The Double-Edged Sword of Indian Gaming

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THE DOUBLE-EDGED SWORD OF INDIAN GAMING

I. INTRODUCTION

Indian gaming is a growing economic phenomenon that inevitably affects surrounding communities, state governments, and hundreds of Indian tribes around the United States. This comment contends that the effect of gaming on Indian tribes themselves is particularly complex and, to a large extent, contradictory. On the one hand, Indian gaming has spurred great economic development in Indian country unlike any other economic enterprise before or since. On the other hand, the operation of Indian gaming has reduced tribal sovereignty in several key areas. To the extent that Indian gaming has simultaneously given tribes significant wealth and taken away significant sovereignty, it has been a distinctly double-edged sword from the tribal perspective.

Part II of this comment briefly traces the history of Indian gaming and explains how Indian gaming has provided large economic benefits to gaming tribes. Part III defines tribal sovereignty and then explains how gaming has reduced tribal sovereignty in three main categories. First, Part III.B shows how the Indian Gaming Regulatory Act (IGRA)\(^1\) provides for heightened state regulation of gaming tribes, thus reducing the sovereignty of gaming tribes vis-à-vis the states. Second, Part III.C shows how Indian gaming has made it more costly for would-be tribes to gain federal recognition, which is a necessary first step for any tribe that wishes to exercise sovereignty. Third, Part III.D explains how gaming has harmed the sovereignty of all existing tribes—gaming and non-gaming alike—by influencing the recent Supreme Court opinion in City of Sherrill v. Oneida Indian Nation.\(^2\) Sherrill deals a significant blow to tribal sovereignty, limiting tribes’ ability to exercise authority over recently acquired land parcels. Finally, Part IV suggests that Indian gaming may continue to erode other aspects of tribal sovereignty in the near future.

II. THE RISE OF INDIAN GAMING AS AN ECONOMIC FORCE

A. The Genesis of Indian Gaming

While Indian gaming is perhaps the preeminent issue in Indian country today, it is of relatively recent vintage. Commercial Indian gaming began in the late 1970s and early 1980s, as a few tribes—mostly in Florida and California—set up bingo halls on their reservations to generate revenue. These tribal bingo halls generally did not comply with state laws regulating bingo, and consequently state law enforcement officials sought to shut down the bingo operations. The tribes responded by suing in federal court, arguing that the states had no right to enforce their gaming laws on tribally owned bingo halls located on Indian land.

In the 1981 case Seminole Tribe of Florida v. Butterworth, the Fifth Circuit Court of Appeals held that Florida could not enforce its bingo restrictions against the Seminole Tribe’s bingo hall. The court reasoned that Florida generally treated bingo as a regulated activity, not a prohibited activity, and that the Seminole Tribe was not subject to Florida’s civil regulatory laws. A year later, the Ninth Circuit Court of Appeals used substantially similar logic and held that California could not apply its bingo regulations against the Barona Band’s bingo hall near San Diego.

Under the aegis of the Seminole and Barona precedents, gambling halls grew rapidly throughout Indian country. While bingo remained the dominant game, Indian tribes increasingly set up poker rooms and other card games. Ultimately, the Supreme Court had to decide whether these gaming enterprises could exist free from state regulation, and the Court did so in the landmark case of California v. Cabazon Band of Mission Indians.

B. The Cabazon Decision

The facts of Cabazon were quite similar to those of the earlier Seminole and Barona cases. The Cabazon Band of Mission Indians (Band) operated a bingo hall and...
poker room on its reservation in Riverside County, California. The Riverside County sheriff announced his intention to shut down both enterprises because they violated a state statute regulating bingo and a county ordinance restricting poker, respectively. In response, the Band sued for a declaratory judgment that the sheriff could not apply state and county laws against the tribe’s gaming operations. The district court agreed and issued the declaratory judgment for the Band, and the Ninth Circuit affirmed.

The U.S. Supreme Court affirmed the Ninth Circuit. In reaching its conclusion, the Court first had to decide whether Public Law 280, a federal statute, gave California the authority to apply its gambling laws against the Band. PL 280 is a statute that originally gave six states, including California, criminal and civil jurisdiction in Indian country. However, a previous Supreme Court decision, Bryan v. Itasca County, had drawn a distinction between PL 280’s grant of criminal and civil jurisdiction. According to Bryan, PL 280 granted states broad authority to enforce their criminal laws in Indian country. But in the civil context, PL 280 merely granted states jurisdiction over private litigation and did not give those states general regulatory authority over Indian country.

Thus, in the Cabazon context, PL 280 could have authorized California to apply its gambling laws against the Band if those laws were deemed “criminal/prohibitory” laws, but PL 280 could not be relied upon if the California gambling laws were deemed “civil/regulatory” laws. The Cabazon Court noted that California allowed certain types of gambling—including regulated bingo, card rooms, and horse racing—and actually promoted gambling through its state-run lottery. Accordingly, the Court held that “California regulates rather than prohibits gambling in general and bingo in particular.” Because California’s existing laws against gambling were civil/regulatory rather than criminal/prohibitory, PL 280 did not authorize California to apply those gambling laws against the Band.

Once the Court disposed of California’s PL 280 argument, it still had to determine whether common law principles of federal Indian law allowed California to apply its

13. Id. at 204–05.
14. Id. at 205–06; Cabazon Band of Mission Indians v. Co. of Riverside, 783 F.2d 900, 901 (9th Cir. 1986).
15. Cabazon, 480 U.S. at 206.
16. Co. of Riverside, 783 F.2d at 901, 906.
17. Cabazon, 480 U.S. at 222.
19. These six states are sometimes called “mandatory” PL 280 states. PL 280 also contained a mechanism by which other states could assume similar jurisdiction by enacting state legislation to that effect. By 1968, nine additional states had chosen to assume some or all aspects of PL 280 jurisdiction. In 1968, Congress amended PL 280 to hold that additional states could only assume jurisdiction with the consent of their tribes, and as of 1997 not a single tribe had so consented. See Carole Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1406–08 (1997).
21. Id. at 384–85.
22. Cabazon, 480 U.S. at 211.
23. Id. The Court rejected California’s argument that its bingo laws were criminal/prohibitory because the state imposed misdemeanor criminal penalties for breach of those laws. According to the Court, the mere fact that an otherwise regulatory law is enforceable by criminal penalties does not transform that law into a criminal/prohibitory law for purposes of PL 280 jurisdiction.
24. Id. at 212 & n. 11.
gambling laws against the Band. According to the Court, the relevant test was the flexible preemption test of New Mexico v. Mescalero Apache Tribe.\textsuperscript{25} Under Mescalero, state regulation in Indian country is preempted if the proposed state regulation "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."\textsuperscript{26}

Applying the Mescalero test, the Cabazon Court found that the federal government had encouraged Indian gaming by issuing grants and other financial assistance and by approving tribal ordinances which set forth the contours of Indian gaming.\textsuperscript{27} These federal actions indicated that there were "important federal interests" in promoting Indian gaming,\textsuperscript{28} as well as tribal interests which paralleled these federal interests.\textsuperscript{29}

On the other side of the scale, the Court found that California's only asserted interest in applying its gambling laws against the Band was to prevent the infiltration of organized crime onto tribal gaming facilities.\textsuperscript{30} However, California had produced no evidence that organized crime was presently operating in and around the Band's facilities.\textsuperscript{31} Thus, the Court concluded that the state interest in regulating the Band's gaming operations was outweighed by the federal and tribal interests in promoting those operations, and so the California gambling laws were preempted vis-à-vis the Band.\textsuperscript{32}

C. Congressional Response to Cabazon: IGRA

It did not take Congress long to respond to Cabazon. Given Cabazon's disallowance of state regulation over Indian gaming, Congress remained the only non-Indian actor that could effectively place limits on the Indian gaming industry. While Congress had debated various bills to regulate Indian gaming even before Cabazon,\textsuperscript{33} the largely unexpected Cabazon holding "threw the ball into Congress's lap to do something, fast."\textsuperscript{34}

Accordingly, in 1988, Congress passed IGRA\textsuperscript{35} and President Reagan signed the bill into law on October 17 of that year. While IGRA is a complicated law, its basic framework is to divide the universe of Indian gaming into three classes and create different regulatory rules for each class.

According to IGRA, Class I gaming includes social games conducted for nominal prizes and traditional games of chance which are played in conjunction with tribal ceremonies.\textsuperscript{36} Regulation of Class I gaming is left solely to the discretion of the

\textsuperscript{25} 462 U.S. 324 (1983).
\textsuperscript{26} Id. at 334.
\textsuperscript{27} Cabazon, 480 U.S. at 217–18.
\textsuperscript{28} Id. at 217.
\textsuperscript{29} Id. at 219.
\textsuperscript{30} Id. at 220.
\textsuperscript{31} Id. at 221.
\textsuperscript{32} Cabazon, 480 U.S. at 221–22.
\textsuperscript{33} Indeed, Congress had debated various Indian gaming bills throughout the decade of the 1980s. See Gary Sokolow, The Future of Gambling in Indian Country, 15 Am. Indian L. Rev. 151, 155–63 (1990).
\textsuperscript{36} Id. at § 2703(6).
industrial tribes.\textsuperscript{37} Class II gaming includes bingo and bingo-like games, as well as non-banked card games such as poker.\textsuperscript{38} Class II gaming is jointly regulated by the individual tribes and a newly established National Indian Gaming Commission, which has the power to approve or deny tribal gaming ordinances.\textsuperscript{39} Finally, Class III gaming comprises all games which are not included in Class I or Class II.\textsuperscript{40} Thus, Class III games include banked card games like blackjack, pai gow, and baccarat, as well as roulette, craps, slot machines, and pari-mutuel sports betting. Class III gaming—often called “casino-style” gaming—is subject to all the restrictions of Class II gaming, with the additional requirement that the tribe negotiate a gaming compact with the state and draft its tribal gaming ordinances in conformity with that tribal-state compact.\textsuperscript{41}

