and combated poverty and high unemployment on the reservations.

Organized Crime Control Act primarily to maintain and reinforce the monopolies of Nevada casinos (and since the voter approval of a 1976 referendum legalizing gambling, those in Atlantic City, New Jersey) on broader forms of commercial gaming, a role federal authorities had consistently played since the first Indian commercial gaming prosecution in 1949.

Apparently the federal government did not object if Indian tribes economically competed with charitable or religious organizations and veterans groups, which under the laws in many states previously held exclusive rights to hold public bingo events, generally for low stakes, but did object when tribes moved into more lucrative forms of gaming, which at the time constituted the exclusive prerogatives of Nevada and Atlantic City gaming interests. Whether such federal concerns stemmed from unfounded fears of organized crime involvement, as sometimes claimed, or from a desire to shore up and protect from Indian competition the Nevada and Atlantic City gaming interests (which, at least early in their history, contained significant organized crime influence), remains less than clear and deserves far greater study than it has received. Nevertheless, while possessing a "nuclear weapon" that could have obliterated the embryonic Indian commercial gaming industry, to their credit, federal law enforcement authorities reserved it for use with the Indian outliers of the industry who sought to push the gaming envelop too far, or at least too far for the comfort of federal and state authorities.

The third dark cloud looming over the Indian commercial gaming industry's string of generally good luck involved the threat of adverse legislative action by Congress. While the next section discusses in far greater detail the history of federal legislative action involving Indian commercial gaming, it should be noted here that serious Congressional involvement with the issue did not begin only after the Indian tribes scored their climactic litigation victory in *California v. Cabazon Band of Mission Indians*.[99] Rather, as discussed more thoroughly in the next section, Congress held hearings on proposed legislation, some of which contained significant federal prohibitions on Indian commercial gaming, as early as 1984, three years before *Cabazon* was decided.[100] Thus, both Congress and the federal courts were simultaneously grappling with this new emergent industry in Indian country, and their proposed solutions were not always consistent or ever parallel to one another.

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99. 480 U.S. 202 (1987).

100. *See infra* note 131 and accompanying text.

During the mid-1980s both Congress and the federal courts operated on parallel but non-intersecting tracks to address the new Indian commercial gaming phenomena. As these two governmental locomotives sped down their respective tracks, the Indian gaming industry wondered which would reach the station first and ultimately prescribe the legal regime to govern the future of Indian gaming. Most Indian tribes then had far greater faith in the federal courts than Congress, despite the fact that the first signs of a growing Supreme Court hostility to claims of tribal sovereignty and governing authority had already had begun to appear.[101] Until the Supreme Court decided *Cabazon*, Congress failed to harmonize much of its proposed legislation with existing judicial decisions. Had Congress won the locomotive race to the station, it might have enacted far more draconian legislation regulating and prohibiting significant portions of the Indian gaming industry. Fortunately, Indian gaming advocates stoked the litigation fires propelling the state-initiated *Cabazon* case. That case reached final decision in the Supreme Court before Congress could coalesce on and pass Indian gaming legislation.

Far from being the catalyst or even the cause for enactment of the Indian Gaming Regulatory of Act of 1988, as is sometimes claimed, the Supreme Court decision in *California v. Cabazon Band of Mission Indians*[102] actually constituted the culmination of the long train of federal judicial analysis of Indian commercial gaming begun in 1949 in *Sosseur* and dramatically accelerated during the 1980s after *Seminole Tribe v. Butterworth.*[103] During the 1980s Congress actively engaged in its own evaluation of the problem, but its efforts to produce a solution for the growing Indian commercial gaming industry were far behind schedule. While lower federal courts had spoken frequently on the question, the first pronouncement by the United States Supreme Court on the question had profound implications for both the legal and political debate and, ultimately, helped shape the overall structure of the Indian gaming legislation that Congress adopted in the form of the Indian Gaming Regulatory Act.

To assess the significance of *Cabazon*, careful consideration should be given to the state of pre-*Cabazon* decisions on Indian gaming. Beginning with *Seminole Tribe v. Butterworth*, cases out of Public Law 280

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101. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194–95 (1978) (holding tribes lack criminal jurisdiction over nonmembers); *see also* Rice v. Rehner, 463 U.S. 713, 721 (1983) (holding California could require a tribal member and a federally licensed Indian trader to secure a state liquor license to sell liquor on the reservation); Montana v. United States, 450 U.S. 544, 564 (1981) (tribes lack civil/regulatory authority over nonmembers on non-Indian land within a reservation with two exceptions).

102. 480 U.S. 202 (1987).

103. 685 F.2d 310 (5th Cir. 1981).

reservations almost uniformly adopted the regulatory/prohibitory distinction and generally held that state laws prohibiting commercial bingo operations were regulatory and therefore inapplicable to on-reservation Indian commercial bingo operations since charitable, religious, or veterans groups generally were afforded limited, tightly regulated opportunities to employ bingo as a fundraising device. These cases therefore held that *state* law enforcement officials could not enforce such state gaming laws against Indian commercial bingo operations. On non-Public Law 280 reservations, states had even less of a legal claim to regulate and therefore invariably lost efforts to interfere with Indian commercial bingo operations.

By contrast, the legal victories by tribal gaming operations over *state* law enforcement authorities did not establish that *federal* authorities could not employ federal law (sometimes federal law adopting the very same state gaming laws that the state enforcement cases had held inapplicable to tribes) to interfere with tribal gaming. At least three such federal statutes already had become implicated with Indian gaming. First, since 1951, section 5 of the Johnson Act had expressly prohibited the possession or use of any mechanical gambling devices in Indian country. Second, since the Seventh Circuit decided *Sosseur* in 1949, federal courts have held that the Assimilative Crimes Act, made applicable to Indian country by the General Crimes Act, adopted and made state gaming laws applicable to Indians in those portions of Indian country not governed by Public Law 280 or other like statutes transferring to states federal law enforcement authority for specific reservations. Finally, *Farris* and *Dakota* not only held that federal prohibition on conducting an illegal gambling business contained in the Organized Crime Control Act applied to Indian businesses operated in Indian country. *Dakota* also expressly rejected any application of the prohibitory/regulatory test, which had been so critical to the Public Law 280 gaming cases involving the states, to interpret the federal statutory language that adopted state gaming laws.

Thus, under the Organized Crime Control Act, as interpreted in *Dakota*, courts must consider *all* state gambling laws, whether prohibitory or regulatory, to determine whether a commercial gaming facility constituted an illegal gambling business prohibited by the Organized Crime Control Act. While *Bay Mills* suggested that federal authorities might have some trouble employing either the Organized Crime Control Act or the Assimilative Crimes Act to *enjoin* operation of an illegal tribal gambling business, as they successfully did in *Dakota*, nothing in the *Bay Mills* opinion prevented the federal government from filing criminal charges against the operators or owners of such a facility, as it did in *Farris*. Not surprisingly, the history illuminated by the reported decisions suggests that

the federal government more frequently undertook such prosecutions where the owners and operators of the gaming facility were individual tribal members, even when permitted or licensed under tribal law, than where the facility was operated by a tribe.

Given this background, the 1987 Supreme Court decision in *Cabazon* must be evaluated to ascertain how or whether it resolved these lingering impediments to the growth of the tribal commercial gaming industry. The ultimate decision in *Cabazon* marked the culmination of almost a decade of extensive litigation regarding the legality of the growing Indian gaming industry. Due in part to express prohibitions on gambling devices in Indian country contained in the Johnson Act, growth in the Indian gaming industry prior to IGRA primarily had been based on bingo, card games, and, occasionally dice, rather than games of chance requiring gambling devices within the meaning of the Johnson Act. The facts in *Cabazon* therefore typified the existing state of the industry. Both the Cabazon and Morongo Bands of Mission Indians had opened gaming facilities on their respective reservations, both located in Riverside County, California.[104] Those facilities operated pursuant to tribal gaming ordinances both of which had been approved by the Secretary of the Interior, presumably as required by their respective tribal constitutions. Federal support had also been given for loans involved in the construction and operation of the facilities.[105] Both tribes offered high-stakes bingo at their facilities.[106] The Cabazon Band, which was then led by the late Art Welmas, a particularly strong leader who was not shy about exercising the sovereignty of his small tribe, also had a card club offering draw poker and other card games. Non-Indians constituted the primary patrons of these casinos.[107] As the facts of the case noted, these gaming facilities generated both a major source of employment for tribal members and the sole source of tribal revenues.

Under existing California law, bingo was permitted only when the games were operated and staffed by members of designated charitable organizations[108] who could not be paid for their services. California law also required that the profits be kept in special accounts that could be employed only for charitable purposes.[109] Prizes in such games were expressly limited to $250 per game.[110] Some California gambling laws, including those

104. 480 U.S. at 205.
105. *Id.* at 204–05.
106. *Id.* at 205.
107. *Id.*
108. CAL. PENAL CODE § 326.5 (West Supp. 1987).
109. *Cabazon*, 480 U.S. at 205.
110. *Id.*

involving certain card clubs offering draw poker or other card games, afforded some local option autonomy for municipal government. Riverside County had two ordinances it sought to apply to the Cabazon and Morongo operations, one regulating bingo and another prohibiting the playing of draw poker or other card games.[111]

Initially, the Tribe filed suit in federal court seeking a declaratory judgment that the local bingo and card club ordinances could not be enforced against their facilities. Apparently recognizing the weakness under Public Law 280 of the county position based solely on municipal ordinances, the State of California intervened asserting its right to enforce its own gaming laws against the Bands under both Public Law 280 and state sovereignty and further claiming that the tribal gaming facilities were illegal since they violated federal law. The case was heard in federal district court on stipulated facts, and the court granted the tribes' motion for summary judgment, concluding that neither the state nor the county had any lawful authority to enforce their prohibitions against gaming on Indian activities in Indian country, even where non-Indians patronized their gaming establishments. The Ninth Circuit affirmed, and both the State of California and the County of Riverside sought review from the United States Supreme Court.[112]

Justice White wrote the ultimate opinion for the Court affirming the decisions below, which five other justices joined. While the 6-3 vote of the Court in favor of the tribes basically followed prior Indian legal doctrine and broke no new doctrinal ground, the actual split on the Court was far from conventional. Significantly, Chief Justice Rehnquist, who proved to be no supporter of Indian tribes on most other issues of tribal jurisdiction and authority,[113] joined the majority. Likewise, since Justices White and Powell

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111. Riverside County, Cal., Ordinance 558 (Jan. 13, 1976) (regulating bingo); Riverside County, Cal., Ordinance 331 (Oct. 29, 1947) (prohibiting draw poker and other card games). The County of Riverside should have realized that its claim to regulatory authority over Indian gaming had been foreclosed by three prior decisions of the Ninth Circuit expressly holding that Public Law 280 did not adopt and apply local or municipal laws to Indians in Indian country since such ordinances were not state laws "of general application" as expressly required by Public Law 280. Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1391 (9th Cir. 1987); United States v. County of Humboldt, 615 F.2d 1260, 1261 (9th Cir. 1980); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 661 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

112. For a useful history of the Cabazon gaming resurgence, including the case, see AMBROSE I. LANE, RETURN OF THE BUFFALO: THE STORY BEHIND AMERICA'S INDIAN GAMING EXPLOSION (1995). *See also* W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 9–69 (2000).

113. *See, e.g.*, Rice v. Rehner, 463 U.S. 713, 733 (1983) (holding California could require a tribal member and a federally licensed Indian trader to secure a state liquor license to sell liquor on the reservation); Montana v. United States, 450 U.S. 544, 565–66 (1981) (holding tribes lack civil/regulatory authority over nonmembers on non-Indian land within a reservation with two

rarely supported claims of tribal jurisdiction in other fields,[114] their assent to the majority opinion also proved pivotal. Had these three justices, who generally voted against tribal jurisdictional claims, joined the dissent, the result would have been a 6-3 vote *against* the legality of tribal gaming. Equally surprising, Justice O'Connor, who sometimes cast pivotal deciding votes in favor of tribes on other questions[115] and whom many thought favorably disposed to tribal claims, voted against tribal claims in this case.

While many tribal advocates see *Cabazon* as a major victory that vindicated their legal claims to complete tribal authority over gaming on their reservations,[116] the actual holding of *Cabazon* stopped far short of that

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exceptions); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 176–77 (1980) (Rehnquist, J., dissenting) (arguing for a preemption analysis "based on the principle that Indian immunities are dependent upon congressional intent at least absent discriminatory state action prohibited by the Indian Commerce Clause," and that balancing state and tribal interests "is not the appropriate gauge for determining validity [of particular forms of taxation] since it is that very balancing which we have reserved to Congress") [citations omitted]; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (Rehnquist, J.) (holding that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians and may not assume such jurisdiction unless specifically authorized to do so by Congress); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976) (Rehnquist, J.) (holding state could require Indian retailer on the reservation to add the tax on cigarettes to sales price with respect to sales to non-Indians).

114. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (holding that tribe lacked authority to zone property in those areas of its reservations that had been opened to non-Indian settlement); *Montana v. United States*, 450 U.S. at 544; *Oliphant*, 435 U.S. at 191.

115. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (holding Indian off-reservation treaty rights to hunt, fish and gather not extinguished by subsequent events, with Justice O'Connor casting deciding vote in case).

116. *E.g.*, Gregory Elvine-Kreis, Comment, *The Effect of the Indian Gaming Regulatory Act on California Native American's Independence*, 35 SAN DIEGO L. REV. 179, 193 (1998) ("The Supreme Court in Cabazon allowed tribes to conduct casino-style gaming as well as bingo."); T. Barton French, Jr., Note, *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow the Growth of Indian Gaming*, 71 WASH. U. L.Q. 735, 741 (1993) ("[T]he Cabazon decision . . . allowed tribes to conduct casino-style gaming as well as bingo."); Guy Levy, Note, *Western Telcon v. California State Lottery; Will Native Americans Lose Again?*, 19 T. JEFFERSON L. REV. 361, 373 (1997) ("[A]fter the Cabazon decision, Indians were allowed to operate whatever gambling ventures they chose."); Joseph J. Weissman, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WASH. L. REV. 123, 124 (1993) ("The Cabazon decision allowed unregulated gambling to flourish on Indian reservations."); Mark C. Wenzel, Comment, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed with Casino Gambling Without a State Compact*, 30 GONZ. L. REV. 467, 474 (1994–95) ("The Cabazon case has been perceived as even more deferential to the Indian tribes because it allows casino-style gambling as well as bingo."); Stephen Magagnini, *Tribe's Court Victory is Historic: Renegade Band Blazed Trail to Legalized Indian Gambling*, THE SACRAMENTO BEE, July 2, 1997, at A12 ("The Cabazon's stunning 1987 U.S. Supreme Court triumph legalized Indian gaming throughout California and the nation."); Joshua

result. In fact, careful analysis of the opinion demonstrates that the Supreme Court stopped far short of even declaring the gaming undertaken by the Cabazon and Morongo bands to be lawful. All the Court's opinion held was that neither the State of California nor the County of Riverside had any lawful jurisdiction to directly enforce state and local gaming prohibitions and regulations against the tribal operations. The case did not even hold that such laws might not be applied to the tribes. The Court basically addressed three arguments made by California as to why its gaming laws should be enforceable against the tribal gaming operations (the three arguments presented here for clarity in other than the order the Court addressed them). First, the Court considered whether Public Law 280 delegated to the State or county any authority to enforce its gaming laws against Indians in Indian country. Second, the Court considered whether, irrespective of such delegation, the State of California had inherent sovereignty to reach Indian gaming facilities *serving primarily non-Indians* located in Indian country. Finally, the Court considered California's claim that the tribal gaming in Indian country constituted an illegal gambling business that violated the Organized Crime Control Act.

