

Gambling on Proposition 1A: The California Indian Self-Reliance Amendment

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“We can’t go back. The bridge is gone.”

—Strong Eyes¹

THE JOURNEY BACK towards tribal self-sufficiency has been long and hard: For nearly two centuries, California Native American² tribes have been forced off their lands, enslaved, and even systematically murdered.³ Their children have been taken from them, and their tribal cultures devastated.⁴ Even though American Indian reservations continue to represent the nation’s poorest communities,⁵ tribal government gaming has revealed a new path, and now offers hope for an easier future.⁶

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1. As quoted by JOYCE SEQUICHIE HIFLER, *A CHEROKEE FEAST OF DAYS* 105 (Council Oak Publishing Co. 1992).

2. “Native American” and “American Indian” are terms used interchangeably in this Comment to refer to cultures indigenous to the United States. The term “Indian,” alone, is also used as defined in 25 U.S.C. § 1903(3) (as “any person who is a member of an Indian tribe”) and in reference to terms of art such as “Indian Country.”

3. See Michael Lombardi, *Long Road Traveled I: From the Treaty of Temecula to the Pala Compact*, CAL. INDIAN GAMING NEWS, <http://www.cniga.com/facts/history.php> (last visited Mar. 26, 2002) [hereinafter Lombardi I].

4. See Indian Child Welfare Act, 25 U.S.C. § 1901 (2001).

5. See Status on Economic Impact of Indian Gaming, at <http://indiangaming.org/info/pr/statistics.shtml> (last visited Mar. 26, 2002) [hereinafter Economic Impact].

6. California is home to approximately 320,000 tribal members—more than any other state in the nation. However, California Indians have less income, less education, less land per capita, greater unemployment and higher poverty rates than non-California Indians. Additionally, although California Indians make up twelve percent of Indians nationwide, they receive less than one percent of all federal general assistance funds. See *California Indians Past and Present*, Alliance of California Tribes Website, at <http://www>.

"Indian gaming may not be the best thing in the world, but it's the only thing that seems to work."⁷ While gambling may be considered a vice by some, no other means of economic development has proven as fruitful for overcoming the extreme poverty of the past. Indian government gaming generated \$12.7 billion in 2001; the \$9.7 billion generated in 2000 represented a more than two thousand percent increase since the Indian Gaming Regulatory Act⁸ ("IGRA") was passed in 1988.⁹ At Foxwoods Resort Casino in Connecticut, the most successful tribal casino in the nation, the October 2001 slot machine win hit sixty-three million dollars.¹⁰ With New York,¹¹ Arizona,¹² Texas,¹³ and other states having recently passed or currently considering legislation to legalize tribal gaming, the total revenue generated by Indian casinos is poised to explode, surpassing even these staggering figures.¹⁴

In California, gaming has proven to be an invaluable resource for tribal governments for more than a decade, producing unprecedented revenue to help tribes provide for their members.¹⁵ Tribes

allianceofcatribes.org/californiaindians.htm (last visited June 29, 2002). Consequently, the income generated by tribal casinos has the potential to make a greater proportional impact in California than anywhere else in the nation.

7. James May, *California Indian Gaming Issues and Politics—Part 3 of 3*, INDIAN COUNTRY TODAY (Mar. 26, 2002), <http://indiancountry.com/?1017148100> (last visited Mar. 26, 2002) [hereinafter *Issues and Politics*] (quoting an anonymous Washington, D.C. tribal attorney).

8. 25 U.S.C. § 2710 (2001).

9. See Cong. Testimony, 2001 WL 21757797, July 25, 2001. Today, well over two hundred tribes in twenty-nine states operate casinos. See Mike Adams, *Niagara Falls Pulls for Jackpot*, SUNSPOT.NET MARYLAND'S ONLINE COMMUNITY, May 28, 2002, at <http://www.sunspot.net/news/nationworld/balte.gamble28may28.story?collfal%2Dhome%2Dheadlines> (last visited June 1, 2002).

10. See Ann Baldelli, *Slot Machines at Casinos Remain Hugely Successful*, THE DAY (Connecticut) (Nov. 16, 2001), <http://www.theday.com/news/ts-re.asp?NewsUID=15BD8F47-396C-4570-9802-E66D28D29F8B> (last visited Nov. 17, 2001).

11. See Tony Batt, *Casino Industry: Regulation of Gaming Suggested*, LAS VEGAS REV.-J. (Nov. 17, 2001), <http://www.lvrj.com/cgi-bin/printable.cgi?lvrj> (last visited Nov. 17, 2001).

12. See Tom Zoellner, *Tribes Gear Up for Casino Fight*, ARIZ. REPUBLIC (Nov. 14, 2001), http://www.lvrj.com/lvrj_home/2001/Nov-17-Sat-2001/business/17463507.html (last visited Nov. 17, 2001).

13. See Gary Scharrer, *Casino Backers Protest Cornyn Visit*, EL PASO TIMES (Nov. 15, 2001), <http://www.borderlandnews.com/stories/borderland/20011115-153165.shtml> (last visited Nov. 17, 2001).

14. Numerous states have recognized the fiscal benefits that tribal gaming can provide for state budgets. For example, New York legalized six new tribal casinos in October 2001 as part of a plan to help make up a nine billion dollar shortfall resulting from the September 11, 2001 terrorist attacks on the World Trade Center. See Batt, *supra* note 11.

15. See Batt, *supra* note 11.

have used casino proceeds to install modern water, sewer, and power lines—some obtaining these resources for the first time. Such proceeds have also helped generate the funds necessary to start other businesses, thereby aiding in economic development and diversification, and reducing tribes' dependency on gaming as a source of revenue.¹⁶ For tribes that have not elected to take part in gaming, or whose lands are too far from urban centers to make gaming feasible, revenue sharing agreements¹⁷ have reduced dependence on welfare, and produced critical income to ensure basic provisions for tribal members.¹⁸

Tribal casinos have also had a major impact on the communities surrounding Indian reservations. They have generated millions of dollars annually in federal taxes, contributed to tourism and related industries, and provided jobs (often in depressed areas) for thousands of non-Indians.¹⁹

Even though tribal gaming has blossomed into a multi-billion dollar industry, far more is at stake than mere dollars: For many tribes, gaming represents a critical means of affirming and exercising their governmental sovereignty. It has also meant developing political clout²⁰ and ensuring the self-sufficiency of their communities.²¹

16. See Ernest L. Stevens, Jr., *Letter to the Editor*, WALL STREET J., May 17, 2002, http://www.pechanga.net/press_release/national_indian_gaming_assoc2.htm (last visited May 19, 2002) ("Indian gaming rebuilds Indian Communities, creates full time jobs with benefits, reduces welfare . . . Nationwide, gaming has established 300,000 jobs, generated over \$3.5 billion in federal taxes and revenue savings, and generated over one billion dollars in state and local taxes."). The letter also asserts that the Viejas Band of Kumeyaay Indians in Southern California has used casino profits to "[build] a tribal school, [fund] a college scholarship program, [establish] fire, police and emergency medicine services and [build] a water reclamation and sewer system." See generally California Nations Indian Gaming Association Website, at <http://www.cniga.com/overview/index.php> (last visited Mar. 28, 2002).

17. Revenue sharing programs pool funds from the net winnings of gaming tribes, and then distribute the proceeds to non-gaming tribes to help with tribal sustenance and economic development. See Tribal-State Gaming Compact § 4.3.2 (Sept. 10, 1999), available at <http://www.cgcc.ca.gov/tsc.doc> (last visited May 26, 2002).

18. See Stevens, *supra* note 16. See also website, Yes on 1A Basic Facts (clarifying that such revenues are shared with non-gaming tribes to support these types of services) at <http://www.yeson1a.net> (last visited Nov. 18, 2001).

19. For example, tribal casinos in Riverside and San Bernardino Counties employed more than 8800 people at the beginning of February 2002. The estimated annual payroll for the five largest casinos in the region was one hundred and fifteen million dollars. See Jack Katzanek, *Economy: American Indian Tribes Already Employ Thousands and are Adding Jobs*, PRESS-ENTERPRISE (Feb. 24, 2002), at www.pe.com/cgi-bin/gold_print.cgi (last visited Feb. 24, 2002).

20. See May, *Issues and Politics*, *supra* note 7.

21. See Economic Impact, *supra* note 5. According to a recent survey, seventy-four percent of Americans believe that "strengthening tribal self-government is a national political

Nowhere has this been more true than in California. On March 7, 2000, the future of Indian gaming took a critical leap forward when California citizens and tribes passed Proposition 1A.²² This proposition amended the California State Constitution,²³ altering its anti-gaming provisions to expressly authorize slot machines and other previously prohibited forms of gaming in tribal casinos.²⁴ Since the proposition's passage, sixty-two²⁵ of California's one hundred and nine federally recognized tribes²⁶ have secured tribal-state compact agreements that allow tribes to legally own and operate casinos on tribal land.²⁷

It is hard to overestimate the impact that the passage of Proposition 1A has had and will continue to have in California and across the nation. California's approach toward tribal gaming and the compacts necessary to make such gaming legal provide one of two primary models for other states to follow as they define the scope of gambling

priority." See press release, PECHANGA.NET, at http://www.pechanga.net/press_release/survey_finds_american_people_su.htm (last visited Mar. 29, 2002) (survey conducted Feb. 14–20, 2002).

22. See S. Res. 142, Proposed S. CONST. Amend. 11, 1999-2000 Reg. Sess. (Cal. 1999) (providing the full text of the proposition), available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/1Atext.htm> (last visited Mar. 12, 2002).

23. See CAL. CONST., art. IV, § 19, cl. f (clause f added with the passage of Proposition 1A).

24. The Indian Gaming Regulatory Act ("IGRA"), see discussion *infra* Part I.A., established a classification system for tribal games, which ranges from Classes I–III. Slot machines are considered Class III gaming, which requires tribal-state agreements (or "compacts"). See Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (2001). See also 25 U.S.C. § 2703(8)(2001) (defining Class III gaming). The compacts that were validated by Proposition 1A's constitutional amendment are agreements between individual tribal governments and the state of California, that define the scope of on-reservation gaming. Such agreements are mandated by federal law, as necessary for the legal operation of "Las Vegas style" (*i.e.* Class III) gambling on Indian lands. See 25 U.S.C. § 2710(d)(1)(C). See also discussion *infra* Part I.A.