Upon request by a tribe, the state has a statutory duty to bargain in good faith for a mutually agreeable gaming compact.\textsuperscript{42} Tribal-state compacts may include the following subjects: (i) provisions regarding the application of criminal and civil laws to the gaming enterprise, (ii) allocation of criminal and civil jurisdiction between the tribe and state, (iii) taxation by the tribe, (iv) state assessments of sufficient money to defray the costs of state regulation, (v) remedies for breach of contract, (vi) standards for the operation and maintenance of gaming facilities, and (vii) any other subjects directly related to the operation of gaming activities.\textsuperscript{43} Once a tribal-state compact is satisfactorily negotiated, it must be ratified by the Secretary of the Interior before taking effect.\textsuperscript{44}

As originally passed, IGRA allowed a tribe to sue in federal district court to enforce the state’s obligation to bargain in good faith for a Class III gaming compact.\textsuperscript{45} If the district court agreed with the tribe that the state was not bargaining in good faith, the court could appoint a mediator who would receive proposed compacts from both parties and select the one that the mediator deemed most appropriate.\textsuperscript{46} If the parties did not agree to the terms of this mediator-selected compact, the mediator would notify the Secretary of the Interior and the Secretary would prescribe gaming regulations for the tribe in accordance with the mediator’s compact.\textsuperscript{47}

However, in the 1996 case Seminole Tribe v. Florida, the Supreme Court held that states’ Eleventh Amendment sovereign immunity precluded tribes from suing a state in

\textsuperscript{37} Id. at § 2710(a)(1).
\textsuperscript{38} Id. at § 2703(7). “Banked” card games refer to card games in which all players compete against a single opponent, usually the casino itself. “Non-banked” card games refer to card games in which the players compete against each other.
\textsuperscript{39} Id. at § 2710(b). IGRA sets forth a number of criteria that the Commission must consider in deciding whether to approve tribal gaming ordinances. For instance, the tribe is only allowed to use gaming profits for discrete purposes, 25 U.S.C. § 2710(b)(2)(B), and the gaming facilities must be constructed and maintained “in a manner that adequately protects the environment and the public health and safety.” Id. at § 2710(b)(2)(E).
\textsuperscript{40} Id. at § 2703(8).
\textsuperscript{41} Id. at § 2710(d)(1)(C).
\textsuperscript{42} Id. at § 2710(d)(3)(A). This statutory duty is not absolute; a state need not bargain with the tribe if the state prohibits (rather than merely regulates) gaming by non-Indians. See infra nn. 79–101 and accompanying text.
\textsuperscript{44} Id. at § 2710(d)(8).
\textsuperscript{45} Id. at § 2710(d)(7)(A).
\textsuperscript{46} Id. at § 2710(d)(7)(B)(iv).
\textsuperscript{47} Id. at § 2710(d)(7)(B)(vii).
federal court without the state’s consent.\textsuperscript{48} Thus, \textit{Seminole Tribe} allows states to short-circuit IGRA’s elaborate lawsuit provision by invoking their Eleventh Amendment immunity from suit.

In the wake of \textit{Seminole Tribe}, the Secretary of the Interior adopted a set of regulations to be applied when a state asserts its Eleventh Amendment immunity against a tribal lawsuit under IGRA.\textsuperscript{49} These regulations basically track IGRA’s original lawsuit procedure but authorize the Secretary to perform the judicial functions that IGRA had originally entrusted to the federal district court.\textsuperscript{50}

A few states—most notably California—have superseded \textit{Seminole Tribe} by prospectively waiving their Eleventh Amendment immunity from tribal lawsuits under IGRA.\textsuperscript{51} California’s waiver of immunity was almost certainly in response to a remarkable Ninth Circuit case, \textit{United States v. Spokane Tribe}.\textsuperscript{52} \textit{Spokane Tribe} held that the lawsuit provision of IGRA is an inseparable component of the Class III compacting process; Congress would not have enacted IGRA had it known that states could block tribal lawsuits through their Eleventh Amendment immunity.\textsuperscript{53} Therefore, \textit{Spokane Tribe} concluded that a tribe may offer Class III gaming \textit{without} a compact if the state frustrates the compacting process by raising Eleventh Amendment immunity against a tribal lawsuit.\textsuperscript{54}

Presumably, California feared the possibility that its tribes might initiate Class III gaming without first bargaining with the State. Therefore, California waived its Eleventh Amendment immunity in order to sidestep \textit{Spokane Tribe} and preserve IGRA’s requirement that no tribe offer Class III gaming without first striking a tribal-state compact.

D. The Tribal Benefits of Indian Gaming

At the dawn of IGRA, Indian gaming in the United States grossed approximately $110 million per year.\textsuperscript{55} Most of this money came from bingo, although some tribes offered poker rooms and a small number offered casino-style gaming.\textsuperscript{56} But in the eighteen years since IGRA’s enactment, Indian gaming has grown by leaps and bounds. In 2004, Indian gaming grossed $19.4 billion from three hundred seventy-five discrete tribal gaming enterprises across the United States.\textsuperscript{57} Indian gaming was responsible for creating an estimated 553,000 jobs in that year.\textsuperscript{58} While pre-IGRA gaming was mostly

\textsuperscript{50} See Eric S. Lent, Student Author, \textit{Are the States Beating the House?: The Validity of Tribal-State Revenue-Sharing under the Indian Gaming Regulatory Act}, 91 Geo. L.J. 451, 471-72 (2003).
\textsuperscript{52} 139 F.3d 1297 (9th Cir. 1998).
\textsuperscript{53} \textit{Id.} at 1300.
\textsuperscript{54} \textit{Id.} at 1301.
\textsuperscript{55} Rose, supra n. 34, at 4.
\textsuperscript{56} \textit{Id.}
\textsuperscript{58} Natl. Indian Gaming Assn., \textit{An Analysis of the Economic Impact of Indian Gaming} in 2004.
limited to bingo, modern Indian gaming runs the gamut from modest bingo halls to giant gambling resorts offering a full range of casino-style games.\(^{59}\)

As for gaming's effects on the participant tribes themselves, demographic studies have found that gaming is strongly associated with improved quality of life on Indian reservations. For example, median household income among gaming tribes rose by 35% between 1990 and 2000.\(^{60}\) For non-gaming tribes, the rise was only 14%.\(^{61}\) Unemployment decreased by 4.8% over the same period for gaming tribes, while non-gaming tribes showed only a 1.8% decrease in unemployment.\(^{62}\) In fact, almost every census-measured category showed a significantly greater socioeconomic improvement for gaming tribes than non-gaming tribes between 1990 and 2000.\(^{63}\)

Not surprisingly, numerous commentators have seized on these data and proclaimed that gaming is an indispensable tool for prosperity and economic development in Indian country. Gaming is often called the “new buffalo,” an evocative phrase meant to underscore how gaming provides Indian tribes with sustenance just as the wild buffalo did centuries ago.\(^{64}\) One noted Indian scholar recently opined that “[g]aming is one of the few economic development strategies making inroads toward prosperity for many tribes.”\(^{65}\) Another commentator declared that “[t]ribal gaming is the one successful economic venture that has worked virtually every place a tribe has established a gaming operation.”\(^{66}\)

It is hard to argue with the contention that Indian gaming has been an economic success or that gaming profits have dramatically improved the quality of life for many


\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Kalt and Taylor charted fourteen measures of socioeconomic health and found that gaming tribes registered larger increases than non-gaming tribes in twelve of those fourteen categories.

\(^{64}\) See e.g. Sherry M. Thompson, Student Author, The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada, 11 Ariz. J. Intl. & Comp. L. 520, 521 (1994) (“The recent trend of casino gambling on Indian lands has been likened to the mythical return of the buffalo. The great beast that once darkened the plains and provided Indians with sustenance has returned in the guise of slot machines, blackjack tables, roulette wheels and bingo cards. . . . [G]aming proceeds have raised impoverished nations from the depths of despair.” (footnotes omitted)).


\(^{66}\) Gary C. Anders, Indian Gaming: Financial and Regulatory Issues, 556 Annals Am. Acad. Political & Soc. Sci. 98, 102 (1998) (quoting Rick Hill, chairman of the Natl. Indian Gaming Assn.). This seemingly extravagant claim has found cautious support in later empirical research. A recent study by Light and Rand indicated virtually no instances of tribes closing their casinos due to lack of business. Light & Rand, supra n. 3, at 10 n. 28. However, many Indian gaming operations yield very modest profits. In 2004, for example, one quarter of all tribal gaming operations generated less than $3 million in annual revenue. See Natl. Indian Gaming Commn., supra n. 57.
tribal members. But, economic success is not the only criterion to consider in assessing the effects of Indian gaming. Gaming has had more negative effects on tribal sovereignty.

III. THE IMPACT OF INDIAN GAMING ON TRIBAL SOVEREIGNTY

A. What is Tribal Sovereignty?

Tribal sovereignty in the federal Indian law context connotes political autonomy, or, as the Supreme Court has put it, the right of Indian tribes “to make their own laws and be ruled by them.” While this articulation of sovereignty refers to the positive right of Indian tribes to govern themselves, the major legal battles over Indian sovereignty have focused on tribes’ negative liberty to be free from external control by federal and state governments. Thus, famous early Indian law cases asked whether the federal government could regulate the sale of Indian land and whether states had the power to impose criminal laws on Indian reservations.

By the turn of the twentieth century, it was clear that the tribes had lost their battle to retain their sovereignty vis-à-vis the federal government. In a series of late nineteenth- and early twentieth-century decisions, the U.S. Supreme Court enunciated the rule that Congress has plenary power over Indian tribes. Under this judicially constructed “plenary power doctrine,” Congress can regulate all aspects of Indian country irrespective of subject matter.

Thus, the sovereignty battles of the latter twentieth century have mostly focused on the extent to which the states can regulate Indian tribes, their members, and their land.

