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ARTICLE

BRINGING BALANCE TO INDIAN GAMING

MATTHEW L. M. FLETCHER*

This Article argues that the national debate on Indian gaming wrongly focuses on the issue of off-reservation gaming and other symptoms of the current imbalance in Indian gaming law, rather than addressing the fundamental reason for the imbalance. The Article first describes the history of Indian gaming law that led to Congress's enactment of the Indian Gaming Regulatory Act ("IGRA") in 1988 and explains the delicate balance that the IGRA created between state and tribal interests. The author suggests that the Supreme Court's Seminole Tribe decision in 1996 ruptured this balance by invalidating the IGRA provision that extended federal jurisdiction to claims against states for failure to negotiate gaming compacts with tribes in good faith. As a result of the imbalance, states have been able to impose revenue-sharing agreements of questionable legality and fairness on tribes. This, in turn, has led tribes to pursue expanded gaming opportunities off-reservation and to invoke a procedure of uncertain validity that allows the Secretary of the Interior to prescribe gaming compacts between tribes and states. The Article proposes a legislative fix designed to restore the intended balance of the IGRA in a politically salable manner. The primary elements of the proposal are ratification of all existing revenue sharing agreements to which the concerned tribes consent, a requirement that all future gaming compacts include revenue sharing, and ratification of the Secretary's procedure for prescribing fair gaming compacts.

The brewing national backlash against off-reservation Indian gaming may result in amendments to the Indian Gaming Regulatory Act ("IGRA" or "the Act")¹ that would prohibit off-reservation gaming. The backlash has resulted from misconceptions that Indian tribes, their "attack-dog" lobbyists,² and their "shady" gaming management and development companies³ could impose Vegas-style casino operations in Middle American

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¹ Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721 (2000).

² See John Cochran, *Scrutiny on Tribes Keeps Stakes High*, CQ WEEKLY, Jan. 27, 2006, available at 2006 WLNR 1939588.

³ See, e.g., M. Neil Browne et al., *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?*, 78 NEB. L. REV. 37, 51–52 (1999) (footnotes omitted).

communities that do not want them. The resulting debates over the amendments to the Act distract policymakers from the real imbalance in Indian gaming—the imbalance created by the stronger bargaining position of state governments relative to Indian tribes. This imbalance allows state governments to impose revenue sharing agreements of dubious legal validity on Indian tribes in exchange for the right to commence gaming operations. Indian tribes, in response to their weak bargaining position, have sought off-reservation opportunities to expand the size of a revenue pie that is shrinking as a result of these revenue-sharing agreements.

The agenda of the 109th Congress included hearings on off-reservation gaming, tribal lobbying matters, taking of land into trust for gaming purposes, and the regulation of Indian gaming.⁴ All of these issues have legs when it comes to politics—they appear in the national news and inspire a substantial amount of passionate democratic debate.⁵

One could make a strong case that the congressional agenda is a result of a national backlash against Indian gaming.⁶ Members of both houses

⁴ See generally *Oversight Hearing Before the S. Indian Affairs Comm. on In re Tribal Lobbying Matters*, 109th Cong. (2005); *Oversight Hearing on the Second Discussion Draft of Legis. Regarding Off-Reservation Indian Gaming Before the H. Resources Comm.*, 109th Cong., (2005); *Oversight Hearing on Draft Legis. to Amend the Indian Gaming Regulatory Act to Restrict Off-Reservation Gaming, and for other purposes Before the H. Resources Comm.*, 109th Cong. (2005).

⁵ See generally STEVEN ANDREW LIGHT & KATHRYN R. L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 11–13 (2005) (discussing the controversies of Indian gaming); Peter Roper, *Off-Reservation Casinos Shock Congress*, PUEBLO CHIEFTAIN (COLO.), Sept. 25, 2005, available at 2005 WLNR 15178554; Jodi Rave, *Governors: Casinos Off Reservation Top Concern*, MISSOULIAN (MONT.), Mar. 31, 2005, at B1, available at 2005 WLNR 6020534 (discussing off-reservation gaming); Susan Schmidt & James V. Grimaldi, *Norton Ex-Aides Clash on Lobbyist's Influence; Lawyer Says He Accused Griles of Aiding Abramoff*, WASH. POST, Nov. 3, 2005, at A19, available at 2005 WLNR 17731764 (discussing tribal lobbying); Suzanne Gamboa, *Lobbyists Diverted Millions from Tribes; McCain asks Justice to Investigate the Trail of Billing, Money*, CHARLOTTE OBSERVER, June 23, 2005, at 14A, available at 2005 WLNR 9901208 (discussing tribal lobbying); Tu-Uyen Tran, *Council Gives Lukewarm Support; Vote Set for Monday*, GRAND FORKS HERALD, Oct. 11, 2005, at A1, available at 2005 WLNR 16434974 (discussing fee-to-trust-matters); John Stearns & Suzanne Struglinski, *McCain Aims to Strengthen Oversight of Tribal Gambling*, LAS VEGAS SUN, Sept. 22, 2005, at C3, available at 2005 WLNR 15438951 (discussing Indian gaming regulation and *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123 (D.D.C. 2005), where the court invalidated class III gaming regulations implemented by the National Indian Gaming Commission).

⁶ See, e.g., 151 CONG. REC. S13389, S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain) (noting a “backlash against Indian gaming generally”). See generally *Oversight Hearing Before the S. Indian Affairs Comm. on the Regulation of Indian Gaming*, 109th Cong. 12–13 (2005) (Statement of Kathryn R. L. Rand & Steven Andrew Light) (“At times, the claims made by tribal gaming’s opponents may . . . set the tone of the public conversation about Indian gaming . . . [and] the agenda for public policy.”), available at <http://indian.senate.gov/2005hrgs/042705hrgrand.pdf> [hereinafter Rand & Light Testimony]; *The Impact of the U.S. Supreme Court's Recent Decision in Seminole v. Florida on the Indian Gaming Regulatory Act of 1988*, 104th Cong. 104–513 (1996) (statement of Franklin Ducheneaux) (noting “the distortion of [the right of Indian tribes to game] by the press and opponents of Indian gaming”) [hereinafter Ducheneaux Testimony].

of Congress have introduced legislation intending to limit off-reservation gaming, limit the taking of lands into trust for gaming purposes, expand regulation of Indian gaming, and increase restrictions on Indian lobbying activities.⁷ The current climate on Capitol Hill in relation to Indian gaming is one of reform and may reflect the vast changes and growth in the Indian gaming industry since 1988.⁸

At the time of the enactment of IGRA in 1988, Senator McCain stated, “It is with great reluctance that I am supporting [IGRA].”⁹ He lamented that “[t]ribes never banded together and offered their own gaming proposal.”¹⁰ When Senator McCain introduced his own legislation, more supportive of tribal sovereignty, he stated, “[u]nfortunately, I received no more than a handful of letters supporting this measure; only more calls for ‘no legislation.’ I believe Tribes and tribal organizations share part of the burden for the direction that Indian gaming legislation has taken.”¹¹

Senator McCain’s “reluctant” support for IGRA underscores the realities of national politics and Indian affairs. Some legislation is “inevitable,” despite efforts by tribes to call for “no legislation.”¹²

Tribes and states are in need of a simple legislative fix that benefits both sides and cuts to the heart of the imbalance in IGRA. The solution to these salient political issues is not piecemeal legislative efforts to remedy the alleged problems with Indian gaming. These problems are symptoms of an imbalance in the overarching federal statutory scheme. The Act originally created a balanced and careful relationship between Indian tribes—and to a lesser extent, the federal government—and the various states.¹³ The crux of that statutory scheme was a congressional waiver of

⁷ See, e.g., To Amend the Indian Gaming Regulatory Act to Limit Casino Expansion, H.R. 3431, 109th Cong. (2005) (restricting off-reservation gaming and increasing state authority to restrict Indian gaming); Common Sense Indian Gambling Reform Act, H.R. 2353, 109th Cong. (2005) (increasing Indian gaming regulation, limiting off-reservation gaming, increasing regulation of tribal lobbying, and increasing state authority over Indian gaming); Indian Gaming Regulatory Act Amendments of 2005, S. 2078, 109th Cong. (2005) (expanding the National Indian Gaming Commission’s regulatory authority and constricting the legal authority for off-reservation gaming expansion); To Amend the Indian Gaming Regulatory Act to Modify a Provision Relating to the Locations in Which Class III Gaming is Lawful, S. 1518, 109th Cong. (2005) (restricting lands where Indian gaming is authorized); National Indian Gaming Commission Accountability Act of 2005, S. 1295, 109th Cong. (2005) (increasing federal regulation of Indian gaming).

⁸ 151 CONG. REC. at S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

⁹ S. Rep. No. 100-446, at 33 (1988)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Steven Andrew Light & Kathryn R. L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 271–73 (2004) (describing the intent of Congress to balance the interests of the three sovereigns); Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee’s Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 129–32 (1997) (describing the policy considerations of the Act); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 49 (1997) (“In the end, the 1988 Indian Gaming

state sovereign immunity that allowed Indian tribes to sue the states and force their governors to negotiate with tribes over gaming compacts.¹⁴

The Supreme Court, however, in *Florida v. Seminole Tribe of Florida*,¹⁵ obliterated that balance in favor of the states.¹⁶ In *Seminole Tribe*, the Court ruled that the congressional waiver of state immunity was invalid under the Eleventh Amendment, “significantly limiting the bargaining power of Indian tribes.”¹⁷

Indian tribes and the federal government took several steps in order to alleviate the negative impact of *Seminole Tribe* on Indian gaming. Indian tribes and the states began to negotiate broader revenue sharing agreements,¹⁸ a process some have labeled extortion of Indian tribes by states.¹⁹ Meanwhile, the federal government, through the Secretary of the Interior, proposed an administrative fix to the *Seminole Tribe* problem that would allow the Secretary to promulgate class III gaming procedures for tribes that do not have the opportunity to negotiate a gaming compact.²⁰

The fundamental cause of the disputes between tribes, tribal constituents, states, state constituents, private economic interests, and the federal government is the imbalance in the IGRA brought about by *Seminole Tribe*. The congressional agenda, as evidenced by the Senate Committee’s hearing schedule and the subject matter of the various bills being debated, ignores the key issue of whether revenue sharing agreements contained in gaming compacts are valid in accordance with IGRA.²¹ These

Regulatory Act represented a political compromise made to protect the same state regulatory interests that the Supreme Court had found unpersuasive in *Cabazon*, while still preserving gaming as a means of tribal economic development, thus alleviating the financial burden that the tribes place on the federal government.” (footnote omitted); Franklin Ducheneaux & Peter S. Taylor, *Tribal Sovereignty and the Powers of the National Indian Gaming Commission* 26–32 (describing the legislative negotiation and balancing leading up to the enactment of IGRA) (on file with author).

¹⁴ See 25 U.S.C. § 2710(d)(7) (2000), *invalidated by Florida v. Seminole Tribe of Fla.*, 517 U.S. 44 (1996).

¹⁵ 517 U.S. 44 (1996).

¹⁶ See LIGHT & RAND, *supra* note 5, at 49–50; Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 452 (2003); Light & Rand, *supra* note 13, at 274; Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 664–65 (2004); Skibine, *supra* note 13, at 132–33; Wambdi Awanwicake Wastewin, Case Comment, *Federal Courts—Indians: The Eleventh Amendment and Seminole Tribe: Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517, 540 (1997).

¹⁷ See *Seminole Tribe*, 517 U.S. at 47.

¹⁸ See LIGHT & RAND, *supra* note 5, at 86–87; Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 440–41 (2001) [hereinafter Washburn, *Recurring Problems*]; Kevin K. Washburn, A.B.A. CTR. FOR CONTINUING LEGAL EDUC., *INDIAN GAMING: A PRIMER ON THE DEVELOPMENT OF INDIAN GAMING, THE NIGC AND SEVERAL IMPORTANT UNRESOLVED ISSUES* (2002).

¹⁹ See *infra* note 145 and accompanying text.

²⁰ See Class III Gaming Procedures, 64 FED. REG. 17,535 (Apr. 12, 1999) (codified as 25 C.F.R. pt. 291 (2004)).

²¹ See *generally* In re Gaming Related Cases, 331 F.3d 1094, 1115 (9th Cir. 2003) (upholding the validity of California tribal-state gaming compact revenue sharing provisions);

revenue sharing agreements are the creaky bridge between the states and the tribes that operates as the de facto *Seminole Tribe* fix. The critical weakness of these agreements is their questionable validity in the light of the IGRA's prohibition on state taxation of Indian gaming revenues.²² Legal commentators have proposed numerous legislative fixes that would give the upper hand in Indian gaming compact negotiations to the states²³ or to the tribes,²⁴ or that propose litigation strategies designed to assist the tribes.²⁵ These proposals are neither salable nor workable in the real world.

Henry Buffalo & Robert Miller, Commentary, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 681, 689 (2004) ("And irrespective of what the Ninth Circuit has said, I still believe that the law prohibits revenue sharing agreements."); Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation*, 5 J. GENDER RACE & JUST. 487, 490 (2003) ("Although states and tribes continue to enter into these agreements with the approval of the Department of the Interior, substantial questions remain as to whether these agreements are valid revenue-sharing or illegal state taxation under the IGRA."); Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 325–26 (2004–2005) ("States that wish to engage in revenue sharing from Indian gaming must formulate their revenue sharing provisions in a manner to bypass the prohibition against tax impositions."); Lent, *supra* note 16, at 461 ("The plain statutory language of IGRA, its legislative history, and relevant case law illustrate that tribal-state revenue sharing is inappropriate under IGRA."); Rubin Ranat, Note and Comment, *Tribal-State Compacts: Legitimate or Illegal Taxation of Indian Gaming in California?*, 26 WHITTIER L. REV. 953, 980 (2005) ("[I]f Congress clarifies the meaning of IGRA or passes legislation allowing tribes to bring suit against states, the Court may hold California's Compact illegal.").

²² See 25 U.S.C. § 2710(d)(4).

²³ See, e.g., Nicolas S. Goldin, Note, *Casting a New Light on Tribal Casino Gambling: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 845 (1999); Jason D. Kolkema, Comment, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361, 365 (1996); Edmund F. Leedham III, Note, *The Indian Gaming Controversy in Connecticut: Forging a Balance Between Tribal Sovereignty and State Interests*, 13 BRIDGEPORT L. REV. 649, 693–94 (1993); Blake A. Watson, *Indian Gambling in Ohio: What Are the Odds?*, 32 CAP. U. L. REV. 237, 312 (2003).

²⁴ See, e.g., Gary W. Donohue, Note, *The Eleventh Amendment: The Supreme Court's Frustrating Impediment to Sensible Regulation of Indian Gaming*, 45 WAYNE L. REV. 295, 324 (1999); Jason Kalish, Note, *Do the States Have an Ace in the Hole or Should the Indian Call Their Bluff?: Tribes Caught in the Power Struggle Between the Federal Government and the States*, 38 ARIZ. L. REV. 1345, 1370–71 (1996); Lent, *supra* note 16, at 471; Anthony J. Marks, Note & Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L. REV. 157, 198 (1996); Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming By Removing the "Governor's Veto" for Gaming on "After-Acquired Lands"*, 37 U. MICH. J.L. REFORM 1227 (2004); Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1166 (1995).

²⁵ See Joe Laxague, Note, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77, 91 (1999); Lent, *supra* note 16, at 472–73. Compare Kathleen M. O'Sullivan, Note, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123, 144–50 (1995) (arguing that IGRA meets the federal trust responsibility to Indian tribes and would likely survive a challenge by tribes based on the trust relationship), with Christian C.

This Article proposes a legislative solution to IGRA that would validate both the current revenue sharing agreements and the administrative solution to *Seminole Tribe*, provide all sides with a significant win-win opportunity, and avoid interference by federal courts. This Article's legislative proposal is a pragmatic approach to the enormous and controversial issue of Indian gaming. The proposal recognizes the governmental parties affected by Indian gaming, provides benefits to all of them, and preserves Indian gaming for the long-term by strengthening the operative statute.

Part I of this Article details the original intent of the Act and describes the balance created within it. The Act is based on the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*.²⁶ Working from this foundation, Congress sought to maintain an equilibrium between its two constituents, the tribes and the states, in enacting the statute. However, state governments soon flexed their muscle in heated response to the decision and to the balancing act Congress implemented in the legislation.

Part II deals with the *Seminole Tribe* case and its aftermath, a wobbly legislative scheme that altered the balance of bargaining power chosen by Congress and disrupted settled expectations. The decision created an impetus for tribes to take extensive political measures to preserve and expand their gaming rights and opportunities while inviting states to seek expanded economic stakes in tribal government revenue streams. Part II then draws the connection between an imbalanced IGRA and the current congressional agenda which seeks to limit and regulate Indian gaming further than IGRA ever intended. It also describes the legal weaknesses of the schemes, including revenue sharing agreements, created by states, tribes, and federal government to further the goals of IGRA in a post-*Seminole Tribe* legal and political landscape.

Part III outlines the legislative response Congress should take in order to bring balance to IGRA once again. The legislation proposed in this Part would ratify all current revenue sharing agreements between tribes and states contained in gaming compacts, with certain limitations. The legislation would also validate the Department of the Interior's class III Gaming Procedures regulations as applied to certain situations.

Part IV analyzes the impacts of the four-part legislative proposal, concluding that re-balancing IGRA will preserve benefits not only for tribes, but also for states and local units of government. Moreover, this rebalancing will make IGRA stronger and more apt to survive the rise and fall of political tides over time. Finally, Part IV defends this legisla-

Bedortha, Comment, *The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & The Long Search for Autonomy*, 6 SCHOLAR 261, 286 (2004) (arguing that federal and state governments should promote tribal gaming in order to give the federal trust responsibility "teeth").

²⁶ 480 U.S. 202 (1987).

tive proposal against tribal and state sovereignty critiques and concludes that this proposal best satisfies the political interests of both states and Indian tribes while restoring the inherent balance of the IGRA.

I. BALANCE: CABAZON BAND AND IGRA

As early as the 1960s and into the 1970s, a few Indian tribes in California, Florida, Maine, New York, and Wisconsin, desperate for tribal government revenue, opened high-stakes bingo parlors.²⁷ The theory was straightforward. Federal jurisprudence has long held that state laws have no force in Indian Country, and state criminal laws that might otherwise prohibit high stakes bingo would likely not apply to tribally owned and operated bingo halls.²⁸ Federal officials saw the potential for Indian tribes to make a significant amount of money in these endeavors.²⁹ That money could be used to reduce Indian dependence on federal appropriations—a worthwhile political goal. Even local governments often cooperated with tribes to develop gaming operations.³⁰ In the early part of the 1980s, after

²⁷ See LIGHT & RAND, *supra* note 5, at 39 (California and Florida); Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 565 (1994) (New York); Marks, *supra* note 24, at 158–59 (Florida and Maine); Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 69 (1995) (Florida and Wisconsin).

²⁸ See *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force”); *Bryan v. Itasca County*, 426 U.S. 373, 375–76 (1976) (stating that in the area of state taxation “there has been no satisfactory authority for taxing Indian reservation lands”) (citation omitted); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”); *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977) (citing 18 U.S.C. § 1152); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 568 (1976).

²⁹ See Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 772 (1995) (“During this same period, [federal] officials began to realize the potential economic benefits of tribal gaming operations, and a policy emerged which supported tribal bingo enterprises as an appropriate means by which tribes could further their economic self-sufficiency, the economic development of their reservations, and tribal self-determination.”) (footnotes omitted); William E. Horwitz, Note, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L.J. 153, 164 n.75 (1996) (“The federal government actively encouraged bingo as a means of economic development by providing approvals of tribal bingo ordinances and even guaranteeing some eight million dollars in construction loans for bingo facilities.” (citing 132 CONG. REC. S12,017–18 (daily ed. Aug. 15, 1986) (statement of Sen. Andrews))).