While detailed dissection of the Court's opinion is unnecessary to the present analysis, understanding the broad anatomy of the *Cabazon* holdings requires careful attention to the Court's response to each of the three arguments made by the state. Like the vast majority of the lower federal courts before *Cabazon*, the majority of the Supreme Court rejected the state's argument that Public Law 280 delegated or granted to states or counties any authority to apply state gaming regulations to Indian gaming in Indian country, even where predominantly patronized by non-Indians. Relying primarily on *Bryan*, which in turn had relied upon Professor Carole Goldberg's seminal article on Public Law 280, the Court placed the final stamp of approval on the regulatory/prohibitory formulation first applied to Indian gaming in *Seminole Tribe v. Butterworth* seven years earlier. If a state prohibition on any form of gaming constituted an absolute ban without any exceptions, the prohibition reflected the state's criminal policy on crime, i.e., to ban the conduct totally. If prohibitory, the state law could be enforced under Public Law 280. At the time very few states had such absolute bans; Utah and Hawaii constituted the most obvious examples.[117]

L. Weinstein, *Ruling Increases Odds Against a Maine Casino; If Congress Rewrites the Indian Gaming Act, However, It Could Include Maine's Tribes This Time*, PORTLAND PRESS HERALD, Mar. 28, 1996, at 16A ("The U.S. Supreme Court ruled in California v. Cabazon Band of Mission Indians that nearly all Indian tribes—including those in Maine—have a right to open casinos.").

117. UTAH CONST. art. VI, § 27; HAW. REV. STAT. § 712-1220 (1973).

On the other hand, where a state permitted the conduct by some actors (including itself) or for some limited purposes (such as charitable fund raising), the state had *regulated*, rather than prohibited, the conduct and, accordingly, the state law could not be enforced against the tribes. State law did not absolutely bar the underlying activity, but, rather, regulated who could engage in the conduct, when or where they could do so, or under what conditions such gaming could occur, such as low prizes. Since the implications of *Bryan* demonstrated that by enacting Public Law 280 Congress had *not* delegated to states any regulatory authority over Indians in Indian country, Public Law 280 failed to authorize any state to enforce such state gaming regulations against Indian conduct in Indian country. Thus, such conduct remained primarily (but, as we shall see, *not* exclusively) regulated by tribal law. Finding that the charitable and other exceptions to California's bingo prohibitions and the local option card club provisions rendered the California criminal statute otherwise banning commercial bingo and card parlor regulatory, rather than prohibitory, the Court concluded that Public Law 280 failed to authorize California or the County of Riverside to enforce such prohibitions against the Cabazon and Morongo gaming operations.

Second, the Court rejected the argument that merely because the tribal gaming facilities served non-Indians, the State of California possessed inherent sovereignty to regulate such Indian gaming facilities in Indian country.[118] Focusing on the federal approval of the tribes' gaming ordinances through approval of the Secretary of the Interior and federal loans that facilitated the projects, the Court found significant federal support for and approval of such economic development efforts. Furthermore, the Court distinguished at least one of its prior cases upholding inherent state taxing power over Indian sales of cigarettes to non-Indians[119] by noting that the California gaming tribes had invested significant resources and efforts in creating a tourist gaming destination and, unlike the smokeshop cases, had not merely sought to capitalize on and market an exemption from state law without any further business development. The implication, consistent of course with the so-called Protestant work ethic,[120] was that the California tribes should reap the rewards of their own investment and industrious labor in creating a destination tourist gaming establishment. As a consequence,

118. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214–15 (1987).

119. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161–62 (1980).

120. The Supreme Court never explained in either *Colville* or *Cabazon* exactly why the Protestant work ethic constituted an operative principle of federal Indian law or was otherwise incorporated as part of the law of the land.

because of the federal involvement in and approval for such economic development efforts, the Court found that despite whatever inherent sovereignty the State of California might otherwise exercise to protect its citizens who patronize the tribal gaming establishments, its exercise of that power had been preempted by federal Indian law, relying on a long line of cases regarding federal preemption of state adjudication, regulation and taxation in Indian country.[121]

Perhaps the most overlooked and misunderstood portion of the Court's opinion involved its response to the third argument made by California, the claim that the Indians were involved in an illegal gambling business in violation of the Organized Crime Control Act.[122] Cases like *Farris* and *Dakota* already had found the Organized Crime Control Act applicable to Indian gaming in Indian country. Worse still, *Dakota* expressly rejected any application of the prohibitory/regulatory distinction to determine whether a gaming business violated state law, an essential element of the offense under the Organized Crime Control Act, although a split in the circuits existed on the question.[123] The *Cabazon* case therefore afforded the Court the opportunity to reconcile the decisions under Public Law 280 and other cases sustaining the legality of Indian high states bingo operations when attacked by state law enforcement authorities with the limited number of cases finding such operations illegal under the Organized Crime Control Act (or, by inference, the Assimilative Crimes Act, which California failed to raise before the United States Supreme Court). It also afforded the Court an opportunity to resolve a split in the circuits over whether the prohibitory/regulatory distinction employed for Public Law 280 also applied to the interpretation of the Organized Crime Control Act of 1970. Resolving these inconsistencies, of course, might have finally put to rest

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121. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Rice v. Rehner, 463 U.S. 713 (1983); *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 134; White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Bryan v. Itasca County, Minn., 426 U.S. 373 (1976); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976); United States v. Mazurie, 419 U.S. 544 (1975); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 169–73 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Tribe of Indians of Wis. v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

122. *Cabazon*, 480 U.S. at 207.

123. *See Barona Group*, 694 F.2d at 1190; Cabazon Band of Mission Indians v. Riverside County, 783 F.2d 900, 903 (9th Cir. 1986) (prohibitory/regulatory distinction did apply to Organized Crime Control Act of 1970).

any question regarding the legality of Indian gaming in Indian country authorized by tribal law. Despite the fact that California urged the Court to address the question, the Court expressly declined to do so. Instead, it ruled:

> There is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government. Whether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, *a matter that we do not decide*, there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes.[124]

Thus, far from resolving lingering questions under the Organized Crime Control Act or reconciling the known split on the circuits over the coverage of the Organized Crime Control Act, the Court only ruled that since *states* played no role in enforcing the Organized Crime Control Act, that legislation afforded them no grounds for claiming that the Indian gaming was illegal. While the Court noted that to date no evidence appeared to suggest any federal efforts to prosecute tribal gaming operations and also noted the split in the circuits, it *expressly* declined to resolve the issue in a case where state, rather than federal, law enforcement authorities claimed the illegality of the Indian gaming. Thus, far from ruling that the Cabazon and Morongo tribal gaming operations were legal, *Cabazon* only held that *state* authorities had no jurisdiction or power to challenge such operations. It reserved to another day the question of whether *federal* law enforcement authorities could challenge the legality of such gaming facilities or even close them down and prosecute their operators under federal law (much of which, in turn, *adopted* state law). *Cabazon* therefore neither held that the Cabazon and Morongo gaming operations were legal nor did it hold that tribes had exclusive jurisdiction to regulate gaming on an Indian reservation. It only clarified that of the three sovereigns, federal, state, and tribe, the state was the only government dealt out of the game in regulating tribal gaming in Indian country. The Court left the entire question of the relationship of potentially conflicting federal and tribal laws on gaming for another day.

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124. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 213–14 (1987) (emphasis added).

Justice Stevens nicely summarized the basis for the position of the three dissenters in the first paragraph of the dissenting opinion:

> Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. Congress has not pre-empted California's prohibition against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so.[125]

Clearly the dissenters did not trust exclusive tribal regulation of Indian gaming and, in the absence of comprehensive federal regulation or authorization for Indian gaming, they were prepared to permit the states to extend their gaming regulations to the tribal gaming operations in Indian country, irrespective of the seeming doctrinal conflict of such results with prior decisions. The dissenters equated the gambling jurisdiction issue with state cigarette tax cases the states had won involving Indian smokeshops selling cigarettes to non-Indians. Clearly, neither side advanced the view that regulation of gaming in Indian country constituted an exclusive jurisdictional prerogative of the tribes.

While not viewed this way when decided, over two decades later, *Cabazon* is best understood as leaving the Indian gaming issue where the Court found it. Most of the lower federal courts, relying on the *Seminole Tribe v. Butterworth* prohibitory/regulatory analysis, had concluded that state law enforcement officials had no direct role in regulating Indian gaming. *Cabazon* merely validated that consensus. By contrast, when *federal* authorities questioned the legality of Indian gaming under either the Organized Crime Control Act of 1970 or the Assimilative Crimes Act, Indian gaming operations generally were found to be illegal, as in *Sosseur*, *Farris*, and *Dakota.* More significantly, these federal prosecutions occurred through the adoption of state law as part of a federal criminal offense and *Dakota* expressly rejected application of the prohibitory/regulatory distinction in interpreting whether conduct violated state law for purposes of the Organized Crime Control Act of 1970. *Cabazon* did not question any of those rulings or resolve the issue raised by *Dakota* of whether federal law should adopt and apply to Indian country regulatory state gambling laws that the states could not enforce directly. While *Cabazon* did note that federal authorities to date had not invoked the Organized Crime Control Act against Indian bingo operations, it stopped short of holding that they could not do so. Ironically, shortly thereafter, federal prosecutors did secure

125. *Id.* at 222 (Stevens, J., dissenting).

federal convictions under that law for a non-Indian illegal bingo operation. Finally, ever since its enactment in 1950, the Johnson Act had expressly prohibited gambling devices in Indian country and, of course, *Cabazon* could not and did not end that express prohibition.

II. The Game Moves to Congress

While *Cabazon* marked, prior to the enactment of the Indian Gaming Regulatory Act of 1988, the culmination of federal judicial responses to the growing tribally regulated Indian gaming industry, Congress had not stayed entirely out of the game as tribes, states, and, to a far lesser extent, federal law enforcement authorities fought out the gaming wars in the federal courts. Rather, Congress began holding hearings on Indian gaming at least as early as 1984 and members of Congress advanced various legislative proposals for statutory intervention into the growing Indian gaming issue. While many, often in identical terms, have described the congressional enactment of the Indian Gaming Regulatory Act of 1988 as a direct response to *Cabazon*,[126] the more accurate description would involve parallel federal judicial and legislative responses to Indian gaming progressing relatively independent of one another. Once the Supreme Court decided *Cabazon* and the judicial game was temporarily over, Congress was forced to take account of *Cabazon* in the final legislation and to tailor the Indian Gaming Regulatory Act to the Court's analysis in *Cabazon*. While "what if" speculation is always risky, the legislative record, however, strongly suggests that had the Supreme Court never decided *Cabazon*, Congress, nevertheless, might have enacted federal legislation regulating, and perhaps partially prohibiting, Indian gaming. Thus, rather than constituting a Congressional response to *Cabazon*, the Indian Gaming Regulatory Act of 1988, more accurately, probably should be described as the culmination of a multi-year Congressional search for a regulatory scheme for Indian gaming, which, of necessity, ultimately had to take account of *Cabazon*, decided the year before its enactment. To demonstrate

126. *E.g.*, ROD L. EVANS & MARK HANCE, LEGALIZED GAMBLING: FOR AND AGAINST 6 (1998); Peter Hellman, *Casino Craze*, *in* GAMBLING 31, 33 (Andrew Riconda ed., 1995); Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767 (1999); Kurt Eggert, *Truth in Gambling: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 280 (2004); Michael S. Gilmore, *Idaho's Four Compacts for Tribal Gaming*, 48 ADVOC., Nov. 2005, at 20; Brian P. McClatchey, *Tribally-Owned Businesses are not "Employers": Economic Effects, Tribal Sovereignty, and NLRB v. San Manuel Band of Mission Indians*, 43 IDAHO L. REV. 127, 142 (2006); Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1020 (2000).

this point, this section will first examine the early proposals and hearings on Indian gaming and then explore the legislative history of the bills that ultimately became the Indian Gaming Regulatory Act of 1988. Thereafter the work will examine the legislative history of the bills that became the Indian Gaming Regulatory Act of 1988 (IGRA).[127]

A. Early Proposals for and Hearings on Indian Gaming

With approximately 180 Indian gaming facilities, mostly offering bingo, operating in Indian country by 1983, Congress did not wait for the *Cabazon* decision to begin formulating legislative responses to this new development. Representative Morris Udall, a Democrat from Arizona, introduced the first proposed Indian gaming bill during the 98th Congress, H.R. 4566.[128] Styled the Indian Gambling Control Act, a title employed by

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127. For a detailed political history of IGRA, see W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 44, 53–69 (2000). In Kevin K. Washburn, *Recurring Problems in Indian Gamin*g, 1 WYO. L. REV. 427, 437 n.32 (2001), Professor Washburn, who previously served as counsel for the National Indian Gaming Commission, nicely summarized the sources for the legislative history:

> IGRA's legislative history consists primarily of the following:
>
> A. Three congressional committee reports: 1) Report on the IGRA from the Senate Select Committee on Indian Affairs, S. Rep. No. 446, 100th Cong., 2d Sess. (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071; 2) Report on Establishing Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands, and for other purposes from the House Committee on Interior and Insular Affairs, H.R. Rep. No. 488, 99th Cong., 2d Sess. (1986); and, 3) Report on Establishing Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservation and lands for other purposes from the Senate Select Committee on Indian Affairs, S. Rep. No. 493, 99th Cong., 2d Sess. (1986).
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> B. Three entries in the Congressional Record: 1) 134 CONG. REC. 25,369–25,381 (Sept. 26, 1988) (House consideration for S. 555, Sept. 26, 1988 (Passed House, Sept. 27, 1988)); 2) 134 CONG. REC. 24,016–24,037 (Sept. 15, 1988) (Senate consideration and passage of S. 555, Sept. 15, 1988); and, 3) 134 CONG. REC. 2012–2021 (daily ed. Apr. 21, 1986) (House consideration and passage of H.R. 1920).
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> C. Several hearing transcripts, including, among others, Hearing Before the Select Committee on Indian Affairs on S.555 and S.1303, 100th Cong., 1st Sess. (June 18, 1987).

Many of these sources are available online at the website of the National Indian Gaming Commission, http://www.nigc.gov/ReadingRoom/LegislativeHistory/tabid/866/Default.aspx (last visited Oct. 9, 2008). Another very helpful description of the legislative history is contained in 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, 74–87 (1995).

128. H.R. 4566, 98th Cong. (1st Sess. 1983).

many of the later bills as well, H.R. 4566 actually mostly proposed codification and ratification of the then existing status quo with respect to Indian gaming, while clarifying the role of the Secretary of the Interior in overseeing such activities. This original bill would have effectively codified the 1981 *Seminole Tribe v. Butterworth* distinction, approximately four years before *Cabazon* arrived at the same result, although its language failed to clearly make that point. The proposed Udall legislation therefore recognized the right of tribes to game and to regulate gaming so long as the games violated neither federal law nor any express prohibitory state law. The legislation would have authorized the Secretary of the Interior to access and examine tribal gaming facilities and to approve tribal gaming ordinances. It also required tribes to adopt tribal gaming regulations that were at least as restrictive as the parallel state laws regulating gaming.[129] More importantly, unlike the Indian Gaming Regulatory Act that Congress ultimately enacted, H.R. 4566 drew no express distinctions between various forms of gaming. Nevertheless, section 6 of the bill, the critical operative section, expressly excluded from tribal authority any "gambling activity . . . specifically prohibited within Indian country by Federal law or within a State by State public policy as a matter of criminal law."[130] Since the proposed legislation did nothing to modify the Johnson Act, the Organized Crime Control Act or the Assimilative Crimes Act, all of which limited tribal gaming options, H.R. 4566 appeared to offer tribes far more than it actually delivered. Worse still, since the bill failed to expressly indicate whether its phrase "prohibited within Indian country . . . within a State by State public policy as a matter of criminal law" adopted the *Seminole Tribe v. Butterworth* prohibitory/regulatory distinction, the proposed legislation left unresolved most of the questions then being fought out in federal courts. Nevertheless, with all its flaws, the original Udall proposal envisioned tribes as co-equal regulators of gaming with the states. States that permitted gaming regulated games occurring outside of Indian country, while the tribes regulated such gambling within Indian country. Section 7 of H.R. 4566 also would have required the Secretary of the Interior to sign off on tribal gaming management contracts, although it provided few of the substantive limitations on such contracts ultimately enacted in IGRA. While the details of the final legislation Congress enacted five years later as the Indian Gaming Regulatory Act of 1988 differed greatly from the original version of H.R. 4566, the broadest contours of the final version of IGRA

129. H.R. 4566 at § 6.
130 H.R. 4566 at § 6(a).

generally conformed to Representative Udall's vision of the respective roles of tribal and state government.