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67. Even beyond the raw numbers, a large number of compelling anecdotes illustrate the transformative effect that Indian gaming has had for many tribes. For example, the Wisconsin Oneida Tribe has seen its poverty rate drop ten-fold, from 50% to 5%, since the tribe opened its casino. Chuck Nowlen, Casinos Bring Benefits, Capital Times A1 (Jan. 20, 2004). The United Auburn Indian Community in California, whose members lived in “slum-like” conditions just three years ago, has used its new casino profits to provide free medical and dental care for all tribal members and plans to provide free housing within a few years. Louis Sahagun, Tribes Fear Backlash to Prosperity, L.A. Times B1 (May 3, 2004). The Oneida Nation in New York has used its casino profits to fund a new cultural center and museum to preserve its tribal heritage. Brian Patterson, Preserving the Oneida Nation Culture, 13 St. Thomas L. Rev. 121, 123 (2000). And the Miccosukee Tribe has used new-found casino revenue to restore and protect the ecosystem of its Florida Everglades reservation, “outmaneu[vering] some of Florida’s and Washington’s strongest lobbies . . . to help set tougher water-quality standards.” Richard Louv, Is That a UFO Landing, or Just Another Casino? Union Tribune G3 (Apr. 24, 2004); see also John Holland, Tribe Gambles on UM Debate: Miccosukees Seek Influence with $1 Million, South Fla. Sun-Sentinel A1 (Sept. 28, 2004).


72. See Robert Laurence, Learning to Live with the Plenary Power of Congress over Indian Nations: An Essay in Reaction to Professor Williams’ Algebra, 30 Ariz. L. Rev. 413, 418 (1988). Laurence correctly notes that Congress’ plenary power over Indian affairs is not synonymous with absolute power. Congress is still bound by Bill of Rights restrictions in its Indian dealings. Id. Thus, Congress cannot, for example, take Indian reservation land without just compensation. See U.S. v. Sioux Nation, 448 U.S. 371 (1980).

73. Another contentious sovereignty issue, often linked to the question of state authority, deals with the
For example, the U.S. Supreme Court has wrestled with state authority to regulate hunting on Indian reservations, state power to tax Indians, and state jurisdiction over lawsuits against Indian defendants. Congress has also played a large role in defining state power over Indians by passing statutes which grant states authority in Indian affairs or take away such authority. The interplay of federal case law and statutory law has created a complex set of rules regarding state jurisdiction over Indian tribes and tribal affairs. In the following sections, this comment addresses how Indian gaming has altered these rules in the direction of increased state authority and decreased tribal sovereignty.

B. The Effects of IGRA on State Prohibition, Regulation, and Taxation of Indian Gaming

IGRA itself allows for substantial state regulation and de facto taxation of Indian gaming. In some cases, IGRA even allows states to block Indian gaming entirely. The large role states have in regulating and taxing Indian gaming under IGRA stands in sharp contrast to traditional principles of federal Indian law, which contemplate a very limited role for the states in taxing and regulating on-reservation Indian enterprises.

1. State Power to Prohibit Indian Gaming: A Back-Door Extension of PL 280

The clearest way that IGRA enlarges state authority is by allowing states to block Class II and Class III Indian gaming as long as that state prohibits analogous gaming by non-Indians as well. Specifically, IGRA declares that Class II and Class III Indian gaming is only lawful if it is “located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity.” This means that a state can block Indian gaming simply by not “permit[ting] such gaming” for any purpose by any person.

In a sense, this language grants PL 280 authority to all fifty states in the gaming context. Recall from the discussion of Cabazon that the U.S. Supreme Court had to decide whether PL 280 gave California—one of fifteen PL 280 states—the right to enforce its gambling laws against the Cabazon Band. The Supreme Court ultimately decided that PL 280 did not grant such authority. It found that California allowed a
substantial amount of legal gambling, and thus California "regulate[d] rather than prohibit[ed] gambling in general and bingo in particular." The implication was that if California had prohibited all types of gambling, its anti-gambling laws would be deemed criminal/prohibitory laws and the state could then have used PL 280 to apply those laws against the Cabazon Band.

Under IGRA, *every* state—not just California and the other PL 280 states—has the power to block Indian gaming by making its existing gambling laws criminal/prohibitory. If a state’s laws do not "permit such gaming for any purpose by any person," then Indian gaming is automatically unlawful under IGRA. In this respect, IGRA performs the same function as a hypothetical statute granting PL 280 authority to every state.

Later court decisions have fleshed out the meaning of IGRA’s "permit such gaming" language. The main question posed by these cases is how broadly IGRA’s language should be read. For instance, suppose a state allows charity blackjack at fundraisers. By allowing charity blackjack, the state clearly "permits" blackjack within the meaning of IGRA, and thus Indian tribes in that state can initiate tribal-state negotiations for the tribes to offer large-scale commercial blackjack operations. But what about other Class III games? Does the existence of charity blackjack mean that the state "permits" Class III gaming as a whole such that states must negotiate with tribes over all Class III games? Or are state-tribal compacts limited to blackjack because blackjack is the only specific game permitted by the state?

The two circuits which have directly addressed this question have held that the latter interpretation is correct: when a state permits a game, it only acquires the obligation to bargain with tribes *for that particular game*. For example, in *Cheyenne River Sioux Tribe v. South Dakota*, the State refused to negotiate with the Cheyenne River Sioux Tribe when the tribe sought to include keno in its casino plans. The tribe sued in federal court, alleging that the State’s intransigence violated its duty under IGRA to negotiate in good faith for a gaming compact.

The Eighth Circuit Court of Appeals denied the tribe’s claim. The court held that South Dakota law permitted video keno but did not permit the traditional keno which the tribe wanted to offer. The court thus concluded that the state had no obligation to bargain with the tribe over the inclusion of traditional keno.

A year later, the Ninth Circuit came to a similar conclusion in *Rumsey Indian
In Rumsey, a coalition of Indian tribes sought to negotiate tribal compacts for certain banked card games and slot machines and sued when the State of California refused to enter compact negotiations. The State claimed that it did not permit banked card games or slot machines, and thus it was not obligated to negotiate for these games under IGRA. The tribes responded that the State did permit video lottery machines and pari-mutuel horse racing, among other types of gaming. According to the tribes, this wide range of permitted Class III gaming was enough to trigger the State’s obligation to negotiate with the tribes for the proposed slot machines and banked card games.

The court sided with the State, holding that “IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming.” Thus, the State’s allowance of video lottery did not require it to negotiate over “functionally similar” slot machines. Similarly, the State was not obligated to negotiate for banked card games merely because it permitted banked games other than card games.

Many scholars have claimed that Cheyenne River and Rumsey create a circuit split by running counter to the Second Circuit Court of Appeals’ earlier decision in Mashantucket. Indeed, the scholarly consensus is that Mashantucket requires a state to negotiate for all Class III games as long as the state permits any single Class III game.

While Cheyenne River and Rumsey can certainly be criticized on their merits, claims of a circuit split are greatly exaggerated. In fact, the Mashantucket court never directly addressed the question that scholars routinely ascribe to it.

In Mashantucket, the Mashantucket Pequot Tribe sought to establish Class III casino gaming on its Connecticut reservation. Prevailing Connecticut law sharply restricted casino gaming, but Connecticut did allow non-profit organizations to occasionally offer casino games at “Las Vegas Night” fundraising events. The State contended that its limited allowance of charity Las Vegas Nights did not require it to negotiate with the Pequots over their plans for a large-scale commercial casino.

The Second Circuit disagreed with Connecticut, holding its limited Las Vegas

88. 64 F.3d 1250 (9th Cir. 1994).
89. Id. at 1255. The tribes specifically sought to negotiate for “electronic pull tab machines,” but the court readily concluded that these machines were considered “slot machines” under California law. Id. at 1256.
90. Id.
91. Id.
92. Rumsey, 64 F.3d at 1258.
93. Id.
94. Id.
95. 913 F.2d 1024. For an example of such scholarly commentary, review Anthony J. Marks, Student Author, A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming? 17 Loy. L.A. Ent. L.J. 157, 195 (1996) (“The Ninth Circuit’s decision in Rumsey created a split among the circuits. Specifically, the interpretations of IGRA by the Second Circuit and the Ninth Circuit directly conflict.”). Review also Judge William Canby’s dissent from the denial to re-hear Rumsey en banc. 64 F.3d 1250, 1252–53 (9th Cir. 1994) (“This is a case of major significance in the administration of the Indian Gaming Regulatory Act . . . and it has been decided incorrectly, in a manner that conflicts with the Second Circuit’s interpretation of the same statutory language.”). Rumsey has received much more scholarly attention than Cheyenne River, probably because the Ninth Circuit encompasses far more lucrative Indian gaming operations than does the Eighth Circuit.
96. Mashantucket, 913 F.2d at 1029.
Night gaming triggered its obligation to negotiate for the tribe's casino plans. The court expressly rejected "the proposition that a state which allows charities to engage in episodic, regulated casino-type gambling may still be deemed to be in a prohibitive, rather than regulatory, posture as to commercial casino gambling." Instead, the court found that the existence of Class III gaming at charity Las Vegas Nights indicated that Connecticut "permitted" commercial Class III gaming under IGRA.

It must be stressed that the Second Circuit never listed the specific games that the Pequots wanted to offer at their casino. The district court opinion, as well as the other published case documents, similarly failed to list which specific games were at issue. Thus, *Mashantucket* simply does not address the *Rumsey/Cheyenne River* question of whether a state must bargain for all Class III games when it permits a single Class III game. Instead, *Mashantucket* holds only that a state must generally bargain for commercial Class III gaming if the state already permits non-commercial Class III gaming.

Admittedly, *Mashantucket* does have some broad language which suggests that the Second Circuit probably would rule contrary to *Rumsey* and *Cheyenne River* if given the opportunity. For example, *Mashantucket* holds that when courts decide whether a state "permits" Class III gaming under IGRA, they should apply the civil/regulatory-criminal/prohibitory test from *Cabazon*. In *Cabazon*, recall that the Supreme Court cited California's lottery and horse-race betting as evidence that California's gambling laws were not criminal/prohibitory with respect to bingo. Applying this test to IGRA, state authorization of one specific game would be evidence that the state permits other specific games within the meaning of IGRA's "permits such gaming" language.

Thus far, however, the Second Circuit has not had the opportunity to apply the *Cabazon* test to a *Rumsey* or *Cheyenne River* fact pattern. Thus, scholarly accounts of a circuit split are premature at best. The only direct circuit precedent for the *Rumsey/Cheyenne River* question are those two cases themselves, which hold that a state need not negotiate for games B, C, or D if the state only permits game A.

