

Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming

Nicholas S. Goldin

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Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 Cornell L. Rev. 798 (1999)
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NOTE

CASTING A NEW LIGHT ON TRIBAL CASINO GAMING: WHY CONGRESS SHOULD CURTAIL THE SCOPE OF HIGH STAKES INDIAN GAMING

Nicholas S. Goldin[†]

INTRODUCTION	799
I. WHERE WE HAVE BEEN AND WHERE WE ARE: A BRIEF OVERVIEW OF THE HISTORY OF GAMBLING IN THE UNITED STATES.....	805
II. HOW WE GOT HERE: PLOTTING THE COURSE OF THE RECENT CASINO GAMBLING EXPLOSION	808
A. A History of Turbulent Federal-Tribal Relations	808
B. The Development of Gaming on Indian Reservations	810
C. Raising the Stakes: <i>Cabazon</i> , IGRA, and the Emergence of a Gambling Nation	815
D. The Emergence of a New National Pastime: High-Stakes Casino Gambling in the Wake of IGRA	819
III. WHERE WE ARE GOING: THE ADVERSE IMPACT OF CASINO GAMBLING ON AMERICAN COMMUNITIES	832
A. Watching the Same Story Unfold in a Different Century	832
B. The Undesirable Economic Effects of Casino Gambling.....	834
C. The Social Costs of Casino Gambling	835
D. The Adverse Impact of Casino Gambling on Charitable Gambling	838
IV. WHAT WE MUST DO: REVISING IGRA IN LIGHT OF THE LESSON OF THE LAST TEN YEARS	839
A. The Existing Opportunity for Congress to Re-Examine IGRA	839
B. A Proposal To Limit Indian Gaming to Those Types of Gambling Activities That a State Permits for General Commercial Purposes	844

[†] Candidate for J.D. 1999, Cornell Law School; B.A. 1996, Cornell University. The author is the Editor-in-Chief of the *Cornell Law Review*.

CONCLUSION	854
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FIGURES

FIGURE 1	822
FIGURE 2	823

INTRODUCTION

Over the last decade, the United States has undergone nothing short of a revolution in the availability of high-stakes gambling.¹ In 1988, casino gambling was legal only in Nevada and Atlantic City, New Jersey. Barely half of the American public characterized such high-stakes gambling as an acceptable method of generating public revenue.² Whatever the reason—perhaps the nation's historical moral disdain of gambling or the public's apprehension of the pernicious social and economic consequences³—for decades casino gambling simply could not grow beyond Nevada and New Jersey.

Between 1977, when casino gambling began in Atlantic City, and 1988, when Deadwood, South Dakota approved low-stakes casinos, as many as forty states made repeated attempts to legalize casinos through both legislative action and public referenda. But not one of those states successfully introduced commercial casino gambling.⁴ In 1988, however, high-stakes casino gambling unexpectedly began to spread across the nation at an unprecedented and explosive rate.⁵

¹ After November 1988, when Deadwood, South Dakota became the first jurisdiction since New Jersey to legalize casino gambling, see ANTHONY N. CABOT, *CASINO GAMING: POLICY, ECONOMICS, AND REGULATION* 3 (1996); PATRICK LONG ET AL., *WIN, LOSE, OR DRAW? GAMBLING WITH AMERICA'S SMALL TOWNS* 9 (1994), casinos opened in states across the nation, including Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oregon, Washington, and Wisconsin, see Patricia A. McQueen, *North American Gaming at a Glance*, INT'L GAMING & WAGERING BUS., Sept. 1998, at 20, 21.

² See GEORGE GALLUP JR., *THE GALLUP POLL: PUBLIC OPINION* 1989, at 127, 129 (1990) (reporting that 55% of those surveyed approved of legalizing casino gambling at resort areas in their states to help raise revenue).

³ For a comprehensive review of the religious, social, and economic objections to legal gambling, see CABOT, *supra* note 1, at 17-59. For other views regarding gambling, see N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 192 (1997) ("[P]ublic attitudes of ambivalence towards gambling may be traced to the nation's formative years."); Ward Morehouse III, *Gambling on Casinos—and Losing: New Jersey: Where Vested Interest and Public Interest Part Ways*, CHRISTIAN SCI. MONITOR, Mar. 29, 1982, at 12 ("The promise is golden, but communities that choose casinos as a way out of economic woes have found that losses—political influence-peddling, organized-crime activities, and social ills such as compulsive gambling—can outweigh winnings." (typeface altered)).

⁴ See Ward Morehouse III, *Gambling on Casinos—and Losing: Will Other States Follow Suit?*, CHRISTIAN SCI. MONITOR, Mar. 31, 1982, at 12; I. Nelson Rose, *Legal Gambling's Historic Triumph at the Polls*, GAMING INDUS. LITIG. REP., Dec. 1996, at 14, 14.

⁵ See *infra* text accompanying notes 63-68.

Since that year, casinos have opened both on Indian⁶ reservations and in states that long had prohibited high-stakes gambling.

Within a few years, gambling at casinos had become one of the nation's fastest growing industries⁷ and most popular leisure activities.⁸ Now open in some form in twenty-seven states,⁹ high-stakes casinos boast more visitors than the aggregate attendance of all professional and college football games, arena and symphony concerts, and theatrical events combined.¹⁰ And, despite casino gambling losses of almost \$24 billion in 1996 alone,¹¹ ninety-two percent of American adults now agree that casino gambling is an acceptable form of entertainment.¹²

How and why did casino gambling—an activity that had been unique to Nevada and Atlantic City for most of this century—spread so rapidly into more than half the nation in less than a decade? For years, many commentators have explained this recent expansion as part of the broader rise of nationwide gambling over the last three decades.¹³ They suggest that the growth of casino gambling since

⁶ For consistency, this Note uses the term "Indian" when referring to Native Americans because both the federal acts and judicial decisions that involve tribal gaming use this terminology. For a similar explanation of "Indian," see Karen S. McFadden, *The Stakes Are Too High To Gamble Away Tribal Self-Government, Self-Sufficiency, and Economic Development When Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807, 808 n.3 (1996).

⁷ See CRAPPED OUT 1 (Jennifer Vogel ed., 1997); see also Eugene Martin Christiansen, *The United States 96 Gross Annual Wager*, INT'L GAMING & WAGERING BUS., Aug. 1997, at 4, 15 (citing cable television and the computer industry among the small number of other industries that have experienced growth rates comparable to gambling).

⁸ See Keith David Bilezerian, Note, *Ante Up or Fold: States Attempt To Play Their Hand While Indian Casinos Cash In*, 29 NEW ENG. L. REV. 463, 463 (1995) (characterizing casino gambling as "America's newest pastime"); Marc Cooper, *America's House of Cards: How the Casino Economy Robs the Working Poor*, NATION, Feb. 19, 1996, at 11, 12 (same); see also Martin Koughan, *Easy Money*, MOTHER JONES, July/Aug. 1997, at 32, 32 ("Over the last five years, gambling has quietly become one of the nation's favorite forms of entertainment . . .").

⁹ See McQueen, *supra* note 1, at 21.

¹⁰ See Eugene Christiansen, *The United States 94 Gross Annual Wager*, INT'L GAMING & WAGERING BUS., Aug. 1, 1995, at 77.

¹¹ See Christiansen, *supra* note 7, at 13 chart 2, 32, 34.

¹² See Harrah's Entertainment, Inc., *Harrah's Survey of Casino Entertainment: Acceptance* (last modified 1997) <http://www.harrah.com/survey/ce97/ce97_acceptance.html> [hereinafter Harrah's] (reporting that 92% percent of American adults approved of casino gambling in 1996, but 30% would not gamble at casinos themselves).

¹³ See, e.g., ROBERT GOODMAN, *THE LUCK BUSINESS* 159 (1995) ("Government's promotion of casino-style ventures in the early 1990s was a quantum escalation in attempting to use gambling for economic development purposes."); REX M. ROGERS, *SEDUCING AMERICA: IS GAMBLING A GOOD BET?* 40-43 (1997); Blaine Harden & Anne Swardson, *America's Gamble—You Bet! It's the New, \$482 Billion Pastime*, WASH. POST, Mar. 3, 1996, at A1 ("It started slowly more than a quarter-century ago when state lawmakers, hungry for revenue and afraid to raise taxes, began enticing citizens to gamble. . . . Then, hungry for more revenue, they upped the ante with faster, more addictive games."); cf. Richard L. Worsnop, *Gambling Under Attack*, 6 CQ RESEARCHER, 769, 773 (1996) (noting that legal gambling tends to "rise when the economy slumps . . . [or when there is] 'a very strong impetus at the state level to introduce casinos for economic-development or job-creation purposes'").

1988 represents the next inevitable stage of an evolutionary process that began a quarter-century ago when states began to use lotteries and horse racing to revitalize slumping economies.¹⁴

The theory that emphasizes the use of gambling as a tool of economic development adequately explains the growth of noncasino gambling at other points in this nation's history. Pressure on revenue-starved states to find novel methods of raising cash, however, alone cannot account for the recent explosive growth of casino gambling. Instead, as this Note contends, this recent proliferation more likely resulted from Congress's decision in 1988 to authorize Indian tribes to conduct high-stakes gambling. By forcing many states to choose between losing revenue to nearby reservation casinos or to casinos in neighboring states and relaxing their own long-standing prohibitions on gambling, the Indian Gaming Regulatory Act of 1988 ("IGRA")¹⁵ catalyzed this recent expansion of casino gambling.¹⁶

According to the federal judiciary's interpretation, IGRA allows an Indian tribe to conduct any type of gambling activity that its state permits for any purpose. This authorization to conduct gambling applies even when a state allows a particular type of gambling activity only for the limited purpose of charitable fundraising.¹⁷ For instance, if a state so much as allows fire stations or school districts to conduct low-stakes roulette at "Las Vegas" charity nights, then under IGRA an Indian tribe also can offer roulette on its reservation.¹⁸ The difference is that the tribe can conduct the game on its own terms, not subject to state regulations limiting charitable gambling activities.¹⁹ In this example, the tribe could spin a roulette wheel twenty-four

(quoting William R. Eadington, director of the Institute for the Study of Gambling at the University of Nevada-Reno)).

¹⁴ See GOODMAN, *supra* note 13, at 59 ("The initiatives for [casino] expansion have come from . . . politicians hoping to create jobs, raise public revenues, and keep taxes down."); ROGERS, *supra* note 13, at 69-76; Gary K. Vallen, *Gaming in the U.S.—A Ten-Year Comparison*, CORNELL HOTEL & RESTAURANT ADMIN. Q., Dec. 1993, at 51, 51 ("Many experts believe the unparalleled popularity of lotteries has opened the door to other forms of legalized gambling. People who play state lotteries also are attracted to its many other forms: on-line lotto, passive games, keno, on-line numbers, and instant 'scratch and win' games.").

¹⁵ Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (1994)).

¹⁶ See *infra* Part II.D. The author first developed this argument, which this Note discusses at length, in Nicholas Goldin, *Misdeal: How the Federal Government Unintentionally Catalyzed the Greatest Proliferation of Legal Casino Gambling in United States History* (April 15, 1996) (unpublished manuscript, on file with author).

¹⁷ See *infra* text accompanying notes 201-11.

¹⁸ See GOODMAN, *supra* note 13, at 116 ("[I]f the state allows charity 'Las Vegas' nights with low-stakes roulette or blackjack, a tribe can include high-stakes roulette or blackjack in its reservation casino."); Bernard P. Horn, *Is There a Cure for America's Gambling Addiction?*, USA TODAY MAG., May 1997, at 34, 34; *infra* note 209 and accompanying text.

¹⁹ See *infra* note 211 and accompanying text.

hours a day, seven days a week, even though the state did not intend to permit high-stakes profit generating gambling when it authorized charitable gambling.

Congress never intended for IGRA to permit high-stakes tribal gaming in all forty-six states that allow some form of charitable gambling.²⁰ But that is exactly what happened. Admittedly, the new casinos have not only created new employment and business opportunities, generated tourism, and revitalized sluggish economies, but they also have provided new hope for some depressed towns and Indian reservations.²¹ Yet despite some examples of fantastic success with the new casinos, more than two hundred years of American gambling history confirm that legalized gambling, notwithstanding its short-term benefits, is a high-risk economic policy.²²

The problem that Americans face today is that "we appear not to be learning from our history."²³ Like the legal gambling activity that swept across the nation in the eighteenth and nineteenth centuries, the new casinos of the last decade generate substantial social, economic, and environmental costs that nongamblers ultimately must pay.²⁴ Experts long have cautioned that communities considering casino gambling carefully should weigh the anticipated economic benefits against the inevitable adverse consequences.²⁵ Indeed, in 1976,

²⁰ See McQueen, *supra* note 1, at 21 (reporting that 46 states permitted charitable gambling in 1998); *infra* note 200 (documenting that Congress did not intend to trigger the proliferation of high-stakes casinos in those states).

²¹ See *infra* notes 177-85 and accompanying text.

²² See I. Nelson Rose, *The Rise and Fall of the Third Wave: Gambling Will Be Outlawed in Forty Years*, in GAMBLING AND PUBLIC POLICY 65, 71 (William R. Eadington & Judy A. Cornelius eds., 1991) (noting that prior surges of legal gambling in U.S. history have ended "in scandal and ruin"); Keith S. Whyte, *Analysis of the National Gambling Impact Study Commission Act*, 1 GAMING L. REV. 9, 9 (1997) ("Governments often fail to consider . . . that gambling can bring economic problems to their jurisdictions that far outweigh any benefits.").

²³ *Casino Gambling in the United States: Testimony Before the House Comm. on Small Business*, 103d Cong. (1994), available in 1994 WL 513011 (statement of Earl Grinols, Professor of Economics, University of Illinois) [hereinafter Grinols].

²⁴ See John Warren Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 ARK. L. REV. 889, 917 (1995) (comparing the perceived benefits and the monumental costs of casino gaming, and concluding that "[w]hile some states and communities realize short-term profits from legalized gambling, it is clear that states and the nation as a whole suffer a net loss in the long-run when all the negative externalities of gambling are considered"); *infra* Part III.B, C.

²⁵ See, e.g., STATE OF NEW YORK, FINAL REPORT OF THE CASINO GAMBLING STUDY PANEL 26 (1979) (stating that "casino development in any area must first receive the approval of the local legislative body and then, through a mandated referendum, the approval of the people of the city . . . in which the casino/hotel would be located . . . [to] help to insure adequate public information and discussion of the issue" (emphasis added)); Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L. REV. 291, 328 (1995) ("[B]efore deciding to rely on gambling proceeds, policy makers should weigh the effectiveness of gambling as a revenue raising tool against any possible adverse side-effects."). For example, Atlantic City legalized casino gambling in 1976 only after a state commission evaluated its perceived benefits and anticipated drawbacks, and the voters ap-

the only federal commission ever to report on the state of nationwide gambling advised the federal government to maintain its long-standing policy of leaving to the states "the primary responsibility for determining what forms of gambling may legally take place within their borders."²⁶

In this light, it seems surprising that in 1988 Congress effectively would authorize the introduction of high-stakes casinos in any of the twenty-six states²⁷ that then permitted "one-night casino-style charity fund-raisers."²⁸ Without the extended public debate or critical analysis that usually accompanies such a watershed public policy development,²⁹ high-stakes casino gambling then spread into half the nation at an unprecedented pace.³⁰ By 1994, a leading professor on gambling economics had cautioned that "[t]he United States faces a problem, the size of which is only now beginning to be understood. The cause for alarm derives from the enormous costs and consequential social changes that are foreseen to accompany the spread of casino gambling to all parts of the country."³¹

Five years later, as the devastating costs of widespread casino gambling continue to mount, the urgency for the federal government to contain the growth of high-stakes gambling is growing, especially in states that do not allow commercial casino gambling but nevertheless must absorb the social and economic costs of tribal gaming. In fact, this growing uneasiness with the current magnitude of high-stakes gambling recently prompted Congress to commission the first federal study of the social and economic impact of gambling in more than two decades.³² Although the distribution of the report this summer certainly will focus the nation's attention on the effects of high-stakes

proved legalization in a statewide referendum. See 139 CONG. REC. E1367 (daily ed. May 26, 1993) (statement of Rep. Torricelli).

²⁶ COMMISSION ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA: FINAL REPORT 5 (1976) [hereinafter GAMBLING IN AMERICA] (typeface altered).

²⁷ See Michael P. Davis & Terri La Fleur, *U.S. & Canadian Gaming-at-a-Glance*, GAMING & WAGERING BUS., July 15, 1988, at 22, 22 fig. In 1998, 45 states allowed charitable gaming in addition to Nevada, which allows general commercial gambling on a statewide basis. See McQueen, *supra* note 1, at 21.

²⁸ Editorial, *Las Vegas, Connecticut*, N.Y. TIMES, May 11, 1991, at 22.

²⁹ Cf. 139 CONG. REC. E1367 (daily ed. May 26, 1993) (statement of Rep. Torricelli) (noting that IGRA instituted "the practical equivalency of de-regulated casino gaming across the country without the citizens of the United States or their elected representatives ever having made the decision to let that happen"); CABOT, *supra* note 1, at 10 ("When the gambling explosion occurred, most governments were ill-prepared to understand the impacts of the industry or its many components . . .").

³⁰ See Cooper, *supra* note 8, at 15 (comparing the spread of casinos to a "prairie wildfire").

³¹ Grinols, *supra* note 23.

³² For a comprehensive analysis of the act that authorized the study, see Whyte, *supra* note 22; see also Alan K. Ota, *Casinos Look To Improve Their Odds on Capitol Hill*, CQ WKLY., Jan. 23, 1999, at 191, 191 (noting that the study "is expected to set up a showdown between

casino gambling, Congress already faces pressure to revisit its statutory misdeal, which transformed the United States into a gambling nation.

Against the backdrop of the nation's experience with casino gambling over the last several years, the question that Congress and legal scholars are debating is no longer whether Congress *should* clarify and revise IGRA, but rather what approach to adopt when it does so. In recent years, legal commentators overwhelmingly have asserted the pro-gaming position that Congress should amend IGRA to protect the future of Indian gaming.³³

In sharp contrast, this Note urges Congress to seize the opportunity that a recent Supreme Court decision has provided drastically to curtail the broad scope of high-stakes tribal casino gambling that the federal judiciary's broad interpretation of IGRA currently permits.³⁴ Congress should resurrect some of the bills of the last several years that sought to restrict high-stakes tribal casino gambling to those states, such as New Jersey and Nevada, that specifically allow commercial casino gambling or that affirmatively authorize tribes to engage in these enterprises.³⁵

To place the recent explosion of high-stakes casino gambling into its historical perspective, Part I of this Note presents a brief review of the nation's history of legalized gambling. After tracing the development of the federal Indian policy that actively encourages tribes to conduct gaming, Part II describes how tribal gaming has catalyzed the

the gaming industry and moral conservatives, among others. Lawmakers are expected to debate a variety of proposals to tighten regulations on gambling").

³³ See, e.g., sources cited *infra* note 371.

³⁴ In 1996 a Supreme Court decision that involved a central provision of IGRA left unanswered many questions about Indian gaming. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *infra* notes 339-66 and accompanying text. Since *Seminole Tribe*, both the tribes and the states have pushed Congress to clarify the uncertain status of tribal gaming that the decision left in its wake. See, e.g., *Seminole Tribe of Florida v. State of Florida: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. (1996) [hereinafter *Seminole Tribe Hearing*] (statements from representatives of the states, Indian tribes, and academia).

