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NOTES

Is Alternative Dispute Resolution a Possibility in the Riverboat Gambling Quagmire?

*Akin v. Missouri Gaming Commission*¹

I. INTRODUCTION

“‘Flo, I’d like to be The Greek.’ And I said, ‘I’m sorry, Nick, you’re not Greek. And under New York State gambling laws it’s forbidden.’”² -Woody Allen-

During the 1990s, the emergence of riverboat gambling operations has led to an avalanche of social and political debates.³ Since 1989, riverboat gaming has been electorally approved in several midwestern states, including Iowa, Illinois, Indiana, Mississippi, Missouri, and Louisiana.⁴ However, this voter acceptance of a formerly stigmatized industry has not come without a significant backlash. In particular, religious groups have denounced riverboat gambling, claiming that such activity inevitably leads to, *inter alia*, dissipated savings, chronic addictions, and other ancillary societal vices, including prostitution, alcoholism, and drug abuse.⁵

Such emotive responses had not come without a response from the courts. The issue of riverboat gambling in Missouri was argued before the Supreme Court of Missouri twice;⁶ such arguments had raised the possibility that at least five riverboat casinos were in violation of the Missouri Constitution.⁷

The issue has since been resolved. In November of 1998, Missouri voters approved a constitutional amendment that retroactively legalized games of chance aboard gambling casinos that operate from off-river, man-made moats.⁸ This may have overturned and rendered moot *Akin*; however, the issues of alternative dispute resolution that were raised by the gambling battles are still ripe for study and analysis.

1. 956 S.W.2d 261 (Mo. 1997) (en banc).

2. WOODY ALLEN, *WITHOUT FEATHERS* 214 (1972).

3. Daniel T. Murphy & Jack M. Epps, *Riverboat Gaming Development in Missouri*, 53 J. MO. B. 15, 15 (1997).

4. *Id.*

5. See James C. Fitzpatrick, *Clergy Decry Casinos*, KANSAS CITY STAR, Mar. 29, 1994, at B1.

6. See *Akin*, 956 S.W.2d 261 (Mo. 1997) (en banc); *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58 (Mo. 1994).

7. Virginia Young, “Boats in Moats” Win Round In Court Fight, ST. LOUIS POST-DISPATCH, Jan. 30, 1998, at A1.

8. Rick Alm, *Casino Boats in Moats Survive: Missouri Test Issue Wins Locally By a Landslide*, KANSAS CITY STAR, Nov. 4, 1998, at A1.

II. FACTS AND HOLDING

On election day, 1994, the people of Missouri voted on a new constitutional amendment.⁹ The question to which 1,751,459 voters responded was:

Shall the General Assembly be authorized to permit only upon the Mississippi River and the Missouri River lotteries, gift enterprises, and games of chance to be conducted on excursion gambling boats and floating facilities? This proposal would increase state revenues from existing gaming boats approximately \$30,000,000 per year. Impact on local governments is unknown.¹⁰

The ballot passed by a fifty-four to forty six percent margin,¹¹ giving the Missouri Constitution a new amendment, Article III, section 39(e).¹² The amendment specifically reads "The General Assembly is authorized to permit only upon the Mississippi River and the Missouri River lotteries, gift enterprises and games of chance to be conducted on excursion gambling boats and floating facilities."¹³

Following the passage of the amendment, the Missouri Gaming Commission,¹⁴ an entity that has the authority, subject to local voter approval, to determine the number of gaming licenses and the location and type of each gaming facility,¹⁵ issued licenses for the operation of several casinos, including the Riverport Casino Center in Maryland Heights and the Station Casino Kansas City.¹⁶ These casinos were structurally different from other existing Missouri casinos such as the President Casino and the Casino Queen located in downtown St. Louis and East St. Louis, respectively. The new breed of casinos were built in man-made basins, i.e. "moats," off the flow of the river, that were created for the sole purpose of holding the casinos.¹⁷ Following a model used in the gambling town of Tunica, Mississippi, these casinos were built on barges, not boats.¹⁸ Furthermore, the architecture of these new

9. *Akin*, 956 S.W.2d at 263.

10. *Id.*

11. Paul E. Parker, *Salus Populi Suprema Lex Esto: Gambling, Taxes, the Court, and Citizen Amendments in Missouri*, 59 ALB. L. REV. 1675, 1678 (1996) (citing James C. Fitzpatrick & Bill Graham, "One Armed Bandits" Grab Powerful Wave of Support, KANSAS CITY STAR, Nov. 9, 1994, at A1).