2. State-Tribal Compacts: A Vehicle for State Taxation and Regulation of Indian Gaming

Even when states cannot prohibit Indian gaming under IGRA, they have significant ability to tax and regulate Class III gaming operations through the tribal-state gaming compacts which are a necessary precondition for Class III gaming. In the regulation context, tribal-state compacts usually limit the number of gaming machines that tribes

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97. *Id.* at 1031-32 (emphasis in original).
98. *Id.* at 1029.
100 *Mashantucket*, 913 F.2d at 1031.
101. Review *supra* notes 22 to 23 and accompanying text.
can offer, and compacts may contain provisions which subject tribal casinos to state employment laws, building codes, and other regulations. In short, the compacting process has given states an “unprecedented degree of freedom” to apply civil regulations against tribal casinos. This permissiveness of state regulation stands in sharp contrast to the Cabazon holding, which had essentially forbidden state regulation of Indian gaming operations.

It is debatable whether a faithful reading of IGRA would allow states to impose this broad range of regulatory laws on Indian casinos. As mentioned earlier, the text of IGRA lists the permissible subjects for tribal-state compacts. This list does not specifically authorize application of state labor laws, building codes, or other general regulations. Moreover, the legislative history of IGRA suggests that Congress did not intend for tribal-state compacts to include a wide variety of state regulatory laws. Rather, Congress anticipated that states would only regulate to ensure that Indian casinos remained free of corruption and organized crime.

Despite the text and legislative history of IGRA, the Ninth Circuit recently upheld a tribal-state compact provision that authorized California to regulate labor relations at the Coyote Valley Band’s casino. The court found that this labor provision was fairly

103. For example, California’s Model Gaming Compact, signed by sixty-one California tribes, limits each tribe to a total of 2,000 gaming machines. See Model Tribal-State Gaming Compact, supra n. 51, at § 4.3.2.2.

104. In Michigan, the state has used the compacting process to apply the Michigan Employment Security Act and Workers’ Compensation Act against tribal casinos and their employees. See Larry Betz & Donna Budnick, How State and Federal Laws Apply to Tribal Employment, 83 Mich B.J. 15, 16 (July 2004).


106. See William C. Canby, Jr., American Indian Law in a Nutshell 291 (3d ed., West 1998) (remarking that “there is accordingly an unprecedented degree of freedom on the part of the [State and tribe] to allocate jurisdiction over Class III gaming under the umbrella of the federal Act”).

107. Review supra note 43 and accompanying text.

108. See 25 U.S.C. § 2710(d)(3)(C)(i)-(vii). However, section 2710(d)(3)(C) does have three broadly worded clauses that could be interpreted as authorizing application of general state regulatory laws. Specifically, section 2710(d)(3)(C) authorizes compact provisions relating to:

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [gaming] activity;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities.

109. Consider, for example, the views of Senator Daniel Inouye, a principal drafter of IGRA. On the floor of the Senate, Senator Inouye explained

There is no intent of the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use. . . . The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in Class III gaming warranted utilization of existing State regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas.


110. See In re Gaming Related Cases, 331 F.3d 1094, 1115–17 (9th Cir. 2003). The provision specifically required the Coyote Valley Band to negotiate with labor unions for a comprehensive labor scheme, and allowed the state to independently decide whether the resulting scheme was “acceptable.” Id. at 1106.
encompassed within section 2710(d)(3)(C)(vii) of IGRA—a catch-all provision which allows tribal-state compacts to include “any other subjects that are directly related to the operation of gaming activities.” If other circuits adopt the Ninth Circuit’s logic, then a wide array of state regulatory laws would probably be deemed acceptable under the same catch-all compacting provision.

Sometimes state efforts to regulate tribal casinos lead to bizarre results. Consider the case of the Big Lagoon Rancheria Tribe in Northern California. The tribe had long sought to build a casino on its tribal lands along the Northern California coast. However, the tribe’s land was adjacent to the State-owned Big Lagoon ecological preserve, and the California Coastal Act sharply limited development in this “environmentally sensitive habitat area.” The State resisted negotiations with the tribe, contending that the proposed casino would have an unacceptably negative impact on the Big Lagoon ecosystem. In 1999, the tribe ultimately sued the state for violating IGRA’s duty to negotiate compacts in good faith.

In 2005, the lawsuit was settled in a novel fashion. The tribe agreed to waive all gaming rights on its ancestral lands, and the state agreed to let the tribe to build a casino six hundred miles away in Barstow, California. Under IGRA, tribes are allowed to set up gaming operations off their reservations as long as the Secretary of the Interior takes the off-reservation land in trust for the tribe and the state approves of the transaction.

The Big Lagoon deal may have resulted in a mutually agreeable outcome for both parties, but it also demonstrates states’ broad powers to impose civil regulations on tribal gaming operations. In this case, California used IGRA’s compacting process to effectively leverage the Coastal Act’s land-use restrictions against the tribe, refusing to negotiate for a coastal casino that would have violated those land-use restrictions. The tribe was forced to undertake a risky lawsuit in order to compel negotiations, and, in the end, the state achieved its regulatory goal of preventing development around the Big Lagoon ecosystem.

Compared with state regulation, state taxation of Indian gaming is an even more complicated issue under IGRA. On a formal level, IGRA holds that states do not have the power to levy taxes on tribal gaming, except for very limited assessments to compensate for any costs of state regulation. Thus, while a state may negotiate to impose its employment or zoning laws on a Class III gaming operation, it may not negotiate to impose its tax laws on that gaming operation.

116. Id. at § 2710(d)(4) (2000).
However, many compacts do impose a sort of back-door taxation in the form of "revenue-sharing agreements" or RSAs. Under these agreements, a tribe generally agrees to share a percentage of gaming revenue with the state in return for a state promise to prohibit or restrict non-Indian gaming in the state.

The earliest RSAs were signed between Connecticut and its two gaming tribes, the Mashantucket Pequots and the Mohegans. The compacts provided that the tribes pay Connecticut 25% of their slot machine revenue in return for an exclusive right to operate slot machines in the state. In the first seven years of the compact, these revenue-sharing agreements netted an astonishing $1.4 billion for the state coffers.

Other states, realizing the revenue potential of RSAs, were quick to follow Connecticut's lead. Michigan, for example, signed compacts wherein seven tribes would pay the State 8% of their revenue from electronic Class III games in exchange for the exclusive right to conduct Class III electronic gaming in the state. New York struck a similar agreement with the Seneca and Mohawk tribes, in which the tribes paid the state 25% of their slot machine revenue in exchange for an exclusive right to operate such machines.

Thus far, the Department of the Interior has universally approved tribal-state RSAs, reasoning that they are equitable bargained-for exchanges between states and tribes rather than unlawful taxation. Under this view, tribes' revenue payments are simply fair consideration for the state's agreement to provide exclusivity for tribal gaming.

The few courts to address the issue have likewise upheld tribal-state RSAs, applying similar logic as the Department of the Interior. The principal case in this regard, In re Indian Gaming Related Cases, upheld California's RSA against a challenge that it constituted an unlawful tax under IGRA.

The California RSA required that gaming tribes pay into two state funds. The first fund, known as the Revenue-Sharing Trust Fund, disbursed money to non-gaming tribes in California. Every non-gaming tribe in the state received $1.1 million per year from this fund, which was paid by a licensing fee on gaming tribes' slot machines and other devices. The second fund, known as the Special Distribution Fund, was a more

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117. Joseph M. Kelly, Indian Gaming Law, 43 Drake L. Rev. 501, 511 (1995). The Pequot compact was later amended to allow the Mohegan tribe a similar right to operate slot machines; however, non-Indians are still prohibited from operating slot machines in the state.
119. See Lent, supra n. 50, at 459. The Michigan compacts provided that the 8% payments would cease if the state allowed Class III electronic gaming by additional tribes as well as by non-Indians. Accordingly, when the state later entered into Class III compacts with four additional tribes, a federal judge found that the seven original tribes may cease their payments under the compact. See Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 93 F. Supp. 2d 850, 851 (W.D. Mich. 2000).
121. The literature does not document any cases of the Department vetoing a tribal-state compact on the grounds that an RSA provision amounted to forbidden taxation.
123. See Model Tribal-State Gaming Compact, supra n. 51, at § 4.3.2.1.
standard arrangement. The state collected a percentage of the net revenue from tribal gaming devices and used the money for a variety of governmental purposes. In exchange for tribal payment into these two funds, the state granted tribes the exclusive right to operate slot machines and banked card games in the state.

The Gaming Cases court found that these tribal payments were lawful on the grounds that the state offered “meaningful concessions” in the form of its exclusivity deal. Like the Department of the Interior, the Gaming Cases court concluded that the exclusivity promise by the state rendered the RSA a permissible exchange of benefits rather than a prohibited taxation clause.

The court’s conclusion is highly dubious, for the simple reason that the California constitution already prohibited Las Vegas-style gaming. The tribes themselves were only able to negotiate for Class III gaming by successfully bankrolling Proposition 1A, a 2000 constitutional amendment that exempted Indian tribes from the constitutional gambling prohibition. Thus, California’s meaningful concessions were nothing more than a promise not to further amend the state constitution.

And in truth, there was never much chance that the California constitution would be further amended to allow casino gaming by non-Indians. While California voters gave the green light to Indian gaming through Proposition 1A, those same voters seem firmly opposed to non-Indian casino gaming. Consider, for example, the fate of Proposition 68, a 2004 constitutional amendment drafted by a consortium of non-Indian racetracks and card clubs that would have authorized 30,000 slot machines at sixteen of these facilities unless every Class III Indian casino in the state immediately renegotiated its existing compact to give the state 25% of its net revenue. Newspapers were quick to deride Proposition 68 as a classic bait-and-switch. The measure ostensibly sought to give the state a higher percentage of Indian casino revenue, but its real goal was to legalize non-Indian casino gaming—which Proposition 68 would authorize if just one California tribe refused to renegotiate its existing compact within ninety days. California Governor Arnold Schwarzenegger publicly called the measure a “sham,” and Proposition 68’s backers actually stopped advertising a full month before the election after polling showed that it had no chance of passing. It ultimately lost by the lopsided count of 84% to 16%.

The failure of Proposition 68 suggests that non-Indian casino gaming is politically
infeasible in the state. Thus, when California gives tribes the “concession” of exclusive
gaming rights, the state is hardly conceding anything at all. And without any meaningful
concession by the state, California’s RSA becomes nothing more than a prohibited tax
under the Gaming Cases mode of analysis.

