Maine Law Review

Volume 50 | Number 1 Article 7

January 1998

Is the Die Cast? Indian Casino Gambling in Maine

Sharon M. Wheeler
University of Maine School of Law

IS THE DIE CAST? INDIAN CASINO GAMBLING IN MAINE

IS THE DIE CAST? INDIAN CASINO GAMBLING IN MAINE

I. INTRODUCTION

Gambling is the fastest-growing industry in America, earning profits of $45 billion each year.[1] Although gambling on Indian reservations is a $6 billion business,[2] the perception of Indian wealth from gambling revenues is far from reality. Gambling operations provide economic support for only one percent of Indians.[3] Yet, for those who have reaped the high rewards, Indian gambling has become a staple of modern tribal economics. Complex legal issues surround Indian gambling, making it an important and often contentious part of many tribal-state relationships.

Maine law prohibits many gambling activities.[4] The Legislature, however, has carved out an exception for federally recognized Indian tribes in Maine, granting them the opportunity to operate high-stakes bingo.[5] Nevertheless, Maine's Passamaquoddy Indian Tribe[6] has fought for the past four years to gain the State's permission to engage in other gambling activities, most notably the construction and operation of a casino in Calais. The Tribe promoted its efforts under the auspices of a 1988 federal law, the Indian Regulatory Gaming Act[7] (IGRA). The

---

1. *See* Shona McKay, *The Zero Sum Game*, FIN. POST (Canada), Mar. 1, 1997, at 26, *available in* 1997 WL 4088412 (Magazine).

2. *See* Robert Marquand & Peter Grier, *Supreme Court Ruling Bolsters States' Rights*, CHRISTIAN SCI. MONITOR, Mar. 28, 1996, at 3, *available in* 1996 WL 5040455.

3. *See* Julian Schreibman, Note, *Developments in Policy: Federal Indian Law* (pt. III), 14 YALE L. & POL'Y REV. 375, 384 (1996). Efforts for economic development by most tribes come through trust land ownership. *See id.* According to the federal General Accounting Office, most of the 184 tribes which operate the 281 gaming sites barely break even financially, with some tribes even losing money. *See* Merrill Goozner, *High Price of Success*, CHI. TRIB., Sept. 22, 1997, at 1, *available in* 1997 WL 3590971.

4. *See* ME. REV. STAT. ANN. tit. 17, § 332 (West 1983 & Supp. 1996-1997) (prohibiting schemes such as slot machines and roulette); ME. REV. STAT. ANN. tit. 17-A, § 954 (West 1983) (defining unlawful gambling). *But see* ME. REV. STAT. ANN. tit. 8, §§ 374, 384 (West 1997) (exempting state lottery from unlawful gambling laws); ME. REV. STAT. ANN. tit. 17, § 312 (West 1983) (allowing "Beano" or "Bingo" operations with a license); ME. REV. STAT. ANN. tit. 17, § 331 (West 1983) (allowing licenses to be issued for "games of chance," including raffles); ME. REV. STAT. ANN. tit. 17, § 332(3) (West Supp. 1996-1997) (allowing licenses to be issued for electronic video machines).

5. *See* ME. REV. STAT. ANN. tit. 17, § 314-A (West Supp. 1996-1997). These licenses allow the advertising and offering of prizes valued up to $25,000. *See* ME. REV. STAT. ANN. tit. 17, § 314-A(1)(B) (West Supp. 1996-1997). By contrast, about 400 nonprofit groups in Maine are licensed to operate low-stakes bingo and games of chance. *See* Doug Harlow, *Bingo . . . A Game of Chance Taking a Chance in Fairfield*, KENNEBEC J., Aug. 25, 1996, at A1.

6. About 2000 members of the Passamaquoddy Tribe, which is federally recognized, live in Down East Maine, mostly on two reservations at Pleasant Point and Indian Township. Other members live in Canada, many in the New Brunswick area. *See* Diana Graettinger, *Passamaquoddys, Tribe Fights for Ancestral Land in New Brunswick*, BANGOR DAILY NEWS, July 15, 1997, at A1, *available in* 1997 WL 11878703.

7. 25 U.S.C. §§ 2701-2721 (1994) and 18 U.S.C. §§ 1166-1168 (1994). One court has

IGRA requires states to negotiate with Indian tribes wanting to open and operate gambling enterprises, including casinos. The Maine Legislature failed to pass the numerous bills introduced to authorize application of the IGRA to Maine Indians[8] or to provide a separate statutory basis for a casino.[9] A subsequent decision in the Court of Appeals for the First Circuit denied application of the IGRA to Maine Indians.[10] Faced with both legislative and judicial rejection of its casino plan, the Passamaquoddy Tribe now must reevaluate what the future holds for Indian gaming in Maine.

This Comment discusses the policies behind allowing Indians[11] "special" gambling rights, including the doctrine of tribal sovereignty in Part II. Part III examines the IGRA and its effect on several other New England Indian tribes. The reason why Maine Indians are exempted from the IGRA is explained in Part IV, which details the Maine Indian Claims Settlement Act of 1980.[12] Part IV also presents and analyzes the decision of the First Circuit, *Passamaquoddy Tribe v. Maine*,[13] which

---

commented on Congress's word choice of "gaming" instead of "gambling":

> Some might say it was clever of Congress to choose the word "gaming," a prissy word no doubt intended to create the vision of a gentleperson's sport or perhaps to elicit a response similar to that aroused by such "All-American" pursuits as baseball, football, etc.; in any case, the choice of words was surely intended to avoid the "gamier" connotations evoked by the word "gambling."

Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1481 n.1 (D. Or. 1994). The words "gaming" and "gambling" will be used interchangeably in this Comment.

8. One bill sought authorization for the Passamaquoddy Tribe to build the casino pursuant to the IGRA. *See* L.D. 1266 (116th Legis. 1993). The IGRA provides that, upon the request of a federally recognized Tribe, a state must enter good faith negotiations towards a compact for a casino. *See* 25 U.S.C. § 2710(d)(3)(A) (1994).

9. Three bills seeking authorization for the operation of a Calais casino grounded on a statutory basis (not under the IGRA) died in the Judiciary Committee. *See* L.D. 1998 (116th Legis. 1994); L.D. 1999 (116th Legis. 1994); L.D. 2000 (116th Legis. 1994). The last, L.D. 2000, was an emergency measure, requiring submission to a voter referendum in the June 1994 primary election to be effective. *But cf.* L.D. 2010 (116th Legis. 1994) (enacted as P.L. 1993, ch. 713, § 1 and codified at ME. REV. STAT. ANN. tit. 30, § 6205(1)(C) (West 1996)). The bill numbered L.D. 2010 would have allowed the Tribe (if successful in compacting with the State for a casino) to purchase 100 acres in Calais to be held in trust. The Tribe's plan was to secure this land under the acquisition terms of the Maine Indian Claims Settlement Act with the option to build a casino there if the Tribe was successful in its action. *See* Legis. Rec. S-2006 (1994) (comments of Senator Vose). The acquisition was time-limited and conditioned upon approval by the legislative body of Calais and a tribal-state compact (or a court order compelling the State to participate in negotiations). *See* ME. REV. STAT. ANN. tit. 30, § 6205(1)(C) (West 1996). Thus, as a result of *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996), this land is not available to the Tribe.

10. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 794.

11. According to a report prepared at the direction of the National Conference of State Legislatures by its Task Force on State-Tribal Relations, its editors were informed by task force members and tribal members that the terms "Indians," "Native Americans," "American Indians," "Natives," and "Native American Indians" were all acceptable. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES AND TRIBES: BUILDING NEW TRADITIONS vi (James B. Reed & Judy A. Zelio eds., 1995) [hereinafter STATES AND TRIBES: BUILDING NEW TRADITIONS].

12. 25 U.S.C. §§ 1721-1735 (1994).

13. 75 F.3d 784 (1st Cir. 1996).

held that the IGRA did not apply to Maine Indians. Part V considers the interpretation favored by Maine Indians of the Maine Indian Claims Settlement Act of 1980, discusses the latest developments in gambling in Maine, and contemplates the future of Indian gaming in Maine. Finally, this Comment concludes that despite repeated derailment of the Passamaquoddy Tribe's plans for a casino, a casino is not the answer to the Tribe's problems. Instead, the Tribe must focus on its other options, including the high-stakes bingo parlor in Albany Township which won zoning approval in November 1997.[14] In the end, the real challenge for the Tribe is not merely overcoming the resistance to their gambling ventures. The key to better tribal-state relations is an understanding and appreciation by non-Indians of the Tribe's cultural differences and a commitment by the State to improving its economic opportunities.

II. WHY FEDERALLY RECOGNIZED INDIAN TRIBES HAVE "SPECIAL" GAMBLING RIGHTS

A. The Doctrine of Tribal Sovereignty

At the heart of most conflicts between state governments and Indian tribes is the question of who has the authority to do what. The United States Constitution provides in the Commerce Clause[15] that the federal government has the authority to deal with Indian tribes. Thus, absent a specific delegation of authority by Congress,[16] states cannot interfere with tribal government; they lack power over Indian tribal members and their lands.[17] This does not mean, however, that states and tribes cannot

14. *See* Nancy Perry, *Indian Bingo Parlor Wins Approval; The Decision Is Expected to Be Challenged in Court by Residents of Albany Township*, PORTLAND PRESS HERALD, Nov. 21, 1997, at 1B, *available in* 1997 WL 12536824.

15. "The Congress shall have power . . . to regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8. One commentary asserts that states objected to the implication that only the federal government had control over relations with Indians, when the Indian lands were within the borders of organized states. *See* Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic,"* 1996 BYU L. REV. 407, 419 (1996). The authors argue that the states' outcry was based in concerns about the impact on the local economy, and not on the theory of exclusive federal control. *See id.*

16. An example of a specific delegation that extended state authority over Indian affairs is the federal statute known as Public Law 280 (Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1994))). Public Law 280 was enacted to extend state criminal and limited civil jurisdiction to certain Indian lands where Indian tribes needed added protection because they were not adequately organized. *See* Linda King Kading, Note, *State Authority to Regulate Gaming Within Indian Lands: The Effect of the Indian Gaming Regulatory Act*, 41 DRAKE L. REV. 317, 320-21 (1992) (citing S. REP. NO. 83-699, at 848 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411). The statute was aimed specifically at Indian lands in five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), and later some other states assumed this authority (Florida, Idaho, Iowa, Montana, and Washington). *See id.* at 320 n.29.

17. A local example of this conflict is the State of Maine's prosecution of nine members of the Passamaquoddy Tribe for alleged violations of Maine's saltwater fishing laws. *See* Diana Graettinger, *Tradition vs. Modern Law: 9 Passamaquoddies to Appear in Court Today to Defend Their Practice of Saltwater Fishing*, BANGOR DAILY NEWS, Sept. 12, 1997, *available in* 1997 WL

work together. Indeed, from 1991 to 1995, nearly 1500 pieces of legislation were introduced to state legislatures concerning issues of tribal-state relations.[18] One of the more difficult obstacles in tribal-state relations is the different views on tribal sovereignty. From the Indians' point of view, sovereignty is a "key issue that must be resolved in order to improve relations."[19] State governments, on the other hand, "rarely mention tribal sovereignty as a point on which to improve understanding."[20]

The doctrine of tribal sovereignty grew out of the framework of early American government. Yet, America's adoption of federalism challenged the theoretical foundation for sovereignty itself because of

---

11882093 [hereinafter Graettinger, *Tradition vs. Modern Law*]. The key issue is one of jurisdiction. The tribal members refused to enter pleas and asserted that the state's licensing laws did not apply to them because the Tribe had negotiated treaties with both state and local governments, and these treaties reserved inherent aboriginal fishing rights in Passamaquoddy Bay to the exclusive jurisdiction of the Tribe. *See* Diana Graettinger, *Indians Arrested, Get Bail: Fishermen Say State Has No Jurisdiction*, BANGOR DAILY NEWS, Aug. 29, 1997, *available in* 1997 WL 11881252. The State's position is that: (1) the Tribe relinquished its saltwater fishing and other aboriginal rights by signing the Maine Indian Claims Settlement Act in 1980; (2) the Tribe's contentions over the scope of the Settlement Act should be addressed by the Maine Legislature; and (3) state and municipal licenses are required for the type of conduct in which the tribal members engaged. *See* Graettinger, *Tradition vs. Modern Law*, *supra*; Diana Graettinger, *Passamaquoddies Seek Fishing Rights Without Regulation, Tribal Leaders Claim Historical Control*, BANGOR DAILY NEWS, May 22, 1997, *available in* 1997 WL 4763964. The difficulty arises in that the Settlement Act is silent on the issue of saltwater fishing rights. *See id.* Governor Angus King believes that the courts should resolve this issue, but the Passamaquoddy representative in the Legislature believes that negotiations should continue. *See* Graettinger, *Tradition vs. Modern Law*, *supra*. Before the sides ceased their talks, the Tribe offered to issue its own tribal saltwater fishing licenses and engage in conservation practices. *See id.* The State's last offer was to establish the Tribe as a state licensing agent which would issue state licenses to members at no cost. *See id.* The Tribe responded that the State was missing the point: the Tribe wanted freedom, not free licenses. *See id.* After many continuances, the case reached the Calais District Court on October 23, 1997. *See* Diana Graettinger, *Indian Fishing Case Stalled; Judge Requests Written Briefs on Jurisdictional Issue*, BANGOR DAILY NEWS, Oct. 24, 1997, *available in* 1997 WL 11884958. Due to concerns about double jeopardy because the jurisdiction issue remained unresolved, the judge requested that each side present written briefs on that issue. *See id.* The attorneys for the Tribe have filed a 500-page brief in support of their motion to dismiss the suit. *See* Diana Graettinger, *Tribe's Attorneys Ask Dismissal of Suit; Brief Maintains State Has No Authority to Charge Passamaquoddy Fishermen*, BANGOR DAILY NEWS, Dec. 18, 1997, *available in* 1997 WL 16993843.

Meanwhile, legislative efforts are underway to bring the State and the Passamaquoddy Tribe into negotiations concerning commercial clamming, scalloping, and other marine issues. *See* Resolves 1997, ch. 11 (directing the Commissioner of Marine Resources to prepare a report for the Joint Standing Committee on Marine Resources of the Maine Legislature).

18. *See* STATES AND TRIBES: BUILDING NEW TRADITIONS, *supra* note 11, at 18. Most of this legislation was sponsored by Indian legislators. *See id.* The most popular issues for legislation (in order) have been: Native American committees and organizations; education; health; gaming; Native American holidays and ceremonials; and land claims. *See id.* Other issues include: taxation; natural resource allocation and protection; burial protection; economic development; cultural and historic preservation; waste disposal; sovereignty recognition; religious freedom; tribal courts; and child welfare. *See id.*

19. *Id.* at 12.