³⁰ See, e.g., *Worthington v. City Council of City of Rohnert Park*, 31 Cal. Rptr. 3d 59, 61 (Ct. App. 2005) (discussing agreement between municipality and tribe on gaming); Ducheneaux & Taylor, *supra* note 13, at 12 (“Some of these municipal governments began to approach Indian tribes with proposals involving acquisition of land near the town or city for transfer to the United States to be held in trust for the tribe. Then, a gaming facility would be located on the land, providing revenue for the tribes and jobs and economic

a series of federal court decisions favoring this exercise of tribal sovereignty,³¹ tribes in other states followed the lead of the gaming tribes.³²

Yet, this new source of revenue for the gaming tribes also had negative consequences. As soon as the bingo halls opened, some state and county law enforcement officials began to suppress the efforts of these early gaming tribes.³³ In 1953, Congress authorized several states, including California and Wisconsin, to exercise criminal jurisdiction over Indian Country.³⁴ Soon other states, such as Florida, took advantage of the statute.³⁵ Those states with criminal jurisdiction had a much stronger legal claim than other states in shutting down the tribal bingo halls.³⁶ States that had not assumed criminal jurisdiction over Indian Country sometimes chose to regulate gaming by arresting bingo hall patrons as they left the reservation borders.³⁷ At the same time, as the modest revenue potential of bingo halls gave way to more lucrative casino-style gaming, replete with slot machines, poker tables, blackjack, and so on, federal law enforcement agencies began to investigate and prosecute alleged federal criminal violations.³⁸

growth for the non-Indian community.”). Senator McCain neglected to mention this fact when he stated that “unscrupulous developers” were to blame for increased proposals for off-reservation gaming. 151 CONG. REC. S13389, S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

³¹ See *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1189 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986). All of these cases found the state law in question not to apply to Indian reservations because the laws were of a regulatory nature (see *infra* notes 45–59 and accompanying text).

³² See S. Rep. No. 100-446, at 5 (1988).

³³ See *LIGHT & RAND*, *supra* note 5, at 40 (“[T]he local sheriff threatened to shut down the [Barona Group of the Capitan Band of Missions Indians]’s bingo operation and arrest its patrons”); *Cox*, *supra* note 29, at 770 (“The opening of the Seminole Tribe of Florida’s high stakes bingo hall in 1979 was met with immediate resistance from the Sheriff of Broward County who threatened to arrest anyone playing bingo at the Tribe’s gaming hall.”); *Leedham*, *supra* note 23, at 670 (“[T]he Chief State’s Attorney, asserting that the state possessed criminal jurisdiction over the reservation, notified the tribe of his intention to enforce Connecticut’s bingo laws against its enterprise.”).

³⁴ Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161–1162 (2000); 25 U.S.C. §§ 1321–1322 (2000); 28 U.S.C. § 1360 (2000)). See generally *CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997).

³⁵ See *HON. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL* 27 (4th ed. 2004).

³⁶ See *Sullivan*, *supra* note 24, at 1118–20 (comparing the situations in Florida and Wisconsin).

³⁷ See *LIGHT & RAND*, *supra* note 5, at 40.

³⁸ See *Michael Donovan Cox, A.B.A. CTR. FOR CONTINUING LEGAL EDUC., GAMING ENFORCEMENT UNDER THE INDIAN GAMING REGULATORY ACT* (Apr. 17–18, 1997) [hereinafter *Cox, Gaming Enforcement*] (citing *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986)).

The issue of whether states had jurisdiction to shut down or regulate Indian bingo halls and casinos reached the Supreme Court in *Cabazon Band*.³⁹ The Cabazon and Morongo Band of Mission Indians operated bingo games on their respective reservations.⁴⁰ The Cabazon Band also operated poker and other card games.⁴¹ California, a state with criminal jurisdiction in Indian Country,⁴² and Riverside County sought to enforce the state criminal code and county ordinances limiting and regulating bingo games.⁴³

Following the text of Public Law 280 and its decision in *Bryan v. Itasca County*,⁴⁴ the Court adopted an analysis that distinguished between criminal, prohibitory-civil, and regulatory actions by the state.⁴⁵ The two operative provisions of Public Law 280 that give rise to this distinction are sections 2 and 4.⁴⁶ Section 2 is a grant by Congress to California and other states of criminal jurisdiction over Indian Country.⁴⁷ In section 4, Congress grants a form of civil jurisdiction over Indian Country to California and other states.⁴⁸ In *Bryan*, the Court had held that, consistent with the Congressional intent of Public Law 280,⁴⁹ Section 4 “grant[s] States jurisdiction over private civil litigation involving reservation Indians in state court, but [does] not . . . grant general civil regulatory authority.”⁵⁰ In *Cabazon Band*, the Court recognized that “a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.”⁵¹

The rule of *Bryan*, then, is that “it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under section 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.”⁵² The Court noted, however, that

³⁹ 480 U.S. 202 (1987).

⁴⁰ *See id.* at 204–05.

⁴¹ *See id.* at 205.

⁴² *See* 18 U.S.C. § 1162 (2000). In 1953, Congress withdrew federal criminal jurisdiction and extended the criminal jurisdiction of California and a few other states to Indian Country located within those states. *See* GOLDBERG-AMBROSE, *supra* note 34, at 1. Congress created a mechanism through which other states could assume criminal jurisdiction if they chose to do so. *See id.* Congress withdrew that procedure in 1968, but allowed the nine states who had chosen to assume jurisdiction to retain it. *See id.* at 2.

⁴³ *See Cabazon Band*, 480 U.S. at 205–06 (citing CAL. PENAL CODE § 326.5 (1987); Riverside County Ordinance No. 558; Riverside County Ordinance No. 331).

⁴⁴ 426 U.S. 373 (1976).

⁴⁵ *See Cabazon Band*, 480 U.S. at 210.

⁴⁶ *See* 18 U.S.C. § 1162 (Section 2); 28 U.S.C. § 1360 (2000) (Section 4).

⁴⁷ *See* 18 U.S.C. § 1162.

⁴⁸ *See* 28 U.S.C. § 1360.

⁴⁹ *See Bryan*, 426 U.S. at 379 (“The primary concern of Congress in enacting Public Law 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”) (citing Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541–42 (1975)).

⁵⁰ *Cabazon Band*, 480 U.S. at 208 (citing *Bryan*, 426 U.S. at 385, 388–90).

⁵¹ *Id.*, 480 U.S. at 208.

⁵² *Id.*

the test is not a “bright-line rule”⁵³—the test for criminal behavior is whether the activity of the tribe violates the public policy of the state in which the tribe is located.⁵⁴ Frank Ducheneaux, former counsel on Indian Affairs to the House Committee on Interior and Insular Affairs from 1973 to 1990, stated the rule as policymakers understand it:

The rationale of the *Bryan* case, as applied to state regulation of Indian gaming in the *Seminole* and *Barona* case, is quite simple. It holds that, where a state makes gambling a crime and prohibits that activity to all persons or entities within the state, Indian tribes in that state may not engage in such gambling as a matter of Federal-Indian law. The corollary, however, is that, where a state permits gambling as a part of its civil laws, no matter how stringently it may regulate such activity, Indian tribes in that state are free to engage in, or permit and regulate[], that activity on their land free of any state regulation.⁵⁵

Applying this analysis, the Court concluded that the state and local laws fit within the civil/regulatory portion of Public Law 280, or Section 4.⁵⁶ California had not prohibited “all forms of gambling.”⁵⁷ The Court reviewed the forms of gaming that California had legalized and, weighing California public policy, concluded that “California regulates rather than prohibits gambling in general and bingo in particular.”⁵⁸ The Court concluded that Public Law 280 provided no authority for California to enforce its bingo and other gaming laws in Indian Country.⁵⁹

The Court also engaged in a balancing of state, federal, and tribal interests for the purpose of determining whether state laws would be preempted by federal laws and policy.⁶⁰ Applying this balancing test, the Court concluded that “[u]nder certain circumstances a State may validly assert authority over the activities of non-members on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.”⁶¹ California’s asserted interest in preventing the infiltration of organized crime into Indian gambling was insufficient given the lack of any existing criminal involvement in the enterprises, the federal government’s shared interest in preventing organ-

⁵³ *Id.* at 210.

⁵⁴ *Id.* at 213.

⁵⁵ Ducheneaux Testimony, *supra* note 6, at 170.

⁵⁶ See *Cabazon Band*, 480 U.S. at 211.

⁵⁷ *Id.* at 210.

⁵⁸ *Id.* at 211.

⁵⁹ See *id.* at 212.

⁶⁰ See *id.* at 214–22.

⁶¹ *Cabazon Band*, 480 U.S. at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983)).

ized crime, and its obvious authority to forbid Indian gambling enterprises if necessary.⁶²

On the other hand, the Court identified tribal economic development as an “important” federal interest.⁶³ The Court relied upon President Reagan’s 1983 Statement on Indian policy, which provided that, “[i]t is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government.”⁶⁴ The Court noted Department of the Interior efforts to promote tribal bingo operations,⁶⁵ including the making of “grants and . . . guarantee[ing] loans for the purpose of constructing bingo facilities,”⁶⁶ and the provision by the Department of Health and Human Services of “financial assistance to develop tribal gaming enterprises.”⁶⁷ Finally, the Court married the federal interests to the tribal interests by describing the Indian tribes at issue:

The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes’ interests obviously parallel the federal interests.⁶⁸

The Court downplayed the State’s alleged interest in “preventing the infiltration of the tribal games by organized crime” in light of these federal and tribal interests.⁶⁹ In fact, the Court poked holes in the State’s arguments, suggesting that there was no evidence of involvement by organized crime and it was acting hypocritically: “[t]o the extent that [it sought]

⁶² See *id.* at 220-21.

⁶³ *Id.* at 217.

⁶⁴ *Id.* at 217 & n.20.

⁶⁵ See *id.* at 217-18. The Court quoted at length from an affidavit submitted by the Bureau of Indian Affairs Director of Indian Services, which read:

It is the department’s position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes. Furthermore, it is the Department’s position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan’s Indian Policy Statement of January 24, 1983.

Id. at 217 n.21.

⁶⁶ *Id.* at 218.

⁶⁷ *Id.*

⁶⁸ *Id.* at 218-19.

⁶⁹ *Id.* at 220.

to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games⁷⁰

The Court ruled 6-3 in favor of the Cabazon Band.⁷¹

States and local governments responded to *Cabazon Band* by urging Congress to enact legislation to regulate Indian gaming for the (unexpressed) purpose of protecting existing state businesses that engaged in gaming operations and the (expressed) purpose of reducing the influence of organized crime on Indian gaming.⁷² Congress had been debating Indian gaming regulatory bills for several years,⁷³ but *Cabazon Band* created the political impetus to finalize an Indian gaming act.⁷⁴

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act.⁷⁵ The Act was a compromise between the interests of Indian tribes that had been recognized and validated by the Supreme Court and the interests of the state and local governments.⁷⁶ Congress, authorized to take action in this arena by the Indian Commerce Clause,⁷⁷ created a novel scheme for the codification, authorization, and regulation of Indian gaming. As shown below, Congress intended to codify the *Cabazon Band* decision for high-stakes bingo,⁷⁸ authorize tribes to conduct casino-style

⁷⁰ *Id.* at 220–21. More recent studies conclude that Indian casinos do not attract either organized or disorganized crime. See Renee Ann Cramer, *Perceptions of the Process: Indian Gaming as it Affects Federal Tribal Acknowledgment Law and Practices*, 27 L. & POL'Y 578, 596 (2005).

⁷¹ See *Cabazon Band*, 480 U.S. at 222.

⁷² See 134 CONG. REC. H5028 (July 6, 1988) (Statement of Rep. Udall); LIGHT & RAND, *supra* note 5, at 42; Brad Jolly, Note, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 297 (1997); Robert B. Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, 5 GAMING L. REV. 299, 306 (2001); Mark C. Wenzel, Note/Comment, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed With Casino Gambling Without a State Compact*, 30 GONZ. L. REV. 467, 475 (1994-1995).

⁷³ See, e.g., Ducheneaux Testimony, *supra* note 6, at 171 (“In 1983, in the 98th Congress, Mr. Udall introduced the first bill to affect[] gambling activities by Indian tribes.”); Horwitz, *supra* note 29, at 164 (noting legislative history on IGRA as far back as the 98th Congress).

⁷⁴ See LIGHT & RAND, *supra* note 5, at 43; Porter, *supra* note 72, at 306.

⁷⁵ See Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)).

⁷⁶ See *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (quoting *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)), *cert. denied*, *Coyote Valley Band of Pomo Indians v. California*, 540 U.S. 1179 (2004); *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 126 (D.D.C. 2005); *Doe v. Santa Clara Pueblo*, 118 P.3d 203, 207 (N.M. Ct. App. 2005); Ducheneaux Testimony, *supra* note 6 at 175 (“The concept of a Tribal-State compact was the mechanism through which the Congress attempted to resolve the two opposing extreme positions in a manner which would preserve tribal self-government, yet recognize and accommodate legitimate state interests.”).

⁷⁷ U.S. CONST. art. I, § 8, cl. 3; see Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205 (2000) (describing the Indian Commerce Clause as a “grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution”).

⁷⁸ See 25 U.S.C. §§ 2701(5), 2702(1); S. REP. NO. 100-446, at 22–23 (1988).

gaming in certain states⁷⁹ (simultaneously limiting inherent tribal sovereignty to open up casinos in other states)⁸⁰ and create a regulatory scheme for Indian gaming.⁸¹ Overall, however, Congress made clear that the purpose of the Act was to benefit Indian tribes, not states,⁸² and to expand tribal opportunities for self-determination, self-government, economic development, and political stability.⁸³

Congress first established three classes of Indian gaming. Class I gaming includes traditional tribal games, or gaming that would be regulated and authorized *exclusively* by Indian tribes.⁸⁴ This class includes games such as *shaymuhkewuybinegunung*, a Minnesota Chippewa game involving dice in the form of sticks marked with turtles and snakes,⁸⁵ and *puga-saing*, a Michigan Chippewa bowl game using bone and brass pieces carved in the shapes of snakes, men, and other figures.⁸⁶ Class I gaming is not, at this time, a lucrative revenue option for Indian tribes.⁸⁷ Congress defined class II gaming to mean high-stakes bingo,⁸⁸ the type of games tribes first began in California, Florida, Michigan, and New York, and the type at issue in the *Cabazon Band* litigation.⁸⁹ Congress intended to leave the regulation of class II games to Indian tribes, thus codifying the *Cabazon Band* decision, except to the extent that the National Indian Gaming Commission is required to approve class II tribal gaming ordinances and to issue gaming licenses.⁹⁰

⁷⁹ See 25 U.S.C. § 2710(d)(1)(B) (authorizing casino-style gaming in certain states “that permit[] such gaming for any purpose by any person, organization, or entity”).

⁸⁰ See Jolly, *supra* note 72, at 301; Light & Rand, *supra* note 13, at 270; Naomi Mezey, Note, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 713 (1996); Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 132 (1996); Porter, *supra* note 72, at 306–09; Tsosie, *supra* note 13, at 65–66.

⁸¹ See 25 U.S.C. §§ 2701(3), 2702(3), 2704.

⁸² See LIGHT & RAND, *supra* note 5, at 44–48; Grand Traverse Band of Ottawa and Chippewa Indians, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002).

⁸³ See 25 U.S.C. § 2702(1).

⁸⁴ See 25 U.S.C. §§ 2703(6), 2710(a)(1).

⁸⁵ See Stewart Culin, *Games of the North American Indians*, in TWENTY-FOURTH ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY 3, 64 (W. H. Holmes ed., 1907).

⁸⁶ See *Id.* at 66–67.

⁸⁷ See CANBY, *supra* note 35, at 306 (“Class I gaming is not of legal or economic significance.”); Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 382 (2004) (“Such games are not regulated by the IGRA and tend to generate insignificant revenues.”).

⁸⁸ See 25 U.S.C. § 2703(7).

⁸⁹ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204–05 (1987); LIGHT & RAND, *supra* note 5, at 39–43.

⁹⁰ See 25 U.S.C. §§ 2710(b)(2), 2710(c)(1); S. REP. NO. 100-446, at 1 (1988).

Congress defined class III games to include all other gaming.⁹¹ This broad definition includes casino-style gaming, such as slot machines, poker, blackjack, craps, and keno.⁹² Class III gaming is the kind of gaming that can be very lucrative for Indian tribes,⁹³ although some forms of class II gaming can also generate enormous revenues.⁹⁴ It is here that Congress's regulatory and authorization scheme became the most creative. Congress created a structure whereby Indian tribes could not conduct class III gaming without entering into a class III gaming compact with the governor of the state where the tribe wished to begin gaming.⁹⁵ In the compact, the tribe and the state would decide basic issues about the tribal gaming operations, such as which sovereign would handle the regulation of the facility, what types of games could be played at the facility, and other logistical questions.⁹⁶ Congress also prohibited class III gaming in states that prohibited all forms of these games,⁹⁷ importing the *Cabazon Band* analysis into the class III scheme.⁹⁸ In states such as Nebraska or Texas, where no one was authorized to operate slot machines at any time, Congress did not authorize Indian tribes to engage in class III gaming.⁹⁹

In the arena of class III gaming, Congress anticipated the problem that states might refuse to negotiate a gaming compact with the tribes.¹⁰⁰ First, Congress placed the burden on the states to negotiate in good faith with the tribes.¹⁰¹ Second, if the state refused to negotiate in good faith, Congress created an enforcement mechanism against the states by extending jurisdiction to the federal courts to hear claims by a tribe with whom a state had refused to negotiate in good faith.¹⁰² Congress intended a scheme under which a tribe could still commence class III gaming operations even if a state stonewalled the tribe.¹⁰³ Absent this enforcement

⁹¹ See 25 U.S.C. § 2703(8). The National Indian Gaming Commission later promulgated a more specific definition of class III gaming. See 25 C.F.R. § 502.4 (2004).

⁹² See 25 C.F.R. § 502.4 (2006); LIGHT & RAND, *supra* note 5, at 46.

⁹³ See Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 949–50 (2000); Kathryn R. L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 401 n.118 (1997); Tsosie, *supra* note 13, at 79.

⁹⁴ See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 290 (2004) (referencing so-called class II slot machines).

⁹⁵ See 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3).

⁹⁶ See 25 U.S.C. § 2710(d)(3)(C).

⁹⁷ See 25 U.S.C. § 2710(d)(1)(B).

⁹⁸ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210–11 (1987).

⁹⁹ See Op. Neb. Att'y Gen. No. 02001 (2002); Op. Tex. Att'y Gen. No. GA-0278 (2004).

¹⁰⁰ See Ducheneaux Testimony, *supra* note 6, at 175–76 (“The problem for the negotiators [of IGRA] was how to permit the state to have a role in regulation of Indian class III gaming, which *Cabazon* precluded, through the requirement for a compact without placing tribes at the mercy of a state which would not act in good faith.”).

¹⁰¹ See 25 U.S.C. § 2710(d)(3)(A).

¹⁰² See *id.* at § 2710(d)(7)(A).

¹⁰³ See S. REP. NO. 100-446, at 5–6, 18–19 (1988).

mechanism against the states, Congress might not have been willing to include a compact requirement.¹⁰⁴

Congress also created the National Indian Gaming Commission (“NIGC”) to serve as the federal component of the regulatory scheme.¹⁰⁵ Congress intended for federal and state regulation of Indian gaming to be light, unless the tribe consented to such regulation, and it did not intend the NIGC to act as a massive bureaucratic regulatory body.¹⁰⁶ In fact, for several years, the NIGC’s annual budget was limited to a mere \$8 million,¹⁰⁷ and Congress did not authorize the NIGC to promulgate substantive regulations.¹⁰⁸ The tribes would be the primary regulator of class II gaming,¹⁰⁹ while Congress left class III gaming to the tribes and the states.¹¹⁰ As a final and important policy, Congress prohibited states from collecting taxes on Indian gaming operations and revenues.¹¹¹

In summary, the Act created a delicate, yet balanced, structure in relation to class III gaming. Prior to IGRA, the states could do little or nothing to prevent class III gaming because the federal government usually had exclusive jurisdiction over criminal gaming enterprises in Indian Country. After IGRA, the states could prevent class III gaming by prohibiting all class III–style gaming within their borders. Prior to IGRA, the states had no say in the regulation of class III gaming by Indian tribes. After IGRA, the states could force tribes to make concessions on regulation during the compacting process.

¹⁰⁴ See *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 (9th Cir. 1998); *Hearing on Review of Court Decision on Indian Gambling Before the S. Indian Affairs Comm.*, 104th Cong. (1996) (statement of Alex Tallchief Skibine, Professor of Law, University of Utah) [hereinafter Alex Skibine Testimony] (“Had we known that Congress could not waive the state’s sovereign immunity, there is no doubt in my mind that we would have selected the Secretary of the Interior as the recourse in cases where states failed to negotiate in good faith.”).