³⁵ In recent years, federal lawmakers have proposed a variety of revisions to IGRA, some of which would have secured the future of tribal gaming and others of which would have subjected tribal gaming to state commercial gambling law. For a sample of the bills that have sought to limit tribal gaming, see, for example, H.R. 1364, 104th Cong. (1995) (proposing that Class III gaming compacts not take effect without community approval of the gaming activity); H.R. 140, 104th Cong. § 2 (1995) (proposing that Congress amend IGRA to limit Class III gaming activity to those types of gambling that a state allows for "commercial, for-profit" purposes); H.R. 2287, 103d Cong. § 7 (1993) (proposing that Congress amend IGRA to limit Class III gaming activity to those specific types of gambling and the "methods of play" of those activities that a state expressly authorizes for "commercial, for-profit" purposes); H.R. 1953, 103d Cong. § 1 (1993) (proposing that Congress reverse the language in IGRA to limit Class III gaming activity to those types of gambling that a state permits "for a purpose other than a charitable purpose by any person, organization, or entity, other than a charitable organization"); H.R. 1261, 103d Cong. (1993) (proposing that Congress reverse the language in IGRA to prohibit all types of Class III gaming activity, except for types of gambling that a state specifically allows).

growth of casino gambling both on and off Indian reservations, including in states without reservations. Part III introduces the undesirable consequences of this gambling boom and explains why those social and economic costs drastically outweigh any perceived benefits. In Part IV, this Note argues that Congress should use the uncertainty about Indian gaming that a landmark 1996 Supreme Court decision produced as a springboard to clarify the IGRA's meaning.

This Note concludes by proposing that Congress curtail the scope of Indian gaming to those particular types of gambling that a state specifically authorizes for general commercial purposes. This proposal incorporates one exception: communities surrounding a proposed tribal casino would have the option voluntarily to permit the tribe to conduct high-stakes gaming for profit despite the state's existing prohibition against it.

I

WHERE WE HAVE BEEN AND WHERE WE ARE: A BRIEF OVERVIEW OF THE HISTORY OF GAMBLING IN THE UNITED STATES

The history of legal gambling in the United States "is marked by dramatic swings between prohibition and popularity."³⁶ During at least three points in this nation's history, lawmakers and their constituents have hailed legal gambling as a magic elixir to relieve economic pressure.³⁷ After each of these waves of legalized gambling,³⁸ extended periods of prohibition have followed, during which virtually every state has forbidden all forms of gambling for all purposes,³⁹ including low-stakes lotteries.⁴⁰

The first of these waves of legalized gambling developed in the colonial era and ended with the rise of Jacksonian morality in the 1830s.⁴¹ The second wave spanned the mid-nineteenth century, when the need to finance post-Civil War reconstruction projects triggered a brief revival of state-sanctioned lotteries⁴² as well as the opening of casinos on the western frontier and in some large cities.⁴³ Toward the

³⁶ 5 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Gaming* 129 (1998).

³⁷ See Rose, *supra* note 22, at 70-75.

³⁸ See *id.* at 74-75.

³⁹ See, e.g., *infra* notes 44-45 and accompanying text.

⁴⁰ See, e.g., *infra* note 45 and accompanying text.

⁴¹ See NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976*, at 74-88 (1977) [hereinafter *THE LAW OF GAMBLING*]; I. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 95-96 (1992). During this period, states gradually enacted measures and constitutional amendments to prohibit lotteries. By 1862, every state except Missouri and Kentucky had banned lotteries. See *id.* at 96; Rose, *supra* note 22, at 74-75.

⁴² See Rose, *supra* note 41, at 96; Rychlak, *supra* note 25, at 300.

⁴³ See *THE LAW OF GAMBLING*, *supra* note 41, at 158-60, 373-77.

late 1800s, the policy pendulum once again swung away from legalized gambling.⁴⁴ By 1910, almost every state had outlawed all forms of gambling.⁴⁵ The third wave of legal gambling first appeared in 1931 when Nevada reintroduced casino gambling.⁴⁶ As the nation battled the Great Depression, twenty other states legalized pari-mutuel⁴⁷ wagering on horse and dog races.⁴⁸ In addition, several states legalized charitable bingo and charitable gambling at Las Vegas nights.⁴⁹

Despite the limited renaissance of legal gambling during the 1930s and 1940s, this third wave of legal gambling did not reach high tide until the last third of this century.⁵⁰ The first sign of the nationwide erosion of gambling prohibitions occurred in 1964, the year that New Hampshire introduced the first state-run lottery of the twentieth century.⁵¹ Other states quickly followed the lead of this small New England state,⁵² and by 1983 eighteen states had lotteries.⁵³ Over the

⁴⁴ See *id.* at 383-84. Newly admitted states in the Great Plains quickly adopted comprehensive antigambling statutes. See *id.* at 377-78. The federal government bolstered the antigambling crusade by requiring that the western territories that had been reluctant to adopt antigambling measures abolish gambling before joining the Union. See *id.* at 389-90. Similarly, the federal government required Arizona and New Mexico to prohibit gambling before their admission into the Union. See *id.* at 389-91.

⁴⁵ See *id.* at 398; 5 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Gaming* 129 (1998); I. Nelson Rose, *Gambling and the Law: Pivotal Dates* (Dec. 11, 1995) (unpublished manuscript, on file with author). Nevada banned casino gambling in 1909 and by 1911 the only legal gambling in the United States took place at race tracks in Kentucky and Maryland. See Rose, *supra* note 41, at 96-97.

⁴⁶ See Rose, *supra* note 41, at 97.

⁴⁷ "Pari-mutuel" betting is "a system of betting . . . in which those who bet on the winner share the total stakes minus a small percent for the management." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 1642 (1986).

⁴⁸ See Rose, *supra* note 41, at 97. For example, New York legalized pari-mutuel betting on horses in 1939. See NEW YORK STATE TASK FORCE ON CASINO GAMBLING, REPORT TO THE GOVERNOR 5 (1996) [hereinafter NEW YORK TASK FORCE].

⁴⁹ See, e.g., NEW YORK TASK FORCE, *supra* note 48, at 5 (noting that New York authorized charitable, religious, and certain nonprofit organizations to conduct bingo in 1957 and to conduct other games of chance in 1975).

⁵⁰ See Christiansen, *supra* note 7, at 10 ("The old Temperance Reform gambling prohibition continued essentially intact through [this] century's middle decades."); Rose, *supra* note 41, at 97 ("The big boom [of the third wave of legal gambling] began with the first legal state lottery opening in New Hampshire in 1964."); Rychlak, *supra* note 25, at 303 ("From the turn of the century until the mid 1960s, there was fairly little legalized gambling and no state sponsored gambling in the United States."); cf. Harden & Swardson, *supra* note 13 ("The third and largest wave of gambling in the United States did not really begin to roll until . . . 1991.").

⁵¹ See Rose, *supra* note 41, at 97; Richard L. Worsnop, *Lucrative Lure of Lotteries and Gambling*, 1 EDITORIAL RES. REP. 634, 638 (1990).

⁵² See Rychlak, *supra* note 25, at 303 ("New York followed . . . in 1967 and New Jersey . . . in 1970. By 1974, eleven states were on the lottery bandwagon." (footnote omitted)).

⁵³ See Michael P. Davis, *The 'Lotterizing' of America*, GAMING BUS. MAG., May 1983, at 6, 6 (including the District of Columbia and noting also that 27 other states as well as the federal government were considering lotteries at the time); see also Terri La Fleur, *Lottery Tidal Wave Washes over U.S.*, GAMING & WAGERING BUS., June 1986, at 1 ("[L]egislators are finding it difficult to stave off the tidal wave of support for lotteries.").

next ten years, various forms of noncasino legal gambling exploded across the nation.⁵⁴ By 1990, thirty-four states ran lotteries,⁵⁵ and forty-eight states—from the Pacific Northwest to the Bible Belt—permitted some combination of lotteries, keno, video poker devices, slot machines, charitable gambling, and pari-mutuel dog and horse wagering.⁵⁶

Curiously, despite this unprecedented revolution in “mild” forms of gambling activity⁵⁷ that began in the late 1960s and intensified in the 1970s and 1980s, casino-style gambling still existed only in Nevada and Atlantic City in 1988.⁵⁸ This relative paucity of casino gambling as late as 1988 was particularly remarkable because casinos were typically more profitable than any of the forms of gambling that had spread so rapidly among cash-strapped states during the previous several years.⁵⁹ In fact, when New Jersey voters approved casino gambling in Atlantic City in 1976, one expert predicted that by 1990 as many as twenty other states also would have legalized high-stakes casinos.⁶⁰ Although several states tried, not one state successfully legalized high-stakes casino gambling through either legislative action or public referenda between 1976 and November 1988.⁶¹

As late as October 1988, casino gambling still seemed unable to expand into new jurisdictions. In that year, for example, voters in Detroit overwhelmingly rejected a ballot measure to legalize casinos, despite strong support for the measure from the city’s longtime mayor.⁶² By 1990, however, this fourteen-year trend of no casino growth suddenly and unexpectedly had reversed itself. Between 1988 and 1995, the number of states permitting casino gambling jumped from two to

⁵⁴ See Rychlak, *supra* note 25, at 303 (“[N]ew games, locations, and variations have swept across the nation.”).

⁵⁵ See Mary Even & Terri La Fleur, *Gaming-at-a-Glance*, GAMING & WAGERING BUS., July 15-Aug. 14, 1990, at 52, 52 fig.

⁵⁶ See *id.* (citing Hawaii and Utah as the only two states without any form of legal gambling).

⁵⁷ Rychlak, *supra* note 25, at 305 & n.84 (explaining the distinction between low-stakes, mild forms of gambling, and high-stakes games).

⁵⁸ See Davis & La Fleur, *supra* note 27, at 22 fig.

⁵⁹ See Worsnop, *supra* note 13, at 778.

⁶⁰ See CABOT, *supra* note 1, at 3.

⁶¹ See Rose, *supra* note 4, at 14; Worsnop, *supra* note 51, at 636 (“[In] the past 25 years, efforts to establish Las Vegas-style casinos in places outside of Nevada have failed everywhere except in New Jersey . . .”). During the 1970s, several states, including Connecticut, Delaware, Iowa, Florida, Michigan, Minnesota, New Hampshire, South Dakota, and Wyoming, considered legalizing casino gambling. See Michael Hawkins, *Casinos and Land Use: Law and Public Policy*, 12 CONN. L. REV. 785, 785 & n.2 (1980). For example, in the November 1984 elections alone, seven states voted on proposals to legalize various forms of gambling, including lotteries, pari-mutuel wagering, and casinos. Of those seven proposals, the only two that failed were the two that involved the legalization of casino gambling. See *Election Results*, GAMING & WAGERING BUS., Nov. 1984, at 1 fig.

⁶² See Worsnop, *supra* note 51, at 636.

twenty-two.⁶³ Even in Detroit, casinos opened during this nationwide casino boom.⁶⁴

Now available in twenty-seven states,⁶⁵ casino gambling is one of the nation's fastest growing industries⁶⁶—with more than 175 million household visits to casinos annually⁶⁷—and represents the new “national pastime.”⁶⁸ A comparison of the broad scope of legal gambling today and the publicity surrounding the introduction of the New Hampshire state lottery thirty years ago suggests that the United States indeed has undergone a revolution in its acceptance of legal gambling.

II

HOW WE GOT HERE: PLOTTING THE COURSE OF THE RECENT CASINO GAMBLING EXPLOSION

A. A History of Turbulent Federal-Tribal Relations

Over the last two centuries, federal Indian policy has vacillated between separatism and assimilation.⁶⁹ In a seemingly unending quest for a viable solution to a long history of turbulent relations between the federal government and the tribes, each new Congress and President has experimented with different approaches to managing the relationship between the federal government and various tribes. This relationship has been strained since the mid-nineteenth century, when the government forced the tribes in the east to relocate to unsettled lands west of the Mississippi River.⁷⁰ By the mid-nineteenth century, after non-Indians rapidly had settled undeveloped regions in the

⁶³ Compare Patricia A. McQueen, *North American Gaming at a Glance*, INT'L GAMING & WAGERING BUS., Sept. 1, 1995, at 36, 36 fig. (reporting that 22 states allowed casino gambling in 1995), with Davis & La Fleur, *supra* note 27, at 22 fig. (reporting that two states allowed casino gambling in 1988).

⁶⁴ See *infra* text accompanying note 245.

⁶⁵ See McQueen, *supra* note 1, at 21.

⁶⁶ See *supra* note 7 and accompanying text.

⁶⁷ See Harrah's, *supra* note 12.

⁶⁸ Harden & Swardson, *supra* note 13.

⁶⁹ See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 13 (1987); Allison Fabyanske Eklund, Casenote, *When Losing Is Winning: American Indian Tribal Sovereignty Versus State Sovereignty After Seminole Tribe v. Florida*—116 S. Ct. 1114 (1996), 20 HAMLINE L. REV. 125, 132-35 (1996); see also WILLIAM A. BROPHY & SOPHIE D. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 180 (1966) (noting that the federal government's relationship with Indian tribes has shifted “between making treaties with Indian tribes as land-owning, autonomous nations and compelling them to live as wards of the government, segregated on reservations”).

⁷⁰ See Act of May 28, 1830, ch. 148, 4 Stat. 411; see also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 78-92, 122-23 (1982 ed.) (describing the federal government's efforts to relocate American Indians).

West, the federal government gradually implemented the reservation system.⁷¹

In the late nineteenth century, Congress tried to assimilate Indians into mainstream America by dividing tribal reservations into separate parcels and assigning them to individual Indians.⁷² In 1889, the Commissioner of Indian Affairs succinctly expressed the government's objective: "The American Indian is to become the Indian American."⁷³ By 1934, however, the government had deemed its attempt to assimilate the nation's Indians a failure.⁷⁴ Between 1934 and 1958, Congress radically and continuously shifted its approach to tribal-federal relations from a short-lived commitment policy, to an emphasis on tribal economic self-determination and political autonomy,⁷⁵ to a return to its prior assimilationist policy.⁷⁶

In 1958, Congress unofficially abandoned its plan to terminate federal guardianship of Indian tribes,⁷⁷ and President Lyndon Johnson initiated an era of tribal self-determination.⁷⁸ In the first of several presidential expressions of support for tribal self-determination,⁷⁹ Johnson stressed the need to provide tribes with a full share of the economic opportunity and standard of living that other Americans enjoyed.⁸⁰ Two years later, President Richard Nixon reiterated the government's commitment to Indian self-determination:

The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

. . . .

⁷¹ See COHEN, *supra* note 70, at 124.

⁷² See Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-380 (1994)); COHEN, *supra* note 70, at 130-32, 139.

⁷³ COHEN, *supra* note 70, at 139 (internal quotation marks omitted).

⁷⁴ See *id.* at 136, 146-47.

⁷⁵ The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)), barred any future divisions of tribal land, returned land to tribes, and authorized the establishment of tribal governments. See COHEN, *supra* note 70, at 147-49. The federal government wanted tribes to develop their own self-government. See *id.* at 147.

⁷⁶ See COHEN, *supra* note 70, at 152, 170-72. Although the government officially did not adopt termination until 1953, it developed the policy throughout the late 1930s and 1940s. See *id.* at 152.

⁷⁷ See *id.* at 180.

⁷⁸ See *id.* at 184.

⁷⁹ See *id.* at 184-88.

⁸⁰ See Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335, 336 (Mar. 6, 1968) (Lyndon B. Johnson) [hereinafter LBJ's Message].

... [W]e have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be fulfilled.⁸¹

Despite these presidential assurances, as well as several promising developments on the legislative and judicial fronts,⁸² the plight of the Indians remained precarious through the 1970s. Reservation economies were depressed,⁸³ unemployment rates among Indians were more than ten times the national average,⁸⁴ and sickness and poverty rates reached alarming levels.⁸⁵ Many Indians lived in isolated poverty, and some found shelter in makeshift homes like huts and automobiles, lacking plumbing, electricity, and heat.⁸⁶ Conditions further deteriorated as federal funding to tribes continued to dwindle.⁸⁷ As the 1980s approached, both the federal government and the tribes still needed to identify a viable means of tribal economic development. The answer was Indian gaming.

B. The Development of Gaming on Indian Reservations

Although gambling has been a part of tribal culture for centuries,⁸⁸ the modern version of commercial Indian gaming dates back only two decades.⁸⁹ Its legal roots lie in Florida, where in 1979 the

⁸¹ Special Message to the Congress on Indian Affairs, PUB. PAPERS 564, 565, 576 (July 8, 1970) (Richard Nixon).

⁸² See, e.g., Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608 (codified as amended at 26 U.S.C. § 7871 (1994)) (treating tribal governments as states for tax purposes); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n (1994)) (endorsing tribal self-determination); *Antoine v. Washington*, 420 U.S. 194, 196-97 (1975) (enforcing the rights that tribes acquired in treaties with the federal government before formal treaty-making practice ended); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (declaring that tribes have a right "to make their own laws and be ruled by them" (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959))); COHEN, *supra* note 70, at 196, 200-02 (noting federal legislation to expand reservation economies); Anne Merline McCulloch, *The Politics of Indian Gaming: Tribe/State Relations and American Federalism*, *PUBLIUS: J. OF FEDERALISM*, Summer 1994, at 99, 103 (summarizing judicial and legislative advances in tribal sovereignty).

⁸³ See Statement on Indian Policy, 1 PUB. PAPERS 96, 98 (Jan. 24, 1983) (Ronald Reagan) [hereinafter Reagan's Statement].

⁸⁴ See LBJ's Message, *supra* note 80, at 335.

⁸⁵ See *id.* at 336.

⁸⁶ See *id.* at 335.

⁸⁷ See *Indian Gaming Regulatory Act: Hearing on H.R. 964 and H.R. 2507 Before the House Comm. on Interior and Insular Affairs*, 100th Cong. 77 (1987) [hereinafter *IGRA Hearing*]; *id.* at 322 (statement of Terry Martin on behalf of the Chitimacha Tribe of Louisiana). During the Reagan presidency, the federal government continued to reduce funding of tribal programs and services. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 24 (1983).

⁸⁸ See *The History of Tribal Gaming*, *INDIAN GAMING*, June 1998, at 16.

⁸⁹ See Appellants' Reply to Motion to Dismiss on Affirm at 5 n.3, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1985) (No. 85-1708) ("Indian tribes have not traditionally conducted high stakes, gambling operations catering primarily to non-Indians

Seminole Tribe opened one of the nation's first high-stakes bingo parlors on its reservation near Fort Lauderdale.⁹⁰ Although Florida law prohibited commercial gambling, it permitted charitable organizations to conduct bingo as a fund-raising activity.⁹¹ Like most other states that allow charitable gambling, the Florida statute narrowly defines the permissible scope of gambling by nonprofit organizations.⁹² The Seminole Tribe's bingo hall did not even remotely fall within Florida's charitable bingo exception: not only did the tribe generate a profit and compensate the game operators, but the hall also was open six days per week and offered jackpots that exceeded the statutory \$100 limit.⁹³

Florida officials threatened to enforce its prohibition on commercial gambling against the Seminole Tribe.⁹⁴ Although states generally do not have either criminal or civil jurisdiction over activities on tribal land,⁹⁵ Public Law 280⁹⁶ provides Florida and several other states with criminal and limited civil jurisdiction over these activities.⁹⁷ In *Seminole Tribe v. Butterworth*,⁹⁸ however, the Fifth Circuit held that Florida, despite its status as a Public Law 280 state, did not have the authority to enforce its commercial gambling ban against the Seminole Tribe's bingo operation.⁹⁹

The Fifth Circuit based its decision to protect tribal bingo on a distinction that the Supreme Court drew between activities that a state regulates and activities that a state completely prohibits.¹⁰⁰ In *Bryan v.*

..."); MARK MANSON & DANIEL ZEFF, DONALDSON, LUFKIN & JENRETTE SEC. CORP., GAMING 37 (1995) ("While limited American Indian gaming operations have existed in the United States since the late 1970s, it was not until the passage of the Indian Gaming Regulatory Act (IGRA) in 1988 that full-scale Indian casinos were authorized and began to proliferate.").

⁹⁰ See *Seminole Tribe v. Butterworth*, 491 F. Supp. 1015, 1016 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (5th Cir. 1981).

⁹¹ See *id.* at 1018-19.