20. *Id.* Some tribal representatives believe this is the result of ignorance and lack of education about Indian cultures, laws, and treaty rights. *See id.*

its concept of dual, or divided, sovereignty.[21] Because neither the United States nor the states themselves had absolute power, nineteenth-century legal theorists differentiated between legal sovereignty and political sovereignty.[22] The concept of sovereignty came to connote a government's legal authority to make, through its people, decisions that were protective of personal liberty.[23] Under the doctrine of tribal sovereignty, it was recognized that Indian tribes were analogous to states or nations.[24] Within their limited sovereigns, they possessed powers that were *inherent*, not delegated to them by express acts of Congress.[25] In an examination of federal laws, then, the inquiry shifted from what constituted tribal sovereignty to what limitations exist upon tribal sovereignty.[26]

Recognition of tribal sovereignty, "'perhaps the most basic principle of all Indian law,'"[27] began when Chief Justice Marshall wrote a series of three United States Supreme Court opinions.[28] These opinions stated that Indian tribes were sovereign entities before contact with Europeans, and although they lost some of their sovereign powers to a more powerful nation (the United States), they still retained some of these powers.[29] In *Johnson v. M'Intosh*,[30] the Court held that the Indians' right to transfer land was extinguished because their "rights to complete sovereignty, as independent nations, were necessarily diminished"[31] when the European nations (and later the United States) obtained title to the land through the doctrine of discovery.[32] In *Cherokee Nation v. Georgia*,[33] the Court ruled that tribes are not foreign nations but "domestic dependent nations," and therefore their sovereign power to ally with other nations was impliedly relinquished.[34] In *Worcester v.*

21. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 54 (1987).

22. *See id.* Legal sovereignty was "vested in the various concrete organs and agents of government," whereas political sovereignty "ultimately rested with the people." *Id.*

23. *See id.* at 54-55.

24. *See id.* at 55 n.6. Sovereignty thus distinguishes a tribal government from a business entity or social organization. *See id.* at 55.

25. *See id.* at 58 (acknowledging Felix Cohen's scholarship). Felix Cohen has been credited with conducting the scholarship in the field of Indian law which slowed and eventually changed the direction of the United States Supreme Court's opinions. *See id.* at 57. For a bibliography of Cohen's works, see *A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 RUTGERS L. REV. 341 (1954).

26. *See* WILKINSON, *supra* note 21, at 58.

27. *Id.* at 57 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)).

28. *See id.* at 55.

29. *See id.* The three cases are: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

30. 21 U.S. (8 Wheat.) 543 (1823).

31. *Id.* at 574. In *Johnson*, Chief Justice Marshall applied the term "sovereignty" to tribes for the first time. *See id.* at 545.

32. *See id.* at 573-74.

33. 30 U.S. (5 Pet.) 1 (1831).

34. *See id.* at 17.

Georgia,[35] the Court held that Indian tribes were nations with sovereign powers equivalent to European nations,[36] although the United States abridged some of these powers.[37]

Nevertheless, the Court denied the recognition of tribal sovereignty in *United States v. Kagama*.[38] In this 1886 case, the Court upheld the Major Crimes Act,[39] which extended federal criminal jurisdiction over specified crimes to Indian country.[40] The superiority of both the United States and the individual states was said to trump any sovereignty in the tribes.[41]

Subsequent cases similarly diminished the acceptance of the doctrine of tribal sovereignty. In *Cherokee Nation v. Southern Kansas Railway Co.*,[42] for example, the Court authorized the taking of Indian land by eminent domain for the construction of a railroad line, provided that just compensation was paid to the objecting tribe.[43] Furthermore, in contrast to Chief Justice Marshall's opinion in *Worcester*, the Court in *Montoya v. United States*[44] redefined the word "nation" as applied to Indians to mean essentially a large tribe or group of tribes, not a sovereign power or organized government.[45]

Support for the doctrine of tribal sovereignty later appeared in Justice Black's majority opinion in *Williams v. Lee*,[46] decided in 1959. At issue was whether a state court had jurisdiction to decide a civil suit brought by a non-Indian against an Indian couple over a business transaction occurring on Indian land.[47] Adopting the basic policy of *Worcester*, the Court ruled that the case must be heard by the tribal court in order to

---

35. 31 U.S. (6 Pet.) 515 (1832).

36. Chief Justice Marshall wrote:

> The very term "nation," so generally applied to [Indian tribes], means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.

Id. at 559-60.

37. *See id.*

38. 118 U.S. 375 (1886).

39. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153 (1994)).

40. *See* 18 U.S.C. § 1153 (1994). This Act of Congress was largely a reaction to the decision of the Supreme Court in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which held that the federal government lacked control over the Indian reservation. *See id.*; United States v. Kagama, 118 U.S. at 382-83.

41. *See* United States v. Kagama, 118 U.S. at 379.

42. 135 U.S. 641 (1890).

43. *See id.* at 656-57.

44. 180 U.S. 261 (1901).

45. *See id.* at 265.

46. 358 U.S. 217 (1959).

47. *See id.* at 217-18.

promote and protect tribal self-government.[48] In 1978, however, the Court appeared to backtrack in *Oliphant v. Suquamish Indian Tribe*.[49] In *Oliphant*, two non-Indians charged with criminal offenses committed on Indian land sought writs of habeas corpus from a federal district court to escape the jurisdiction of a tribal court.[50] The Court identified another limitation on tribal powers[51] in holding that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[52] Nevertheless, about a fortnight later the Court re-endorsed the doctrine of tribal sovereignty in *United States v. Wheeler*,[53] stating that Indian tribes possess inherent sovereignty, although the tribes' incorporation into the territory of the United States divested some of these powers.[54] The *Wheeler* Court found that "until Congress acts, the tribes retain their existing sovereign powers,"[55] and in doing so, essentially rejected *Kagama*'s ruling that any sovereignty in the tribes was trumped by the superiority of the federal and state governments. The view heralded by Chief Justice Marshall, that Indians possessed inherent powers and were their own (limited) sovereigns, thus became well-established within our judicial system.

B. Judicial Review of Congressional Action in Indian Law

Despite Supreme Court recognition of the tribal sovereignty doctrine, federal legislation has constituted most of the development of Indian law.[56] This method is generally favorable to preserving Indians' rights. Typically, court decisions involve Indians of one tribe, yet the rules of law are applied across the board, implicating the rights of all tribes. Congress, however, can survey and investigate the landscape of an issue beyond a single case or controversy and offer a better perspective on

48. *See id.* at 219, 223.

49. 435 U.S. 191 (1978).

50. *See id.* at 194-95.

51. The first limitation was the lack of authority to transfer land without permission from the federal government. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). The second limitation was the lack of authority to align with foreign nations. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

52. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 212.

53. 435 U.S. 313 (1978).

54. *See id.* at 323.

55. *Id.*

56. As one commentator notes: "Regardless of whatever protections and advances the tribes may have achieved in the courts in modern times, Congress remains the fount of most of Indian law. It is on Capitol Hill that it all can be lost and that most of it can be preserved." WILKINSON, *supra* note 21, at 82. Another commentary argues that federal policy in Indian law is shaped by the general political climate of federal-state relations. *See* Worthen & Farnsworth, *supra* note 15, at 411. The authors trace the struggle between the tribes and the states for control over Indians and their lands from the colonial period through the American Civil War and into the twentieth century. *See id.* at 412-34.

Indian affairs than courts.[57] Once a tribe is federally recognized,[58] it may receive certain rights and benefits under federal legislation.[59] Yet, because Congressional action has not always been protective of Indians, some framework for judicial review became necessary.[60]

In the late 1800s and early 1900s, Congress appeared to act with an unlimited federal power, altering agreements made in treaties concerning tribal property and jurisdictional issues. The Supreme Court implicitly acknowledged this plenary power of Congress by refusing to overturn legislation that effectively limited the scope of tribal sovereignty.[61] The legislation reflected the prevailing paternalistic attitude, whereby Indians were viewed as dependent wards of the United States.[62] Protection of the Indians became a duty of the federal government, with Congress's plenary power being the means of fulfillment.

In *Morton v. Mancari*,[63] the Court began to clarify what constituted proper judicial review of congressional action in Indian law. In the case, class action plaintiffs, who were non-Indian employees of the Bureau of Indian Affairs (BIA) in Albuquerque, New Mexico, challenged on due

57. *See* WILKINSON, *supra* note 21, at 118.

58. It was after the passage of the Indian Reorganization (Wheeler-Howard) Act of 1934 that recognition became necessary because the benefits granted by the Act were limited to descendants of a "recognized Indian tribe." *See* Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)). In 1978, the Department of the Interior promulgated regulations that created a uniform procedure for recognition of tribes. *See* 25 C.F.R. pt. 83 (1997). For an analysis of the Indian Reorganization (Wheeler-Howard) Act of 1934, see Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

Membership ranges from 200 to 200,000 in each of the more than 500 federally recognized tribes in the United States. *See* STATES AND TRIBES: BUILDING NEW TRADITIONS, *supra* note 11, at 3. These Indians are considered citizens of the United States and of the states where they reside. *See id.* at 2.

59. For example, for a tribe to exercise gaming rights under the IGRA, the tribe must first be federally recognized. *See* 25 U.S.C. §§ 2702(1), 2703(5) (1994). Other benefits may include favorable federal tax treatment and eligibility for assistance programs such as welfare. *See* 25 U.S.C. § 1725(i) (1994) (provision of Maine Indian Claims Settlement Act of 1980 addressing eligibility for federal financial benefits and tax considerations); *see also* THEODORE W. TAYLOR, AMERICAN INDIAN POLICY 124-25 (1983) [hereinafter TAYLOR, INDIAN POLICY].

60. Indians, as a group, have more political power now than in years past; nevertheless, as a people who have traditionally been a "low-income minority group with few votes at the polls," their rights have remained vulnerable to wealthier and more powerful interest groups. *See* WILKINSON, *supra* note 21, at 82. A modern exception may be the Mashantucket Pequot Tribe of Connecticut, which federal records show is one of the Democratic Party's most generous contributors, having given $640,000 between 1994 and 1996. *See* Michael Kranish & Ann Scales, *Several N.E. Companies Appear on "Call Sheets,"* BOSTON GLOBE, Sept. 24, 1997, at A8, *available in* 1997 WL 6271116.

61. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566-68 (1903) (upholding federal sale of land notwithstanding treaty requirement that Indians must consent); United States v. Kagama, 118 U.S. 375, 375-77, 385 (1886) (upholding federal Major Crimes Act and allowing federal prosecution of crimes committed by Indians on reservations).

62. *See, e.g.*, Kagama v. United States, 118 U.S. at 383-84.

63. 417 U.S. 535 (1974).

process grounds a provision of the Indian Reorganization Act of 1934,[64] which granted a preference for Indian applicants for jobs in the BIA.[65] In upholding the statute, the Court applied a rational-basis test and found that the statute was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[66] The rational-basis test served as a check, albeit mild, on Congress's powers over Indian affairs.

Two subsequent cases advanced the standard of judicial review: *Delaware Tribal Business Committee v. Weeks*[67] and *United States v. Sioux Nation of Indians*.[68] In *Delaware Tribe*, the Court again applied the rational-basis test and upheld a statute that excluded the plaintiff Kansas Delaware Tribe from a claims settlement paid to the Oklahoma Delaware Tribe.[69] The Court in *Sioux Nation* examined Congress's dual role as a trustee for Indians and as an agent for other national interests. The United States had signed a treaty with the Sioux Nation to include the Black Hills area within a Sioux reservation.[70] After the discovery of gold in the hills, the land was confiscated pursuant to an 1877 statute.[71] When the actual litigation arose many years later, the Court held that because the statute effected a taking by Congress, the federal government must pay just compensation.[72] In determining that a taking had occurred, the Court applied a "good faith" test:

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.[73]

Because Congress had acted in bad faith and therefore not as a trustee, its action could not be upheld.[74] As a result of *Morton*, *Delaware Tribe*, and *Sioux Nation*, Congress's broad powers over the Indians were subjected to at least minimal judicial scrutiny.

The policies behind the doctrine of tribal sovereignty and judicial review of congressional action explain why federally recognized Indian tribes have "special" gambling rights under the IGRA. In enacting the IGRA, Congress recognized that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency,

64. The challenged provision is codified as amended at 25 U.S.C. § 472 (1994).

65. *See* Morton v. Mancari, 417 U.S. at 537-39.

66. *Id.* at 555.

67. 430 U.S. 73 (1977).

68. 448 U.S. 371 (1980).

69. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. at 85.

70. *See* United States v. Sioux Nation of Indians, 448 U.S. at 374-75.

71. *See id.* at 377, 381-82.

72. *See id.* at 424. Justice Blackmun's majority opinion discredited the *Lone Wolf* rationale, whereby a sale of federal land was valid despite the lack of Indian consent required by treaty. *See id.* at 413-15.

73. *Id.* at 409 (quoting Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)).

74. *See id.* at 424.

and strong tribal government."[75] The "specialness" of these rights to regulate gambling derives from the tribes' status as entities with which the United States has a government-to-government relationship. Programs or opportunities that benefit Indians are constitutionally justified because there is no racial classification; Indians are citizens of their own sovereign entities and the federal government may fulfill its unique obligation as a fiduciary to them. Thus, the IGRA's "special" gambling rights that were granted to Indians reflect a congressional recognition of tribal sovereignty, extending over Indian lands and their uses, including the operation of gambling enterprises.[76]

III. INDIAN GAMING UNDER THE INDIAN GAMING REGULATORY ACT

A. The Indian Gaming Regulatory Act (IGRA)

Nationally, Indian gaming has developed into an industry that

---

75. 25 U.S.C. § 2701(4) (1994).

76. The misunderstanding of this concept has resulted in confusion, and more disturbingly, hostility. Sovereignty has been mistaken for a granting of "privileges" through some form of affirmative action. For example, it was not until 1993 that anybody noticed that a New Jersey Indian tribe, which had applied fourteen years earlier for federal tribal recognition (a preliminary requirement for IGRA eligibility), had expressed interest in buying land near New York City to be placed in trust for a reservation in hopes of opening a casino under the IGRA. *See* Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 520 (1995). The Tribe was denied federal recognition, no doubt due in part to the attacks made by the political allies of casino owners. *See id.* Donald Trump filed a lawsuit in New Jersey claiming that the IGRA was unconstitutional under the Tenth Amendment and unfair because the Indians would not be required to pay taxes on their gambling proceeds. *See id.* at 520-21. In addition to his testimony before the House Native American Affairs Subcommittee that organized crime was "rampant" in Indian casinos, Trump charged that tribal members operating casinos "don't look like Indians to me and they don't look like Indians to Indians." *Id.* at 521. This remark was met with antipathy.

Opponents to Indian gaming often focused on the fear of organized crime. *See id.* at 519. Senator McCain, a supporter of Indian interests, rejected this argument:

> Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe [has] is negotiable.

Id. (citing S. REP. NO. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103). Testimony by top officials of the FBI, the IRS, and the Department of Justice before the House Native American Affairs Subcommittee indicated that evidence of widespread organized crime within Indian gaming had not been found. *See id.* at 521.