¹⁰⁵ See 25 U.S.C. §§ 2702(3), 2704.

¹⁰⁶ See *Colo. River Indian Tribes v. Nat’l Indian Gaming Comm.*, 383 F. Supp. 2d 123, 132 (D.D.C. 2005) (“A careful review of the text, the structure, the legislative history and the purpose of the IGRA, as well as each of the arguments advanced by the NIGC, leads the Court to the inescapable conclusion that Congress plainly did not intend to give the NIGC the authority to issue MICS for class III gaming”); see also Ducheneaux & Taylor, *supra* note 13, at 34–54 (analyzing the legislative history and the text of IGRA to conclude that the NIGC lacked authority to promulgate Minimum Internal Control Standards at 25 C.F.R. § 542).

¹⁰⁷ See Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 *NEW ENG. L. REV.* 545, 546 (2003).

¹⁰⁸ See *Colo. River Indian Tribes*, 383 F. Supp. 2d at 132.

¹⁰⁹ See 25 U.S.C. § 2710(b); Ducheneaux & Taylor, *supra* note 13, at 44–48 (describing how the NIGC does not have authority to promulgate Minimum Internal Control Standards at 25 C.F.R. § 542 for class II gaming).

¹¹⁰ See 25 U.S.C. § 2710(d)(1); Ducheneaux & Taylor, *supra* note 13, at 44 (“Except for Commission approval of a tribal gaming ordinance for class III gaming and authority of the Commission to approve any management contract related to such class III gaming, the sole authority for regulation for that activity was to be as agreed upon in the compact.”).

¹¹¹ See 25 U.S.C. § 2710(d)(4).

Casino-style gaming created the possibility of significant government revenues for many Indian tribes, but never before had Congress opened the door to direct state regulation of the activities of Indian tribes through the compacting process. The Act answered most of the unsettled questions of Indian gaming and put the weight of the federal government behind tribal gaming operations development.¹¹²

Indian gaming exploded after the *Cabazon Band* decision and the subsequent enactment of IGRA,¹¹³ altering the tribal-federal-state relationship in fundamental ways. There were some tribes located far from a large gaming market that were still able to establish successful gaming operations.¹¹⁴ Indian gaming provided needed job opportunities and revenue for tribes, and many tribes were able to use that revenue to fund important governmental services—both for themselves and for non-gaming tribes—that the federal and state governments had failed to offer.¹¹⁵ Despite

¹¹² See Ducheneaux & Taylor, *supra* note 13, at 28 (describing how IGRA answered questions about the legality of class III gaming in light of the Johnson Act, 15 U.S.C. § 1171 (2000), and quelled the state, local, and business political forces arrayed against Indian gaming by offering a federal solution).

¹¹³ See LIGHT & RAND, *supra* note 5, at 7–8; see also Ranat, *supra* note 21, at 953; Rand & Light, *supra* note 93, at 382 (describing a “tremendous boom in Indian gaming” since enactment of IGRA); Cox, *Gaming Enforcement*, *supra* note 38, at D-1 (“Since IGRA’s enactment in 1988, there has been a rapid growth in Indian gaming operations. Today there are 274 Indian gaming facilities owned and operated by 182 Indian tribes.”).

¹¹⁴ See Light & Rand, *supra* note 13, at 282 (“The experiences of the Plains Tribes provide empirical evidence for this hypothesis, demonstrating that even modest casino profits strengthen tribal governments and preserve or enhance tribal sovereignty. Such tribes, with large memberships and little access to metropolitan markets, are unlikely to experience dramatic economic and social rejuvenation based solely on casino revenues. Yet from the tribes’ perspective, casino employment and even modest revenue fund tribal strategies to overcome reservation poverty and accompanying social ills.”).

¹¹⁵ See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–19 (1987) (“The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations.”); *Artichoke Joe’s Grand Cal. Casino v. Norton*, 353 F.3d 712, 741 (9th Cir. 2003) (“California’s regulatory scheme benefits nongaming tribes because they receive distributions from the funds that the State requires gaming tribes to allocate to the Indian Gaming Revenue Sharing Trust.”), *cert. denied*, 125 S. Ct. 51 (2004); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002) (“In fiscal year 2001, [the casino] provided approximately 89% of the Band’s gaming revenue. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy.”) (citations to record omitted), *aff’d* 369 F.3d 960 (6th Cir. 2004); *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804, 808 n.4 (N.D. Cal. 1997) (“Congress recognized that for many tribes, gaming income ‘often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.’”) (quoting S. Rep. No. 100-446, at 2–3 (1988)); Cramer, *supra* note 70, at 596–97 (“Gaming revenues have allowed some tribes to

perceptions to the contrary, only a few tribes became truly rich from Indian gaming.¹¹⁶ Many tribes offer no gaming at all, whether due to market conditions, political issues, or cultural reasons.¹¹⁷

II. RUPTURE: SEMINOLE TRIBE

A. *The End of Equal Bargaining Power*

Congress spoke in great detail about its efforts to provide a careful balance between states and tribes in IGRA. The Senate Report notes that the tribal-state compacting process “is a viable mechanism for settling various matters between two equal sovereigns.”¹¹⁸ Congress balanced “the strong concerns of states [regarding] state laws and regulations relating to sophisticated forms of class III gaming . . . against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands.”¹¹⁹ Congress made clear that it had considered state and tribal interests and that, despite state interests, states should not be allowed to preclude Indian tribes from conducting class III gaming in accordance with IGRA:

A tribe’s governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of eco-

establish or improve their own fully certified police departments; many of them are able to offer specialties such as bomb and drug-sniffing dogs and extra personnel, which are often loaned out to non-Indian police forces in the region.” (citations omitted); Kolkema, *supra* note 23, at 367–68 (“Indian gaming is not regarded as a commercial activity. Unlike commercial activities, IGRA requires that all revenues from gaming operations be reinvested in the tribal community to further economic development.”).

¹¹⁶ See LIGHT & RAND, *supra* note 5, at 108; John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J. L. & POL’Y 307, 346 (1999); Kathryn R. L. Rand, *There are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 60–64 (2002).

¹¹⁷ See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors From Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 187–88 (2004) (“But most reservations, frequently the most impoverished, are too remote to attract many customers, so incurring sizable fixed costs for gaming operations would actually reduce tribal welfare. Thus fewer than half of the tribes participate in any gaming enterprises.” (citation omitted)); Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 239–40 (1997) (“Like the Seneca, both the Navajo and the Hopi defeated gaming referenda. These two tribes did so, however, without any strong factional splits and, indeed, with an absence of acrimony.” (citations omitted)).

¹¹⁸ S. REP. NO. 100-446, at 13 (1988) (emphasis added); see also *AT&T Corp. v. Coeur d’Alene Tribe*, 295 F.3d 899, 916 (9th Cir. 2002) (citing S. REP. NO. 100-446, at 4–5); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248 (11th Cir. 1999) (quoting S. REP. NO. 100-446, at 13).

¹¹⁹ S. REP. NO. 100-446, at 13.

conomic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.¹²⁰

As might be expected, IGRA's complicated balancing act involving three sovereigns, divisive political and cultural questions, and large amounts of cash and lawyers generated incredible amounts of litigation.¹²¹ The first wave of litigation can be labeled the "constitutional wave," where several tribes and states sought to overturn the statute as an invalid exercise of congressional authority.¹²² These lawsuits were unsuccessful and never reached the Supreme Court, although there are some derivative suits regarding the authority of the NIGC that remain open.¹²³

The second wave of litigation can be labeled the "bad faith wave," where tribes accused several states, including California, Florida, and Michigan, of refusing to negotiate gaming compacts in good faith.¹²⁴ The tribes filed suit in federal courts against the states and, later, their governors.¹²⁵ The states responded by asserting their Eleventh Amendment immu-

¹²⁰ *Id.*

¹²¹ See *Seminole Tribe*, 181 F.3d at 1239 (referring to IGRA as a "litigation-spawning juggernaut").

¹²² See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650 (7th Cir. 2004) (rejecting tribe's claim that the gubernatorial concurrence provision of IGRA violated the Tenth Amendment); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (rejecting State's claim that IGRA violated the Tenth Amendment); *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9 (D.D.C. 1990) (rejecting tribe's claim that IGRA violated the trust responsibility of the federal government and the Fifth Amendment).

¹²³ See *Col. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123 (D.D.C. 2005).

¹²⁴ See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994) (en banc) (Canby, C.J., dissenting from denial of reh'g en banc), *amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996) (en banc), *cert. denied sub nom. Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995); *Ponca Tribe of Okla. v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995); *Wis. Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994); *Rhode Island v. Narragansett Tribe*, 19 F.3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147 (6th Cir. 1993); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

¹²⁵ See, e.g., *Sault Ste. Marie Tribe*, 5 F.3d at 149 ("Plaintiffs have since amended their

nity.¹²⁶ When the lower courts split on the effect of the congressional “waiver” of state immunity in light of the Eleventh Amendment,¹²⁷ the Supreme Court stepped in and decided *Seminole Tribe of Florida v. Florida*.¹²⁸ *Seminole Tribe* ended the “bad faith wave.”¹²⁹

In *Seminole Tribe*, the Seminole Tribe of Florida sued the State of Florida and its governor in accordance with IGRA’s requirements.¹³⁰ The defendants sought to dismiss the suit on the theory that the Eleventh Amendment precluded the suit.¹³¹ The Supreme Court held that IGRA provided an “unmistakably clear” statement of [congressional] intent to abrogate” state sovereign immunity.¹³² However, the Court held that Congress, in enacting IGRA under the Indian Commerce Clause,¹³³ had no authority to waive state sovereign immunity using its Indian Commerce Clause power.¹³⁴ In short, Indian tribes no longer had a legal recourse that would allow them to operate casino-style games where states refused to negotiate in good faith for a gaming compact.¹³⁵

B. Revenue Sharing Agreements

Following *Seminole Tribe*, Indian tribes remained free to exploit their class II gaming opportunities where no gaming compact was required,¹³⁶ but where states refused to negotiate for class III gaming, tribes no longer could sue the states to force negotiations. Indeed, “[t]ribes have a right without a remedy.”¹³⁷ Reports indicate that no tribe was able to finalize a

complaint and named Governor John Engler as the defendant.”).

¹²⁶ See, e.g., *id.* at 148.

¹²⁷ See Response to Petition for Writ of Certiorari 2, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (No. 94-12) (“Respondent agrees that the instant decision [11 F.3d 1016 (11th Cir. 1994)] is in direct conflict with the Eighth Circuit Court of Appeals in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). In the time since the filing of the Seminole Tribe’s instant petition for *certiorari*, the Ninth Circuit Court of Appeals has rendered its opinion in *Spokane Tribe of Indian v. Washington State* [28 F.3d 991] (9th Cir. 1994).”).

¹²⁸ 517 U.S. 44 (1996).

¹²⁹ See, e.g., *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1298 (9th Cir. 1998) (“Following the Supreme Court’s decision in *Seminole Tribe*, the State invoked its newfound Eleventh Amendment immunity and brought the Tribe’s suit to a sudden end.”).

¹³⁰ See *Seminole Tribe*, 517 U.S. at 51 (also citing 25 U.S.C. § 2710(d)(7)(A)).

¹³¹ See *id.* at 52.

¹³² *Id.* at 56–57 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)).

¹³³ U.S. CONST. art. I, § 8, cl. 3.

¹³⁴ See *Seminole Tribe*, 517 U.S. at 72–73. Congress has authority to waive the sovereign immunity of states using its authority under Section 5 of the Fourteenth Amendment and under the Interstate Commerce Clause, subject to certain limitations. See generally LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 936-61 (3d ed. 2000) (Section 5); *id.* at 807–24 (Interstate Commerce Clause).

¹³⁵ See LIGHT & RAND, *supra* note 5, at 273–74; Light et al., *supra* note 16, at 665; Skibine, *supra* note 13, at 122; Tsosie, *supra* note 13, at 66; Washburn, *Recurring Problems*, *supra* note 18, at 430.

¹³⁶ See 25 U.S.C. §§ 2710(a), 2710 (b) (2000).

¹³⁷ Washburn, *Recurring Problems*, *supra* note 18, at 441.

gaming compact for over two years after the *Seminole Tribe* decision.¹³⁸ Some tribes responded by threatening to close down roads in order to force negotiations.¹³⁹ Other tribes sought to amend state law via public referendum to force negotiations.¹⁴⁰ These measures, however, were ineffective.¹⁴¹

Both states and tribes had reasons to seek agreement. Indian gaming had too much potential to generate government revenue for states to ignore it.¹⁴² While the states could still afford to reject gaming in most instances, Indian tribes could not because they often did not have a sufficient alternative tax base.¹⁴³ The financial advantage for the states was obvious—they could generate revenue without doing much to earn it.¹⁴⁴ Additionally, after *Seminole Tribe*, states could dictate terms to the tribes.

¹³⁸ See LIGHT & RAND, *supra* note 5, at 50; Light et al., *supra* note 16, at 665–66; see also Ron M. Rosenberg, *When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-Pima Maricopa Gaming Compact*, 4 HARV. NEGOT. L. REV. 283, 294 (1999) (“In August 1998, the Salt River Pima Maricopa Indian Community . . . and the State of Arizona entered into the first post-*Seminole Tribe* compact in the United States.”).

¹³⁹ See, e.g., Jacob Viarrial, *Remarks of Pojoaque Pueblo Governor Jacob Viarrial*, 14 T. M. COOLEY L. REV. 533, 534 (1996) (“Our thinking was, if the Governor did not have the authority to sign the gaming compacts, then none of the other agreements that he had ever signed with us were legal either. That included any agreements where we granted the state the right to put highways through our land . . . I might add that because of the road closing, the United States Attorney came back and told us that if we would agree not to close the roads, he would agree not to shut our casinos down. We could all agree to that. So we kept our casinos open.”) (footnotes omitted).

¹⁴⁰ See K. Alexa Koenig, Comment, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1036 (2002) (describing California’s Proposition 1A); Rosenberg, *supra* note 138, at 296–97 (discussing Arizona’s Proposition 201).

¹⁴¹ See, e.g., Bryan J. Nowlin, Note, *Conflicts in Sovereignty: The Narragansett Tribe in Rhode Island*, 30 AM. INDIAN L. REV. 151, 161–64 (2005-2006) (discussing how state referenda were unhelpful to the Narragansett Tribe in Rhode Island).

¹⁴² See S. REP. NO. 100-446, at 13 (1988) (“In the Committee’s view, both State and tribal governments have significant governmental interests in the conduct of class III gaming.”); LIGHT & RAND, *supra* note 5, at 54 (“[S]tate governments began to view lotteries as well as revenue-sharing agreements with gaming tribes as new revenue sources to combat budgetary crises. . . .”); see also Glenn Coin, *Casinomania: A Casino in Every Neighborhood, Hope for Money in Every Coffer*, POST-STANDARD (Syracuse, N.Y.), Jan. 12, 2003, at A1 (“State legislators and the governor are betting that the largest expansion of gambling in state history will help resolve the state’s fiscal crunch.”); Amy Lane, *State Looks to Indian Casinos to Add Revenue*, CRAIN’S DET. BUS., Apr. 14, 2003, at 6 (discussing how Michigan Governor Jennifer Granholm and the Michigan legislature “are looking to Michigan’s American Indian tribes as potential revenue sources”).

¹⁴³ See *supra* text accompanying notes 114 & 115.

¹⁴⁴ See, e.g., Margaret Graham Tebo, *Betting on Their Future: Flush with Cash, American Indians are Laying the Creative Groundwork for New Ventures*, A.B.A. J., May 2006, at 33, 36 (“For the State, it’s a sweet deal. It doesn’t have to make any concessions or put up any money to get a large new tax base. At Quil Ceda, for example, all the utility work . . . was paid for by the tribes.”). See generally Del Laverdure, *Shall We Pay Taxes? Pros and Cons*, Address at Turtle Mountain Community College Project Peacemaker Indian Law Summit (Aug. 1, 2005) (arguing that state and local governments benefit from tribal economic development without providing additional services, and alleging that state and local governments engage in “taxation without representation” in Indian Country).

Not surprisingly, many states began to extort Indian tribes.¹⁴⁵ For example, they demanded a cut of the profits from class III gaming.¹⁴⁶ Other states demanded treaty rights and tax negotiation concessions.¹⁴⁷ Some compacts written after *Seminole Tribe* contain interesting or unusual provisions that extract money from tribes, yet are theoretically consistent with IGRA. For example, the Eastern Band of Cherokee Indians pays \$5 million a year to endow the Cherokee Preservation Foundation.¹⁴⁸ Some states in compliance with IGRA¹⁴⁹ also demanded “pay-as-you-go” revenue sharing provisions, such as the Confederated Tribes of the Grand Ronde Community’s agreement to pay the expenses incurred by the Oregon state police in patrolling their gaming operation.¹⁵⁰

¹⁴⁵ See, e.g., Edison, *supra* note 21, at 327 (“Jacob Viarrial, governor of the Pojaoque, told lawmakers that ‘revenue sharing has become a smokescreen for extortion.’”) (footnotes omitted); Koenig, *supra* note 140, at 1059–60 (“The compact tries to avoid potential illegality by expressly stating that revenue percentages were not imposed as a condition to compact negotiations (which would be extortion). . . .”); Light, et al., *supra* note 16, at 666 (“Without the ability to challenge a state’s demand for revenue sharing in federal court under IGRA (unless, of course, the state consents to suit, as has California), the danger for tribes is that states can simply charge tribes what, in practice, amounts to a multi-million-dollar fee to conduct Class III gaming, in direct contravention to tribes’ sovereign right under *Cabazon* and Congress’s intent under IGRA.”); Kathryn R. L. Rand & Steven A. Light, *Do “Fish and Chips” Mix? The Politics of Gaming in Wisconsin*, 2 GAMING L. REV. 129, 140 (1998) [hereinafter Rand & Light, *Fish and Chips*] (“Wisconsin is using the compact negotiations in order to extort revenue from the tribes in return for ‘allowing’ them to maintain their already highly tenuous sovereignty rights.”); Robert B. Peacock, *Lawmakers Ignore Facts in Push to Expand Gaming*, DULUTH NEWS TRIB. (Minn.), Mar. 12, 2004, at 9A, available at 2004 WLNR 19227073 (“Rep. Jim Knoblach and Sen. Tom Neuville have taken the opposite approach in extorting money from the tribes by introducing legislation to outlaw all video gambling machines in the state beginning Jan. 1, 2006, ‘unless the State’s Indian tribes agree to renegotiate the current video gaming compacts.’”); Jerry Useem, *The Big Gamble: Have American Indians found their new buffalo?*, FORTUNE, Oct. 2, 2000, at 222, available at 2000 WLNR 7913728 (“[The compacts] haven’t been negotiated,’ complained Frank Chaves, co-chairman of the New Mexico Indian Gaming Association. ‘They were dictated.’”).

¹⁴⁶ See *Role and Funding of the National Indian Gaming Commission: Oversight Hearing on the Indian Gaming Regulatory Act Before the S. Indian Affairs Comm.*, 108th Cong. 90 (2003) (prepared statement of Aurene M. Martin, Acting Assistant Secretary-Indian Affairs, Dep’t of the Interior), available at <http://indian.senate.gov/2003hrqs/070903hrg/martin.PDF> [hereinafter Martin Testimony] (“Another consequence of the Supreme Court’s 1996 decision is that more states have sought to include revenue-sharing provisions in Class III gaming compacts, resulting in a discernable increase in such provisions in the past seven years.”).

¹⁴⁷ See KATHRYN R. L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* 153–54 (2006).

¹⁴⁸ See Second Amendment to Tribal-State Compact Between the E. Band of Cherokee Indians and the State of N.C. ¶ 24 (Jan. 17, 2001), available at http://www.ncai.org/ncai/resource/agreements/nc_gaming-easter_band_of_cherokee_indians_second_amendment.pdf.

¹⁴⁹ See 25 U.S.C. § 2710(d)(3)(C)(iii) (2000).

¹⁵⁰ See Amended and Restated Tribal-State Compact for Regulation of Class III Gaming Between the Confederated Tribes of the Grand Ronde Cmty. of Or. and the State of Or. § XXVI (Oct. 9, 2001), available at http://www.ncai.org/ncai/resource/agreements/or_gaming-confederated_tribes_of_grande_ronde.pdf.