Congress held hearings on H.R. 4566 on June 19, 1984.[131] The proposed legislation failed to garner enthusiastic support from the Reagan Administration, the tribes, and the states. The Reagan Administration's Department of Justice at first overtly opposed the legislation, expressing great concern over the law enforcement issues raised by the Indian gaming industry.[132] Specifically, the Department of Justice advanced a position to which it would adhere throughout all of the later debates on Indian gaming legislation. It intimated without any supporting data that the federal government would be unable to exclude organized crime from tribal gaming operations.[133] The position advanced by the Department of the Interior reflected considerable ambivalence. While the Department favored some legislation in principle and generally supported the intent of the bill, they urged, apparently deferring to the Department of Justice, that any final action on the Udall bill be deferred until the law enforcement issues could be thoroughly investigated and addressed.[134] Various tribal leaders testified or offered written statements. Their views offered no greater support for the legislation than those advanced by the representatives of the Reagan Administration. The statement of Newton Lamar, the President of the National Tribal Chairmen's Association typified the tribal sentiment in 1984. Claiming to speak for the 178 tribes represented in the Association, Mr. Lamar, while not wishing to "publicly oppose passage of H.R. 4566," urged deferral of the legislation so that his constituents would have more time "to collectively reconsider their opposition to such a Bill."[135] He indicated that, after such delay, "if [such legislation] is felt to be in their best interest they could then participate in the drafting of that Bill."[136]

Mark Powless, the Chairman of the National Task Force on Indian Gaming, also indicated that the Task Force failed to embrace the Udall bill. While recognizing that federal legislation providing "protection of the right of Indian tribes to operate and regulate gambling on Indian reservations exclusive of State control" would be helpful, the Task Force found itself in "fundamental disagreement" with elements of the Udall proposal and

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131. *Indian Gambling Control Act: Hearing on H.R. 4566 Before the H. Comm. on Interior and Insular Affairs*, 98th Cong. (1984) [hereinafter *H.R. 4566 Hearing*].

132. *Id.* at 59–75.

133. *Id.* at 16 (statement of Hon. Mark M. Richard, Deputy Assistant Att'y Gen., Criminal Division, U.S. Dep't of Justice).

134. *Id.* at 59–65 (statement of Newton Lamar, President, Nat'l Tribal Chairmen's Ass'n).

135. *Id.* at 96.

136. *Id.*

offered their own alternative bill instead.[137] Not surprisingly, the Task Force proposal called for a far more limited role for the Secretary of the Interior than envisioned in the Udall bill. Some tribal leaders simply opposed any federal legislation, claiming that tribal sovereignty fully enabled tribal gaming in Indian country and that the tribes should exercise the exclusive power to regulate gaming in Indian country.[138] In his written submission President Peterson Zah of the Navajo Nation nicely captured the general reaction of Indian country. He applauded Representative Udall's efforts and supported the general idea of protecting Indian gaming efforts through supportive federal legislation. Nevertheless, he found that the proposed Udall bill was "more restrictive than it needs to be to accomplish its purposes."[139] Even the states failed to support Representative Udall's original proposal. No state representative appeared at the hearing to offer oral testimony supporting federal legislative action, and only Herbert Humphrey III, the Attorney General of the State of Minnesota, offered any written statement. Most of his statement addressed technical deficiencies of the Udall bill, as he saw it. He therefore offered lukewarm support for federal legislative action, noting: "I am not opposed to the general intent of H.R. 4566. It offers a reasonable opportunity for the economic development of reservations, but attempts to provide a coherent structure for that development."[140]

Without garnering any enthusiastic support from the states, the Reagan Administration or the tribes, the original Udall bill languished in committee during the 98th Congress.

Congress returned to Indian gaming more actively during the 99th Congress. While various members of Congress introduced several bills, serious Congressional attention centered around several proposals that ultimately represented the two polar extremes of the Congressional gaming debate. Representative Udall[141] basically reintroduced H.R. 4566 in slightly

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137. *H.R. 4566 Hearing*, *supra* note 131, at 76 (statement of Mark Powless, Chairman, National Indian Gaming Taskforce).

138. *Id.* at 96–98 (statement of Newton Lamar, President, Nat'l Tribal Chairmen's Ass'n).

139. *Id.* at 305 (statement of the Navajo Nation on behalf of Chairman Peterson Zah).

140. *Id.* at 308 (statement of Herbert H. Humphrey, III, Minn. Att'y Gen).

141. Representative Udall initially was joined in sponsoring the legislation by Representatives McCain, Richardson, and Bates. Representatives Snowe, Seiberling, McKernan, and Fazio later joined in sponsoring the legislation. *Indian Gambling Control Act, Part I: Hearing on H.R. 1920 and H.R. 2404 Before the H. Comm. on Interior and Insular Affairs*, 99th Cong. 5 (1985) [hereinafter *H.R. 1920 and H.R. 2404 Hearing Part I*] (illustrating the bill's sponsors).

modified form as H.R. 1920.[142] While several other bills were introduced containing ideas that made their way into IGRA, the other major competing bill introduced to deal with Indian gaming was H.R. 2404, proposed by Representative Shumway, a California Republican. While both H.R. 1920 and H.R. 2404 contemplated the creation of federal standards governing Indian gaming in Indian country and both provided some oversight by the Secretary of the Interior of tribal gaming ordinances, tribal gaming management agreements and tribal gaming operations, the Shumway bill differed from the Udall proposal in affording state law a far greater role in limiting tribal gaming opportunities. While H.R. 1920 attempted to codify the prohibitory/regulatory distinction announced in *Seminole Tribe v. Butterworth* and then followed in most of the federal court gaming decisions involving state power, section 3(e) of H.R. 2404 would have prohibited gaming activities in Indian country "unless such activities do not violate state law" or are conducted under federal supervision and are not contrary to state public policy.[143]

The Shumway bill essentially tried to overturn *Seminole Tribe v. Butterworth* by affording state law far greater sway than legally permitted by the prohibitory/regulatory distinction adopted in that case. Essentially, Representative Shumway's bill adopted the position advanced by Judge Roney in his dissent in *Seminole Tribe v Butterworth*[144] that any gaming violating state criminal gaming laws violates a prohibitory criminal statute that implicates state public policy, irrespective of the structure of state gaming law. Representative Shumway expressly indicated that he wanted "Indian tribes [to] conform to the already-established public policy for gambling of the state in which they live."[145] His legislation, therefore, sought to assure that all state gambling laws, whether deemed regulatory or prohibitory, applied to Indian gaming since it reflected state public policy. His intent was that "whatever state officials have deemed appropriate for gambling within the state . . . [should] be applicable to Indian tribes as well." [146] Section 4(c) of H.R. 2404 required the Secretary of the Interior to consult with the Governor of a state to ascertain the state's position regarding its public policy on gaming. While Congress eventually rejected

142. H.R. 1920, 99th Cong. (1985), *reprinted in H.R. 1920 and H.R. 2404 Hearing Part I*, *supra* note 141, at 5–13. Other bills introduced during the 99th Congress not extensively discussed here included H.R. 2420, H.R. 3745, H.R. 3745, and S. 2557.

143. *See H.R. 1920 and H.R. 2404 Hearing Part I*, *supra* note 141, at 14.

144. Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 317 (5th Cir. 1981) (Roney, J., dissenting).

145. *H.R. 1920 and H.R. 2404 Hearing Part I*, *supra* note 141, at 25 (statement of Hon. Norman D. Shumway).

146. *Id.*

this proposed gubernatorial consultation mechanism for dealing with gaming in *existing* Indian country, this gubernatorial consultation device essentially found its way into the anti-proliferation provisions of section 20 of the Indian Gaming Regulatory Act with respect to gaming on covered lands acquired after the effective date of IGRA.[147] Representative Shumway also insisted that Indian gaming must be conducted only by the tribes, not tribal members, and that "profits must be used for the betterment of the tribe, and not for personal gain."[148] While the Udall and Shumway bills differed markedly on whether all state gaming laws should apply to Indian gaming in Indian country, both bills agreed that Indian gaming should be limited to tribally-operated facilities, thereby foreclosing tribes from licensing gaming facilities owned by individual tribal members.

Representative Berreuter of Nebraska later introduced another limited, but ultimately significant bill, H.R. 3130,[149] purporting to limit the power of the Secretary of the Interior to take land in trust for use in gaming activities. While this bill gained no traction, the anti-proliferation concern it addressed eventually found its way into section 20 of IGRA, codified at 25 U.S.C. § 2719. Like section 20, section 1(b) of H.R. 3130 indicated that the prohibition would not apply "if the Indian tribe requesting the acquisition of land in trust obtains the concurrence of the governor of the state and the legislative bodies of all local governmental units in which the land is located."[150] Unlike section 20 (which *only* prohibits the *use* of later-acquired lands for gaming purposes), however, H.R. 3130 expressly prohibited the taking of the land in trust if intended to be employed for gaming purposes.

The House Committee on Interior and Insular Affairs conducted extensive hearings on these three proposals during the summer and fall of 1985 with two sessions in Washington D.C. and one in San Diego.[151] The growing debate over tribal gaming produced far greater interest and participation in these hearing than attracted by the hearings during the 98th Congress. The hearings also reflected a growing hardening of positions. While recognizing a legitimate need for the regulation of non-Indian management firms, some of which had preyed on tribal councils to gain the lion's share of the gaming profits from facilities they operated, many tribes

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147. 25 U.S.C. § 2719 (b)(1) (2009).

148. *H.R. 1920 and H.R. 2404 Hearing Part I*, *supra* note 141, at 25 (statement of Hon. Norman D. Shumway).

149. H.R. 3130, 99th Cong. (1985), *reprinted in Indian Gambling Control Act, Part II: Hearing on H.R. 1920 and H.R. 2404 Before the H. Comm. on Interior and Insular Affairs*, 99th Cong. 17–18 (1985) [hereinafter *H.R. 1920 and H.R. 2404 Hearing Part II*].

150. *H.R. 1920 and H.R. 2404 Hearing Part II*, *supra* note 149 at 23 (statement of Rep. Doug Bereuter).

151. *Id.* at 1 (explaining the locations of the hearings).

opposed any federal regulation of the tribal operations themselves, preferring exclusive tribal regulation. A statement by Frank Wright, Jr., then Chairman of the Puyallup Tribe, illustrated this position. After recognizing and supporting as necessary the federal standards proposed to regulate non-Indian management groups, Chairman Wright argued that the "court cases without exception recognize our right to be self-regulating in the gaming industry."[152] Equally important, the Puyallup Tribe, which had licensed the operation involved in the *Farris* prosecution, "strongly oppose[d] any attempt to limit our right to license our own individual members to operate their own games."[153] Other tribes, unlike the Puyallups, expressed a grudging willingness to accept some limited outside oversight and regulation of Indian gaming, so long as the regulation came from the federal, rather than state, government. For example, Barbara Karshmer, attorney for the Morongo Band of Mission Indians in California, indicated "[t]he tribe supports whole-heartedly the concept of some regulation of gaming as long as that regulation is done by the Federal Government rather than by the States."[154]

Mark Powless, Chairman of the National Indian Gaming Task Force, composed of approximately sixty tribes across the country, advanced positions closer to those advanced by the Puyallups.[155] He suggested that any federal legislation should do three basic things. First, he suggested that such legislation should recognize the legal right of Indian tribes to regulate such gaming activities in Indian country, that the federal government had a trust obligation to protect that legal right, and that states should not be able to interfere with or infringe on these tribal rights of self-government and self-determination.[156] Second, he suggested that any legislation should direct the Department of the Interior to provide technical and financial assistance to gaming tribes.[157] Finally, he proposed that "off-reservation gaming regulated by recognized Indian governments should be dealt with on the local and State level by means of agreements between the parties."[158] This suggestion, although expressly limited to "off-reservation gaming," may have been the first suggestion of the compact mechanism that ultimately became the compromise measure Congress adopted late in its

152. *H.R. 1920 and H.R. 2404 Hearing Part I*, *supra* note 141, at 846.
153. *Id.* at 847.
154. *Id.* at 424.
155. *Id.* at 171–77.
156. *Id.* at 173.
157. *Id.*
158. *Id.*

legislative discussions to break the stalemate between opposing views on the question of class III gaming.

At its fall meeting, the National Congress of American Indians (NCAI) adopted a resolution, later made part of the hearing record, that supported some limited federal legislation.[159] The resolution called for *preemptive* federal legislation that guaranteed "[t]ribal governmental control of gaming operations in Indian country" and assured "[n]on-interference of states in tribally-regulated gaming operations."[160] It insisted that any regulatory regime "require consultation with Indian governments" and that any audit requirements be compatible with existing tribal accounting procedures and schedules.[161] It also favored assistance to tribes in the development of regulatory ordinances and gaming management contracts.[162]

By the fall of 1985, the position of the Reagan Administration toward tribal gaming had begun to soften to support some elements of the proposed Udall legislation that the Department of Justice had opposed in the prior Congress. While still opposed to significant proliferation of Indian gaming due to law enforcement concerns, the United States Department of Interior indicated two classes of tribal gaming with which it expressed some comfort. Specifically, the statement offered by Marian Horn, Acting Solicitor of the Department of the Interior, divided tribal gaming into three classes: "(1) social and Indian ceremonial; (2) bingo; and (3) all other forms of gambling activity."[163] While not precisely paralleling the division ultimately adopted in IGRA, this classification, advanced *before* the Supreme Court decision in the *Cabazon* case, appeared to have provided the analytic framework for the three-tiered classification framework ultimately adopted in IGRA. First, the Department of the Interior indicated that since "[s]ocial and ceremonial gambling is not operated for profit, involves only small stakes and involves only members of the Indian community," it did not believe that any federal regulation of such activities was necessary.[164] Second, while the Department of the Interior recognized that tribal high-stakes bingo operations raised more significant law enforcement questions, it finally indicated that it "wish[ed] to permit continuation of Indian bingo as a matter of Federal policy, but recognize[d] that it has to be regulated effectively to avoid the potential law enforcement problems."[165] The

159. *H.R. 1920 and H.R. 2404 Hearing Part II*, *supra* note 150, at 84–85 (National Congress of American Indians Resolution T-86-54 G-6A).

160. *Id.* at 85.

161. *Id.*

162. *Id.*

163. *Id.* at 33 (statement of Marian Horn, Acting Solicitor, U.S. Dep't of the Interior).

164. *Id.*

165. *Id.* at 33–34.

Department of the Interior therefore opposed state control over Indian bingo, fearing that the states would seek to drive such gaming operations out of business.[166] Instead, it proposed the creation of a federal bingo regulatory commission,[167] the first proposal for the regulatory body that ultimately became the National Indian Gaming Commission. Finally, while recognizing that all other forms of gambling could be "economically beneficial" to the tribes, the Department of the Interior nevertheless suggested that "the potential law enforcement problems are so great as to outweigh the economic benefits to the tribes."[168] In its statement, the United States Department of Justice (Department of Justice or USDOJ) finally relented somewhat on the law enforcement issues, indicating that it understood that tribal gaming produced significant tribal revenue needed for tribal operations and stating that "the law enforcement risks involved with bingo are manageable and do not warrant State regulation."[169] It therefore agreed with the Department of the Interior that tribal high-stakes bingo facilities should be permitted but regulated by a federal bingo regulatory commission.[170] The Department of Justice did not oppose tribal co-regulation so long as the tribal regulations were not inconsistent with those adopted by the federal commission. The Department of Justice nevertheless proposed that Indian gaming not properly licensed by a tribe should be a federal crime. This testimony by the Departments of Justice and Interior, the significant federal agencies on the Indian gaming issue, clearly established the broad outlines of legislation that the Reagan Administration would accept and, accordingly, shaped the final outlines of the Indian Gaming Regulatory Act. Ironically, the position ultimately adopted by the Reagan Administration, i.e., permitting but regulating high-stakes tribal bingo but prohibiting all other forms of tribal gaming, paralleled the way in which federal law enforcement authorities had exercised their prosecutorial discretion since *Sosseur*—reinforcing the Nevada and Atlantic City gaming monopolies by prosecuting any Indian gaming beyond bingo while permitting tribal competition with local charitable bingo games.