Economic competition may be the underlying fear of opponents. *See id.* at 520-21. Some opponents have expressly registered their resentment: the dog and horse track owners in Massachusetts, for example, formed a rare alliance to "level the playing field" upon the perceived threat of a Wampanoag Tribe casino in the city of New Bedford. *See* Mitchell Zuckoff, *Tribal Gambling Rights Source of Much Confusion*, BOSTON GLOBE, Feb. 21, 1995, at 1, *available in* 1995 WL 5923417. In Maine, the Passamaquoddy Tribe's recent efforts to open and operate a high-stakes bingo hall in Albany Township have met with resistance from some residents. *See* Phyllis Austin, *Bingo Parlor Raises Big Passions in Small Township*, MAINE TIMES, Aug. 28, 1997, at 8, *available in* 1997 WL 8886422; *see also infra* Part V.D.

produces revenues of about $6 billion annually,[77] with some individual tribes earning up to $1 billion.[78] Smaller-scale Indian gaming operations, such as bingo and card games, were the precursors to today's casinos, as well as the impetus for congressional action resulting in the IGRA in 1988. The IGRA allows federally recognized Indian tribes to establish and operate gaming activities on "Indian lands"[79] within states which do not, as a matter of criminal law and public policy, prohibit such gaming activity.[80]

1. The Civil-Criminal Distinction of Bryan v. Itasca County, Minnesota *and* California v. Cabazon Band of Mission Indians

Before Congress intervened in Indian gaming regulation, the judiciary applied the same test for Indian challenges to state gambling laws as it did to other state laws. In *Bryan v. Itasca County, Minnesota*,[81] the Supreme Court applied Public Law 280 to a Minnesota personal property tax statute.[82] In narrowly construing the provision in Public Law 280 which granted civil jurisdiction to states,[83] the Court held that a state may not impose taxes on property or activities within Indian lands without congressional consent.[84] Because the grant of civil jurisdiction in Public Law 280 cannot be used to substantially regulate Indian activities, states have jurisdiction over only prohibited activities, not regulated activities.[85] The *Bryan* Court's distinction between laws that address criminal/prohibitory activities and laws that address civil/regulatory activities was applied to early challenges to state gambling statutes.[86] Because tribes were successful in circumventing

77. *See* Marquand & Grier, *supra* note 2.

78. *See* Elizabeth Abbott, *After 5 Years, Mashantuckets Own an Empire*, PROVIDENCE SUNDAY J., Feb. 23, 1997, at A1, *available in* 1997 WL 7318146.

79. The term "Indian lands" means:

> [A]ll lands within the limits of any Indian reservation; and . . . any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4) (1994).

80. *See* 25 U.S.C. § 2701(5) (1994). This concept has been referred to as the "state law permitted" test. *See* Jess Green, *Economic Development and Gaming*, 9 ST. THOMAS L. REV. 149, 151 (1996); *see also infra* note 111 and accompanying text.

81. 426 U.S. 373 (1976).

82. Public Law 280 extended state criminal and civil jurisdiction to specified Indian lands. *See generally supra* note 16.

83. *See* Bryan v. Itasca County, Minn., 426 U.S. at 390.

84. *See id.* at 376-77.

85. *See id.* at 390.

86. *See* Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (finding state and county bingo laws did not apply to the bingo games on Indian lands because the state allowed bingo elsewhere, rendering the laws regulatory and not prohibitory); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1982) (granting Indians injunctive relief and preventing sheriff from interfering with bingo games that awarded prizes larger than state law permitted because the state law was civil and not criminal). *But see* United States

state laws prohibiting gambling activities, tribal bingo operations boomed, largely fueled by a need for tribal revenue in the wake of Reagan-era cuts in federal spending programs for reservations.[87]

In 1987, the Supreme Court further refined the *Bryan* distinction by developing a two-prong test to determine whether a state law is criminal/prohibitory or civil/regulatory in *California v. Cabazon Band of Mission Indians*.[88] California law permitted designated charitable organizations to operate bingo and card games, provided that the prizes were limited to $250 and profits were used for charitable purposes.[89] The Tribe operated bingo games awarding prizes higher than the state limit.[90] The State argued that it could enforce the state bingo law against the Indians, notwithstanding the limit on civil jurisdiction under the *Bryan* test, because the law provided for criminal penalties.[91] Furthermore, the State argued, the law prohibited high-stakes bingo throughout the state, so under the *Bryan* test the Tribe's operations were unlawful.[92]

Using a two-prong test, the *Cabazon* Court examined whether (1) the gaming activities were contrary to state public policy, and (2) the state interests in regulating gaming outweighed the tribal benefits received.[93] The Court concluded that California's gambling laws were merely regulatory because many forms of gambling activities were allowed and thus were not contrary to public policy.[94] Moreover, the revenue generated by gaming was found to be an important and legitimate means of achieving tribal self-sufficiency,[95] which outweighed the state's police power interest.[96] Thus, California could not enforce a criminal law against high-stakes, non-charitable gambling on Indian lands because its authority to regulate such activity was limited by federal law.

---

v. Dakota, 796 F.2d 186 (6th Cir. 1986) (denying application of the criminal/prohibitory-civil/regulatory test of *Bryan* because the charges against the Tribe regarding their craps, blackjack, and poker operations were not brought under state law).

87. *See* Kelly, *supra* note 76, at 503.

88. 480 U.S. 202 (1987). One commentator identifies this case as one of two factors in the explosion of Indian gaming, the other being enactment of the IGRA. *See* Kelly, *supra* note 76, at 502.

89. California v. Cabazon Band of Mission Indians, 480 U.S. at 205.

90. *See id.* at 205 n.3.

91. *See id.* at 209.

92. *See id.* at 211.

93. *See id.* at 209, 216.

94. *See id.* at 210-11.

95. *See id.* at 216-19. According to the Court, the Department of the Interior had "primary responsibility" for the regulation of gaming on Indian lands, and the Department promoted tribal bingo operations as a way to achieve the goals of tribal self-sufficiency and economic development. *See id.* at 217-19.

96. *See id.* at 220-22.

2. *Congressional Response*

Congress reacted relatively quickly[97] to states' fears that tribes would not adequately self-regulate their gaming operations in the wake of their victory in *Cabazon*.[98] Various bills on Indian gaming had been introduced in Congress as early as 1984, with one bill passing the House of Representatives in April 1986 before dying when the 99th Congress adjourned.[99] Legislation was reintroduced in February 1987, but after the favorable ruling in *Cabazon*, tribes were less willing to compromise with the federal government and many opposed any legislation on Indian gaming.[100] Some members of Congress were frustrated by the Indian tribes' inactivity in proposing alternative legislative solutions.[101] The IGRA passed in the Senate by a voice vote on September 5, 1988, and in the House by a vote of 323 to 84 in late September 1988.[102]

Although the IGRA gave states greater control over some aspects of Indian gaming,[103] Congress's intent was to reaffirm tribal sovereignty, not to expand state authority over Indian lands.[104] This congressional sensitivity to the tradition of tribal sovereignty may have reflected Congress's skepticism of the true motive behind the states' outcry to the *Cabazon* decision: economic competition.[105] The IGRA did not conflict

---

97. The Court decided *Cabazon* on February 25, 1987. Congress passed the IGRA in October 1988.

98. Among the states' concerns were the protection of the Indians and the gaming public from "unscrupulous persons" and the achievement of "a fair balancing of competitive economic interests." S. REP. NO. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071.

99. *See* Kelly, *supra* note 76, at 503-05.

100. *See id.* at 505.

101. *See id.* at 507. Indeed, the reaction of Indian leaders was extremely negative, with many vehemently denouncing the seduction of Congressmen by Las Vegas casino interests. *See id.* at 506. They were not far off the mark, since the Las Vegas interests *were* involved and successfully pushed for the addition of the tribal-state compact mechanism, setting up a complex process for tribe and state negotiations. *See id.* at 506-07. Under the IGRA, an Indian tribe must adopt an ordinance or resolution for gaming and submit it to the Chairman of the National Indian Gaming Commission for approval. *See* 25 U.S.C. § 2710(d) (1994). Then, the Indian tribe can request that a state enter into good-faith negotiations for a tribal-state compact governing gaming activities on the Indian lands. *See id.* § 2710(d)(3). A compact is necessary for an Indian casino. *See id.* § 2710(d)(1)(C).

102. *See* Kelly, *supra* note 76, at 507-08.

103. This includes the opportunity for negotiations with tribes seeking to open casinos on Indian lands. *See* 25 U.S.C. § 2710(d)(3)(C), (d)(7)(A), (d)(7)(B)(iii) (1994).

104. Legislative history indicates:

> [A] framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. . . . In no instance, does [the Act] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.

S. REP. NO. 100-446, at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76.

105. *See* Worthen & Farnsworth, *supra* note 15, at 435-36. The states asserted that their jurisdiction over Indian gaming operations was necessary to prevent organized crime. *See id.*; *see also* Kelly, *supra* note 76, at 520.

with the *Cabazon* decision, which held only that states could not regulate Indian gambling where no federal statute delegated this power.[105]

The IGRA regulates many different aspects of Indian gaming operations. Gaming activities are divided into three categories.[107] Class I gaming, which includes "social games solely for prizes of minimal value or traditional forms of Indian gaming . . . [related to] tribal ceremonies or celebrations,"[108] are within the exclusive jurisdiction and control of the Indian tribes.[109] Games of chance, such as bingo and card games, that are either authorized by state law or are not explicitly prohibited are included in Class II gaming.[110] The IGRA adopts a "state law permitted test" for Class II gaming, requiring that such activity must be permitted by the state in which it is located.[111] All forms of gaming that are not in Class I or Class II constitute Class III gaming.[112] For Class III gaming, a tribe must not only satisfy the "state law permitted test" but also enter into a tribal-state compact that reflects good faith negotiations by the two sides.[113] The statute also establishes a National Indian Gaming Commission within the Department of the Interior,[114] with powers to monitor, inspect, and investigate Indian gaming activities and to promulgate regulations.[115] Additionally, the IGRA: (1) restricts gaming revenues to specific purposes and regulates their distribution;[116] (2) establishes a framework for tribal-state compacts and negotiations for Class III gaming activities;[117] (3) oversees and approves management

106. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

107. *See* 25 U.S.C. § 2703(6)-(8) (1994). This classification system replaces the balancing prong of the *Cabazon* test. *See* Kading, *supra* note 16, at 328.

108. 25 U.S.C. § 2703(6) (1994).

109. *See* 25 U.S.C. § 2710(a)(1) (1994).

110. *See* 25 U.S.C. § 2703(7) (1994). The games of baccarat, chemin de fer, blackjack, or any electronic games (e.g., slot machines) are not included in Class II gaming. *See* 25 U.S.C. § 2703(7)(B) (1994).

111. *See* 25 U.S.C. § 2710(b)(1)(A) (1994); *see also* 25 U.S.C. § 2701(5) (1994). The specific characteristics of a particular form of Indian gaming as compared to a form of gaming permitted by state law is often a matter of dispute. *See* Kelly, *supra* note 76, at 528-29 (noting that some federal courts analyze the public policy of the state to make this determination, with doubtful cases being decided in favor of Indians); *see also* Worthen & Farnsworth, *supra* note 15, at 437 n.148 (characterizing the states as arguing the IGRA refers to specific games, whereas the Indians argue the IGRA refers to Class I or Class II gaming in general). A tribe must also adopt an ordinance or resolution which is approved by the Chairman of the National Indian Gaming Commission. *See* 25 U.S.C. § 2710(b)(1)(B) (1994).

112. *See* 25 U.S.C. § 2703(8) (1994). Casino-type games of chance have been held to be Class III gaming. *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1025 (D. Conn. 1990).

113. *See* 25 U.S.C. § 2710(d) (1994); *see also* Kelly, *supra* note 76, at 509 (discussing the negotiation requirements of "good faith" and the roles of mediators and the Secretary of the Interior).

114. *See* 25 U.S.C. § 2704 (1994).

115. *See* 25 U.S.C. § 2706 (1994).

116. *See* 25 U.S.C. § 2710(b)(2)-(3) (1994) (allowing revenues to be used for distribution to tribal operations, programs, economic development, and charitable purposes).

117. *See* 25 U.S.C. § 2710(d)(3) (1994).

contracts between Indians and others;[118] and (4) restricts gaming on newly acquired tribal lands.[119]

The impact of the IGRA has been significant. About 150 compacts under the IGRA have been approved, involving at least 123 Indian tribes.[120] Casinos negotiated under the IGRA exist in twenty-two states.[121] Despite complications in implementation,[122] the IGRA has essentially forced states to negotiate with tribes over issues of regulation, policing, and the structure of proposed gambling facilities.[123] Courts have interpreted the IGRA as endorsing high-stakes gambling; thus some states must consider legalization of certain kinds of gambling in order for non-Indians to compete.[124] This has happened in states where the allowance of charitable "Las Vegas Nights" has opened the doors to Class III gaming activities, including full-fledged casinos, despite the absence of laws legalizing commercial casinos or slot machines.[125] Yet another consequence of the IGRA is the Act's encroachment on state sovereignty in two areas: taxation and competition. Because tribal casinos are tax-free enterprises under federal law and Indian lands held in trust are exempt from state and local sales taxes, the states' economic interests in taxing gaming operations for needed revenue are limited to non-Indian enterprises.[126] Furthermore, Indian gaming operations

---

118. *See* 25 U.S.C. § 2711 (1994).

119. *See* 25 U.S.C. § 2719 (1994) (applying to lands acquired after October 17, 1988, the effective date of the IGRA).

120. *See* STATES AND TRIBES: BUILDING NEW TRADITIONS, *supra* note 11, at 40.

121. *See id.* Those states are: Arizona, California, Colorado, Connecticut, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Washington, and Wisconsin. *See id.*

122. Compliance with the provision creating the National Indian Gaming Commission delayed enforcement of the IGRA. *See* Kelly, *supra* note 76, at 515. Also, a study by the Commission found that 228 of the nation's 274 Indian gaming operations (run by 184 tribes) failed to meet at least one of eight regulatory conditions of the IGRA. *See* Dennis Camire, *Most Indian Gambling Operations Don't Meet Federal Regulations, Report Says*, GANNETT NEWS SERVICE, Dec. 29, 1996, *available in* 1996 WL 4392920. Also complicating the implementation were tribes' efforts to reclaim ancestral land upon which they hoped to build casinos. *See* Kelly, *supra* note 76, at 515.

123. *See* Michael Abramowicz & Partha Chattoraj, *Developments in Policy: Federal Indian Law* (pt. I), 15 YALE L. & POL'Y REV. 353, 357 (1996).

124. *See id.*

125. *See id.* at 357-58; Kelly, *supra* note 76, at 509-10. For more on the concerns raised by "Las Vegas Nights," see the example of the Mashantucket Pequot tribe of Connecticut discussed in Kelly's article. *See id.* at 510-11. But note that the Mashantucket Pequot and Mohegan tribes guaranteed the Connecticut state treasury $80 million in gaming revenues per year in exchange for a virtual casino monopoly. *See id.* at 517. Michigan and Washington state governments also have formal arrangements with Indian tribes to receive proceeds from gaming. *See* STATES AND TRIBES: BUILDING NEW TRADITIONS, *supra* note 11, at 40.