Tribal and state negotiations and compacts after *Seminole Tribe* have one major commonality—revenue sharing with states¹⁵¹ and state subdivisions.¹⁵² For example, most California tribes operating more than 200 slot machines must contribute seven to thirteen percent of their average net winnings per machine to the State of California’s Special Distribution Fund,¹⁵³ and must also participate in revenue sharing arrangements with other tribes.¹⁵⁴ As Professors Light and Rand report, “All told, in 2003 alone, tribes provided \$759 million to state and local governments”¹⁵⁵

Under the post-*Seminole Tribe* regime, revenue sharing is justified as an arm’s length transaction in which the state receives a revenue sharing provision and the tribes receive access to exclusive gaming markets.¹⁵⁶ The problem, as the following examples show, is that revenue sharing percentages have increased while exclusive gaming markets have begun to disappear.

¹⁵¹ See, e.g., Tribal-State Compact Between the State of Cal. and the Cabazon Band of Mission Indians § 5.1(a) (May 16, 2000), available at http://www.ncai.org/ncai/resource/agreements/ca_gaming-cabazon_band_of_mission_indians-5-16-2000.pdf; A Compact between the Pokagon Band of Potawatomi Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Pokagon Band of Potawatomi Indians § 17 (Feb. 18, 1999), available at http://www.ncai.org/ncai/resource/agreements/mi_gaming-pokagon_band_of_potawatomi-12-3-1998.pdf; Indian Gaming Compact between the Pueblo of Pojoaque and the State of New Mexico, Revenue Sharing Agreement ¶¶ 2–3 (Aug. 29, 1999), available at http://www.ncai.org/ncai/resource/agreements/nm_gaming-pueblo_of_pojoaque.pdf; Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York ¶ 12(b)(1) (2002), available at http://www.ncai.org/ncai/resource/agreements/ny_gaming-seneca_nation-4-12-2002.pdf. See generally LIGHT & RAND, *supra* note 5, at 69–73; Light, et al., *supra* note 16.

¹⁵² It matters a great deal who benefits from the revenues paid out by tribes. Indian tribes that negotiate payments to the state only, such as in Connecticut, can expect local cities and counties that receive nothing to muster a political fight with the tribes. See RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 160–61 (2005) [hereinafter CRAMER, CASH] (describing the political forces mobilized against Connecticut gaming tribes and against federal recognition of other Connecticut tribes). Payments to local units of government help to alleviate that political problem. See Cramer, *supra* note 70, at 597. For example, because of the good will engendered payments to local units of government, Michigan Indian tribes such as the Grand Traverse Band of Ottawa have been better able to enter into cross-deputization agreements with local law enforcement. See Brief of Non-Federal Appellees 10 n.6, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (No. 05-5206) (“[T]he [Little River Band of Ottawa Indians] have entered into cooperative law enforcement agreements with state and local governments and generated significant good will within the surrounding non-Indian communities.”) (internal citations omitted).

¹⁵³ See, Tribal-State Compact Between the State of California and the Hoopa Valley Tribe § 5.1(a) (May 16, 2000), available at http://www.ncai.org/ncai/resource/agreements/ca_gaming-hoopa_valley_tribe-5-16-2000.pdf.

¹⁵⁴ *Id.* at § 4.3.2.1. Another example is the Coshatta Tribe of Louisiana, which pays \$7 million each year to local units of government. See Tribal-State Compact for the Conduct of Class III Gaming Between the Coshatta Tribe of La. and the State of La. § 12(C)(1) (Sept. 25, 2001), available at http://www.ncai.org/ncai/recourse/agreements/la-gaming-coshatta_tribe-9-25-2001.pdf.

¹⁵⁵ LIGHT & RAND, *supra* note 5, at 87 (footnote omitted).

¹⁵⁶ See *infra* Parts II.B.1 and II.B.2.

1. *The New Mexico Experience (1997)*

Post-*Seminole Tribe* revenue sharing agreements placed the Secretary of the Interior, charged with approving and publishing gaming compacts,¹⁵⁷ in a bind. In 1997, Interior Secretary Bruce Babbitt declined to approve or disapprove the gaming compact between the State of New Mexico and the Pueblo of Isleta.¹⁵⁸ In accordance with the statute, the refusal to approve or decline meant that the compact was considered approved.¹⁵⁹ However, Secretary Babbitt's letter stated that the compact was approved "only to the extent it [was] consistent with the provisions of IGRA."¹⁶⁰ The compact "require[d] the Pueblo to pay the State 16% of 'net win' . . . as long as the State did not take any action directly or indirectly to attempt to restrict the scope of Indian gaming permitted under the Compact, and did not permit any further expansion of non-tribal class III gaming in the State."¹⁶¹ Keeping in mind the prohibition on state taxes, assessments, or fees on Indian gaming, Secretary Babbitt wrote:

To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Pueblo—in this case up to 16% of "net win"—is appropriate in light of the benefit conferred on the Pueblo.

In light of the large payments required under the Compact, the Department questions whether the limited exclusivity provided the Pueblo meets the standards discussed in the previous paragraph. The Compact does not provide substantial exclusivity. Indeed, the Compact seems to expand non-Indian gaming by allowing for a state lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other nonprofit membership organizations, gaming by nonprofit tax exempt organizations for fundraising purposes, and the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs.¹⁶²

¹⁵⁷ See 25 U.S.C. § 2710(d)(3)(B) (2000).

¹⁵⁸ Letter from Hon. Bruce Babbitt, Sec'y of Interior, to Hon. Gary E. Johnson, Governor, State of N.M., at 3 (Aug. 23, 1997), available at <http://www.doi.gov/news/archives/indnmcom.html> [hereinafter Babbitt Letter].

¹⁵⁹ See *id.* (citing 25 U.S.C. § 2710(d)(8)(C)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

In addition, the compact required the Pueblo to pay flat regulatory fees to the state.¹⁶³ Upon consideration of the terms, the Secretary also stated that the Department “has serious questions about the permissibility of this regulatory fee structure under IGRA.”¹⁶⁴ According to Secretary Babbitt, “[u]nlike other tribal-state compacts, this Compact does not require the State to provide an accounting of the regulatory fees in order to ensure that the payments actually match the cost of regulation”¹⁶⁵

The Secretary of the Interior saw the advantage of the revenue sharing agreements for tribes, but refused to take an affirmative position that all revenue sharing agreements are valid under IGRA. The Secretary created administrative policy that the department would approve such agreements where a state granted “‘substantial exclusivity’ for Indian gaming in exchange for the payment.”¹⁶⁶ In the case of the seven Michigan Indian tribes that entered into gaming compacts in 1993, for example, the exclusive market they shared as a collective group was the entire State of Michigan.¹⁶⁷ Once the exclusive market gave way to the state’s grant of three casino licenses and subsequent opening of the new casinos in the City of Detroit, the revenue sharing provision of the gaming compacts was severed.¹⁶⁸

2. *The New York Experience (2002)*

Revenue sharing, as tied to exclusive gaming markets, is but a short-term solution. As Indian and non-Indian gaming grows nationwide, the opportunity to create exclusive gaming markets has declined. Each new revenue sharing agreement is based on a smaller exclusive gaming market. At some point, the exclusive gaming market granted will be too small to justify the amount of revenue sharing under the standard created by the Secretary. As Secretary of the Interior Gale Norton pointed out in reference to the gaming compact between the Seneca Nation and the State of New York, if a tribe’s exclusive gaming market is four rural counties, how does that justify a twenty-five percent payment of net win to the state and local communities?¹⁶⁹

Secretary Norton followed Secretary Babbitt’s approach by allowing the Seneca gaming compact to take effect without secretarial approval or

¹⁶³ See Babbitt Letter, *supra* note 158, at 2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Martin Testimony, *supra* note 146, at 2.

¹⁶⁷ See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 271 F.3d 235, 237 (6th Cir. 2001) (“[T]he Seven Tribes agreed to make semi-annual payments of eight percent of the net win from their casinos’ electronic games of chance, so long as the Seven Tribes collectively enjoyed the ‘exclusive right to operate’ those types of games within the state.”).

¹⁶⁸ See *id.* at 239.

¹⁶⁹ See Letter from Gale A. Norton, Secretary of Interior, to Hon. Cyrus Schindler, Nation President, Seneca Nation of Indians (Nov. 12, 2002) [hereinafter Norton Letter].

disapproval.¹⁷⁰ The Seneca compact added a new twist to the “substantial exclusivity” requirement—it created exclusivity in a 10,500 square mile area in western New York State by denying future opportunities to engage in gaming for neighboring tribes.¹⁷¹ Specifically, the compact granted a twenty-five-mile radius of exclusivity to the Seneca Nation to game in Buffalo, New York, excluding other tribes such as the Tuscarora Nation which had equal claims to that region.¹⁷² The Tuscarora Nation argued that allowing the Seneca Nation to game in Buffalo violated the Secretary’s trust responsibility to all Indian tribes,¹⁷³ but Secretary Norton rejected that argument by opining that IGRA “did not create an absolute right to off-reservation gaming.”¹⁷⁴

Of particular importance is the portion of Secretary Norton’s statement regarding off-reservation gaming. The Seneca Nation compact arose out of a congressionally approved land claims settlement between New York and the Nation: the Seneca Nation Settlement Act.¹⁷⁵ This land settlement statute required the Secretary to acquire parcels in Buffalo and Niagara Falls to be held in trust for the benefit of the Seneca Nation, which would allow the Nation to engage in “off-reservation gaming”¹⁷⁶ because the newly acquired lands were not considered part of the reservation. Most off-reservation gaming proposals require the tribe to petition the Secretary to exercise her discretion to take land into trust in accordance with the general fee-to-trust acquisition statute,¹⁷⁷ but the Seneca proposal was different. For Secretary Norton, this statute, which was a mandatory fee-to-trust acquisition, took away her discretion to refuse to take the land into trust for off-reservation gaming purposes.¹⁷⁸ Secretary Norton made clear that she “believe[d] that IGRA does not envision that off-reservation gaming would become pervasive.”¹⁷⁹ This was significant because for the first time, a tribe and a state attempted to solve the problem of dwindling gaming market exclusivity by seeking off-reservation gaming markets.¹⁸⁰

¹⁷⁰ See *id.* at 1 (“I have decided to allow this Compact to take effect without [s]ecretarial action.”).

¹⁷¹ See *id.* at 3–4.

¹⁷² See *id.* at 4–5.

¹⁷³ See *id.* at 4.

¹⁷⁴ Norton Letter, *supra* note 169, at 5.

¹⁷⁵ See *id.* at 5 (citing 25 U.S.C. § 1774).

¹⁷⁶ See *id.* at 2, 5 (quoting 25 U.S.C. § 1774).

¹⁷⁷ See 25 U.S.C. § 465.

¹⁷⁸ See Norton Letter at 6 (“I want to emphasize, however, that the analysis regarding off-reservation land as part of a Congressionally approved settlement greatly differs from the analysis the Department engages in when the issue is simply a trust acquisition for off-reservation gaming.”).

¹⁷⁹ *Id.* at 2.

¹⁸⁰ Martin Testimony, *supra* note 146, at 3. As former Acting Assistant Secretary of Indian Affairs Aurene Martin testified:

Since taking office, Secretary Norton has raised the question whether the law provides her with sufficient discretion to approve off-reservation Indian gaming ac-

The previous examples show how the Department of the Interior has implemented *Seminole Tribe* in particular cases in light of competing pressures by states, Indian tribes, and a shrinking number of gaming markets. The following section details the Department of the Interior's more general response to the *Seminole Tribe* decision.

C. The Secretarial Procedure

The United States has long been known both legally and politically as the trustee of Indians and Indian tribes.¹⁸¹ The Department of the Interior is empowered and obligated by federal statutes to manage Indian affairs¹⁸² and, by extension, act as the trustee on behalf of the federal government.¹⁸³ In some areas of law, including Indian gaming, the forms that the trust relationship takes are made explicit.¹⁸⁴ The Department plays an important role in the negotiation of tribal-state compacts. IGRA states:

If the State does not consent during the 60-day period described in [25 U.S.C. § 2710(d)(7)(B)(vi)] to a proposed compact sub-

quisitions that are great distances from their reservations, so-called "far-flung lands." This is further framed by what appears to be the latest trend of states that are interested in the potential of revenue sharing with tribes encouraging tribes to focus on selecting gaming location[s] on new lands based solely on market potential rather than exercising governmental jurisdiction on existing Indian lands.

Id.

¹⁸¹ See, e.g., *Creek Nation v. United States*, 318 U.S. 629, 642 (1943) (Murphy, J., dissenting) ("We have held that the Government in its relations with the Indian tribes occupies the position of a fiduciary, that the relationship is similar to that of guardian and ward, and that the duties and responsibilities of the United States toward its wards require a generous interpretation.") (citing *Choctaw Nation v. United States*, 119 U.S. 1, 27, 28 (1886); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)); *Seminole Nation v. United States*, 316 U.S. at 296–97 ("In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."); CANBY, *supra* note 35, at 35 ("Some form of special relationship between the federal government and the Indian tribes was probably implicit in the decision, made immediately after the Revolution, to keep Indian affairs in the hands of the federal government as a means of protecting the tribes from the states and their citizens (thereby avoiding Indian wars)."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4] (Neil Jessup Newton ed., 2005); U.S. COMM'N ON CIV. RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 2–6 (2003) (describing the trust responsibility as a "civil right").

¹⁸² See 25 U.S.C. §§ 2, 9 (2000).

¹⁸³ See 25 U.S.C. § 13.

¹⁸⁴ See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (relying largely on *United States v. Mitchell*, 463 U.S. 206 (1983) for the conclusion that the trust relationship created in Tucker Act, 28 U.S.C. § 1491 (2000), supplies a waiver of sovereign immunity and thus creates a right of action against the United States); *Mitchell*, 463 U.S. 206 (interpreting Tucker Act to waive sovereign immunity within the trust relationship in Indian affairs).

mitted by a mediator under [§ 2710(d)(7)(B)(v)], the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures (I) which are consistent with the proposed compact selected by the mediator under [§ 2710(d)(7)(B)(iv)], the provisions of this chapter, and the relevant provisions of the laws of the State, and (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.¹⁸⁵

In the pre-*Seminole Tribe* world of Indian gaming, Congress gave the Secretary a mandate to enforce and implement gaming compacts selected by a mediator in accordance with Section 2710(d)(7)(B)(iv).¹⁸⁶

After the decision in *Seminole Tribe*, the Secretary of the Interior sought to reshape the Secretary's role under the new legal regime. Following the understanding of congressional staffers familiar with the negotiations leading up to the enactment of IGRA, such as Alex Skibine, former deputy counsel on Indian Affairs for the House Interior Committee, and citing IGRA and 25 U.S.C. §§ 2 and 9,¹⁸⁷ the Secretary promulgated a rule, now codified at 25 C.F.R. Part 291, that allows a tribe to invoke a secretarial procedure akin to that of 25 U.S.C. § 2710(d)(7)(B)(vii) if a state refuses to negotiate a class III gaming compact in good faith and invokes its Eleventh Amendment immunity from suit.¹⁸⁸ However, the Secretary's authority to promulgate the rule has been challenged.¹⁸⁹

If Part 291 is a valid exercise of the Secretary's authority, the procedure would be a very effective tool that tribes could use to avoid the intransigence of a state refusing to engage in good faith compact negotiations. However, nothing in the text of IGRA allows the tribe or the Secretary to bypass the requirement of IGRA that a federal court make a determination that the state "has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities. . . ."¹⁹⁰ As the Secretary asserted in promulgating the final rule,

¹⁸⁵ 25 U.S.C. § 2710(d)(7)(B)(vii).

¹⁸⁶ *See id.*

¹⁸⁷ *See United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 (9th Cir. 1998); Alex Skibine Testimony, *supra* note 104.

¹⁸⁸ *See Class III Gaming Procedures*, 64 FED. REG. 17535, 17536–37 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291); *see also* Request for Comments on Establishing Departmental Procedures To Authorize Class III Gaming on Indian Lands When a State Raises an Eleventh Amendment Defense To Suit Under the Indian Gaming Regulatory Act, 61 FED. REG. 21394 (May 10, 1996) ("The Supreme Court's *Seminole* decision does not affect the validity of existing class III gaming compacts, but it does require the United States to consider the effect of a State's refusal to engage in remedial litigation designed to oversee the compacting process.").

¹⁸⁹ *See Santee Sioux Nation v. Norton*, No. 8:05CV147, 2006 WL 2792734 (D. Neb., Sept. 26, 2006); *see also* Martin Testimony, *supra* note 146, at 2 (noting legal challenges to the Secretary's authority to promulgate the rule filed by Florida and Alabama).

¹⁹⁰ 25 U.S.C. § 2710(d)(7)(B)(iii).

Part 291 restores a critical portion of IGRA and fulfills Congressional intent,¹⁹¹ but is that enough to authorize the rule? The Ninth Circuit suggested, without ruling, that this procedure would not have been valid in the pre-*Seminole Tribe* legal world,¹⁹² but that, in a post-*Seminole Tribe* world, the procedure might be a valid exercise of secretarial discretion in promoting the Congressional intent behind IGRA.¹⁹³ Some states and legal commentators, on the other hand, have attacked the procedure as an invalid exercise of secretarial discretion.¹⁹⁴

The criticisms by states and commentators are not without foundation. Like revenue sharing agreements, nothing in the text of IGRA or even the legislative history expressly authorizes the secretarial procedure. As a result, this proposed solution, like that of revenue sharing agreements, rests on tenuous ground at best.

D. IGRA's Imbalance and a National Backlash Against Indian Gaming

While the Secretary's authority is litigated, the controversy surrounding Indian gaming continues bitterly. The acrimony between states and tribes has intensified as political pressures have mounted and has led, at best, to inefficiency in Indian gaming.

Seminole Tribe made it possible for states to exploit Indian tribes by exacting massive revenue sharing payments. To generate compensating revenue, tribes have had to expand their gaming operations outside of their

¹⁹¹ See Class III Gaming Procedures, 64 FED. REG. At 17537 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291).

¹⁹² See *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994), *vacated on other grounds*, 517 U.S. 1129 (1996).

¹⁹³ *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301–02 (9th Cir. 1997) (citing *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994)).

¹⁹⁴ See 64 FED. REG. at 17537 (“Nearly all of the comments from the States reiterated or expanded on comments previously submitted arguing that the Secretary lacks legal authority to promulgate these regulations.”); Martin Testimony, *supra* note 146, at 2 (identifying legal challenges filed by Florida and Alabama); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 454 (Clay Smith ed., 3d ed. 2004) (“The regulation subsequently was challenged by several states . . .”); Goldin, *supra* note 23, at 843 (“A unilateral decision by the Secretary to dictate the parameters for tribal gaming would undermine the congressional objective that underlies IGRA.”); Rebecca S. Linder-Cornelius, *The Secretary of Interior as Referee: The States, the Indian Nations, and How Gambling Led to the Illegality of the Secretary of Interior's Regulations in 29 C.F.R. § 291*, 84 MARQ. L. REV. 685, 696 (2001) (“The Secretary's new regulations defeat the purpose of the IGRA. The clear intent of the IGRA was to bring the states into the process of tribal gaming. When the state asserts an Eleventh Amendment defense, the tribes are left with no recourse. However, in the new regulations, when a state claims it has negotiated in good faith to no avail, the only recourse it is left with is a biased factfinder who can do what it wants without any state input.”); Laxague, *supra* note 25, at 91 (“By placing the adjudication of tribal-state disputes into the hands of an official with a moral and legal duty to pursue the best interests of the tribes, the Secretary's proposed rules do both parties a disservice and badly skew the balance of interests intended by Congress when it wrote the IGRA.”).

existing reservation lands to reach more valuable markets.¹⁹⁵ These gaming markets, of course, were created because “restrictive state gaming laws create barriers to entry that provide Indian tribes with an artificial monopolistic market. . . .”¹⁹⁶ Additionally, it has been suggested that the increasing political influence of Indian tribes has induced some state legislators “to act in the interests of these tribal constituents.”¹⁹⁷ An explanation that is at least as likely, however, is that non-Indian political leaders see independent political value in encouraging and helping some tribes expand their gaming operations to urban areas.