Many other RSAs can be deemed back-door taxation for the same reason. When
states agree to bar non-Indian gaming under these agreements, they are generally
agreeing to maintain a status quo that is highly resistant to change in any event. Thus,
the states’ concessions are quite minimal, and the RSAs should rightly be considered
unlawful taxation under both the Gaming Cases framework and the Department of
Interior’s similar logic.

Arizona provides another good example of how dismal state concessions can be
under tribal-state RSAs. The model Arizona gaming compact, signed by ten tribes in
December 2002, required that tribes pay up to 8% of Class III revenue to the
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state.

In
return, the state promised to maintain its current restrictions on casino-style gaming by
non-Indians.

But the voters of Arizona seem unlikely to expand non-Indian casino gaming in
any event. Just one month before the state and tribes signed the model compact, Arizona
voters soundly defeated Proposition 201, a measure that would have allowed slot
machines at non-Indian dog tracks.

Not only did Proposition 201 fail, it failed by an
overwhelming 4-to-1 margin.

If Proposition 201 is any indication, non-Indian casino
gaming is a political non-starter in Arizona. Thus, when the state’s model compact
promises to maintain the status quo on non-Indian gaming, it is merely echoing what the
political calculus had already determined. In this respect, Arizona tribes have not
obtained any meaningful concession to offset the revenue that they must remit to the
state.

By allowing back-door taxation of tribal casinos, IGRA gives states a significant
power that they would otherwise lack. Prevailing precedent holds that states have almost
no power to tax Indians in Indian country. In McClanahan v. Arizona Tax
Commission, for instance, the Supreme Court barred the state from imposing its
personal income tax on an Indian who earned his living on the reservation. In Montana
v. Blackfeet Tribe, the Court blocked a state attempt to tax a tribe’s royalties from
reservation oil and gas leases. Indeed, while many Indian law principles entail a
balancing of state and tribal interests, state taxation is subject to “a more categorical
approach: ‘[a]bsent cession of jurisdiction or other federal statutes permitting it,’ . . . a
State is without power to tax reservation lands and reservation Indians.”

135. Id. at 18.
136. See Mary Jo Pitzl, Gaming Initiatives: What They’re About, A Guide to the Three Ballot Propositions,
137. John Steams, Legal Issues Likely Settled, People Have Spoken, Profs Say, Ariz. Republic A20 (Nov. 7,
   2002).
   Tribes & Bands of Yakima Nation, 502 U.S. 251, 258 (1992)).
not for IGRA, states would certainly be unable to tax tribally-owned, on-reservation casinos.

Why, then, do tribes agree to RSAs which are tantamount to disguised state taxation? One possibility is that tribes are extremely—perhaps even unreasonably—risk-averse. For example, an extremely risk-averse Arizona tribe might worry about future competition from non-Indian gaming even though the dismal failure of Proposition 201 indicates that non-Indian gaming is presently infeasible in Arizona and probably will remain infeasible for quite some time. If a tribe is nervous enough about hypothetical future competition, it might consider revenue-sharing to be a fair trade for a state promise of exclusive gaming rights.

However, a darker possibility is that tribes agree to RSAs because they have no other options. After all, Seminole Tribe prevents most tribes from suing states and contesting the legality of RSAs in federal court. The Interior Department’s permissive stance toward RSAs prevents tribes from gaining relief by invoking the Secretary’s post-Seminole dispute-resolution procedure. And while tribes might theoretically challenge the legality of an RSA in state court—the Eleventh Amendment immunity only applies to federal lawsuits—state courts are unlikely to provide a fair and impartial forum for claims against the state itself.

C. The Effects of Indian Gaming on the Federal Recognition Process

While IGRA has important implications for tribal sovereignty, it only addresses the limited topic of Indian gaming. Thus, with minor exceptions, Indian tribes are not directly affected by IGRA unless they choose to offer gaming.

However, Indian gaming as a whole has had major effects on tribal sovereignty that extend far beyond the gaming tribes themselves. One prime example is the impact gaming has had on the ability for putative tribes to gain federal recognition.

1. An Overview of the Federal Recognition Process

Federal recognition is a necessary first step before any Indian tribe can exercise federally protected sovereignty over its land and members. For instance, only federally recognized tribes enjoy immunity from state taxation and regulation. Federal recognition also gives tribes affirmative rights under federal law, including the right to

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141. The In re Gaming Related Cases lawsuit was only possible because California had waived its Eleventh Amendment immunity against tribal lawsuits under IGRA. Review supra notes 51–54 and accompanying text.

142. See Brian Casey Fitzpatrick, Student Author, Finding a Fair Forum: Federal Jurisdiction for IGRA Compact Enforcement Actions in Cabazon Band of Mission Indians v. Wilson, 35 Idaho L. Rev. 159, 176–77 (1998). Even this state lawsuit option might now be unavailable because the Supreme Court has ruled that states have inherent sovereign immunity from suit in their own courts which is coextensive with their Eleventh amendment immunity from suit in federal court. See Alden v. Me., 527 U.S. 706 (1999).

143. IGRA’s Class III compacting process occasionally entails direct third party effects on non-gaming tribes. For example, California’s 1999 model compact provided for every non-gaming tribe to get $1.1 million in annual revenue, to be funded by a licensing fee on gaming tribes’ slot machines. Review supra note 124 and accompanying text.

144. See R. Spencer Clift, III, The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code and Related Matters, 27 Am. Indian L. Rev. 177, 195 (2003).
levy their own taxes and maintain a separate judiciary. From the perspective of tribal sovereignty, the importance of federal recognition can hardly be overstated.

There are currently two realistic avenues by which an unrecognized tribe can gain federal recognition. First, Congress may pass legislation to recognize a specific tribe. The Mashantucket Pequot Tribe—the most successful gaming tribe in the nation—gained federal recognition through this route in 1983. More recently, a handful of Midwestern tribes have also gained recognition through this legislative procedure.

The second and more common method of gaining recognition is through the Bureau of Indian Affairs (BIA). The BIA has recognized tribes on a case-by-case basis during most of the twentieth century, but the Bureau did not formally publish a set of criteria to be applied in all tribal recognition proceedings until 1978. Under the current BIA guidelines, a petitioning tribe must satisfy seven mandatory criteria before gaining federal recognition:

1. the tribe has been identified as an American Indian entity on a substantially continuous basis since 1900;
2. a predominant portion of the tribe has comprised a distinct community from historical times until the present;
3. the tribe has maintained political influence or authority over its members from historical times until the present;
4. the tribe has submitted a copy of its present governing documents including its membership criteria;
5. tribal membership consists of individuals who descend from a historical Indian tribe or from multiple tribes which functioned as a single political entity;
6. membership is composed principally of persons who are not members of any acknowledged North American Indian tribe; and
7. neither the group nor its members are the subject of congressional legislation that has

145. H.R. Rpt. No. 103-781, at 2–3 (1994) ("[Federal recognition] institutionalizes the tribe’s quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary."). As this excepted language suggests, many of the rights “granted” by federal recognition are actually inherent sovereign powers which tribes have always possessed. But given Congress plenary power to abrogate tribal sovereignty, there is enormous value in federal acknowledgment of tribes’ pre-existing sovereign rights.

146. For a discussion of a theoretical third avenue, review infra notes 153 to 158 and accompanying text.


expressly terminated or forbidden the Federal relationship.150

Once a tribe submits a petition for recognition that includes documentation of all seven criteria, the BIA will place the tribe on "active consideration" and must issue proposed findings within one year as to whether the tribe should gain federal recognition.151 Unfortunately, this one year requirement is usually honored in the breach. In 2002, the BIA itself admitted that it might take fifteen years to fully process the petitions currently pending before it.152

It is sometimes asserted that tribes can gain recognition through a third, judicial route.153 Indeed, Congress itself has declared that tribes may be recognized "by a decision of a United States court."154 But this judicial route is practically unavailable because courts generally apply the doctrines of exhaustion of administrative remedies and primary jurisdiction to defeat tribal recognition claims.155

Under the exhaustion of administrative remedies doctrine, a court will refuse to recognize a tribe if the tribe has not fully availed itself of the BIA recognition process.156 Given the glacial pace of the BIA process, this exhaustion doctrine bars a great many tribes from obtaining judicial recognition while their recognition petitions wind their way through the BIA machinery.

The primary jurisdiction doctrine performs the same function as the exhaustion doctrine, but in a slightly different context. The classic example is land claims. When a tribe sues to recover illegally taken land, the outcome of the lawsuit often turns on whether the tribe meets the federal recognition criteria.157 If the tribe has not yet been federally recognized, courts will usually hold the tribe's lawsuit in abeyance in order to give the BIA primary jurisdiction to either recognize or not recognize the tribe.158

The conceptual difference between two doctrines is that the exhaustion doctrine applies when either the BIA or the court could give the tribe its requested relief (i.e., federal recognition), while the primary jurisdiction doctrine applies when the tribe's ultimate requested relief can only be given by a court (e.g., damages for illegally taken land.) But both doctrines effectively bar federal courts from recognizing tribes, notwithstanding courts' formal power to do so.

150. 25 C.F.R. § 83.7 (2004).
151. Id. at § 83.10.
153. See e.g. John W. Ragsdale, Jr., The United Tribe of Shawnee Indians: The Battle for Recognition, 69 UMKC L. Rev. 311, 322 (2000).
157. See Golden Hill Paugusset Tribe v. Weicker, 39 F.3d 51, 59 (2d Cir. 1994) (stating that the criteria for a tribe to sustain a land claim lawsuit are substantially the same as the criteria for BIA recognition); Catawba Indian Tribe of S.C. v. S.C., 718 F.2d 1291, 1295 (4th Cir. 1983).
158. See Golden Hill, 39 F.3d at 60; U.S. v. 43.47 Acres of Land, 45 F. Supp. 2d 187, 194 (D. Conn. 1999); but see N.Y. v. Shinnecock Indian Nation, 400 F. Supp. 2d 486 (E.D.N.Y 2005) (finding that the Shinnecock Indian Nation is an Indian tribe for purposes of tribal land claim despite its lack of BIA recognition).
2. Indian Gaming Raises the Barriers to Federal Recognition

The advent of Indian gaming has complicated tribal recognition efforts, chiefly by dramatically raising the cost of BIA recognition. One staffer from the Senate Committee on Indian Affairs estimates that recognition typically cost less than $200,000 before gaming, and now recognition efforts cost in the millions.\(^{159}\) Christine Grabowski, an anthropologist heavily involved in many recognition proceedings, has remarked that the expenses associated with gaining recognition have become so high that they "do the process . . . a great injustice."\(^{160}\)

Indian gaming has raised the costs of federal recognition because only federally recognized tribes may conduct gaming under IGRA,\(^{161}\) and popular belief holds that tribes only seek federal recognition in order to offer gaming.\(^{162}\) Therefore, tribal recognition efforts are vigorously opposed by anti-gambling advocates as well as present gaming interests who fear competition from the newly recognized tribe. Under the BIA guidelines, any interested party may submit factual or legal arguments for or against the tribe’s petition for recognition,\(^{163}\) and opposing interests sometimes flood the BIA with information arguing against the recognition of a new tribe.\(^{164}\) The end result is a long, expensive war of paper between supporters and opponents of recognition.