126. *See* Abramowicz & Chattoraj, *supra* note 123, at 357, 361; Schreibman, *supra* note 3, at 380. This tax-free status has not gone unchallenged. In June 1997, Representative Bill Archer (R-TX), Chairman of the House Ways and Means Committee, proposed a tax on all Indian tribal business revenue at a 34% rate in order to help balance the federal budget. Committee members defeated the proposal by a vote of 22 to 16. The tax would have been imposed on tribal operations

compete with non-Indian operations, which are taxable.[127]

States have directly challenged the constitutionality of the IGRA on various grounds, including the Tenth and Eleventh Amendments.[128] Two cases that succeeded on Tenth Amendment grounds at the federal district court level were reversed on appeal.[129] In a third case, the Court of Appeals for the Eighth Circuit held that the IGRA does not violate the rule of law that the "Federal Government may not compel the States to enact or administer a federal regulatory program,"[130] because it only forces states to negotiate.[131] Many commentators predicted that, in enacting the IGRA, Congress successfully abrogated the states' Eleventh Amendment defense to tribal litigation.[132] The recent case of *Seminole Tribe v. Florida*[133] shows that they were mistaken.

3. *Ambiguity After* Seminole Tribe v. Florida

The Supreme Court decision in *Seminole* leaves much ambiguity surrounding the future of the IGRA.[134] The Seminole Tribe sued the State of Florida to compel negotiations under the IGRA.[135] The State defended on Eleventh Amendment grounds, arguing that Congress did not possess the power to abrogate the states' immunity from suit.[136] The Court held for the State, striking down the enforcement mechanism in the IGRA that allowed tribes to sue those states which refused to negotiate or failed to negotiate in good faith in federal court.[137] The

---

ranging from "mom-and-pop" bingo halls to frozen yogurt stands to casinos. *See Tribes Celebrate Win Over Casino Tax Plan*, BANGOR DAILY NEWS, June 16, 1997, *available in* 1997 WL 4765621.

127. *See* Abramowicz & Chattoraj, *supra* note 123, at 357.

128. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

129. *See* Ponca Tribe v. Oklahoma, 834 F. Supp. 1341 (W.D. Okla. 1992), *aff'd in part and rev'd in part*, 37 F.3d 1422 (10th Cir. 1994); Pueblo of Sandia v. New Mexico, No. CIV 92-0613 JC, 1992 WL 540817 (D.N.M. Nov. 18, 1992), *aff'd in part and rev'd in part sub nom.* Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994).

130. New York v. United States, 505 U.S. 144, 188 (1992).

131. *See* Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993) (citing New York v. United States, 505 U.S. at 188).

132. For a bibliography, see Kelly, *supra* note 76, at 522 n.164.

133. 116 S. Ct. 1114 (1996).

134. One commentary argues that the Court used the IGRA dispute as a vehicle to overrule *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and not to clarify the IGRA. *See* Worthen & Farnsworth, *supra* note 15, at 439-40.

135. *See* Seminole Tribe v. Florida, 116 S. Ct. at 1121; *see also* 25 U.S.C. § 2710(d)(3)(A) (1994).

136. *See* Seminole Tribe v. Florida, 116 S. Ct. at 1121.

137. *See id.* at 1119 ("We hold that notwithstanding Congress's clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) [of the IGRA] cannot grant jurisdiction over a State that does not consent to be sued.").

Court further held that it would not rewrite a statutory scheme for an enforcement mechanism to ensure good faith negotiations by the states.[138]

In the wake of *Seminole*, some commentators have predicted subsequent congressional reaction, including revision of the IGRA.[139] Some factors may indicate a trend that does not favor the Indians' position, including proposed bills in the 104th Congress increasing the states' negotiating powers in the regulation and compact process with tribes, and federal budget proposals seeking taxation of Indian gaming revenues.[140] On the other hand, the Indians' position may be strengthened through their increased political power, the shifting interests of states and tribes, and the perception of gambling as a national issue.[141] Indeed, Congress established the National Gambling Impact Study Commission in August 1996 to investigate the impact of gambling on America.[142] The nine-member panel of appointees was given a $4 million budget and a two-year mandate to provide Congress with reliable data because of the concern that forty-eight states now allow some form of gambling.[143] Some have criticized the composition of the Commission,[144] charging that the appointments will not allow for balanced points of view, are politically motivated, and will not provide objectivity for the study.[145]

---

138. *See id.* at 1133.

139. *See* Abramowicz & Chattoraj, *supra* note 123, at 358 (suggesting that Congress may enact legislation for the federal government to negotiate Class III gaming compacts directly with tribes); Worthen & Farnsworth, *supra* note 15, at 441-43 (suggesting Congress is likely to take a broad stroke in revising the IGRA). Congress made reforms to the IGRA in 1995 in response to states' pressure to grant them greater regulatory authority over Indian gaming. *See* Shreibman, *supra* note 3, at 385. Previous attempts in 1993 and 1994 to make significant changes to the IGRA failed because the Chairman of the Senate Committee on Indian Affairs was adamantly opposed to any amendment of the IGRA. *See* Kelly, *supra* note 76, at 535-36. For a bibliography of legal commentary addressing how Congress should amend the IGRA, see *id.* at 522 n.164.

140. *See* Worthen & Farnsworth, *supra* note 15, at 442-43.

141. *See id.* at 443-47. Regarding shifting interests, tribes focus more often on the economic advantages of gaming than on tribal autonomy, and states focus on preserving Indian culture rather than gaming's economic impact. *See id.* at 445-46.

142. *See* McKay, *supra* note 1.

143. *See id.* Utah and Hawaii are the two states without legalized gambling. *See* Worthen & Farnsworth, *supra* note 15, at 438 n.154.

144. On April 29, 1997, President Clinton made his three appointments to the Commission. *See President Clinton Names Three Choices to Complete Gambling Commission*, ANDREWS GAMING IND. LITIG. REP., May 1997, *available in* 1997-MAY ANGILR 3 (Westlaw). These members joined the three chosen by the Speaker of the House of Representatives and the three chosen by the Senate Majority Leader. *See id.* Among the commission members are three appointees representing casino interests. *See id.* One Clinton appointee is a member of an Alaskan Indian tribe which runs state-approved bingo games. *See id.*

145. *See id.*; *see also, e.g.*, Warren Richey, *Doubts About Clinton's Gambling Panel Picks: Study of Industry's Impact May Be Biased, Say Critics*, CHRISTIAN SCI. MONITOR, Feb. 5, 1996, at 1, *available in* 1997 WL 2799110; William Safire, *Losers Weepers*, N.Y. TIMES, Jan. 27, 1997, at A6, *available in* 1997 WL 7981333.

B. Indian Gaming In New England: Connecticut and Rhode Island

The Passamaquoddys are not the only Indians in New England who assert the right to establish casino gambling enterprises. New England is fertile ground for casinos, if Indians can negotiate for them, because the residents there spend a greater percentage of their money on legal gambling than those in any other region in the country.[146] Yet tribal efforts to build and operate casinos have met with varying degrees of resistance at the legislative, gubernatorial, and popular levels.[147] A brief examination of four Indian tribes in two New England states illustrates the complex challenges facing Indians who wish to establish casinos under the IGRA.

1. Connecticut

The oft-quoted success story of Indian casino gambling is that of the Mashantucket Pequot Tribe of Connecticut.[148] The 300-member tribe employs 11,000 people in its diversified industries, which include the Foxwoods Resort & Casino, real estate, pharmaceuticals, golf courses, restaurants, high-speed ferries, and retail enterprises.[149] About $1 billion in tax-free money flows annually into Foxwoods, the largest casino in

146. *See Experts: New England Too Reliant on Gaming Revenues*, LEWISTON SUN J., Apr. 29, 1996, at 2B. This includes state-run lottery games as well as Indian gaming. In fiscal year 1995, lottery sales alone constituted $203 million in Connecticut; $465 million in Massachusetts; and $142 million in Rhode Island. Residents of Maine, Vermont, and New Hampshire spent $125.9 million on lottery tickets in the same period. *See id.*

147. This is true despite the growing reliance on gambling revenues to fill state coffers. Massachusetts and Rhode Island each receive six percent of their tax dollars from gambling, while Connecticut receives five percent. *See id.* Additionally, by agreement with the State of Connecticut, the Mashantucket Pequot Tribe has given $504 million in slot machine revenues to the Connecticut state treasury since 1993. *See* Abbott, *supra* note 78. The Tribe's agreement designates about 65% of its total take to the State, compared to what the casinos in New Jersey and Nevada turn over: 8% and 6.2%, respectively. *See* William G. Flanagan & James Samuelson, *The New Buffalo—But Who Got the Meat?*, FORBES, Sept. 8, 1997, at 148, *available in* 1997 WL 9059629.

148. The Tribe received federal recognition in 1983. *See* Act of Oct. 18, 1983, Pub. L. No. 98-134, 97 Stat. 851. The Mashantucket Pequot Tribe is closely related to another tribe currently seeking federal recognition, the Eastern Pequot Indians. The long-term plans of the Eastern Pequots include what could be Connecticut's third Indian casino. *See* Lyn Bixby, *Eastern Pequots' Recognition May Mean Third Casino in State*, HARTFORD COURANT, May 5, 1997, at A1, *available in* 1997 WL 2999292.

149. *See* Tina Cassidy, *For Pequots, It's Time to Hedge Their Bets: With a Wallet Fat From Foxwoods, Tribe Is Creating New Opportunities, New Hopes*, BOSTON GLOBE, July 28, 1996, at G1, *available in* 1996 WL 6871173. Although the Tribe had agreed to lease a large parcel of land in North Stonington, Connecticut, to Six Flags Theme Parks for an amusement park, the company recently withdrew its zoning application with the town so it could consider other sites for its $250 million investment. The Tribe's land, however, is still believed to be a top choice. *See* Matthew Kauffman, *Six Flags Withdraws Zoning Application*, HARTFORD COURANT, July 16, 1997, at F1, *available in* 1997 WL 10976634. The Tribe has also been involved in talks with the owner of the New England Patriots football team about building a stadium on tribal land. *See* Mike Szostak, *NFL Sees No Conflict in Pequot Site*, PROVIDENCE J.-BULL., Feb. 26, 1997, at A6, *available in* 1997 WL 7318770.

North America, which opened its doors in February 1992.[150] The economic boost has changed the area's mood about gambling.[151] To build this empire, however, the Tribe had to fight the State of Connecticut in federal court.

In 1989, the Mashantucket Pequot Tribe sued the State of Connecticut in federal district court for refusing to negotiate a Class III gaming compact under the IGRA.[152] The State appealed the grant of summary judgment for the Tribe. On appeal, the Court of Appeals for the Second Circuit affirmed the district court's order directing the State to enter into good faith negotiations with the Tribe and to negotiate a tribal-state compact within sixty days.[153] After finding that state law permitted nonprofit organizations to hold "Las Vegas Nights," where games of chance of the same type as Class III gaming were played,[154] the appellate court applied the *Cabazon* test.[155] Because the state law applicable to Class III gaming was found to be regulatory and not prohibitory,[156] under the IGRA the State had to negotiate in good faith with a requesting tribe.[157] Because the State failed to negotiate at all,[158] the court affirmed the district court's order that the State enter into good faith negotiations with the Tribe.[159]

The Mashantucket Pequot Tribe's courtroom victory was not the precursor for the gambling success of the Mohegan Tribe[160] of Connecticut. The Mohegan Tribe[161] opened its own casino, Mohegan Sun, in October 1996, under a provision of a land claims settlement that it signed with the State of Connecticut in 1994.[162] The Tribe sought to recover over 20,000 acres of ancestral land, but agreed to withdraw the claim in

150. *See* Abbott, *supra* note 78; McKay, *supra* note 1. The Mashantucket Pequot Tribe began operating a high-stakes bingo hall in Ledyard in July 1986, a start that is similar to the Penobscot Nation's gaming operations on Indian Island, Maine, and the Passamaquoddy Tribe's present efforts to build a high-stakes bingo hall in Albany Township, Maine. *See, e.g.*, Austin, *supra* note 76; Liz Chapman, *Stage Set for Bingo at Albany*, LEWISTON SUN J., Sept. 27, 1996, at 1A; Liz Chapman, *Resistance Expected*, LEWISTON SUN J., Sept. 27, 1996, at 1A.

151. Although the region's tourism has boomed, some raise concerns about the Tribe's unchecked powers, traffic problems, and crime. *See* Abbott, *supra* note 78. For the past four years, neighboring communities have been fighting the Tribe's attempts to annex 165 acres, which if acquired as tribal land could be developed virtually without restrictions. *See id.*

152. *See* Mashantucket Pequot Tribe v. Connecticut, 737 F. Supp. 169 (D. Conn. 1990).

153. *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1025 (2d Cir. 1990).

154. *See id.* at 1029 (citing CONN. GEN. STAT. §§ 7-186a to 7-186p (1989)).

155. *See id.* at 1031-32.

156. *See id.* at 1032.

157. *See id.* at 1028; *see also* 25 U.S.C. § 2710(d)(3)(A) (1994).

158. *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d at 1027.

159. *See id.* at 1025.

160. The Mohegans received federal recognition in March 1994, a necessary step for initiating a tribal-state compact for Indian gaming. *See* Kelly, *supra* note 76, at 516-17.

161. Members of the Tribe prefer this spelling to the alternative "Mohicans." *See* Judith Gaines, *High Stakes Mohegans, Others Betting on Casino to Brighten Future*, BOSTON GLOBE, June 19, 1996, at 1, *available in* 1996 WL 6866086.

162. *See* Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 2, 108 Stat. 3501 (codified at 25 U.S.C. § 1775 (1994)).

exchange for permission to purchase up to 700 acres for a reser-vation and casino.[163] The agreement designated the town of Montville as the host community for the casino.[164] Mohegan Sun is now the third-largest casino in America, after Foxwoods and MGM Grand in Las Vegas.[165]

Casino dreaming was also the impetus for a third Connecticut Indian tribe's land claims. In early 1997, the Golden Hill Paugussett Tribe filed a request for reconsideration for federal recognition with the United States Department of the Interior because the Bureau of Indian Affairs (BIA) refused recognition in October 1996.[166] The Tribe is seeking federal recognition as the first step towards the possibility of opening a casino.[167] Earlier, the Tribe had pursued land claims under the Trade and Intercourse Act of 1790[168] in state and federal courts, but the Court of Appeals for the Second Circuit directed the lower court to stay the Tribe's action pending a determination of tribal status by the BIA.[169] The title to over $10 billion in real estate in the City of Bridgeport and surrounding suburbs is clouded by the land claim, involving more than 1000 property owners.[170] Nevertheless, the Tribe insists the real issue in the case is that for over 300 years it has been cheated out of its land, and that a "fair and just settlement" is necessary for the survival of the 100-member tribe.[171]

2. *Rhode Island*

The Narragansett Indian Tribe has sought to build Rhode Island's first Indian-owned casino, to join the two non-Indian gaming facilities in Lincoln Downs and Newport.[172] The Tribe met with initial success in the federal courts. In 1992, the Tribe notified the State that it wanted to negotiate for a tribal-state compact for a casino.[173] The State sought

---

163. *See* Kelly, *supra* note 76, at 517.

164. *See* 25 U.S.C. § 1775(a)(9)(B) (1994). The Tribe agreed to compensate Montville $500,000 per year, in addition to a $3 million initial payment, for any impact on the area due to its tribal development. *See* Kelly, *supra* note 76, at 517 n.133. Additionally, along with the Mashantucket Pequot Tribe, the Mohegans agreed to guarantee a payment of $80 million to the State from gaming revenues in exchange for a virtual monopoly on all casino gambling. *See id.* at 517.