12. *Akin*, 956 S.W.2d at 263.

13. MO. CONST. of 1945, art III, § 39(e) (1994).

14. Created by MO. REV. STAT. § 313.004 (1994). The commission consists of five members who meet quarterly. The members may not be elected officials, rather they are appointed by the governor. The members are appointed for three year terms, their tenure not to exceed six years. An action by the committee is binding only if the action is taken at a meeting where three of the five members are present and those three vote in favor of the action. MO. REV. STAT. § 313.004(1) (1994); Murphy & Epps, *supra* note 3, at 16.

15. MO. REV. STAT. § 313.812(10) (1994); Murphy & Epps, *supra* note 3.

16. Fred Faust, *School Won't Let Mom Talk About Her Casino Job*, ST. LOUIS POST-DISPATCH, Feb. 1, 1998, at A1.

17. Young, *supra* note 7, at A1.

18. Faust, *supra* note 16, at A1.

casinos was blended with adjoining land-based buildings, so guests would not even see the water.¹⁹

On August 29, 1996, three plaintiffs, Lycurgus W. Starkey, Susan J. Rix, and W. Todd Akin, a state representative from Town and Country, Missouri,²⁰ filed suit with the Cole County Circuit Court in Missouri against the Missouri Gaming Commission.²¹ They alleged, in particular, that the Maryland Heights casinos were unconstitutional because they were floating in a man-made basin rather than on the Missouri or Mississippi rivers.²² In particular, they argued the casinos were not contiguous to the river but within 1,000 feet of the main channel.²³ As a result, the plaintiffs asserted, the casinos were in violation of the Missouri Constitution's mandate that the riverboats be only "upon the Mississippi River and Missouri River."²⁴

Soon thereafter, the Missouri Gaming Association, the City of Maryland Heights, and three gaming corporations, including applicants Harrah's Maryland Heights Corporation and Players Maryland Heights, L.P., intervened on behalf of the defendant Missouri Gaming Commission.²⁵ The defendants advanced three principal arguments. First, defendants referred to a 1994 statute, enacted before the constitutional amendment was adopted, in order to qualify this river/land distinction.²⁶ Chapter 313 dealing with licensed gaming activities, defined the Mississippi and Missouri Rivers as:

the water, bed, and banks of those rivers, including any space filled by the water of those rivers for docking purposes in a manner approved by the commission but shall not include any artificial space created after May 20, 1994, and is located more than 1,000 feet from the closest edge of the main channel of the river as established by the United States Army Corps. of Engineers.²⁷

Defendants argued that this statute should be utilized in interpreting the subsequent amendment.²⁸

Secondly, the Defendant Missouri Gaming Commission argued that although the definition may not be patently ambiguous, the General Assembly should be given free rein to define terms.²⁹ The Missouri Gaming Commission dismissed the assertion that a word must be ambiguous before the General Assembly can define

19. *Id.* Hence, the idiom "boat in a moat."

20. *Id.* Todd Akin is the lead plaintiff in the case. He is a republican representative from the Town and Country district in St. Louis county. *Id.*

21. *Id.*

22. *Id.*

23. *Akin*, 956 S.W.2d at 262.

24. MO. CONST. of 1945, art. III, § 39(e) (1996) (emphasis added).

25. *Akin*, 956 S.W.2d at 262.

26. *Id.* at 263.

27. MO. REV. STAT. § 313.800(1)(16) (1994).

28. *Akin*, 956 S.W.2d at 263.

29. *Id.* at 264.

it.³⁰ Moreover, the Defendant Missouri Gaming Association disagreed with the plaintiffs' definition of the word "on," opting for a broader definition of the word.³¹

Judge Thomas J. Brown III of the Circuit Court of Cole County upheld the validity of the statute and dismissed the suit.³² Plaintiffs appealed to the Missouri Supreme Court under Article V, section 3 of the Missouri Constitution.³³ The Missouri Supreme Court subsequently held that the Missouri Constitution did not authorize riverboat gambling in artificial spaces that were not contiguous, or directly "on", the Mississippi or Missouri Rivers.³⁴

III. LEGAL HISTORY

A. Recent History of Riverboat Gambling in Missouri

The case history of riverboat gambling in Missouri is an interesting one, beginning years before the adoption of the Missouri Constitutional amendment in 1994. The November 1994 amendment proposal was the third time in two years that the issue of riverboat gambling had been placed before Missouri voters.³⁵ This issue had its inception in the 1992 general elections.³⁶ On November 3, 1992, referendum law House Bill 149 was placed before the voters.³⁷ The ballot title placed before each voter stated:

Proposition A.--Authorizes riverboat gambling excursions on the Mississippi and Missouri Rivers, regulated by State Tourism Commission. Excursions may originate where locally approved by voters. Five hundred dollar maximum loss limit per person per excursion. The proposal is intended to produce increased General Revenue.³⁸

The people approved this referendum by a 62 percent vote.³⁹ According to experts, by submitting the issue to voters, the legislature circumvented the constitutional proscription against legislative enactment of lottery games.⁴⁰ In

30. *St. Louis Country Club v. Administrative Hearing Comm'n of Mo.*, 657 S.W.2d 614, 617 (Mo. 1983) (en banc).

31. *Akin*, 956 S.W.2d at 264. Although it is unclear what legal precedent the defendants utilized here, *St. Louis Country Club v. Administrative Hearing Commission of Missouri* stated that words standing alone are to be interpreted according to their ordinary meaning, but if a term is specially defined by statute, the special definition must be given effect. *St. Louis Country Club*, 657 S.W.2d at 616 (citing *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 600 (Mo. 1977) (en banc)).

32. *Akin*, 956 S.W.2d at 261-62.

33. *Id.* at 262.

34. *Id.* at 264.

35. *Parker*, *supra* note 11, at 1675.

36. *Harris*, 869 S.W.2d at 59.

37. *Id.*

38. *Id.* at 60 n.1.

39. *Parker*, *supra* note 11, at 1676.

40. *Id.*

addition, voter approval was gained partially by claims that the referendum's weaknesses would be amended by the legislature.⁴¹

The legislature made good on their assurances. On April 28, 1993, the General Assembly enacted two statutes, Senate Bills 10 and 11.⁴² As a practical matter, these acts repealed almost all of House Bill 149, the referendum motion of the previous year, yet retained the referendum's spirit.⁴³ The acts, *inter alia*, created a Gaming Commission to regulate riverboat gambling, a job previously performed by the Tourism Commission under the referendum.⁴⁴ They also continued special exemptions from licensing requirements for certain boats and stretches of the Mississippi riverbank and for certain boats, and allowed all riverboats to be permanently docked.⁴⁵ Most importantly, however, the act maintained the referendum's definition of riverboat gambling games.⁴⁶ These gambling games included, but were not limited to, games of skill or games of chance on an excursion gambling boat.⁴⁷ Governor Mel Carnahan signed the acts on April 29, 1993.⁴⁸

On April 30, 1993, one day after the Governor approved the act and two days after the act was passed by the Missouri legislature, Troy Harris, a taxpayer and registered Missouri voter, filed a petition for declaratory judgment that the acts were unconstitutional.⁴⁹ Harris specifically claimed that the statutes were in violation of, *inter alia*, Article III, sections 39(9), 40(28), and 40(30) of the Missouri Constitution.⁵⁰ Section 39(9) of the Missouri Constitution stated:

The general assembly shall not have the power . . . [e]xcept as otherwise provided in section 39(b) and section 39(c) of this article, to authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets⁵¹

As games of chance, i.e. lotteries, were statutorily allowed on the riverboats, Harris argued that Senate Bills 10 and 11 were patently unconstitutional.⁵² After the circuit court dismissed the suit, Harris appealed to the Missouri Supreme Court.⁵³

The court, sitting en banc, first found that the challenged law was clearly an act of the General Assembly, and thus subject to the limitations of Article III, section

41. *Id.* Professor Parker also states that there was concern the Missouri tourism commission would be overwhelmed with such a gigantic responsibility. *Id.* Apparently, this was the impetus for the establishment of the Missouri Gaming Commission.

42. *Harris*, 869 S.W.2d at 59.

43. *Id.* at 59-60.

44. *Id.* at 60. The Gaming Commission's duties and responsibilities are codified at MO. REV. STAT. § 313.004 (1994).

45. *Id.* at 60. Codified at MO. REV. STAT. § 313.812(3) (1994).

46. *Id.*

47. MO. REV. STAT. § 313.800(1)(10) (1994).

48. *Harris*, 869 S.W.2d at 60.

49. *Id.*

50. *Id.*

51. MO. CONST. of 1945, art. III, § 39(9) (1994). Keep in mind the chronology: these events took place before the adoption of 39(e).