⁹² See *id.* at 1018-20.

⁹³ See *id.* at 1016-17.

⁹⁴ See *id.* at 1017; Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 169 (1990).

⁹⁵ See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (quoting U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

⁹⁶ Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. §§ 1161-1162 (1994), 25 U.S.C. §§ 1321-1322 (1994), 28 U.S.C. § 1360 (1994)) (providing to enumerated states jurisdiction "with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such states, and for other purposes").

⁹⁷ See *id.* Public Law 280 allows states to acquire its grant of jurisdiction by adopting all or part of it via statute or constitutional amendment. See 25 U.S.C. §§ 1321-1322 (1988). In 1961 Florida became a Public Law 280 state. See FLA. STAT. ANN. § 285.16 (West 1991).

⁹⁸ 658 F.2d 310, 316 (5th Cir. 1981).

⁹⁹ See *id.* at 316.

¹⁰⁰ See *id.* at 312-16.

Itasca County,¹⁰¹ the Supreme Court held that while Public Law 280 confers state criminal jurisdiction over activities that a state prohibits altogether, it does not provide general civil regulatory jurisdiction over activities that a state merely regulates.¹⁰² Noting that the charitable bingo statute at issue did not prohibit bingo altogether but rather "regulate[d it] by imposing certain limitations to avoid abuses,"¹⁰³ the Fifth Circuit classified the law as an exercise of Florida's regulatory authority. The court then concluded that Florida could not enforce its commercial gambling ban on the Seminole Tribe's reservation.¹⁰⁴

Although it may not have been evident in 1981, the Fifth Circuit's restrictive interpretation of Public Law 280's grant of criminal jurisdiction in the context of tribal gaming profoundly impacted the future of both legal gambling and Indian economic self-determination. *Seminole Tribe* expanded a narrow charitable gambling law into a legal loophole for high-stakes, profit-generating Indian bingo. Following the Fifth Circuit's lead, at least seven other federal courts upheld the right of tribes to conduct high-stakes bingo for profit in other states that barred general commercial gambling but allowed nonprofit organizations to conduct low-stakes charitable bingo.¹⁰⁵ In so doing, the federal judiciary opened the floodgates to high-stakes tribal bingo in any of the forty-five states that by the mid-1980s had allowed religious, educational, and fraternal organizations to conduct bingo for charitable fund-raising purposes.¹⁰⁶

To a large extent, tribal bingo spread so rapidly across reservations because the federal government shared with the tribes an interest in tribal gaming. By rehabilitating reservation economies, gaming held the potential to reduce the tribes' involuntary but longstanding reliance on federal funding.¹⁰⁷ As early as 1983, President Ronald Reagan endorsed—at least indirectly—tribal gaming as a way of pro-

¹⁰¹ 426 U.S. 373 (1976).

¹⁰² *See id.* at 390.

¹⁰³ *Seminole Tribe*, 658 F.2d at 314.

¹⁰⁴ *See id.* at 313-16.

¹⁰⁵ *See, e.g.,* Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1189-90 (9th Cir. 1982); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245, 249-50 (D. Conn. 1986); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 720 (W.D. Wis. 1981); *see also* S. REP. NO. 480-541, 99th Cong. (1986) (listing several other cases that followed *Seminole Tribe*).

¹⁰⁶ *See* Michael P. Davis, *U.S. & Canadian Gaming-at-a-Glance*, GAMING BUS. MAG., Aug. 1984, at 52, 53 fig.; *see also* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZONA ST. L.J. 25, 47 (1997) ("After the *Butterworth* decision, . . . tribes across the country began to establish gaming enterprises. . . . [D]uring the 1980s, only five states actually prohibited all forms of gambling.").

¹⁰⁷ *See infra* notes 177-85 and accompanying text.

moting Indian self-determination.¹⁰⁸ He pledged to advance tribal economic self-determination¹⁰⁹ by encouraging tribes to adopt "innovative approaches . . . [to] overcome the legislative and regulatory impediments to economic progress."¹¹⁰ Reagan declared: "This administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs."¹¹¹

The Department of the Interior implemented Reagan's policy initiative throughout the 1980s by encouraging tribes to open high-stakes bingo parlors.¹¹² The Interior Department even provided tribes with grants and guaranteed loans to help finance the construction of the necessary facilities.¹¹³ As a result, tribal gaming eventually "crept up on the White establishment so slowly and quietly that it went unnoticed until it had taken hold around the country."¹¹⁴ By 1986, almost 110 tribes conducted some combination of bingo and card games.¹¹⁵ Jackpots generating an annual total of approximately \$100 million¹¹⁶ became the prime source of funding for many tribes.¹¹⁷ The tribes used the money to develop education, economic, and health programs¹¹⁸ that did not exist just a decade earlier.

It did not take long before the tribes faced opposition from state governments that were unwilling to tolerate high-stakes tribal gaming. As federal, state, and tribal authorities disagreed over the applicable law that should govern these operations,¹¹⁹ the rapid proliferation of sizable Indian gaming operations intensified the need for a nation-

¹⁰⁸ See Reagan's Statement, *supra* note 83, at 96 (endorsing tribal self-determination); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987) (citing Reagan's statement in upholding Indian gaming); *IGRA Hearing*, *supra* note 87, at 78 ("The proliferation of tribal gaming operations was . . . encouraged by President Reagan's Indian Policy Statement . . .").

¹⁰⁹ See Reagan's Statement, *supra* note 83, at 96.

¹¹⁰ *Id.* at 99.

¹¹¹ *Id.* at 97.

¹¹² See *Cabazon*, 480 U.S. at 217. Within two months of President Reagan's broad endorsement of tribal autonomy, the Department of the Interior warned that it would oppose any congressional attempt to subject Indian tribes to state gambling laws. See *id.* at 217 n.21.

¹¹³ See *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245, 246 (D. Conn. 1986); S. REP. NO. 99-493, at 5 (1986).

¹¹⁴ Senator James Abourezk, *Introduction to* AMBROSE I. LANE, SR., *RETURN OF THE BUFFALO: THE STORY BEHIND AMERICA'S INDIAN GAMING EXPLOSION* at xviii (1995).

¹¹⁵ See Sokolow, *supra* note 94, at 151.

¹¹⁶ See S. REP. NO. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3072.

¹¹⁷ See Thomas L. Wilson, *Indian Gaming and Economic Development on the Reservation*, 68 MICH. B.J. 380, 380 (1989).

¹¹⁸ See Sokolow, *supra* note 94, at 151.

¹¹⁹ See Anthony J. Marks, Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L.J. 157, 164 (1996).

wide regulatory framework for Indian gaming.¹²⁰ By 1983, Congress had begun to debate Indian gaming¹²¹ and the reconciliation of three distinct interests. First, the federal and state governments expressed concern that organized crime would infiltrate and corrupt tribal gaming operations.¹²² Second, the states disliked the idea of unregulated, untaxable high-stakes gambling within their borders.¹²³ Third, many tribes not only needed gaming to survive,¹²⁴ but they resented the perceived intrusion of federal or state regulations on their sovereignty.¹²⁵

In 1987, the Supreme Court pre-empted the congressional attempt to enact Indian gaming regulations by issuing a landmark decision that transformed tribal bingo into a billion-dollar high-stakes gaming industry.¹²⁶ As Part II.C discusses in greater detail, the Court declared that tribes may conduct profit-generating gambling free from state interference in any state that does not prohibit all forms of gambling.¹²⁷ The Court ruled that the existence of even a limited amount of legal gambling in a state—including a state lottery—is enough to open the door to high-stakes casino gambling on Indian reservations.

¹²⁰ Not until 1988 did either the federal government or the states have any regulatory scheme to govern tribal gaming. See 5 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Gaming* 129 (1998). This absence prompted congressional legislation because, above all other concerns, the federal and state governments feared that organized crime would infiltrate tribal gaming operations. See *IGRA Hearing*, *supra* note 87, at 78; Marks, *supra* note 119, at 164.

¹²¹ See S. REP. NO. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3073. For a history of Congress's repeated attempts to enact tribal gaming regulations in the years before the Court issued its *Cabazon* decision, see Sokolow, *supra* note 94, at 155-58.

¹²² See *IGRA Hearing*, *supra* note 87, at 465 (statement of John F. Duffy, National Sheriff's Assoc.) ("Indian gambling . . . is an issue for non-Indians alike, as gambling on Indian lands attracts [high] numbers of non-Indians and generates havens for organized criminals . . ."); INFORMATION PLUS, *GAMBLING: CRIME OR RECREATION?* 12 (1996). History confirms that high stakes gambling operations provide fertile ground for heightened criminal activity, especially organized crime activity. See PRESIDENT'S COMM'N ON ORGANIZED CRIME, *ORGANIZED CRIME AND GAMBLING* at vi (1985) (transcript of hearing); Sokolow, *supra* note 94, at 166; Eklund, *supra* note 69, at 142; Christiansen, *supra* note 7, at 47.

¹²³ See INFORMATION PLUS, *supra* note 122, at 12. In 1985, the National Association of Attorneys General endorsed state regulation of tribal gaming. See McCulloch, *supra* note 82, at 101.

¹²⁴ As one member of the Chitimacha Tribe of Louisiana stated:

Given the large cutbacks in federal assistance in recent years, the lack of a tax base, economic infrastructure or sufficient exploitable natural resources, many tribes found themselves in a situation of having to eliminate or drastically cut back critically needed services. Many tribes were facing high deficits and bankruptcy. Gaming revenue was the only viable revenue generating activity that many tribes could turn to in order to remain solvent and restore essential services.

IGRA Hearing, *supra* note 87, at 327 (statement of Terry Martin, council member of the Chitimacha Tribe of Louisiana).

¹²⁵ See INFORMATION PLUS, *supra* note 122, at 12.

¹²⁶ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹²⁷ See *id.* at 221.

C. Raising the Stakes: *Cabazon*, IGRA, and the Emergence of a Gambling Nation

Several tribes that experienced the economic benefits of gaming during the mid-1980s unsurprisingly sought to expand their gaming operations to include games more complex and more profitable than simple bingo.¹²⁸ But did the Fifth Circuit's reasoning in *Seminole Tribe* also immunize high-stakes casino gambling from the reach of state gambling prohibitions? In *California v. Cabazon Band of Mission Indians*,¹²⁹ the Supreme Court provided an answer: yes. The Court held that an Indian tribe may operate any form of gambling for profit, immune from state regulation and interference, so long as its state permits some form of gambling.¹³⁰

Under *Cabazon*, a state cannot regulate tribal gaming—even if this gaming lacks the state's approval—unless the state prohibits every form of gambling by all entities.¹³¹ In effect, the Court authorized tribes to open profit-generating, high-stakes casinos in any of the approximately thirty-one states that in 1988 both contained reservations and allowed some type of gambling, including charitable fund raising or a state lottery.¹³² The holding effectively immunized all forms of tribal gaming from the commercial gambling restrictions of any state that, for instance, so much as permitted the Rotary Club to hold bingo nights on Saturday evenings.

The Court expressed several reasons for its decision. First, the Court invoked the distinction between prohibitory and regulatory laws¹³³ on which the Fifth Circuit had relied in its 1981 decision to insulate tribal bingo from the reach of Florida's ban on commercial bingo.¹³⁴ The Court then ruled that California's charitable gambling statute was regulatory in nature because it did not prohibit gambling altogether, but permitted nonprofit organizations to sponsor low-stakes, charitable bingo nights.¹³⁵ Second, the Court held that the mere existence of a state lottery meant that high-stakes casino gam-

¹²⁸ See Eric J. Swanson, Comment, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 474 (1992).

¹²⁹ 480 U.S. 202 (1987).

¹³⁰ See *id.* at 220-22. California argued that two tribes within its borders did not have the authority to conduct bingo and poker games on their reservations. See *id.* at 205.

¹³¹ See *id.* at 211-12. The *Cabazon* Court never addressed the possibility that state governments might have a role in the regulation of tribal gaming operations.

¹³² See Christiansen, *supra* note 7, at 10-12; see also Amy L. Cox, Comment, *The New Buffalo: Tribal Gaming as a Means of Subsistence Under Attack*, 25 B.C. ENVTL. AFF. L. REV. 863, 866 (1998) ("Because most states permitted gambling in some limited instances, there were few states in which tribal gaming was illegal [following *Cabazon*].").

¹³³ See *Cabazon*, 480 U.S. at 208-11 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

¹³⁴ See *Seminole Tribe v. Butterworth*, 658 F.2d 310, 313-15 (5th Cir. 1981); *supra* notes 99-104 and accompanying text.

¹³⁵ See *Cabazon*, 480 U.S. at 210-11.

bling, even in violation of state law, did not offend the state's public policy on legal gambling.¹³⁶ Finally, the Court recognized California's fear that organized crime might infiltrate tribal casinos, but held that "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development" outweighed the state's concern.¹³⁷ The Court observed: "The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. . . . Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."¹³⁸

The *Cabazon* decision had tremendous implications for the future expansion of high-stakes casino gaming both on and off Indian reservations. Because charitable gambling laws typically place restrictions on stakes, frequency, and use of the profits, legislators historically have regarded charitable gambling "as a relatively harmless [activity], a means of raising needed money for worthy causes, not as a form of dangerous gambling" such as high-stakes commercial gambling.¹³⁹ As the law stood after *Cabazon*, however, the charitable gambling laws that many states had enacted as limited exceptions to their broad bans on commercial gambling¹⁴⁰ threatened to trigger a nationwide explosion of high-stakes, profit-generating casinos.

Following the *Cabazon* decision, Congress undoubtedly could have invoked its plenary power over Indian affairs either to prohibit or curtail tribal gaming or to authorize state governments to enforce their gambling restrictions on reservations.¹⁴¹ Given the potential of Indian gaming to stabilize tribal economies and further Indian self-sufficiency,¹⁴² however, Congress likely never would have considered

¹³⁶ See *id.* at 211 (noting "that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery").

¹³⁷ *Id.* at 216, 220-22.

¹³⁸ *Id.* at 218-19.

¹³⁹ Rose, *supra* note 22, at 73; see also Vallen, *supra* note 14, at 58 ("Bingo, especially for charity, is usually viewed as a mild form of gambling. Many states that are generally opposed to gambling have legalized bingo.").

¹⁴⁰ See THE LAW OF GAMBLING, *supra* note 41, at 400 ("Many states which otherwise refuse[d] to license gambling allow[ed] churches to hold weekly bingo. The legislatures apparently believe[d] that no private profit is made, as in commercial bingo, and the public is indirectly benefited by the increase in charity treasuries." (footnote omitted)). In 1931, Massachusetts became the first state to exempt charitable gambling from prosecution under its gambling laws. See *id.* at 111.

¹⁴¹ See *Cabazon*, 480 U.S. at 221 ("[S]urely the Federal Government has the authority to forbid Indian gambling enterprises . . ."); Swanson, *supra* note 128, at 496 ("Congress could have provided blanket regulations covering and restricting Indian gaming across the country."); *infra* note 377 and accompanying text (discussing Congress's plenary power over Indian affairs).

¹⁴² See Gaming Regulatory Act Amendments: Hearing on S. 1077 Before the Senate Comm. on Indian Affairs, 105th Cong. (1997) (testimony of David Hayes on behalf of Department of

either possibility at the time. In fact, long before the Court decided *Cabazon*, both houses of Congress already had begun to draft the current federal regulations that authorize Indian gaming.¹⁴³ In 1988, in reaction to the heightened urgency to address the unregulated nature of Indian gaming that the *Cabazon* decision left,¹⁴⁴ Congress rushed to give the states some measure of control.

The result was IGRA, the nation's first regulatory framework for tribal gaming.¹⁴⁵ IGRA not only represented a break with the federal government's historical deference to states in the area of gambling regulation,¹⁴⁶ but it marked the first time in U.S. history that the federal government expressly approved of casino gambling.¹⁴⁷ At its heart, IGRA was a "political compromise" that sought "to protect the same state regulatory interests that the Supreme Court had found unpersuasive in *Cabazon*, while still preserving gaming as a means of tribal economic development."¹⁴⁸

IGRA provides the general rule that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."¹⁴⁹ It then divides Indian gaming into three classes and establishes separate regulatory schemes for each one.¹⁵⁰ Class I and Class II include low-stakes social games, traditional Indian games, bingo, lotteries, and punch boards.¹⁵¹ Class III covers all other types of gambling, including traditional casino games, electronic and video gaming devices, and pari-mutuel horse and dog wagering.¹⁵² Under IGRA, only the tribes control Class I games,¹⁵³

the Interior) ("The availability of gaming as an economic development tool has enabled gaming tribes to generate their own revenue and to provide health, education and other governmental services to their people.").

¹⁴³ On February 19, 1987, the Senate began to debate the bill that Congress subsequently enacted as IGRA, and the Supreme Court announced its *Cabazon* decision on February 25, 1987. See *Cabazon*, 480 U.S. at 202; 1988 CIS ANNUAL LEGISLATIVE HISTORIES OF U.S. PUBLIC LAWS 494 (1989).

¹⁴⁴ See CABOT, *supra* note 1, at 8 ("Congress viewed the *Cabazon* case as unacceptable. In the words of US Senator Harry Reid of Nevada, it posed the potential 'for rapid and uncontrolled expansion of unregulated casino-type gambling on Indian lands.'").

¹⁴⁵ See 5 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Gaming* 129 (1998).

¹⁴⁶ See G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 925 (1978); Symposium, *Legal Aspects of Public Gaming*, 12 CONN. L. REV. 661, 661 (1980) ("The regulation of gambling has traditionally been entrusted to the states.").

¹⁴⁷ See CABOT, *supra* note 1, at 7.

¹⁴⁸ Tsosie, *supra* note 106, at 49.

¹⁴⁹ 25 U.S.C. § 2701(5) (1994).

¹⁵⁰ See *id.* § 2703(6)-(8).

¹⁵¹ See *id.* § 2703(6)-(7).

¹⁵² See *id.* § 2703(8).

¹⁵³ See *id.* § 2710(a)(1).

both the tribes and the National Indian Gaming Commission regulate Class II games,¹⁵⁴ and a comprehensive set of regulations governs Class III games.¹⁵⁵ The remainder of this Note focuses on Class III gaming, which has proven to be the most uncertain,¹⁵⁶ controversial,¹⁵⁷ and regrettable category of tribal gaming under IGRA.¹⁵⁸

IGRA allows a tribe to conduct Class III gaming in any state "that permits such gaming for any purpose by any person, organization, or entity."¹⁵⁹ In other words, IGRA authorizes a tribe to operate any type of gambling that its state permits for any purpose. Before a tribe can spin the roulette wheel or roll the dice, however, IGRA mandates that the tribes reach agreements, or "compacts," with their respective states that delineate the conditions and regulations for the Class III gaming operations.¹⁶⁰

The states did not have any role in the regulation of tribal gaming under the *Cabazon* regime.¹⁶¹ In exchange for including the states in the tribal gaming regulatory process, IGRA requires that the states show "good faith" in negotiating gaming compacts with interested tribes.¹⁶² Anticipating the possibility that states might stonewall a tribe's attempt to negotiate Class III compacts, IGRA authorizes tribes to sue states that refuse to negotiate in good faith.¹⁶³ If a state has not acted in good faith, then a federal court can order the state to enter a compact within sixty days.¹⁶⁴ If the state resists the court order, then a court-appointed mediator can select a compact from the parties' proposals, to which the parties must consent within sixty days.¹⁶⁵ As a last resort, IGRA authorizes the Secretary of the Interior to prescribe gaming regulations and impose them on the parties.¹⁶⁶

IGRA represents a substantial commitment by the federal government in support of tribal economic self-determination. Indeed, Con-

¹⁵⁴ See *id.* § 2710(b).

¹⁵⁵ See *id.* § 2710(d).

¹⁵⁶ See *infra* note 337 and accompanying text.