165. *See* Lyn Bixby, *25 Years of Gambling in Connecticut*, HARTFORD COURANT, Feb. 24, 1997, at A1, *available in* 1997 WL 2982774.

166. *See* Richard Weizel, *Tribe Takes on Connecticut*, BOSTON GLOBE, Feb. 9, 1997, at B1. The Connecticut Attorney General's Office has filed a brief with the United States Department of the Interior, attacking the Paugussetts' request for reconsideration. *See* Bixby, *supra* note 165.

167. *See* Weizel, *supra* note 166.

168. 25 U.S.C. § 177 (1994); *see also infra* note 196.

169. *See* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994).

170. *See* Kelly, *supra* note 76, at 516; Weizel, *supra* note 166.

171. *See* Weizel, *supra* note 166.

172. *See In Search of Narragansetts*, PROVIDENCE J.-BULL., Jan. 23, 1997, at B6, *available in* 1997 WL 7312837. The Lincoln Park dog track and Newport Jai Alai offer video gambling. *See Indians Sue R.I. Over Gambling*, PORTLAND PRESS HERALD, May 29, 1996.

173. *See* Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 690 (1st Cir. 1994).

declaratory and injunctive relief to prevent application of the IGRA provisions.[174] In *Rhode Island v. Narragansett Indian Tribe*,[175] the Court of Appeals for the First Circuit held that: (1) the IGRA applied to the lands in Rhode Island held in trust by the federal government for the Narragansett Indians; (2) the Narragansett Tribe could invoke the IGRA to compel the State to negotiate a tribal-state compact in good faith; and (3) the IGRA worked a partial repeal by implication of the Rhode Island Indian Claims Settlement Act of 1978.[176] At issue was a grant of jurisdiction to the State in the Settlement Act that subjected the settlement lands to the civil and criminal laws of the State of Rhode Island.[177] Because the language of the Settlement Act "does not unequivocally articulate an intent to deprive the Tribe of jurisdiction, [the court held] that its grant of jurisdiction to the state is non-exclusive."[178] Using the rules of statutory construction when two federal laws conflict, the court determined that the IGRA trumped the Rhode Island Settlement Act for two reasons.[179] First, "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[180] Second, "in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent."[181] The court rejected the State's arguments relying on legislative history, which arguably showed intent to exempt Rhode Island's Indian lands from the IGRA.[182]

The battle was not yet won by the Narragansetts. Five months after the First Circuit decision, Governor Bruce Sundlun signed an agreement that would have allowed the Narragansett Indians to open a casino in West Greenwich if the plan received voter approval.[183] Voters rejected the plan.[184] In November 1995, the Rhode Island Supreme Court ruled that Sundlun had acted beyond his authority in signing the pact without the approval of the Rhode Island General Assembly.[185] The Tribe was

174. *See id.* at 690-91.

175. 19 F.3d 685 (1st Cir. 1994).

176. *See id.* at 689; *see also* Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716 (1994). Similar arguments were made in the later cases in Maine. *See* Passamaquoddy Tribe v. Maine, 897 F. Supp. 632 (D. Me. 1995), *and* Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996).

177. *See* 25 U.S.C. § 1708 (1994) ("[T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.") (two exceptions not relevant omitted).

178. Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 702. The court compared the Rhode Island provision to parallel grants of jurisdiction involving Maine and Massachusetts. *See id.*; *see also* 25 U.S.C. §§ 1725, 1771g (1994).

179. *See* Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 704.

180. *Id.*

181. *Id.*

182. *See id.* at 697-700. The court responded: "In the game of statutory interpretation, statutory language is the ultimate trump card." *Id.*

183. *See Indians Sue R.I. Over Gambling*, *supra* note 172.

184. *See id.*

185. *See id.*

dealt another blow when, in October 1996, Congress passed United States Senator John Chafee's amendment to a federal spending bill.[186] The amendment removed the Narragansett Tribe from the jurisdiction of the IGRA and required approval of Rhode Island voters for any kind of Indian gaming.[187] Because the Tribe lost its constitutional challenge to the legislation in the United States district court in August 1997,[188] the Tribe's only hope for casino approval now lies with Rhode Island voters.[189]

IV. INDIAN GAMING IN MAINE

A. The Maine Indian Claims Settlement Act

In the only case to address Maine Indian gaming ventures under the IGRA,[190] the Court of Appeals for the First Circuit held in *Passamaquoddy Tribe v. Maine*[191] that the Indians of Maine could not engage in gambling activities pursuant to the IGRA because the Act was not made expressly applicable to Maine.[192] The requirement of express application by Congress is found in a provision of the Maine Indian Claims Settlement Act of 1980.[193] The Maine Indian Claims Settlement Act proved central to the court's decision. The Settlement Act's history and underlying policies played a fundamental role in the exemption of Maine Indians from application of the IGRA.

1. The Land Claim

In the early 1970s, the Passamaquoddy Tribe asserted aboriginal land claims to nearly twelve million acres of Maine (sixty percent of the

186. *See* Michael Remez, *Narragansett Tribe Rallies at U.S. Capitol, Says Sovereignty Infringed by 1996 Measure*, HARTFORD COURANT, Jan. 22, 1997, at A4, *available in* 1997 WL 2974859.

187. *See id.*

188. *See* John E. Mulligan, *Tribe Loses Bid to Lift Restriction on Gaming*, PROVIDENCE J.-BULL., Aug. 20, 1997, at A1, *available in* 1997 WL 10848591 (noting the district court's rejection of the Tribe's contention that the Chafee amendment violates its right to equal protection). Representative Patrick Kennedy (D-RI) has introduced legislation in the House to repeal Chafee's amendment. *See id.*

189. "Rhode Islanders rejected five casino proposals by generally wide margins." *Poll Shows Rhode Island Split on Casino Gambling: Voters in 18-to-24 Age Range More Favorable*, BANGOR DAILY NEWS, Aug. 10, 1996, *available in* 1996 WL 10704632.

190. In an earlier Indian gaming case, the Maine Supreme Judicial Court, sitting as the Law Court, held that the Penobscot Indian Nation violated state law by operating beano games without a state-issued license. *See* Penobscot Nation v. Stilphen, 461 A.2d 478, 481 (Me. 1983).

191. 75 F.3d 784 (1st Cir. 1996).

192. *See id.* at 794. The Passamaquoddys were seeking an order compelling the State to negotiate a compact for establishing a casino pursuant to the IGRA. *See id.* at 788; *see also* 25 U.S.C. § 2710(d)(3)(A) (1994).

193. 25 U.S.C. § 1735(b) (1994). The entire Act is found at 25 U.S.C. §§ 1721-1735 (1994).

state),[194] upon which over 350,000 non-Indians then resided.[195] This assertion was based on a theory that treaties with Massachusetts and Maine violated the Trade and Intercourse Act of 1790 and were therefore invalid.[196] The Department of Justice later described the claim as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties."[197]

The land claim had modest beginnings. In 1957, an elderly Passamaquoddy Indian woman gave the Indian township governor some old papers, which included letters from George Washington and an original treaty under which the Passamaquoddy Tribe ceded much of its aboriginal land to the Commonwealth of Massachusetts.[198] The township governor began an investigation into the Passamaquoddy Tribe's land title.[199] The Tribe retained an attorney, who, after researching the history of the Passamaquoddy Tribe to the time of the American Revolutionary War,[200] encouraged the Passamaquoddy Tribe

194. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 787. Two other Maine Indian tribes, the Penobscot Nation and the Houlton Band of Maliseet Indians, joined in the claim and benefitted from the settlement. *See* House Interior and Insular Affairs Comm., Maine Indian Claims Settlement Act of 1980, H.R. REP. NO. 96-1353, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3786, 3787; *see also* 25 U.S.C. § 1721 (1994).

195. *See* H.R. REP. NO. 96-1353, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 3787.

196. *See* THEODORE W. TAYLOR, THE BUREAU OF INDIAN AFFAIRS 108 (1984) [hereinafter TAYLOR, BUREAU]. The Trade and Intercourse Act of 1790, reenacted many times, is codified at 25 U.S.C. § 177 (1994). Among other provisions regulating the activities between Indians and non-Indian citizens of the United States is the requirement that no transfer of land from Indians or Indian tribes would be valid without the approval of the federal government. *See* 25 U.S.C. § 177 (1994). This principle of inalienability has been described as "a lynchpin of federal Indian law" because all tribal land leases in the twentieth century were authorized by Congress under the assumption that authorization was required. *See* Tim Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979*, 31 ME. L. REV. 5, 5 (1979). The version of the Act in effect in 1793 read in pertinent part:

> [N]o purchase or grant of lands, or any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . .

H.R. REP. NO. 96-1353, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 3788. The Act and its successors were originally designed for a single purpose: "to reduce the possibility of Indian hostilities in response to incursions by whites." Jack Campisi, *The Trade and Intercourse Acts*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 337, 337 (Imre Sutton ed., 1985). For an overview of Indian land claims on the eastern seaboard under the Trade and Intercourse Acts, see *id.* at 337-62.

197. H.R. REP. NO. 96-1353, at 13-14, *reprinted in* 1980 U.S.C.C.A.N. at 3789.

198. *See* Campisi, *supra* note 196, at 342. Under the 1794 treaty with Massachusetts, some twelve million acres of land were relinquished by the Indians, with only 23,000 acres remaining with the Tribe. *See id.* The State of Maine was part of the Commonwealth of Massachusetts until 1820. *See id.* Subsequent sales and leases of Passamaquoddy ancestral land by the State of Maine further reduced tribal holdings to about 17,000 acres. *See* H.R. REP. NO. 96-1353, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 3787.

199. *See* Campisi, *supra* note 196, at 342. According to the treaty, the Indian reservation had been 6000 acres larger. *See id.*

200. Attorney Thomas N. Tureen published his findings in the *Maine Law Review*. *See* Francis J. O'Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: "A Gross*

to assert their claims.

In order to proceed, the Tribe requested that the United States, as trustee of the Tribe, assert the claims against the State.[201] In 1972, the United States Department of the Interior denied the request.[202] According to the Department, the Trade and Intercourse Act did not protect Indian tribes that were not federally recognized, and there existed no trust relationship between the United States and the Maine Indian tribes.[203]

The Tribe sought and obtained a declaratory judgment in the United States District Court for the District of Maine,[204] where the court held that: (1) the Trade and Intercourse Act applied to the Passamaquoddy Tribe; (2) the Act established a trust relationship between the United States and the Tribe; and (3) the Tribe's request for litigation on their behalf could not be denied on the sole ground that there was no such trust relationship.[205] The Court of Appeals for the First Circuit affirmed.[206] After the Court of Appeals decision and upon investigation into the merits of the claim, the Department of Justice determined that efforts to effect a settlement should be pursued.[207]

National Hypocrisy?", 23 ME. L. REV. 1 (1971). In 1777, Colonel John Allan, under the direction of General George Washington, negotiated a treaty with the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians whereby, in exchange for assistance by the Indians to the colonial effort, the United States would protect their lands and provide supplies in times of need. *See* H.R. REP. NO. 96-1353, at 11-12, *reprinted in* 1980 U.S.C.C.A.N. at 3787; *see also, e.g.*, TAYLOR, BUREAU, *supra* note 196, at 107-08; Campisi, *supra* note 196, at 342. This treaty was never ratified by Congress and the Indians received no protection by the federal government after the war. *See* H.R. REP. NO. 96-1353, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 3787; *see also* TAYLOR, BUREAU, *supra* note 196, at 108.

201. *See* H.R. REP. NO. 96-1353, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 3788. Federal involvement was necessary because the Eleventh Amendment to the United States Constitution provides states with immunity from being sued in federal court. *See* U.S. CONST. amend. XI. As a trustee of the Tribe, however, the United States could assert the Tribe's claims against the State. *See* Campisi, *supra* note 196, at 343.

202. *See* H.R. REP. NO. 96-1353, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 3788; *see also* Campisi, *supra* note 196, at 343.

203. *See* Campisi, *supra* note 196, at 343.

204. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975). Defendants in the suit were the Secretary of the Interior, the Attorney General of the United States, and the United States Attorney for the District of Maine. The State of Maine was permitted to intervene as a party defendant. *See id.* at 651.

205. *See id.* at 667 (referring to the Trade and Intercourse Act as the Indian Nonintercourse Act).

206. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975). The court qualified its holding: "In so ruling, we do not foreclose later consideration of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions in Maine." *Id.* at 380-81. For an analysis of the First Circuit decision, authored by two attorneys who served as counsel for the State of Maine in researching pending litigation involving the land claims of Maine Indians, see John M.R. Paterson & David Roseman, *A Reexamination of* Passamaquoddy v. Morton, 31 ME. L. REV. 115 (1979).

207. *See* H.R. REP. NO. 96-1353, at 13-14, *reprinted in* 1980 U.S.C.C.A.N. at 3780-90. Among the concerns were the sheer difficulty of litigating claims that would involve numerous

2. The Negotiations

President Carter formed a negotiating team to act on the recommendations of William Gunter, a retired Georgia Supreme Court justice whom Carter had appointed to study the Passamaquoddy Tribe's claims.[208] Justice Gunter's recommendations included alternatives in the event that a consensus between the federal government, the Tribe, and the State of Maine was not reached.[209] Despite the incentive for agreement provided by these unfavored alternatives, the federal agencies failed to formulate a proposal that was satisfactory.[210] Instead, the State of Maine drafted a state act to implement the settlement of the claims[211] which received gubernatorial approval and was brought to Washington.[212] After more negotiations and hearings before the United States Senate, an amended version of the proposed settlement bill drafted by the House[213] was enacted and signed into law by President Carter on October 10, 1980.[214] The law, which is the result of the agreement between the State of Maine and Maine Indians, is codified as the Maine Indian Claims Settlement Act of 1980.

3. The Agreement

The purpose of the Maine Indian Claims Settlement Act was four-fold:[215] (1) to resolve disputes regarding land titles resulting from tribes' claims; (2) "to clarify the status of other land and natural resources in the State of Maine;" (3) to ratify the Maine Implementing Act; and (4) to confirm that existing and future Indian tribes in the State of Maine would be subject to all laws of the State of Maine, as provided in the

---

appeals on each court ruling, questions of fact from two centuries ago, and an estimated five to fifteen years in court. *See id.* at 14, *reprinted in* 1980 U.S.C.C.A.N. at 3789. Additionally, millions of acres in Maine would be subjected to clouded titles, and the sale of municipal bonds would be nearly impossible. *See id., reprinted in* 1980 U.S.C.C.A.N. at 3789-90.

208. *See* TAYLOR, BUREAU, *supra* note 196, at 109-10. For an overview of the negotiation process presented as a case study, see *id.* at 107-16.

209. For Justice Gunter's recommendations, see *id.* at 109-10.

210. *See id.* at 113.

211. *See* ME. REV. STAT. ANN. tit. 30, §§ 6201-6214 (West 1996 & Supp. 1996-1997) (Maine Implementing Act). The effectiveness of the Maine Implementing Act was contingent upon the enactment of federal legislation that: (1) extinguished aboriginal land claims and derivative claims by Indians; (2) discharged all such pending claims; (3) provided the necessary funds for extinguishment; and (4) ratified and approved the Maine Implementing Act without modifications. *See* P.L. 1979, ch. 732, § 31. The end result of the Implementing Act was to change both the relationship between tribal and state authority in Maine and the legal status of the Passamaquoddy Tribe and the Penobscot Nation into municipalities. *See* Penobscot Nation v. Stilphen, 461 A.2d 478, 488-89 (Me. 1983); *see also* ME. REV. STAT. ANN. tit. 30, § 6206 (West 1996).