52. *Harris*, 869 S.W.2d at 60.

53. *Id.*

39(9).⁵⁴ The Supreme Court created a gambling taxonomy of three levels: games of chance, games of skill, and those games whose status had not been ascertained.⁵⁵ Those games of chance, including bingo, keno layout, number tickets, pull tabs, jar tickets, push cards, and punchboards, were found to be "lotteries within the meaning of Article III, section 39(9), of the Missouri Constitution."⁵⁶ As a result, they were prohibited upon the riverboats.⁵⁷ Games of skill, not within the prohibitions of section 39(9), including poker and blackjack, were constitutionally permissible on the riverboats.⁵⁸ Finally, other gambling games, namely slot machines, baccarat, craps, roulette wheel, klondike table, faro layout, and video games of chance, were not labeled as either games of chance or games of skill.⁵⁹ The court found that these newer games necessitated an evidentiary hearing as to the elements of skill and chance.⁶⁰

As the scaffolding of Missouri gaming industry was beginning to collapse,⁶¹ rapid action was necessary. Attempting to rescue the upcoming summer tourist influx, a constitutional amendment was submitted to voters in April, 1994⁶² for the purpose of legalizing all games of chance and games of skill on Missouri riverboats. The proponents of riverboat gambling raised over sixty times the funds as their opponents,⁶³ however, the amendment went down in defeat.⁶⁴ Games of chance would not be allowed to operate on Missouri riverboats during the summer of 1994.

After a summer of raising money and petitioning for signatures, gaming proponents were successful in putting the measure on the ballot for a third time.⁶⁵ On November 8, 1994, the people of Missouri adopted the requisite constitutional amendment that allowed for games of chance and skill to take place on Missouri riverboats.⁶⁶

54. *Id.* Apparently, the Respondents, Missouri Gaming Commission, attempted to argue that Senate Bills 10 and 11 were not "new legislation", rather part of the referendum. The court noted that the language of the senate bill "explicitly repealed the referendum law . . . enacted by the General Assembly and approved by the voters." Thus, Senate bills 10 and 11 were subject to constitutional mandates. See Parker, *supra* note 11, at 1676.

55. Harris, 869 S.W.2d at 61-63.

56. *Id.* at 64; see also Parker, *supra* note 11, at 1676.

57. Harris, 869 S.W.2d at 64.

58. *Id.*

59. *Id.*

60. *Id.*

61. Slot machines make up about two-thirds of casinos' revenue. Young, *supra*, note 7, at A1.

62. Parker, *supra* note 12, at 1677 (citing Jo Mannies & Kathryn Rogers, *Data Show Big Role of KC Apathy*, ST. LOUIS POST-DISPATCH, Apr. 7, 1994, at A1). This amendment was similar to the November 1994 amendment discussed in the facts and holding section.

63. *Id.* (citing James C. Fitzpatrick, *Big Money Flows to Sway Voters on Gambling Issue*, KANSAS CITY STAR, Mar. 30, 1994, at A1). Proponents had raised \$3.2 million, while opponents had raised \$45,000. *Id.*

64. *Id.* Professor Parker notes the influence of more than a dozen religious leaders representing many Christian denominations who came out deceptively against the amendment. *Id.* (citing James C. Fitzpatrick, *Clergy Decry Casinos*, KANSAS CITY STAR, Mar. 29, 1994, at B1).

65. *Id.* at 1678.

66. Akin, 956 S.W.2d at 263; see also, *supra* text accompanying notes 12, 23.

*B. The Trend of Missouri Courts toward a "Plain Meaning"
Method of Statutory Interpretation.*

As Justice Holmes taught, the ordinary meaning of statutory language is the common understanding of what the "rule of law" is.⁶⁷ The plain meaning interpretation of legislative action is best summed up by the expression that "[c]itizens ought to be able to open up the statute books and find out what the law requires of them."⁶⁸

In *Akin*, the Missouri Supreme Court relied upon the principles of Missouri law which emphasize plain meaning interpretations of the Missouri Constitution. The court adhered to the tenet that "every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it."⁶⁹