States and other gaming interests continued to oppose any form of Indian commercial gaming. Robert K. Corbin, the Attorney General of the State of Arizona, filed a statement reflecting his frustration with the lack of federal law enforcement against high-stakes bingo operations, including video

166. *Id.* at 34.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 49 (statement of Victoria Toensing, Deputy Asst. Att'y Gen., U.S. Dep't of Justice).

bingo machines, at several Arizona reservations, and noted that he shared the view of state and federal law enforcement authorities that such high-stakes gaming operations would produce serious law enforcement problems.[171] More specifically, Attorney General Corbin, noting that such high-stakes gaming was then illegal under the provisions of the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13, and the Organized Crime Control Act, 18 U.S.C. § 1955, documented his unsuccessful efforts to get federal law enforcement officials to actively enforce those prohibitions.[172] He noted that a June 7, 1985 resolution of the Conference of Western Attorneys General had urged Congress to recognize state and local jurisdiction over Indian gaming, claiming that such jurisdiction was "essential to State sovereignty and should not be usurped or taken over by the Federal government."[173] Thus, while applauding the provisions of sections 3(a) and 4(b)(1) of the H.R. 2404 authorizing tribal licensing and regulation of gaming in Indian country only where not otherwise prohibited by federal law or state criminal gaming laws, he opposed both the Udall and the Shumway bills because they inadequately addressed the law enforcement and public policy concerns of the states. Similarly, Glen Salter, the Deputy County Counsel for the County of Riverside, where the Cabazon and Morongo Bands had opened high-stakes bingo facilities, testified against permitting such Indian gaming. He claimed, without any substantiating evidence, that the local tribal gaming halls were generating several million dollars of revenue per year and "[l]aw enforcement officials within the Western United States recognize this situation naturally creates a lure for organized crime."[174] Perhaps revealing the real local concern, the Riverside deputy counsel indicated that "unregulated gambling hurts the local, truly charitable organizations."[175] While supporting the general approach of H.R. 2404, the Riverside deputy counsel noted that the proposed legislation failed to fully address their concerns, since it failed to

171. *H.R. 1920 and H.R. 2404 Hearing Part I, supra* note 141, 32–51 (statement of Robert K. Corbin, Att'y Gen. of Arizona).

172. *Id.* at 28.

173. *Id.* at 36.

174. *Id.* at 365 (statement of Glen Salter, Deputy County Counsel, County of Riverside). When specifically asked in response to his statement whether he had any evidence about the involvement of organized crime, he quickly back-pedaled, first claiming that while he had none "I believe the Attorney General of the State of California states he has such evidence," but then indicating "I believe in my statement I at no time indicated there was organized crime, because we are not taking that position." *Id.* at 369. Thus, as was true throughout the debates on IGRA, organized crime was trotted out by the Riverside deputy counsel as a scare tactic, only to back off when the committee demanded actual evidence.

175. *Id.* at 366.

subject tribal gaming to local as well as state law and failed to limit the management of tribal games solely to tribal members.[176]

Rudolf Corona, Jr., a Deputy Attorney General for the State of California, advanced the most intractable state position.[177] He expressly rejected the prohibitory/regulatory distinction adopted by the federal courts in the state enforcement cases, arguing that the appropriate approach should involve "a general balancing of the interest test to determine whether the States have a significant interest in an area and whether, based on severe impacts beyond the reservation, the tribes should be allowed to be controlled in this area."[178] Thus, he concluded that "the balance of interests clearly balance in favor of the States to control this area."[179]

The 1985 House hearings also produced testimony from established gaming interests, including horse and greyhound racing operators.[180] As stated by Richards Rolapp, President of the American Horse Council, representing various horse racing interests, the operation of tribal gaming facilities, including "race tracks outside the accepted regulatory schemes of the States could do great damage to the public belief in integrity and honesty the States have sought to uphold with their pari-mutuel laws."[181] The gaming interests therefore strongly opposed any federal legislation that legalized gambling in Indian country outside of the state gaming regulatory regime.

In the Senate, Senators introduced parallel bills, and the Senate Select Committee on Indian Affairs held hearings the day following one of the hearings conducted by the House of Representatives. The main vehicle for Senate hearings involved S. 902, a bill that loosely paralleled the Udall bill, H.R. 1920, although it also contained provisions to substitute for the regulation and oversight envisioned by the Secretary of the Interior regulation by regional Indian Gaming Commissions voluntarily established by the tribes in the various BIA regional service areas.[182] During the hearings conducted by the Senate Select Committee on Indian Affairs on S. 902, many of the same witnesses testified who had appeared at the House

176. *Id.* at 366–67.

177. *Id.* at 101–09 (statement of Rudolf Corona, Jr., Deputy Att'y Gen. of California).

178. *Id.* at 104.

179. *Id.*

180. *Id.* at 280–305 (panel consisting of Richards Rolap, President of American Horse Council; Andrew P. Miller, American Greyhound Track Operators Association; James J. Hickey, Jr., American Horse Council; and Thomas Aronson, American Horse Council).

181. *Id.* at 281 (statement of Richards Rolapp, President, American Horse Council).

182. S. 902, 99th Cong. § 11 (1985), *reprinted in Gambling on Indian Reservations and Lands: Hearing on S. 902 Before the S. Select Comm. on Indian Affairs*, 99th Cong. 11–14 (1985) [hereinafter *1985 Hearing on S. 902*].

committee hearings the day before.[183] During the Senate hearings, the interested parties basically restated the positions advanced during the House hearings. The tribal speakers split over whether Congress should enact any federal legislation and, if so, what such legislation should do. Most opposed any significant federal regulation of or limitation on tribal gaming opportunities, although some acknowledged the need for regulation of outside gaming management firms.

For example, the statement of James E. Billie, Chairman of the Seminole Tribe whose high-stakes bingo facility began the modern litigation success for Indian gaming, indicated the importance of the growing Indian gaming business to the Tribe and the lives of tribal members:

> [H]ardly a week goes by that a banker doesn't call up on me seeking business from the Seminole Tribe. Just 5½ years ago I couldn't get beyond the assistant teller in South Florida's banks to talk about bingo. We have young people in our tribe who are not asking if they can go to college but whether they will be accepted in an ivy league college or different types of schools they have.[184]

Chairman Billie generally supported the direction of S. 902 "to once and forever clear up the questions and uncertainties related to Indian gaming and to set certain standards and guidelines by which Indian tribes can move forward without the constant cloud of never-ending litigation and harassment by the State and local governments where our lands are located."[185] He therefore advanced the position later adopted by NCAI Resolution T-86-54 G-6A favoring federal legislation expressly preempting state regulatory authority over Indian gaming. Nevertheless, he expressed concern regarding the provisions related to non-Indian management firms, noting "[w]e don't feel it would be in the interest of the Seminoles or other Indian tribes or their ability to develop business enterprises if forced to break or modify existing contracts."[186] He asked whether the members of the committee would "do business with an entity that is susceptible to this type of situation."[187]

Senator Domenici of New Mexico indicated that he feared the growing proliferation of gaming in Indian country, noting that the industry had rapidly grown to eighty high-stakes bingo halls with dog racing then being proposed for Santa Ana Pueblo in New Mexico and jai alai sought in

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183. *See 1985 Hearing on S. 902*, *supra* note 182, at III–V (list of witnesses).
184. *Id.* at 599 (statement of James E. Billie, Chairman, Florida Seminole Tribe).
185. *Id.* at 597–98.
186. *Id.* at 599.
187. *Id.*

Arizona.[188] He clearly supported extensive federal oversight of the exploding Indian commercial gaming industry. While claiming not to "endorse any particular approach,"[189] both his prepared statement and his testimony appeared to reject the prohibitory/regulatory distinction and to advance a view that if tribal gaming failed to comply with any state criminal gambling law, it should be treated as illegal. This position is far closer to that advanced in H.R. 2404 than S. 902.

Rudolf Corona, Jr., Deputy Attorney General in the State of California, also testified and focused attention on the serious law enforcement problems created by tribal gaming.[190] For example, citing events at the Cabazon Reservation (a devastating example given the role that the Cabazon high-stakes gaming operation would later play in the development of Indian gaming), he indicated:

> [A] non-Indian, John Nichols, has run the tribe for 7 years. Earlier this year he was arrested for the crimes of soliciting to commit the murders of five people. He has since, in a plea bargain, been convicted of two of those crimes and was sentenced to prison.
>
> Nevertheless, the Nichols family continues to run the Cabazon Tribe, and in a public interview John Nichols, Jr., admitted to having received a $50,000 loan from organized crime associate Tommy Marson to run the gambling operation.
>
> In addition, he also admitted to hiring well-known organized crime associates Rocco Zangari and Irving "Slick" Shapiro. Indeed, Mr. Zangari was later indicted in Los Angeles for racketeering and Mr. Zangari offered that the Nichols had been systematically looting the tribe.[191]

Noting that the Department of Justice suggested in prior House hearings that the federal government lacked the expertise, resources, or ability to prevent organized crime infiltration into Indian gaming, he unequivocally opposed S. 902 and sought to assure full state regulation and oversight of any gaming taking place in Indian country.[192] In supportive documents, the California Deputy Attorney General presented his case that Indian gaming posed serious law enforcement problems and that the high-stakes bingo operations he discussed actually were illegal under both federal and state law.[193]

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188. *Id.* at 17, 22 (statement of Sen. Pete V. Domenici).
189. *Id.* at 17.
190. *Id.* at 127–38 (statement of Rudolf Corona, Jr., Deputy Att'y Gen. of California).
191. *Id.* at 127–28.
192. *Id.* at 128.
193. *Id.* at 130–48.

With the exception of the California Deputy Attorney General, most of the witnesses appearing before both the House and Senate hearings appeared totally oblivious to the potential implications of existing *federal*, as opposed to state, laws for Indian gaming. Since S. 902, like most of the bills proposed to deal with Indian gaming, only permitted such gaming where not "specifically prohibited within Indian country by Federal law,"[194] significant potential existed that the combination of the Johnson Act,[195] the Assimilative Crimes Act,[196] and the Organized Crime Control Act,[197] might actually prohibit virtually all high-stakes commercial gaming in Indian country, including high-stakes bingo. *Farris* had already been decided and suggested that result and the *Dakota* prosecution was already underway and within a year would clearly reject application of the prohibitory/regulatory distinction to the construction of the Organized Crime Control Act. Nevertheless, hardly any advocate for Indian gaming noted the problem and therefore none of the bills proposed directly addressed the impact of the Assimilative Crimes Act and the Organized Crime Control Act on commercial Indian gaming in Indian country.

For this reason, the final version of the Indian Gaming Regulatory Act of 1988 equally failed to directly address the question. The final version of IGRA appears to have *implicitly* limited the application of the Assimilative Crimes Act and the Organized Crime Control Act to exclude gaming in Indian country that is permitted by IGRA for two reasons. First, final language of 25 U.S.C. § 2710, unlike S. 902 and other preliminary bills, failed to expressly make the legality of Indian tribal commercial gaming dependent on whether the Indian gaming was prohibited in Indian country

194. S. 902, 99th Cong. § 6(a) (1985), *reprinted in 1985 Hearing on S. 902*, *supra* note 182, at 6. Subsequently, proposed legislative findings and the Senate report on an amended version of H.R. 1920 did acknowledge and address the problem directly in one of the few references to the issue in the legislative history. *See* S. REP. No. 99-493, at 9 (1986). Additionally, S. 555, the bill that later formed the basis for IGRA, originally contained a finding referencing the issue. However, in light of *Dakota*, the bill incorrectly asserted that the Assimilative Crimes Act and the Organized Crime Control Act failed to adopt as federal law state criminal prohibitions of gaming that were regulatory in form, rather than prohibitory. S. 555, 100th Cong. § 2(a)(5) (1987). While such an argument could be made for the Assimilative Crimes Act based on the Ninth Circuit decision in *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977), the *Dakota* case overtly rejected adopting the prohibitory/regulatory distinction for application of the Organized Crime Control Act. Perhaps this incorrect reading of the Organized Crime Control Act cases accounts for the failure of Congress to more carefully and directly address the relationship of IGRA to the Assimilative Crimes Act and the Organized Crime Control Act. *See also* United States v. Burns, 725 F. Supp. 116, 124 (N.D.N.Y. 1989). In any event, these findings found in the original version of S. 555 failed to find their way into the final legislation.

195. 15 U.S.C. § 1175 (1992).

196. 18 U.S.C. §§ 7, 13, 1152 (1984).

197. 18 U.S.C. § 1955 (1970).

by existing federal law. Second, the final language also included a specific federal criminal penalty for engaging in gaming in Indian country not in conformity with IGRA.[198] Most of the other early gaming bills, like S. 902, expressly made the legality of Indian gaming turn in part on whether the gaming did not violate any federal criminal laws. Therefore, no such argument could easily be made regarding their terms. Had those bills been enacted, at most, tribes might have been relegated to arguing that neither the Assimilative Crimes Act nor the Organized Crime Control Act "specifically prohibited" their gaming activities, as S. 902 required. Since developing such gaming enterprises often involved a multi-million dollar investment, such a technical parsing of the language of the bill constituted a pretty slender reed on which to rest such an investment. Nevertheless, notwithstanding the large stakes involved, most tribal advocates simply missed the looming threat that federal law might pose to their burgeoning gaming operations. Since federal prosecutors had not in fact prosecuted any Indian high-stakes bingo operations, most Indian advocates assumed they were safe despite the fact that these two federal statutes appeared to cover such conduct. They therefore failed to strongly urge any express statutory language addressing the problem (perhaps fearing that raising the question might encourage such federal prosecution or be used against them should one eventuate) and Congress ultimately included none in the final version of IGRA. Luckily for the development of the Indian gaming industry, the final version of IGRA did not incorporate the "specifically prohibited within Indian country by Federal law" language included in most of the prior bills.[199]

During the second session of the 99th Congress, the House committee returned to work on H.R. 1920 during the spring of 1986 and ultimately reported out to the House of Representatives a significantly amended bill.[200] The amended version of H.R. 1920 re-titled the legislation to its ultimate form—the Indian Gaming Regulatory Act—and established several of the major elements that found their way into the final legislation. Building on earlier proposals for regional gaming regulatory commissions, it proposed creation of a National Indian Gaming Commission, as a federal, rather than tribal, oversight body with authority to approve tribal gaming ordinances.[201] Building on the tripartite classification of tribal gaming previously offered in the testimony of Maron Horn, Acting Solicitor of the Department of the

198. 18 U.S.C. § 1166 (1988).

199. Pub. L. No. 10-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701–21 (1988); 18 U.S.C. §§ 1166–68 (1988)).

200. H.R. REP. NO. 99-488, at 1–9 (1986).

201. *Id.* at 2.

Interior, the amended version of H.R. 1920 for the first time divided tribal gaming into the three classes that ultimately found their way into the final version of the legislation.[202] The amended bill gave tribes exclusive jurisdiction over social and ceremonial gaming (class I)[203] and permitted the National Indian Gaming Commission to approve tribal ordinances regulating bingo and certain related gaming (class II).[204] For all other forms of gaming (class III) the bill permitted the Commission to approve tribal gaming ordinances only if those provisions were at least as stringent as employed by the state in which the reservation was located to regulate similar forms of gaming.[205] Thus, the amended bill called for concurrent federal and tribal regulation of class II and class III gaming, but also adopted as federal standards for class III gaming the structure of state gambling law irrespective of its regulatory content.[206] Fearing competition with the established Nevada gaming interests, the bill also expressly prohibited any class II and class III gaming on Indian lands in Nevada,[207] thereby expressly reinforcing one of the themes of this article—that federal law persistently has been invoked to protect the Nevada and Atlantic City gaming monopolies from Indian competition. While the states had sought a direct regulatory and law enforcement role for Indian gaming, the compromise offered in the amended version of H.R. 1920, ultimately broadly adopted in IGRA, failed to provide for any direct state regulation or law enforcement. Instead, H.R. 1920 adopted state gambling law as the federal standard governing class III gaming. Enforcement of that state standard, however, remained exclusively a federal and tribal prerogative. Given the historic reluctance of federal law enforcement authorities to invoke the Assimilative Crimes Act and the Organized Crime Control Act against tribal high-stakes bingo operations that violated state law, this position clearly failed to satisfy the concerns of state and local governments. The House committee reported out the amended version of HR. 1920 and the House of Representatives debated and passed the bill, sending it to the Senate.