¹⁵⁷ See Tsosie, *supra* note 106, at 51 ("The heart of the controversy over Indian gaming, of course, concerns neither Class I nor Class II gaming, but rather 'high-stakes' or casino gaming, which is designated as Class III gaming . . .").

¹⁵⁸ See *infra* Part III.

¹⁵⁹ 25 U.S.C. § 2710(d)(1)(B).

¹⁶⁰ See *id.* § 2710(d)(1)(C).

¹⁶¹ See *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987); Alan C. Sweeney, *Whatever Happened to IGRA?*, INDIAN GAMING, Feb.-Mar. 1998, at 44, 44.

¹⁶² 25 U.S.C. § 2710(d)(3)(A).

¹⁶³ See *id.* § 2710(d)(7)(A)(i). In 1996, the Supreme Court invalidated this procedural mechanism on the grounds that it unconstitutionally abrogated the states' Eleventh Amendment sovereign immunity. See *infra* text accompanying notes 343-48.

¹⁶⁴ See 25 U.S.C. § 2710(d)(7)(B)(iii).

¹⁶⁵ See *id.* § 2710(d)(7)(B)(iv).

¹⁶⁶ See *id.* § 2710(d)(7)(b)(vii).

gress authorized tribal gaming expressly to advance "tribal economic development, self-sufficiency, and strong tribal governments."¹⁶⁷ Only time would tell whether IGRA would advance those objectives without creating a host of new problems.¹⁶⁸

D. The Emergence of a New National Pastime: High-Stakes Casino Gambling in the Wake of IGRA

In the decade since Congress enacted IGRA, casino gambling both on and off Indian reservations has increased by extraordinary proportions. After a string of federal court decisions broadly interpreted the permissible scope of Class III gaming under IGRA,¹⁶⁹ tribal bingo became a multibillion dollar gaming industry. In 1987, tribal gaming generated \$110 million,¹⁷⁰ or six percent of the total amount that all forms of legal gambling generated nationally.¹⁷¹ In 1996, estimates placed industry revenues at \$5.4 billion, which accounted for approximately five percent of all revenue that casinos in the United States generated annually.¹⁷² Much to the chagrin of the off-reservation gambling industry,¹⁷³ within two years of its opening, the Mashantucket Pequot Tribe's Foxwoods casino became the most profitable casino in the Western Hemisphere.¹⁷⁴ With \$1 billion in gross reve-

¹⁶⁷ *Id.* § 2702(1).

¹⁶⁸ See Sokolow, *supra* note 94, at 183 ("Only time will tell how well the IGRA, discussed in Congress for over five years, actually works.").

¹⁶⁹ See, e.g., *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991); *Mashantucket Pequot Tribe v. Connecticut*, 737 F. Supp. 169 (D. Conn. 1990); see also Swanson, *supra* note 128, at 488-89 (reviewing the judiciary's "lax interpretation" of the scope of the Class III gaming issue and reporting that "[a]s a result of favorable court decisions, reservation casinos are opening around the country").

¹⁷⁰ See 1987 *Gross Annual Wager*, GAMING & WAGERING BUS., Aug. 15, 1988, at 8.

¹⁷¹ See *id.* (reporting that gamblers in the United States legally wagered \$18.443 billion in 1987).

¹⁷² See Christiansen, *supra* note 7, at 13 chart 2 (reporting that tribal gaming accounts for more than \$4.731 billion of the \$24.638 billion generated at all casinos in the United States, taking into account revenue from Class III Indian operations, card rooms, bookmakers, and off-reservation commercial casinos). Another estimate places the total revenue from tribal gaming at \$10 billion. See ROGERS, *supra* note 13, at 45.

¹⁷³ See ROGERS, *supra* note 13, at 82-83.

¹⁷⁴ See Kenan Pollack, *A Tribe That's Raking It in*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 59. In 1991, shortly before Foxwoods opened, the chairman of the Tribe's gambling operations said he expected the casino to generate approximately \$80 million annually. He also said the casino would be "modest, about half the size of the smallest casino in Atlantic City, with a capacity of about 1,000 customers . . . [and] would be understated, forgoing neon and blending into the wooded surroundings." See Nick Ravo, *How a Tribe in Connecticut is Taking on Atlantic City*, N.Y. TIMES, Apr. 14, 1991, § 4 (Week in Review), at 6. In one month in 1998, by contrast, the 23-story Foxwoods hotel and casino generated more than \$65 million in revenue from its slot machines alone. See Alan K. Ota, *Indian Gambling Operations Find 'Devoted' Advocate in Rep. Kennedy*, CQ WKLY., Jan. 23, 1999, at 194; *Take is Up at Foxwoods*, N.Y. TIMES, Oct. 16, 1998, at B10.

nue annually, Foxwoods is also the largest casino in the world.¹⁷⁵ Under IGRA,

225 tribes in 27 states are operating newly legal gambling establishments on reservation lands. From one bingo hall in Florida in 1980, there are now more than 89 casinos and 170 high-stakes bingo operations with more opening almost every month. Half of the nation's 318 federally recognized tribes with a total of 1.9 million people are trying to get into gambling.¹⁷⁶

On some reservations tribal gaming indisputably has earned its characterization as the "new buffalo."¹⁷⁷ Tribes have used revenue that their gaming operations have generated to "support scholarships; construct health clinics, day-care centers, and teenage runaway and halfway houses; build new schools and hospitals; open hotels, restaurants, gas stations, and flower shops; fund retirement programs; and invest in hydroelectric plants."¹⁷⁸ For example, the Coeur d'Alene Tribe's casino in the State of Washington has created jobs for all of its 1490 members.¹⁷⁹ And gaming revenue has enabled Mille Lacs Band of Ojibwe in Minnesota to "build a hospital and a high school, and . . . [purchase] a bank that had once refused to grant it a loan."¹⁸⁰

In New York, economic development resulting from the Oneida Nation's Turning Stone casino has revived the 1100-member tribe from the brink of extinction.¹⁸¹ Before the casino opened in 1993, sixty percent of the tribe's members—many of whom lived on a thirty-two-acre plot in rusted trailer homes—were unemployed.¹⁸² The Oneida Nation is now the region's largest employer,¹⁸³ and its casino generated an estimated \$200 million in revenue and \$60 million in

¹⁷⁵ See Koughan, *supra* note 8, at 36.

¹⁷⁶ ROGERS, *supra* note 13, at 45.

¹⁷⁷ Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51 (1995); see also *Gaming Regulatory Improvement Act: Hearing on S. 1870 Before the Senate Comm. on Indian Affairs*, 105th Cong. 83 (1998) [hereinafter *GRIA Hearing*] (statement of Kevin Gover, Assistant Secretary for Indian Affairs, Department of the Interior) ("After centuries of economic stagnation, Indian tribes have seen gaming draw customers and businesses to their often remote land and has proved to be a successful means of stabilizing and improving tribal self-government and addressing various social and economic problems.").

¹⁷⁸ ROGERS, *supra* note 13, at 81.

¹⁷⁹ See *Tribe Starts New Business: Gambling Site on Internet*, N.Y. TIMES, July 5, 1997, at 8.

¹⁸⁰ Dirk Johnson, *Manna in the Form of Jobs Comes to the Reservation*, N.Y. TIMES, Feb. 21, 1999, § 4 (Week in Review), at 6.

¹⁸¹ See James Dao, *Once Destitute, Oneida Tribe Braces for Flood of Gambling Profits*, N.Y. TIMES, July 18, 1993, at 27.

¹⁸² See *id.*

¹⁸³ See James Dao, *Gambling in the Middle of Nowhere: Oneidas' Casino Wins Without Slots or Eastern Seaboard*, N.Y. TIMES, Nov. 10, 1997, at B1.

profits in 1996.¹⁸⁴ The Oneidas have used gambling profits to mobilize a forty-three-member police force, to purchase a cattle farm, and to finance the construction of a T-shirt printing factory, tribal housing, two hotels, an arena, a golf course, five gas stations, and community buildings.¹⁸⁵

But this fortune is only half the story: these new jobs, new homes, and new reservation programs have come at a hefty price.¹⁸⁶ High-stakes tribal gaming has brought an end to nearly a century during which virtually no casino gambling existed anywhere in the United States.¹⁸⁷ Indian gaming had this unintended and very troubling effect by catalyzing the proliferation of both Indian gaming and non-Indian, high-stakes casino gambling into regions outside its historical bases of Nevada and Atlantic City.

One only need compare the pace of casino expansion during the decade immediately before and the decade immediately after the enactment of IGRA to see this effect. Between 1977 and 1988, every attempt to legalize casino gambling failed.¹⁸⁸ During that period, as many as forty states considered casino-enabling bills, but not one of those states enacted such a proposal into law.¹⁸⁹ By contrast, in the ten years since Congress enacted IGRA, casinos have opened in twenty-five new states, including non-Indian commercial casinos in nine states.¹⁹⁰

It is important to dismiss two factors that might appear to account for the recent proliferation of casino gambling. One possible explanation is that consumer demand for casino gambling has increased in the last decade. That theory, however, lacks support. Aside from the successful 1976 vote to legalize casinos in Atlantic City (which faced virtually no active opposition from antigambling forces), voters did not approve high-stakes casino gambling in a statewide referendum until 1996, long after casinos had spread across the nation.¹⁹¹

¹⁸⁴ See James Dao, *Anxiety Growing Over Indian Claim in New York State*, N.Y. TIMES, Jan. 13, 1999, at A1; William Glaberson, *Struggle for Oneidas' Leadership Grows Bitter as Casino Succeeds*, N.Y. TIMES, June 17, 1996, at A1.

¹⁸⁵ See Dao, *supra* note 183; Dao, *supra* note 184.

¹⁸⁶ See, e.g., ROGERS, *supra* note 13, at 81-83.

¹⁸⁷ See 5 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Gaming* 129 (1998) ("Before the 1990s, most gaming was illegal in a majority of states. Since the passage of the [Indian Regulatory] Gaming Act, many state legislatures have approved gaming in a variety of forms."); McCulloch, *supra* note 82, at 107 ("Indian gaming . . . led to pressures on lawmakers to open gambling to all").

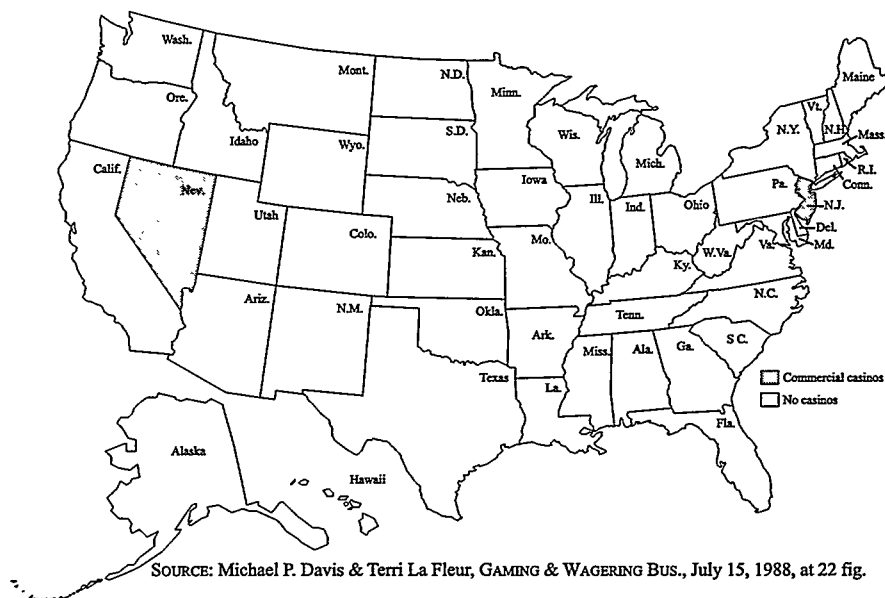
¹⁸⁸ See *supra* note 4 & 61 and accompanying text.

¹⁸⁹ See *supra* note 4 & 61 and accompanying text.

¹⁹⁰ Compare McQueen, *supra* note 1, at 21 (reporting that 27 states had casino gambling in 1998), with Davis & La Fleur, *supra* note 27, at 22 fig. (reporting that two states had casino gambling in 1988).

¹⁹¹ See Rose, *supra* note 4, at 14; I. Nelson Rose, *Gambling and the Law: Endless Fields of Dreams* 16 (Dec. 6, 1995) (unpublished manuscript, on file with author); see also Good-

FIGURE 1
CASINO GAMBLING BY STATE (1988)



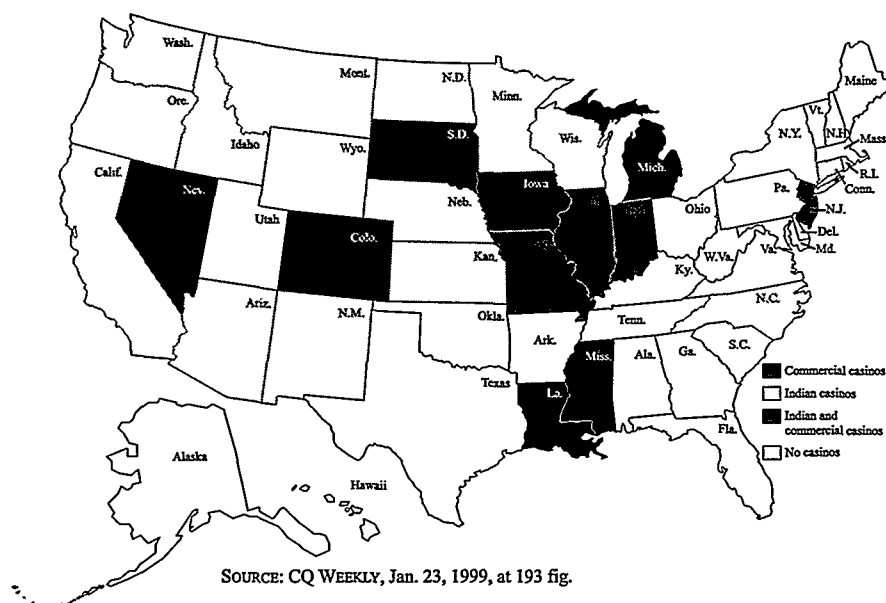
SOURCE: Michael P. Davis & Terri La Fleur, *GAMING & WAGERING BUS.*, July 15, 1988, at 22 fig.

Another common explanation for the recent casino gambling explosion states that economic pressure on cash-starved governments pushed more jurisdictions to embrace casino gambling.¹⁹² Such fiscal imperatives undoubtedly account for the surges of legal gambling in the colonial period and in the late nineteenth century, as well as for the rapid proliferation of lottery and electronic games throughout the

MAN, *supra* note 13, at 58 ("The rush to legalize casino gambling was not the result of any popular drive for more gambling in America. . . . [O]ur research . . . did not uncover a single grass-roots organization lobbying for more opportunities to gamble."); SEN. FRANK PADAVAN, *ROLLING THE DICE: WHY CASINO GAMBLING IS A BAD BET FOR NEW YORK STATE* at iii (1994) ("The trend toward wide spread casino gambling is not the result of a groundswell of popular demand. It is the gambling industry and the gambling industry alone that is beating the drums."). Moreover, in 1989, on the eve of the casino gambling explosion, Gallup reported that "the public remains ambivalent about the idea of legalized gambling." GALLUP, *supra* note 2, at 138.

¹⁹² See, e.g., CABOT, *supra* note 1, at 4-5 ("U.S. states and cities face severe budget problems and large capital costs resulting from deteriorating infrastructures. . . ."); GOODMAN, *supra* note 13, at 159 ("Government's promotion of casino-style ventures in the early 1990s was a quantum escalation in attempting to use gambling for economic development purposes."); Vallen, *supra* note 14, at 52 ("Many [states] have turned to gaming legislation as an answer to their plight. 'Fueled by state governments' appetite for tax revenue . . . gambling operations are popping up. . . ." (omission in original)); see also Christiansen, *supra* note 7, at 16 ("Governments do not often find economic development tools of such proven effectiveness to hand. The pressure to use it is unrelenting, and may overpower personal dislike of casinos or even public concern about compulsive gambling.").

FIGURE 2
CASINO GAMBLING BY STATE (1999)



1970s and 1980s.¹⁹³ But economic demands alone cannot explain the unprecedented growth of casino gambling during the early 1990s. The fiscal strain that gripped many states during the first half of this decade did not suddenly surface in 1989, when the first casinos opened outside Nevada and New Jersey.

Rather, most of the twenty-five states in addition to Nevada and New Jersey that now offer casino gambling actually faced equally severe economic shortfalls in the late 1970s and especially in the 1980s. In the 1980s, federal grants to state and local governments plummeted.¹⁹⁴ Many states faced large deficits and decreasing revenue because of weaknesses in the national economy,¹⁹⁵ including international competition, fiscal conservatism in Washington, more frequent tax revolts, mergers, downsizing, and post-Cold War layoffs.¹⁹⁶ During the thirteen-year period between the legalization of casino gambling in Atlantic City in 1976 and the introduction of casinos in South Dakota in 1988, lotteries and other noncasino forms of

¹⁹³ See Blakey & Kurland, *supra* note 146, at 927 & n.12.

¹⁹⁴ See Michael deCourcy Hinds, *Cash Crises Forces Localities in U.S. to Slash Services*, N.Y. TIMES, June 3, 1991, at A1.

¹⁹⁵ See Vallen, *supra* note 14, at 52. As a result, to avoid deficit spending during this period, 38 states reduced their spending. See *id.*

¹⁹⁶ See GOODMAN, *supra* note 13, at 159-61.

gambling proliferated, and more than two-thirds of the states tried to legalize casinos.¹⁹⁷ Yet not once during that period did any of those cash-strapped states successfully introduce casino gambling,¹⁹⁸ an extremely lucrative form of legalized gambling.¹⁹⁹

Instead, the catalyst for the casino explosion that engulfed the nation in the early 1990s was IGRA and the advent of high-stakes Indian gaming operations. This analysis does not suggest that Congress intended IGRA to trigger the proliferation of high-stakes casinos into states that allowed only charitable Las Vegas nights.²⁰⁰ But that is exactly what happened.

This unintended fallout began with the federal judiciary's unexpected transformation²⁰¹ of IGRA into a "legal loophole"²⁰² for high-stakes tribal casinos in states that long had outlawed commercial casino gambling.²⁰³ Congress intended IGRA to prohibit high-stakes tri-

¹⁹⁷ See *supra* notes 4 & 61 and accompanying text.

¹⁹⁸ See *supra* notes 4 & 61 and accompanying text.

¹⁹⁹ See Worsnop, *supra* note 13, at 778.

²⁰⁰ During a Senate hearing on the IGRA bill in 1987, a senator was asked to ensure that the Act would not authorize tribes to open casinos in states that permitted only charitable Las Vegas nights. The senator replied: "I can assure you that is my intent as author of the measure." Maura Casey, *Indians Bet on Gambling: Tribes Use Federal Law to Open New Casinos*, CHRISTIAN SCI. MONITOR, Aug. 12, 1991, at 19 (internal quotation marks omitted). In this regard, "[s]ponsors of [IGRA] . . . assumed that only in states like Nevada, which already has casinos, would casinos be allowed to open on tribal land." *Id.* In 1993, a member of the House of Representatives said: "Current law had been interpreted to mean that casino gaming can take place on tribal lands in a State that only allows such gaming as part of charitable Las Vegas nights. That was clearly not the intent of Congress." 139 CONG. REC. E1367 (daily ed. May 26, 1993) (statement of Rep. Torricelli). In 1998, a Senator expressed the same sentiments: "Congress didn't intend to permit gaming on Indian lands in contravention of State law." *GRIA Hearing*, *supra* note 177, at 83 (statement of Sen. Harry Reid); see also Rose, *supra* note 191, at 15 ("Congress never intended for there to be high-stakes casinos on Indian land simply because a state allows charities to have 'Las Vegas Nights.' . . . Few [congressmen] realized that dozens of states allowed low-stakes casinos and other gambling for charities when they voted for the Act."). In 1993, one of the authors of IGRA said: "I've watched Indian gaming spread haphazardly into more than two dozen states across the country. This rapid proliferation has left many uncertainties in its trail. Court decisions have opened holes that violate the intent of the act." Matt Connor, *Nevada, N.J. Legislators Sponsor Indian Gaming Bills*, INT'L GAMING & WAGERING BUS., July 15-Aug. 14, 1993, at 1, 44 (internal quotation marks omitted).