Missouri case law is equivocal in its approach to interpreting the state constitution and legislation using the plain meaning approach. Some decisions have stated that the ordinary, usual meaning of words is to be utilized, and said usual meaning normally appears in the dictionary.⁷⁰ Indeed, influential weight shall be given to official legislative and executive acts, and such acts are "very persuasive on the courts." However, such weight is "held persuasive only when the section in question is ambiguous and its meaning doubtful."⁷¹ The courts have often stressed an objective, lay-person approach to its ancillary department's procurements, as they did in *Zahner*. In *Zahner*, it insisted that it "must undertake to ascribe to the words the meaning the people understood the words to have when they adopted the provision."⁷²

Nevertheless, other decisions have been less confident of such a plain meaning philosophy. In *Boone County Court v. Missouri*,⁷³ the court stated that "[r]ules applicable to constitutional construction are the same as those applied to statutory construction, except that the former are given a broader construction, due to their more permanent character."⁷⁴ Such a statement seems at direct odds with the interpretative theories utilized in *Dalton* and *Zahner*. Yet, the court again utilized this reasoning a year later, when it explained, in *St. Louis Country Club v. Administrative Hearing Commission of Missouri*,⁷⁵ that if a term is specially defined by statute, the special definition must be given effect.⁷⁶ Needless to say, Missouri courts have been less than clear on utilizing a uniform philosophy for statutory interpretation.

67. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

68. WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 564 (2d ed. 1995).

69. *State, ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 385 (1954).

70. *Zahner v. City of Perryville*, 813 S.W.2d 855, 858 (Mo. 1991) (en banc).

71. *State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 984 (1947).

72. *Zahner*, 813 S.W.2d at 858.

73. 631 S.W.2d 321 (Mo. 1982) (en banc).

74. *Id.* at 324.

75. 657 S.W.2d 614 (Mo. 1983) (en banc).

76. *Id.* at 617. In defense of a plain meaning interpretation of the Missouri constitution, the above statement was made in reply to a statutory interpretation issue rather than a constitutional interpretation issue.

IV. INSTANT DECISION

In *Akin*, the Missouri Supreme Court applied a plain meaning interpretation to amendment 39(e) to the exclusion of all other theories of statutory interpretation.⁷⁷ After a brief history of amendment 39(e) and the ballot title from which it was adopted,⁷⁸ the court emphasized that the meaning of the phrase “only upon the Mississippi River and the Missouri River” was key to this case.⁷⁹

The *Akin* court wasted no time in designating the standards they would be using to interpret the meaning of the words “upon” and “only.” In determining the meaning of a constitutional provision, the court first undertook to ascribe to the words the meaning that the people understood them to have when the provision was adopted.⁸⁰ The only way to accomplish this was to reflect the common sense of the people and expound every word in its “plain, obvious, and common-sense meaning.”⁸¹

Relying on the *Zahner* decision, the court then looked to the dictionary to ascertain the “plain, obvious, and common-sense meaning” of the words “upon” and “only.”⁸² Webster’s Third New International Dictionary defines “only” as “exclusively, solely.”⁸³ “Upon” is defined as “on,” which is “used as a function word to indicate position over and in contact with that which supports from beneath.”⁸⁴ Finally, the court uses Webster’s definition of “river,” as “a natural surface stream of water of considerable volume and permanent or seasonal flow.”⁸⁵

Based upon these denotations, the court concluded that “[b]y approving the 1994 constitutional amendment, the people intended that games of chance be conducted on facilities that are solely over and in contact with the surface of the Mississippi and Missouri Rivers.”⁸⁶ As a result, any casinos located in man-made moats or artificial spaces that are not contiguous to the surface stream of the river, thus being land based, were in violation of the Missouri Constitution.⁸⁷ Nevertheless, gambling may occur in artificial spaces that are contiguous to the surface stream, thus being river based.⁸⁸

Throughout their discussion, the court dismissed pleas by the defendants to rely upon the *Boone County* and *St. Louis Country Club* precedents, that allow for broader statutory interpretation in determining the connotations of constitutional and statutory words and phrases.⁸⁹ Defendants claimed that section 313.800.1(16), broadly defining the “Missouri River” and the “Mississippi River,” should be given

77. *Akin*, 956 S.W.2d at 263.

78. *Id.*

79. *Id.* (emphasis added).

80. *Boone County Court*, 631 S.W.2d at 324.

81. *Akin*, 956 S.W.2d at 263 (citing *Dalton*, 263 S.W.2d at 385).

82. *Id.* (citing *Zahner*, 813 S.W.2d at 858 (“This ordinary and usual meaning normally appears in the dictionary.”)).

83. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1577 (1976)).

84. *Id.* (citing WEBSTER’S at 2517, 1574).