The expansion or even the mere possibility of expansion of Indian gaming operations into urban areas has contributed significantly to the controversy concerning and resistance towards Indian gaming.¹⁹⁸ Local newspaper articles covering Indian gaming expansion to off-reservation areas describe a potential or actual “backlash” against the tribal interests in most instances.¹⁹⁹ As could be expected, this backlash has spilled into the halls of Congress.²⁰⁰ The congressional agenda of the 109th Congress was not about tinkering with the Act, but instead was a drastic response to the growing national concern over “reservation shopping,” a political code word that links off-reservation Indian gaming expansion to smarmy non-Indian gaming developers and greed.²⁰¹ Senator Dianne Feinstein’s comment in April 2005 aptly described this concern:

¹⁹⁵ See Washburn, *supra* note 94, at 293.

¹⁹⁶ *Id.* at 295.

¹⁹⁷ *Id.* (footnote omitted).

¹⁹⁸ See generally LIGHT & RAND, *supra* note 5, at 63–65.

¹⁹⁹ See, e.g., Editorial, *Still a Lousy Idea: “Advisory” Votes or Not, Madera Casino is a Terrible Choice*, FRESNO BEE (Cal.), Aug. 27, 2005, at B8, available at 2005 WLNR 13589669 (“This project, if approved, has the potential to cause a backlash against all Indian gaming. At some point, if casinos blanket urban areas, the public might decide to allow all-out Las Vegas gaming in California open to anyone, not just tribes. That would surely cut into tribal gaming revenues.”); *A Worsening Bet; Indian Gaming a Worry for Locals, State and Feds*, SAN DIEGO UNION-TRIB., July 10, 2005, at G2, available at 2005 WLNR 10889416 (“Even some tribes already well into the casino/hotel/resort business are looking askance at some newcomers’ plans. They are not only competition; they are also fuel for backlash from a public already questioning where gambling saturation begins and Indian sovereignty ends.”); Jim Barnett, *Wu Goes Against Governor, Opposes Plan for Gorge Casino*, OREGONIAN (Portland, Or.), Apr. 29, 2005, at A1, available at 2005 WLNR 6744537 (“‘If we permit this one in Cascade Locks, I don’t see a logical stopping point,’ [U.S. Rep. David] Wu, [D-Or.] said. ‘That ultimately is harmful to the state of Oregon and to the tribes. I don’t know at what point there would be a popular backlash about tribal casino gambling.’”).

²⁰⁰ See Scott Van Voohris, “Reservation Shopping” Spurs Casino Backlash, BOSTON HERALD, Aug. 9, 2005, at 35, available at 2005 WLNR 12529798 (“A Capitol Hill backlash against tribal gambling threatens to torpedo the national expansion of Connecticut’s two giant Indian casinos, Foxwoods and Mohegan Sun.”); *Off-Rez Gaming Finds Growing List of Critics*, ALBUQUERQUE J., July 2, 2005, at A8, available at 2005 WLNR 10437598 (“If off-reservation casinos are allowed to proliferate, McCain told the Associated Press, ‘we’re going to see a backlash against Indian gaming, because that was not the intent of the (1998 Indian Gaming Regulatory Act).’”).

²⁰¹ See, e.g., Jeffrey Mize, *Oregon Tribal Leader Wants Ban on Off-Reservation Casinos—Cowlitz Say Foes Are “Misleading People,”* OREGONIAN, Nov. 10, 2005, at A1, avail-

Attempts at off-reservation gaming and the practice of “reservation shopping” have increased dramatically in my State over the past five years and it is now estimated that there may be up to 20 proposals to game outside of tribal lands in California.

There is . . . reason to be concerned about off-reservation gaming and its effect on the surrounding communities. I have watched as out-of-state gaming developers have sought out tribes offering to assist them in developing casinos near lucrative sites in urban areas and along central transit routes—far from any nexus to their historic lands.²⁰²

What is “off-reservation gaming”? In short, “off-reservation gaming” is not gaming itself but any *proposal* to conduct Indian gaming on lands not already located within an Indian reservation or on lands held in trust by the federal government for the benefit of Indian tribes. By definition, Indian gaming cannot occur on off-reservation lands—it must be conducted, in accordance with IGRA, on “Indian lands.”²⁰³ “Indian lands” are defined as trust lands or reservation lands.²⁰⁴ Once land is acquired by the Secretary for the benefit of an Indian tribe, that land is considered “Indian land” and the tribe can conduct gaming operations there. In reality, the term “off-reservation gaming” is oxymoronic and instead refers to an expansion of Indian land to accommodate increased gaming.

The backlash associated with off-reservation gaming is tied to the *Seminole Tribe* decision. Anti-Indian gaming interests regularly turn to the courts to prevent gaming expansion or to strike down gaming compacts under state law.²⁰⁵ This has politicized and weakened IGRA, an already weak and creaky structure.²⁰⁶

able at 2005 WLNR 18194102 (“Citizens Against Reservation Shopping and other groups have accused the Cowlitz of trying to create a reservation near La Center solely because of its economic potential, not its historical and cultural significance to the tribe.”); James P. Sweeney, *Proposal Would Enable Joint Casino Projects; Legislation to Add Barriers to Gaming off of Reservations*, SAN DIEGO UNION-TRIB., Nov. 10, 2005, at A3, available at 2005 WLNR 18296809 (“Pombo’s draft legislation would place new constraints—including a requirement for local approval—on off-reservation casinos, which have become a national controversy also known as ‘reservation shopping.’”).

²⁰² *A Bill to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Deemed to be Held in Trust: Oversight Hearing on S. 113 Before the S. Indian Affairs Comm.*, 109th Cong. 5–6 (2005) (prepared statement of Sen. Dianne Feinstein), available at <http://indian.senate.gov/2005hrgs/040505hrg/Feinstein.pdf> [hereinafter Feinstein Testimony].

²⁰³ 25 U.S.C. §§ 2710(a)(1), 2710(b)(1), 2710(d)(1) (2000).

²⁰⁴ 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12.

²⁰⁵ See, e.g., *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006); *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003); *Dewberry v. Kulongoski*, 406 F.Supp. 2d 1136 (D.Or. 2005); *Citizens Exposing Truth About Casinos v. Norton*, No. 02-1754, 2004 U.S. Dist. Lexis 27498 (D.D.C., Apr. 23, 2004); *Complaint, Michigan Gambling Opposition v. Norton*, No. 1:05CV01181 (D.D.C. June 13, 2005).

²⁰⁶ See Tsosie, *supra* note 13, at 61.

Arising after the “constitutionality” and “bad faith” waves of IGRA-related litigation that culminated in *Seminole Tribe*, the current voracious wave of litigation could be labeled the “state law” wave. In it, Indian tribes and states have negotiated and entered into class III gaming compacts with revenue sharing provisions, complex regulatory schemes, derivative state and tribal legislation, and settled expectations—only to have many of the compacts struck down under state law.²⁰⁷ These legal challenges, whether upholding or striking down gaming compacts, disrupt gaming operations in a significant way.²⁰⁸ Many gaming compacts—including those in effect for more than a decade—are vulnerable to challenge as courts reject laches arguments that would protect against such suits.²⁰⁹ The revenue streams of both states and tribes are accordingly at serious risk in many states. Very little stops anti-gaming organizations or pro-tribal sovereignty interests from suing the states and tribes to invalidate revenue sharing agreements.²¹⁰

A fourth wave of litigation involves Indian tribes that seek to commence gaming operations on lands acquired after IGRA’s enactment, or attempts by Indian tribes who did not have federal recognition at the time Congress enacted IGRA to commence gaming on their initial reservations. IGRA includes a prohibition on Indian gaming on lands acquired after the enactment of IGRA in October 1988,²¹¹ but that prohibition is subject

²⁰⁷ The compacts have been invalidated on the theory that the state’s constitution does not provide authority for the governor to negotiate and execute a compact without authorization from the legislature. *See, e.g., Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1069–79 (D. Ariz. 2001) (striking down Arizona compacts), *rev’d*, 305 F.3d 1015 (9th Cir. 2002); *Hotel Employees and Restaurant Employees Int’l Union v. Davis*, 981 P.2d 990, 1002–09 (Cal. 1999) (striking down California compacts); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1183–85 (Kan. 1992) (striking down Kansas compacts); *Taxpayers of Mich. Against Casinos v. Michigan*, 657 N.W.2d 503, 514–17 (Mich. Ct. App. 2002) (upholding Michigan compacts), *rev’d*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005); *Taxpayers of Mich. Against Casinos v. State*, 708 N.W.2d 115, 121–26 (Mich. Ct. App. 2005) (striking down amendments to Michigan compacts); *State ex rel. Clark v. Johnson*, 904 P.2d 11, 26–27 (N.M. 1995) (striking down New Mexico compacts); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1060–61 (N.Y. 2003) (striking down New York compacts); *Panzer v. Doyle*, 680 N.W.2d 666, 696–97 (Wis. 2004) (striking down Wisconsin compacts).

²⁰⁸ The Grand Traverse Band of Ottawa and Chippewa Indians sued the United States Attorney for the Western District of Michigan in 1996 to enjoin federal actions to shut down the Turtle Creek Casino. While the suit was pending, the Band was not be able to borrow money for use in support of the Turtle Creek facility except by paying much higher interest rates, stifling the Band’s ability to expand its operations. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y.*, 46 F. Supp. 2d 689 (W.D. Mich. 1999); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004). *See* Interview with John F. Petoskey, General Counsel, Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 22, 2005).

²⁰⁹ *See, e.g., Saratoga County Chamber of Commerce*, 798 N.E.2d at 1055–57; *Dairyland Greyhound Park, Inc. v. Doyle*, No. 01-2906, 2003 WL 24124290, at *9 (Wis. Cir. Feb. 11, 2003).

²¹⁰ *See, e.g.,* cases cited *supra* note 205.

²¹¹ 25 U.S.C. § 2719(a).

to several exceptions.²¹² The litigation over these exceptions can be labeled the “after-acquired wave” of litigation.²¹³ The question of off-reservation gaming derives from the exceptions to the prohibition of gaming on lands acquired after the enactment of IGRA.²¹⁴

IGRA’s imbalance served as the catalyst for other alleged problems on the agenda of the 109th Congress. Congress has focused on off-reservation gaming issues, tribal lobbying matters, the taking of land into trust for gaming purposes,²¹⁵ and the regulation of Indian gaming.²¹⁶ To protect their interests from this agenda, tribes have spent millions of dollars on lobbyists and political donations in efforts to preserve current gaming markets, exclude competing interests from their gaming markets, and expand or create gaming markets.²¹⁷

²¹² 25 U.S.C. §§ 2719(a)(1), 2719(b)(1)(A), 2719(b)(1)(B)(i)–(iii) (exceptions for lands located within or contiguous to the reservation, for secretarial and gubernatorial approval, for settlement of a land claim, for an initial reservation, and for a restored tribe or restored lands).

²¹³ See, e.g., *TOMAC*, 433 F.3d 852, 856 (restoring tribe exception); *City of Roseville*, 348 F.3d at 1032 (restoring lands exception); *Oregon v. Norton*, 271 F.Supp.2d 1270, 1280 (D.Or. 2003) (restoring lands exception); *Grand Traverse Band of Ottawa and Chippewa Indians*, 198 F. Supp. 2d at 939–40 (restoring tribe, restoring lands exception); *Citizens Exposing Truth About Casinos*, 2004 U.S. Dist. Lexis 27498, at *13–*15 (restoring tribe, restoring lands exception); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 193–94 (D.D.C. 2002) (restoring tribe, restoring lands exception); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 164 (D.D.C. 2000) (clarifying meaning of “restoration” and remanding for reconsideration of entitlement to restoration of lands exception); *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 706–07 (W.D. Mich. 1999) (restoring tribe, restoring lands exception), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002).

²¹⁴ See, e.g., *Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469 (6th Cir. 1998); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688 (9th Cir. 1997); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253 (D. Kan. 2004); *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165 (W.D. Wis. 1996).

²¹⁵ The taking of land into trust by the Secretary of the Interior is a method for expanding gaming to off-reservation areas—although one that has limited utility in the real world. This is due in part to the “rigorous” hurdle faced by the tribes in convincing the Secretary to take land into trust, and is evidenced by the small number of instances in which tribes have successfully convinced the Secretary to acquire land in trust for gaming purposes. See Letter from James E. Cason, Associate Deputy Secretary, Dept. of the Interior, to Hon. Ron Suppah, Chairman, Confederated Tribes of the Warm Springs Reservation of Oregon 1–2 (May 20, 2005) [hereinafter Cason Letter] (on file with author); *Oversight Hearing on Taking Land Into Trust: Hearing before the S. Comm. on Indian Affairs*, 109th Cong. 2–3 (May 18, 2005) (Prepared Statement of George T. Skibine, Acting Deputy Assistant Secretary of Indian Affairs) [hereinafter George Skibine November Testimony], available at <http://indian.senate.gov/2005hrsgs/051805hrsg/skibine.pdf> (“During [the George W. Bush] administration, the Secretary has approved eight applications to take land into trust that have qualified under these various exceptions to the gaming prohibition . . .”); Glenn Coin, *Oneida’s Request Sizeable; Tribe’s Application Wants 17,310 Acres in Federal Trust*, POST-STANDARD (Syracuse, N.Y.), Nov. 13, 2005, at B1, available at LEXIS, Allnews (“It’s not uncommon for the BIA to take up to 10 years to rule on trust applications, said Donald Laverdure, an Indian law professor at Michigan State University.”).

²¹⁶ See *supra* notes 1, 4–8 and accompanying text.

²¹⁷ See, e.g., *Trial Lobbying Matters: Hearing before the S. Comm. on Indian Affairs*, 109th Cong. 1 (June 22, 2005) (statement of Amy Moritz Ridenour) (describing the lobbying activities of the Mississippi Band of Choctaw Indians), available at <http://indian.senate>.

The focus on off-reservation gaming misses the point. If Indian tribes had the ability to force states to negotiate in good faith, they would not need to expend millions of dollars on lobbyists such as Jack Abramoff and Michael Scanlon.²¹⁸ Nor would tribes need to seek quality time with powerful politicians and lobbyists such as former Representative Tom DeLay, Grover Norquist, and Ralph Reed.²¹⁹ If Indian tribes could force states to negotiate gaming compacts, they would be less inclined to exploit class II gaming in attempts to expand revenue streams when facing states that stonewall class III gaming compacts.²²⁰ All parties involved would benefit from a more cooperative approach, which would protect and promote the interests of the tribes as well as the interests of state, federal, and local governments.

III. TOWARD BALANCE: A PRACTICAL LEGISLATIVE PROPOSAL

Attempting to amend the Indian Gaming Regulatory Act invites a repeat of the years of feverish lobbying and political games that led up to the 1988 Act.²²¹ Now that Indian gaming revenues approach \$20 billion a year,²²² the stakes are far higher than they were in 1988.²²³ As argued above, amending the Act to remedy only the problems in the current law for Indian tribes, namely the *Seminole Tribe* problem, is not a viable political option. Even the Senate Indian Affairs Committee, led by supporters of

gove/2005hrgs/062205hrg/ridenour.pdf.

²¹⁸ See generally Plea Agreement & Attachment, United States v. Abramoff, No. 06-00001 (D.D.C. Jan. 3, 2006), available at <http://news.findlaw.com/hdocs/docs/abramoff/usabrmff10306plea.pdf>; Plea Agreement & Attachment, United States v. Scanlon, No. 05-411 (D.D.C. Nov. 17, 2005), available at <http://www.indianz.com/docs/scanlon112105a.pdf> and <http://www.indianz.com/docs/scanlon112105b.pdf>; *Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (Nov. 2, 2005), available at <http://www.gpo.gov/congress/senate/senate13ch109.html>; *Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (June 22, 2005), available at <http://www.gpo.gov/congress/senate/senate13ch109.html>; Kathryn R. L. Rand & Steven Andrew Light, *Don't Punish Tribes for Abramoff*, GRAND FORKS HERALD, Jan. 18, 2006, at 1, available at 2006 WLNR 938601.

²¹⁹ See Bill Marsh, *In Power and Under Siege*, N.Y. TIMES, Oct. 23, 2005, § 4, at 14.

²²⁰ See generally *Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (Apr. 27, 2005) (statement of Philip N. Hogen, Chairman, Nat'l Indian Gaming Comm.), available at <http://indian.senate.gov/2005hrgs/042705hrg/hogen.pdf>; *id.* (prepared statement of Kevin K. Washburn, Associate Professor, U. of Minn. Law School), available at <http://indian.senate.gov/2005hrgs/042705hrg/washburn.pdf> [hereinafter Washburn April Testimony]; Staudenmeier & Lynch, *infra* note 288.

²²¹ See generally Ducheneaux & Taylor, *supra* note 13.

²²² See Press Release, Nat'l Indian Gaming Comm'n, National Indian Gaming Commission Announces Indian Gaming Revenue for 2004 (July 13, 2005), available at <http://www.nigc.gov/ReadingRoom/PressReleases/PR17072005/tabid/163/Default.aspx> (reporting \$19.4 billion in revenues).

²²³ See S. Rep. No. 100-446, at 2 (1988) (In the hearings leading to the enactment of IGRA, "it was determined that collectively, [tribal] games generate more than \$100 million in annual revenue to tribes.").

Indian sovereignty such as Senator McCain, does not consider such a *Seminole Tribe* fix to be worth discussing.²²⁴ Accordingly, a major overhaul of the Act to restore the balance of IGRA must include concessions by both Indian tribes and the states to be politically viable. As an example, national power players like the states of California and Connecticut must be persuaded that any re-balancing of IGRA will protect their revenue streams. This Article proposes such a balanced solution.

First, to recognize the practice and reality of tribal-state gaming compacting in the post-*Seminole Tribe* world, Congress should ratify all existing revenue sharing agreements contained in class III gaming compacts through the exercise of the Interstate Commerce Clause²²⁵ where the concerned tribal party consents via a valid tribal legislative resolution. In addition, Congress should authorize tribes, the states, and local units of government to engage in future revenue sharing that meets the broad outlines and limitations articulated by the Department of the Interior. Second, as a concession to tribes, Congress should ratify the current procedure contained in 25 C.F.R. Part 291 and authorize the Secretary of the Interior to promulgate amendments as necessary. Third, as a concession to states and local governments, Congress should mandate that future class III gaming compacts provide for revenue sharing with state and local governments. The revenue sharing should be governed by a formula that allows each government (state, federal, and tribal) to collect an amount equivalent to what it would have collected had the tribal gaming operations been within state jurisdiction. Fourth, as a concession to the federal government and as an acknowledgment of the technological realities of gaming, Congress could create a class II-Plus category of gaming that would include class II gaming aided by technology and that would be subject to the new revenue sharing rules. This modification would reflect the fact that the distinction between class II and class III gaming has become obsolete and superficial.

A. Ratify Current Revenue Sharing Agreements

After *Seminole Tribe*, the tribes and the states entered into revenue sharing agreements that varied state-by-state, with politicians, advocates, and negotiators on both sides relying upon the tenuous legal validity of the agreements²²⁶ to move forward with gaming operations.²²⁷ In the decade that has passed since *Seminole Tribe*, dozens of tribes have been able

²²⁴ In fact, the last time the Committee discussed *Seminole Tribe* at any length appears to have been in 1996, right after the Court handed down the decision. See *Hearing on Review of Court Decision: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. (May 9, 1996).

²²⁵ U.S. CONST. art. I, § 8, cl. 3.

²²⁶ See *supra* notes 151–155 and accompanying text.

²²⁷ See National Congress of American Indians, Gaming Compacts, http://www.ncai.org/Gaming_Compacts.103.0.html (last visited Dec. 6, 2005).

to enter into class III gaming compacts after making significant concessions to states. Some gaming compacts, especially those in Connecticut and Michigan, are even older and are actually the products of litigation,²²⁸ yet are still in jeopardy of being invalidated. Ratifying these compacts would protect the settled expectations of the parties by eliminating the possibility that litigation might upset their arrangements.