The Senate also returned to the issue during the second session of the 99th Congress, holding further hearings on S. 902 during the summer of 1986, perhaps in anticipation of passage of H.R. 1920 by the House of

202. *See id.* at 9.
203. *Id.* at 4.
204. *Id.*
205. *Id.* at 4–5.
206. *Id*.
207. *Id.* at 4.

Representatives.[208] These hearings involved many of the same witnesses and basically rehashed the same positions advanced in the hearings conducted by the relevant House and Senate committees the previous summer.

Perhaps the most interesting new development during these Senate hearings occurred in the testimony from the Reagan Administration Department of Justice offered by Victoria Toensing, Deputy Assistant Attorney General in the Criminal Division.[209] Expressing significant skepticism regarding the then leading statutes, S. 902 and the amended H.R. 1920, the Department of Justice advanced support for a new bill it helped draft, introduced as S. 2557.[210] While S. 2557 never gained significant traction on its own, elements of its approach ultimately found their way into the final version of IGRA. The United States Department of Justice criticized both the broad approach and the details of S. 902 and H.R. 1920. Recognizing that the federal courts generally had adopted a prohibitory/regulatory distinction to determine the applicability of state law, Ms. Toensing rejected the utility of such an approach, claiming that it has produced a situation where "high-stakes gambling thrives mainly unlicensed and unregulated, so presently there is no protection either for the tribes or for their customers."[211] She noted that "[s]tates that permit gambling regulate it strictly" and urged that such strict regulation was necessary because "criminal elements have found ways to skim profits or to cheat customers."[212] Thus, the very "nature of the enterprise . . . requires close regulation and control."[213] Nevertheless, the Criminal Division conceded that it had "no evidence that Indian-operated gambling is any more susceptible to corruption than any other type of gambling, nor do we have any reason to believe that it is any less so."[214] She also criticized the breadth of the definition of legal bingo contained in an amended version of H.R. 1920 since it would include pull tabs and punchboards and therefore authorize instant lotteries.[215] She also suggested the structure of the National Indian Gaming Commission proposed in the amended version of H.R. 1920

208. *Establish Federal Standards and Regulations for the Conduct of Gaming Activities within Indian Country: Hearings on S. 902 Before the S. Select Comm. on Indian Affairs*, 99th Cong. (1986) [hereinafter *1986 Hearings on S. 902*].

209. *Id.* at 46–49, 51–55, 142–61.

210. S. 2557, 99th Cong. (1986).

211. *1986 Hearings on S. 902*, *supra* note 208, at 47 (statement of Victoria Toensing, Deputy Assistant Att'y Gen., Criminal Division, Justice Department).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

(a full-time Chairman with seven other part-time commissioners) provided inadequate resources for effective regulation and would be "subservient to the tribes."[216]

Accordingly, the Department of Justice helped draft and advanced legislation (ultimately embodied in S. 2557) that would strictly limit Indian commercial gaming to bingo and impose significant federal regulatory oversight on such bingo operations through a full time National Indian Gaming Commission authorized to approve tribal bingo ordinances and to provide oversight of bingo facilities.[217] Its bill, while not prohibiting class III gaming or otherwise directly subjecting it to state regulation, sought a four year moratorium on any new class III tribal gaming. During that period the National Indian Gaming Commission could approve tribal class III gaming ordinances only if they were "substantially equivalent to those of the State within whose boundaries such gaming occurs."[218] During their proposed four year moratorium, the Department of Justice bill directed the preparation by the Comptroller General of a report examining any existing class III Indian gaming operations and suggesting ways in which such gaming should be regulated.[219] While the four year moratorium advanced by the Department of Justice garnered little support, its idea of separating class II from class III and adopting as federal law for *only* class III gaming the state criminal law gambling standards began the process of cutting the Gordian knot that had prevented any compromise on the Indian gaming issue. In essence, IGRA ultimately adopted a similar distinction, retaining the prohibitory/regulatory distinction for class II gaming, while prohibiting class III gaming irrespective of the prohibitory/regulatory structure of state law unless state law enforcement concerns could be assuaged through a compact. Thus, while S. 2557 gained absolutely no legislative traction, it inadvertently contributed to the ultimate compromise achieved in the final legislation.

Ultimately, the Indian gaming Regulatory Act came quite close to passage during the 99th Congress, before the Supreme Court decided *California v. Cabazon Band of Mission of Indians*.[220] After passing the House of Representatives on April 21, 1986 by voice vote,[221] the bill was sent to the Senate. The Senate Select Committee on Indian Affairs considered H.R. 1920 and voted 6-3 in favor of reporting out their amended

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216. *Id.* at 48.
217. *Id.* at 148.
218. *Id.* (citation omitted).
219 *Id.*
220. 480 U.S. 202 (1987).
221. 132 CONG. REC. H2012 (1986).

legislation. The Committee ultimately reported out an amended version of H.R. 1920 with a favorable recommendation of an amended version of the bill.[222] The amended Senate version of H.R. 1920 adopted the basic approach of the legislation passed by the House, including a National Indian Gaming Commission, approval of tribal gaming ordinances, federal oversight of class II gaming facilities, and gaming management contracts.[223] Nevertheless, the amended Senate version of H.R. 1920 included a number of other provisions. For example, section 4 of Senate's version incorporated the anti-proliferation provisions first proposed in H.R. 3130, albeit as a limited prohibition on the *use* of tribal trust land, rather than a limitation on the authority of the Secretary of the Interior to take the land into trust, as originally proposed.[224] This version of the legislation thereby set the outlines of what became section 20 of IGRA, 25 U.S.C. § 2719. The Senate bill contemplated a full time Indian Gaming Commission composed of five members.[225] Section 11 of the Senate version of H.R. 1920 retained the tripartite classification of gaming with exclusive tribal regulation of class I gaming and shared federal and tribal power over class II bingo and like gaming so long as it was not absolutely prohibited by state law (as was then true in Arkansas, Hawaii, Indiana, Mississippi, and Utah) and *not otherwise prohibited by federal law*.[226] In one of the few express references to the problem, the committee report, but not the bill language, expressly stated that the italicized limitation was not intended to include the Assimilative Crimes Act or the Organized Crime Control Act.[227] For class III gaming the Senate version contained an absolute prohibition on such activities unless the tribe consented to a transfer to the state of full regulatory and law enforcement jurisdiction over such activities.[228] The Senate version of the bill, therefore, came far closer to advancing the concerns of state and gaming interests, at least for class III gaming, than the position adopted in the House of Representatives. This final Senate committee action in the 99th Congress came two months before the Supreme Court heard argument in *Cabazon* and five months before the Court announced its famous decision in that case. Nevertheless, since the committee report emerged only a month before off-year Congressional elections, H.R. 1920 failed to make it to the Senate floor in the waning days of the 99th Congress and

222. S. REP. NO. 99-493, at 1 (1986).
223. *Id.* at 8–20.
224. *Id.* at 10–11.
225. *Id.* at 11.
226. *Id.* at 14–17.
227. *Id.* at 15.
228. *Id.* at 16.

therefore died just short of passage. Nevertheless, the hearings and committee work undertaken by the 99th Congress laid the groundwork for the climactic 100th Congress that approved IGRA. The precise structure of a National Indian Gaming Commission and the role of state law and state law enforcement in the governance of class III gaming remained issues that not only divided the affected parties but also divided the House of Representatives and the Senate. Whether the two bodies could have bridged that gulf during conference in the 99th Congress before the Supreme Court rendered its decision in *Cabazon* had the Senate-proposed version of H.R. 1920 reached a favorable vote in the Senate remains doubtful.

By the time the United States Supreme Court announced its decision in *California v. Cabazon Band of Mission Indians* on February 25, 1987, Congress already had fully developed most of the broad outlines of Indian gaming legislation that would become IGRA. Nevertheless, the interested parties, while generally supporting the idea of federal legislation and the establishment of federal standards for Indian gaming, remained significantly divided on what role, if any, state law and state law enforcement should play in regulating Indian commercial gaming, particularly with reference to class III gaming. The pressures created by the impending review and ultimate decision in *Cabazon* finally riveted everyone's attention to the stakes involved in that discussion. The ultimate decision in *Cabazon*, while clearly not providing the catalyst for Congressional legislation dealing with Indian gaming as suggested by many, helped broker the compact compromise that cut through the divergent positions of the affected parties and permitted a rapid resolution to the half-decade of Congressional efforts to legislate on Indian gaming.

Within two months of convening, the 100th Congress confronted the fact that the *Cabazon* decision definitely and finally rejected the various claims to state regulatory control of Indian gaming. Tribal gaming advocates over-generalized the decision, suggesting that the Court had upheld the exclusive power of Indian tribes to regulate reservation gaming.[229] *Cabazon* clearly did not so hold since it only rejected state and county claims to regulate Indian on-reservation gaming without even resolving the legality under the Organized Crime Control Act of the tribal bingo facilities and card club

229. *See, e.g.*, Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto" for Gaming on "After-Acquired Lands,"* 37 U. MICH. J.L. REFORM 1227, 1242 (2004) ("Due to the *Bryan/Butterworth/Cabazon* line of cases, tribes had exclusive control over reservation gaming."); Brad Jolly, Note, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 277 (1997) ("In the IGRA, Congress stated that 'Indian tribes have the exclusive right to regulate gaming activity on Indian lands' and claimed to codify the Supreme Court's decision in *Cabazon*.") (citing 25 U.S.C. § 2701(5) (1988)).

involved in the case. Thus, far from holding that tribes had exclusive regulatory power over Indian commercial gaming, *Cabazon* did not even establish the legality of the existing high-stakes bingo operations. Nevertheless, what it did hold, i.e., that states lacked regulatory or law enforcement power over tribal commercial gaming facilities in Indian country, seriously weakened the central claim of both the state and local governmental opposition to Indian gaming and the position of the existing non-Indian gaming interests. With the central tenet of their legal position definitively rejected by the Supreme Court, both the States and the gaming interests exhibited a greater willingness to compromise, as the implications of *Cabazon* on an otherwise federally unregulated Indian gaming industry became clearer. *Cabazon* did not really alter the legal terrain for Indian commercial gaming in any fashion other than providing a definitive Supreme Court ruling ratifying the legal consensus that had emerged in the lower federal courts. By dashing the last hope of a legal victory for the states and non-Indian gaming interests, however, the decision helped bring both of those interests to the legislative negotiating table by increasing the urgency of a legislative compromise on Indian gaming. That compromise ultimately involved the last minute invention of the compact process developed hurriedly for class III gaming.

When the 100th Congress returned to Indian gaming legislation, the Senate took the laboring oar. The Senate Select Committee on Indian Affairs conducted hearings on two bills during the summer of 1987.[230] These hearings centered on two bills, each reflecting the then disparate views on the role of state law in regulating and limiting class III Indian gaming. The provisions of S. 555,[231] offered by Senator Inouye (joined by Senators Evans and Daschle) basically tracked the central features of the amended version of H. 1920, offered by the Senate Select Committee during the prior Congress. It called for a full time five member National Gaming Commission[232] to effectuate federal regulation of Indian gaming with powers to approve tribal gaming ordinances,[233] to review and approve management contracts for the operation of tribal gaming facilities,[234] and to oversee and monitor class II gaming facilities.[235] It limited the use of tribal

230. *Gaming Activities on Indian Reservations and Lands: Hearings on S. 555 and S. 1303 Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987) [hereinafter *Hearings on S. 555 and S. 1303*].

231. S. 555, 100th Cong. (1987), *reprinted in Hearings on S. 555 and S. 1303*, *supra* note 230, at 3–43.

232. *Id.* § 5(a), (b)(1).

233. *Id.* § 6(a)(3).

234. *Id.* § 6(a)(4).

235. *Id.* § 11(b)(2).

gaming revenue[236] and called for Commission approval of any tribal plan for *per capita* distribution of tribal gaming revenues.[237] Addressing the central remaining unresolved issue, section 11(d)(1) of S. 555 would have made all class III gaming unlawful in Indian country unless the tribe consented to a transfer of both regulatory and law enforcement jurisdiction over such gaming activities to the state in which the tribe was located. Rejecting the position of the Criminal Division of the United States Department of Justice, S. 555 expressly included lotto, pull tabs, punch boards, tip jars, and other similar games as well as card games legal under state law within the definition of class II gaming set forth in section 4(8). Rather than relying on state regulation and law enforcement for class III gaming, as suggested by the Department of Justice and contained in S. 555, S. 1303,[238] offered by Senator McCain (joined by Senators Inouye and Evans), required the Commission to approve tribal ordinances and to license tribes to operate class III facilities "unless it makes a specific finding that such applicant cannot operate the gaming activity in accordance with the standards established under this Act and the gaming codes established by the Commission."[239] Representative Udall also introduced H.R. 2057,[240] a virtually identical companion to S. 1303. Where a tribe applied to conduct class III gaming and secures approval for its gaming ordinance, the McCain and Udall bills required the Chairman of the Commission to adopt and enforce against any class III tribal gaming licensee a "comprehensive regulatory scheme for such gaming activity" that "shall be identical to those provided for the same activity by the State within which such Indian gaming activity is to be conducted."[241] Both S. 555 and S. 1303 added criminal penalties to the United States Code for gaming in violation of their provisions or for theft, embezzlement, or other financial improprieties associated with an Indian gaming facility. Unlike S. 555, the McCain bill did not include card games otherwise permitted under state law within its definition of class II gaming.[242] Recognizing the growing importance of computer technology to the gaming industry during the mid-1980s, notwithstanding the Johnson Act, both Senate bills expressly *included*

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236. *Id.* § 11(b)(2)(B).

237. *Id.* § 11(b)(3).

238. S. 1303, 100th Cong. (1987), *reprinted in Hearings on S. 555 and S. 1303*, *supra* note 230, at 44–79.

239. *Id.* § 12(b).

240. 100 H.R. 2507, 100th Cong. (1987), *reprinted in Indian Gaming Regulatory Act: Hearings on H.R. 964 and H.R. 2507 Before the H. Comm. on Interior and Insular Affairs*, 100th Cong. 40–75 (1987).

241. *Id.* § 12(e).

242. S. 1303 § 21(5)(B).

"electronic or electromechanical facsimiles" of class II games within the definition of class II games.[243] While clearly very similar in overall structure the differences between S. 505 and S. 1303 reflected the vastly narrowed grounds of disagreement among the various interests affected by proposed Indian gaming legislation. The role of state regulators and law enforcement in regulating tribal class III gambling operations remained the thorny sticking point.

While most Indian tribes generally accommodated the idea of protective federal regulation that preemptively adopted the prohibitory/regulatory distinction for class II gaming and they were willing trade some federal oversight of their class II operations for the security offered by such legislation, they adamantly rejected the idea of direct state regulation of their Indian gaming operations. For example, Herman Agoyo of the All Indian Pueblo Council emphatically indicated that the Council supported the then existing version of S. 1303 (and not S. 555), because "we support Federal legislation to regulate Indian controlled gaming, [but] we do not and will not support State jurisdiction."[244] Since S. 1303 clearly required that any class III gaming standards adopted by the proposed National Indian Gaming Commission must be at least as stringent as the prevailing state gambling laws in the state where the reservation was located, the tribal objection to state jurisdiction clearly was not to the idea of direct state regulation of Indian activities in Indian country than to the more abstract idea that state law might apply to such conduct through federal adoption. Tribes uniformly rejected any direct state law enforcement role, while some, like the All Pueblo Council, reluctantly were willing to acquiesce to the adoption of state law as the governing federal standard for class III gaming.