Even when tribes initially succeed in gaining BIA recognition, opponents have sometimes protracted the fight by appealing the BIA’s decision. For example, the Schaghticoke Tribe of Connecticut sought recognition throughout the 1990s, fighting constant opposition from Connecticut’s attorney general and assorted anti-casino groups. The anti-Schaghticoke forces freely admitted that their opposition stemmed from a concern that the Schagticokes, if recognized, would open a casino in the state.\(^{165}\) But, in 2004, the Schaghticokes appeared to have finally won their battle for recognition when the BIA approved their petition.

Undaunted, Connecticut Attorney General Richard Blumenthal appealed the decision to the Interior Department’s Board of Indian Appeals, which overturned the Schagticokes’ recognition in 2005.\(^{166}\) To continue their recognition efforts, the


\(^{161}\) 25 U.S.C. §2703(5). Of course, even before IGRA, only federally recognized tribes possessed the inherent sovereignty to set up gambling enterprises (or any other enterprises) free from state regulation. Review supra notes 144–45 and accompanying text.

\(^{162}\) Jack Campisi, *Reflections on the Last Quarter Century of Tribal Recognition*, 37 New Eng. L. Rev. 505, 507 (2003). Campisi points out that this popular belief does not stand up to critical analysis because the vast majority of tribes who are currently pursuing recognition began their efforts well before *Cabazon* and IGRA. *See also* Mark Edwin Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process* 253 (U. Neb. Press 2004) ("After the phenomenal gaming-fueled success of recently acknowledged tribes in the Northeast, [unacknowledged tribes] have had to overcome a pervasive idea that many, if not the majority, of unacknowledged peoples were assimilated 'pretenders' lining up to cash in on the gaming bonanza.").

\(^{163}\) 25 C.F.R. § 83.9(a) (2004).


\(^{165}\) Light & Rand, supra n. 3, at 61.

Schaghticokes must now seek judicial review of the Board’s decision in federal court—a very chancy and expensive undertaking.

The Chinook Tribe of Washington provides the slightly different example of a tribe who initially gained BIA recognition, only to see a rival tribe appeal the decision and ultimately overturn it. The Chinooks gained their recognition in January 2001, but the neighboring Quinault Tribe appealed the decision to the Board of Indian Appeals. In July 2002 the Board agreed with the Quinaults and overturned the Chinooks’ recognition.167 According to some press accounts, the Quinaults’ opposition was driven by fears that a recognized Chinook Tribe could open a casino to compete with the Quinault Beach Resort and Casino on the Washington coast.168

A tribe may face gaming-related resistance to its recognition efforts regardless of the tribe’s own position on gaming. For example, when the Los Angeles-area Gabrieno-Tongva Tribe sought federal recognition in 2001, its leaders emphatically denied any plans to open a casino.169 Yet these statements failed to quell gaming-related opposition from local governments, who argued that the Tongvas’ anti-gambling stance could quickly change if there was any change in tribal leadership.170

The Tongva example171 underscores how closely tribal recognition and gaming are linked in the public consciousness. If an unrecognized tribe is geographically positioned to open a profitable casino, there may be nothing that the tribe can do to convince third parties that it will not begin gaming once given recognition. Thus, virtually all unrecognized tribes—save perhaps those in very remote areas—must contend with gaming-related opposition to their federal recognition efforts.

The Schaghticokes, Chinooks, and Tongvas all illustrate the way in which gaming has raised the cost and difficulty of gaining BIA recognition. On the other hand, gaming does provide some tribes with vastly increased resources which they can use to pursue recognition. Unrecognized tribes near major metropolitan areas are often courted by wealthy casino investors who promise to bankroll the tribe’s recognition efforts in exchange for a share of any future casino profits. These investors may offer “dream teams” of anthropologists and genealogists to assemble the detailed historical and genealogical records which the BIA requires.172 Thus, for casino-savvy tribes willing to

167. See Linda Shaw, Chinooks Invited to the White House, Then Lose Their Federal Recognition, Seattle Times A1 (July 8, 2002).
170. Id.; see also Bill Hillburg, Tribe Seeks Recognition from U.S.; Rivals Suspect Casino Plans, L.A. Daily News N12 (Dec. 23, 2001). As it turns out, anti-gambling forces were correct to be skeptical of the Tongvas’ claims. Three years after they disavowed any interest in gaming, the Tongva leadership announced that it would consider casino plans if given federal recognition. See Louis Sahagun, Tribe May Consider L.A.-Area Casino, L.A. Times B3 (Aug. 26, 2004).
171. The Tongvas have been seeking recognition through Congress as well as through the BIA. But the Tongva example still illustrates the point that anti-gambling interests may oppose tribal recognition even when the tribe itself emphatically denies any interest in gaming.
172. Barry, supra n. 160. The Connecticut Mohegans provide an example of a tribe whose recognition efforts were lavishly funded by outside casino investors. Hotel developer Len Wolman spent approximately ten million dollars to fund the Mohegans’ recognition efforts in the early nineties. Review Johnathan
embrace outside investors, the increased costs of BIA recognition might be more than offset by the vastly increased resources that these tribes can apply towards their recognition efforts.

But what about unrecognized tribes who disavow gaming, for either practical or moral reasons? As the Tongva example illustrates, tribes who disavow gaming may still face gaming-related opposition to their recognition efforts. But these tribes cannot rely on wealthy casino investors to help offset the gaming-related opposition. In short, the advent of Indian gaming has been an unmitigated disaster for unrecognized, anti-gaming tribes: it has dramatically raised the cost of federal recognition without giving these tribes any additional resources to help them in their recognition efforts.

D. Indian Gaming as a Driving Force behind City of Sherrill

Indian gaming has potentially reduced the sovereignty of all existing tribes by helping drive the recent Supreme Court opinion in City of Sherrill v. Oneida Indian Nation.\(^{173}\) Sherrill deals a sharp blow to tribal sovereignty, preventing tribes from buying back illegally taken land and asserting sovereign rights over the newly acquired land parcels. The Sherrill decision, and the hidden role that Indian gaming likely played in that decision, is described below.

1. An Overview of Sherrill

Sherrill involved an attempt by the City of Sherrill, New York, to tax parcels of land owned in fee by the Oneida Indian Nation (Nation). The Nation resisted these taxes, claiming that the land parcels were sovereign Indian territory and thus immune from state and local taxation.\(^{174}\)

The land parcels had a long and complicated history of ownership. They were originally part of the Nation's 300,000-acre reservation, which had been established near the dawn of the United States.\(^{175}\) During the late eighteenth and early nineteenth century the Nation sold off virtually its entire reservation, including the land parcels at issue, to the State of New York.\(^{176}\) In the 1985 case, County of Oneida v. Oneida Indian Nation (Oneida II),\(^{177}\) the Supreme Court held that these centuries-old sales of reservation land were illegal because a federal statute (the Non-Intercourse Act) had forbidden states from buying Indian land without the participation of the federal government.\(^{178}\) Because the land sales were illegal, the Court found that the Nation could sue the present owners

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174. Sherrill, 125 S. Ct. at 1489.
175. Id. at 1483.
176. Id. at 1484–85.
178. Id. at 232–33. The Non-Intercourse Act specifically declared that: "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138, § 4 (1790).
of that land for wrongful possession and collect money damages.\textsuperscript{179} However, the Court reserved the question of whether “equitable considerations should limit the relief available to the present day Oneida Indians.”\textsuperscript{180} This cryptic statement was widely understood to reference the idea that the Court might be unwilling to actually eject the current inhabitants of the Oneidas’ reservation.\textsuperscript{181}

In the years following \textit{Oneida II}, the Nation bought the land parcels at issue in open-market transactions.\textsuperscript{182} Relying on \textit{Oneida II}, the Nation claimed that these parcels had always legally remained reservation land. The Nation thus refused to pay local taxes on the parcels, arguing that localities may not tax or regulate tribally owned reservation land.\textsuperscript{183} The district court granted the Nation’s claim for tax immunity, and the Second Circuit affirmed.\textsuperscript{184}

The Supreme Court reversed, holding that the Oneidas could not exercise sovereign tax immunity over the recently acquired land parcels. The Court found that granting tax immunity over the two parcels would be inequitable, due to the long period of time that the land parcels had been under the jurisdiction of New York, and the disruptive consequences that would result if the Oneidas were able to establish sovereign jurisdiction over the parcels.\textsuperscript{185}

Regarding the time period, the Court noted that the wrongful sale of the Oneidas’ reservation occurred in the early years of the United States, and New York had exercised jurisdiction over this land for nearly two centuries. According to the Court, the two hundred years of uninterrupted state jurisdiction created “justifiable expectations” that the state—rather than the Nation—would continue to exercise jurisdiction.\textsuperscript{186}

Regarding the consequences, the Court claimed that granting the Oneidas jurisdiction over the land parcels would have “disruptive practical consequences.”\textsuperscript{187} The Court noted that most of the surrounding land and population was non-Indian, and the land parcels at issue were scattered throughout the predominantly non-Indian area. Thus, the Court concluded that granting the Nation sovereign authority over the parcels would create a “checkerboard of alternating state and tribal jurisdiction” which would seriously burden the administration of local governance and adversely affect neighboring landowners.\textsuperscript{188} In particular, the Court worried that:

If [the Oneida Indian Nation] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new

\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 253 n. 27.
\textsuperscript{182} \textit{Sherrill}, 125 S. Ct. at 1488.
\textsuperscript{183} Id. at 1489.
\textsuperscript{184} Id. at 1488.
\textsuperscript{185} Id. at 1490 n. 9 ("The relief [the Oneida Indian Nation] seeks—recognition of present and future sovereign authority to remove the land from local taxation—is unavailable because of the long lapse of time, during which New York’s governance remained undisturbed, and the present-day and future disruption such relief would engender.").
\textsuperscript{186} Id. at 1490–91.
\textsuperscript{187} \textit{Sherrill}, 125 S. Ct. at 1493.
\textsuperscript{188} Id.
generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.\textsuperscript{189}

2. The Illogic of Sherrill

The Court's two grounds for denying tax immunity to the Oneidas are both highly dubious in light of earlier Supreme Court precedent. Regarding the "length of time" argument, it is certainly true that New York had exercised jurisdiction over the land parcels for nearly two centuries. But in \textit{Oneida II}, the Court had expressly rejected the argument that a very long period of state jurisdiction could defeat the Oneidas' claim for wrongful possession.\textsuperscript{190} Thus, it is unclear why a similarly long period of state jurisdiction should bar the Oneidas from re-establishing tax immunity over the recently acquired land parcels.