25. See California Gambling Control Commission Website, at <http://www.cgcc.ca.gov/tribalcasinos.shtml> (last visited Sept. 5, 2002). (Forty-six tribal casinos are currently in operation in California. Sixteen California tribes have signed compacts with the state but not implemented gaming).

26. See California Indian Legal Services Website, at <http://www.calindian.org/about/cils.htm> (last visited June 23, 2002) (explaining that the organization is partially supported by "California's 109 federally recognized Indian tribes").

27. While each tribe (as an independent sovereign domestic nation) has its own agreement with California and thus there are many tribal-state compacts, reference is made throughout this paper to *the* tribal-state compact. This singular indication references the model agreement originally drafted by several tribes and the state, on which all of the later, individual agreements were based. Tribal-State Gaming Compact, Sept. 10, 1999, available at <http://www.cgcc.ca.gov/tsc.doc> (last visited May 26, 2002) [hereinafter Tribal-State Gaming Compact].

within their borders.²⁸ Consequently, it is likely that much of the country will scrutinize the impact of California's compacts as tribal government gaming proliferates across the nation.

This Comment discusses the current and potential impact of the Proposition 1A constitutional amendment and its resultant compacts on tribal governments and their surrounding communities. It also details and proposes solutions to five of the most urgent issues now facing tribes and the state as they work together to shape an effective model for the future.

To place the importance of Proposition 1A's passage in context, Part I of this Comment summarizes the history of Indian gaming law and its relationship to tribal sovereignty. Specifically, Part I focuses on the roles of IGRA and the National Indian Gaming Commission²⁹ ("NIGC"), which provide federal oversight for tribal gaming. It also analyzes the practical impact of legal precedents including: *Seminole Tribe of Florida v. Florida*,³⁰ which serves as an impediment to tribes suing the states to enforce IGRA compliance; Proposition 5,³¹ the California Supreme Court-doomed predecessor to Proposition 1A; and *Hotel Employees and Restaurant Employees International Union v. Davis*,³² which held that the gaming authorized by Proposition 5 was unconstitutional. Lastly, Part I evaluates the legality of Proposition 1A and the tribal-state compacts it secured.

Part II of this Comment analyzes the current state of tribal gaming law in California and identifies five areas where the state has run into difficulties implementing California's compact provisions. It discusses: 1) several text-based ambiguities, such as the maximum number of machines that can be operated by tribes; 2) the model compact's renegotiation clauses and their potential impact on compact permanency; 3) the monopoly and equal protection issues argued by anti-tribal gaming interests; 4) the legality of the tribal-state compact's special distribution fund; and 5) concerns regarding how

28. See Zoellner, *supra* note 12 (describing how the California (or "first") approach consists of tribes and the state jointly negotiating a model agreement that is then ratified by voters, while the New Mexico (or "second") approach is comprised of the legislature drafting a tribal gaming compact without tribal input).

29. See 25 U.S.C. § 2704 (West 2001) (establishing the NIGC). Further information on the NIGC is available at www.nigc.gov (last visited Nov. 18, 2001).

30. 517 U.S. 44 (1996).

31. See Proposition 5—Full Text of the Proposed Law, at <http://Vote98.ss.ca.gov/VoterGuide/Propositions/5.htm> (last visited July 28, 2002).

32. 981 P.2d 990 (Cal. 1999).

the boundaries of a reservation are currently defined, and how they will be defined in the future.

Part III discusses potential approaches to resolving these issues, emphasizing the importance of a speedy, effective, and final resolution for tribal governments and the state of California.

I. Background: Judicial and Statutory Notions of Tribal Sovereignty

Although this Comment does not focus on the history of tribal gaming, a general understanding of tribal law and Native American history is critical to placing Proposition 1A in context. It is important to note that tribal-state relations have always filled a unique niche in American law: as sovereign domestic nations, tribes have a complex legal relationship with both state and federal governments.³³ Consequently, California tribes' potential for security—and in a few cases, even prosperity—balances on a long and often-misunderstood foundation.³⁴

A. Indian Gaming Regulatory Act

In the mid-1980s, tribes across the country increasingly operated bingo halls as a means of generating income.³⁵ In response, state and county governments tried to hold such halls subject to their gaming laws,³⁶ while tribes repeatedly asserted their sovereign immunity from state and county regulation.³⁷ In a landmark 1987 case, the United States Supreme Court sided with the tribes, holding that states and counties were unjustified in their attempted regulation of Indian bingo.³⁸ This decision served as a strong judicial affirmation of tribal self-governance, and offered hope for a new period of tribal government recognition. However, because states were dissatisfied with the

33. See, e.g., *Hotel Employees*, 981 P.2d at 1014 (Kennard, J., dissenting). See also 25 U.S.C. § 1901 (acknowledging the “special relationship” that exists between the United States and tribal governments). Understanding this relationship is especially critical considering that “the lives of Indians are impacted by law more pervasively than are the lives of most other Americans.” David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 296 (2001).

34. See generally, Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427 (2002).

35. See website, *History of IGRA*, National Indian Gaming Commission (“NIGC”), at <http://www.nigc.gov> (last visited June 30, 2002).

36. See *id.*

37. See *id.* Just like states cannot regulate one another but are subject to federal oversight, tribes are neither bound by the laws of the states or other tribal governments.

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

holding and its rejection of external oversight, Congress quickly enacted IGRA, which provided for expanded federal regulation of tribal gaming.³⁹ Simultaneously, Congress created the NIGC as an independent body to oversee IGRA compliance.⁴⁰

IGRA's primary function is to require that tribes establish compacts⁴¹ with states before they operate certain kinds of games.⁴² This requirement helped make tribal gaming the most heavily regulated form of gambling in the world.⁴³ IGRA also categorized tribal games into three classes: Class I includes "social games [with] prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."⁴⁴ Class II games include bingo (whether electronic or manual) and certain non-banked and non-electronic card games.⁴⁵ Class III is broadly defined as "all forms of gaming that are not Class I gaming or Class II gaming."⁴⁶

Tribal governments and the United States federal government enjoy varying and overlapping degrees of authority over the several classifications. Class I games fall within the "exclusive jurisdiction of the Indian tribes"⁴⁷ and are therefore exempt from state and federal

39. See website, National Indian Gaming Commission Home Page, at <http://www.nigc.gov> (last visited Nov. 17, 2001).

40. See *id.* The NIGC's stated mission includes regulating gaming on Indian lands in order to protect tribes from "organized crime and other corrupting influences," confirming tribes are the primary beneficiaries of gaming income, and ensuring that both players and operators conduct games "fairly and honestly."

41. Every Indian tribe that offers Class III gaming must have an individual agreement or "compact" with the state in which they reside. The purpose of the compact is to "govern the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). In California, a model tribal-state compact was created through negotiations with Governor Gray Davis, prior to the passage of Proposition 1A. The model compact served as the foundation for each compact later signed by individual tribes and the state. See Michael Lombardi, *Long Road Traveled II: Tribal Self-Sufficiency and the Battle for Proposition 1A*, CAL. INDIAN GAMING NEWS, at <http://www.cniga.com/facts/history.php> (last visited June 2, 2002) [hereinafter Lombardi II].

42. See Cynthia A. De Silva, Comment, *Waging the Wager War: Tribal Sovereignty, Tribal Gaming, and California's Proposition 5 and Chapter 409*, 30 MCGEORGE L. REV. 1025, 1053-55.

43. See *id.* at 1054-55 (1999). Gaming is monitored at the tribal level by tribal government regulatory bodies. It is also regulated by state gaming departments, the FBI, the NIGC, the Bureau of Indian Affairs, and the United States Department of Justice. See website, California Nations Indian Gaming Association Questions and Answers, at <http://www.cniga.com/facts/qanda.php> (last visited Apr. 3, 2002) [hereinafter Questions and Answers].

44. 25 U.S.C. § 2703(6) (2001).

45. See *id.* § 2703(7).

46. *Id.* § 2703(8). Class III games have traditionally included slot machines, and such games as baccarat, craps, and blackjack. See *Hotel Employees*, 981 P.2d at 998.

47. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(a)(1) (2001).

regulation.⁴⁸ By contrast, Class II games, as mentioned above, are subject to both tribal jurisdiction and IGRA's general provisions,⁴⁹ while Class III games are additionally subject to compacts that must be negotiated with states.⁵⁰ IGRA further mandates that Class III gaming only be conducted "in a State that permits such gaming for any purpose by any person, organization or entity,"⁵¹ meaning that tribes can generally only offer types of gaming already allowed in the state. This wording, however, is vague enough to have created significant legal controversy.⁵² For example, prior to the passage of Proposition 1A, California tribes argued that as soon as California enacted a state lottery, and thereby introduced a form of Class III gaming into the state, California tribes immediately became eligible to offer *any* kind of Class III gaming on their reservations. The state, however, asserted that tribes only became eligible to offer the same type of Class III gaming as that already conducted in California—specifically, a lottery.⁵³

IGRA had provided a built-in protection against abuse of the infringement on tribal sovereignty by requiring states to negotiate compacts with tribes in good faith.⁵⁴ However, the United States Supreme Court subsequently found that requirement unconstitutional.

B. *Seminole Tribe of Florida v. Florida*⁵⁵

In the landmark case *Seminole Tribe of Florida v. Florida*,⁵⁶ the Supreme Court precluded tribes' ability to hold states to their end of the IGRA agreement: to negotiate compacts if so requested. In *Seminole*, the Court found that requiring states to negotiate with tribes violates states' sovereignty under the United States Constitution's Eleventh Amendment.⁵⁷ This decision left tribes bound by IGRA, but precluded their ability to sue states for non-compliance.⁵⁸

Frustrated and angered by the betrayal, a handful of California tribes began to expand their existing gaming establishments without

48. *See id.*

49. *See id.* § 2710(a)(2).