²⁰¹ See CABOT, *supra* note 1, at 8.

What many in Congress failed to anticipate was how the courts would interpret the [Indian Gaming Regulatory] Act. Most believed the Act would allow the tribes to conduct gaming only on the same basis as non-Native Americans. For example, if commercial blackjack for profit was illegal under state law, then it would be illegal on the reservation as well. . . .

The court cases have not followed this logic.

Id.

²⁰² Swanson, *supra* note 128, at 495 (internal quotation marks omitted).

²⁰³ In 1993, for example, the Oneida Nation in New York invoked its right under IGRA to open the state's first casino since the 1870s. See *Oneida Indians' Casino Permits 18-Year-Olds to Gamble*, N.Y. TIMES, Oct. 10, 1992, at 39. In fact, New York's constitution to this day expressly prohibits general gambling. See NEW YORK TASK FORCE, *supra* note 48, at 5. Simi-

bal gaming in those states that prohibited casino gambling as a matter of public policy.²⁰⁴ But the federal courts misinterpreted IGRA²⁰⁵ by refusing "to recognize a public policy distinction between allowing 'Las Vegas Nights' as charity fundraisers and condoning hard-core casino gambling."²⁰⁶ Beginning with the Second Circuit,²⁰⁷ a series of federal court decisions²⁰⁸ interpreting IGRA held that "if a state allowed volunteer fire departments to conduct occasional low-stakes Las Vegas nights, then an Indian tribe in that state could sponsor 24-hour, high-stakes casino gambling."²⁰⁹ Other states that allowed Las Vegas nights watched closely²¹⁰ as federal court decisions opened the loophole for high-stakes casino gambling by "allow[ing] tribes to operate casinos in some states where the government would jail non-Native Americans for the same activity."²¹¹

larly, in 1992, the Mashantucket Pequot Tribe opened Connecticut's first-ever casino on its reservation in the southeastern part of the state. See *infra* note 227 and accompanying text.

²⁰⁴ See Michael Abramowicz & Partha Chattoraj, *Developments in Policy: Federal Indian Law: Gambling in the Wake of Seminole*, YALE L. & POL'Y REV. 353, 357 (1996).

²⁰⁵ See *GRIA Hearing*, *supra* note 177, at 81 (statement of Sen. Harry Reid) ("[M]any judicial opinions of this act [are] telling us what we really meant. I believe that in most of their decisions, they did not know what we meant . . .").

²⁰⁶ Abramowicz & Chattoraj, *supra* note 204, at 357.

²⁰⁷ See *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990); see also Matt Connor, *Foxwoods: How Charity Gaming Paved the Way*, INT'L GAMING & WAGERING BUS., June 1, 1995, at 17 (reporting that the Pequot decision "was the first serious challenge to IGRA, . . . and it would change the face of gaming in the United States forever").

²⁰⁸ See, e.g., *Lac du Flambeau Bank of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 488 (W.D. Wis. 1991) (forcing the state to negotiate with the tribe over a Class III gaming compact). But see *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, 428 (9th Cir. 1994) (holding that the state has no duty to negotiate with the tribes over Class III gaming, except perhaps for some video slot machines); *GRIA Hearing*, *supra* note 177, at 82 (statement of Sen. Harry Reid) ("The *Rumsey* case accurately reflects the intent of IGRA. *Rumsey* held that IGRA does not require a State to negotiate over one form of class III gaming activity simply because it is legalized in another, albeit a similar form of gaming.").

²⁰⁹ Horn, *supra* note 18, at 34. In other words, tribes could conduct profit-generating, high stakes casino gaming in any state that banned casino gambling for profit but allowed charitable Las Vegas nights. See NEW YORK TASK FORCE, *supra* note 48, at 5-6; see also CRAP-PEL OUT, *supra* note 7, at 3 ("Suddenly, church basement 'Las Vegas Nights' became full-fledged 24-hour, tribal-run casinos."); PADAVAN, *supra* note 191, at 4 ("The [IGRA] law has been interpreted to mean that if a state allowed, for example, 'Las Vegas Nights,' even if only by charitable organizations, Indians could not be denied the opportunity to sponsor casino gambling. Indian tribes could offer the same games as the charities . . . , but would not be subject to the restrictions and rules applied to the charities."); Connor, *supra* note 207, at 17 ("The Foxwoods Casino resort here, operated by the Mashantucket Pequots, came into being because Connecticut allowed charity casino nights. . . . [S]everal other states have allowed Indian tribes to operate casino games on their reservations because the state allowed charity casino nights."); Kirk Johnson, *Indians in Connecticut Get Casino Gambling*, N.Y. TIMES, Oct. 26, 1990, at B1 ("[T]wo courts have so far agreed that 'Las Vegas nights,' while authorized for a different purpose, nonetheless open the door for the tribe to do the same thing on their own terms.").

²¹⁰ See Phil Hevener, *Indian Gaming Growth Explosive, but Act Under Fire*, INT'L GAMING & WAGERING BUS., Feb. 15-Mar. 14, 1991, at 1, 1.

²¹¹ CABOT, *supra* note 1, at 9.

For the most part, the states did not want tribal casinos to open within their borders. Because the states cannot tax or regulate activities on Indian reservations,²¹² they neither can collect taxes on money that gamblers wager at Indian casinos nor regulate the type or frequency of the games. Beyond the tax issue, tribal gaming also competes with non-Indian lotteries, keno, dog and horse racing, and other state-sanctioned gambling activities²¹³ that raise public funds.²¹⁴ Because gambling is a "zero-sum game,"²¹⁵ the lure of faster-paced games that exist only on Indian reservations inevitably drains money from state-sanctioned games.²¹⁶ In addition, tribal gaming operations, which are tax-exempt, collect money that gamblers otherwise might have spent on taxable goods and services.²¹⁷

The popularity of tribal casinos ultimately forced states to accept that the "introduction of Indian casinos into previously non-gaming states can pressure such jurisdictions into passing casino legislation for taxable operations to protect dollars that are flowing tax-free into the tribal economies."²¹⁸ Commercial gambling lobbyists mounted vigorous regional campaigns to convince wary state legislators that legalizing casino gambling was a win-win proposition.²¹⁹ The gambling industry's lobbyists argued that as long as Indian gaming existed

²¹² See Eklund, *supra* note 69, at 141-42. For a comprehensive analysis of taxation of Indian gaming, see Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 ARIZ. ST. L.J. 251 (1997).

²¹³ See MANSON & ZEFF, *supra* note 89, at 37; cf. Ellen Perlman, *The Gambling Glut*, GOV. ERNING, May 1996, at 49, 55 ("To make headway against the Indian gambling halls, the Oregon lottery has campaigned to introduce video slot machines.").

²¹⁴ See Abramowicz & Chatteraj, *supra* note 204, at 357.

²¹⁵ Worsnop, *supra* note 13, at 774 (internal quotation marks omitted); see also Perlman, *supra* note 213, at 52 ("States are finding that each new game impacts existing ones. There's only so much gambling money to go around.").

²¹⁶ See GOODMAN, *supra* note 13, at 27; Charles Babington, *Casinos Not a Sure Bet, Other States Discover*, WASH. POST, Aug. 6, 1995, at B1; see also NEW YORK TASK FORCE, *supra* note 48, at viii, x ("Where a track does not have casino-style gambling but there is casino gambling nearby, the track is hurt severely. . . . [T]he experience of other states suggests that a loss in lottery sales is likely to follow the legalization of casino gambling."); Wilson, *supra* note 117, at 381 ("The major reason for most state opposition to tribal gaming is that non-Indian interests perceive Indians as competing directly for the same revenues generated through state sanctioned gaming activities."); Wolf, *supra* note 177, at 55-59 (discussing the direct competition between state-sanctioned gambling ventures and tribal gaming enterprises); Eklund, *supra* note 69, at 142 (noting that Indian casinos pose "a competitive threat to existing state . . . gambling operations").

²¹⁷ See Babington, *supra* note 216. In Minnesota, for example, tribal casinos divert consumers from taxable, non-Indian businesses. See Swanson, *supra* note 128, at 490.

²¹⁸ MANSON & ZEFF, *supra* note 89, at 37.

²¹⁹ See GOODMAN, *supra* note 13, at 59 ("The initiatives for expansion have come from a well-heeled gambling industry hoping to increase profits . . ."); Kindt, *supra* note 24, at 889-90, 892-93 (discussing some of the promises about future benefits that gambling interests typically make when seeking to introduce gambling into new jurisdictions).

within their borders, "states might as well legalize commercial casinos, which, unlike Indian casinos, they would be able to tax."²²⁰

This argument was seductive.²²¹ Taking an "if you can't beat them, join them" approach,²²² states moved to legalize casino gambling in the early 1990s with a fury that the nation never before had experienced.²²³ Two examples concern the experiences of New York and Connecticut, two states that did not permit commercial casino gambling when Indian tribes opened high-stakes casinos within their borders.

In 1993, the Oneida Nation opened the first legal casino in New York since the 1870s.²²⁴ The following year—and for only the third time in the state's history—both houses of the New York legislature approved constitutional amendments to legalize commercial casino gambling.²²⁵ Lest it appear that this timing was merely coincidental, one should consider this remark by the state senator who sponsored the 1994 amendment to legalize commercial casino gambling: "I always opposed [casino gambling] in the past, . . . [b]ut the fact is, it's really here and maybe we ought to let it happen."²²⁶

²²⁰ Horn, *supra* note 18, at 34; see also Swanson, *supra* note 128, at 490 (noting this trend in Minnesota and Connecticut).

²²¹ See CABOT, *supra* note 1, at 5 (noting that the pressure to legalize casinos to compete with Native American casinos "is acute in those states where the reservations have casinos, but the rest of the state does not").

²²² Swanson, *supra* note 128, at 490 (internal quotation marks omitted); see also Remarks at a Town Meeting in San Diego, 1 PUB. PAPERS 680, 689 (May 17, 1993) (William J. Clinton) ("[E]ssentially, if they so choose, . . . any Indian land could become Las Vegas So the Governors are all real nervous about that, partly because they think that they'll have to turn their States into Nevada because the pressure to give the gambling rights to everybody else will get so great"); *Push on for Gaming Legislation*, CASINO J. NAT'L GAMING SUMMARY, June 19, 1995, at 6, 7 (noting that the author of the New York commercial casino-enabling bill argued that "[w]e have Indian casinos in our backyard . . . and thousands of people are leaving the state on a daily basis to spend their money in other states" (internal quotation marks omitted)).

²²³ Some lawmakers and newspapers anticipated this fallout. See, e.g., Editorial, *supra* note 28 ("One [tribal] casino would invite more, and the state would sink deeper into gambling."); Kirk Johnson, *Weicker, To Block Indian Casino, Seeks Repeal of Charity Gambling*, N.Y. TIMES, May 1, 1991, at A1 (reporting that Connecticut's governor feared that the opening of the Foxwoods tribal casino would pressure the state to legalize commercial casinos).

²²⁴ See *Oneida Indians' Casino Permits 18-Year-Olds to Gamble*, *supra* note 203.

²²⁵ See GAMING U.S.A. '95 at 382 (Harvey Wittemore & Morgan Baumgartner eds., 1995) (noting that both houses have approved constitutional amendments to legalize commercial casino gambling in 1970, 1980, and 1994). To legalize commercial casino gambling in New York, both houses of two consecutively elected sessions of the state legislature must pass identical concurrent constitutional amendments, which the voters must then approve in a general referendum. See NEW YORK TASK FORCE, *supra* note 48, at 2.

²²⁶ James Dao, *Legalizing of Casinos Gains in Albany*, N.Y. TIMES, Feb. 7, 1994, at B5 (internal quotation marks omitted); see also SENATE FINANCE SUBCOMMITTEE ON RACING, GAMING AND WAGERING, STATE OF NEW YORK, STAFF REPORT ON CASINO GAMING LEGALIZATION 112 (1994) ("Growth and introduction of casinos surround our State and are occurring on our State Indian lands. . . . The passage of this measure in 1994 leaves open a door

In February 1992, the Mashantucket Pequot Tribe opened the Foxwoods casino in southeastern Connecticut, which was the first legal casino in the state's history.²²⁷ Revenue from the state's pari-mutuel tracks and jai alai stadiums plummeted shortly after Foxwoods opened.²²⁸ The non-Indian gambling industry immediately mobilized a campaign to legalize thousands of slot machines across the state with the ultimate goal of permitting full-scale commercial gambling.²²⁹ The move ultimately died,²³⁰ but only because the state previously had given to the Pequots a statewide monopoly on slot machines in exchange for twenty-five percent of the revenue from the machines.²³¹ Topping \$100 million in 1993 alone, this revenue represented too great a temptation for the state to forfeit.²³²

The New York and Connecticut experiences with tribal gaming illustrate how "the economic competition between states' revenue considerations and Indian casinos often pushes states toward looser regulation of off-reservation gambling."²³³ This copycat effect that tribal gaming created also had powerful reverberations in states, unlike New York and Connecticut, that did not have Indian reservations within their borders.²³⁴ Resembling the geographic-driven diffusion of state lotteries in the 1970s and 1980s,²³⁵ casino-enabling bills

to a new type of economic development and competition."); *Pataki Calls Casinos 'Inevitable,'* CASINO J. NAT'L GAMING SUMMARY, Sept. 1995, at 10 (reporting that New York's governor, calling casino gambling "inevitable," advocated off-reservation casino gambling to compete with tribal gaming); *Gaming Hearings Commence*, CASINO J. NAT'L GAMING SUMMARY, May 2, 1994, at 6 ("Whether you like it or not, casino gambling is here. Isn't it time for New York taxpayers to get a piece of the action?" (quoting a New York state senator)).

²²⁷ See Kirk Johnson, *Pequot Casino Faces Challenges of Success*, N.Y. TIMES, May 3, 1992, at 46; George Judson, *Not a Grandma Moses Picture: Poker in the Woods*, N.Y. TIMES, Feb. 16, 1992, at A36.

²²⁸ See Kirk Johnson, *Hartford Senate Passes Bill To Legalize Slot Machines*, N.Y. TIMES, Apr. 30, 1992, at B8.

²²⁹ See *id.* In November 1992, Mirage Resorts proposed a full-service commercial casino in Bridgeport, Connecticut. See George Judson, *Mirage Resorts Offers Plan for Gambling on the Bridgeport Waterfront*, N.Y. TIMES, Nov. 13, 1992, at B4.

²³⁰ See Kirk Johnson, *Casino Bill Allowed To Die in Connecticut*, N.Y. TIMES, May 22, 1993, at 21.

²³¹ See Jonathan Rabinovitz, *For Pequots' Point Man, No Task Is Too Small*, N.Y. TIMES, Nov. 17, 1995, at B1. Under the agreement between the Tribe and the state, if the state allowed slot machines elsewhere, then the Pequots immediately would terminate their payments. See *A Bird in the Hand, or a Casino in Bridgeport?*, CASINO J. NAT'L GAMING SUMMARY, Jan. 23, 1995, at 2, 3.

²³² See Johnson, *supra* note 230.

²³³ Abramowicz & Chattoraj, *supra* note 204, at 357-58.

²³⁴ See GOODMAN, *supra* note 13, at 5-6. State legislators began to ask, "why should we allow our residents to spend large sums of money in other states instead of our own?" LINCOLN H. MARSHALL & DENIS P. RUDD, INTRODUCTION TO CASINO & GAMING OPERATIONS 133 (1996) (internal quotation marks omitted).

²³⁵ See John L. Mikesell & C. Kurt Zorn, *State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence*, 46 PUB. ADMIN. REV. 311, 311 (1986) ("Some states implemented lotteries because of the revenue they feared lost to their lottery neighbors. . ."). Two years after

spread in the early 1990s into states that faced no in-state competition from Indian casinos, but faced competition from casinos in neighboring states.

Casino gambling eventually spread into states without tribal casinos because "a jurisdiction that does not endorse gaming while its neighbors do risks having its local consumer and tourist assets hemorrhage into competing economies."²³⁶ Casinos overwhelmingly draw their patrons from the tourists and citizens of neighboring states.²³⁷ A

New Hampshire started the first state-run lottery of this century, *see supra* note 51 and accompanying text, neighboring New York introduced its own lottery, *see* NEW YORK TASK FORCE, *supra* note 48, at 5, which New Jersey quickly followed, *see* Rose, *supra* note 22, at 68. By 1982, although every state in the northeast had introduced a lottery, Arizona was the only state west of the Mississippi River that had done so. *See* Joseph P. Shapiro, *America's Gambling Fever*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 52, 57. By the mid 1980s, however, lotteries had begun to spread from coast to coast. *See* Andrew H. Malcolm, *Legal Gambling Grows to \$24 Billion Annually*, N.Y. TIMES, May 3, 1984, at A16 ("Another two dozen states, watching their residents spend millions on lotteries enriching the coffers of neighboring states, are considering establishing or expanding legalized gambling in some form."). Today, 37 states and the District of Columbia operate lotteries. *See* McQueen, *supra* note 1, at 21.

²³⁶ MANSON & ZEFF, *supra* note 89, at 84; *see also* NEW YORK TASK FORCE, *supra* note 48, at ii ("New Yorkers spent approximately \$2.35 billion last year on casino gambling and related expenses in three out-of-state destinations: Atlantic City; Las Vegas; and [the Mashantucket Pequot's] Foxwoods, Connecticut. Legalized casino gambling in New York could capture a substantial proportion of these dollars now expended elsewhere."); David Firestone, *Giuliani Says City Must Plan for Gambling*, N.Y. TIMES, Dec. 6, 1997, at A1 (reporting that New York City's mayor supports the legalization of commercial casino gambling within city limits because, in the mayor's words, "We're going to have gambling in New York City anyway . . ." (internal quotation marks omitted)); *Governor Announces Opposition to Gaming Referendum Bill*, CASINO J. NAT'L GAMING SUMMARY, May 1, 1995, at 2 (noting that pari-mutuel operators in Alabama wanted commercial casino gambling because of fear of competition from Mississippi casinos and anticipated competition from two forthcoming Indian casinos). This phenomenon is hardly new. In 1973, when legal casino gambling remained available only in Nevada, a report that New York had commissioned had warned that

[i]mportant sections of the State's economy have been damaged, often severely, by the lure of legal gambling in Nevada, Puerto Rico and the Caribbean Islands. More recently, moves toward legalization of additional forms of gambling in New Jersey, Connecticut, Massachusetts, Pennsylvania and other nearby states have raised the possibility of extensive additional damage.

JOSEPH J. WEISER, REPORT ON "RECOMMENDATIONS TO EXTEND LEGALIZED GAMBLING" 3 (1973).