For the beneficiaries of these agreements—states, local governments, tribes, tribal members, lenders, and so on—the potential legal invalidity of revenue sharing is an underappreciated concern. Only one court, the Ninth Circuit, has spoken on the legality of these agreements, upholding them on the basis that the State of California offered “meaningful concessions in return for fee demands.”²²⁹ Assuming that this standard accords with the purposes of IGRA, which the Ninth Circuit also considered,²³⁰ it is far from clear that all compacts would survive that test. The Wisconsin compacts from the early 1990s, with their set fee structure not expressly tied to a particular purpose,²³¹ or the New Mexico compacts that Secretary Babbitt criticized²³² might be vulnerable. Compacts in other states, such as Michigan, that relied upon the allowance of a significant exclusive gaming market likely would survive.²³³

But it is not certain that other jurisdictions would adopt such a test in deciding a case challenging the validity of revenue sharing in class III compacts. Some courts could adopt a test that would validate the revenue sharing agreements as long as they follow the purposes of IGRA²³⁴—a broad test under which many compacts would survive—while other courts could adopt a narrow test relying on the plain language of the statute.²³⁵ Under such a narrow test, it is possible that no revenue sharing provision would survive except the 1993 Michigan compacts entered into through a consent judgment in federal court.²³⁶ This uncertainty regarding the validity

²²⁸ See *LIGHT & RAND*, *supra* note 5, at 57–58 (noting the gaming compact reached by Connecticut and the Mashantucket Pequot Nation after the Nation successfully sued the State in 1989); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, No. 1:90 CV 611 (W.D. Mich. Aug. 20, 1993) (stipulation for entry of consent judgment), available at http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf (noting the compact reached between Michigan and seven tribes as part of the settlement of a “good faith” lawsuit against the State and its governor, John Engler, in 1993).

²²⁹ *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir. 2003).

²³⁰ See *id.* at 1111 (citing 25 U.S.C. § 2702(1) (2000)).

²³¹ See Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 ¶ 6(A) (1998), available at http://www.ncai.org/ncai/resource/agreements/wi_gaming-forest_county_potawatomi_community_amendment.pdf.

²³² See Babbitt Letter, *supra* note 158.

²³³ See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 271 F.3d 235, 237 (6th Cir. 2001).

²³⁴ See 25 U.S.C. § 2702 (2000).

²³⁵ See 25 U.S.C. § 2710(d)(3)(C) (2000).

²³⁶ See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, No. 1:90 CV 611 (W.D. Mich. Aug. 20, 1993) (stipulation for entry of consent judgment), available at http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf.

of revenue sharing agreements is destabilizing and detrimental to Indian gaming in many respects.

Given the “trend” of states and tribes locating Indian gaming farther away from Indian Country in order to cater to a lucrative off-reservation gaming market and maximize the revenue for both parties to share,²³⁷ it is more and more likely that the Secretary will decline to approve such compacts—or that gaming opposition organizations will sue to declare such compacts invalid. Secretary Babbitt allowed the New Mexico compacts, which were part of this trend, to go through only because the Pueblos had no other options.²³⁸ Secretary Norton allowed the Seneca Nation compact to go through because it was tied to a Congressional land claims settlement act.²³⁹ Gaming opposition groups have no shortage of funding to contest every off-reservation gaming operation.²⁴⁰ In the face of such challenges, all gaming compacts, regardless of whether it involves off-reservation gaming, are threatened by the possibility of a court not limiting its decision to its facts.²⁴¹

This Article’s proposal would also allow tribes to “opt-out” of ratification protection for their gaming compact revenue sharing arrangement. This provision would protect the choices of the tribal sovereign, especially

²³⁷ See Martin Testimony, *supra* note 146, at 3; George Skibine November Testimony, *supra* note 215, at 3.

²³⁸ See Press Release, Statement of Secretary of the Interior Bruce Babbitt on the New Mexico Gaming Compacts (Aug. 23, 1997), available at <http://www.doi.gov/news/archives/indnmcom.html> (“The legislatively mandated compacts appear to put New Mexico tribes in an untenable situation. On one hand, they are expected to agree to a number of burdensome conditions that go well beyond the scope of any of the 161 compacts that are now approved between states and tribes in this country. On the other hand, if the tribes do not agree to these conditions or if the compacts are disapproved, existing gaming establishments may be threatened with closure, causing immediate and enormous economic hardship.”).

²³⁹ See Norton Letter, *supra* note 169, at 2 (“I have concluded that this Compact appropriately permits gaming on the subject lands because Congress has expressly provided for the Nation to acquire certain lands pursuant to the Settlement Act.”).

²⁴⁰ E.g., Susan Erler, *Michigan Indian Tribe Protest Casino Consultant's Fee*, TIMES (Munster, Ind.), Dec. 1, 2004, available at 2004 WLNR 12794117 (“In a show of protest Tuesday, Potawatomi Indian tribe members presented a mock \$5 million check to a consultant whose job was to stall the tribe’s planned casino in New Buffalo, Mich. Kevin Flynn had been hired as a consultant by Boyd Gaming Corp. as part of a \$273.5 million agreement in 1999 for Boyd to buy Blue Chip Casino LLC. The terms of the contract called for Flynn, who’d previously been chief executive officer of Blue Chip, to be paid \$5 million, in addition to a \$500,000 yearly consulting fee, if the Pokagon Band of Potawatomi Indians failed to open a casino by the time the contract expired on Tuesday.”); Brief of Non-Federal Appellees 4, *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (“This case is one of several protracted efforts by TOMAC, spanning six years, to stall or thwart Indian gaming opportunities in Michigan. In 1999, the same year TOMAC initiated its various litigation efforts to stop the Band’s efforts to pursue gaming under IGRA, a large gambling company, facing competitive threats from, the Tribe’s New Buffalo casino, initiated an enterprise, involving the payment of over \$5 million, to delay the Tribe for five years.”).

²⁴¹ See generally Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 *HAMLIN L. REV.* 543 (1985) (discussing the Court’s tendency toward a universalist approach in Indian affairs and the benefits of a more tribal-specific approach).

those that have been exploited by the states. Those tribes that choose not to approve the congressional ratification process would continue operating under the current gaming compacts, subject to the current law. It is possible that many tribes would refuse to follow the congressional ratification process. To allow tribes the greatest flexibility in choosing to opt into this procedure, there should be no deadline for adopting resolutions that allow Congress to ratify a compact.

Congress should authorize future compacts that include revenue sharing provisions meeting the “substantial exclusivity” test now followed by the Department of the Interior in analyzing the prohibition on state taxes and fees.²⁴² The Department has defined “substantial exclusivity” to mean “where a compact provides a tribe with substantial economic benefits in the form of a right to conduct class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the state.”²⁴³ Moreover, Congress should adopt the Department’s analysis of when a state’s regulatory fee structure is too onerous to be valid under the current incarnation of IGRA. That test states that regulatory fees should be audited to ensure that “the payments [to the state or other government] actually match the cost of regulation. . . .”²⁴⁴ If a tribe and a state cannot negotiate a revenue sharing agreement meeting these criteria, the tribe would be free to invoke the secretarial procedure in Part 291.

B. Ratify the Secretarial Procedure

The Secretary of the Interior intended the secretarial procedure codified at 25 C.F.R. Part 291 after the Court’s decision in *Seminole Tribe* to prevent a state’s “veto over IGRA’s dispute resolution system [and the resulting] stalemate [to] the compacting process.”²⁴⁵ The Department noted that some states had “signaled their intention to assert immunity to any suit in Federal court.”²⁴⁶ The purpose of the secretarial procedure was to “end the stalemate.”²⁴⁷

Part 291 “tracks IGRA’s negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to

²⁴² See 25 U.S.C. §§ 2710(d)(3)(A), 2710(d)(4) (2000).

²⁴³ Norton Letter, *supra* note 169, at 3; see also Babbitt Letter, *supra* note 158 (defining “substantial exclusivity” to mean “completely prohibit[ing] non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place”); Martin Testimony, *supra* note 146, at 2 (noting that “substantial exclusivity” requires that a state confer a “valuable economic benefit” on the tribe and that payments to the state or local governments are “appropriate in light of the benefit conferred on the tribe”).

²⁴⁴ Babbitt Letter, *supra* note 158.

²⁴⁵ Class III Gaming Procedures, 64 Fed. Reg. 17535, 17536 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Federal court where a State refuses to waive sovereign immunity.²⁴⁸ The procedure requires the tribes to follow five major steps. First, where a state raises sovereign immunity as a defense to a tribal suit brought in accordance with IGRA²⁴⁹ and that suit is dismissed by the court,²⁵⁰ the tribe must request the Department of the Interior to establish gaming procedures.²⁵¹ The request must comply with a host of requirements to be eligible for the issuance of class III gaming procedures²⁵² and then the Secretary must notify the tribe whether the request met the requirements.²⁵³ Upon a determination by the Secretary that the tribe is eligible for the procedures,²⁵⁴ the Secretary must seek from the State comments on the proposed procedures and alternative procedures.²⁵⁵ If the State does not object, then the Secretary may approve the proposed class III gaming procedures.²⁵⁶ If the State does object, the Secretary must appoint a mediator to mediate the disputes or disagreements between the tribe and the State.²⁵⁷ The Secretary must then approve the mediated class III gaming procedures or reject the mediator's proposed procedures and adopt his or her own.²⁵⁸

As the Secretary intended, these procedures track the current provisions of IGRA as much as possible where the federal court dismisses a tribal claim and removes itself from the process.²⁵⁹ Congressional authorization and ratification of these procedures would require a state to concede to a class III gaming compact, but the state would retain the discretion to choose whether a federal court will be involved by reserving to the state the choice of whether to invoke sovereign immunity or consent to suit. Where a state chooses to follow the current IGRA dispute resolution track, the court would first make a "good faith" determination.²⁶⁰ Where a state chooses to raise its immunity defense, the secretarial procedure would dispense with the "good faith" determination²⁶¹ and, it appears, shorten

²⁴⁸ *Id.*

²⁴⁹ 25 U.S.C. § 2710(d)(7)(B) (2000); Class III Gaming Procedures, 25 C.F.R. § 291.2(b) (2006).

²⁵⁰ Class III Gaming Procedures, 25 C.F.R. § 291.3(e) (2006).

²⁵¹ *Id.* § 291.3(a).

²⁵² *Id.* § 291.4.

²⁵³ *Id.* § 291.6.

²⁵⁴ *Id.* § 291.6(b).

²⁵⁵ Class III Gaming Procedures, 25 C.F.R. § 291.7 (2006).

²⁵⁶ *Id.* § 291.8(b)(1).

²⁵⁷ *Id.* § 291.10.

²⁵⁸ *Id.* § 291.11.

²⁵⁹ Class III Gaming Procedures, 64 Fed. Reg. 17535, 17536 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291) ("The rule tracks IGRA's negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to Federal court where a State refuses to waive sovereign immunity.").

²⁶⁰ 25 U.S.C. § 2710(d)(7)(B)(iii) (2000).

²⁶¹ See Class III Gaming Procedures, 64 Fed. Reg. at 17537 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291) ("The final regulation eliminates the requirement that the Secretary make a finding on the 'good faith' issue.").

the process considerably. Both the current IGRA mechanism and the secretarial procedure lead to a mediation process.²⁶²

Though the secretarial procedure is an onerous, lawyer-intensive venture, it is an effective restoration of the dispute resolution mechanism that Congress intended the tribes and the states to follow when it enacted IGRA. Congress made clear that it “sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years.”²⁶³ One of those principles is the “long- and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands.”²⁶⁴ An important corollary of this principle is the notion that “tribal governments retain all rights that were not expressly relinquished.”²⁶⁵

Building upon that principle, Congress intended that the only mechanism in IGRA that would allow a state to exercise its will in Indian Country would be a tribal-state compact that required an affirmative act of consent by the concerned tribe to state authority or jurisdiction.²⁶⁶ The only “veto” Congress intended states to have is located within the Gubernatorial concurrence provision in the secretarial determination exception to the general prohibition on “off-reservation” gaming.²⁶⁷ Since *Seminole Tribe* disrupted that scheme, a state—indirectly—can assert its will over an Indian tribe and prevent the tribe from conducting class III gaming if it chooses to raise its Eleventh Amendment immunity. Congressional ratification and authorization of the secretarial procedures restores the original intent of Congress in enacting IGRA.

A contextual view of the legislative history behind IGRA supports this view. *Cabazon Band* involved gaming that Congress would label as class II gaming—high stakes bingo and some card games.²⁶⁸ Because of the *Cabazon Band* decision, anti-gaming constituencies had conceded the battle over which sovereign would have primary regulatory authority over class II gaming.²⁶⁹ At the time of the final legislative push toward the passage of

²⁶² See 25 U.S.C. §§ 2710(d)(7)(B)(iv)–(vii) (2000); 25 C.F.R. §§ 291.10–11 (2006).

²⁶³ S. Rep. No. 100-446, at 5 (1988).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *id.* at 6 (“The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.”).

²⁶⁷ See 25 U.S.C. § 2719(b)(1)(A); George Skibine November Testimony, *supra* note 215, at 3 (“[Under § 2719(b)(1)(A)], by requiring that the Governor of the affected state concur in the Secretary’s determination, the statute acknowledges that in a difference of opinion between a sovereign tribe and a state, the state prevails.”).

²⁶⁸ 480 U.S. 202, 204–05 (1987); see also 25 U.S.C. § 2703(7)(A) (2000).

²⁶⁹ See Ducheneaux & Taylor, *supra* note 13, at 28 (“The opposing forces had pretty much concluded that they had lost the class II argument. . . .”).

IGRA, Congress had to make a decision on casino-style gaming and the Johnson Act.²⁷⁰ The Johnson Act prohibited slot machines and other gaming devices on Indian lands.²⁷¹ As Frank Ducheneaux and Pete Taylor wrote, “although casino gaming had not yet become a major part of the Indian gaming scene, a few tribes had developed operations [by 1988] that would be class III under the pending legislation and other tribes saw definite possibilities in casino gaming.”²⁷² The tribes sought a waiver from the Johnson Act in the pending legislation that would become IGRA.²⁷³ Congress could have banned class III gaming by simply not providing the Johnson Act waiver the tribes sought. It did not choose this option, but rather provided the waiver and left class III gaming as an option for tribes in eligible states.²⁷⁴

The negotiations leading to the final bill “were often tense, volatile, and acrimonious. On more than one occasion, a party would threaten to walk out and the process was near collapse.”²⁷⁵ Given that IGRA was adopted in this strongly contested environment, the original balance fought for and achieved by the parties and intended by Congress to be preserved by the statute, should be maintained.

In Senate Report No. 446, the Committee wrote that it “ha[d] carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives”²⁷⁶ The Committee also acknowledged “the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands.”²⁷⁷ Moreover, the Committee recognized that “[a] tribe’s governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.”²⁷⁸ This legislative history makes clear that Congress intended to eliminate the federal barriers to class III gaming while allowing the states a role on the class III compacting proc-

²⁷⁰ See 15 U.S.C. §§ 1171–1178.

²⁷¹ 15 U.S.C. § 1175(a) (2000).

²⁷² Ducheneaux & Taylor, *supra* note 13, at 28.

²⁷³ See *id.* (“Some of the tribes and their congressional supporters thought that it might be possible to include a waiver of the Johnson Act in any legislative compromise.”).

²⁷⁴ See 25 U.S.C. § 2710(d)(6) (2000).

²⁷⁵ *Id.* at 29.

²⁷⁶ S. Rep. No. 100-446, at 6 (1988).

²⁷⁷ *Id.* at 13.

²⁷⁸ *Id.*

ess.²⁷⁹ The secretarial procedure fulfills this intent and therefore should be ratified.

While the secretarial procedure has been invoked, it has never been concluded due to state challenges.²⁸⁰ As a result, the tribes and the states cannot have settled expectations concerning this process. No tribe and state have reached an agreement concerning a gaming compact or begun gaming operations after completing the procedure. One could argue that if Congress were to revamp this area, there would be no reason to keep the onerous structure of mediators and proposed gaming procedures. But this suggestion forgets the “tense, volatile, and acrimonious” negotiations leading to the creation of the structure in the first place.²⁸¹ It is worthwhile to maintain but modify the existing structure rather than “starting from scratch”—a process that, if the 1980s are any gauge, would take years of difficult and costly negotiation.

The first two elements of this legislative proposal return tribes and states to a situation much like that which existed before *Seminole Tribe*, but that is not the upshot of this proposal. Request for a return to the days of IGRA before *Seminole Tribe* is a common refrain heard from tribal advocates and legal commentators,²⁸² and it is similar to the calls from tribes heard by Senator McCain in the 1980s for “no legislation.”²⁸³ As a political matter, too much time has passed since 1996 for states and even some tribes to accept a “Back to the Future” package of legislation. The following two elements are intended to even the balance in a manner viable to all parties—tribal, state, and federal.

C. Mandate Revenue Sharing in Future Compacts

This element of the proposal requires all class III gaming compacts to include revenue sharing provisions with states *and* local units of government. To address the off-reservation impacts of tribal gaming and the so-called “lost revenue”²⁸⁴ that state and local governments articulate in

²⁷⁹ See *id.* at 13–14.

²⁸⁰ See Martin Testimony, *supra* note 146, at 2.

²⁸¹ Ducheneaux & Taylor, *supra* note 13, at 29.

²⁸² See *supra* notes 24–25 and accompanying text.

²⁸³ See S. Rep. No. 100-446, at 33 (1988). See generally 151 CONG. REC. S13389 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

²⁸⁴ “Lost revenue” refers to tax revenue that states and local units of government expected to generate but for the rights and expressions of sovereignty by tribal governments. See, e.g., Fred Grimm, *Jeb Should've Told Seminoles to Deal Us In*, MIAMI HERALD, June 21, 2005, at B1, available at 2005 WLNR 23048561 (“Some seven years (and \$1.6 billion in lost revenue) later, Gov. Bush is going into negotiations with a Seminole operation that now takes in a billion dollars a year—a quarter of that pure, sweet profit. Those profits aren't being taxed. Nor does the casino open its books to state auditors or allow pesky state bureaucrats to regulate their games.”); Editorial, *Broad Casino Opposition*, GRAND RAPIDS PRESS (Mich.), June 19, 2005, at D12, available at 2005 WLNR 9811533 (“Kalamazoo's Economic Development Corporation and the Grand Rapids Chamber of Commerce oppose the casino because of the negative economic impact it will have on West Michigan. This

their opposition to Indian gaming, revenue sharing that alleviates these concerns would be mandated. Congress should place the burden on states and local units of government to prove the “lost revenue” and off-reservation impacts of gaming in measurable monetary amounts. Tribes with gaming facilities that do not generate a significant amount of revenue, a threshold to be determined by Congress, would be exempt from revenue sharing. Tribes with large revenue streams would be required to pay no more than twenty-five percent of “net win,” as they presently do in Connecticut.²⁸⁵

Such a mandatory revenue sharing provision would eliminate a majority of the negotiating points that currently consume states and tribes in their compact negotiations. This would greatly reduce the transaction costs of reaching agreements and eliminate the nasty “crossover” negotiating tactics, such as making treaty rights and tax agreements contingent upon gaming, which have been employed in some states. The cap on revenue sharing precludes states from recovering an unfair windfall while the floor allows modest gaming operations to continue to benefit reservation communities. States that see Indian gaming as a potential source of revenue for reducing budget shortfalls—creating resentment by tribes—would be less inclined to use that tactic.

A key provision is the requirement that local units of government receive a share of the revenue as well. Some revenue sharing agreements, such as those in Connecticut, shortchange the towns and counties in the revenue sharing formula, creating local resentment against the tribes.²⁸⁶ It is, after all, the local governments that respond first to emergencies at the tribal casino and feel the impact of increased commercial traffic in the area resulting from successful gaming operations. Tribes sharing revenue with local units of government, as a general matter, have a much better relationship with local government.²⁸⁷

‘big hurt’ will be especially severe in the surrounding counties—particularly Kalamazoo and Kent—which will be the biggest losers due to lost jobs, lost productivity and lost revenue.”). *Contra* Tom Wilemon, *Indians Face Steep Odds, Says Keynote; Former Senator Rails Against Schwarzenegger*, SUN HERALD (BILOXI, MISS.), May 5, 2005, at A1, available at 2005 WLNR 22894375 (“[Ben Nighthorse] Campbell expressed his displeasure at having read in newspaper accounts comments about Indians ‘not paying their fair share’ or ‘ripping us off.’ ‘I would say that’s a comment made by somebody who has just got off the boat and doesn’t understand the history of what has happened to Indians in California,’ Sen. Campbell said. ‘They paid for their lifestyle in blood, lost relatives, millions of acres of lost land, untold billions of dollars in lost revenue from what’s under the land—oil, gas, coal and so on. . . . They’ve paid their dues, Mr. Schwarzenegger.’”).

²⁸⁵ See LIGHT & RAND, *supra* note 5, at 70.