50. *See id.* § 2710(d)(1)(C).

51. *Id.* § 2710(d)(1)(B).

52. *See, e.g.,* *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 999–1000 (Cal. 1999) (where the California Supreme Court debated the scope of gaming authorized by IGRA's text).

53. *See id.* at 999–1000.

54. *See De Silva, supra* note 42, at 1055–56.

55. 517 U.S. 44 (1996).

56. *See id.*

57. *See id.* at 76.

58. *See id.* at 56.

the IGRA-required compacts.⁵⁹ Although they continued to try to initiate negotiations with the state, the *Seminole* decision left them little bargaining power.⁶⁰ While IGRA allowed tribes to operate any type of gaming already conducted in-state,⁶¹ the California Constitution (as originally ratified in the nineteenth century) prohibited any form of gambling (although later amendments authorized bingo⁶² and horse-racing).⁶³ Then, the creation of a California state lottery created an even broader gaming possibility—and with it, even greater tribal-state conflict.⁶⁴

Several tribes broadly interpreted IGRA as authorizing lottery-style gaming devices that looked similar to California lottery keno machines. In turn, however, tribal gaming machines looked similar to traditional slot machines, although they operated off a lottery-style player pool system.⁶⁵ Consequently, the state characterized the tribes' machines as having greater similarity to illegal Vegas-style slot machines than lottery terminals, thereby disagreeing with tribes that such machines were permitted by IGRA.⁶⁶ Tensions between California's then-governor Pete Wilson and the tribes escalated: Tribes refused to give up the extremely lucrative machines, and the governor refused to negotiate compacts with tribes until they abandoned their new source of revenue.⁶⁷

C. California's Proposition 5: The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998

Because California's chief executive refused to negotiate the IGRA-required compacts and a judicial remedy had been foreclosed

59. See De Silva, *supra* note 42, at 1055.

60. See David B. Jordan, Note, *Rolling the Dice on the Cyber-Reservation: The Confluence of Internet Gaming and Federal Indian Law*, 24 AM. INDIAN L. REV. 455, 457 (2000).

61. See Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(B) (2001).

62. The operation of bingo is limited to charities.

63. See *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 997–998 (Cal. 1999) (addressing the similarities between slot and lottery machines).

64. See discussion *supra* Part I.A.

65. In a player pool system, casinos charge a flat fee per play. For example, the house may charge a player twenty-five cents each time she places a five dollar bet, regardless of whether she wins or loses. Any money won by the player is made up of funds lost by previous players, from which the house takes nothing. By contrast, Las Vegas-style slot machines offer "house banked" games, which enable the house to collect players' losses. See *Hotel Employees*, 981 P.2d at 1016–19. The tribes' primary argument was that unlike Las Vegas and New Jersey slot machines, their machines operated off a lottery-style player pool in which the tribes had no economic interest in the outcome. See *id.* at 1001.

66. See *Hotel Employees*, 981 P.2d at 1016.

67. See De Silva, *supra* note 42, at 1065.

with *Seminole*, the tribes turned to the state legislature for help.⁶⁸ In 1998, in an unprecedented show of unity,⁶⁹ dozens of California tribes came together in support of Proposition 5,⁷⁰ an initiative aimed at establishing a voter-backed model compact that would legalize their electronic gaming machines. The proposition contained a default provision that would trigger implementation of the Proposition 5 compact if the governor refused to negotiate individualized agreements.⁷¹ With their families' well-being and the functioning of their governments at stake, the tribes dedicated millions of dollars to the initiative.⁷² The opposition of California gaming facilities and Nevada casinos, which hoped to bar tribal competition, helped make the initiative the most expensive non-presidential campaign in the history of the United States.⁷³ While the people of California overwhelmingly passed Proposition 5,⁷⁴ the outcome was immediately challenged by its opponents in the courts.

D. *Hotel Employees and Restaurant Employees International Union v. Davis*⁷⁵

In *Hotel Employees and Restaurant Employees International Union v. Davis*, tribal gaming opponents claimed Proposition 5 violated the California state constitution, by allowing a prohibited form of gambling.⁷⁶ In his return to the plaintiffs' petitions, then-Governor Wilson filed his support on behalf of plaintiffs and in opposition to the

68. See *id.* at 1070–74, 1080–81.

69. Tribes are distinct government entities, and as such, they have historically conflicted with one another over such inter-governmental issues as land and water rights, etc., just like other government bodies. Because tribes have been fiercely (and understandably) protective of their individual, sovereign identities, as well as often isolated from one another politically, financially and geographically, their coming together to pass Proposition 5 marked an historically unprecedented unity. This united front has been one of the major elements credited for the successful passage of both Proposition 5 and Proposition 1A, as well as compact negotiations with the state of California. See, e.g., May, *Issues and Politics*, *supra* note 7.

70. See Yes on 1A Basic Facts Website, *supra* note 18.

71. See *Hotel Employees*, 981 P.2d at 1000–01. The default compact was triggered at the end of a thirty day period if the governor did not open negotiations upon any tribe's request.

72. See *Lawsuit Threatens California Indian Gaming*, ARIZ. CENTRAL (NOV. 16, 2001) (stating more than ninety million dollars was spent by Yes on Proposition 5 and its opposition), at <http://www.azcentral.com/archive> (last visited June 29, 2002).

73. See *id.*

74. See *id.* See also Lombardi II, *supra* note 41. Sixty-three percent of voters' voted for the proposition. See Questions and Answers, *supra* note 43.

75. 981 P.2d 990 (Cal. 1999).

76. See *id.* at 995.

tribes.⁷⁷ However, in the same election that had passed Proposition 5, the people of California had voted in a new governor, Gray Davis, who consequently became the new real party at interest.⁷⁸ One of Governor Davis's first tribal-related acts was to remove Wilson's support for the plaintiffs, and file a new return that established the governor's office as Proposition 5-neutral.⁷⁹

In a rare move, the California Supreme Court preempted California's lower courts from debating the proposition's constitutionality,⁸⁰ declaring the questions underlying *Hotel Employees* of great public importance and in need of urgent resolution.⁸¹ In its holding, the court interpreted the state's gaming provisions narrowly, determining that the proposition's authorization of electronic gaming machines conflicted with state constitutional law (which forbade "Las Vegas" style gambling), and declared the Proposition 5 compact "invalid and inoperative."⁸² Only Justice Kennard dissented, reasoning that the proposition could not be unconstitutional since the people's initiative power "must be *liberally construed* to promote the democratic process. . . ."⁸³ She argued further that "[b]ecause federal law has preempted the field of Indian gambling regulation, it is federal law, not state law, that authorizes Indian gambling."⁸⁴

In spite of the blow dealt by *Hotel Employees*, the governor recognized that the public's landslide support of Proposition 5 demonstrated a resounding approval of tribal gaming on tribal lands. Consequently, Governor Davis agreed to negotiate with a majority of the tribes to create a second model compact that could then be presented to the voters for ratification in the form of a proposed constitutional amendment.⁸⁵ In exchange for a percent of tribal gaming revenue,⁸⁶ the governor offered tribes even more than what they had sought with Proposition 5: Instead of offering a compact limited to preserving tribes' lottery-style, player pool terminals, he agreed to al-

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *Id.* at 994.

83. *Id.* at 1011 (Kennard, J., dissenting) (quoting *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991)) (alteration in original).

84. *Id.* at 1012.

85. *See* Michael Lombardi, *Long Road Traveled III: California Indian Self Reliance and the Battle for 1A*, CAL. INDIAN GAMING NEWS, <http://www.cniga.com/facts/history.php> (last visited Mar. 26, 2002) [hereinafter Lombardi III].

86. *See* discussion *infra* Part II.D.

low full Las Vegas-style slot machines,⁸⁷ as well as an exclusive right to conduct Class III gaming in the state.⁸⁸ The compact that emerged from the negotiations ultimately formed the basis for Proposition 1A, a governor- and tribe-backed proposal to modify the California constitution to legalize Class III tribal gaming on tribal lands.⁸⁹

E. Proposition 1A

The passage of Proposition 1A on March 7, 2000 added the following language to the California State Constitution:

[T]he Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.⁹⁰

The effects of this amendment are only just now beginning to be felt. In September 2001, Governor Davis appointed the last of five members to California's Gambling Control Commission, a new regulatory body that, in tandem with tribal government agencies, will ensure compliance with Proposition 1A's tribal-state agreements.⁹¹ The Commission also recently dispersed the first twenty-five million dollars from the compacts' revenue sharing fund to California's non-gaming reservations.⁹²

87. See *Hotel Employees*, 981 P.2d at 999. Slot machines are consistently the biggest casino money-makers. Tribal slot machines can each generate net proceeds of more than \$100,000 per year. See Mike Geniella, *Slots Pay Off Big for Indian Casinos*, PRESS DEMOCRAT, Jan. 2, 2002, www.pressdemocrat.com/local/news/02slots_b1.html (last visited Jan. 2, 2002).

88. See Tribal-State Gaming Compact, *supra* note 28, at Preamble § E.

89. See Lombardi II, *supra* note 41. See also CAL. CONST. of 1897, art. IV, § 19, cl. f. (clause f added with the passage of Proposition 1A).

90. See CAL. CONST. of 1897, art. IV, § 19, cl. f (amended 2000). California voters approved the passage of Proposition 1A by a landslide sixty-five percent. See Lombardi III, *supra* note 85.

91. See James May, *Gambling Control Commission Gets Senate Committee Support Not All Tribes Concur*, INDIAN COUNTRY TODAY (Aug. 24, 2001), <http://www.indiancountry.com/?article=170> (last visited Sept. 22, 2001) [hereinafter *Gambling Control Commission*]. See also LEGISLATIVE ANALYST'S OFFICE ANALYSIS OF THE 2001-2002 BUDGET BILL, CALIFORNIA GAMBLING CONTROL COMMISSION (0885), F-43 (2001).