Regarding the "disruptive consequences" point, it is also true that granting the Oneidas tax immunity over the land parcels would create a checkerboard of alternating state and tribal jurisdiction in the area. But the Court has not worried about such jurisdictional checkerboards in the past. Quite the opposite: prevailing precedent on jurisdiction over Indian reservations embraces the idea of checkerboard state and tribal jurisdiction.

The prime case in this regard is \textit{Montana v. United States},\textsuperscript{191} which dealt with attempts by the Crow Tribe to regulate hunting and fishing by non-Indians within the Crow reservation. The Court concluded that the tribe may regulate non-Indian hunting and fishing on Indian-owned land within the reservation, but the tribe may \textit{not} regulate this activity on reservation land owned in fee by non-Indians.\textsuperscript{192} Thus, when it comes to regulating non-Indian activities within the reservation, the Court effectively granted the state jurisdiction on non-Indian fee land\textsuperscript{193} while granting the tribe jurisdiction on the remaining Indian-owned land.

\textit{Montana} created an elaborate checkerboard of state and tribal jurisdiction within the Crow reservation. Thirty percent of the reservation was owned in fee by non-Indians,\textsuperscript{194} and this 30\% was broadly scattered amidst tribally owned land and individual

\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Oneida II}, 470 U.S. at 253 ("One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.").
\textsuperscript{191} 450 U.S. 544 (1981).
\textsuperscript{192} \textit{Id.} at 557. "Indian-owned land" within the Crow Reservation consisted of land which was allotted to individual Crow Indians and land held in trust for the tribe as a whole. \textit{See id.} at 548.
\textsuperscript{193} The language in \textit{Montana} primarily referenced the regulatory jurisdiction of the tribe, not the state. But it seems clear that the state would exercise jurisdiction whenever the tribe is barred from doing so. \textit{See id.} at 566-67 (referencing state regulations as the default authority over non-member fee land because tribal regulations are inapplicable); \textit{see also} Katosh Belvin Nakai, Student Author, \textit{Red Rover, Red Rover: A Call for Comity in Linking Tribal and State Long-Arm Provisions for Service of Process in Indian Country}, 35 Ariz. St. L.J. 633, 668 n. 172 (2003) (noting "\textit{Montana} . . . seem[s] to suggest that the state can assert jurisdiction on non-Indian fee lands").
\textsuperscript{194} \textit{Mont.}, 540 U.S. at 548. This 30\% figure included 28\% owned in fee by individual non-Indians and 2\% owned in fee by the state of \textit{Montana} itself.
Indian allotments. According to the Court, the State of Montana could regulate non-Indian hunting and fishing on this scattered 30%, while the tribe could regulate the remaining portion of the reservation.

Of course, Montana created a precedent of checkerboard jurisdiction that extends far beyond the Crow reservation itself. After all, many Indian reservations are characterized by a pattern of non-Indian fee land broadly dispersed among Indian-owned land. This pattern is a legacy of the late nineteenth- and early twentieth-century allotment policy, under which the federal government allotted tribal land to individual Indians and authorized those Indians to sell their allotments to outsiders.196 By mandating that regulatory jurisdiction track the nature of land ownership, Montana guarantees a complicated checkerboard of alternating state and tribal jurisdiction over a huge portion of Indian country.

In later years, the Court applied the Montana framework to other types of government regulation, including taxes197 and zoning restrictions.198 Taken as a whole, these cases grant states broad governmental authority over non-Indian fee land, while granting tribes broad authority over Indian-owned land. Thus, in many cases, the question of tribal versus state jurisdiction over a piece of land turns on the ownership of that land.199 And given the checkerboard pattern of land ownership in many Indian reservations, the Montana line of cases establishes a corresponding checkerboard of state and tribal jurisdiction.

Given the Court’s past embrace of checkerboard jurisdiction, it seems bizarre—or disingenuous—for the Sherrill court to cite the supposed inequity of checkerboard jurisdiction as a reason for denying the Oneidas’ claim. But the peculiarities of Sherrill do not end there. The Court’s grounds for denying the Oneidas’ claim were not only contrary to Court precedent, they were also completely ignored by the two parties in the case. The petitioning City of Sherrill based its case on the theory that the land in question was no longer Indian country, either because Congress had never set aside the Oneidas’ reservation or because Congress had disestablished that reservation in the nineteenth century.200 The Oneidas responded, naturally enough, by asserting that Congress had set aside their reservation in a 1794 treaty and had never disestablished

196. Nakai, supra n. 193, at 648 n. 85 (“Because the Indian allotment policies opened many reservations up to non-Indian settlement, today many reservations have a so-called checkerboard pattern of ownership.”).
199. There are certainly exceptions to this general rule of state authority over private fee land and tribal authority over Indian-owned land. For example, Montana itself set out two situations in which tribes may regulate non-Indians on private fee land: (1) when the non-Indian has entered into consensual dealings with the tribe or its members and (2) when the non-Indian’s conduct threatens the political integrity, economic security, or health and welfare of the tribe. See Mont., 450 U.S. at 555–56. Conversely, states may regulate Indian-owned land under certain circumstances. See e.g. Mescalero, 462 U.S. at 333. But these exceptions do not alter the general point: in a wide variety of cases, the choice between state and tribal authority will hinge on whether the land in question is owned by Indians or non-Indians.
200. Petr.’s Br. 13–16 (Aug. 12, 2004). The City of Sherrill also argued that the Oneidas may have ceased to exist around the turn of the twentieth century and that any period of tribal non-existence would prevent the land from currently being considered “Indian country.” See id. at 40.
that reservation.\textsuperscript{201} Conspicuously absent from the parties’ historical analysis was any talk about whether current equitable considerations should influence the outcome of the case. The Supreme Court itself candidly admitted that its \textit{Sherrill} opinion was based on “considerations not discretely identified in the parties’ briefs.”\textsuperscript{202}

3. The Gaming Backlash Theory of \textit{Sherrill}

Why did the Supreme Court disregard the issues raised by the parties, instead deciding \textit{Sherrill} based on an alternative theory that runs contrary to Court precedent? Obviously, one cannot say for certain. But this comment contends that \textit{Sherrill} was likely driven by a backlash against Indian gaming—a fear that Indian gaming would mushroom uncontrollably if the Oneidas and similar tribes were allowed to establish sovereignty over recently acquired land.

There is strong circumstantial evidence for this view. As the previous discussion about federal recognition demonstrates, Indian gaming has spawned a vigorous backlash from neighboring communities and society at large. It certainly seems plausible that the Court would be sensitive to the anti-gaming backlash. One scholar recently opined that the Court is very cognizant of public attitudes toward Indians and may pen anti-Indian decisions to avoid further stirring a public backlash.\textsuperscript{203}

Moreover, the result in \textit{Sherrill} is consistent with the “gaming backlash” hypothesis. By denying the Oneidas’ claim, the Court effectively prevented the Oneidas—or any similarly situated tribe—from reacquiring illegally taken land and putting a gaming facility on that land.\textsuperscript{204} \textit{Sherrill}’s ability to curtail Indian gaming can best be seen by examining a closely related case, \textit{Cayuga Indian Nation of New York v. Village of Union Springs (Union Springs I)}.\textsuperscript{205}

The Cayuga case involved a strikingly similar fact pattern to \textit{Sherrill}. Like the Oneidas, the Cayuga Indian Nation possessed a large New York reservation at the dawn of the United States. And like the Oneidas, the Cayugas sold virtually their entire reservation to New York in the late eighteenth and early nineteenth century, in violation of the Non-Intercourse Act.\textsuperscript{206} Not surprisingly, a federal court confirmed that these sales of Cayuga land were void,\textsuperscript{207} and thus the present-day Cayugas could collect damages for wrongful possession from the current occupants of the land.\textsuperscript{208}

In 2003, the Cayugas purchased a piece of their illegally taken reservation and

\begin{footnotesize}
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\item Respt.’s Br. 10 (Sept. 30, 2004).
\item \textit{Sherrill}, 125 S. Ct. at 1490 n. 8.
\item Louis F. Claiborne, \textit{The Trend of Supreme Court Decisions in Indian Cases}, 22 Am. Indian L. Rev. 585, 588–89 (1998) (“I have suggested that stirring a public backlash may encourage the Supreme Court to call a sharp halt to the recognition of Indian rights, and may even persuade it to retreat somewhat.”).\textsuperscript{203}
\item However, it should be noted that, even before \textit{Sherrill}, only tribes with presently existing reservations would have been able to reacquire land and exert governmental sovereignty over that land. See infra note 219 and accompanying text.
\item \textit{Union Springs I}, 317 F. Supp. 2d at 132.
\item \textit{Cayuga Indian Nation of N.Y. v. Cuomo}, 1999 WL 509422 at *30 (N.D.N.Y. July 1, 1999).
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\end{footnotesize}
began building a Class II gaming facility on this property.\textsuperscript{209} The Village of Union Springs, in which the property was located, tried to apply its local zoning codes to stop this construction.\textsuperscript{210} In 2004, a federal district court enjoined Union Spring from applying its zoning codes against the property on the grounds that the property remained part of the Cayugas' reservation and municipalities have no authority to zone tribally owned reservation land.\textsuperscript{211}