²⁸⁶ See Jessica Durkin, *Foxwoods Reaches Milestone; It Has Sent More Than \$2 Billion to State*, NORWICH BULL. (Conn.), Feb. 16, 2005, at A1 (“The billions may be good news for Hartford and the tribe, but officials from locally affected towns are fighting for a larger share of the slot take. They maintain the two host towns of Montville and Ledyard and three ‘impact’ towns of Norwich, Preston and North Stonington are not getting a fair distribution of revenue from the highly successful gambling venues outside their back door.”).

²⁸⁷ See *supra* note 152.

An additional benefit to the cap on revenue sharing is that states and tribes would be less inclined to seek gaming markets closer to non-Indian urban communities. The states would not receive the massive windfalls predicted from gaming and would be less inclined to encourage tribes to expand their gaming operations. Similarly, tribes would have less incentive to seek off-reservation gaming opportunities if they were guaranteed a greater minimum share of the gaming revenues generated from their existing lands. This would alleviate a great deal of the resentment building against Indian gaming and thus confer a significant benefit.

D. Reclassify Technology-Aided Class II Gaming as Class II-Plus

Finally, assuming Congress adopts the first three elements of this proposal, there would be no reason not to reclassify technology-aided class II devices. States and tribes would share the revenue from such devices in accordance with a class III compact (or a class II-Plus compact).

The so-called "Class II Gaming Debate"²⁸⁸ arose out of two types of circumstances that excluded some tribes from class III gaming. First, some states prohibited all forms of class III gaming, rendering tribes located in those states ineligible for class III gaming compacts.²⁸⁹ Second, some states that did allow class III gaming refused to negotiate compacts.²⁹⁰ However, no gaming compact is necessary for class II gaming.²⁹¹ As a result, the stalemates created by states refusing to negotiate or by states prohibiting all forms of class III gaming encouraged tribes to seek increasingly valuable forms of class II gaming. Today, some technology-aided class II games are practically indistinguishable from class III games.²⁹²

This trend has created substantial problems that have attracted the attention of Congress. As Professor and former NIGC General Counsel Kevin Washburn testified recently:

The Department of Justice's persistent, unsuccessful attempts to apply the Johnson Act to Class II 'technological aids' . . . causes prudent gaming companies to stay out of that market As a

²⁸⁸ Heidi McNeil Staudenmeier & Andrew D. Lynch, *The Class II Gaming Debate: The Johnson Act vs. the Indian Gaming Regulatory Act*, 74 Miss. L.J. 843 (2004).

²⁸⁹ See 25 U.S.C. § 2710(d)(1)(B) (2000); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), *reh'g denied*, 99 F.3d 321 (1996) (holding that where the State does not permit other forms of gambling, it need not negotiate gaming compacts with Indian tribes).

²⁹⁰ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

²⁹¹ See 25 U.S.C. § 2710(b)(1) (2000).

²⁹² See, e.g., *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1025 (10th Cir. 2003) ("The video screen depicts a grid that is similar in appearance to that of a slot machine."); *United States v. Santee Sioux Tribe of Neb.*, 324 F.3d 607, 610 (8th Cir. 2003) ("At trial, the following evidence was adduced regarding the Lucky Tab II machines. First, the instruments look and sound very much like traditional slot machines.").

result, the companies with the largest involvement in Class II tribal gaming are those that are willing to tread close to the thin line separating lawful and unlawful gaming. This approach has rewarded these companies with extraordinary profits that would not be available in a market with full and open competition. These profits have come at the expense of Indian tribes whose choices of business partners are constrained by the Department of Justice's actions and threatened actions.²⁹³

Classifying class II technological aids as class II gaming allows tribes to sidestep the bargaining process intended to govern the establishment of class III-like gaming and encourages continued federal and state efforts to stop such gaming. Classifying class II technological aids as class II-Plus gaming (or even class III gaming) under a scheme where states could not bar all class III gaming compacts and where states could share in the revenue would solve these problems in a manner sufficient to satisfy all governmental constituents.

E. Summary

The four-part legislative proposal offers notable benefits for the tribes, the states, and the federal government, while preserving the settled expectations of the parties. Moreover, the proposal will serve to stifle a growing backlash against Indian gaming that can be traced to the imbalance within IGRA.

IV. BRINGING BALANCE TO INDIAN GAMING

The four-part legislative proposal would restore balance to the post-*Seminole Tribe* IGRA. The *Seminole Tribe* decision handed down in 1996 generated tribal furor because, in the years following IGRA's enactment in 1988, so many tribes had become accustomed to being able to rely on the Act's federal court remedy when facing states that refused to negotiate in good faith.²⁹⁴ The proposal in this Article recognizes that both states and tribes have ten years of experience and concrete agreements relating to class III gaming in the post-*Seminole Tribe* world. As a result, this proposal is not intended to disrupt those positive expectations and creative solutions.

This four-part legislative proposal is an experiment in balancing the interests of the two sovereigns with the largest stake in Indian gaming—

²⁹³ Washburn April Testimony, *supra* note 220, at 9–10.

²⁹⁴ See, e.g., *Hearing on Review of Court Decision on Indian Gambling Before the S. Comm. on Indian Affairs*, 104th Cong. 364 (1996) (prepared statement of W. Ron Allen, President, National Congress of American Indians) (“The *Seminole* decision will have significant impacts on the conduct of Indian gaming in the short run.”).

states and tribes. It is designed both to achieve a middle ground between eviscerating either side's sovereign rights and to ameliorate the national backlash against off-reservation gaming. To achieve the balance, Indian tribal interests would accept reduced authorization to engage in off-reservation gaming in exchange for improved authorization to engage in class III and class II-Plus gaming. Conversely, states would accept increased class III and class II-Plus gaming in exchange for reduced expansion of off-reservation gaming. Overarching these compromises are the benefits both states and tribes will enjoy from explicit authorization and ratification of revenue sharing agreements.

A. Preserving Tribal Sovereignty

Indian gaming is not the product of greed or loose morals. It is the product of desperation on the part of Indian people neglected and abused by centuries of federal, state, and local governments.²⁹⁵ Indian tribes began gaming operations to raise money to pay for critical governmental services.²⁹⁶ Congress recognized this in the very language of IGRA.²⁹⁷ A concomitant goal of IGRA was preserving tribal government revenues in order to support the development of tribal government structures and political stability.²⁹⁸ Any attorney working in Indian law in 1980 would likely attest that they never expected tribal governments to build and fund their own schools, homes, health clinics, law enforcement and public safety facilities, and other governmental structures. The advances that have been made by tribal governments derive almost exclusively from Indian gaming.²⁹⁹ The legislative proposal here recognizes and advances the goals of tribal governments and of IGRA by expanding opportunities for class III and class II-Plus gaming.

²⁹⁵ See PAUL PASQUARETTA, *GAMBLING AND SURVIVAL IN NATIVE NORTH AMERICA* 163–64 (2003) (“Working within a system that was largely devised to confine, limit, and destroy them, [Indians] have found ways to reclaim lost territories, position themselves in politically advantageous ways, and resist outside dominance. . . . [I]t is important to recognize that gambling is not simply a pathological response to perceived powerlessness, but a natural human response to the inherent chaos of living.”); Rand & Light Testimony, *supra* note 6, at 9 (“A gaming tribe simply is not Enron, nor is it MGM Mirage or Harrah’s Entertainment.”).

²⁹⁶ See, e.g., *Grand Traverse Band of Ottawa and Chippewa Indians v. U. S. Att’y for the W. Dist. of Mich.*, 198 F. Supp 2d 920, 926 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004).

²⁹⁷ See S. REP. NO. 100-446, at 13 (1988) (“A tribe’s governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents . . .”).

²⁹⁸ See 25 U.S.C. § 2702(1) (2000) (naming Indian gaming “as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”).

²⁹⁹ Cf. Rand & Light Testimony, *supra* note 6, at 7 (“That Native Americans have assumed such a prominent place in non-tribal public and policy discourse is almost entirely an artifact of Indian gaming.”).

Indian gaming is also the product of legal and political choices made by the states.³⁰⁰ One authority has argued that states could have stopped Indian gaming in its tracks at any time but chose not to take that action.³⁰¹ Many state and local governments rely upon the revenues derived from Indian gaming.³⁰² In addition to receiving revenue shares, state and local governments benefit from increased income and sales tax revenues and from decreased welfare burdens.³⁰³ Further, local communities benefit from improved tribal public safety services,³⁰⁴ and both local and national businesses benefit from expanded market opportunities.³⁰⁵

Arguably related to tribal sovereignty concerns is the continued opportunity for tribes to seek “off-reservation” gaming operations. Many tribes located far from urban areas have modest or even failing gaming operations, or no operations at all, due to market conditions.³⁰⁶ Tribes who fit this category and who are seeking but are currently unable to reach gaming markets will not be helped by this proposal. But, since only a few very fortunate tribes have been able to convince state, local, and federal policymakers to approve an off-reservation gaming operation,³⁰⁷ these tribes will not effectively have lost much.

Some tribes might object to the mandatory revenue sharing provisions. Any act of Congress that requires Indian tribes to take actions to which they might object raises questions of tribal sovereignty. However, the 1988 class III gaming compact provision was such a derogation of tribal sovereignty, and the tribes learned to accept it. In the twenty-first century, revenue sharing has become a virtual requirement for class III compacts with state governments. Thus, mandatory revenue sharing, under the reasonable terms adopted by the Department of the Interior and in a legal environment where class III gaming is more accessible, would not be a serious derogation of tribal sovereignty.

³⁰⁰ See Washburn, *supra* note 94, at 295.

³⁰¹ See *id.*

³⁰² See Rand & Light Testimony, *supra* note 6, at 13 (noting that “some 30 states and myriad non-tribal communities have [benefited from]” Indian gaming).

³⁰³ See Light et al., *supra* note 16, at 658 (“But Indian gaming’s beneficiaries are not limited to tribes; non-tribal jurisdictions benefit from tribal casinos, as well. On balance, states with Indian gaming operations, as well as the numerous non-reservation communities located near tribal casinos, have realized extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged. Tribal gaming assists states by promoting economic development in underdeveloped rural areas while leveraging growth and development in surrounding non-tribal communities.”).

³⁰⁴ See, e.g., Letter from Michael Oltersdorf, Sheriff, Leelanau County, Mich. to George Bennett, Chairman, Grand Traverse Band 1–2 (Sept. 1, 1998), available at <http://www.ncai.org/ncai/resource/agreements/Leelanau%20County%20Sheriff's%20Office%20letter%20Sept.%201,%201998.pdf> (noting positive cooperation with tribal police department).

³⁰⁵ See LIGHT & RAND, *supra* note 5, at 83–85.

³⁰⁶ See Washburn, *supra* note 94, at 293.

³⁰⁷ See *infra* text accompanying notes 342–346.

B. Preserving State Sovereignty

State sovereignty is a powerful tool for protecting state interests. In cases such as *Seminole Tribe*, the Rehnquist Court made clear that Congress has limited authority to waive state sovereignty.³⁰⁸ States' rights under the Ninth, Tenth, and Eleventh Amendments are at historic levels.³⁰⁹ Perhaps it is no surprise that tribes—historic adversaries of state governments—fared poorly in the Rehnquist Court in recent tribal-state legal clashes.³¹⁰

Legal commentators and policymakers have voiced numerous objections to Indian gaming since the enactment of IGRA.³¹¹ Many commentators proposed radical revisions of IGRA that would preserve and protect tribal sovereignty.³¹² Some have even considered repealing the statute altogether, which would return the state of the law to that which existed immediately after *Cabazon Band*.³¹³ Others seek a legislative reversal of *Seminole Tribe* that would return the state of the law to something approximating the original intent of Congress in enacting IGRA.³¹⁴ Other commentators advocate increased state authority over Indian gaming operations and increased state influence over what kind of gaming is conducted in Indian Country.³¹⁵

No legal commentator has advocated a middle-ground, pragmatic legislative reform of IGRA in the vein of this Article's proposal. Proposals that rearrange the law far to the advantage of either states or tribes amount to little more than shots across the bow by the opposing sides. It is little wonder that the proposals of the legal academic community, with the possible exception of those of Professor Kevin Washburn, do not reach the ears of the national policymakers in the Senate Indian Affairs Committee or the House Resources Committee.³¹⁶

³⁰⁸ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see also cases cited *infra* note 317.

³⁰⁹ See generally HERMAN SCHWARTZ, *The States' Rights Assault on Federal Authority*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT*, 155 (2002); DAVID H. GETCHES, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); DAVID H. GETCHES, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

³¹⁰ See, e.g., *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

³¹¹ See *supra* note 23 and accompanying text.

³¹² See *supra* note 24 and accompanying text.

³¹³ Cf. Donohue, *supra* note 24, at 325 ("A repeal of IGRA may well result in courts returning to the pre-IGRA *Cabazon* prohibitory/regulatory test, in which case any state that allows any form of gambling, including state lotteries, will be deemed regulatory and thus unable to regulate or prohibit Indian gaming.").

³¹⁴ See *supra* note 25 and accompanying text.

³¹⁵ See *supra* note 23 and accompanying text.

³¹⁶ See *Oversight Hearing on Indian Gaming: Regulation of Class III Gaming Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 13–22 (2005) (prepared statement of Kevin K. Washburn, Associate Professor, U. of Minn. Law School); Washburn April Testimony, *supra* note 220.

1. General States' Rights Objections to IGRA

This Section responds to the common state sovereignty criticisms of Indian gaming as they relate to this Article's legislative proposal. The proposal keeps states' right in mind and preserves them. It provides passive benefits and positive virtues to states. First, by not requiring the states to take any action whatsoever, it avoids a Tenth Amendment challenge.³¹⁷ Second, because it does not attempt to repeat the IGRA state sovereign immunity debacle by relying upon the Interstate Commerce Clause to invoke yet another waiver, this proposal avoids Eleventh Amendment difficulties.³¹⁸ Third, as a positive benefit, this proposal would preserve the revenue streams created through the post-*Seminole Tribe* compacting process that so often produced revenue sharing agreements. Fourth, as another positive benefit, this proposal reduces the transaction costs of negotiating and litigating class III gaming compacts. States and their subdivisions, as well as tribes, will receive their financial benefits from Indian gaming without having to sit through hundreds of hours of meetings, all billed by attorneys. Fifth, states and local units of government will be compensated for "lost" tax revenues, increased public expenditures, and other impacts they can prove.

What some states will lose is the windfall of tribal money paid to them in exchange for the right to conduct class III gaming. Those states that do not match their demand for revenue sharing to the real cost of tribal gaming will no longer be able to take more than their fair share from the tribes in their states. States that have sought tribal revenues in order to help balance their budgets without a concomitant increase in state expenditures or public services in Indian Country will need to seek other sources of revenue.

States that do not allow gaming and that object to the increased tribal opportunity to engage in class III gaming will remain free to prohibit all forms of gaming within their borders.³¹⁹ States that have already opened the door to class III gaming by entering into compacts will likely have missed their chance to shut it.³²⁰

³¹⁷ See, e.g., *Citizens for Safer Cmty. v. Norton*, 541 U.S. 974 (2004); *Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 716 (9th Cir. 1981), cert. denied sub nom.; *Crow Tribe of Indians, Mont. v. Envtl. Prot. Agency*, 454 U.S. 1081 (1981); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 798–99 (W.D. Wis. 2003), aff'd, 367 F.3d 650 (7th Cir. 2004), cert. denied, 125 S. Ct. 878 (2005); *Carcieri v. Norton*, 290 F. Supp. 2d 167, 189–90 (D.R.I. 2003), aff'd, 432 F.3d 45 (1st Cir. 2005); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 153–54 (D.D.C. 2002), aff'd, 348 F.3d 1020 (D.C. Cir. 2003), cert. denied sub nom.

³¹⁸ See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 787–88 (1991).

³¹⁹ See, e.g., S. REP. NO. 100-446, at 11 (1988) ("There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo.").

³²⁰ See Jane Gordon, *Experts Doubt Repeal Can Hold*, N.Y. TIMES, Jan. 12, 2003, § 14

2. Specific Objections to the Secretarial Procedure

Nicolas Goldin, predicting that the secretarial procedure would rise in prominence, has made four arguments against the procedure from an anti-Indian gaming point of view.³²¹ First, “[a] unilateral decision by the Secretary to dictate the parameters for tribal gaming would undermine the congressional objective that underlies IGRA.”³²² Second, “[a]llowing the secretary to conclude that a state Governor, attorney general, and court system do not understand the state’s public policy would make a travesty of the concept of federalism and in its place substitute a system in which Washington claims it knows best what state laws mean.”³²³ Third, “[t]he secretary’s inherent authority includes a responsibility to protect the interests of Indian tribes, making it impossible for the secretary to avoid a conflict of interest or exercise objective judgment in disputes between states and tribes.”³²⁴ Fourth, “the proposed procedure would create a disincentive for tribes to try to resolve disagreements with uncooperative states.”³²⁵

The proposal here answers the concern raised about the balance created by Congress in IGRA. Goldin would have a better point if there was no counterbalance to the imposition of the secretarial procedure. However, under this Article’s proposal, a counterbalance is provided in that states and local units of government would receive sufficient revenue sharing from tribal gaming operations to meet any burden that Indian gaming placed on their governments. Goldin’s concern about the underlying purpose of IGRA—that “Congress enacted IGRA in the aftermath of *Cabazon* expressly because it wanted to ensure that the states play a role in the tribal gaming regulatory process”³²⁶—is not only belied by the text of IGRA, which makes clear that IGRA was intended to benefit tribes,³²⁷ but has also been rejected by federal courts.³²⁸

(Connecticut), at 5 (“‘What Connecticut has done is try to close the door after all the horses have escaped,’ said Nell Jessup Newtown, dean of the University of Connecticut School of Law and an authority on Indian law. ‘The great state of Connecticut permits such gaming by an entity or organization, for any purpose. If we didn’t have any tribes or the casinos and they had repealed the Las Vegas Nights ordinance earlier, the game would be over. But they didn’t repeal it when they had the chance.’”).

³²¹ See Goldin, *supra* note 23, at 843–44.

³²² *Id.* at 843.

³²³ *Id.* at 843–44 (quotation marks and footnote omitted).

³²⁴ *Id.* at 844 (quotation marks, footnote, and brackets omitted).

³²⁵ *Id.* (quotation marks and footnote omitted).

³²⁶ Goldin, *supra* note 23, at 843.

³²⁷ See 25 U.S.C. § 2702(1) (2000).

³²⁸ Some courts and commentators have asserted that a critical element of congressional intent in passing IGRA was to slow or halt the spread (or proliferation) of Indian gaming. See *Ponca Tribe of Okla. v. State of Okla.*, 37 F.3d 1422, 1425 (10th Cir. 1994), *vacated*, 517 U.S. 1129 (1996); *Texas v. Ysleta del sur Pueblo*, 220 F. Supp. 2d 668, 681 n.6 (W.D. Tex. 2001); Goldin, *supra* note 23, at 824 n.200. However, this is the minority view and has not been upheld by a court of last resort. See, e.g., *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att’y for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002) (rejecting State of Michigan’s argument that the purpose of IGRA

Yet it is certain that, there would have been no IGRA absent strong state political pressure, so Goldin has a point—states did want additional authority over Indian gaming regulation. However, under IGRA, states received no regulatory authority over class I and class II gaming and could only acquire regulatory authority over class III gaming if the tribe consented in a gaming compact. Ironically, given Goldin's position that states would naturally want more regulatory authority, some states have been uninterested in negotiating for more authority.³²⁹ In Michigan, for example, the State expressly disclaimed regulatory duties over Indian gaming.³³⁰ Thus, the objection ultimately rings hollow.

The "Washington can't tell states what state law means" argument appears to misread the terms of the secretarial procedure and IGRA. The argument is also belied by experience. The Secretary has been making—and will continue to make—determinations of state law in approving class III compacts.³³¹ The Secretary is now charged with making a determination of whether a class III compact violates "any provision of [IGRA],"³³² which would include a determination that the class III gaming "is located in a State that permits such gaming for any purpose by any person, organization, or entity"³³³ Thus, IGRA requires the Secretary to make an interpretation of state law, but this does not mean that the Secretary is deciding or dictating what the state law is.³³⁴

As for the Secretary's alleged conflict of interest, the final version of the secretarial procedure eliminated the requirement that the Secretary take over the federal court's job of determining whether a state had failed to negotiate in good faith.³³⁵ Instead, the Secretary would proceed without making that determination at all. As for the possibility that the Secretary would propose procedures that benefited its trustee to the detriment of the states, one need only consider the *Cobell v. Norton* litigation,³³⁶ the letter

was to "limit the proliferation of casinos"), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

³²⁹ See generally *RAND & LIGHT*, *supra* note 147 at 117 (noting that state regulation of tribal gaming varies).