Some tribal hardliners, however, refused to accept any federal regulation of tribal gaming. Roger A. Jourdain, Chairman of the Red Lake Band of Chippewa Indians, testified unequivocally that "the Red Lake Band opposes the adoption by Congress of S. 555, S. 1303, or any other legislation that would impose upon Indian tribes Federal standards and regulations covering the conduct of gaming activities on Indian reservations."[245] The Red Lake Chippewas not only opposed enactment of any federal legislation governing

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243. S. 555, 100th Cong. § 4(8) (1987), *reprinted in Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the S. Select Comm. on Indian Affairs*, 100th Cong. 7 (1987) [hereinafter *S. 555 and S. 1303 Hearing*]; S. 1303, 100th Cong. § 21(5)(B) (1987), *reprinted in Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the S. Select Comm. on Indian Affairs*, 100th Cong. 77 (1987).

244. *Hearings on S. 555 and S. 1303*, *supra* note 230, at 107 (statement of Herman Agoyo, Chairman, All Indian Pueblo Council).

245. *Id.* at 172 (statement of Roger A. Jourdain, Chairman of the Red Lake Band of Chippewa Indians).

Indian gaming but unsuccessfully requested that if any such legislation passed over their objection that they be expressly exempted from its coverage.[246] Relying on *Cabazon*, Chairman Jourdain claimed the case "held that *Indian tribes have inherent sovereignty* to operate and regulate tribal bingo and card games outside the scope of State and county regulatory laws."[247] Thus, for Chairman Jourdain the ruling in *Cabazon* reaffirmed inherent tribal sovereignty, rather than limiting the reach of state sovereignty and jurisdiction. He also seriously questioned the need for any federal legislation.[248]

Despite the decision in *Cabazon*, state representatives remained wedded to the idea of state and local, rather than federal, regulation and law enforcement of Indian gaming. John Duffy, the Sheriff of San Diego County, speaking on behalf of the American Sheriff's Association, urged that state and local control of Indian gaming constituted an essential requirement because, based on Public Law 280, "[t]he citizens of San Diego County expect—and I think should reasonably expect—that laws are applied equally throughout San Diego County."[249] Thus, opponents of high-stakes Indian gaming already had begun cloaking their policy arguments in

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246. *Id.* at 173.

247. *Id.* at 172–73 (statement of Roger A. Jourdain, Chairman of the Red Lake Band of Chippewa Indians) (emphasis added).

248. Specifically, Chairman Jourdain argued:

> Indian tribes have been successful in their gaming operation and regulation under tribal laws. These operations have been free from the interference of organized crime. Orderly, crime-free gaming activities continue to be conducted on the Red Lake Band's Reservation. No proof or even allegation of the actual existence of "organized crime" has been made in any of the litigation and congressional hearings on Indian gaming activities. *Cabazon*, the Supreme Court noted that at no time did California state there was any criminal or organized crime involvement in the tribal gaming enterprises.
>
> Let me digress there just a second. If any organized crime wanted to come onto Red Lake Indian Reservation it would have to first apply for a passport to come on our aboriginal lands, so we've got full control of that. There's only one organized crime syndicate we can't deal with— they have been systematically destroying the economy of our Indian reservation and other reservations—that syndicated crime is none other than the Bureau of Indian Affairs.
>
> For the Federal Government to impose upon Indian tribes Federal bureaucratic control over what have become successful business activities developed solely through tribal self-determination would constitute a derogatory interference with tribal self-government and a breach of faith by the Federal Government.

Id. at 173 (statement of Roger A. Jourdain, Chairman of the Red Lake Band of Chippewa Indians).

249. *Id.* at 125 (statement of John Duffy, Sheriff, San Diego County).

the mantle of equality and opposition to Indian monopolies. They did so despite the fact that federal Indian gaming legislation actually equalized the opportunity of Indian governments to benefit from gaming. The federal legislation allowed the Indian tribes to benefit from the same type of gaming that was already available to all state, and in some states local, governments but to date had only been commercially exploited by Nevada and Atlantic City. Rejecting the idea of federal, as opposed to state and local, regulation of Indian gaming, Duffy argued that "a Federal Commission as proposed in the legislation before you is incapable of regulating from [sic] gambling conducted for 500 Indian tribes in 50 different States from Washington, DC [sic]" and that such regulation is "best done at the local level when these sharp operations are involved."[250] Interestingly, Duffy argued that law enforcement problems in Indian gaming emerged not from Indian operated facilities, but from "profiteering management companies."[251]

Perhaps because the *Cabazon* decision raised the specter of serious gaming competition, Nevada gaming interests became far more active during the 100th Congress Senate committee hearings in seeking significant federal restraints on tribal gaming than they had previously. Prior to the 100th Congress, the primary gaming interest opposition to tribal high-stakes gambling came from horse and dog tracks—local gambling markets that competed directly with tribal operations. In the 1987 Senate hearings, the Senate Select Committee on Indian Affairs heard from Senator Reid of Nevada, who argued forcefully "for State regulation of gaming on all lands within a State [including Indian country], and against any exception to that rule."[252] Senator Reid bluntly indicated that the issue was "of the utmost importance, both to the future of my State's most important industry, [and] also to the integrity of the United States and to the well-being, safety, and honor of those who occupy Indian lands."[253] Senator Hecht, the other Senator from Nevada, testified to the same effect and also offered a similarly supportive statement by Congresswoman Barbara Vucanovich from Nevada.[254] Philip Hannifin, the former Chairman of the Nevada Gaming Control Board and a former Nevada gaming executive, echoed

250. *Id.* at 128 (statement of John Duffy, Sheriff, San Diego County).

251. *Id.* at 128–29.

252. *Id.* at 82 (statement of Sen. Reid).

253. *Id.*

254. *Id.* at 80–81, 190–91 (oral statement of Sen. Hecht and written statement of Rep. Vucanovich). Representative James H. Bilbray from Nevada also submitted a similar statement strongly urging "[t]he imposition of a state regulatory scheme on the Class III games operated on Indian lands [in order to] enhance both the appearance and the fact of integrity in the operation of the games." *Id.* at 202 (statement of Rep. Bilbray).

Senator Reid's plea, arguing that "any such Indian regulation [must] be conformed to existing State laws and regulations and that the Congress should not establish a scheme by which gambling would be allowed without experienced regulation, or that by way of regulation that which would be allowed would result in an uneven playing field . . . ."[255] He also focused on the externalities of gaming and suggested that permitting tribal gaming unfairly would export such problems to adjacent communities.[256] Stanley Hunterton, a former Nevada federal prosecutor with the Organized Crime Strike Force, testified that "[t]he process of gaming regulation and the process of rooting out the corrupting influences that are associated with legalized casino gaming are every bit as difficult professionally and emotionally as Senator Reid conveyed . . . ."[257] He therefore echoed Senator Reid's remarks, claiming, despite his eleven-year career as a federal prosecutor, that the federal Indian Gaming Commission was a bad idea since "I see no reason to believe, based on that 11 years of experience, that the Federal Government [sic] would do a better job than the states."[258]

The Reagan Administration Department of Justice, without providing any concrete evidence when asked, expressed their concerns regarding potential organized crime penetration of Indian class III gaming.[259] They therefore continued their opposition to permitting casino gambling in Indian country that was not regulated by state authorities. Accordingly, while noting some problems with the bill, Assistant Attorney General Victoria Toensing of the Criminal Division indicated that the Criminal Division

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255. *Id.* at 149 (statement of Phillip Hannifin, Former Chairman, Nevada Gaming Control Bd.; Former Chief Executive, Summa Corp.).

256. He indicated:

> One more thought for your consideration is that Nevada has experienced street crime rates that are in excess of what might be expected absent gambling–or the gambling environment, the 24 hours, a lot of whiskey, a lot of entertainment, a lot of romance and adventure and risk. In this context it must be pointed out that tribal reservations that most likely will be into this business are surrounded by urban areas of non-Indian jurisdiction, and by communities that will ultimately bear the expense and the penalty of trying to control this crime phenomenon attracted to its environment by the presence of the gambling.

Id. at 151–52.

257. *Id.* at 137 (statement of Stanley Hunterton, Att'y; Former Prosecutor, U.S. Dep't of Justice, Organized Crime Strike Force).

258. *Id.* at 138.

259. *Id.* at 95 (statement of Valarie Toensing, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice).

viewed the Inouye bill, S. 555, more favorably than the McCain alternative.[260]

Thus, at the end of the summer 1987 hearings, the Senate Select Committee on Indian Affairs had clearly narrowed the gulf between the parties, gaining acceptance for structuring the legislation around three classes of gaming. No one disagreed with affording tribes exclusive regulatory power over class I social and ceremonial gaming. After *Cabazon*, the states and the gaming interests seemed reconciled to the notion of tribal regulation of high-stakes bingo operations with federal oversight through approval of tribal gaming ordinances and management (and certain other) contracts as well as federal oversight and monitoring of facilities. Most interests seemed accommodated to the handling of such federal regulation of class II gaming though a national Indian Gaming Commission, although the precise details and structure of the Commission differed in various bills. While some disparity existed in the bills as to whether class II games should be defined to include non-banking card games, like poker, where legal under state law of the type approved in *Cabazon*, that difference did not appear to reflect a major point of contention. The major remaining point of disagreement involved the role, if any, of state regulators and law enforcement authorities in regulating and monitoring Indian class III gaming. The Nevada gaming interests fought hard to prevent any expansion of Indian gaming into the machine based casinos that functioned as the lifeblood of the gaming industry in that state. Based on the hearings during

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260. *Id.* at 92–93, 252–62. One fairly telling colloquy occurred during Ms. Toensing's testimony. She noted that

> [v]ery few states . . . allow casino gambling, but there are many more States that for 1 or 2 nights a year and for certain charitable purposes, allow the local churches to have Las Vegas evening, and therefore allow for a brief period and for limited amounts, the crap games and the roulette wheels and the card playings that are in the casino gambling.

Id. at 92 (statement of Valarie Toensing, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice). After so noting, she indicated that she hoped "that would not mean that the whole area of casino gambling is then allowed on Indian reservations under that civil regulatory analysis." *Id.* at 92–93 (statement of Valarie Toensing, Assistant Att'y Gen., Criminal Division, U.S. Dep't of Justice). Chairman Inouye then assured her "that [was his] intent as author of the measure." *Id.* at 93. Of course, S. 555 as it then stood during these hearings constituted a far different bill than the legislation that ultimately passed. It prohibited all class III gaming unless a tribe consented to complete state regulatory and law enforcement jurisdiction over such activities. S. 555, 100th Cong. § 11(d)(2)(A) (1987), *reprinted in Hearings on S. 555 and S. 1303*, *supra* note 230, at 21. Thus, the Inouye comments seemed to indicate that if a tribe consented to such state jurisdiction over class III gaming under his bill, the state jurisdiction over class III gaming the state assumed would not be restricted by the prohibitory/regulatory distinction otherwise applied to Public Law 280 transfers of criminal jurisdiction to affected states.

the summer of 1987, the Senate Select Committee on Indian Affairs was no closer to resolving that impasse after *Cabazon* than it had been before the Supreme Court announced that decision.

Interestingly, since almost none of the bills proposed prior to that time proposed to expressly repeal or modify the Johnson Act[261] in application to Indian country, the class III games most thought were under discussion at the time did *not* involve slot machines, but, rather involved certain banking card games, dice, and, perhaps, roulette (depending on whether a roulette wheel constitutes a gambling device prohibited by the Johnson Act). Because of the Johnson Act, slot machines in Indian country simply never constituted part of the debate, since almost no bills expressly proposed to repeal or modify the express statutory application of Section 5 of the Johnson Act[262] to Indian country. Almost entirely overlooked in the debate was a small provision in S. 555 that purported to indicate that the Indian country prohibition contained in section 5 of the Johnson Act[263] would not apply to any gaming conducted in conformity with that bill.[264] Since S. 555, as then drafted, required tribes to consent to both the application of state law and to state regulatory and law enforcement jurisdiction over such class III gaming, this provision applied to S. 555, as originally drafted, effectively made little change in the gaming landscape. The only real change was to permit tribes to conduct occasional casino nights with gambling devices permitted by state law in those states that permitted charitable organizations to do so. Of course, when this provision found its way into the final compromise version of the legislation it legitimized a far more profound change in the gaming landscape than perhaps Congress originally contemplated. In fact, more than any other single portion of IGRA, this three-line provision that originated in S. 555 and ended up in the final legislation without much serious attention during the hearings has been responsible for the massive financial success of Indian gaming in improving the reservation economies for certain well-positioned tribes.

A year later, during August 1988, the Senate Select Committee on Indian Affairs returned to attempting to forge successful compromise legislation. This time, unlike the efforts of the prior four years, the Committee successfully bridged the gulf that divided the interests sufficiently to secure broad enough support for the legislation to get it passed. The key to this last-minute compromise involved the decision to not finally resolve the issue of the scope of state jurisdiction and regulatory authority over class III

261. Pub. L. 81-906, 64 Stat. 1134 (1951) (codified at 15 U.S.C. §§ 1171–78).
262. 15 U.S.C. § 1175 (1992).
263. *Id.*
264. S. 555 § 11(d)(2)(E).

gaming and, instead, to punt the issue to later compacts to be negotiated between the tribes and the states.[265] Thus, rather than forcing tribes to accept a transfer to the states of jurisdiction over reservation gaming as a necessary precondition to engaging in any class III gaming, the compromise proposed to let the tribes and the states work that matter out on their own through compact negotiations.[266] Thus, rather than finally resolving the central issue that divided tribes from the states and the gaming interests, Congress decided to let those parties resolve the issue themselves after enactment of the federal legislation through tribal-state compacts.[267] This compromise, of course, had significant implications for the structure of the final legislation, since it meant Congress could not and did not significantly extend the federal regulatory power of the National Indian Gaming Commission to class III gaming beyond having class III gaming ordinances and management contracts approved by the Chairman. Not only did this last-minute compromise significantly limit the scope of federal regulatory oversight of class III gaming through the National Indian Gaming Commission (NIGC),[268] it produced significant statutory awkwardness over the power of the NIGC to approve class III management contracts.[269]

Based on its ultimate support for the final legislation, the Nevada gaming interests and congressional delegation clearly thought that by relegating class III gaming to the tribal-state gaming compact process, the compact compromise ultimately would mean full application of state law and full state regulation of any class III tribal gaming. This would protect their monopoly on gaming based on gambling devices otherwise prohibited by both the Johnson Act and the law in most states. Thus, they sought to employ federal law in the fashion it had been used since 1949 to reinforce their casino gaming monopoly, which had created Nevada's largest

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265. Wolf, *supra* note 127, at 86.

266. *Id.*

267. As one commentator put the matter, "[i]n sum, Congress 'punted' the issue of deciding state versus tribal jurisdiction to the states and tribes to negotiate amongst themselves on a case-by-case basis." Wolf, *supra* note 127, at 86.

268. *See* Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 137–40 (D.C. Cir. 2006) (NIGC lacks any powers of regulatory or monitoring oversight for class III gaming).

269. The original power to approve class II management contracts was codified at 25 U.S.C. § 2711 (1988). That section references class II management contracts, but remains silent on class III management contracts. Listed among the powers of the NIGC Chairman were to "approve management contracts for class II gaming *and class III* gaming . . . ." *Id.* § 2705(a)(4) (emphasis added). As a result of the last minute legislation redrafting caused by the compact compromise, Congress simply stuck a one sentence requirement for approval of class III management contracts into a different subsection of the statute dealing with class III gaming, rather than rewriting the section of the statute dealing with management contract approval. *Id.* § 2710(d)(9).

industry. That position may explain why the final versions of the bill quietly moved electronic and electromechanical facsimiles of class II games like bingo, lotto or pull tabs, from class II gaming (where they had been classified in prior versions of the bill) into the class III gaming category, while permitting electronic and electromechanical devices to be employed without a tribal-state gaming compact as aids in playing class II games.[270]

The compact compromise first publicly emerged when the Senate Select Committee on Indian Affairs reported out a significantly amended version of S. 555 on August 3, 1988.[271] The amended version of S. 555 adopted the results of *Cabazon* by including not only bingo, lotto, pull tabs, and punch boards within the definition of class II gaming[272] but also extending that definition to non-banking card games that were permitted in the states where they were played.[273] It also grandfathered all existing card games and individually owned class II games licensed by a tribe. However, all electronic or electromechanical facsimiles of games of chance like bingo were moved from class II, where they had been positioned by prior bills, to class III status with a one year grace period to permit the negotiation of compacts covering such machines during the grace period.[274] Class II games remained regulated concurrently by the tribes, through federally approved tribal gaming ordinances and oversight, and the National Indian Gaming Commission.[275] The new innovation, of course, involved the tribal-state compact as a means for resolving the impasse over the regulation of class III gaming. Rather than providing a fully developed regulatory regime for class III gaming, the legislation authorized the tribes and states to negotiate a regulatory structure.[276] Since the bill failed to make the federal government a negotiating party to the compact formation, it also failed to contemplate any active *federal* regulatory oversight over class III gaming by the National Indian Gaming Commission. Clearly, the tribes and the states could not agree among themselves to foist the entirety of the regulatory burden on the federal government. State and local law

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270. *See* 25 U.S.C. § 2703(7)(B) (1992).