92. See James May, *Lawsuit Threatens Proposition 1A*, INDIAN COUNTRY TODAY (Feb. 14, 2001), <http://www.indiancountry.com/?article=444> (last visited Oct. 5, 2001) [hereinafter *Lawsuit*].

II. Problems with California's Current Tribal Gaming Law

The first steps taken toward implementing the tribal-state compact have illuminated several problems regarding its interpretation and implementation. It is critical these issues be clarified as soon as possible through the legislative, executive, and judicial branches of government—in tandem with tribes—to avoid the very litigation the model compact was designed to circumscribe. It is especially important that these issues be clarified prior to March 2003, when tribes and the state become eligible to renegotiate the terms of their agreement.⁹³

Three issues complicate an easy resolution. First is the intergovernmental nature of the compacts. Tribal gaming law represents an intricate web of federal and state law, made even more complex by tribal government sovereignty. Maintaining the sovereign rights of each governmental body while simultaneously meeting each of their needs is extraordinarily difficult; additionally, it can be difficult to parse out whose laws control. Further, some issues involve the state and tribes, others tribes and tribes, and yet others tribes and outside private interests, such as the card room owners who also hope to gain the right to conduct Class III gaming.

Second is the difficulty of striking compromises among California's more than one hundred tribal governments.⁹⁴ For example, the needs of tribes that have as many as two thousand slot machines are very different from those of tribes without casinos, or remote gaming tribes with casinos capable of supporting only a small handful of machines. Thus, tribes occasionally conflict over which solutions will provide the best outcome for tribal members. Such dissention weakens the strength tribes have when working in sync as a united force.

A third unique problem is the ironic alliance of the outside interests that comprise their foes. These include California card rooms and Nevada casinos—who dread the competition from tribal casinos—and anti-gaming groups, who would like to eliminate gambling entirely. The power of these entities should not be underestimated, as they

93. See discussion *infra* Part II.B.

94. See James May, *Two Years After California's Proposition 1A, Indian Gaming Still Faces Controversy*, INDIAN COUNTRY TODAY, Mar. 13, 2002 (quoting tribal gaming consultant Michael Lombardi as saying "[i]t's almost impossible to get California tribes to unite or agree about anything," and explaining how the Spanish, American and Mexican governments have historically exploited inter-tribal conflict for their own purposes), <http://indiancountry.com/?1015866292> (last visited Mar. 13, 2002) [hereinafter *Two Years After*].

include some of the wealthiest corporations and individuals in the nation.⁹⁵

While several lawsuits challenging the constitutionality of Proposition 1A have already been filed and dismissed,⁹⁶ others are pending.⁹⁷ Even if these latter suits are similarly dismissed, more are sure to follow: There is too much at stake—for the tribes, for states, for private gaming interests, and for California voters—to avoid yet another fight.

A. Model Compact Ambiguities

Several text-based ambiguities within the compact must be clarified so that tribes and the state can appropriately and effectively fulfill the agreement's mandated requirements. These ambiguities have primarily focused on two provisions: the maximum number of slot machines authorized in-state,⁹⁸ and the regulation of revenue sharing,⁹⁹ as discussed below.

1. Slot Machine Maximums

One of the most publicized and criticized of the Proposition 1A compact provisions has been the complicated formula used to determine the maximum number of slot machines authorized in California.¹⁰⁰ Soon after the model compact's ratification, tribes and the

95. See, e.g., *Court Rebuffs Pataki In Suit Over Gambling*, Gambling Magazine, at <http://www.gamblingmagazine.com/articles/29/29-343.htm> (last visited Aug. 11, 2002) (discussing Donald Trump's involvement in fighting the approval of tribal casinos in New York).

96. See, e.g., May, *Gambling Control Commission*, *supra* note 91.

97. For example, recent lawsuits have claimed that giving tribes exclusive rights to Class III gaming violates the Equal Protection clause of the United States Constitution. California tribes have responded that the exception for tribes is not based on ethnicity, which would potentially implicate Equal Protection, but on tribes' government status, and thus is consistent with California's lottery provision (which allows the state to generate funds for government use) and its charitable gaming exception (which allows non-profits to conduct bingo games). See Don Thompson, *Court Decision Could Undermine Tribal Gambling, Bar First Urban Casino*, SACRAMENTO BEE, Nov. 16, 2001, <http://www.sacbee.com/static/live/news/calreport/N2001-11-16-1645-2.html> (last visited Nov. 17, 2001) [hereinafter *Court Decision*] (discussing card room operators' and gambling opponents' claim that the Proposition 1A amendment provides tribes with a Congressionally unintended monopoly on Class III gaming). While Judge David F. Levi of the United States District Court for the Eastern District of California recently resolved this issue in favor of tribes, the card rooms are already threatening to appeal. See Thomas Peele, *State Pacts with Tribes Within Law, Judge Says*, CONTRA COSTA TIMES, July 30, 2002, <http://www.bayarea.com/mld/bayarea/news/3762444.htm> (last visited July 30, 2002).

98. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.2.2.

99. See *id.* at § 4.3.2.1.

100. For a detailed description of the formula used, see *id.* at § 4.3.

state found themselves in the awkward position of disagreeing as to exactly how many machines had been approved.¹⁰¹ While the governor has traditionally asserted that the maximum statewide allotment is 45,206 machines,¹⁰² the Legislative Analyst's Office has estimated that the number actually allowed may be as high as 113,000.¹⁰³ Tribes similarly contend that the governor's maximum is too conservative.¹⁰⁴

Finalizing a concrete number has been complicated even further by the compact's slot machine sharing plan,¹⁰⁵ which enables tribes with large casinos to lease non-gaming and smaller tribes' allotments. Such leases enable remote tribes to benefit financially from their allotment, even if they never operate casinos. They also allow tribes with larger casinos to maximize profits by enabling them to put into play a greater number of machines than the per tribe 2000 machine cap (and thereby add additional net revenue to the tribal revenue sharing fund discussed below, maximizing the net proceeds that can be distributed to nongaming tribes).¹⁰⁶ Because slot machines are extraordinarily lucrative, but the state wants to cap the total number in play to limit the spread of gambling, the number permitted will continue to be a major issue when compact renegotiations begin in March 2003.¹⁰⁷

2. Revenue Sharing

Conflict has also arisen regarding tribes' eligibility for revenue sharing funds and whether tribes can be required to share their proceeds with other tribes.¹⁰⁸ The revenue sharing funds consist of a pool of money generated by gaming tribes for allocation to non-gaming tribes.¹⁰⁹ The tribal-state compact expressly provides up to \$1.1 mil-

101. See Kevin Yamamura, *State's Slot Machines on the Rise: Indian Casinos Have More Than Doubled Number to 40,833*, SACRAMENTO BEE, Dec. 27, 2001, at A3.

102. This number was updated to 51,306 in June 2002 when the State Gambling Control Commission issued additional licenses (however, only about 41,000 are currently in use). See Bettina Boxall, *Tribes Granted More Slot Licenses*, L.A. TIMES, June 22, 2002, <http://www.latimes.com/news/local/la-000043678jun22.story> (last visited June 22, 2002).

103. See *id.*

104. See *id.*

105. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.2.2.

106. See *id.*

107. See Yamamura, *supra* note 101. The Proposition 1A compact provides that tribes and the state can amend the terms of the compact beginning in March 2003. See discussion *infra* Part II.B.

108. See *Two Years After*, *supra* note 94.

109. See Tribal-State Gaming Compact, *supra* note 27, at § 5.0.

lion for each non-gaming and eligible gaming tribe.¹¹⁰ Non-gaming tribes include those that will never be able to offer gaming because their reservations are not located in or near population areas that can support the industry.¹¹¹ The compact defines “eligible tribes” as those having fewer than 350 slot machines.¹¹² However, both definitions are somewhat vague. For example, they do not recognize issues of federal status, a lack of which has often excluded many tribal members from obtaining federal support.¹¹³

Revenue sharing eligibility has been an area where tribes conflict with each other, threatening the unified front that was crucial to the tribes’ success in passing Proposition 1A. Because the fund represents a limited pool, tribes vie with one another for revenue, creating a built-in incentive to limit the number of tribes found eligible. For example, if the funds flowing into the pool are not enough to pay each eligible tribe the full \$1.1 million, then whatever funds *are* available are split evenly among those tribes.¹¹⁴ Consequently, the greater the number of eligible tribes, the less each eligible tribe may be

110. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.2.1. This provision has the dual role of ensuring a certain dollar amount for tribes, and providing an incentive to limit the number of tribes that actually go into gaming (acting as a win-win for remote tribes and the state).

111. See *California Indians Past and Present*, *supra* note 6 (stating that most California tribes “will never achieve self-sufficiency through gaming because of the sparse population base around the reservations to which tribes were assigned,” due to California’s nineteenth century policy of opposing any law that enabled Indians to retain or obtain land that might prove of value). Other economic opportunities currently pursued by California tribes include natural resource development, retail sales, manufacturing, recycling and sanitary landfill operations. See generally website, Alliance of California Tribes, *supra* note 6. While anti-gaming interests may argue such operations can be utilized in place of gaming, implementing these industries requires a huge initial influx of capital which most tribes do not have. For many tribes, it is gaming that has provided the necessary revenue to effectively initiate such industries on tribal land, and provided the basis for economic development and diversification.

112. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.2(a)(i).

113. The federal government does not recognize all Indian tribes as legitimate. It has also regularly underestimated the number of tribal members who live in the United States. For example, the Bureau of Indian Affairs has traditionally determined Indian populations by counting only those individuals who live on or near reservations. See Carole Goldberg-Ambrose and Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes*, Alliance of California Tribes Website, at <http://www.allianceofcalifornia.org/report.htm> (last visited June 29, 2002) (arguing that “the Bureau of Indian Affairs should eliminate its strict adherence to the ‘on or near reservation’ requirement, and should count all members of [even] *unrecognized* tribes who meet eligibility standards under the 1988 amendments to the Indian Health Care Improvement Act,” to ensure that as many tribal members as possible are counted, to maximize funding and service to such groups (emphasis added)).