212. *See* TAYLOR, BUREAU, *supra* note 196, at 113.

213. H.R. 7919, 96th Cong. (1980) (enacted).

214. *See* TAYLOR, BUREAU, *supra* note 196, at 114.

215. *See* 25 U.S.C. § 1721(b) (1994) (stating legislative purposes of the Settlement Act).

Settlement Act.[216] Under the terms of the Settlement Act, the land claims of all the Maine Indian Tribes were extinguished in exchange for $81.5 million to be paid by the federal government.[217] This appropriation would establish two trust funds in the United States Treasury.[218] The Act also provided for qualified restraints on alienation of land and natural resources owned or held in trust by the Indians, but preserved the tribal possession of land and natural resources reserved to them in the treaties with Massachusetts.[219] Laws of the State of Maine would apply to most Maine Indians and their lands,[220] and the State would recognize a separate and distinct Indian jurisdiction for the Passamaquoddy Tribe and the Penobscot Nation.[221] The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians became federally recognized, making them eligible for federal benefits programs and federal tax considerations.[222]

Despite the benefits received by the Passamaquoddy Tribe under the Settlement Act, one of the Act's provisions later proved problematic. The provision states that any congressional enactment to benefit Indians or their lands made after the effective date of the Settlement Act must

---

216. *Id.* The Settlement Act subjects Maine Indians, other than those in the Passamaquoddy Tribe and the Penobscot Nation, to state civil and criminal jurisdiction and state laws; the Passamaquoddy and Penobscot Indians are authorized to exercise a separate and distinct jurisdiction to the extent authorized by the Maine Implementing Act. *See id.* § 1725(a), (f) (1994). The Maine Implementing Act subjects all Indians in Maine to state laws and the civil and criminal jurisdiction of the state courts unless otherwise provided. *See* ME. REV. STAT. ANN. tit. 30, § 6204 (West 1996).

217. *See* 25 U.S.C. §§ 1723, 1724(a) & (c), 1733 (1994). The Passamaquoddys and the Penobscots each received $26,800,000 to be held in trust for land acquisition, while the Houlton Band of Maliseets received $900,000 to be held in trust for the same purpose. Additionally, $27,000,000 was granted to establish a Maine Indian Claims Settlement Fund. *See* 25 U.S.C. §§ 1724(a), (c) & (d), 1733 (1994). All aboriginal titles to land and other land claims were extinguished, even those of Indians who were not receiving compensation, such as the Micmacs and other bands of Maliseets. *See* 25 U.S.C. § 1723 (1994). The Passamaquoddys used $25 million of the settlement proceeds to purchase a cement plant from Martin Marietta in 1983. The Tribe invented and patented a smokestack scrubber which recycled kiln dust and reduced emissions before selling the plant to CDN-USA in 1988 for $80 million. *See* STATES AND TRIBES: BUILDING NEW TRADITIONS, *supra* note 11, at 33; *see also* Emmet Meara, *Thomaston Tax Rift in State's Lap*, BANGOR DAILY NEWS, Feb. 20, 1997, *available in* 1997 WL 4758299. The company that the Tribe established to develop and market the scrubber has since declared bankruptcy. *See* Diana Graettinger, *Money Problems Beset Tribe*, BANGOR DAILY NEWS, Dec. 16, 1996, *available in* 1996 WL 10712020.

218. *See* 25 U.S.C. § 1724(a), (c) (1994) (creating the Maine Indian Claims Settlement Fund and the Maine Indian Claims Land Acquisition Fund).

219. *See* 25 U.S.C. § 1724(g) (1994) (indicating restraints on alienation); *id.* § 1722(f), (i) (incorporating the definitions of Indian reservations from the Maine Implementing Act); ME. REV. STAT. ANN. tit. 30, § 6203(5), (8) (West 1996) (defining terms).

220. *See* 25 U.S.C. § 1725 (1994). Members of the Passamaquoddy Tribe and Penobscot Nation and their lands are subject to state laws to the extent provided for in the Maine Implementing Act, ME. REV. STAT. ANN. tit. 30, § 6204 (West 1996). *See* 25 U.S.C. § 1725(b) (1994).

221. *See* 25 U.S.C. § 1725(f) (1994).

222. *See* 25 U.S.C. § 1725(i) (1994). For a discussion of the Tribes' eligibility for federal programs and for state financial reimbursement, see TAYLOR, INDIAN POLICY, *supra* note 59, at 124-25.

include explicit language of application to the Indians of Maine.[223] Because the IGRA did not meet this requirement, the court in *Passamaquoddy* held that the IGRA did not apply to the Passamaquoddy Tribe.[224] Thus, the State could not be forced to negotiate with the Tribe for any gaming activities, including a casino. The protection of this savings clause constituted part of the consideration the State received in the negotiations that led to the adoption of the Maine Indian Claims Settlement Act.[225] The provision would bar the Passamaquoddy Indians from the opportunity to raise revenues for tribal purposes through those gambling activities permitted under the IGRA, unless they obtained state approval. This opportunity is available to most other Indian tribes in the country.[226]

B. The Maine Decision: Passamaquoddy Tribe v. Maine

Prompted by the success of other Indian tribes, in 1993 the Passamaquoddy Tribe sought permission from the State to build a casino in Calais, under the provisions of the IGRA.[227] The Attorney General's Office informed the Tribe that it could not establish a casino because the IGRA did not apply to Maine Indians.[228] After unsuccessfully promoting specific state legislation that would have allowed a casino without implicating the IGRA,[229] the Tribe asked Governor John McKernan, Jr., to enter into negotiations for a tribal-state compact pursuant to the IGRA.[230] When the State refused to negotiate, the Tribe sued in the federal district court to compel negotiations, but lost.[231] The Court of Appeals for the First Circuit affirmed the lower court's grant of

223. *See* 25 U.S.C. § 1735(b) (1994).

224. *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 789-90 (1st Cir. 1996).

225. *See id.* at 794. The State was also relieved of the burdens of litigation, the clouding of land titles, and the uncertainty of the future of the tribal-state relations. *See generally* 25 U.S.C. § 1721(b) (1994).

226. The Indian Gaming Regulatory Act does not apply to Indian tribes in Utah or Hawaii because those states have no legalized gambling. *See* Worthen & Farnsworth, *supra* note 15, at 438 n.154. Texas and South Carolina have made agreements with Indian tribes that include restrictions on tribal sovereignty to the exclusion of IGRA application. *See* 25 U.S.C. § 941*l*(a) (1994) (explaining that state laws govern gambling where IGRA does not apply); *see also* Ysleta Del Sur Pueblo v. Texas, 36 F.3d 1325, 1327-28, 1335 (5th Cir. 1994) (holding that the Tribe's approval of the federal Restoration Act, which barred tribal gaming activities but restored trust status, supersedes application of the IGRA); Kelly, *supra* note 76, at 528 n.203 (noting that explicit language prohibiting application of the IGRA was included in South Carolina's Settlement Act with the Catawba Indian Tribe).

227. *See* Joshua L. Weinstein, *Tribe's Right to Open Casino Questioned by Judges*, PORTLAND PRESS HERALD, Jan. 11, 1996, at 4B, *available in* 1996 WL 9612666.

228. *See id.*

229. Three bills died in the Judiciary Committee: L.D. 1998 (116th Legis. 1994); L.D. 1999 (116th Legis. 1994); and L.D. 2000 (116th Legis. 1994).

230. *See* Weinstein, *supra* note 227, at 4B.

231. *See id.*; *see also* 25 U.S.C. § 2710(d)(3)(A) (1994) (allowing tribes to request that States enter negotiations).

judgment on the pleadings to the State and denied relief to the Tribe.[232]

On appeal, the Tribe asserted a number of arguments reminiscent of those raised by the Mashantucket Pequot Tribe and the Narragansett Tribe in their actions to compel negotiations under the IGRA. The court systematically rejected each of these arguments, including the one that succeeded for the Narragansetts.[233] That successful line of argument contended that the IGRA impliedly repealed certain provisions in the Rhode Island Settlement Act.[234]

The Tribe presented a rejoinder based on constitutional grounds because they were aware that the Maine Indian Claims Settlement Act of 1980 contained a savings clause[235] (section 16(b)), which provided that unless Congress specifically mentioned application to Maine Indians, they would be exempt from any subsequent federal law enacted for the benefit of Indians.[236] The Tribe contended that such a provision was unconstitutional because it bound a successor Congress to the will of a predecessor Congress.[237] The court responded that the provision was "purely an interpretive aid" that "serves both to limn the manner in which subsequently enacted statutes should be written to accomplish a particular goal and to color the way in which such statutes thereafter should be read."[238] The court also noted that the purpose of section 16(b) was to give the State "a measure of security against future federal incursions upon [the State's] hard-won gains" in the Settlement Act.[239] Three further reasons cited by the court defeated the Tribe's contention: (1) Congress was not prohibited from writing a new statute with the necessary language, or at least with a clear indication of intent to do so; (2) Congress could repeal the provision; and (3) the Supreme Court had upheld and given effect to many similar provisions.[240]

The court characterized the Tribe's second argument as its "most ferocious attack."[241] The Tribe contended that because the IGRA impliedly repealed section 16(b) to the extent that gambling on Indian lands was concerned, section 16(b) did not warrant any consideration.[242]

---

232. *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 788, 794 (1st Cir. 1996).

233. *Compare* Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 703-04 (1st Cir. 1994), *with* Passamaquoddy Tribe v. Maine, 75 F.3d at 790-91. First Circuit Judge Selya is the author of both the *Passamaquoddy* and *Narragansett* opinions.

234. *See* Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 703-04; *see also supra* notes 176-82 and accompanying text.

235. 25 U.S.C. § 1735(b) (1994). The court refers to the provision as "section 16(b)" in the opinion because the provision was so numbered in the session law. *See* Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 16(b), 94 Stat. 1785, 1797 (1980).

236. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 789.

237. *See id.*

238. *Id.*

239. *Id.* at 787.

240. *See id.* at 789-90.

241. *See id.* at 790.

242. *See id.* The issue of implied repeal generates much controversy in the field of Indian law. If Congress enacts legislation that does not specifically mention Indian tribes, "a question almost inevitably arises whether some facet of the tribes' own power to regulate has been overridden

The court stated the general rule that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.'"[243] The similar situation in *Narragansett* was distinguished because the Rhode Island Settlement Act had no provision like section 16(b); Indian gaming in Rhode Island was subjected to both the IGRA and the Rhode Island Settlement Act.[244] Thus, the *Narragansett* court could not give full effect to both acts, and found a repeal by implication of the Rhode Island Settlement Act.[245] As further support for its position, the *Passamaquoddy* court cited to a Senate report indicating that Congress was cognizant of section 16(b) but chose not to displace it with the provisions of the IGRA.[246]

As a fallback argument, the Tribe conceded that section 16(b) may be given full force and effect, but that the IGRA nevertheless controlled because it was deemed to be applicable within Maine.[247] The Tribe argued that Congress intended to confer the benefits of the IGRA upon Indian tribes that by definition are federally recognized and possess governmental power, and the Tribe satisfied those criteria.[248] The court summarily rejected that argument because it completely ignored section 16(b) and was a veiled attempt at implied repeal of the Settlement Act.[249]

The Tribe also argued that because the IGRA is broad and comprehensive legislation delineating a regulatory framework for a defined subject, Indian gaming, it satisfies section 16(b) with the minimum particularity.[250] Relying on *Marcello v. Bonds*,[251] the Tribe attempted to draw a parallel from section 16(b) to a provision in the Administrative Procedure Act[252] (APA), which requires that statutes intended "to supersede or modify the APA's judicial review modalities must do so 'expressly.'"[253] In *Marcello*, the Court held that the

---

by implication." WILKINSON, *supra* note 21, at 46. Due to the age and scope of many Indian tribal laws, statutory conflicts are common. *See id.*

243. Passamaquoddy Tribe v. Maine, 75 F.3d at 790 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

244. *See id.* at 791 (citing Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 704-05 (1st Cir. 1994)).

245. *See id.* (citing Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 704-05).

246. *See id.* at 790-91 (citing SELECT COMM. ON INDIAN AFFAIRS, INDIAN GAMING REGULATORY ACT, S. REP. NO. 100-446, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082).

247. *See id.* at 791.

248. *See id.* at 791-92; *see also* 25 U.S.C. § 2703(5) (1994).

249. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 792.

250. *See id.* Many federal statutes dealing with Indians are substantive and self-implementing, addressing a particular subject and applying broadly to all tribes. These statutes are immediately effective and usually deal exhaustively with a particular area of law. *See* WILKINSON, *supra* note 21, at 11 (listing examples of such statutes).

251. 349 U.S. 302 (1955).

252. 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1994).

253. Passamaquoddy Tribe v. Maine, 75 F.3d at 792 (citing Marcello v. Bonds, 349 U.S. at 305).

subsequent Immigration and Nationality Act of 1952 contained a review scheme for deportation extensive enough so as to "expressly" supersede the APA provision;[254] that is, although the later statute did not indicate in explicit language the intent to supersede the APA, the Court concluded that it did supersede the APA. The *Passamaquoddy* court conceded the Tribe's assertion that the IGRA could be viewed as comprehensive.[255] Nevertheless, the court distinguished *Marcello* because the IGRA would not render section 16(b) meaningless and Congress did not indicate in the IGRA an exclusivity of application.[256] Moreover, the court was troubled by the Tribe's assertion that in order to invalidate section 16(b), Congress needed only to enact a comprehensive statute.[257] In rejecting the Tribe's argument that the IGRA superseded, the court stated that Congress "chose not to include in the [IGRA] *any* indication that it meant to make the statute specifically applicable within Maine."[258]

Asserting statutory ambiguity, the Tribe further argued that the court should utilize a preferential construction in interpreting the Maine Settlement Act and the IGRA together.[259] The Tribe argued that this preference is based on a "strong federal interest in safeguarding Indian autonomy."[260] History requires this preferential construction. In the past, where there has been ambiguity in interpreting treaties and agreements made with the Indian tribes, a reading in favor of the Indians was preferred because the documents were drawn up in English and were drafted and held by the federal government.[261] Moreover, the Tribe asserted that as a trustee of the Indian tribes, the federal government has a duty of fair dealing because of the special obligations it has assumed.[262] The court easily dismissed this argument by denying that any ambiguity existed and refusing to apply any "judicial embroidery."[263] The court conducted no further examination of the principle of preferential construction for Indians.

The Tribe's last effort at persuasion differed from the others. Because the district court did not defer to an opinion of the National Indian Gaming Commission stating that the IGRA applies in Maine, the Tribe asserted that the lower court erred.[264] The court disagreed for

254. *See* Marcello v. Bonds, 349 U.S. at 308-10.

255. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 792.

256. *See id.* at 792-93.

257. *See id.* at 793 n.5.

258. *See id.* at 793.

259. *See id.*

260. *See id.*; *see also, e.g.*, DeCoteau v. Dist. County Court for the Tenth Judicial Dist., 420 U.S. 425, 447 (1975) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977)) (stating that "legal ambiguities are resolved to the benefit of the Indians").