²³⁷ *See Push on For Gaming Legislation*, *supra* note 222, at 7 (noting that a state senator who supported commercial casino gambling argued that "thousands of people are leaving the state on a daily basis to spend their money in [casinos in] other states" (internal quotation marks omitted)). For example, casinos in Mississippi draw an estimated 64% of their customers from other states. *See* UNIVERSITY ASSOCS., MICHIGAN INDIAN GAMING ENTERPRISES: ECONOMIC IMPACT OF MICHIGAN'S INDIAN GAMING ENTERPRISES 21-23 tbls.13, 14 (University Associates eds., 1994) (noting that Indian casinos in Michigan drew over 44% of their customers from 50-plus miles away, and an average of 18% from other states, with at least one such casino drawing 49% of its customers from other states); Jimmy Heidel, *Casino Gaming and Mississippi's Economic Development*, 64 MISS. L.J. at iii (Winter 1995) (introducing a law journal symposium on gambling in Mississippi); *cf.* STATE OF NEW YORK, *supra*

state that lacks casino gambling but is near a state that has casinos therefore gets hit twice. First, it forfeits revenue it would have derived from taxing goods that gamblers would have purchased with money that they instead lost at casinos in nearby states.²³⁸ Second, it bears gambling's myriad social costs when its gambling residents return home.²³⁹

Thus, the combination of regional competition for casino gamblers and prodding from the commercial gambling lobby pressured casino-free states to prevent revenue from flowing across state lines by legalizing casino gambling.²⁴⁰ For example, voters in Detroit rejected casino gambling in four consecutive referenda between 1976 and 1994.²⁴¹ Their opposition quickly diffused in May 1994 when a large casino opened across the river in Windsor, Ontario. In August 1994, by which time Detroit had become a primary feeder market for the Canadian casino,²⁴² voters in the Motor City approved the legalization of commercial casinos in a nonbinding referendum.²⁴³ Detroit's mayor then reversed his anticasino position and began to lobby vigor-

note 25, at 6 ("One of the major reasons for introducing casino gambling into New York State is the potential positive impact it would have on the tourist and related industries of the state.").

²³⁸ See *infra* notes 240-45 and accompanying text.

²³⁹ See Rychlak, *supra* note 25, at 326 ("If neighboring states have gambling, and people cross state boundaries to place their bets, the state without gambling may suffer the adverse consequences that are caused by gambling, without receiving the benefit of increased revenue."); see also *Gambling: Testimony Before the Senate Comm. on Governmental Affairs*, 104th Cong. (1995), available in 1995 WL 11869201 (statement of Tom Grey, Executive Director, National Coalition Against Legalized Gambling) [hereinafter Grey] ("[G]ambling States intentionally locate casinos along their borders with non-gambling States. By doing so, they export social problems, especially pathological gambling, to non-gambling [S]tates."); Earl L. Grinols, *Gambling as Economic Policy: Enumerating Why Losses Exceed Gains*, IL BUS. REV., Spring 1995, at 6, 11 (stating that "casinos shrink the economies of neighboring areas while sending many of the social costs home with the problem gamblers"). For example, 82% of the visitors at Casino Windsor in Ontario, Canada are Americans who return to the United States not only with less money to spend on taxable goods and services, but also with their gambling-related problems that could lead to more crime, alcohol abuse, and related expenses. See James T. Madore, *Windsor's Lesson: An Ontario City on U.S. Border Hits the Jackpot*, BUFFALO NEWS, Dec. 31, 1995, at A1; *infra* section III.C.

²⁴⁰ See Rychlak, *supra* note 25, at 326 ("Alabama, Arkansas, Florida, Louisiana, and Tennessee are all feeling pressure from the Mississippi casinos."); Cooper, *supra* note 8, at 15 (reporting that competition drove the diffusion of casino gambling throughout the Mississippi River Valley); Jeffrey Klein, *Bad Odds*, MOTHER JONES, July-Aug. 1997, at 3, 3 ("[G]ambling companies started lobbying nearby states to legalize gambling, arguing that new casinos were the only way to stop casino cash from flowing into [other states].").

²⁴¹ See *Detroit Mayor Warm to Casinos*, CASINO J. NAT'L GAMING SUMMARY, Aug. 29, 1994, at 5.

²⁴² See *Detroit Voters Approve Casino Gaming*, CASINO J. NAT'L GAMING SUMMARY, Aug. 8, 1994, at 1.

²⁴³ See *id.*

ously for commercial casino gambling.²⁴⁴ Predictably, in November 1996 Detroit legalized casino gambling, admitting its goal of preventing the flow of money across the Canadian border to Casino Windsor.²⁴⁵

This copycat scenario also bears responsibility for the introduction of non-Indian commercial casino gambling throughout the Midwest,²⁴⁶ where the nation's heaviest concentration of off-reservation casino gambling exists.²⁴⁷ In 1989, Iowa sparked a "prairie wildfire,"²⁴⁸ and over the next six years casino gambling swept across six states in the Mississippi Valley region.²⁴⁹ In anticipation of gaming on the three Indian reservations within its borders, Iowa approved limited-stakes²⁵⁰ commercial casino gambling on riverboats, effective 1991.²⁵¹

Following this first resurgence of legal riverboat gambling in the Midwest in a century,²⁵² "[a] panic immediately gripped the neighboring states."²⁵³ In 1990, neighboring Illinois and nearby Mississippi approved high-stakes casino gambling.²⁵⁴ To give their casinos a competitive edge over casinos in Iowa, neither Illinois nor Mississippi imposed any limits on maximum bets or total losses.²⁵⁵ In 1991, the

²⁴⁴ See Valarie Basheda, *Archer Gives Engler Big Picture on What Gambling Would Mean for Detroit*, DETROIT NEWS, May 31, 1995, at 2D; *Detroit Mayor Archer Now Favors Casinos*, CASINO J. NAT'L GAMING SUMMARY, Dec. 12, 1994, at 3.

²⁴⁵ See Evelyn Nieves, *Casino Envy Gnaws at Falls on U.S. Side*, N.Y. TIMES, Dec. 15, 1996, at 49; George Weeks, *Ex-Mayor Young Revels in Casino Gambling Approval*, DETROIT NEWS, Nov. 7, 1996, at 7A.

²⁴⁶ See Harden & Swardson, *supra* note 13 ("Fierce competition along the Mississippi has spilled over into states that had no casinos.").

²⁴⁷ See McQueen, *supra* note 1, at 21. By 1995, Mississippi had become the nation's third-largest casino jurisdiction, behind Nevada and New Jersey. See Rychlak, *supra* note 25, at 291.

²⁴⁸ Cooper, *supra* note 8, at 15 (describing the spread of gambling that followed Iowa's legalization).

²⁴⁹ Compare McQueen, *supra* note 63, at 36 fig. (reporting casino gambling in Illinois, Indiana, Iowa, Louisiana, Mississippi, and Missouri), with David Migoya & Terri La Fleur, *Gaming-at-a-Glance*, GAMING & WAGERING BUS., July 15, 1989, at 30 fig. (reporting casino gambling in Iowa). In 1991, one leading gambling analyst accurately predicted that "[I]ow-stakes and riverboat casinos will spread like ripples in a pool throughout the middle of the nation." Rose, *supra* note 22, at 68.

²⁵⁰ Patrons could bet a maximum of five dollars per hand and could lose no more than \$200 per visit. See CABOT, *supra* note 1, at 2.

²⁵¹ See MARSHALL & RUDD, *supra* note 234, at 130; Paul Doocey, *Not So Fast for Riverboat Growth*, GAMING & WAGERING BUS., Nov. 5, 1994, at 38, 38; see also Rick Pearson, *Riverboat Gambling Supporters Alter Bill, Prepare New Push*, CHI. TRIB., Jan. 5, 1990, at 4 (describing the debate over riverboat gambling in Illinois).

²⁵² MARSHALL & RUDD, *supra* note 234, at 130.

²⁵³ Cooper, *supra* note 8, at 15; see also Harden & Swardson, *supra* note 13 ("If Iowa hadn't done it, perhaps we wouldn't have done it," said Jim Edgar, the . . . governor of Illinois. "If we hadn't done it, perhaps those other states wouldn't have done it.").

²⁵⁴ See Doocey, *supra* note 251, at 38.

²⁵⁵ See CABOT, *supra* note 1, at 2; MARSHALL & RUDD, *supra* note 234, at 131 ("One of the main differences in the legislation was that there was no maximum loss per cruise.").

dominos continued to fall. Unwilling to watch states such as Illinois collect a twenty percent tax on the bets of out-of-state gamblers,²⁵⁶ Louisiana authorized high-stakes riverboat casino gambling without any loss limits and one land-based casino in New Orleans.²⁵⁷

In 1994, two additional Mississippi Valley states introduced casino gambling. Indiana legalized riverboat gambling with no restriction on individual losses,²⁵⁸ and Missouri approved several riverboat casinos without loss limits.²⁵⁹ That same year, the torrent of casino gambling turned full circle. Fierce competition from casinos in Illinois, Mississippi, Missouri, and Louisiana—all of which did not enact betting or loss limits—forced Iowa, which, ironically, triggered this regional chain reaction, to lift its limits on maximum bets and individual losses.²⁶⁰

III

WHERE WE ARE GOING: THE ADVERSE IMPACT OF CASINO GAMBLING ON AMERICAN COMMUNITIES

A. Watching the Same Story Unfold in a Different Century

A jurisdiction that legalizes gambling is itself playing the odds. It is betting that the economic benefits that sometimes flow from legal gambling will outweigh the adverse economic and social consequences. Although some jurisdictions might benefit from the short-term economic gains that follow the introduction of legal gambling,²⁶¹ the inevitable social and economic problems leave "a large residue of costs for the future."²⁶² For this reason, a public backlash ultimately has brought an end to every prior surge of gambling in U.S. history.²⁶³

The same adverse effects that have followed the prior explosions of gambling activity also have accompanied the casino gambling boom

Casino approval in Mississippi is especially significant because Mississippi went from "a rigid anti-gambling policy" to becoming the nation's third-largest casino state. *THE LAW OF GAMBLING*, *supra* note 41, at 275 (describing the growth of antigambling policies in southern states after the Civil War); *see* Rose, *supra* note 191, at 7 (discussing the role that competition among the states for revenue played in Mississippi's legalization of gambling).

²⁵⁶ *See* MARSHALL & RUDD, *supra* note 234, at 131 ("Illinois also levies a twenty percent tax on the gross gaming receipt.").

²⁵⁷ *See* CABOT, *supra* note 1, at 2; MARSHALL & RUDD, *supra* note 234, at 132.

²⁵⁸ *See* MARSHALL & RUDD, *supra* note 234, at 132.

²⁵⁹ *See id.* at 133.

²⁶⁰ *See* GOODMAN, *supra* note 13, at 5-6; MARSHALL & RUDD, *supra* note 234, at 130.

²⁶¹ *See* GOODMAN, *supra* note 13, at xiii.

²⁶² *Id.*

²⁶³ *See* CRAPPED OUT, *supra* note 7, at 9; *see also* Rose, *supra* note 22, at 72-78 (reviewing the rise and fall of the nation's two previous waves of gambling). One gambling analyst predicts that scandal and corruption also will lead to the downfall of the current wave of legal gambling: "The 1990s and the first decade of the 21st century will be the final boom. By 2029, it will all be outlawed, again, for a while." *Id.* at 83.

that began in 1989.²⁶⁴ In fact, the recent casino boom actually may prove more socially and economically destructive than the prior waves of nationwide gambling. The director of a recent study on gambling in the United States has reported that the new casinos are "producing a very different and much more troubling gambling economy than this country has ever experienced."²⁶⁵ At best, for both Indian and non-Indian communities, casino gambling has produced a "mixed bag."²⁶⁶ In Tunica, Mississippi, for instance, legal casino gambling has reduced the city's welfare rate by one-third, but crime in Tunica has dramatically increased.²⁶⁷

The lesson of the last decade is that "[n]ot every town can become the next Las Vegas,"²⁶⁸ a city in which taxes on the gambling activity of out-of-state visitors make it unnecessary for residents to pay income or inheritance taxes.²⁶⁹ It took the residents of some areas only a few years to accept this reality. In 1995, voters in Jefferson City, Missouri repealed a 1992 measure that legalized casino gambling on riverboats.²⁷⁰ Similarly, in the late 1980s, South Dakota and Colorado approved limited casino gambling in a few former mining towns.²⁷¹ Today, residents of those towns overwhelmingly find that their communities are no longer ideal places to live and would not advise other jurisdictions to legalize gambling.²⁷² By 1995, many proponents of legalized gambling in Mississippi also were "changing their tune."²⁷³

²⁶⁴ In 1991, one gambling analyst warned that [l]ike a prophecy fulfilled, it looks like we are doomed to repeat our history, having failed to learn the lessons of the past. Twice before in American history players could make legal bets in almost every state, but these waves of legal gambling came crashing down in scandal and ruin.

Rose, *supra* note 22, at 71.

²⁶⁵ GOODMAN, *supra* note 13, at 14.

²⁶⁶ LONG ET AL., *supra* note 1, at ix.

²⁶⁷ See Shapiro, *supra* note 235, at 56 (noting that "crime skyrocketed").

²⁶⁸ Rose, *supra* note 41, at 99; see also CRAPPED OUT, *supra* note 7, at 27 ("Las Vegas being one notable exception, casinos rarely do much good for the communities that host them."); William N. Thompson & Robert Schmidt, *Hey, Feds: Don't Botch the Workforce Miracle—Vegas*, 2 GAMING L. REV. 5, 5 (1998) ("[T]he city of sin has become the embodiment of the 'American Dream' Thirty million visitors will come to Las Vegas this year, and next year there will be even more visitors The M.G.M.—the largest Hotel [sic] in the world—turns away requests for 650 rooms each weekend.").

²⁶⁹ See Kurt Andersen, *Las Vegas, U.S.A.*, TIME, Jan. 10, 1994, at 42, 45 (noting that half of Nevada's public funds come from consumption taxes that out-of-staters mainly pay).

²⁷⁰ See *Voters Turn Thumbs Down on Gaming*, INT'L GAMING & WAGERING BUS., Dec. 1995, at 20 (citing election results).

²⁷¹ See *supra* note 1 and accompanying text.

²⁷² See LONG ET AL., *supra* note 1, at xi.

²⁷³ Rychlak, *supra* note 25, at 293 (internal quotation marks omitted).

B. The Undesirable Economic Effects of Casino Gambling

Although the gambling industry argues otherwise,²⁷⁴ the adverse economic impact of casino gambling exceeds any marginal, short-run economic benefits.²⁷⁵ It is true that new casinos have jumpstarted many local economies²⁷⁶ by energizing job growth,²⁷⁷ replenishing public revenue streams,²⁷⁸ generating tourism,²⁷⁹ and boosting retail sales.²⁸⁰ In 1994 alone, casino gambling generated \$1.4 billion nationally for state and local governments.²⁸¹ But these short-term benefits mask the "long-term socio-economic problems so large and so costly that it would be an anomaly for any taxes received from the activities to cover completely the increased costs."²⁸²

For every dollar that a community collects from gambling taxes, it must spend at least three dollars to cover new expenses, including additional police and criminal justice services, infrastructure repairs, social welfare, and addiction counseling services.²⁸³ Not one of fifty-five surveyed counties that had introduced casinos between 1990 and 1992 experienced any greater economic growth than comparable counties without casinos.²⁸⁴ Some of these counties actually lost local businesses.²⁸⁵ Even Donald Trump, who operates the largest gambling empire in the eastern United States,²⁸⁶ has conceded that "[p]eople will spend a tremendous amount of money at the casinos, . . . money that they would normally spend on buying a refrigerator or a new car. Local business will suffer because they'll lose customer dollars to the casino."²⁸⁷

²⁷⁴ See, e.g., PADAVAN, *supra* note 191, at 9 ("[T]he casino interests will promise much more than they can ever deliver."); American Gaming Association, *Gaming Industry Myths & Facts* (visited Jan. 10, 1999) <www.americangaming.org/media/myths_facts/index.html> (discussing some positive aspects of legal gambling).

²⁷⁵ See GOODMAN, *supra* note 13, at xiii.

²⁷⁶ See LONG ET AL., *supra* note 1, at 9-10; Rychlak, *supra* note 25, at 361.

²⁷⁷ See MARSHALL & RUDD, *supra* note 234, at 90-91.

²⁷⁸ For example, three years after Tunica, Mississippi legalized casinos, the county's annual budget increased from \$3 million to \$25 million. See Stephanie Saul, *Gambling: The New National Pastime: Rural Renewal*, NEWSDAY, Dec. 10, 1995, at A7.

²⁷⁹ See Rychlak, *supra* note 25, at 292.

²⁸⁰ See *id.*

²⁸¹ See ROGERS, *supra* note 13, at 70.

²⁸² Kindt, *supra* note 24, at 894.

²⁸³ See PADAVAN, *supra* note 191, at ii (noting that gambling would force governments to increase spending); ROGERS, *supra* note 13, at 77; Shapiro, *supra* note 235, at 55; see also LONG ET AL., *supra* note 1, at 10 (citing South Dakota's need for additional police officers, prosecutors, court personnel, and social services following its introduction of casino gambling).

²⁸⁴ See Cooper, *supra* note 8, at 16-18.

²⁸⁵ See *id.*

²⁸⁶ See Kirk Johnson, *Gambling Industry Scoffs at Mayor's Plan for Governors Island*, N.Y. TIMES, Jan. 7, 1998, at B6.

²⁸⁷ GOODMAN, *supra* note 13, at 34 (citing Philip Longman, *Casino Fever—Part I*, FLA. TREND, May 1994, at 30 (internal quotation marks omitted)).

Far from creating new wealth for a community, a new casino “cannibalize[s]” the surrounding economy.²⁸⁸ By diverting consumer spending from existing stores and services to the casino floor,²⁸⁹ the casino shifts existing jobs instead of creating new ones.²⁹⁰ For instance, “[t]he owner of a restaurant closed by a casino complex becomes a casino restaurant captain.”²⁹¹ It is only a matter of time before casinos force many existing local businesses to downsize and sometimes to close.²⁹² Thus, the net economic effect of legal casino gambling in many communities is the loss of local jobs and a decline in revenue.²⁹³ To summarize,

When people spend \$100 on a slot machine instead of a local restaurant, the local restaurant obviously loses \$100. Overall, in the local economy as a whole, just as much money is lost by local businesses as is gained by the casino. And the result is that just as many people lose their jobs outside the casino as gain jobs inside the casino.²⁹⁴

C. The Social Costs of Casino Gambling

Although “most states . . . simply prefer to look the other way,”²⁹⁵ the new surge in casino gambling dramatically has reshaped the civil life and culture in surrounding areas.²⁹⁶ In perspective, this social toll equals “the lost output of an additional . . . [1990-91] recession every eight to fifteen years, or an additional hurricane Andrew . . . every year, or two 1993-level Midwest floods . . . annually.”²⁹⁷ The social consequences fall into four categories: criminal activity, problem gambling, erosion of family cohesion, and diminished quality of life.

First, casinos bring crime—and lots of it. Given that “[w]herever gambling goes, crime and corruption follow,”²⁹⁸ it is not surprising that the new casinos have caused sharp upsurges in criminal activ-

²⁸⁸ *Id.* at 26-27.

²⁸⁹ *See id.* at 26-31 (explaining that casinos hurt the economy by diverting money from local businesses).

²⁹⁰ *See* PADAVAN, *supra* note 191, at ii.

²⁹¹ *Id.*

²⁹² *See* LONG ET AL., *supra* note 1, at 11, 12 (noting that in the casino towns of South Dakota and Colorado, many retail businesses either have closed or now offer gambling to compete with the casinos).

²⁹³ *See* GOODMAN, *supra* note 13, at 26-27.

²⁹⁴ Worsnop, *supra* note 13, at 774 (quoting Bernard P. Horn, National Coalition Against Legalized Gambling (internal quotation marks omitted)).

²⁹⁵ LONG ET AL., *supra* note 1, at xiii.

²⁹⁶ *See id.* at x.

²⁹⁷ Grinols, *supra* note 239, at 7.