85. *Id.* (citing WEBSTER’S at 1962).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 264.

weight because it was intact before the constitutional amendment was adopted. However, this argument was easily dismissed by the court.⁹⁰ The court decreed that to the extent section 313.800.1(16) conflicts with the Missouri Constitution, it is invalid.⁹¹ Defendants then asserted that statutory language could be utilized to define a constitutional term even in the absence of ambiguity.⁹² The court disposed of this theory by relying on *State ex rel. Randolph County v. Walden*.⁹³ The court stated that the legislature had no authority to vary the meaning of unambiguous terms in the Constitution.⁹⁴ Since the terms in the constitutional amendment were unambiguous and easily definable by consultation with a dictionary, neither the legislature, nor any other entity, could redefine their meaning.⁹⁵

In an effort to salvage their case and utilize a plain meaning argument, defendants attempted to opt for a broader definition of the word “upon” in the interpretation of the amendment. Defendants Missouri Gaming Association stressed a different dictionary definition of the word “on,” namely “a location closely adjoining something (a town situated on the river) or location very near some point of a narrowly extended area (as a street) (lives on the principal street of the town).”⁹⁶ The court was not convinced; they merely dismissed this definition as part of a more general definition that “on” is “used as a function word to indicate contiguity or dependence.”⁹⁷ The sub-definition cited by the Association did not have a different meaning than the general definition of “on,” because a facility is “over and in contact with” the river if it is in an artificial space, filled with river water, that touches the surface stream for considerable distances.⁹⁸ Since this case was dismissed before any evidence could be heard, the cause was reversed and remanded for proceedings consistent with the court’s opinion.⁹⁹

V. COMMENT

A. *An Introduction*

Immediately upon the handing down of this decision, legal, business, and societal confusion erupted. Missouri Attorney General Jay Nixon stated that “some [casinos] will have to move or be moved. If you operate games of chance in an area not allowed by the constitution, that is a crime.”¹⁰⁰ The decision threatened the future of St. Louis’ Riverport Casino Center and two Kansas City projects possessing a combined investment of \$720 million.¹⁰¹ Although *Akin* was remanded to the trial

90. *Id.* at 263.

91. *Id.* at 264.

92. *Id.* Defendants cited *St. Louis Country Club*, 657 S.W.2d at 617 for support.

93. 206 S.W.2d 979, 984 (1947).

94. *Akin*, 956 S.W.2d at 264.

95. *Id.*

96. *Id.* at 264 (citing WEBSTER’S at 1574).

97. *Akin*, 956 S.W.2d at 264 (citing WEBSTER’S at 1574).

98. *Id.*

99. *Id.* at 265.

100. Faust, *supra* note 16, at A1.

101. *Id.*

court, immediate issues developed concerning whether the casino companies would have grounds to sue the state.¹⁰² The casinos' plans had been continuously and systematically approved *vis a vis* the state regulatory commissions, including the Missouri Gaming Commission, every step of the way.¹⁰³ Licenses, upon which the casino companies relied, were granted by the state of Missouri; the Missouri Supreme Court was now declaring them unconstitutional.¹⁰⁴

During this period of adjudication, the Missouri Gaming Commission had developed state procedures for disciplining riverboat casinos who were alleged to be in violation of state law.¹⁰⁵ On January 29, 1998, however, Cole County Circuit Judge Byron Kinder ruled that the gaming commission's disciplinary process was backwards.¹⁰⁶ Casinos had been required to prove their innocence before regulators presented evidence of wrongdoing, a patent violation of both Fourteenth Amendment procedural due process and the Missouri Constitution.¹⁰⁷

Additionally, there existed the problem of increased revenue flow if several integral casinos should be forced to close. Casinos argued that the gaming industry has become an integral part of Missouri's economy.¹⁰⁸ Casino licensees were being taxed at the rate of twenty percent on all adjusted gross receipts from gambling games.¹⁰⁹ The "home county" in which the casino was located was receiving ten percent of the casino's adjusted gross receipts tax collections.¹¹⁰ These funds were being used to "promote the safety of the public visiting the gambling boats."¹¹¹ The remaining adjusted gross receipts tax collections were being placed in a treasury fund to benefit Missouri public education.¹¹² About \$136 million per year in gaming taxes was going directly to fund Missouri public schools; \$53 million per year was going to cities and counties where the casinos are located.¹¹³