261. *See* WILKINSON, *supra* note 21, at 47.

262. *See id.*

263. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 793.

264. *See id.* The Tribe had adopted an ordinance to authorize bingo and other Class II gaming activities and submitted it to the Chairman of the Commission for approval, pursuant to section

three reasons. First, where Congress had unambiguously expressed its intent, no deference was to be given to an agency interpreting federal statutes.[265] Second, an interpretation of the relationship between the Settlement Act and the IGRA was outside the proper scope of duty of the Commission's Chairman.[266] The administration of the Settlement Act instead rested solely with the Secretary of the Interior.[267] Notwithstanding the Commission's expertise in the IGRA, its role was not to reconcile the IGRA with other federal laws.[268] Third, because the Chairman reached his conclusion through examining case law,[269] the court refused "to defer to a determination that amounts to little more than the Commission's understanding of judicial precedents."[270]

In holding that the IGRA did not apply to Maine Indians and therefore the State could not be compelled to negotiate a Class III gaming compact, the court emphasized the bargain struck in the Maine Settlement Act:

> [The State] received valuable consideration for the accord, including the protection afforded by section 16(b). The Tribe also received valuable consideration, including land, money and recognition. Having reaped the benefits, the Tribe cannot expect the corollary burdens imposed under the Settlement Act to disappear merely because they have become inconvenient.[271]

V. DISCUSSION

A. Judicial Response

In *Passamaquoddy*, the interaction of the Maine Indian Claims Settlement Act and the IGRA is central to the court's analysis. The court examined these statutes in detail to determine whether the IGRA applies to the Indians of Maine. The court reached the proper and inevitable conclusion that the IGRA does not apply in Maine.

The effect of the savings clause in the Settlement Act, section 16(b), is unambiguous when the actual language and the context of the drafting are examined. Section 16(b) reads in pertinent part:

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State

2710(b)(1)(B) of the IGRA. *See id.* Within the letter of approval, the Chairman determined that the IGRA applied in Maine. *See id.*

265. *See id.* at 794.

266. *See id.*

267. *See id.*; *see also* 25 U.S.C. §§ 1725, 1727 (1994).

268. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 794.

269. *See id.* The court noted that the primary cases relied upon by the Chairman were *Marcello* and *Narragansett*. *See id.*

270. *Id.*

271. *Id.*

> of Maine . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.[272]

The Settlement Act became effective on October 10, 1980.[273] Congress enacted the IGRA eight years later with the intention of allowing Indian tribes to regulate gaming activity on Indian lands, subject to some limitations.[274] If the IGRA were to apply in Maine, it would preempt certain provisions of the Maine Criminal Code.[275] Thus, the IGRA clearly satisfies the criteria for implicating section 16(b). The court noted that the Senate report on the IGRA bill, which explicitly acknowledged the Maine Indian Claims Settlement Act, shows that Congress was aware of the possibility of unintentional displacement of earlier federal statutes:[276] "'[I]t is the intention of the Committee that nothing in . . . [the IGRA] will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the . . . [Maine] Indian Claim[s] Settlement Act.'"[277] The IGRA is silent on its application to Maine Indians.[278] Thus, when section 16(b) is introduced, the only proper conclusion is that the IGRA cannot apply in Maine.

Section 16(b) was an important and deliberate inclusion in the Settlement Act. The State received a measure of control over subsequent federal legislation concerning Indians and Indian lands where Congress failed to specify its applicability in Maine. By participating in the negotiations culminating in the Settlement Act, the Indians of Maine accepted the terms of section 16(b). The significance of section 16(b) became clear when the Maine Legislature considered the bill that would have allowed the Passamaquoddy Tribe to build a casino without implicating the IGRA.[279] A former Deputy Attorney General, who was responsible for directing the State's legal defense against the land claims of the Passamaquoddy Tribe and the Penobscot Nation, wrote during the hearings, in the course of representing opposition to the bill: "[Section 16(b)] is a provision that is unique in federal law. It was a critical element of the entire settlement, since the State was adamant that the terms of the deal not be undone without the

---

272. 25 U.S.C. § 1735(b) (1994).

273. *See* TAYLOR, BUREAU, *supra* note 196, at 114.

274. *See* 25 U.S.C. § 2701(5) (1994).

275. *See* ME. REV. STAT. ANN. tit. 17-A, §§ 953-954 (West 1983 & Supp. 1996-1997).

276. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 790-91.

277. *Id.* at 791 (quoting SELECT COMM. ON INDIAN AFFAIRS, INDIAN GAMING REGULATORY ACT, S. REP. NO. 100-446, at 12, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082).

278. Nevertheless, Congress expressly indicated that the IGRA does not apply to certain Indian tribes, such as the Catawba Indian Tribe of South Carolina. *See* 25 U.S.C. § 941*l*(a) (1994). South Carolina included this language in its settlement act with the Tribe. *See, e.g.*, Kelly, *supra* note 76, at 528 n.203.

279. *See* L.D. 1266 (116th Legis. 1993) (An Act to Allow a Casino to Be Constructed by the Passamaquoddy Tribe in Calais for the Purpose of Gambling).

consent of the State or an explicit act of Congress."[280] Because the legislative history of the IGRA reflects some cognizance of this provision,[281] it cannot be argued that Congress meant for the IGRA to apply in Maine. In the end, the effect of section 16(b) was *bargained for* by the State, and *bargained away* by the tribes.

B. The Settlement Act as a Living Document

The holding in *Passamaquoddy* was justified under the rules of statutory interpretation. Yet, the larger issue of whether Indians in Maine should be permitted to engage in gaming enterprises may not be so easily answered by an interpretation of section 16(b) of the Maine Indian Claims Settlement Act. In fact, the State and the Indian tribes have fundamental disagreements over how the Settlement Act is to be viewed.

As evidenced in *Passamaquoddy*, the State's prevailing position is that a plain reading of section 16(b) defeats any argument that federal laws such as the IGRA could apply to Maine Indians without express congressional indication.[282] The State views the Settlement Act as a document that defines the tribal-state relationship, so what was not given to the Tribes through this negotiation process is not owed to the Tribes.[283] In other words, the State is saying to the Tribes, "unless we gave it to you, you don't have it."[284]

Maine Tribes, on the other hand, have persistently argued for a broader approach to implementing and understanding the Settlement Act. This approach would contemplate the Settlement Act as being more than a rigid statute. The Act would be an "organic and living document," a flexible writing whose interpretation is meant to change over time, similar to a treaty.[285] Indeed, some Indians may view the Act as a treaty, since it denotes the relationship between the sovereign State and the sovereign Tribes.

---

280. Letter from John M. R. Paterson, Attorney for Save Downtown Calais, to State Senator Gerard P. Conley, Jr., and State Representative Constance D. Cote 3 (May 16, 1993), *in* Legislative History of Casino Gambling Legislation in Maine (Feb. 1995) (unpublished compilation, on file at the Maine State Law and Legislative Reference Library).

281. *See* S. REP. NO. 100-446, at 12, *reprinted in* 1988 U.S.C.C.A.N. at 3082.

282. *See* Passamaquoddy Tribe v. Maine, 75 F.3d at 787 (observing that section 16(b) "gave the State a measure of security against future federal incursions upon these hard-won gains" through negotiations).

283. *See* Task Force on Tribal-State Relations, At Loggerheads—The State of Maine and the Wabanaki, Final Report to the 118th Legislature 22 (Jan. 15, 1997) [hereinafter At Loggerheads]. The Wabanaki is a term describing members of the four federally recognized Indian Tribes in Maine: the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseets, and the Aroostook Band of Micmacs. *See id.* at 1.

284. *See id.* at 20.

285. *See id.* at 21. This view is endorsed in the report of the Task Force on Tribal-State Relations. *See id.*

Many tribal members assert that the State interprets the terms of the Settlement Act too narrowly, ignoring its spirit and intent.[286] Moreover, to some Indians it appears that the State believes it has the exclusive right to interpret the Settlement Act.[287] Some tribal members view the intent of the Settlement Act as meaning, "unless we gave it up, we retain it."[288] They point to rules of preferential construction under the federal Indian common law, where the underlying assumption is that the tribes held unequal bargaining power with the states.[289] Thus, any ambiguity is to be interpreted in favor of the tribes; courts are to interpret laws as the tribes understand them; and only an explicit enactment by Congress can deprive tribes of rights or power.[290] Although the Tribe made this preferential construction argument in *Passamaquoddy*, the Tribe did not argue before the court that the Settlement Act should be viewed more broadly.[291]

Despite its name, the Settlement Act has not settled many key areas of conflict that have arisen through different interpretations of the Act's intent. An example of this clash of views is Governor King's quote in a newspaper article on the pending controversy over sovereign saltwater fishing rights, in which he said that the Tribe gave up these rights when it signed the Settlement Act.[292] In the same article, however, the Passamaquoddy Tribe's Representative in the Legislature said that the Tribe's understanding was that the Maine Indian Tribal-State Commission created by the Settlement Act would address the saltwater fishing issue, not the language of the Act itself.[293]

Recognizing the growing tensions, the Legislature formed the Task Force on Tribal-State Relations in June 1996 to find ways to improve both the tribal-state relationship and the effectiveness of the Maine Indian Tribal-State Commission created by the Act.[294] The final report of the Task Force identified six different areas of tribal-state conflict.[295] These include: (1) aboriginal rights; (2) acculturation and assimilation; (3) federal recognition; (4) property and land; (5) sovereignty; and (6) the trust relationship.[296] Through its findings and analysis, the Task Force addressed the strikingly different views held by the State and the

286. *See id.* at 1.

287. *See id.* at 21.

288. *See id.* at 20.

289. For a discussion of these rules of preferential construction for Indians, see WILKINSON, *supra* note 21, at 47.

290. *See id.*; *see also supra* notes 259-61 and accompanying text.

291. *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 793 (1st Cir. 1996).

292. *See* Graettinger, *Tradition vs. Modern Law*, *supra* note 17. Governor King says, "One of the things that was clearly established [in the Settlement Act] was that we did not have a state within a state.... The act said that the tribes gave up their aboriginal claims in terms of natural resources, which is [the State's] position." *Id.*; *see also* 25 U.S.C. § 1723(b) (1994).

293. *See* Graettinger, *Tradition vs. Modern Law*, *supra* note 17.

294. *See* ME. REV. STAT. ANN. tit. 30, § 6212 (West 1996).

295. *See* At Loggerheads, *supra* note 283, at App. #1-1.

296. *See id.* at App. #1-1 to 1-2.

Tribes regarding the Settlement Act's intent and effectiveness.

In the context of Indian gaming, section 16(b) is not ambiguous. The IGRA cannot apply to the Indians of Maine because it does not meet the requirements of section 16(b). The court in *Passamaquoddy* found no ambiguity in construing section 16(b) and the IGRA together.[297] The court rejected the Tribe's argument for preferential construction, which depends upon an initial finding of ambiguity, and refused to further examine the concept.[298] Nevertheless, perhaps an argument for ambiguity can be made on a basis other than *textual* ambiguity. Suppose the Settlement Act was viewed as an "organic and living" document, as recommended by the Task Force.[299] If the Tribes viewed the Settlement Act as a document whose interpretation could be changed and adapted to conditions over time, or at the very least be reevaluated, there exists an alternative to the strict reading of section 16(b). The ambiguity would arise in how the basic *intent* of the section is *understood*: section 16(b) says what it says, but not necessarily what it means. That is, the Tribe may have agreed to its terms, but in so agreeing, it held the belief that some issues were to be resolved, and would be resolved, at a later date.[300] The Settlement Act thus serves as the starting point for shaping the tribal-state relationship, instead of the finishing point.[301]

Although an argument for ambiguity in the Settlement Act's intent may be strained given the language of section 16(b), the advantage in reevaluating organic documents is that amendments can be made to reflect changed positions.[302] It is apparent that Maine Tribes could not foresee the passage of the IGRA eight years after signing the Settlement Act. The reality of this lack of prescience is not lost on Maine Tribes.[303]

---

297. *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 792-93 (1st Cir. 1996).

298. *See id.* at 793.

299. *See* At Loggerheads, *supra* note 283, at 21. Although a bill to implement the recommendations of the Task Force was amended by the Legislature, the final version empowers the Maine Indian Tribal-State Commission to "consider the concerns that gave rise to the legislation proposed by the Passamaquoddy Tribe to amend the Act to Implement the Maine Indian Claims Settlement and determine how those concerns may be addressed." Resolves 1997, ch. 45, § 2; Comm. Amend. A to L.D. 1269, No. H-531 (118th Legis. 1997).

300. The Task Force report noted that the Tribes and the State have successfully made agreements concerning cooperative law enforcement, fishing and gaming, and environmental issues, all without defeating the basic intent of the Settlement Act. *See* At Loggerheads, *supra* note 283, at 21.

301. The Task Force report noted that the Tribes and the State have different reference points for the Settlement Act. Whereas the State "tends to view the Settlement as the central defining document for its relationship with the Tribes," the Tribes offer their "traditional values, aboriginal rights, Indian common law, and [pre-Settlement Act] treaties" as factors shaping the tribal-state relationship. *Id.* at 22.

302. *See* 25 U.S.C. § 1725(e) (1994) (granting federal consent to the State of Maine to amend the Maine Implementing Act).

303. The Task Force report indicated that one member of the Passamaquoddy Tribe believed the original intent of the Settlement Act has been sidetracked. *See* At Loggerheads, *supra* note 283, at 20. The tribal member stated that if he had known at the time of the Act how it would be implemented, he would not have supported it. *See id.* He further stated: "We thought we would be treated fairly, but injustices have not been addressed.... Other federally recognized Tribes have

Perhaps something more is warranted than a summary dismissal of IGRA application relying solely on a rigid reading of the Act's text.[304] Unfortunately, the decision in *Passamaquoddy* may have closed the door on further discussions on this point.[305]

C. *Maine's Selective Support of Gambling*

Maine's strong resistance to the Passamaquoddy Tribe's casino proposal should not be viewed as an absolute stance against gambling. Indeed, Mainers wager $232 million annually on legal lottery tickets, bingo games, and horse races.[306] Estimates of illegal gambling figures in Maine are as high as $1 billion per year.[307] The Legislature has permitted certain forms of gambling, including the Maine State Lottery, bingo and beano (including high-stakes operations for Indians), raffles, and electronic video gambling machines.[308] Presently, efforts to preserve live harness racing in the state by authorizing video lottery terminals at these facilities are being considered by the Legislature.[309] Moreover, the state has an economic dependence on revenues from the lottery, evidenced by the fact that a proposed bill to eliminate instant ticket lottery machines failed in April 1997.[310]

Despite the economic benefits derived from some forms of gambling, opposition to gambling on moral grounds plays a leading role in shaping legislation and policy. On the national level, groups such as the National Coalition Against Legalized Gambling boast of their successes in staving

---

the privilege to do a lot of things. Gaming is the most recent example of this. The casino would have been a major boost for the Passamaquoddy Tribe." *Id.*

304. This is especially true if the Tribes were "herded into the Settlement" as some members believe. *See id.* at 19.

305. It should be noted that three bills introduced in the Legislature in 1994 that would have advanced the Passamaquoddy Tribe's casino plans were crafted by Judiciary Committee members to avert the potential lawsuit which eventually became *Passamaquoddy Tribe v. Maine*. *See* Legis. Rec. 654 (1994) (comments of Representative Robichaud). All three bills died in committee. *See* L.D. 1998 (116th Legis. 1994); L.D. 1999 (116th Legis. 1994); L.D. 2000 (116th Legis. 1994). Thus, the Legislature's uncertainty about IGRA application and its preparation for potential litigation may be seen as deferring to the court's determination as the final resolution.