²⁹⁸ *Internet Gambling Prohibition Act: Hearings on H.R. 2380 Before the House Subcomm. on Crime*, 105th Cong. (1998), available in 1998 WL 8991668 [hereinafter *Internet Gambling Act Hearings*] (statement of Bernard P. Horn, Director of Political Affairs, National Coalition Against Gambling Expansion).

ity.²⁹⁹ For example, one study found that in 1994 communities with gambling generally recorded almost double the national crime rate.³⁰⁰ As the overall national crime rate fell two percent, those jurisdictions with casinos generally experienced nearly a six percent jump.³⁰¹ The thirty-one jurisdictions that had introduced casino gambling within the twelve months immediately preceding the study faced a dramatic 7.7% increase.³⁰² For example, on the Gulf Coast, crime soared approximately twenty percent after the opening of the first casinos.³⁰³

Legal casino gambling has brought dramatic increases in both general criminal offenses, including prostitution, drug dealing, loan sharking, and financial scamming,³⁰⁴ and violent crime, including assault, robbery, arson, and rape.³⁰⁵ Since casino gambling came to some Mississippi communities, overall crime has soared at least 800%.³⁰⁶ Rapes have increased by 200%,³⁰⁷ and robberies have risen by 218%.³⁰⁸ Some jurisdictions with new casinos also are combating a drastic growth of low-level crimes, such as property and traffic-related offenses.³⁰⁹

The second social cost of casino gambling concerns the positive correlation between the amount of gambling activity in a region and the number of problem gamblers.³¹⁰ Many new casino communities have experienced significant increases in the number of problem

²⁹⁹ See NEW YORK TASK FORCE, *supra* note 48, at xiii.

³⁰⁰ See Shapiro, *supra* note 235, at 58 fig. (comparing 1092 incidents with 593 incidents per 10,000 people).

³⁰¹ See *id.* at 60.

³⁰² See *id.*

³⁰³ See Rychlak, *supra* note 25, at 346-47.

³⁰⁴ See National Coalition Against Legalized Gambling, *Crime Sheet* (1998) [hereinafter *Crime Sheet*].

³⁰⁵ See NEW YORK TASK FORCE, *supra* note 48, at xiii. This result is hardly surprising, given what happened in Atlantic City: in the seven year period following the introduction of casino gambling, all categories of crime increased, especially violent crimes and auto thefts. See Simon Hakim & Andrew J. Buck, *Do Casinos Enhance Crime?*, 17 J. CRIM. JUST. 409, 414 (1989). Since 1978, moreover, the city's crime rate has exceeded New Jersey's overall rate. See PADAVAN, *supra* note 191, at 19. Once the city with the fiftieth most crimes per capita in the nation, Atlantic City is now the city with the most crime per capita in the entire United States. See *id.*

³⁰⁶ See Saul, *supra* note 278.

³⁰⁷ See *Crime Sheet*, *supra* note 304, at 2 (citing Gulfport's police chief).

³⁰⁸ See *id.*

³⁰⁹ See NEW YORK TASK FORCE, *supra* note 48, at xiii; Rychlak, *supra* note 25, at 346; *Crime Sheet*, *supra* note 304, at 2 ("The conclusion appears inescapable that casino gambling is a magnet for street criminals." (quoting New Jersey Casino Control Comm'n Report (1989) (internal quotation marks omitted))).

³¹⁰ See GOODMAN, *supra* note 13, at 47. Even the casino industry itself has acknowledged the dangers of compulsive gambling and addiction. See *Casinos Sponsor Gambling Conference*, AP, Feb. 5, 1999, available in LEXIS ("We were not going to make the mistake the tobacco industry made in denying the problem of addiction." (quoting Frank J. Fahrenkopf, Jr., president of the American Gaming Association)).

gamblers that the states must support. In Iowa, riverboat casinos have triggered more than a threefold increase in the number of adult pathological or problem gamblers.³¹¹ Minnesota saw the number of its Gamblers Anonymous groups grow from one to forty-nine since the first of its sixteen Indian casinos opened.³¹² The public and private costs of this rise in problem gambling are staggering.³¹³ The total annual expense for each problem gambler ranges from \$13,200 to more than \$50,000.³¹⁴ Even with the lower figure of \$13,200, the annual cost of problem gambling in a state, such as Iowa, that experiences only a one-half percent increase in the number of problem gamblers will top \$70 million.³¹⁵

Third, legal casino gambling has led to great personal and familial anguish. Illinois, for example, legalized casino gambling in 1990.³¹⁶ A recent survey of members of Gamblers Anonymous of Illinois found that

26 percent . . . had divorced or separated because of gambling; 34 percent had lost or quit a job; 44 percent had stolen from work to pay their gambling debts; 21 percent had filed for bankruptcy; 18 percent had had gambling-related arrests; 66 percent had contemplated suicide, and 16 percent had attempted suicide.³¹⁷

Legal gambling "takes disproportionately from those who can afford it least,"³¹⁸ a trend that does not exactly trouble the gambling industry. One casino owner rather bluntly stated: "We target everybody. . . . What's the difference if it's a social security check, a welfare check, a stock dividend check?"³¹⁹ The new casinos not only appeal to individuals who would wager elsewhere if the casinos were not open, but they also "make[] gamblers of those who would be unlikely to place a bet with an illegal 'bookie.'"³²⁰

Finally, the fourth social cost of legal casino gambling results from the flood of "gambling tourists,"³²¹ which has diminished the quality of life in many previously tranquil communities. Some towns

³¹¹ See Horn, *supra* note 18, at 35 (noting an increase in problem gamblers from 1.7% to 5.4% of Iowa's adult population).

³¹² See *id.*

³¹³ See CRAPPED OUT, *supra* note 7, at 6-7; GOODMAN, *supra* note 13, at xiii.

³¹⁴ See GOODMAN, *supra* note 13, at 51.

³¹⁵ See *id.* at 51-52.

³¹⁶ See *supra* note 254 and accompanying text.

³¹⁷ Shapiro, *supra* note 235, at 59; see also Horn, *supra* note 18, at 35 (noting that casino gambling in the Mississippi Gulf Coast region has expanded simultaneously with a 69% increase in domestic violence).

³¹⁸ GOODMAN, *supra* note 13, at xiv.

³¹⁹ PADAVAN, *supra* note 191, at 13 (internal quotation marks omitted and typeface altered).

³²⁰ *Id.* at 12.

³²¹ See LONG ET AL., *supra* note 1, at 13-14 (discussing the trend that gambling alters patterns of tourism). Incidentally, "[v]isitors to Las Vegas also kill themselves at a higher

that have casino gambling now battle noise, traffic, congestion, and parking problems, while casinos also have replaced local meeting spots.³²² Twenty-four-hour drive-through pawn shops often line the streets, serving gamblers who have exhausted their daily cash-advance limits and casino credit lines.³²³

D. The Adverse Impact of Casino Gambling on Charitable Gambling

The recent proliferation of high-stakes casinos severely has reduced the profitability of charitable gambling.³²⁴ Increasingly, the coffers of the high-stakes gambling industry divert the donations that organizations raise through charitable gambling activities. Nonprofit organizations still raise almost \$2.5 billion annually from bingo, Las Vegas nights, and other charitable gambling activities,³²⁵ but the growth of Indian, riverboat, and land-based casinos has captured some of the money that gamblers previously had wagered at charitable events.³²⁶ This apparent preference for full-scale casino gambling probably results because these casinos typically offer more favorable

rate" than visitors to any other U.S. city. *Study: Suicide Rate Higher in 3 Gambling Cities*, AP, Dec. 16, 1997, available in Westlaw.

³²² See *id.* at x, 12.

³²³ See Brett Pulley, *In Gulf Casinos' Wake, a Pawnshop Boom*, N.Y. TIMES, Dec. 13, 1997, at A1 (describing the growth of pawnbrokers near casinos in Gulfport, Mississippi). The addictive force of casino gambling is so great that some cash-strapped gamblers who have exhausted their daily cash-advance limits actually use their credit cards to purchase big-ticket items from stores near casinos and immediately pawn their new purchases at one-third the sales price to obtain cold cash that they can wager at the craps table. See *id.*

³²⁴ See Christiansen, *supra* note 7, at 42 ("Charitable gaming is being impacted by the widespread availability of close-substitute casino games offered at much lower consumer prices."); see also *Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 187 (1987) [hereinafter *Reservation Hearing*] ("[T]he 32 States that have Indian lands within their borders can anticipate severe negative impacts on legal gambling revenues as a result of reservation gaming. . . . Revenues from charitable games other than bingo ('Las Vegas Nights,' pull-tabs, etc.) would decline by \$27 million"); PADAVAN, *supra* note 191, at 8 ("The effect of casino gambling on charitable gambling, particularly church bingo, has been severe."). But see NEW YORK TASK FORCE, *supra* note 48, at 123 ("As evidenced by the interviews of the various town and municipal clerks who license [charitable] gambling activities in the vicinity of the [Oneida Nation's] Turning Stone, the presence of the . . . Casino has had no appreciable effect on the fund-raising abilities of their licensed organizations.").

³²⁵ See Christiansen, *supra* note 7, at 31 chart 10, 53 chart 21 (reporting revenue of \$952.2 million from charitable bingo and \$1475.3 million from nonbingo charitable gambling). The amount of money that some charitable gambling operations collect truly is astonishing; for example, the largest nonprofit bingo operation in New York generates several million dollars annually. See Frank Brieady, *Technicality Defeats Limits on Bingo Hall*, SYRACUSE POST-STANDARD, Feb. 6, 1999, at 1B.

³²⁶ See Greg Gattuso, *What's Ahead for Charity Gambling?*, FUND RAISING MGM'T, Sept. 1993, at 19, 21 ("Many Las Vegas night 'customers' are taking their money to a slew of new casinos opening up on Native American reservations.").

odds than local churches and fire stations that follow charitable rules, which favor the house.³²⁷

This competition between commercial and charitable gambling has caused charitable revenue to decrease.³²⁸ In Nebraska, charity keno, raffles, bingo, and pull tabs must compete with both high-stakes commercial and Indian casinos in neighboring Colorado, South Dakota, Iowa, and Kansas.³²⁹ Now, gamblers wager "less on in-State charitable games and (presumably) more on cross-border commercial games."³³⁰ This trend is troubling because it jeopardizes the ability of organizations to raise charitable funds through the sponsorship of low-stakes casino nights.

IV

WHAT WE MUST DO: REVISING IGRA IN LIGHT OF THE LESSON OF THE LAST TEN YEARS

A. The Existing Opportunity for Congress to Re-Examine IGRA

The nation's experience with casino gambling during the last decade has confirmed what communities in the United States already have realized: In terms of sound public policy, legal gambling is simply a bad bet. It cannibalizes local economies, generates crime, exacerbates the epidemic of problem gambling, weakens the social fabric of communities and families, and creates new expenses that nongamblers ultimately must bear.³³¹ It therefore is imperative that Congress revisit the 1988 gaming act, which bears responsibility for catalyzing this nationwide explosion of casino gambling.

One might argue that it is too late for Congress to limit the scope of national casino gambling. After all, Indian casinos and their commercial counterparts already are open in twenty-seven states.³³² Plus, increasing signs suggest that the intensity of the surge in high-stakes casino gambling already has begun to dissipate.³³³ The weakness of that argument is that it overlooks the ongoing destruction of local economic and social structures that has resulted from the existing casino gambling activity. One leading gambling expert has warned that "[i]f the past is a guide, gambling and its harmful effects will continue to grow unless the cycle is cut short by foresightful policy choices at

³²⁷ See *id.* at 42.

³²⁸ See Christiansen, *supra* note 7, at 28, 42 ("The slowdown in charitable (non-reservation) bingo that began in 1994 is becoming a long term trend. . . . After years of moderate but consistent growth non-bingo charitable gaming ground to a halt in 1996.").

³²⁹ See *id.* at 42.

³³⁰ *Id.*

³³¹ See *supra* Part III.

³³² See McQueen, *supra* note 1, at 21.

³³³ See *id.* at 20 ("The days of unabated expansion into new jurisdictions seem to be over, as legislators are reluctant to approve new gambling bills.").

the national level."³³⁴ There is no question that Congress has the constitutional authority retroactively to scale back the permissible amount of tribal gaming.³³⁵ Moreover, even a prospective restriction would alleviate some of the pressure on nongambling states to compete with tribal gaming by legalizing casinos.

Congress has an unusual opportunity right now to reconsider its policy on casino-style gambling generally and on Indian gaming in particular. Aside from the immense pressure that Congress faces from both the states and the tribes to clarify exactly what gaming rights IGRA provides,³³⁶ one of the many legal disputes over IGRA's regulatory scheme³³⁷ has forced the future of tribal gaming to the floor of Congress. The provision of IGRA that has thrown tribal gaming into a legal tailspin authorizes tribes to sue states that refuse to negotiate Class III gaming compacts in good faith.³³⁸

The specific dispute arose when Florida refused to negotiate a compact regarding Class III casino-style gaming with the Seminole Tribe.³³⁹ Pursuant to IGRA's enforcement provision, the tribe sued Florida to compel the state to enter compact negotiations.³⁴⁰ In response, Florida moved to dismiss the suit on the grounds that its Eleventh Amendment sovereign immunity shielded it from the tribe's federal suit.³⁴¹ After widespread speculation about the legal merit of the state's defense,³⁴² the dispute between Florida and the Seminole

³³⁴ Grinols, *supra* note 23.

³³⁵ See *infra* note 377.

³³⁶ See, e.g., GRIA Hearing, *supra* note 177, at 81 (statement of Sen. Harry Reid). ("One thing that all of us agree is that the current situation with regard to Indian gaming is a mess. It's not working for the Indians, not working for the States, for the attorneys general, for the Governors, for the Interior Department and the Justice Department.")

³³⁷ See, e.g., *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir.) (determining whether state officials and bodies can bind their state by entering tribal-state gaming compacts), *cert. denied*, 118 S. Ct. 45 (1997); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994) (assessing the scope of Class III gaming under IGRA); *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) (reviewing the standard by which federal courts should measure a state's alleged good faith), *vacated*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (deciding whether the Tenth Amendment precludes Congress from compelling states to negotiate in good faith with Indian tribes seeking to enter Class III compacts); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990) (assessing the scope of Class III gaming under IGRA).

³³⁸ See Wolf, *supra* note 177, at 52-53; Eklund, *supra* note 69, at 142-43.

³³⁹ See *Seminole Tribe v. Florida*, 801 F. Supp. 655, 656 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996).

³⁴⁰ See *id.*

³⁴¹ See *id.*

³⁴² See, e.g., Marc S. Feinstein, Note, *Cheyenne River Sioux Tribe v. South Dakota, Indian Gaming, and the State's Eleventh Amendment Immunity: Where Will the Conflict in the Circuits Fuse?*, 39 S.D. L. REV. 604 (1994) (discussing the validity of the Eleventh Amendment defense); T. Barton French, Jr., Note, *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow the Growth of Indian Gaming*, 71 WASH. U. L.Q. 735 (1993) (arguing that the Eleventh Amendment does not preclude

Tribe reached the Supreme Court in 1996. In *Seminole Tribe v. Florida*,³⁴³ the first Supreme Court decision to address tribal gaming since *Cabazon* in 1987, a five-to-four majority held that Congress unconstitutionally had abrogated the states' Eleventh Amendment sovereign immunity when it authorized tribes to sue states under IGRA.³⁴⁴

By invalidating the provision in IGRA that authorized tribes to file federal suits against uncooperative states,³⁴⁵ *Seminole Tribe* flatly refuses to allow congressional abrogation of state sovereign immunity. When courts and commentators cite the opinion, it is usually for that constitutional holding.³⁴⁶ But the decision holds great significance apart from its Eleventh Amendment holding: It dramatically reshaped the federal Indian gaming policy that had existed for almost a decade. By fostering uncertainty as to the future ability of tribes to enter and renew existing Class III tribal gaming compacts,³⁴⁷ *Seminole Tribe* "may have raised more questions than it answered."³⁴⁸

Specifically, the invalidation of the linchpin enforcement provision of IGRA's tribal-state compact negotiation process sent IGRA—an "innocent bystander" to [the Eleventh Amendment] feud—to "intensive care with a gaping wound."³⁴⁹ The *Seminole Tribe* decision leaves open the possibility that a state could prevent a tribe from conducting Class III gaming by refusing to negotiate the requisite gaming compact and later by asserting Eleventh Amendment immunity if the tribe sues. In a footnote appended to the decision's last sentence, the

IGRA-based tribal suits against uncooperative states); Joseph J. Weissman, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WASH. L. REV. 123, 125 (1993) (asserting "that Congress abrogated the Eleventh Amendment's bar to suits against the states in enacting IGRA").

³⁴³ 517 U.S. 44 (1996).

³⁴⁴ See *id.* at 76.

³⁴⁵ See *id.*

³⁴⁶ See Philip W. Berezniak, Recent Decision, 35 DUQ. L. REV. 741, 757 (1997).

³⁴⁷ See *id.* at 23; Sweeney, *supra* note 161, at 44 ("[*Seminole Tribe*] opened the door for states simply to refuse to discuss Indian gaming, whether or not the refusal was in bad faith."); see also Christiansen, *supra* note 7, at 46 ("*Seminole v. State of Florida*, it seems, settled nothing. Litigation brought by tribes against States, or by States against tribes, or by people unhappy with the practical consequences of the intrusion of Indian gambling into their communities continues to work its way through courts all over the country." (footnote omitted)). The Department of the Interior expressed uncertainty about its authority to impose conditions for tribal gaming in the absence of a tribal-state compact. Just two months after the Court announced *Seminole Tribe*, the Department solicited public input regarding its authority under IGRA "to promulgate 'procedures' to authorize Class III gaming on Indian lands when a State raises an Eleventh Amendment defense to an action brought" by a tribe seeking to negotiate a Class III compact. Request for Comments, 61 FED. REG. 21,394, 21, 394 (1996). The Senate Committee on Indian Affairs moved equally quickly to assess the impact of the decision on tribal gaming. See *Seminole Tribe Hearing*, *supra* note 34.

³⁴⁸ Abramowicz & Chatteraj, *supra* note 204, at 354.

³⁴⁹ Pat Smith, *Seminole Tribe of Florida v. Florida: A Victory for States' Rights*, MONT. LAW., July-Aug. 1996, at 21, 21.

Court explicitly refused to address what remedy would be available to tribes that fall victim to this impasse.³⁵⁰

In the wake of *Seminole Tribe*, a split emerged between the Ninth and Eleventh Circuits over the question of whether a state, by asserting the Eleventh Amendment, can deny a tribe its right to open a Class III casino.³⁵¹ Under the Eleventh Circuit's approach, tribes facing a sovereign immunity defense can seek immediate relief directly from the Secretary of the Interior, who can impose Class III gaming regulations on a state under IGRA.³⁵² Under the Ninth Circuit's pre-*Seminole Tribe* interpretation of IGRA, by contrast, the Secretary cannot mandate regulations for tribal gaming until the tribe unsuccessfully has tried to sue the uncooperative state and a court-appointed mediator unsuccessfully has attempted to impose a gaming compact upon the parties.³⁵³ That is, the Ninth Circuit held that a tribe can seek relief from the Secretary only if it is a "last resort" after the state and the tribe have exhausted IGRA's intricate remedial procedures.³⁵⁴

The Court's holding in *Seminole Tribe* seems to leave tribes in the Ninth Circuit without any recourse against a state that refuses to cooperate in Class III compact negotiations. Recognizing the potential for such a stalemate, the Ninth Circuit recently suggested that *Seminole Tribe* renders the circuit's pre-*Seminole Tribe* approach unworkable.³⁵⁵ A Ninth Circuit panel noted that the circuit's prior approach "was [fashioned] in the context of our (incorrect) assumption that tribes could sue states"³⁵⁶ and that "[n]one of the circumstances that might justify enforcing IGRA according to its terms appears to be present"³⁵⁷ in a situation in which a tribe "believes it has followed IGRA faithfully

³⁵⁰ See *Seminole Tribe*, 517 U.S. at 76 n.18 ("We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit.").

³⁵¹ See *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996); *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994), *vacated*, 517 U.S. 1410 (1996).

³⁵² See *Seminole Tribe*, 11 F.3d at 1029. Although the Supreme Court reversed the Eleventh Circuit's decision in *Seminole Tribe*, this holding remains valid law in that jurisdiction because the Supreme Court did not address this issue.