114. See Tribal-State Gaming Compact, *supra* note 27, at § 5.0.

awarded.¹¹⁵ Although \$1.1 million may not seem like significant funding for government operations, it can make a critical impact on tribal education, housing, and economic diversification,¹¹⁶ especially for tribes with relatively few members. Since smaller and poorer tribes comprise the majority of those vying for funds, the stakes involved are especially high.

The Commission's revenue sharing distribution *process* has also been criticized.¹¹⁷ For example, several tribes and the state have battled over which government bodies (state or tribal) have the right to allocate slot machines.¹¹⁸ Further, some tribes have criticized the state's initial delay in distributing funds to needy reservations, as well as the ways in which the state may have used its control of the funds to force the unnecessary disclosure of privileged tribal information, thereby infringing on tribal sovereignty.¹¹⁹ Conversely, the government has complained that it was the tribes' lack of compliance with contributing to the revenue-sharing pool that was the primary bar to speedy implementation.¹²⁰ The effect of this power struggle has been to exacerbate distrust between some gaming tribes and the state.¹²¹

B. Renegotiation Clauses and the "Most Favored Tribe" Provision

Clauses within the compact that allow for its modification have the potential to significantly impact tribes' and the state's ability to restrict or expand the scope of gaming in California. Generally speaking, there are two such clauses inherent to the compact: 1) a renegotiation provision; and 2) a "most favored tribe" provision.

115. For example, if the revenue sharing pool has a value of twenty million dollars and there are twenty-five eligible tribes, each would be awarded \$800,000. But if there are only twenty eligible tribes, each would be awarded one million dollars. This theoretically creates an incentive for tribes to fight against the eligibility of others. *See id.* at § 4.3.2.1. (explaining how revenue sharing funds are to be allotted).

116. Other economic opportunities currently pursued by California tribes include natural resource development, retail sales, manufacturing, recycling and sanitary landfill operations. *See generally* website, Alliance of California Tribes, *supra* note 6. While anti-gaming interests may argue such operations can be utilized in place of gaming, undertaking these industries requires a huge initial influx of capital which most tribes do not have. For many tribes, it is gaming that has provided the necessary revenue to effectively initiate such industries on tribal land, and provided the basis for economic development and diversification.

117. *See* May, *Gambling Control Commission*, *supra* note 91.

118. *See* Sweeney, *supra* note 107. *See also* Boxall, *supra* note 102.

119. *See* Sweeney, *supra* note 107.

120. *See id.*

121. *See id.*

The tribal-state compact's "renegotiation" clause reserves the right of both a signatory tribe and the state to amend the agreement at any time after March 7, 2003, so long as both parties agree.¹²² This clause provides a three year trial period to determine the effectiveness of the compact's provisions, and imbues the agreement with flexibility so that any unmet needs can later be addressed.

Under the compact's "most favored tribe"¹²³ provision, if the governor enters into an agreement with any tribe that is more favorable than the model compact, the state must adopt the preferred agreement for *all* tribes.¹²⁴ Thus, this provision leaves open the possibility of gaming expansion by enabling replacement of existing compact provisions with ones more favorable to the tribes.¹²⁵

While these provisions provide much-needed flexibility, they have also acted as a source of concern for anti-gaming interests and of uncertainty for tribes and the state.¹²⁶

C. The "Monopoly" and "Equal Protection" Issues

Monopoly and equal protection criticisms have been, and continue to be, the most powerful weapons in the arsenal of anti-tribal gaming interests—especially since they have ensnared the attention of the press.¹²⁷ Both have resulted in several lawsuits, and even contributed to a temporary freeze on tribal slot machine licensing.¹²⁸

Proposition 1A opponents argue that a constitutional amendment that exempts tribes (and only tribes) from California's ban on Las Vegas-style gaming¹²⁹ establishes an unconstitutional race-based classification.¹³⁰ Proposition 1A advocates counter that the exception

122. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.3.

123. See *id.* at § 15.4 (defining a most favored tribe as "any other tribe that contains more favorable provisions with respect to any provisions of [the] Compact").

124. See *id.*

125. For example, if the governor were to compact with even one tribe to permit a maximum of 2500 machines, the 2000 per tribe maximum would disappear, and be replaced with the more tribal-friendly maximum.

126. See Boxall, *supra* note 102 (asserting the need for the meaning of the compact's language to be clarified during renegotiations in March 2003).

127. See, e.g., *Lawsuit*, *supra* note 92.

128. See *Two Years After*, *supra* note 94. See also *Lawsuit Threatens California Indian Gaming*, AZCENTRAL.COM: ARIZONA'S HOME PAGE, Nov. 16, 2001, www.azcentral.com/azc-bin/print.php3 (last visited Nov. 17, 2001).

129. See Tribal-State Gaming Compact, *supra* note 27, at § E.

130. See *Court Decision*, *supra* note 97.

is based on a government status, a legitimate classification, and not race.¹³¹

This same provision has been characterized as anti-competitive, with California card rooms arguing that the tribes' exclusive right to provide slot machines constitutes a monopoly on gambling in-state, contrary to Congress's intent.¹³²

D. The Legality of California's Special Distribution Fund

The California compact mandates that gaming tribes contribute to a special distribution fund.¹³³ Unlike the revenue sharing fund which benefits tribes, the special distribution fund provides revenue to off-set state expenses relevant to tribal gaming.¹³⁴ However, it also provides that a portion of the monies be spent on "any other purposes specified by the Legislature."¹³⁵ This stipulation may conflict with federal law, as IGRA expressly limits states' abilities to "impose any tax, fee, charge, or other assessment upon an Indian tribe . . ." ¹³⁶ beyond that needed to off-set the state's costs in regulating tribal gaming.¹³⁷ Several tribes have also argued that this clause is an illegal infringement on tribal sovereignty, noting that no other governments are compelled to fund other governments' programs (for example, California citizens cannot be forced to pay for Texas programs, and vice versa).

E. Reservation Boundaries

One of the most significant hurdles for tribes and the state will be figuring out how to allow for reasonable growth *and* place legal limits on gaming expansion, without compromising their respective sovereignty. This will require articulating the scope of reservation boundaries, including landless tribes' ability to have land taken into trust. This debate has primarily focused on potential tribal casino expansion

131. See May, *Gambling Control Commission*, *supra* note 91. See also *Artichoke Joe's v. Norton*, No. CIV-S-01-0248 DFL GGH (E.D. Cal. July 29, 2002), available at http://207.41.18.73/caed/staticOther/page_1509.htm (affirming that tribes' exclusive gambling rights are based on government status, not race).

132. See *Court Decision*, *supra* note 97.

133. See Tribal-State Gaming Compact, *supra* note 27, at § 5.0 (describing the special distribution fund and the percent of net slot machine revenue to be contributed by each gaming tribe).

134. See *id.* at § 5.2(a).

135. See *id.*

136. 25 U.S.C. § 2710(d)(4) (2001) (applying only to Class III gaming).

137. See *id.* at § 2710(d)(3)(C)(iii).

into urban and suburban communities, which creates competition for existing card rooms¹³⁸ and arguably threatens the character of suburban communities.¹³⁹

One especially publicized boundary issue involves the ability of tribes to acquire formerly private urban card rooms, take them into trust as tribal property, and convert them into full-blown Indian casinos. This type of expansion has been the focus of the Lytton Band of Pomo Indians' recent (and vehemently contested) efforts to purchase an urban card room in Contra Costa County.¹⁴⁰

The Lytton tribe has also experienced a negative backlash due to state citizens' fear of *suburban* "invasion." Such concerns have impacted the tribe's efforts to purchase fifty acres in Sonoma County to replace the Sonoma reservation they lost years ago.¹⁴¹ Neighbors are

138. California card rooms are privately owned casinos that are limited to providing Class I and Class II games. See *Hotel Employees*, 981 P.2d at 1004 (describing card rooms as casinos "not permitted to offer gaming activities in the form of: (1) lotteries; (2) banking games, whether or not played with cards; (3) percentage games, whether or not played with cards; (4) slot machines; or (5) games proscribed by name, including twenty-one" as prohibited by statute).

139. Another current "boundary" issue is Internet gaming. While the complexities of on-line gambling law is beyond the scope of this Comment, it is important to note that the Internet provides considerable potential for the expansion of gambling, tribal or otherwise. With respect to Internet gaming, the compact says only that "the Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law." Tribal-State Gaming Compact, *supra* note 27, at § 4.1(c). Until federal Internet gambling law is clarified, this compact provision potentially leaves room for further growth, and thus further contention.

140. See, e.g., Henry K. Lee, *Second Suit Filed to Stop Takeover of Casino by Tribe: Competitors Try to Stop Lytton Band in San Pablo*, S.F. CHRON., Aug. 15, 2001, at A4.

141. The story of tribal land-loss in California is especially vicious. Tribes lost a first wave of land during the gold rush era, during which settlers often took tribal lands by force, sometimes by murdering tribal members to secure settlement claims. A policy of genocide further decimated the California tribal population, effectuating its plummet from 150,000 to an estimated low of 20,000 men, women and children. Between 1851 and 1852, the United States federal government signed eighteen treaties with California Indians, which, if ratified, would have reserved more than eight million acres in-state as tribal land. However, the California State Senate and governor opposed any agreements that could potentially preclude non-Indian access to lands that might be either farmable or rich in gold. Accordingly, the United States Senate secretly rejected the eighteen treaties. To add further insult, tribal members were rounded up, often regardless of family units, and exiled to reservations. Another wave of land loss (representing more than ninety million acres) took place during the United States' official policy of assimilation around the turn of the twentieth century. A final blow was dealt in 1958 with the passage of California's Rancheria Act, which "terminated" thirty-eight tribes, moving their lands into alternate ownership. Because of these violations, California Indians now own less than one-fifth of the land per capita than that owned by tribal members elsewhere in the nation. See *California Indians Past and Present*, *supra* note 6.

concerned that once the tribe owns the land it will build a casino instead of housing.