306. *See* Nancy Perry, *Morality, Money Clash in Debate Over Gambling, a Sag in the Harness Racing Industry and the Rise of Illegal Video Gaming Push the Issue to the Forefront*, ME. SUNDAY TELEGRAM, Mar. 3, 1996, at 1B, *available in* 1996 WL 9619437 [hereinafter Perry, *Morality, Money*].

307. *See id.* Illegal gambling activities include video poker, high-stakes card games, and sports contests. *See id.*

308. *See supra* note 4 (listing types of gambling that are legal and illegal in Maine).

309. *See* L.D. 1676 (118th Legis. 1997). A vote in June 1997 has carried the issue over into 1998.

310. *See* A. Jay Higgins, *Legislator Unlucky in Lottery Fight*, BANGOR DAILY NEWS, Apr. 19, 1997, *available in* 1997 WL 4761741. Because of an apparent downward trend in lottery revenues, Governor King reluctantly agreed to allow installation of these machines two years ago. *See id.* Now numbering about 200, the machines are expected to generate net proceeds of $639,000 to the state on gross revenues of $4.6 million in the next fiscal year. *See id.*

off the spread of gambling.[311] Formed in 1994, the Coalition has fought against voter referenda on gambling issues, joined by civic groups, religious organizations, political organizations, and economic and business groups, as part of a larger anti-gambling backlash.[312] With its last members chosen in May 1997, the National Gambling Impact Study Commission is ready to undertake its mission of analyzing the economic and social impact of legalized gambling upon the country, individual states, political subdivisions, Indian Tribes, and businesses.[313] The public perception may be that the Commission is expected to conduct an objective analysis of the issue. Nevertheless, the congressional law establishing the commission directs it to focus primarily on the evils of gambling.[314]

In Maine and elsewhere, opponents of gambling on moral grounds often distinguish lotteries from other forms of gambling. This may be because of the economic dependence of state governments on lottery revenues or a perception that the "victims" of lottery gambling are somehow less vulnerable than casino patrons. A Washington, D.C., institute published a study which concluded that the moral line drawn between lotteries and other gambling forms, such as casinos, is "puzzling."[315] The study found that patrons of casinos tended to be more educated and affluent than those who played state lotteries.[316] Moreover, the ads for the lottery games were often found to mislead players on their chances of winning.[317] In Maine, Governor King supports the state lottery, but opposes other forms of gambling and has pointed out the high social costs, including the disproportionate impact on the poor and the false sense of economy in recycling money but not spending it on anything useful.[318] A recent survey on the Maine State Lottery dispels the myth that Maine's lottery games prey upon the poor.[319]

---

311. *See* Warren Richey, *Support for Casinos Stalls as States Count the Cost*, CHRISTIAN SCI. MONITOR, Jan. 31, 1997, at 1, *available in* 1997 WL 2799037.

312. *See id. See generally* Margot Hornblower, *No Dice: The Backlash Against Gambling*, TIME, Apr. 1, 1996, at 28, *available in* 1996 WL 8825053.

313. *See President Clinton Names Three Choices to Complete Gambling Commission*, *supra* note 144; *see also supra* notes 142-45 and accompanying text.

314. *See* Andrew Beyer, *Gambling Foes Are on Dicey Ground*, WASH. POST, Feb. 28, 1997, at D9, *available in* 1997 WL 9337176. Conservative opponents of gambling sponsored the bill. *See id.*

315. The Competitive Enterprise Institute found that almost every argument the moralists make against casinos applies equally to lotteries. *See id.*

316. *See id.*

317. *See id.*

318. *See* Perry, *Morality, Money*, *supra* note 306.

319. *See* Nancy Perry, *Survey on Maine Lottery Dashes Popular Perceptions of Players*, PORTLAND PRESS HERALD, Aug. 6, 1997, at 1A, *available in* 1997 WL 12528613. A survey of 800 randomly questioned Maine residents conducted in June 1997 found that only 28% of Mainers with household incomes of less than $25,000 per year play the lottery on a daily or weekly basis. *See id.* The most likely players are those whose households earn between $25,000 and $50,000 per year. *See id.* Moreover, almost half of those surveyed (46%) said they played the lottery for the fun of it. *See id.*

Where those who oppose forms of gambling other than lotteries can argue the economic benefits to the state and take the moral stance that lotteries are distinguishable from other forms of gambling, it is not surprising that the Passamaquoddy Tribe's efforts to build a casino have been so vigorously thwarted. The Tribe planned for its casino revenues to benefit mainly the Tribe, not the state.[320] Although the casino plan's opponents at the public legislative hearings resisted most strongly on the grounds that it would change the culture of the area,[321] the underlying reason may well have been moralistic. If the Tribe had proposed a country music hall in Calais instead of a casino, the outcry to preserve the area's culture may not have been as forceful. Moreover, the state and those who opposed the casino plan may have feared that other groups would push for a similar exception from state laws prohibiting casino enterprises.

D. The Future of Indian Gaming in Maine

Even setting aside any plans for an Indian casino,[322] Maine Tribes still face strong opposition to any gambling activities. The Legislature's carved-out exception permitting only federally recognized Indian tribes in Maine to operate high-stakes bingo games[323] likely engendered animosity between the Tribes and non-Indians. The competition for gambling dollars goes both ways: non-Indians fear greater "privileges" will continue to flow exclusively to the tribes, while Indians fear more groups will encroach on the "special" rights held by Indians.[324]

---

320. The Tribe's casino plans emphasized economic development for the distressed Washington County region. *See generally* Legislative History of Casino Gambling Legislation in Maine (Feb. 1995) (unpublished compilation, on file at the Maine State Law and Legislative Reference Library). Washington County has experienced unemployment levels of between 12% and 14%, although the combined rates of unemployment on the Passamaquoddy Tribe's two reservations there is about 50%. *See* A. Jay Higgins, *King Stands Firm Against Casino Plan*, BANGOR DAILY NEWS, Feb. 16, 1996, *available in* 1996 WL 2186141. Governor King has promised to help the Passamaquoddy Tribe find other alternatives to gambling that would improve their economic situation. *See id.*

321. *See generally* Legislative History of Casino Gambling Legislation in Maine (Feb. 1995) (unpublished compilation, on file at the Maine State Law and Legislative Reference Library) (testimony before the Judiciary Committee on L.D. 1266).

322. A bill introduced by the Passamaquoddy Tribe Representative in the Legislature proposing a voter referendum on the issue of an Indian casino was offered in February 1997 but was withdrawn by tribal leaders soon thereafter. *See* L.D. 970 (118th Legis. 1997).

323. *See* ME. REV. STAT. ANN. tit. 17, § 314-A (West Supp. 1996-1997) (permitting federally recognized Indian tribes to operate high-stakes bingo games on trust lands). In January 1997, State Representative George Kerr (D-Old Orchard Beach) introduced a bill which would have permitted the town of Old Orchard Beach to hold high-stakes beano games, an activity available only to Indians. *See* L.D. 7 (118th Legis. 1997). This bill failed to pass. Maine Tribes have also proposed legislation, seeking to expand the number of weekends per year that high-stakes beano games could be offered from 27 to 52. *See* L.D. 576 (118th Legis. 1997). The Legislature passed a compromise permitting 40 weekends, but could not garner enough votes to defeat the governor's veto. *See* Comm. Amend. A to L.D. 576, No. H-146 (118th Legis. 1997).

324. The strained relations are illustrated by the legislative process surrounding a bill that

The most recent challenge for the Passamaquoddy Tribe has been local resistance to its plans to construct a $5 million high-stakes bingo hall on eighteen acres of its tribal land in Albany Township. Although the project received zoning approval by the State Land Use Regulation Commission (LURC) in November 1997, two residents have filed an appeal seeking revocation of the zoning change and development permit.[325] This parcel of trust land was considered to be the most developable by the Tribe for this purpose, since earlier attempts at bingo operations on its reservation lands Down East failed due to the remote location.[326]

In mid-August 1997, LURC held hearings on the Tribe's application for zoning and development permits.[327] LURC's deliberations were to focus on the environmental impact of the project and the needs of the community, not on the morality of gambling.[328] During the two days of contentious hearings, residents of the Albany Township community expressed their concerns about the project, which included: traffic volume, noise, inadequate roads and bridges, flooding, and septic leaks.[329] The resistance, however, was not limited to the project's alleged environmental impact.

In addition to the environmental concerns, several miscommunications during the hearings illustrated the divide between Maine Indians and non-Indians.[330] After one supporter of the bingo parlor chastised the opponents for being prejudiced against the Passamaquoddy Tribe, the audience heard a local farmer's written testimony questioning the "special privileges" afforded Indians in fishing and hunting on the land.[331] He wondered if those "privileges" extended to a project such as

---

Representative George Kerr introduced last year. *See* L.D. 1218 (117th Legis. 1995). The bill sought to legalize and regulate "gray machines," which are video poker and blackjack games that are legal so long as there is no payout (more often, however, the machines do make a payout). *See* Nancy Perry, *Legislators Leave Video Gambling Unregulated*, PORTLAND PRESS HERALD, Apr. 2, 1996, at 3B, *available in* 1996 WL 9652405. Kerr amended his bill to attract more backers, with one amendment explicitly prohibiting the Passamaquoddy and Penobscot Tribes from having the games. *See id.* The bill was ultimately rejected. *See id.*

325. *See* A. Jay Higgins, *2 Albany Residents Challenge Bingo Hall; Court Action Seeks LURC Zoning Change*, BANGOR DAILY NEWS, Dec. 19, 1997, *available in* 1997 WL 16993912.

326. *See* Austin, *supra* note 76. A bill to transfer into trust status additional tribal holdings of property contiguous to the Albany Township parcel has been carried over by the Legislature for consideration in 1998. *See* L.D. 964 (118th Legis. 1997).

327. The Tribe submitted these applications "under protest" because it believed that LURC did not have jurisdiction over the issue. *See* A. Jay Higgins, *Passamaquoddy Accuses Sheriff of Ethnic Slur*, BANGOR DAILY NEWS, Aug. 22, 1997, *available in* 1997 WL 118808836. The Tribe relied on the specific grant to them by the Legislature which allows federally recognized Indian tribes to operate high-stakes bingo. *See id.*; *see also* ME. REV. STAT. ANN. tit. 17, § 314-A (West Supp. 1996-1997).

328. *See* Higgins, *Passamaquoddy Accuses Sheriff of Ethnic Slur*, *supra* note 327.

329. *See* Austin, *supra* note 76.

330. As one example, a county official told the attendees that he did not want the project "to cost taxpayers one red nickel." *Id.* He later responded that he did not mean to offend anyone with his remark that some perceived as racist. *See id.*

331. *See id.*

this.[332] Also in dispute was whether the Tribe actually plans to build a casino on the site.[333] Tribal members have denied that the bingo parlor was only a first step towards a larger goal of a casino.[334] The Tribe, however, signed a loan agreement with a real estate investor which indicates a distinct interest in constructing a casino in the area.[335] Clearly, the issues of tribal sovereignty and "special" gambling rights are far from settled.

The Tribe has reason to be concerned about its project. The Tribe views this effort as one that could not only alleviate its depressed economic conditions but also advance tribal autonomy. The anticipated $2 to $3 million in revenues from the 43,000 square foot facility would help the Tribe fund its social and municipal programs.[336] The bingo parlor is expected to employ between fifty and seventy-five people.[337] With increased financial stability, the Tribe could work towards preserving its traditions, culture, and reservation populations. Considering the challenges that the Tribe has faced in gaining approval for other gaming ventures, the Tribe has wisely submitted to the Legislature a series of reforms to increase the Tribe's autonomy over its trust land.[338] Of the more than half-dozen bills, only one was carried over for further legislative consideration.[339]

VI. CONCLUSION: AS ONE DOOR CLOSES, WILL ANOTHER OPEN?

The die has likely been cast against Indian casino gambling in Maine. Nevertheless, a casino is probably not the answer to the Passamaquoddy Tribe's problems. Indeed, the Tribe seems to have channeled its energies into the bingo parlor in Albany Township. Absent any serious

---

332. *See id.*

333. The attorney for the Tribe denied such a scenario, but the opponents' attorney contended that it would be "'naive and foolish to believe' [the Tribe] wouldn't try to expand." *Id.*

334. *See* A. Jay Higgins, *Casino Part of Tribe's Loan Deal; Bingo Hall Already OK'd*, BANGOR DAILY NEWS, Dec. 12, 1997, *available in* 1997 WL 11887938.

335. *See id.*

336. At the hearings, tribal representatives presented the following statistics on the 1400-member community: a 58% unemployment rate; a 32% high school dropout rate; per capita income of $6000 to $7000 per year; and an average lifespan of only 47 years. *See* Austin, *supra* note 76. The high-stakes bingo operations of the Penobscot Nation Indians generated $2.4 million in fiscal year 1996 and earned the tribe profits of about $1.5 million. *See* Liz Chapman, *High-Stakes Games Prove Profitable for Penobscot Nation*, LEWISTON SUN-J., Sept. 28, 1996, at 1A.

337. *See* Phyllis Austin, *Plenty of Bucks and Questions Surround Albany Bingo Parlor*, MAINE TIMES, July 3, 1997, at 8, *available in* 1997 WL 8886400.

338. *See* L.D. 954 (118th Legis. 1997) (establishing a Passamaquoddy license plate); L.D. 955 (118th Legis. 1997) (renaming geographical locations in tribal territory); L.D. 956 (118th Legis. 1997) (repealing state law jurisdiction over Indian lands); L.D. 957 (118th Legis. 1997) (giving full faith and credit to tribal courts); L.D. 958 (118th Legis. 1997) (recognizing tribal moose hunting licenses); L.D. 965 (118th Legis. 1997) (creating a Passamaquoddy representative district); L.D. 966 (118th Legis. 1997) (subjecting persons on tribal land to tribal court jurisdiction).

339. *See* L.D. 964 (118th Legis. 1997) (transferring tribal holdings into trust). The other bills died in committee.

environmental implications, the bingo parlor could be a vehicle for positive changes in the Tribe. As tribes use their sovereignty to achieve economic self-sufficiency, their dependence on state and local governments decreases. Their traditions and pride are strengthened. Their young people stay. They can command respect as an independent government. But, change comes slowly, especially when it begins with gambling activities.

The issue of gambling in Maine is not likely to go away soon. Each year, the Legislature faces a myriad of bills that would expand, regulate, or prohibit gambling rights for Indians and non-Indians alike. In Maine's ever-changing political climate, Indian tribes are better off seeking approval for gaming proposals one step at a time. Whether tribal gaming proposals are approved or rejected, the state should continue to work with the tribes to develop sound economic opportunities, end discrimination, and promote understanding of cultural differences.

Sharon Wheeler