The very next year, however, the Supreme Court decided \textit{Sherrill}. In the wake of \textit{Sherrill}, Union Springs moved to lift the 2004 injunction, and the district court readily granted its motion.\textsuperscript{212} The court based its decision exclusively on \textit{Sherrill}. Specifically, the court reasoned that granting the Cayugas immunity from municipal zoning would have the same "disruptive consequences" that led the Supreme Court to deny the Oneidas' tax immunity in \textit{Sherrill}.\textsuperscript{213} The practical effect of this new \textit{Union Springs} decision was immediate and predictable: within days, the Cayugas were forced to close their year-old gaming facility.\textsuperscript{214}

\textit{Union Springs} demonstrates how the \textit{Sherrill} opinion has been used to curtail the expansion of Indian gaming. Furthermore, there is language in \textit{Sherrill} suggesting that the Supreme Court precisely intended to influence \textit{Union Springs} and similar cases. As mentioned earlier, the \textit{Sherrill} Court explicitly worried that granting the Oneidas tax immunity would allow them to initiate a new round of litigation to free the property from zoning and regulatory control.\textsuperscript{215} \textit{Sherrill} then dropped a footnote warning that "[o]ther tribal entities have already sought to free historic reservation lands purchased in the open market from local regulatory controls."\textsuperscript{216} This footnote cited only two cases: the original \textit{Union Springs} opinion and the case of \textit{Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York}.\textsuperscript{217} Both cases involved tribes who purchased land within their ancestral reservations and sought to build gaming facilities on this land in contravention of local zoning codes.

This footnote strongly suggests that when the \textit{Sherrill} Court worried about tribes' flouting local zoning codes, the Court was specifically worried that tribes would set up unauthorized gaming facilities. In other words, the fear of increased Indian gaming was the driving force behind \textit{Sherrill}.

Finally, the gaming backlash hypothesis can explain why the Court decided \textit{Sherrill} on grounds not addressed by either party. As mentioned earlier, the parties in \textit{Sherrill} focused on the historical record, debating whether Congress had ever established or disestablished the Oneidas' reservation.\textsuperscript{218} This debate is certainly germane to the

\textsuperscript{209} \textit{Union Springs I}, 317 F. Supp. 2d at 147.
\textsuperscript{210} \textit{Id.} at 133.
\textsuperscript{211} \textit{Id.} at 148 (concluding that the property remained Indian country for purposes of municipal zoning).
\textsuperscript{212} \textit{Union Springs II}, 390 F. Supp. 2d 203.
\textsuperscript{213} \textit{Id.} at 206. Indeed, the court suggested that immunity from municipal zoning is more disruptive than immunity from municipal taxation. \textit{See id.}
\textsuperscript{215} Review supra note 189 and accompanying text.
\textsuperscript{216} \textit{Sherrill}, 125 S. Ct. at 1493 n. 13.
\textsuperscript{217} 2004 WL 1945359 (N.D.N.Y. Sept. 1, 2004).
\textsuperscript{218} Review supra notes 200 to 201 and accompanying text.
question in Sherrill because a tribe whose reservation had been congressionally
disestablished would be categorically barred from exerting sovereignty over re-acquired
land within that former reservation. But if the Court had decided Sherrill on these
grounds, then Sherrill would have little precedential value for other cases involving other
Indian tribes. For example, the Cayugas’ claim in Union Springs would hardly be
affected by a finding that Congress had previously disestablished the Oneidas’
reservation.

By focusing instead on the “disruptive consequences” of granting the Oneidas’
claim, the Sherrill Court was able to create a general precedent that would bar other
tribes from buying back illegally taken land and putting casinos on their new property.
After all, any tribe which reacquires land in a predominantly non-Indian area would
engender “disruptive consequences” by flouting municipal zoning codes and building an
unauthorized casino on such land. Union Springs is but one example of how the logic of
Sherrill bars other tribes from establishing Indian gaming on reacquired land. In short,
the gaming backlash hypothesis can explain not only the result in Sherrill but also why
the Sherrill Court employed the anomalous disruptive consequences logic in reaching its
conclusions.

IV. CONCLUSION

This comment has sketched the ways in which Indian gaming has thus far
impacted tribal sovereignty. Yet the story is far from over. As Indian gaming continues
to grow in the United States—$19.4 billion per year at last count—one expects that
gaming will continue to engender negative changes in the contours and extent of tribal
sovereignty. Indeed, there are preliminary signs that other aspects of tribal sovereignty
may already be eroding as Indian gaming thrusts tribes into the legal forefront.

For example, the California Supreme Court has recently abrogated tribal sovereign
immunity in a gaming-related context. In Agua Caliente Band of Cahuilla Indians v.
Superior Court, the court held that the California Fair Political Practices Commission
could sue the Agua Caliente Tribe in order to compel the tribe to report its campaign
contributions in accordance with California law. The court expressly rejected the
tribe’s contention that its sovereign immunity shielded it from the Commission’s
lawsuit.

Agua Caliente, on its face, is not a case about Indian gaming. But in fact, the
tribe’s massive campaign contributions were funded almost exclusively from the tribe’s
lucrative Palm Springs casinos. Moreover, these campaign contributions generally
went to support gaming-related ballot propositions and political candidates who were

219. Indeed, for this very reason, the Second Circuit Sherrill opinion had largely focused on whether
Congress had disestablished the Oneidas’ reservation, and the opinion concluded that Congress had not done
so. See Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 160–65 (2nd Cir. 2003). By deciding Sherrill
on other grounds, the Supreme Court implicitly let this conclusion stand.
221. Id. at *1.
222. Id. at *15.
223. Jake Henshaw, Ruling Has Implications for Agua Caliente Tribe, Desert Sun (Palm Springs, Cal.) B1
thought to be supportive of Indian gaming. Indeed, *Agua Caliente* can best be seen as a struggle between a wealthy gaming tribe anxious to protect its interests and a state determined to subject the tribe to the normal rules of the political process.

At the federal level, a recent decision by the National Labor Relations Board indicates that tribes may lose another aspect of their sovereignty—namely, their traditional exemption from federal labor laws. In *San Manuel Indian Bingo and Casino*, the NLRB held that the National Labor Relations Act applied to the tribally owned, on-reservation casino reversing thirty years of NLRB precedent.

In reaching its conclusions, the *San Manuel* opinion stressed that the tribe’s casino employed large numbers of non-Indian employees and catered to a predominantly non-Indian client base. According to *San Manuel*,

When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way. When the Indian tribes act in this manner, the special attributes of their sovereignty are not implicated.

The *San Manuel* board apparently felt compelled to modify tribes’ long-standing exemption from the National Labor Relations Act, given the emergence of tribal casinos as major regional employers whose economic impact reached Indians and non-Indians alike. It remains to be seen whether federal courts will uphold *San Manuel*, but certainly the decision suggests that tribal immunity from federal labor laws may be eroding.

Viewed together, *Agua Caliente* and *San Manuel* demonstrate how the wealth and influence of certain gaming tribes may cause courts and agencies to curtail tribal sovereignty in response. This is hardly a surprising phenomenon. When Indian tribes were poor and marginalized, few people cared to challenge tribal sovereign immunity or regulate meager tribal businesses. But in the modern gaming era, wealthy Indian tribes are seen as serious political and economic actors who must be subjected to the normal regulatory rules that constrain all other actors.

Indeed, *Agua Caliente* and *San Manuel* are simply following the path laid down by IGRA, *Sherrill*, and other legal developments. These cases and statutes are all examples of how courts and legislatures have responded to Indian gaming by cutting back on tribal sovereignty. Similarly, gaming-related opposition to tribes’ federal recognition efforts reflects a more grassroots attempt to limit tribal sovereignty. All these examples show how the economic success of Indian gaming has spawned a backlash that threatens the historic sovereignty of Indian tribes.

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224. See Josh Richman, *Two Gaming Measures on Ballot, but One Is DOA*, Alameda Times-Star (Oct. 19, 2004) (stating the Agua Caliente Tribe donated approximately $12.5 million to Proposition 70, an unsuccessful ballot proposition related to Indian gaming); Benjamin Spillman, *Battin Affirms Support of Easing Restrictions on Indian Gambling*, Desert Sun (Palm Springs, Cal.) B4 (Mar. 25, 2004) (stating that the Agua Caliente Tribe has donated nearly $400,000 in recent years to support State Senator Jim Battin, one of the foremost proponents of Indian gaming in the California Legislature).


228. *Id.*
This comment is not a call for tribes to end their gaming enterprises. For one thing, the economic success of gaming strongly counsels that tribes should not abandon this crucial source of revenue. Just as gaming has lifted some tribes out of poverty, a willful suspension of gaming could cause these tribes to sink right back into poverty. For another thing, this genie cannot be put back in its bottle. The losses in tribal sovereignty—at least some of them—are here to stay. If every Indian tribe suspended gaming operations tomorrow, Sherrill would still stay on the books. Unrecognized tribes would still face gaming-related opposition from third parties suspicious about their future intentions.

But this comment does call on tribes to recognize the gaming backlash and to do what they can to minimize its continued effects. At the legislative level, tribes must lobby Congress to resist further diminishments of tribal sovereignty. At the judicial level, tribes must use their gaming profits to fund legal challenges to arrest the recent slew of anti-Indian court decisions. And, perhaps most importantly, tribes must assiduously educate the American citizenry that Indian tribes are not simply economic actors who should be regulated and taxed in the same way as private businesses. As one present example, the San Manuel Tribe has recently run television commercials that highlight the constitutionally protected nature of tribal sovereignty.229 Such educational messages are critical to counteract peoples’ all-too-common perception of Indian tribes as nothing more than private casino entrepreneurs.

Like Indian gaming itself, the gaming backlash is here to stay. Yet from the tribal perspective, the backlash can and must be minimized. It would be sadly ironic if the “new buffalo” of Indian gaming destroyed the very sovereignty that gives Indian tribes their unique legal identity.

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