As demonstrated by the existence of forces as diverse as education and due process, the complexities of riverboat gambling and its effects are not easily organized; such riverboat gaming projects are interdisciplinary matters that touch on many areas of the law, including real estate finance, municipal law, environmental law, federal administrative law, and taxation.¹¹⁴ Such a web of conflicts may seem out of the range of dispute resolution. The potential for increased jobs, educational funds, tourism, and a unique form of entertainment indicates that some compromises needed to be reached.¹¹⁵ Obviously, the structure and bureaucracy of the courts had been unsuccessful in reaching an effective compromise; this issue had been in front

102. *Id.*

103. *Id.*

104. *Id.*

105. Young, *supra* note 7, at A1. The Commission staff had found that six of the state's eleven casino complexes violated the guidelines. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Murphy & Epps, *supra* note 3, at 16 (citing MO. REV. STAT. § 313.822 (1994)).

110. *Id.* (citing MO. REV. STAT. § 313.822(1)(1) (1994)).

111. *Id.*

112. *Id.*

113. Young, *supra* note 7, at A1.

114. *Id.*

115. *See id.*

of the legislature and courts for the past seven years to no avail. The courts had done little to resolve the quagmire; could dispute resolution have accomplished anything more?

B. *The Indian Gaming Reservation Act*

One possibility is a look toward the federal government and federal courts on application of dispute resolution tactics to the gambling issue. In 1988, Congress passed the Indian Gaming Regulatory Act¹¹⁶ in an effort to facilitate agreements between the gambling industry of Indian tribes and the corresponding state and local laws. The Indian Gaming Regulatory Act (IGRA) divides gaming into three classes.¹¹⁷ Class I gaming includes social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations.¹¹⁸ Class II gaming includes, *inter alia*, bingo, lotto, pull tabs, punch boards, and tip jars.¹¹⁹ Class III gaming includes casino-type gambling, parimutuel horse and dog racing, lotteries, and all other forms of gaming that are not class I or class II gaming.¹²⁰

The IGRA gives the Indian tribes limited jurisdiction over their gaming enterprises. For example, if any Indian tribe proposes to engage in a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe must submit an ordinance or resolution to the Chairman of Indian affairs.¹²¹ That Indian tribe shall then request the State in which such lands are located to *enter into negotiations* for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities.¹²² Upon receiving such a request, the state *shall negotiate with the Indian tribe in good faith* to enter into such a compact.¹²³ Tribal-state compacts can include provisions regarding the application of criminal and civil laws and regulations, allocation of criminal and civil jurisdiction between the tribe and state, taxation by the tribe, remedies for breach of contract, standards for the operation and maintenance of gaming facilities including licensing, and any other subjects directly related to the operation of gaming activities.¹²⁴

The IGRA has been less than successful. One commentator has described the act as a "political compromise that pleased neither the states nor the tribes."¹²⁵ Generally, the Indian tribes have been overmatched by the States during the negotiations, and these negotiations only happen if the state actually consents to conducting negotiations. Courts have chipped away at the Indian tribes' bargaining power little by little. A state is often not required to negotiate with respect to forms of gaming it does not, at that present time, permit.¹²⁶ Moreover, in the event the state

116. 25 U.S.C. § 2701-2721 (1988).

117. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 275 (8th Cir. 1993).

118. *Id.*

119. *Id.*

120. *Id.*

121. 25 U.S.C. § 2710(d)(2)(A) (1988).

122. 25 U.S.C. § 2710(d)(3)(A) (1988) (emphasis added).

123. *Id.* (emphasis added).

124. *Cheyenne River Sioux Tribe*, 3 F.3d at 275-76 (citing 25 U.S.C. § 2710(d)(3)(C) (1988)).

125. Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 770 (1995).

126. *Cheyenne River Sioux Tribe*, 3 F.3d at 279.

refuses to negotiate, the Supreme Court has held that the doctrine of *Ex Parte Young*¹²⁷ does not allow a suit against a state's governor to require compact negotiations.¹²⁸

Most breakdowns in these IGRA negotiations involve the types of games that will be permitted on the Indian reservations.¹²⁹ This has been referred to as the scope of the gaming problem.¹³⁰ Federal legislation compelling negotiation has been highly unsuccessful and has spawned a multitude of lawsuits crying bad faith on behalf of the opposing party. The "scope of the [federal] gaming problem" to which Professor Cox alluded is precisely the scope of the Missouri gaming problem; disagreements on what games will be permitted and what games will be excluded. This controversy is the nexus of the Missouri problem; whether games of chance should be allowed on riverboat casinos. If federal legislation compelling negotiation was highly unsuccessful, the odds are strong that negotiations on a state level would be unsuccessful as well.