The landless United Auburn Indian Community's efforts to secure property for a casino just outside of Sacramento have also garnered significant press attention.¹⁴² United Auburn is relying on an exception to the IGRA provision that limits tribes to operating casinos on land owned prior to October 1988. This exception permits tribes to conduct gaming on land acquired more recently only if approved by the Secretary of the Interior, and then only if the Secretary sees proceeding as a potential benefit for both the tribe and the surrounding community.¹⁴³ Casino operators in Reno "view the [potential United Auburn] casino as perhaps their biggest competitor among the tribal casinos built or pending in Northern California,"¹⁴⁴ and thus have ardently contested such approval.

An additional, related issue has recently emerged: In June, California Attorney General Bill Lockyer released his preliminary finding that land owned by the Dry Creek Pomo tribe in Sonoma County does not qualify as a reservation for gaming purposes, stating that the federal government technically holds the land in "fee" as opposed to "in trust." The tribe counters that such specific wording should not be determinative, and that the land, for all extents and purposes, *is* held in trust.¹⁴⁵ The final outcome of this issue will have radical implications for tribes nationwide.¹⁴⁶

Lawsuits have now been filed by anti-tribal gaming interests to stop pending property acquisitions.¹⁴⁷ Ultimately, the publicity generated by these cases threatens tribal rights by playing on citizens' worst

142. See Dave Berns, *Lawyer Will Keep Fighting California Casino Project*, LAS VEGAS REV. J. (Feb. 15, 2002), at http://www.lvrj.com/cgi-bin/printable.cgi?lvrj_home/2002/Feb-15-2002/business/18105589.html (last visited Feb. 15, 2002).

143. See 25 U.S.C. § 2719(b)(1)(B) (2001).

144. Don Thompson, *Interior Department Says it Will Approve Sacramento-Area Casino*, SACRAMENTO BEE (Feb. 13, 2002), at www.sacbee.com/content/news/story/1628259p-1704605e.html (last visited Feb. 13, 2002) [hereinafter *Interior Department*].

145. See Sam Kennedy, *Lockyer: Pomo Casino May Be Illegal*, PRESS DEMOCRAT (June 7, 2002), at http://www.pressdemo.com/local/news/07casino_a1.html (last visited June 22, 2002).

146. Tribal gaming has its greatest support in those parts of the state that have the highest concentration of tribal casinos. For example, while seventy-eight percent of Californians support Indian gaming as a means for tribal self-sufficiency, eighty percent of survey participants in San Diego (which has seven casinos) concur, but only sixty-eight percent of Sacramento survey-takers feel similarly. See Lombardi III, *supra* note 85.

147. See *Court Decision*, *supra* note 97. As a result of these controversies, the Bureau of the Interior rescinded its initial approval of the project (reinstating it a few days later). See *id.*

fear: that tribal casinos will be able to expand limitlessly, penetrating both urban and suburban communities.¹⁴⁸

III. Solutions

A. Text-based Ambiguities

One of the first and simplest ways to secure the permanency of the tribal-state compacts will be for the state and tribes to quickly, effectively and permanently resolve any disagreement as to the specific meaning of the compact's provisions. Ideally, this should be completed prior to or during compact negotiations in March 2003. Once such discrepancies are resolved, tribes and the state should utilize public relations strategies to promote their unity. It is critical that they not overlook the impact of public perception on political decision-making. Once tribes and the state are in private *and* public agreement, it will become much more difficult for anti-tribal gaming interests to drive a wedge between the state and tribes by drawing the public's attention to any areas of dissension. Public clarification of any ambiguities would also preclude anti-gaming interests from using fear tactics to exacerbate voters' dread of an unchecked and unrealistic spread of tribal gaming. Since California's tribal-state compacts include an extensive and detailed dispute resolution process, litigation-based efforts to resolve such issues should be undertaken only as a last resort, and, as directed by the compacts, solely in federal court.¹⁴⁹

1. The Total Number of Machines Authorized

It should be noted that the ambiguity as to the total number of machines allowed may actually create a much-needed and beneficial flexibility. The compact's per tribe maximum, when combined with California's supply and demand economy, may ultimately prove a more effective means of imposing permanent limits on the proliferation of gambling than any arbitrary state-wide limit.

However, because differences in interpreting the total number of machines permitted has been heavily publicized, tribes and the state should come out with an "official" total, and thereby stem criticism

148. *See, id.* (quoting Lidia Robinson, who argued for tribal casinos being "[p]ut . . . out in the middle of nowhere").

149. *See* Tribal-State Gaming Compact, *supra* note 27, at § 9.0. Because the compact mandates that any dispute first be adjudicated through a specific dispute resolution process, California overstepped the boundaries of its own agreement when it went through the court system to obtain an injunction against the sale of additional slot machine licenses. *See id.* (detailing the compact dispute resolution process).

over their disagreement. A specific number and a united front should also help assuage voters' fears of unlimited gaming expansion.

While opponents have criticized the model compact's ambiguity as to the total number of machines authorized, contending this makes a significant difference in the impact of gaming in-state,¹⁵⁰ this fear is unfounded: A statewide cap does exist.¹⁵¹ First, the compact mandates a statewide limit of 2000 machines per tribe. When this number is multiplied by the 109 tribes in-state, a concrete figure of 218,000 is derived that leaves little room for ambiguity. While lease-sharing agreements are permitted between tribes, allowing some tribal casinos to install more than the 2000 per tribe slot machine maximum, such leases do not impact the total number of machines in play since the licenses merely reallocate use.¹⁵² A second figure can also be generated by multiplying the 2000 machine cap by the estimated number of tribes located in areas capable of supporting on-reservation gaming. This number should be publicized in conjunction with the first, as the more "realistic" maximum. Ultimately, these two ceiling numbers offer a baseline by which tribes, the state, and the Office of the Legislative Analyst can resolve related textual ambiguities.¹⁵³

2. Revenue Sharing Payouts

Tribes and the state's gaming commission must expressly delineate which tribes are entitled to revenue sharing disbursements. A broad approach to eligibility may ultimately prove most effective. Since tribal gaming generates significant revenue and recent casino expansion indicates that such income will continue to grow, it is probable that the funds generated will ultimately prove sufficient to provide every non-gaming and otherwise eligible tribe with the maximum

150. See I. Nelson Rose, *The Gaming Industry: Current Legal, Regulatory, and Social Issues*, SF89 ALI-ABA 217, 220 (2001).

151. See Tribal-State Gaming Compact, *supra* note 27, at § 4.3.

152. Such leases make sense from a free market perspective: They enable larger tribal casinos to maximize revenue, put much-needed capital into the hands of non-gaming tribes in the form of lease payments, and ultimately contribute a maximum amount of capital to the compact's revenue sharing and state distribution funds. The alternative is to "waste" those machines on tribes that cannot use them, and thereby hinder tribes based in remote areas from benefiting economically from their allotment.

153. See LEGISLATIVE ANALYST'S OFFICE ANALYSIS OF THE 2001-2002 BUDGET BILL, CALIFORNIA GAMBLING CONTROL COMMISSION (0885), F-45-F-46 (2001). According to the Legislative Analyst's Office ("LAO"), the office provides fiscal and policy advice to the California State Legislature to ensure the California's executive branch of government implements legislative policy effectively and in a manner that is cost efficient. See website, Legislative Analyst's Office, at <http://www.lao.ca.gov/laofacts.html> (last visited July 28, 2002).

\$1.1 million allotment.¹⁵⁴ A broad approach to eligibility would provide a win-win situation for both tribes and the state: Supporting the broadest possible number of tribal members will reduce welfare dependency for some of the state's neediest citizens, saving California significant long-term revenue. It will also preserve sovereignty by enhancing tribes' ability to care for their constituents. Further, a tribal-run body such as the California Nations Indian Gaming Association should be permitted to play an active role in the fund's management distribution, in order to avoid the types of mismanagement and dissension that continue to plague non-tribal entities such as the Bureau of Indian Affairs.¹⁵⁵

B. Renegotiation Clauses

Anti-tribal gaming interests argue that the model compact's renegotiation provisions create a risk that tribes and the state will significantly expand the scope of gaming. However, since California's legislature and governor would have to authorize such expansion and they are elected bodies who remain accountable to the public, it is unlikely this will happen.¹⁵⁶ Any major expansion will likely occur only with express voter approval, in accord with the traditional checks and balances of a democratic government.

Even the "most favored tribe" provision¹⁵⁷ may actually *limit* the scope of gaming: Because the state is obligated to replace existing compact terms with any preferred agreement, the state will be reluc-

154. This broad approach to eligibility mirrors the similarly broad approach to granting federal support recommended by Carole Goldberg-Ambrose and Duane Champagne in their Report to Advisory Council on California Indian Policy. See Goldberg-Ambrose, *supra* note 113.

155. For an overview of the Bureau's mismanagement of billions of dollars of tribal funds, see the Native American Rights Fund Website, at <http://www.narf.org/cases/iim.html> (last visited Aug. 11, 2002).

156. The power of politics has been evidenced by a freeze enacted by Governor Davis in early 2002 regarding the granting of any new compacts. The freeze was instigated while a lawsuit filed by California card rooms was pending. See Benjamin Spillman, *Gaming Interests Watching Gubernatorial Race*, DESERT SUN, Mar. 8, 2002, <http://www.thedesertsun.com/news/stories/business/1015562011.shtml>. The freeze has temporarily contained the number of machines in-play across the state, which has been steadily creeping close to the governor's stated limit. The freeze may also be a way for the governor to avoid the public controversy that could erupt when the total number of machines in-play exceeds his limit. He may consider this especially critical now, with the next gubernatorial election, slated for November 2002, quickly approaching. *But see id.* (discussing a statement by the governor's spokeswoman that the freeze is unrelated to the election, and was triggered solely by the pending lawsuit).

157. See Tribal-State Gaming Compact, *supra* note 27, at § 15.4.

tant to negotiate compacts that provide for expanded gaming provisions with *any* tribe.

Finally, the renegotiation clauses act as safeguards for state citizens: If tribes hope to expand the number of machines authorized, any agreement on the part of the state will likely be qualified according to the public's reaction as to how the agreements have worked so far. An indirect form of political pressure thus ensures that it is in the tribes' best interest to implement gaming in such a way as to most benefit local communities.