271. S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071. While S. 555 became the legislative vehicle that resulted in passage of the Indian Gaming Regulatory Act, other bills were introduced in both houses during the 100th Congress, including H.R. 1079, H.R. 964, H.R. 2507, H.R. 3605, and S. 1303. The Senate report took account of these bills and reflected the incorporation of details of some and compromises on others. *Id.* at 4–5, 1988 U.S.C.C.A.N. at 3074.

272. *Id.* at 7, 1988 U.S.C.C.A.N. at 3077.

273. *Id.* at 9, 1988 U.S.C.C.A.N. at 3079.

274. *Id.* at 10, 1988 U.S.C.C.A.N. at 3080.

275. *Id.* at 7, 1988 U.S.C.C.A.N. at 3077.

276. *Id.*

enforcement officials had been so adamant on the issue of state jurisdiction that many supporters of the legislation, no doubt, expected most states to demand a transfer of regulatory and law enforcement jurisdiction (precisely what the original version of S. 555 had contemplated) as a necessary precondition to entering into any tribal-state compact to permit tribes to engage in any class III gaming.[277]

When the Senate Select Committee on Indian Affairs reported out their amended version of S. 555 containing their compact compromise, the final version of the Indian Gaming Regulatory Act had pretty much been put in place. Only drafting details and one major change in the structure of the National Indian Gaming Commission remained. As S. 555 came out of the Committee, the National Indian Gaming Commission was still composed of five full-time members.

Explaining their compact compromise, the Senate Select committee on Indian Affairs wrote:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.
>
> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and

277. The Senate committee report on S. 555 clearly reflected the expectation that state regulation would emerge from the tribal-state compact negotiations:

> [T]he Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming—many can and will.

Id. at 14, 1988 U.S.C.C.A.N. at 3084.

> State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.[278]

Elaborating upon the actual procedural operation of its compact compromise, the Senate Select Committee hit the nail on the head by identifying the central problem with the compromise as providing the states an incentive to negotiate in good faith. The report prophetically noted:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe[s] and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.
>
> The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. *That incentive for the States had proved elusive.*[279]

Despite the Committee's difficulty in finding an incentive for state good faith negotiation, their solution involved the imposition on the states of, what they thought, involved a legally enforceable duty to negotiate in good faith.[280] The means hurriedly chosen to enforce that obligation—tribal suit in federal district court against states that failed to negotiate in good

278. *Id.* at 5–6, 1988 U.S.C.C.A.N. at 3076.
279. *Id.* at 13, 1988 U.S.C.C.A.N. at 3083 (emphasis added).
280. *Id.* at 14–15, 1988 U.S.C.C.A.N. at 3084–85.

faith[281]—clearly imperiled, and ultimately doomed,[282] its carefully balanced negotiated compromise. By completely failing to consider the constitutional implications under both Article III and the 11th Amendment of the remedy hurriedly chosen, the Senate Select Committee on Indian Affairs crafted a carefully balanced compact compromise that ultimately turned out to be constitutionally unenforceable. This failure later proved to effectively give the states precisely what the committee report claimed it sought to avoid—a virtual state veto power over Indian class III commercial gaming in Indian country.

In his separate Additional Views appended to the Senate Report 100-446, Senator McCain nicely summarized the impasse that pushed the Committee into the tribal-state compact compromise and reinforced the point that Congress intended no transfer of regulatory control to the states. Reflecting on the various hearings, Senator McCain wrote:

> As the debate unfolded, it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition. Never mind the fact that tribes have used gaming revenues, and S. 1303 would have restricted their use, to support tribal governmental functions as well as addressing the health, education, social and economic needs of their members. Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe[s] have is negotiable.
>
> The debate now focuses on S. 555, as amended. The Committee Report is clear as to the purpose of Tribal/State compacts as called for in Section 11(d). I understand Senator Evans' concerns regarding the potential overextension of the intended scope of the Tribal/State compact approach. Toward this end, I believe it is important to again underscore the statement that appears on page 10 of the Report: "The Committee does not intend

281. *Id.* at 14, 1988 U.S.C.C.A.N. at 3084.

282. *See* Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (IGRA provisions for enforcement in federal district court of state obligation to negotiate compacts in good faith through a suit against the state declared unconstitutional since they violated the 11th Amendment).

> to authorize any wholesale transfer of jurisdiction from a tribe to a state.[283]

While Senator McCain opposed "wholesale" transfers of jurisdiction over Indian country to the states, and believed "the right of Tribes to be self-governing and to share in our federal system must not be diminished,"[284] no doubt many supporters of S. 555, even as amended, expected numerous *limited* transfers of jurisdiction to the states over class III tribal gaming to emerge from the tribal-state compact process envisioned by the legislation. Despite that expectation, ultimately few such jurisdictional transfers to the states were actually negotiated, leaving the National Indian Gaming Commission to attempt to fill that perceived vacuum without any direct statutory authority to do so.

The Senate took up debate of S. 555 on September 15, 1988.[285] During the debate, Senator Inouye clearly indicated that he thought the compact process would result in extensive *state* regulation of class III gaming. He said:

> Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level.
>
> Therefore, for those tribes wishing to engage in [class III] gaming, the most realistic option appeared to be State regulation. However, the committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming. Thus, the best option available is the approach taken by the committee on S. 555 and that is the tribal-state compact approach.[286]

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283. S. REP. NO. 100-446, at 33–34 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103–04.

284. *Id.* at 34, 1988 U.S.C.C.A.N. at 3104.

285. *See* 134 CONG. REC. S12643 (daily ed. Sept. 15, 1988).

286. *Id.* at 12650. During the debate on IGRA in the Senate, one exchange took place that ultimately would have long-term implications for the Rhode Island Narragansetts. Senator Pell of that State indicated that he had requested that language directly citing the Rhode Island Indian Claims Settlement Act, Public Law 95-395, be stricken from IGRA having received assurances that the jurisdictional provisions of that legislation would remain fully in effect with reference to gaming. *Id.* Senator Inouye responded that he had personally assured his colleague that "the protections of the Rhode Island Indian Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, *and regulatory* laws of the State of Rhode Island." *Id.* (emphasis added). Senator Chaffee of Rhode Island therefore clarified for the record that "any [Indian] high-stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State." *Id.* While not technically an amendment to the legislation, the NIGC and the

Clearly, the tribal-state compromise therefore constituted a useful *political* compromise to break the impasse that had stalled federal Indian gaming legislation for a half decade and therefore left Indian commercial gaming regulated only by the tribes that that conducted it (which many viewed, rightly or wrongly, as effectively unregulated). Nevertheless, Senator Inouye's explanation of the tribal-state compact compromise indicates how poorly Congress actually had thought through this last minute compromise. Clearly, no one envisioned the NIGC undertaking significant oversight and regulation of class III gaming beyond approving tribal ordinances. The anticipation involved employing *existing* state regulatory bodies. Nevertheless, since only Nevada, (where tribes really did not stand to profit from class III gaming since they could not effectively compete with the large established casino interests) and New Jersey (where there were no federally recognized tribes) actually permitted and heavily regulated large class III gaming operations, most states, just like the federal government, lacked extensive regulatory bodies to regulate class III gaming. Many states might have a horse or dog racing commission and a few states may have permitted and regulated card parlors, but such specialized bodies lacked the experience, expertise, and often the statutory power to deal with banking card games, roulette, and even video poker or slot machines that tribes might seek to undertake. Thus, for the most part, the regulatory mechanism that Senator Inouye claimed "already exists at the State level," did not actually exist.[287] From the standpoint of state governance, it certainly was unlikely a tribal-state compact could create a new state regulatory body not otherwise authorized by statute or confer on existing regulatory bodies powers not previously contemplated by state law. Likewise, given the intransigent opposition of Indian tribes to any transfer to the state of regulatory jurisdiction over their gaming operations, why Congress thought they would agree to such state regulation through the compact process remains unclear. Perhaps Congress believed that faced with the draconian choice provided by the section 11 of the Indian Gaming Regulatory Act of either no class III gaming or class III gaming with state regulation specified through an agreed upon compact, the tribes could cave and accept state regulation.

The critical flaw in that calculus appeared to be the unsupported and incorrect assumption that states already had in place full regulatory bodies

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federal courts have treated this so-called Chafee Amendment as limiting the rights of the Narragansett Indian Tribe to conduct any gaming under IGRA. *See* Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158 F.3d 1335, 1341 (D.C. Cir. 1998) ("[N]arragansetts are not the only tribe excluded from IGRA and subjected instead to state gaming law.").

287. 134 CONG. REC. at S12650.

capable of handling all types of class III gaming in which tribes might seek to participate. Outside of Nevada and New Jersey, no such bodies existed. Faced with the prospect of creating a whole new regulatory regime to oversee Indian class III gaming *without any federal funding to support such efforts*, most states only demanded very limited and relatively inexpensive regulatory oversight of Indian class III games during the subsequent compact negotiations. This left class III gaming primarily regulated by the tribes that conducted them. Hindsight therefore demonstrates that the tribal-state compact compromise, while a highly artful *political* compromise to secure passage of the legislation, totally failed to operate as the Senate envisioned. This failure was primarily because the Senate Select Committee on Indian Affairs, in its rush to secure passage of the legislation after having made its great political breakthrough, assumed that states already had in place extensive regulatory regimes that, by way of experience, expertise, and lawful powers, could fully deal with regulating Indian class III gaming. The record is devoid of any thorough investigation of this critical assumption.

Rather than examining the regulatory structure carefully, the Senators supporting the legislation spent far more time during the debate explaining the political elements of the compromise. Senator Evans, for example, emphasized that under the compromise, the parties would agree upon the regulatory structure by "sit[ting] down together in negotiations on equal terms and com[ing] up with a recommended methodology for regulating class III gaming on Indian lands."[288] He emphasized, however, that "when a tribe and a State negotiate a compact, there need be no imposition of State jurisdiction whatsoever."[289] Indeed, he prophetically noted that "[i]t is entirely conceivable that a particular State will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the particular tribe and State."[290]

Not surprisingly, Senator Reid of Nevada was particularly active during the debate over S. 555 in attempting to pick apart problems with the statute. In particular, he was concerned about the relationship of the bill to the Johnson Act prohibitions on gambling devices. He expressly requested that Senator Inouye confirm that the bill only provided a very "limited waiver" of the Johnson Act for those tribes that have successfully negotiated a tribal-state compact.[291] Senator Inouye confirmed that reading, noting that

288. *Id.* at S12651.
289. *Id.*
290. *Id.*
291. *Id.* at S12650.

as reported by the Committee the bill "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State in which the tribe is located."[292] Therefore, Senator Inouye assured Senator Reid that the bill was "not intended to amend or otherwise alter the Johnson Act in any way."[293] The fact that this answer fully satisfied Senator Reid, who during the hearings on S. 555 had strongly opposed any expansion of Indian gaming into casino competition with the Nevada gaming interests, clearly demonstrates that Congress failed to fully appreciate the importance of the Johnson Act exemption and the likelihood that it would facilitate the development of full-blown casinos in Indian country. Perhaps this failure of foresight developed from the incorrect assumption that states could not or would not agree in compact negotiations to Indian gaming that included gambling devices. Clearly, despite the Johnson Act exemption briefly discussed in this exchange, most who discussed the bill seemed to assume that Indian class III gaming might include at most banking card games and dice, as prior Indian efforts had done.

On the Senate floor, Senator Inouye, the floor manager of the bill, successfully offered a set of amendments (Amendment No. 3039),[294] mostly technical, to alter the bill that emerged from committee. Among those amendments, however, were several suggested by Senator McCain. One amendment reduced the size of the National Indian Gaming Commission from five members to three.[295] Another amendment added "lotto" to the definition of class II games despite the fear of some states of competition with their state lotteries.[296] These amendments also finalized the ability of tribes to reduce federal regulatory oversight of their class II bingo operations by securing a certificate of self-regulation after a three-year period (at least one of which must be after the effective date of IGRA) of problem-free management and regulation of their games.[297]

Interestingly, most of the floor opposition to S. 555 in the Senate came from Senators who claimed that tribes in their states opposed the legislation. Senator Daschle of South Dakota indicated that "[m]y reason for opposing the bill is that those Indian tribes from South Dakota whom I represent have informed me that this bill is unacceptable."[298] Their concerns centered on

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292. *Id.*
293. *Id.* at S12651.
294. *Id.* at S12652.
295. *Id.* at S12653.
296. *See id.* at S12650, S12652.
297. *See id.* at S12652–53.
298. *Id.* at S12657.

state interference with the exercise of their sovereign powers.[299] Similarly, Senator Burdick of North Dakota indicated that he opposed the bill because "the final bill has met with great opposition by tribes in my State of North Dakota," as well as garnering opposition, for different reasons, from the North Dakota Attorney General.[300] Despite this token opposition, the Senate passed the legislation by voice vote.[301] In 1988, the Indian gaming issue simply had not attracted the level of controversy that would later emerge as tribes capitalized on the gaming expansion opportunities afforded by IGRA.

Having already held extensive hearings and having passed similar, but not identical, legislation in the prior Congress, the House of Representatives took up S. 555 and voted to suspend the rules and debate the bill as passed by the Senate without again sending it through committee.[302] After voting to directly consider S. 555 without committee action, debate commenced in the House of Representatives on September 27, 1988,[303] with Representative Udall, who first proposed federal Indian gaming legislation four years before, serving as floor manager for the bill. Representative Vucanovich of Nevada, like her fellow Senators, was satisfied with the legislation, despite her prior concerns regarding the impact of Indian gaming legislation on her state's largest industry. She argued that the Senate bill "represents a sound attempt by Congress to strike a fair balance among the many parties who have interests at stake in the regulation."[304] Nevertheless, the bill encountered some opposition from House members who still sought greater state control over Indian gaming. Representative Shumway, who had previously offered legislation subjecting Indian gaming to state law and regulation, opposed passage of S. 555 and indicated:

> I make no secret of my personal opposition to using gambling as a means to raise money. However, I also believe that the decision to permit gambling should be left up to the individual States. In States where gambling is permitted, a mechanism is already in place to police and oversee the games of chance. It makes far more sense to permit the states to extend existing regulations to games taking place on Indian lands. There is no need to establish more Federal Government.[305]

299. *Id.*
300. *Id.* at S12655.
301. *See id.* at S12657.
302. 134 CONG. REC. H8146 (daily ed. Sept. 26, 1988).
303. *Id.*
304. *Id.* at H8154.
305. 134 CONG. REC. E3103 (daily ed. Sept. 27, 1988).