C. A Modest Proposal

Despite the years that have passed, the problems still exist. For the past six years, the Missouri court system has been extremely unsuccessful in reaching a compromise concerning the riverboat gambling issue.¹³¹ Unfortunately, neither the proponents nor the opponents of riverboat gambling were in any better a position after *Akin* than they were in 1992. Parties have refused to compromise, preferring instead to direct their cries toward the legal system. This has cost the Missouri taxpayers an unknown, yet undoubtedly unconscionable, amount of money. Moreover, the case is far from over. Opponents of the new Constitutional Amendment insist that the state must prepare for the inevitable crime, welfare, and bankruptcies that the gambling industry will produce.¹³²

The gambling casino industry employs 7,200 individuals in the St. Louis Metropolitan area alone.¹³³ The gambling casino industry generates millions of dollars for the Missouri educational system.¹³⁴ Conversely, many believe the gambling casino industry breeds societal vices such as addiction and drug use.¹³⁵ Yet, suspect strategies to facilitate the demise of riverboat gambling, such as stressing collateral, yea, irrelevant, issues like the difference between a "moat" and a "river" merely increase tension and disagreement. Moreover, such backdoor tactics have wasted thousands of dollars of taxpayer money. Maybe educated discussion between all of the interested parties, without being unnecessarily bogged

127. 209 U.S. 123 (1908). The *Ex parte Young* doctrine allows a suit to be brought against a state officer in lieu of the Eleventh Amendment restrictions. WILLIAM COHEN & JONATHAN T. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 76 (10th ed. 1997).

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

129. Cox, *supra* note 125, at 782.

130. *Id.* at 782-83.

131. See *supra* text accompanying notes 35-66.

132. See *supra* text accompanying notes 101-03.

133. Fred Faust, *School Won't Let Mom Talk About Her Casino Job*, ST. LOUIS POST-DISPATCH, Feb. 1, 1998, at A1.

134. See *supra* text accompanying notes 108-09.

135. See *supra* text accompanying note 62.

down in the structure and formality of the court system, would lead to a more cohesive and agreeable solution. Perhaps some form of mediation or arbitration would have presented more creative solutions. This quagmire is not a classic adversarial challenge of those morally opposed to gambling against those who enjoy such entertainment. Other interests abound; other interested parties include the educational system, the casino workers and employees of Missouri, churches and religious groups, and the Missouri department of tourism. Traditional legal action had been wholly ineffective; perhaps some honest dialogue and compromise was all that was needed.

Some of the advantages of arbitration, in particular, cut directly toward the center of the riverboat gambling quagmire. One benefit is that arbitration can be initiated without long delays, the procedure is relatively short, and a decision can be reached promptly.¹³⁶ This would have eased tension and facilitated the process for casinos whose licenses were up for renewal or casinos whose business lifeblood was in danger. Also, in arbitration, the parties may have selected the applicable norms, i.e. specifying the particular body of law that would serve as the basis for a decision that might not be relevant in a court setting.¹³⁷ This would have eliminated the intrusion of collateral, ancillary issues that tend to obfuscate the real issue. A perfect example of an ancillary issue is the technical definition of a river. What was really at issue was whether gambling should have been made legal; any deviations from the real premise were simply a waste of taxpayer money and time. Finally, in arbitration, the resolution can be tailored to the circumstances.¹³⁸ As previously mentioned, this would remove the complex issue from the straightjacket of traditional legal process and enable a more flexible, workable solution to be crafted.

VI. CONCLUSION

In effect, the state of Missouri is still embroiled in a complex legal and societal disaster. The issue of legalizing riverboat gambling has been of primary importance for the past six years. Unfortunately, as procured in the recent case of *Akin v. Missouri Gaming Commission*, the problem is not going away anytime soon. However, it would appear that both adversaries have exhausted not only their war chests and legal stratagems, but also taxpayer dollars. There has been no lone victor in this saga. Notwithstanding the lack of success of compelled arbitration between state and casino operator on a federal level, some other method of agreement should have been sought in the gaming situation. Maybe some form of multiple party arbitration and/or honest discussion would have denoted at least a starting point for a more constructive finish to this embittered controversy.

MATTHEW POTTER

136. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 197 (1988).

137. *Id.*

138. *Id.*