Consequently, by working closely with local organizations, providing donations to nearby non-profits, and generating jobs for neighboring communities, tribes can garner significant public interest in the long-term viability of tribal casinos. This public interest can then prove a major motivation for local representatives, who will be further encouraged to support tribal casinos as providing a win-win for both tribes and the state.¹⁵⁸

C. The "Monopoly" and Equal Protection Issues

Tribal gaming opponents argue that California (and all states) should not have the ability to exempt sovereign tribal nations from generally applicable state gambling laws. They assert that Proposition 1A grants tribes a form of immunity from anti-competition requirements and establishes an unconstitutional preference for a select ethnic or racial group in violation of the United States Constitution.

Ruling that tribes' exclusive Class III gaming rights are unconstitutional, however, would have serious and negative repercussions, not only for tribes, but for the state. Ultimately, such a determination threatens one of two results: First, if private gaming organizations were allowed the same rights as tribes, California would be exposed to a proliferation of private gaming. This result would be contrary to the voters' intent of permitting gaming solely for tribal government purposes. Second, if such non-profit gaming rights were barred, other

158. Survey results gathered by CNIGA and the First Nations Development Institute indicate that many gaming tribes already use gaming revenue to donate generously to local and state-wide charities, both to foster goodwill and benefit local organizations. The survey found that tribal casinos, which represent fourteen percent of gambling institutions nationwide, donated an estimated sixty-eight million dollars to charities in 1999. See Survey Results of Indian Gaming Nation Charitable Gaming, at <http://indiangaming.org/info/survey.shtml> (last visited Mar. 27, 2002). It should be noted that these figures do not account for the additional revenue tribal casinos bring into local communities in the form of jobs and other economic stimulation, or the percent of tribal members that casino profits have removed from welfare rolls. See *id.*

provisions of the California constitution would also be placed at risk as possible illegal monopolies, such as the gambling exception which gives charities the right to conduct bingo for non-profit purposes.

Such a decision would also threaten the financial strength of the state. If tribal gaming were eliminated, so too would be the millions of dollars given to the state through the tribal-state compact's special distribution fund. Alternately, if tribal gaming rights were expanded to private parties, the tribal-state compacts would be threatened, as such funds may be dependent on tribal exclusivity for consideration (as discussed *infra* Part III.D.).¹⁵⁹

As for the Equal Protection issue, opening up gaming rights to private parties misconstrues the classification under which tribes were given their exclusive rights: as sovereign governments, not as a racial or ethnic group.¹⁶⁰ Allowing tribes to own and operate casinos to raise funds for government purposes such as the installation of housing, electrical lines, water lines and fire hydrants, and is similar to the state of California being allowed to conduct a lottery to generate revenue for government purposes such as education. IGRA mandates that tribal members can not operate casinos to generate funds for private purposes.¹⁶¹ Providing tribes with a constitutional exception to California's anti-gambling laws is also consistent with those gaming exceptions already in the California constitution, which permit certain forms of gaming exclusively for government or non-profit use (such as the California lottery and charitable bingo provisions).¹⁶² Because one hundred percent of tribal casino proceeds go directly to tribal government coffers and not individuals, the distinction is based on the *purpose* of the gaming and not the race of those involved. Since the exclusivity granted tribes is therefore conditioned on government status, private gaming interests can legally be denied Class III gaming rights, and tribal exclusivity falls outside the parameters of Equal Protection.

159. See Tribal-State Gaming Compact, *supra* note 27, at § 12.4. See generally Gatsby Contreras, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487 (2002) (debating the role of exclusivity agreements in legalizing revenue sharing agreements between tribes and states).

160. See Artichoke Joe's, *supra* note 131, at 4-5.

161. Federal law under IGRA requires that all gaming proceeds, with very limited exceptions, be allocated for tribal government purposes only. See 25 U.S.C. § 2710(a)(1)(B) (2001).

162. See CAL. CONST. of 1897, art. IV, § 19 (amended 2000).

Further, gambling law has traditionally been left to state control,¹⁶³ and thus the federal judiciary should not abrogate that control. This is especially true since doing so would directly contradict the Supreme Court's holding in *Seminole*, which asserted the states' freedom from suit by private parties and the inability of the federal courts to compel states to comply with Congressionally-mandated law.¹⁶⁴

Regardless, however, Proposition 1A's opponents are trying to use such arguments to undo Proposition 1A, by also utilizing the initiative process: California card rooms and racetracks are relying on their Equal Protection argument to try to secure expanded gambling rights for private parties in the form of a Gambling Control Act.¹⁶⁵ This act is slated for the November 2002 California ballot. It would authorize expanded table games and unlimited slot machines at *all* California gaming establishments, tribal or private.¹⁶⁶ Passing this act would be a mistake, however, from the vantage point of both tribes and the state. While it would appease private casino interests it would controvert the general public's goal in passing Proposition 1A: to allow for limited gambling on Indian reservations, to raise capital for government purposes *only*.¹⁶⁷ Consequently, the passage of such an act is not the answer to ending current or future lawsuits, or simultaneously meeting the needs of California voters, tribal governments and the state: Instead, it would merely change the function of gaming from a means to raise funds for non-profit government purposes, to a means of lining private pocketbooks.

D. Legality of California's Special Distribution Fund

Most of the compact's special distribution fund provisions do not conflict with federal law as they provide for funding to off-set state expenses initiated by tribal gaming, as expressly authorized by IGRA.¹⁶⁸ However, the portion of the compact which allows funding to go to "any other purposes" specified by the legislature potentially violates IGRA's anti-tax provision.¹⁶⁹ The compact tries to avoid poten-

163. See Jordan, *supra* note 60, at 457.

164. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

165. See Benjamin Spillman, *Gambling Ballot Measure Sought*, DESERT SUN (Dec. 28, 2001), at <http://www.thedesertsun.com/news/stories/business/1009510440.shtml> (last visited Jan. 4, 2002).

166. See *id.*

167. See Lombardi III, *supra* note 85.

168. See 25 U.S.C. § 2710(d)(3)(C)(iii).

169. See Tribal-State Gaming Compact, *supra* note 27, at Preamble § 5.0. Section 5.0 stipulates that funds be distributed for five purposes: 1) grants for programs that fight

tial illegality by expressly stating that revenue percentages were not imposed as a condition to compact negotiations (which would be extortion), but as additional consideration paid by tribes in exchange for an exclusive right to conduct Class III gaming.¹⁷⁰ However, there is a risk that courts will not agree that this express provision represents the parties' true intent. It is possible that courts will eventually find that the state's economic interest is the driving force behind tribal-state compacting, and that it constitutes an illegal state "tax" of Indian gaming.¹⁷¹

Eliminating the compact's special distribution fund provision is not a realistic solution, at least for now. It is this allocation of tribal funding that gives California a direct financial interest in tribal gaming, and therefore motivates the state to create and honor the tribal-state compacts. By providing the state with a piece of tribal gaming revenue, tribal casinos generate millions of dollars to offset state budget shortages, and to fund special legislative projects.¹⁷² Without income from the special distribution fund, states would have significantly less motivation to support tribes' efforts.¹⁷³ Ultimately, percentage allocations, while unquestionably an imposition on tribal sovereignty, are necessary to compel states to negotiate compacts post-*Seminole*. The effect of fiscal incentives on existing agreements are already apparent, as with New York state's recent approval of six tribal

gambling addiction; 2) grants for government agencies affected by tribal gaming; 3) compact implementation costs assumed by the State Gaming Agency and Department of Justice; 4) to compensate for a lack of funds in the Revenue Sharing Trust; and 5) "any other purposes specified by the Legislature."

In California, the percent contribution mandated by Section 5.0 slides based on the number of machines in operation; for example, tribes with 200 or fewer machines contribute nothing, while tribes with 201 to 500 machines contribute seven percent of their net, and tribes with 501 to 1000 machines contribute ten percent for every machine over the first 200. The cap is thirteen percent for all terminals over and above the first 1000.

170. See Tribal-State Gaming Compact, *supra* note 27, at Preamble § E.

171. See Contreras, *supra* note 159, at 493-499, 506-507.

172. Some suggest that there is a direct connection between the recent recession and the sudden proliferation of compacting in the United States. At least twenty-two states are currently considering approving or expanding tribal gaming as a means to at least partially off-set the nationwide thirty-eight billion dollar budget shortfalls being faced by thirty-eight states. A similar gaming explosion occurred during a recession in the early 1990s, leading to an increase in riverboat gambling across the South and Midwest. See Joe Weinert, *States View Gambling as Quick Fix for Deficits*, PRESS OF ATLANTIC CITY, Feb. 15, 2002, <http://www.pressplus.com/business-casino/103001NYCHALLENGES.html> (last visited Oct. 30, 2002).

173. It is important to note that such funds do not represent the only financial benefit provided by tribal gaming. Tribal casinos also employ thousands of workers, often in economically depressed areas, and purchase supplies from retail and wholesale stores in their surrounding communities. They also bring a customer base to relatively remote areas of the state, simultaneously benefiting non-tribal businesses.

casinos as part of a plan to generate income to offset costs associated with the September 11, 2001 attack on the World Trade Center.¹⁷⁴ Unless Congress or the United States Supreme Court takes action to modify the impact of *Seminole*, Congress will have to modify IGRA to permit the allocation clauses, or, better yet, provide official commentary that allows for percent clauses as contractual consideration for exclusive gaming rights.¹⁷⁵ This could be done by codifying the Department of Interior's as-of-now "informal policy" that "allow[s] states to claim a portion of gambling revenues [as long as the state] offers tribes . . . 'substantial exclusivity' over gambling."¹⁷⁶ A federally-required cap on any garnered percent would help limit the infringement on tribal sovereignty, and ensure that percent clauses truly operate as consideration. Ideally, state and tribal governments should secure an arrangement that maximizes benefits for the greatest number of people, but adheres to the greatest possible deference to tribal sovereignty.¹⁷⁷

E. Reservation Boundaries

IGRA and other expressions of tribal gaming law reveal that voters' fear of an unmitigated expansion of tribal casinos into urban and suburban areas is mostly unrealistic. Thus, it is critical that California's judicial, executive and legislative bodies clarify that significant urban and suburban casino expansion is largely a non-issue, so that casinos can continue to provide social and fiscal benefits for their communities. Ultimately, the federal and state governments should allow local government compromises to control (such as the deals negotiated between Lytton and the city of San Pablo), since such negotiations bal-

174. See Carolyn Thompson, *N.Y. Gambling Plan Becomes Law*, WASH. POST, Oct. 31, 2001, <http://www.washingtonpost.com/wo-dyn/articles/A19490-2001Oct31.html> (last visited Oct. 31, 2001). Funds from New York's recent agreements are expected to raise one billion dollars over the next three years to help defray costs from the world trade center collapse. See Tony Batt, *supra* note 11.