³³⁰ *E.g.*, A Compact Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Grand Traverse Band of Ottawa and Chippewa Indians § 8 (1993) (providing that the following notice be placed in every tribal casino: "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN"), available at http://www.michigan.gov/documents/GTB_Compact_70613_7.pdf.

³³¹ See 25 U.S.C. § 2710(d)(8)(B)(i) (2000).

³³² *Id.*

³³³ *Id.* § 2710(d)(1)(B).

³³⁴ See, e.g., Joint Letter from Hon. Theodore R. Kulongowski, Governor, State of Or., and Ron Suppah, Chairman, Confederated Tribes of Warm Springs Reservation of Or., 1–2 (May 12, 2005) [hereinafter *Kulongowski & Suppah Letter*] (on file with author) (noting that the Secretary asked the State of Oregon and the Confederated Tribes of the Warm Springs Reservation for the legal basis to conduct class III gaming in Oregon, to which the parties responded).

³³⁵ See generally 25 C.F.R. Part 291.

³³⁶ See *Cobell v. Norton*, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("The Interior Department has failed to discharge the fiduciary duties it owes to [Individual Indian Money trust

from Secretary Norton expressing discomfort at expanding Indian gaming,³³⁷ the fact that there has been a vacancy in the post of Assistant Secretary for Indian Affairs for much of the George W. Bush Administration,³³⁸ or the difficulty that Indian tribes have in convincing the Secretary to exercise her discretion to take land into trust³³⁹ to realize that a legally conflicted Secretary of the Interior is not a serious concern here.

Finally, the argument that the procedure would discourage tribes from negotiating with states is also answered by this proposal. The revenue sharing elements of the proposal create bargaining points for both tribes and states in negotiations over class III gaming compacts. Ratifying the secretarial procedure would simply prevent the negotiations from being completely open-ended. Additionally, by expanding revenue sharing with local units of government, the proposal facilitates expanded negotiation with local units of government over the provision of governmental services and encourages broader state agreements, such as omnibus tax agreements. Equalizing bargaining power expands the opportunities for intergovernmental agreement beyond gaming.³⁴⁰ Goldin's crabbed view of tribal and state policymakers is belied by the reality of increasing tribal-state cooperation in ever-expanding areas of governance.³⁴¹

3. The "Problem" of Off-Reservation Gaming

While off-reservation gaming and "reservation shopping" dominate the national discussion of Indian gaming law and policy, these issues are minor in comparison to the real problems faced by tribes, states, local governments, and the federal government as a result of IGRA's imbalance. As mentioned earlier, the opportunities for off-reservation gaming and "reservation shopping" are foreclosed to all but a few tribes, and even those tribes have extraordinary difficulty in opening new gaming operations. George Skibine recently testified about the hurdles a tribe must clear

account] beneficiaries for decades.").

³³⁷ See Norton Letter, *supra* note 169.

³³⁸ See *Sen. Johnson Meets with Bureau of Indian Affairs Nominee*, U.S. FED. NEWS, Sept. 13, 2006, available at 2006 WLNR 15938122 ("The assistant Secretary position to which Mr. Artman is nominated has been vacant for the past 18 months following the departure of Dave Anderson. 'It's been nearly two years since someone has held this post—far too long. We need someone in place that will keep the lines of communication open and consult with our tribes,' Johnson said.").

³³⁹ See, e.g., U.S. Gov't Accountability Office, *BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781, at 46-49 (July 2006) (listing dozens of non-gaming-related fee-to-trust applications in which the Bureau of Indian Affairs took more than a year to process).

³⁴⁰ See *Brief of Non-Federal Appellees 10 n.6, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006).

³⁴¹ See generally National Congress of American Indians, *Tribal-State Relations*, http://www.ncai.org/State-Tribal_Relations.92.0.html (last visited December 7, 2005) (providing links to numerous agreements between Indian tribes and states and local governments).

before it can start gaming off its reservation.³⁴² First, it must convince the Secretary to take land into trust.³⁴³ Second, it must satisfy one of the statutory exceptions to the general prohibition of gaming on lands acquired after the enactment of IGRA in 1988.³⁴⁴ Mr. Skibine testified that “[s]ince 1988, the Secretary has approved 26 trust acquisitions for gaming that have qualified under the . . . exceptions. . . .”³⁴⁵ He also testified that the Secretary’s approval does not necessarily mean that the land has actually been taken into trust: “[f]or instance, the existence of liens or other encumbrances, or litigation challenging the Secretary’s decision may delay the proposed trust acquisition, often for years.”³⁴⁶

Despite the fact that few tribes have been able to benefit from the exceptions to the ban on gaming on after-acquired lands, Senator McCain recently proposed to eliminate one of the exceptions, alleging that there are “unscrupulous developers seeking to profit off Indian tribes” and that a stronger prohibition would “discourage attempts by creative non-Indian developers to turn a tribe’s legal rights into a form of extortion.”³⁴⁷ Similarly, former Representative Rick Pombo recently proposed a draft bill that would re-write Section 2719(b) to require gubernatorial concurrence for *all* off-reservation gaming proposals.³⁴⁸ These proposals may be effective in quelling the backlash against off-reservation gaming and “reservation shopping,” but they do little or nothing to quell the real threats to Indian gaming.

Mr. Skibine’s testimony that the Secretary agrees to take off-reservation lands into trust only after a tribe has passed two high hurdles belies the need for such a change in IGRA. Off-reservation gaming is simply not a critical problem in the way that revenue sharing agreements are.

C. *Ameliorating the Backlash?*

This Article’s legislative proposal goes a long way toward undermining the arguments made against Indian gaming by opponents, both political and ideological. Professors Light and Rand have shown, in their discussion of popular culture, how mainstream American society misunder-

³⁴² See *Oversight Hearing Before the S. Comm. on Indian Affairs on Section 20 of the Indian Gaming Regulatory Act*, 109th Cong. 225-33 (2005) (prepared statement of George T. Skibine), Acting Deputy Assistant Secretary—Indian Affairs for Policy and Economic Development, Department of the Interior.) [hereinafter George Skibine July Testimony].

³⁴³ See 25 U.S.C. § 465 (2000); George Skibine July Testimony, *supra* note 342, at 1.

³⁴⁴ See 25 U.S.C. § 2719(a) & (b) (2000); George Skibine July Testimony, *supra* note 342, at 1–2 (identifying five effective exceptions contained within the statute).

³⁴⁵ George Skibine July Testimony, *supra* note 342, at 2.

³⁴⁶ *Id.* at 3.

³⁴⁷ See 151 CONG. REC. S13389-90 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

³⁴⁸ A Bill to Amend the Indian Gaming Regulatory Act to Restrict Off-Reservation Gaming, and For Other Purposes, H.R., 109th Cong. § 1 (Discussion Draft 2005).

stands and misconstrues Indian gaming.³⁴⁹ Many non-Indians believe that Indian tribes stumbled across a way to acquire massive wealth at the expense of non-Indians through loopholes in federal Indian law,³⁵⁰ that many tribes are as wealthy and greedy as the worst Mafioso,³⁵¹ and that gaming tribes are no more “Indian” than non-Indians.³⁵² These beliefs demonstrate how many non-Indians are susceptible to what Reinhold Niebuhr called “emotionally potent oversimplification”³⁵³ when it comes to Indian gaming. It is unfortunate but true that non-Indians without an educational background in Indian culture, history, and law are more apt to believe and respond to newspaper stories about tribal corruption and greed than they are to stories about tribal self-governance and recovery from centuries of oppression.³⁵⁴

³⁴⁹ See LIGHT & RAND, *supra* note 5, at 1–2 (describing how Indian gaming operations are depicted in television shows such as *The Simpsons*, *South Park*, *The Sopranos*, and *Malcolm in the Middle*); Rand & Light Testimony, *supra* note 6, at 7 (“Indian gaming and ‘casino Indian’ imagery have become a phenomenon widely visible in popular culture, the mass media, and the discourse used by public policymakers.”).

³⁵⁰ See, e.g., Jörg Blech, *The Benefits of Becoming Indian*, DER SPIEGEL, Jan. 16, 2006, <http://www.spiegel.de/international/Spiegel/0,1518,395703,00.html> (describing Indian gaming as occurring through a “loophole”); Carolyn Jones, *Legislator Seeks State Probe of Casino’s Bingo Machines*, S.F. CHRON., Sept. 6, 2005, at B3, available at 2005 WLNR 14089440 (referring to tribes that use class II technological aids as exploiting a loophole); Rick Alm, *Point, Counterpoint: Let Kansas Voters Decide*, KAN. CITY STAR (Mo.), July 12, 2005, at D17, available at 2005 WLNR 22828732 (asserting that Kansas tribes, in their attempts to begin off-reservation gaming operations, are exploiting a loophole); William E. Schmidt, *Bingo Boom Brings Tribes Profit and Conflict*, N.Y. TIMES, Mar. 29, 1983, at A1, available at 1983 WLNR 499339 (“[T]he multimillion-dollar boom in bingo has increasingly brought the Indians into direct conflict with a variety of law-enforcement agencies off the reservation. The authorities say the tribes are taking advantage of loopholes in state and Federal law to run unregulated gambling operations.”).

³⁵¹ E.g., CRAMER, CASH, *supra* note 152, at 105 (describing the phenomenon of “Rich Indian Racism”); Rand & Light Testimony, *supra* note 6, at 7 (“Somewhat incongruously, [tribal governments] are accused of being too naive or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for ‘revenge.’”); Matt Assad, *One City’s Jackpot is Neighbor’s Bust; Decade of Casinos Shows Host Town in Iowa Reaps Benefits but Region Shares in Gambling’s Woes*, ALLENTOWN MORNING CALL (Pa.), Nov. 6, 2005, at A1, available at 2005 WLNR 18002139 (“‘That’s what they do,’ said Pat Loontjer, who directs an Omaha-based group, whose members include the likes of Warren Buffett, that has worked to keep gambling out of Nebraska. ‘They get their foot in the door by claiming it’s family entertainment, and then they expand, expand and expand to feed their greed.’”).

³⁵² See CRAMER, CASH, *supra* note 152, at 105–07.

³⁵³ See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* xv (1932) (Charles Scribner’s Sons ed. 1952) (“Contending factions in a social struggle require morale; and morale is created by the right dogmas, symbols and emotionally potent oversimplifications.”).

³⁵⁴ Cf. Rand & Light Testimony, *supra* note 6, at 9 (“Sovereignty, in the minds of many Americans, simply means unearned money for tribal members.”); Memorandum from John G. Roberts to Fred R. Fielding I (Nov. 30, 1983) (on file with author) (referring to a bill restoring lands to the Las Vegas Paiute tribe and asserting that “[t]his bill essentially does nothing more than take money from you, me, and everyone else and give it to 143 people in Nevada (about \$10,000 each), simply because they want it.”).

Indian tribes thus lose in the media. In the arena of Indian gaming, non-Indian politicians and anti-Indian business interests, both having ready access to major news outlets, exploit tribes' vulnerability to "emotionally potent oversimplification" to generate non-Indian backlash against gaming whenever it suits them.³⁵⁵ The most recent manifestation of this phenomenon is in the area of off-reservation gaming. Tribes, often with the encouragement and political and financial backing of states, local governments, or gaming development interests, have begun to seek off-reservation gaming markets in urban areas where tribal governmental and jurisdictional presence often is minimal. For example, the City of Rohnert Park in California agreed with the Graton Rancheria to work together to develop a gaming operation on land west of the city.³⁵⁶ The agreement was summarized as follows by the California Court of Appeals:

In October of 2003, the Tribe and the City entered into a lengthy Memorandum of Understanding (MOU). It provided that the Tribe intended to submit an application to the Secretary of the Interior requesting the United States to take title to the property in trust for the Tribe, and make a determination that the land shall be eligible for gaming under the IGRA. The MOU recited that the Tribe wished to enter into a voluntary contractual arrangement with the City to make contributions and community investments to mitigate impacts of the casino project. The MOU provided for payments of over \$200 million to the City over 20 years. . . . It also provided for termination of the MOU if the land was not accepted in trust for the Tribe or if the tribal-state compact was terminated.³⁵⁷

Although this agreement is arguably what anti-Indian gaming opponents would consider a best case scenario for off-reservation gaming, rather than lauding their city for reaching an agreement likely to create millions of dollars in additional revenue for both governments, some citizens urged rejection of the plan.³⁵⁸ Again, there were news reports describing the proposal in emotional terms like "backlash,"³⁵⁹ hyping reports of corruption

³⁵⁵ Cf. Cramer, *supra* note 70, at 598 (noting that "[t]he availability of gaming financing for petitioning groups leads to gross oversimplifications about acknowledgment.").

³⁵⁶ See *Worthington v. City Council of City of Rohnert Park*, 31 Cal. Rptr. 3d 59, 61 (Cal. Ct. App. 2005).

³⁵⁷ *Id.* at 63.

³⁵⁸ See *Worthington*, 31 Cal. Rptr. 3d at 64 ("We emphasize that the issues to be determined in this appeal do not concern the wisdom of allowing Indian gaming in or near California cities or the advisability and ramifications of building a casino and resort complex at the designated location in Sonoma County. These actions undeniably raise emotional issues that have resulted in heated debate and political action throughout the state.") (citation omitted).

³⁵⁹ See Jim Doyle, *Backlash on Betting: Californians Have Second Thoughts About Gambling*, S.F. CHRON., Oct. 24, 2004, at E1, available at 2004 WLNR 7628993 ("Four

by gaming developers,³⁶⁰ and capturing readers' attentions with headlines such as "Gambling, Gambling Everywhere."³⁶¹

Similarly, consider the attempt by the Confederated Tribes of the Warm Springs Reservation and the State of Oregon to seek the Secretary of the Interior's approval of a class III gaming compact on off-reservation lands.³⁶² The Warm Springs tribes already had land in trust near a lucrative gaming market, but it was "heavily timbered and sloped land, [was] within the boundaries of the Columbia River National Scenic Area, and [had] not been logged or used for other commercial purposes."³⁶³ Rather than exercising their right to open a gaming operation on that land, the Tribes engaged in rigorous compact negotiations with the State that ultimately produced an agreement on a tract that was acceptable to both parties.³⁶⁴ Despite the fact that the Tribes and the Governor negotiated over the sticking points and reached a decision that protected vast swathes of undeveloped land, the majority of mass media outlets assailed the proposal. One newspaper article depicted the Warm Springs community as more politically powerful than "mining, textile, and environmental groups."³⁶⁵ An editorial opposed to the proposal predicted with over-the-top sarcasm that its approval would signal a slippery slope of tribal casinos in the area.³⁶⁶

This hype attracts Congressional attention, but the attention is misguided. Senator Feinstein's testimony that twenty more tribes are seeking to open off-reservation gaming operations in California³⁶⁷ ignores a critical factor—the Secretary of the Interior is not approving any gaming compacts where the land is not already in trust, a requirement necessary for

years after California voters gave the green light to Nevada-style casinos on Indian land, signs of a backlash are forming. Some question whether we're barreling too hard and too fast down the one-lane blacktop to Las Vegas.").

³⁶⁰ See Jim Doyle, *Vegas Firm With a History of Fines Has Big Plans for Indian Casinos*, S.F. CHRON., Mar. 28, 2005, at A1, available at 2005 WLNR 4821406.

³⁶¹ Editorial, *Gambling, Gambling Everywhere*, S.F. CHRON., May 30, 2004, at E4, available at 2004 WLNR 7642222.

³⁶² See generally Cason Letter, *supra* note 215; Kulongowski & Suppah Letter, *supra* note 334.

³⁶³ Kulongowski & Suppah Letter, *supra* note 334, at 5.

³⁶⁴ See *id.* at 1 ("The Compact represents good faith compromises reached after long and productive negotiations between the parties."); *id.* at 5 ("[T]he Governor has indicated his intention to concur in the taking into trust for gaming purposes . . . land not currently held in trust").

³⁶⁵ Jeff Kosseff, *Tribes Buy Into Political Process*, OREGONIAN (PORTLAND), May 9, 2005, at A01, available at 2005 WLNR 7337479.

³⁶⁶ See Editorial, *Opinion—In Our View: Make No Gorge Deal; Oregon Governor Should Take a Stand: No Tribal Casinos on Nontribal Land*, COLUMBIAN (Vancouver, Wash.), May 29, 2005, at C, available at 2004 WLNR 11724314 ("[I]f Oregon Gov. Ted Kulongowski allows the Warm Springs Indians to put a casino on nontribal land at Cascade Locks, Ore., the Yakama Indians could seek to build a casino on the Washington side. Then the Umatillas and the Nez Perce could join the fun with requests to build casinos along Interstate 84. Think of the marketing possibilities: 'Casinos in the Scenic Area'[:] 'Gambling in the Gorge'[:] 'Four Places to Make a Fortune between Beacon Rock and Biggs.'").

³⁶⁷ See Feinstein Testimony, *supra* note 202, at 6.

these proposals to take effect.³⁶⁸ And since the Department has approved few such trust acquisitions,³⁶⁹ and all of those approved required gubernatorial concurrence,³⁷⁰ the argument rings hollow in terms of on-the-ground reality. But, sadly, the fact that off-reservation gaming is even a legal possibility is enough to provoke a national backlash.³⁷¹

This proposal eliminates many of the political and economic factors that drive Indian tribes to pursue off-reservation gaming. However, many federally recognized tribes still have no land base, while other, unrecognized, tribes may someday achieve federal recognition. IGRA contemplates that both classes of tribes be allowed to open gaming operations on trust lands under IGRA's exceptions. By definition, these lands are called "off-reservation" lands and their use for Indian gaming will be subject to harsh media scrutiny. Although this proposal goes a long way toward reducing the need for off-reservation gaming, it is unlikely to wholly eliminate the backlash.

V. CONCLUSION

Senator McCain's exasperated comments at the time of the enactment of IGRA deserve the attention of the tribes.³⁷² This Article argues that the congressional agenda, including former Representative Pombo's draft bill on off-reservation gaming, is a response that does not focus on the critical issue: the unbalanced bargaining power of tribes and states in a post-*Seminole Tribe* world, which leads to one-sided revenue sharing agreements that may or may not be illegal under IGRA. Off-reservation gaming is a red herring. The origin of off-reservation gaming and reservation shopping is the imbalance in IGRA.

This Article argues that a legislative package to ratify and authorize revenue sharing, restore the balance of IGRA moving forward, and clarify the law on class II technologic aids would alleviate the major problems in IGRA resulting from the *Seminole Tribe* decision. While *Seminole Tribe* might have looked like a major victory for states in 1996, it

³⁶⁸ See James P. Sweeney, *Off-reservation Gambling Limited by Interior Policy*, SAN DIEGO UNION-TRIB., May 30, 2005, at A1, available at 2005 WLNR 8666297 ("The [Department of the Interior] will no longer consider gambling agreements for sites that are not Indian lands held in trust for a tribe by the federal government . . ."); Cason Letter, *supra* note 215, at 2 ("Only after the Tribes have acquired the Cascade Locks Land into trust, will the Department consider the terms and conditions of a timely submitted compact pursuant to the applicable provisions of IGRA.").

³⁶⁹ See George Skibine November Testimony, *supra* note 215, at 2.

³⁷⁰ See 25 U.S.C. § 2719(b)(1)(A) (2000).

³⁷¹ See 151 CONG. REC. S13389-90 (daily ed., Nov. 18, 2005) (statement of Sen. McCain).

³⁷² Senator McCain's most recent proposal would "eliminat[e] the authority of the Secretary to take land into trust off-reservation pursuant to the so-called 'two-part determination' provisions of Section [2719(b)(1)(A)]." *Id.* at S13390.

ultimately could be the undoing of a once carefully balanced Indian gaming structure.

One aspect of the Indian gaming debate that gets little national exposure is the reality that many state and local governments now depend on Indian gaming revenues. Congress may have intended for IGRA to benefit tribes, but *Seminole Tribe* changed the law in a manner that allowed state and local governments to benefit from Indian gaming as well. Perhaps, then, the current imbalance in IGRA will actually have provided a unique opportunity to strengthen the law and policy of Indian gaming for the long term. But to turn that opportunity into a reality, Congress must re-balance IGRA to benefit tribes *and* state and local governments.