Ultimately, the House of Representatives passed S. 555 without any amendments by a vote of 323 in favor and only 84 opposed, again reflecting the relative lack of public controversy surrounding the legislation.[306] President Reagan signed the bill into law on October 17, 1988.[307]

III. IGRA: RETURN OF THE BUFFALO OR FEDERAL USURPATION OF TRIBAL SOVEREIGNTY

Given the subsequent enormous success of Indian gaming, the heated tribal opposition to the passage of IGRA seems, with the benefit of hindsight, quite difficult to understand. North and South Dakota tribes had lobbied their Senators to oppose the bill, the New Mexico lobbying delegations thought passage meant "the game was over," and the Red Lake Chippewa and Mescalero Apache Tribes unsuccessfully sued to enjoin enforcement of IGRA, claiming the law was unconstitutional.[308] Yet today, from the perspective of 2008 looking backward at this history, most rightly would argue that for the minority of tribes that have significantly benefited from gaming, due mostly to their location, IGRA represented the first major reverse capital flow into (rather than out of) Indian country since contact with Euro-American settlers. For them, IGRA clearly represented a return of the buffalo to Indian country, *not* a federal usurpation of tribal sovereignty, as seen by some tribes when it passed. So how could so many tribal leaders have been so wrong about IGRA?

The answer to this question seems to lie in the binary way in which tribal leaders and some Indian advocates perceive decisions affecting Indian country—the tribal sovereignty filter. Through this binary, monochromatic filter, new case decisions or laws are either black or white—they are either good or bad for tribal sovereignty. A good illustration of this problem involves the position of the late Chairman Roger Jourdain of the Red Lake Chippewa Tribe toward both *Cabazon* and IGRA. Since *Cabazon* rejected state claims to regulatory power over Indian gaming, he saw the decision as good for tribal sovereignty. Hence, in his view, the decision must have "held that *Indian tribes have inherent sovereignty* to operate and regulate tribal bingo and card games outside the scope of State and county regulatory laws,"[309] when its actual holding really was limited to *state* claims of power to regulate Indian gaming. Similarly, S. 555 and,

306. 134 CONG. REC. H8426 (daily ed. Sept. 27, 1988).

307. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2710).

308. Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9, 10 (D.D.C. 1990).

309. *Hearings on S. 555 and S. 1303*, *supra* note 230, at 172–73 (emphasis added).

ultimately, IGRA placed some regulatory oversight on class II gaming and imposed new conditions on class III gaming not otherwise evident in *Cabazon*. Accordingly, through the binary, monochromatic filter of tribal sovereignty, IGRA must be bad for tribal sovereignty and, therefore, forcefully opposed. Chairman Jourdain, of course, forcefully undertook to do both through lobbying and litigation.

Reading Indian law developments through the binary, monochromatic filter of tribal sovereignty unfortunately totally masks details and nuance. That view asks only whether the "good guys" won or lost in any decision affecting Indian country. Real life is never that simple. For example, in *Cabazon*, only the states lost their claims to regulatory authority. While the tribal plaintiffs won their case, they did not even secure a declaration that their tribal bingo operations and card parlors were lawful since they only sought to enjoin state, not federal, regulation of their operations. Thus, the holding of *Cabazon* actually involved a far more limited decision than Chairman Jourdain and other tribal advocates following his approach understood. Likewise, despite the fact that IGRA probably gave more power and decisional choice to the tribes than it curtailed, Chairman Jourdain and many other tribal leaders opposed the legislation based on the mere fact that it provided federal regulatory oversight of existing tribal class II gaming through the National Indian Gaming Commission and prohibited expansion of gaming beyond what *Cabazon* factually permitted without securing a tribal-state compact. These tribal leaders, seeing IGRA through the binary, monochromatic filter of tribal sovereignty, considered IGRA a major defeat for tribes.

Obviously, IGRA, like *Cabazon*, involves far more complex trade-offs than the binary, monochromatic filter of tribal sovereignty highlights. To accurately assess any legislative compromise like IGRA it is necessary to carefully weigh what tribes gained and what compromises they were forced to make to further those gains. That cannot be done through a binary, monochromatic filter of tribal sovereignty, but, instead, requires a far more careful and complex analysis of developments affecting Indian country.

In the case of IGRA, Indian tribes *gained* far more than they were forced to compromise from the final bill that passed. Perhaps the single most important, and certainly the single most lucrative, gain involved the express exemption from the Johnson Act for tribal class III gaming conducted pursuant to a tribal-state compact.[310] Without this express exemption from the Johnson Act, none of the slot machines, video poker machines, or perhaps even roulette wheels, which constitute the cash cows of modern

310. 25 U.S.C. § 2710(d)(6) (2006).

Indian gaming, would have been possible since all such gambling devices were expressly prohibited in Indian country under section 5 of the Johnson Act.[311] Second, despite the overt silence of IGRA on the question, Indian tribes *implicitly* gained a waiver or implied limitation of the Assimilative Crimes Act and the Organized Crime Control Act to lawful Indian gaming under IGRA. *Sosseur*, *Dakota*, and *Farris* had already been successfully employed to shut down Indian gaming facilities and prosecute their operators where violative of state law.[312] Since the OCCA applied to bingo that was illegal under state law and *Dakota* had held that the prohibitory/regulatory distinction did not apply to OCCA, this gain involved nothing less than a resolution of the remaining legal question about class II gaming that *Cabazon* left unresolved. Third, Indian tribes gained the advantage of a relatively clear federal statutory preemption of state jurisdiction over their gaming enterprises, i.e., a statutory codification of *Cabazon*, thereby limiting the effects of case alteration that sometimes occurs with legal precedents. Fourth, while Indian tribes thereafter would continue to push the envelope, Indian gaming interests gained some greater clarity from IGRA as to the outside limits of their lawful gaming without a tribal-state compact and for which gaming the tribes needed to negotiate compacts with the states. Fifth, since *Cabazon* had not discussed any class III gaming, Indian tribes also gained an express preemption of any state regulatory role in such actions other than those upon which they agreed through a tribal-state compact. Sixth, Indian tribes also gained a weakening of any state arguments regarding the ability to tax the proceeds of Indian gaming operations or the gaming transactions through the anti-state tax language of IGRA.[313]

The compromises struck in IGRA required tribes to give up remarkably little to gain these advantages. Clearly, the claimed right they relinquished to which most tribes objected involved the so-called "right" to conduct class III gaming without entering into negotiations with their "deadliest enemies,"[314] the states. In reality, however, that "right" involved a largely

311. 15 U.S.C. § 1175 (2006).

312. *See also* United States v. Burns, 725 F. Supp. 116, 124 (N.D.N.Y. 1989) (noting IGRA "evidences no intention to eradicate existing federal or state laws governing gambling," particularly for conduct occurring *before* the effective date of IGRA, but holding that "IGRA makes 15 U.S.C. § 1175, and other statutes, including 18 U.S.C. § 1955, inapplicable to class II bingo and lotto gaming") (emphasis omitted).

313. 25 U.S.C. § 2710(d)(4).

314. The Supreme Court recognized this tribal-state antagonism as long ago as its decision in United States v. Kagama, 118 U.S. 375, 384 (1886), when it referred to the states as the Indians' "deadliest enemies." The tribal antipathy to state regulation or even dealing with state authorities has persisted since that time.

theoretical claim. The prohibition on gambling devices in Indian country contained in section 5 of the Johnson Act[315] already foreclosed the tribes from entering into the most lucrative forms of class III gaming. Additionally, the federal government had shown considerable willingness in *Sosseur*, *Farris*, and *Dakota* to use the Assimilative Crimes Act and the Organized Crime Control Act to prevent the tribes from entering into the remaining forms of class III gaming—card games, dice, and betting on sports events, including horse and dog racing. Thus, at most, the "right" to engage in class III gaming unfettered by state law or regulation remained largely theoretical. Second, in exchange for the advantages listed in the prior paragraph, Indian tribes also were forced to accept some new regulation and oversight of their existing business models through the NIGC. Their class II games could be regulated and monitored, although IGRA significantly tempered this new requirement by permitting the tribes to secure a certificate of self-regulation after three years of successfully complying with IGRA requirements.[316] Thus, this new oversight provided little onerous new federal regulation. Tribal management contracts were significantly limited and required federal approval,[317] although some such contracts may already have required federal approval under the provisions of 25 U.S.C. § 81.[318] Thus, this change did not involve significantly greater intrusion into tribal affairs than already existed and, actually, was welcomed by many tribes. Under IGRA, all tribal gaming ordinances had to be approved by the Chairman of the National Indian Gaming Commission.[319] Even prior to IGRA, however, many tribes with Indian Reorganization Act (IRA) constitutions[320] had governing documents requiring some or all of their ordinances, including any gaming ordinances, to be approved by the Secretary of the Interior, as the facts in *Cabazon* demonstrate the Cabazon and Morongo Bands had done. Thus, for such IRA tribes IGRA only transferred this approval requirement for gaming ordinances from the Secretary to the Chairman of the NIGC. For those few tribes without IRA constitutions, like the Navajo Nation, or with amended IRA constitutions that omitted any such federal approval requirement for their tribal ordinances, this new approval requirement for gaming ordinances, however,

315. 15 U.S.C. § 1175.

316. 25 U.S.C. § 2710(c)(3).

317. *Id.* §§ 2710(d), 2711.

318. *See, e.g*, Barona Group of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc., 824 F.2d 710, 720 (9th Cir. 1987); A.K. Mgmt. Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 787 (9th Cir. 1986); Wis. Winnebago Bus. Comm. v. Koberstein, 762 F.2d 613, 619 (7th Cir. 1985).

319. 25 U.S.C. § 2710(b)(2), (d)(2)(B).

320. 25 U.S.C. § 476 (2006).

did provide a new type of federal oversight of their exercise of their sovereignty, albeit only for gaming ordinances. Significantly, the Red Lake Chippewa Tribe and the Mescalero Apache Tribe were not tribes for which this federal approval requirement was new. IGRA also imposed on tribes a new requirement to secure federal approval for any plan to distribute gaming revenues *per capita* to members, presumably to prevent political favoritism or corruption.[321] Finally, by providing that Indian gaming could only be operated by an Indian tribe,[322] IGRA expressly curtailed the opportunity that some tribes, like the Puyallup Tribe, sought to pursue of licensing individual Indian gaming entrepreneurs. On balance, one can see that, given the existing structure of federal law, Indian tribes traded off little to gain quite a bit.

By contrast, federal, state, and gaming interests gained little from IGRA. States, which effectively had been dealt out of Indian gaming regulation by the structure of federal Indian law and the decision in *Cabazon*, did gain a voice in the conduct of class III gaming within the state through the tribal-state gaming compact compromise. Congress clearly saw that compromise as only providing the states with a voice on the question, not a final veto. Unfortunately, the failure of Congress to consider 11th Amendment and Article III constitutional issues with their last-minute compact compromise created serious problems of legislative drafting that converted, through judicial decision,[323] what Congress initially intended to be a state consultative role on the regulation of class III, into a virtual state veto on the question.[324] Eventually, the tribes on their own successfully developed revenue sharing as an extra-statutory device to provide the necessary incentive to states to come to the compact negotiating table and negotiate class III gaming compacts in good faith. Such monetary carrots (some might call them bribes) ultimately have worked far better than the ill-conceived litigation stick Congress provided the tribes in IGRA. Thus, while Congress, by its own admission, had great difficulty coming up with

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321. 25 U.S.C. § 2710(b)(3).

322. *See id.* § 2710(b), (d).

323. Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (holding 5-4 that the provisions of 25 U.S.C. § 2710(d)(7), authorizing tribal enforcement of the legal duty imposed on the states to negotiate tribal-state compacts for class III gaming in good faith, could not be constitutionally enforced against any state claiming state sovereign immunity due to the 11th Amendment).

324. In an attempt to fill this judicially created gap and redress the problems with the Indian Gaming Regualatory Act enforcement mechanism created by the Supreme Court's *Seminole Tribe* decision, the Secretary of the Interior promulgated regulations providing a regulatory substitute that relied on administrative invitations to the state to participate, rather than a compulsory process. 25 C.F.R. Pt. 292. The Fifth Circuit recently found these regulations to be statutorily unauthorized and therefore legally invalid. Texas v. United States, 497 F.3d 491 (5th Cir. 2007), *cert. denied sub nom.*, Kickapoo Traditional Tribe v. Texas, 129 S. Ct. 32 (2008).

an incentive to force the states to negotiate class III gaming in good faith, the tribes ultimately successfully surmounted that problem in most instances. Out of the compacts, Congress also anticipated states might gain a regulatory role for class III gaming, with tribal consent and some reimbursement for any costs attendant to such regulation. Thus, without agreement and a compact, states only gained from IGRA a seat at the class III negotiating table and nothing more. At the time, however, many tribes treated the passage of IGRA as if it meant the complete application of state law to class III gaming, which it clearly did not indicate and has not meant.

The federal government probably lost more than it gained through IGRA. While it gained greater regulatory oversight of at least class II gaming through the NIGC, oversight of *per capita* distributions of gaming revenue, and control over tribal gaming ordinances and management contracts (much of which it already exercised), it either expressly or implicitly lost application of the Johnson Act, the Organized Crime Control Act and the Assimilative Crimes Act to Indian gaming. No longer could federal prosecutors employ these federal statutes to protect the Nevada and Atlantic City gaming monopolies while denying similar economic development opportunities to Indian tribes.

In that sense, the established gaming interests actually were the biggest losers in the enactment of IGRA. The Nevada congressional delegation lobbied hard and thought they had secured full protection for their tourist monopoly through the class III compact compromise and the very "limited waiver" of the Johnson Act attached thereto. They had no realization, however, that IGRA would usher in a new era of tribal governmental equality with states on the question of permitting class III gaming, including the lucrative slot machines, video poker, roulette, and blackjack tables that built Las Vegas, Reno, Tahoe, and Laughlin, Nevada. No longer would Nevada and Atlantic City constitute the exclusive gamblers' tourist destinations in the country; thanks to IGRA a new form of tourist destination would rise in Indian country.

CONCLUSION

Hindsight tells us that enactment of the Indian Gaming Regulatory Act of 1988 did indeed herald the return of the buffalo for many successful gaming tribes. For them, IGRA produced the first sustained capital flow into, rather than out of, Indian country since their tribal members first found foreign light-skinned Euro-Americans roaming, and eventually settling on, their lands. IGRA therefore produced nothing less than the first sustained reverse capital flow since contact. The fact that this reverse capital flow

contradicts a colonial paradigm in which Euro-American settlers get to exploit native resources, but not the reverse, helps explain why the statute has been so incredibly controversial with the public, when not originally highly controversial when passed. Clearly none of the interests fully understood the ramifications of IGRA when passed. Tribal interests opposed it for curtailing their gaming opportunities and enlarging the states' role when, in fact it did neither and on the first question greatly enlarged tribal gaming opportunities. State interests rejected it because it failed to give them complete regulatory control over Indian gaming even though the tribes thought it excessively enlarged state power. The United States Department of Justice and the rest of the Reagan Administration only reluctantly supported it, believing that it provided inadequate regulation of the growing Indian gaming industry. Congress failed to provide any federal regulation for class III gaming, believing that through the tribal-state gaming compact process Indian tribes would voluntarily make themselves subject to state gaming law and state gaming regulation through state regulatory bodies they erroneously thought already existed.[325] And ultimately the gaming interests, led by the Nevada congressional delegation, reluctantly supported the bill, incorrectly believing that it had sufficiently curtailed tribal gaming opportunities that the tribes ultimately would pose no threat to their entrenched monopoly in the casino business. With the benefit of hindsight, all the players at the IGRA table were fundamentally wrong. The big winners in the process turned out to be many of the very Indian tribes that had opposed passage of the legislation. But hindsight is always better than foresight.

325. While Virginia Boylan advised the author during a conversation on October 16, 2008 that the Congressional staff fully appreciated the important potential tribal gaming expansion possibilities posed by the Johnson Act exemption for class III gaming in IGRA, the significance of that understanding was considerably underplayed, intentionally or otherwise, during the debates and in committee reports. Thus, review of the congressional records underlying the enactment of IGRA offers little appreciation by most parties of the importance of IGRA in *facilitating* class III gaming. Rather, the misguided focus of concern at the time was that without additional federal regulation *Cabazon* might permit the Tribes to move unregulated gaming into massive casino-style gaming—a greatly exaggerated concern in light of the Johnson Act, *Sosseur*, and *Dakota*. Thus, supporters of the legislation saw IGRA as regulating otherwise unregulated tribal gaming and limiting class III expansion instead of understanding that it actually *facilitated* the tribal development of casino gaming, i.e., a broad expansion beyond the class II gaming that predominated when IGRA was enacted.