175. See Contreras, *supra* note 159, at 510-11.

176. *Id.* at 506 (discussing former Department of Interior Secretary Babbitt's policy statement advocating the allowance of revenue sharing agreements between tribes and states, despite IGRA's anti-tax provision, if such agreements are conditioned on the maintenance of substantial exclusivity). Under this approach, the exclusivity granted tribes is viewed as contractual consideration for the state's financial interest. *Id.*

177. While it will not be easy to find a solution suitable for all of the country's more than five hundred tribal governments, it is imperative that tribal governments be represented at all levels of decision making, to maintain tribal sovereignty. In the long run, such a partnership will do more to secure a permanent solution than any fix asserted solely by the legislature or the courts.

ance the competing and complementary needs of local tribes *and* surrounding neighborhoods.

The true scope of the tribal-state compacts and any relevant law must be publicized, to lessen local opposition and relieve the fear of unmitigated expansion. Under federal law, tribes are bound to conduct IGRA-regulated gaming only on lands possessed prior to October 17, 1988.¹⁷⁸ There are only four general exceptions to this rule: 1) if lands fall within or are contiguous to a reservation's boundaries;¹⁷⁹ 2) if the tribe had no reservation as of October 17, 1988 and the land falls within the tribe's last recognized reservation;¹⁸⁰ 3) if the Secretary of the Interior and local officials determine that permitting a gaming establishment would be in the best interest of the tribe's members and would not negatively impact surrounding communities (in which case approval from the governor of that state is also needed);¹⁸¹ or 4) if lands are taken into trust for the tribe for additional consideration, such as to settle a land claim, or restore prior tribal property.¹⁸²

Because of these severe restrictions, the Lytton and United Auburn tribes' inroads into urban areas promise to be relatively isolated. The Lytton tribe's success in having an urban card room taken into trust represents an almost freak occurrence.¹⁸³ A rider on an act that was approved by Congress in 2000 allowed the card room to be declared tribal property even though it did not belong to the tribe prior to the October 1988 cut off date.¹⁸⁴ This was only made possible because the tribe's land had been terminated decades earlier.¹⁸⁵ And even the incredible hurdle of getting a special act passed by Congress has not ensured that a casino will be built. The tribe will still need to secure a compact from the governor before it can operate any Class III games on site.¹⁸⁶ Further, if the tribe chooses to work with a professional casino development and management company to get the casino up and running, it will have to secure additional approval from

178. See 25 U.S.C. § 2719 (2001).

179. See *id.* at § 2719(a)(1).

180. See *id.* at § 2719(a)(2)(B).

181. See *id.* at § 2719(b)(1)(A).

182. See *id.* at § 2719(b)(1)(B).

183. See John M. Glionna, *Land Part of Cultural Roots, Tribe Says*, L.A. TIMES, Mar. 18, 2002, at B1.

184. See *id.*

185. See *id.*

186. See *id.*

NIGA, which regulates such agreements to ensure that tribal governments, and not private interests, most benefit.¹⁸⁷

The only reason Lytton has managed to obtain the assistance needed to get as far as it has is because of the tremendous support it has received from the city of San Pablo, where the card room is located.¹⁸⁸ In addition to the estimated one hundred and fifty million dollars it would generate for the relatively impoverished city,¹⁸⁹ another argument in favor of the deal may actually be its urban setting: Since cities already contain card rooms, tribal casinos may be less likely to change the character of the surrounding community, than in more rural neighborhoods.¹⁹⁰

The United Auburn situation, which was made possible by IGRA's land into trust exception,¹⁹¹ has also progressed as far as it has only because of support from the county in which their casino would be located.¹⁹² As stated in an article in the *Sacramento Bee* that partially quotes Interior Secretary for Indian Affairs Neal McCalab, "the tribe's agreement with Placer County is a model for how the department would like to see tribes operate—'by using consultation, cooperation, [and] communication all in the service of conservation.'"¹⁹³ Such "cooperation" has included a promise by the tribe to compensate for any lost local property taxes, to donate nine hundred thousand dollars annually for police, fire and emergency services, to pay fifty thousand dollars for efforts to fight compulsive gambling, and to establish an advisory committee as a forum for community feedback.¹⁹⁴

Ultimately, since IGRA and other federal laws have made land acquisition a long and difficult process, have required agreement on the part of states, and have limited gaming on newly acquired lands to tribes that had no reservation prior to October 1988, the potential for

187. Another safeguard against tribal governments being a "front" for private gaming companies (in addition to the tribe's sovereignty and monetary interests) is IGRA, which limits the amount of time a professional, non-tribal management company can be involved in the operation of Indian casinos.

188. See *Interior Department*, *supra* note 144.

189. See Glionna, *supra* note 183, at B1.

190. It should be noted that even the impact of tribal casinos on rural neighborhoods can be mitigated with the use of architectural styles that draw on the surrounding environment, or by incorporating industries traditionally welcomed by the local communities, such as health spas in Sonoma County.

191. See Jeff Simpson, *Decision Expected Soon on California Tribal Casino*, LAS VEGAS R. J. (Feb. 2, 2002), <http://www.lvrj.com/lvrj-home/2002/Feb-02-Sat-2002/business/18010330.html> (last visited Feb. 2, 2002).

192. See *Interior Department*, *supra* note 144.

193. *Id.*

194. See *Court Decision*, *supra* note 130.

acquiring suburban and urban property for Indian gaming is extraordinarily limited. As attorney Joseph Kelly, co-editor of *Gaming Law Review*, has stated, the process is "one of the most difficult things on Earth."¹⁹⁵ While two tribes in the state are working to overcome such hurdles, the process has been long and difficult, and will most likely discourage tribes that would have even less chance for success.

Conclusion

California's tribes and voters had one primary goal with the passage of Proposition 1A: to empower tribes to maximize their self-sufficiency.¹⁹⁶ However, ambiguous tribal-state compact provisions and continued misperceptions about the potential scope of Indian gaming threaten the significant fiscal and social benefits Proposition 1A has helped secure for tribal and California communities. Further, any decision that overturns Proposition 1A would ensure that the will of the people—who are themselves a legislative force¹⁹⁷—has been violated not only once, but twice.¹⁹⁸ Consequently, it is critical that the state and tribes work together, quickly and efficiently, to resolve all compact ambiguities, and face the public with a united front. The precedent set now is critical not only to California, but to the nation as a whole: The resolution of these issues will provide a model for other states to follow as they provide for Indian gaming within their borders.¹⁹⁹

Ultimately, it is within California citizens' and the state's best interest to ensure tribal gaming is maintained. The economic and social stakes are extremely high. The comments of Lytton Tribal Chairwoman Margie Mejia seem especially representative: "I wish we didn't have to run a casino to buy this land . . . [b]ut you tell me what other way a tribe with no assets can make that kind of money."²⁰⁰ For many, gaming seems a lesser evil than the extreme poverty and resultant de-

195. Joe Weinert, *New York Casino Proposal Still Faces Many Obstacles*, Press Plus: The Press of Atlantic City Online (Oct. 30, 2001), at <http://www.pressplus.com/business-casino/103001NYCHALLENGES.html> (last visited Oct. 30, 2001).

196. See Lombardi III, *supra* note 85.

197. See *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 1011 (Cal. 1999) (Kennard, J., dissenting).

198. Proposition 5, which also evidenced the public's support for tribal gaming as a means for self-sufficiency, was repealed following the California Supreme Court's decision in *Hotel Employees*. The proposition had been approved by state citizens by a landslide sixty-three percent. See Lombardi I, *supra* note 3.

199. More than twenty states are currently considering facilitating the implementation or expansion of tribal gaming within their borders. See Weinart, *supra* note 198.

200. Glionna, *supra* note 183.

spair, low self-esteem, high suicide rates and poor health conditions that still plague many tribal nations. And ultimately, once such significant change has come, there can be no going back to the conditions of the past. As the Native American Indian Strong Eyes once stated under much bleaker conditions, "We can't go back. The bridge is gone."²⁰¹

Gaming not only benefits tribal members, but non-gaming Indians and general populations, as well. By providing per capita revenue as well as funds to develop an economic infrastructure on tribal reservations, Proposition 1A compacts and the tribal casinos they support have made a significant impact on the California economy. Tribal gaming has generated thousands of jobs;²⁰² created a market for local suppliers;²⁰³ raised revenue to benefit local charities;²⁰⁴ helped remove members of both gaming and non-gaming tribes from welfare rolls;²⁰⁵ generated millions of dollars in state and federal taxes;²⁰⁶ provided schools for tribal youth;²⁰⁷ and reinvested in local communities.²⁰⁸ But perhaps even more importantly, the survival of the Proposition 1A constitutional amendment will maintain something even more precious than financial benefits: the faith of all California citizens—tribal and otherwise—in a democracy that ensures that this time, their voices will be heard.

201. Hifler, *supra* note 1, at 105.

202. *See* Questions and Answers, *supra* note 43.

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See* Brenda Norrell, *American Indians Celebrate Winning in New Mexico*, at http://www.pechanga.net/documents/american_indians_celebrate_whni.html (last visited Dec. 12, 2001).

208. *See* Questions and Answers, *supra* note 43.