³⁵³ See *Spokane Tribe*, 28 F.3d at 997 ("The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation."). To avoid the possibility that a state might prevent a tribe from opening a Class III casino by raising a sovereign immunity defense, the Ninth Circuit ruled that a state cannot invoke the Eleventh Amendment to avoid a suit under IGRA. See *id.*

³⁵⁴ *Id.*

³⁵⁵ See *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

³⁵⁶ *Id.* at 1301.

³⁵⁷ *Id.* at 1302.

and has no legal recourse against a state that allegedly hasn't bargained in good faith."³⁵⁸

The recent Ninth Circuit decision did not explicitly authorize a tribe to seek relief directly from the Secretary of the Interior. By remanding the case to the district court for reconsideration in light of *Seminole Tribe*,³⁵⁹ however, the panel seemed to endorse the Eleventh Circuit's approach, which allows tribes that face an Eleventh Amendment defense to circumvent IGRA's compact requirements and seek relief directly from the Interior Department. The Secretary of the Interior supports this position. Shortly after the *Seminole Tribe* decision, the Secretary suggested regulations that would give its office the authority to impose a Class III compact on a state that asserts sovereign immunity in response to a tribe's suit brought under IGRA.³⁶⁰

This analysis suggests that the circuit split between the Ninth and Eleventh Circuits is resolved. Even so, the need for Congress to reconsider the national Indian gaming policy will remain as pressing as ever.³⁶¹ Other federal courts might begin to fashion different remedies to overcome post-*Seminole Tribe* tribal-state stalemates, a development that would create inconsistency in the enforcement of a federal act. Moreover, if the Secretary of the Interior directly imposes tribal casino gaming on a state, then this unelected federal official effectively assumes a massive unilateral power that Congress did not intend to delegate.³⁶²

This outcome is troubling for several reasons. First, Congress enacted IGRA in the aftermath of *Cabazon* expressly because it wanted to ensure that the states play a role in the tribal gaming regulatory process, which the *Cabazon* regime had denied to the states. A unilateral decision by the Secretary to dictate the parameters for tribal gaming would undermine the congressional objective that underlies IGRA.³⁶³ Second,

[t]he proposed rule would permit the secretary to overrule any state's interpretation of its own laws, even to conclude that the final decision of a state supreme court was erroneous. Allowing the secre-

³⁵⁸ *Id.*

³⁵⁹ *See id.*

³⁶⁰ *See* Request for Comments, 61 FED. REG. 21,394, 21,395 (1996).

³⁶¹ *See* Christiansen, *supra* note 7, at 7 ("The country needs a workable gambling policy. It doesn't have one.").

³⁶² *See* *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 997 (9th Cir. 1994), *vacated*, 517 U.S. 1410 (1996); *GRIA Hearing*, *supra* note 177, at 146 (statement of the National Governors Ass'n) ("Neither the Indian Gaming Regulatory Act of 1988 (IGRA) nor any other law endows the secretary with this authority.").

³⁶³ *See* *GRIA Hearing*, *supra* note 177, at 82 (statement of Sen. Harry Reid) ("We never intended IGRA to act as a subversion of States' rights, yet by allowing the Secretary to unilaterally dictate the terms and conditions of tribal gaming within a State, that's what we're doing.").

tary to conclude that a state Governor, attorney general, and court system do not understand the state's public policy would make a travesty of the concept of federalism and in its place substitute a system in which Washington claims it knows best what state laws mean.³⁶⁴

Third, "[t]he secretary's inherent authority includes a responsibility to protect the interests of Indian tribes, making it impossible for the secretary to avoid a conflict of interest or exercise objective judgment in disputes between states and tribes."³⁶⁵ Finally, the *Seminole Tribe* Court urged states and tribes to continue to negotiate through a stalemate, but the proposed procedure would create a disincentive for tribes to try to resolve disagreements with uncooperative states.³⁶⁶

In 1993, three years before the Supreme Court's *Seminole Tribe* decision introduced uncertainty into tribal gaming, forty-nine governors petitioned Congress to revise IGRA.³⁶⁷ The following year, a leading expert on gambling policy warned Congress that "[g]ambling is now expanding so fast that it is outrunning any coordinated or prudent national policy."³⁶⁸ Now, five years later, the need for Congress to revisit its 1988 decision that authorized Indian gaming is even more pressing.³⁶⁹ Simply put, Congress must provide a uniform resolution to the uncertainties that have surrounded tribal gaming since the enactment of IGRA.³⁷⁰

B. A Proposal To Limit Indian Gaming to Those Types of Gambling Activities That a State Permits for General Commercial Purposes

Commentators have suggested various ways in which the federal government might resolve the uncertainty surrounding post-*Seminole Tribe* Indian gaming. Each proposal offers a different resolution to the politically charged Indian gaming issue. A survey of the literature, however, reveals that virtually every suggestion shares the same underlying premise. Despite the apparent costs of widespread casino gam-

³⁶⁴ *Id.* at 146 (statement of National Governors Ass'n); *cf. id.* at 145 (statement of National Governors Ass'n) ("State and tribal governments are best qualified to craft agreements on the scope and conduct of Class III gaming under IGRA.").

³⁶⁵ *Id.* at 146 (statement of the National Governors Ass'n).

³⁶⁶ *See id.* (statement of the National Governors Ass'n).

³⁶⁷ *See* 139 CONG. REC. E1367 (daily ed. May 26, 1993) (statement of Rep. Torricelli).

³⁶⁸ Grinols, *supra* note 23.

³⁶⁹ *See* Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1156-57 (1995).

³⁷⁰ *See generally* Worsnop, *supra* note 13, at 784 (raising some of the questions that surround Indian gaming).

bling, most authors advocate the preservation of high-stakes tribal gaming.³⁷¹

In sharp contrast to these suggestions, this Note urges the federal government to curtail the scope of legal casino gambling. Given the tendency of the federal courts to misinterpret IGRA to permit a much broader scope of high-stakes tribal gaming than Congress had intended, the nation clearly cannot rely on the federal judiciary to limit the amount of tribal gaming by applying IGRA as Congress had anticipated. As one senator remarked: "If we've learned any lesson from IGRA, it's that we should not allow the scope of gaming to be decided by the courts."³⁷²

This focus on casino-style gambling does not suggest that the proliferation of lotteries, keno, video slot machines, and pari-mutuel wagering does not hold partial responsibility for the mounting social and economic costs of legal gambling.³⁷³ But at least three factors argue for a restriction on casino gambling in particular, rather than on these other forms of legal gambling. First, a measure that specifically limits casino gambling less likely would jeopardize the fiscal stability of the countless local governments that depend on gambling for revenue.³⁷⁴ Second, casino gambling has the greatest potential of all forms of gambling to grow further, exacerbating social and economic risks.³⁷⁵ Finally, casino-style gambling accounts "for 49.7% of all con-

³⁷¹ See, e.g., Jason Kalish, Note, *Do the States Have an Ace in the Hole or Should the Indians Call Their Bluff? Tribes Caught in the Power Struggle Between the Federal Government and the States*, 38 ARIZ. L. REV. 1345, 1370 (1996) (urging Congress either to "let the tribes act autonomously" when conducting gaming or replace IGRA's tribal-state negotiating and litigating procedures with a federal mediator); Marks, *supra* note 119, at 198 (advising the federal judiciary to interpret IGRA to "allow the tribes to conduct an enterprise that will bring them out of decades of poverty"); Mark E. Stabile, Comment, *The Effect of the Federally Imposed Mediation Requirement of the Indian Gaming Regulatory Act on the Tribal-State Compacting Process*, 7 SETON HALL J. SPORT L. 315, 342-44 (1997) (arguing that Congress should prevent tribal-state deadlocks by incorporating into IGRA a dispute resolution mechanism of negotiation and mediation).

³⁷² GRIA Hearing, *supra* note 177, at 82 (statement of Sen. Harry Reid).

³⁷³ See, e.g., Rick Bragg, *End Video Poker Gambling*, *South Carolina Chief Urges*, N.Y. TIMES, Jan. 22, 1998, at A16 (reporting that video poker in South Carolina "has caused a collective misery, spawned a new generation of addicted gamblers and destroyed families").

³⁷⁴ It may come as a surprise that state-run lotteries—not casinos—"are far and away the largest generators of government revenues." Christiansen, *supra* note 7, at 60. The tax revenue from lotteries exceeds the tax payments of the casino industry by more than six times. See *id.* at 15, 60 (explaining also that in 1996 "casinos accounted for 49.7% of all consumer gambling expenditures" while lotteries accounted for approximately 82%—about \$13.8 billion—of all gambling taxes). In 1994, for example, state and local governments received almost \$35 billion from lotteries but only \$1.4 billion from casino gambling. See ROGERS, *supra* note 13, at 70.

³⁷⁵ See Rose, *supra* note 41, at 104; Christiansen, *supra* note 7, at 16. People in the United States no longer have an "unsatisfied demand for bingo, charitable games, lotteries and parimutuel sports." *Id.* There remains, however, a "substantial unsatisfied demand for casino games." *Id.* Thus, despite leveling off in the rate of growth of legal gambling over the last three years, casino gambling activity has expanded significantly. See *id.* In 1996,

sumer gambling expenditures—almost half of the U.S. gambling dollar.”³⁷⁶

It may seem that the most efficient way to halt the adverse impact of high-stakes casino gambling would involve a congressional prohibition on all forms of casino gambling—Indian and commercial alike.³⁷⁷ Surely, a blanket prohibition immediately would begin to ameliorate the deterioration of local economies and social structures. Such a drastic measure, however, would pose difficulties regarding enforcement and paradoxically might even exacerbate the adverse consequences of casino gambling. The failure of Prohibition in the 1930s not only strengthens doubts about the capacity of the federal government to repress consumer demand for an activity such as casino gambling, which ninety-two percent of American adults condone,³⁷⁸ but it

casino gambling growth outpaced the growth of all other forms of legal gambling and accounted for most of the 5.6% (\$2.54 billion) increase from 1995 in consumer spending on gambling, *see id.* at 13-16. What heightens the significance of this pattern is that this growth in casino gambling activity occurred even though not one new major market introduced casinos. *See id.* at 12-13.

³⁷⁶ Christiansen, *supra* note 7, at 15.

³⁷⁷ Without question, Congress can act pursuant to its broad plenary power over Indian affairs to prohibit tribal gaming altogether. The same authority that Congress exercised when it enacted IGRA would support a measure that curtails the scope of tribal gaming. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (“State laws generally are not applicable to tribal Indians on an Indian reservation *except where Congress has expressly provided that State laws shall apply.*” (quoting U.S. DEP’T OF THE INTERIOR, *supra* note 95, at 845 (emphasis added))). Since the eighteenth century, the Supreme Court “has recognized the doctrine of plenary power, namely the right of Congress to unilaterally intervene and legislate over a wide range of Indian affairs, including the territory of the Indian nations.” Laurence C. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992, in EXILED IN THE LAND OF THE FREE* (Oren Lyons et al. eds., 1992). The Supreme Court has interpreted this plenary power to encompass a “broad police power” that while not absolute, “includes general federal authority to legislate over health, safety, and morals.” COHEN, *supra* note 70, at 219, 220. In fact, until *Seminole Tribe* the Court never had invalidated any exercise of congressional power over Indian affairs. *See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW* 5 (3d ed. 1993).

With regard to off-reservation gambling, Congress could enact a blanket prohibition on all forms of casino gambling under its power to regulate interstate commerce, which includes the authority to enact “protective” measures to “combat activities disfavored for largely non-commercial reasons.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-6, at 311, 312 (2d ed. 1988); *see also* *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the federal ban on the interstate transportation of lottery tickets); Rose, *supra* note 22, at 83 (“[A] social movement to outlaw gambling could force Congress to outlaw everything under its power to regulate interstate commerce.”).

³⁷⁸ *See* Harrah’s, *supra* note 12; *see also* Christiansen, *supra* note 7, at 8-12 (discussing Prohibition and legalized gambling); *cf.* GAMBLING IN AMERICA, *supra* note 26, at 1 (“Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.”).

also suggests that any attempt to enforce such a law may not be worth the risks.³⁷⁹

For these reasons, this Note urges the federal government to invoke its broad plenary power over Indian affairs to curtail the scope of Class III tribal casino-style gaming that the federal judiciary's broad interpretation of IGRA currently permits. In recent years, Congress has considered several bills that have proposed a reduction in the amount of tribal gaming.³⁸⁰ Because legalized Indian gaming has acted as the catalyst for the proliferation of high-stakes Indian and non-Indian casino gambling,³⁸¹ Congress must enact statutory constraints on tribal casino gaming. The undesirable social and economic consequences of that activity are no longer mere possibilities. They have arrived.³⁸²

This emphasis on the need for a federal remedy does not preclude the states from acting to avoid tribal gaming without federal intervention. Of course, a state may block the introduction of high-stakes tribal gaming under IGRA simply by banning all forms of casino-style gambling, including charitable fundraising.³⁸³ In fact, Arizona has taken this route.³⁸⁴ The danger of forcing states to rely exclusively on such a strategy, however, is that states cannot repeal gaming laws with ease. For example, Connecticut unsuccessfully tried to use this approach to prevent the Pequots from opening the Foxwoods casino.³⁸⁵

A better tack would involve the congressional implementation of a flexible policy that protects the interests of both the states that do not allow any form of profit-generating casino gambling and the tribes that want to operate gaming as a means of economic survival. Accordingly, this Note recommends that Congress revise IGRA (1) to limit tribal gaming activities to those specific Class III games that the state allows for commercial profit-generating purposes and (2) to provide communities in states that ban commercial casino gambling with the

³⁷⁹ After the Eighteenth Amendment outlawed the sale and distribution of alcohol in 1920, organized crime increased to satisfy the demand for liquor, which ultimately forced a repeal of the ban. See 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Prohibition* 193-94 (1998); see also Klein, *supra* note 240, at 3 ("[W]e already learned in the '30s that prohibition leads to more corruption. Since people will gamble anyway, it's better to regulate this industry than to cede control of it to organized crime."); Rychlak, *supra* note 25, at 311 & n.118 (noting that an inability to enforce blanket antigambling bans historically has been one of the primary reasons behind the decision to legalize gambling).

³⁸⁰ See *supra* note 35.

³⁸¹ See *supra* Part II.D.

³⁸² See *supra* Part III.B, C.

³⁸³ See Vallen, *supra* note 14, at 52.

³⁸⁴ See *id.*

³⁸⁵ See Kirk Johnson, *Connecticut Clears Way for Indian Casino*, N.Y. TIMES, May 17, 1991, at B1.

option of exempting tribes from the state's general restriction.³⁸⁶ This proposal combines provisions from several different bills that Congress has considered in recent years.³⁸⁷

Under this proposal's opt-out provision, a majority of the community surrounding the site of a proposed high-stakes tribal gaming operation voluntarily could decide to allow the tribe to open the casino despite the general statewide prohibition on gambling.³⁸⁸ To exercise this option, a majority of the surrounding community would need to approve the proposed gaming compact "in a referendum held . . . in the first general election (with respect to which the filing deadline has not passed) occurring after the date on which the compact" is submitted for approval.³⁸⁹ The surrounding community would constitute "the political jurisdiction in which [the] class III gaming activity under the compact is to occur."³⁹⁰ To illustrate, this proposal would allow a tribe to conduct roulette for profit in a state that allows commercial roulette for profit or when the surrounding community has exempted the Indian gaming operation from a statewide prohibition on such gambling.

This proposal closes the judicially created loophole that has allowed tribal profit-generating casinos to open in many states that permit casino-style gambling only for low-stakes charitable purposes.³⁹¹ Judging from their vigorous opposition to high-stakes tribal gaming,³⁹² state governments likely would support this revision of IGRA. After all, this measure would effectuate the public policies of states, such as New York and Connecticut,³⁹³ that have been unable to avoid the operation of high-stakes tribal casinos despite explicit bans on commercial casino gambling. In so doing, it would maintain "the long-held position of the federal government . . . to allow states to permit gambling if they want it, but to protect the policies of states

³⁸⁶ In 1995, Congress considered a bill proposing a similar revision. See H.R. 1364, 104th Cong. (1995).

³⁸⁷ For a list of the bills that proposed similar restrictions on tribal gaming, see *supra* note 35.

³⁸⁸ See H.R. 1364 § 1.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ See *supra* text accompanying notes 201-11.

³⁹² See *GRIA Hearing*, *supra* note 177, at 141 (statement of Raymond C. Scheppach, National Governors Ass'n) ("The Governors firmly believe that it is an inappropriate breach of state sovereignty for the federal government to compel states to negotiate tribal operation of gambling activities that are prohibited by state law."); *id.* at 144 (statement of National Governors Ass'n) ("Amendments to IGRA must . . . [make] clear that tribes can negotiate to operate gambling of the same types and subject to the same restrictions that apply to all other gambling in the state.").

³⁹³ See *supra* text accompanying notes 224-233.

that don't want gambling."³⁹⁴ In the nineteenth century, for example, the federal government enacted a series of antilottery measures to bolster the antigambling enforcement efforts of states that had been unable to enforce their own state lottery prohibitions.³⁹⁵

Moreover, the federal government always has let the states decide for themselves how to regulate the amount of gambling activity within their borders.³⁹⁶ Reflecting this tradition, the first federal commission to have studied nationwide gambling advised in 1976 that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."³⁹⁷ By allowing each state to decide whether to expose itself to the substantial social and economic costs of legal casino gambling,³⁹⁸ this Note's proposal satisfies that test. A state that has decided to allow profit-generating casino gambling should not have the ability to deny a tribe the opportunity to conduct the same activity. Conversely, a state that has chosen to prohibit high-stakes commercial casino gambling should not have to absorb the social and economic costs of unwanted tribal casino gaming.³⁹⁹ By giving states that have blanket prohibitions on casino gambling an option voluntarily to allow tribes to operate any forms of gambling activity, this proposal reflects the notion that there is no reason to prevent a jurisdiction from allowing gambling if it believes that the benefits outweigh the costs.⁴⁰⁰

³⁹⁴ *Internet Gambling Act Hearings*, *supra* note 298; see also Blakey & Kurland, *supra* note 146, at 1021 (noting that the principle that historically has shaped the federal government's regulation of gambling has been "to balance the policies of all jurisdictions").

³⁹⁵ See THE LAW OF GAMBLING, *supra* note 41, at 513-15; Blakey & Kurland, *supra* note 146, at 927-43 (examining the two obstacles that limited the ability of states to curb nineteenth century lotteries without federal assistance: (1) the Contract Clause of the Constitution and (2) the difficulty of enforcing lottery bans across state lines). Similarly, when New York could not enforce its gambling prohibition against illegal casinos in the town of Saratoga during the 1940s, Congress ultimately came to the state's aid by shutting them down. See PADAVAN, *supra* note 191, at 3.

³⁹⁶ See Hawkins, *supra* note 61.

³⁹⁷ GAMBLING IN AMERICA, *supra* note 26, at 5 (typeface altered).

³⁹⁸ In the words of one congressman who proposed a similar measure to limit tribal gaming in 1993, this proposal would "give back to the States a reasonable opportunity to say no to gaming." 139 CONG. REC. E1368 (daily ed. May 26, 1993) (statement of Rep. Torricelli).

³⁹⁹ Cf. STATE OF NEW YORK, *supra* note 25, at 26 ("[N]o city, town, or village which does not vote to authorize gambling within its border should be required to accept it."). As the Ninth Circuit has held, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, 427 (9th Cir. 1994); accord *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *GRIA Hearing*, *supra* note 177, at 82 (statement of Sen. Harry Reid). The National Governors Association has expressed its agreement with the *Rumsey* interpretation, and it believes that the decision reflects the original intent of Congress. See *id.* at 141-42 (statement of Raymond C. Scheppach, National Governors Ass'n).

⁴⁰⁰ Cf. *GRIA Hearing*, *supra* note 177, at 139 (letter from the mayors of La Mesa, El Cajon, Santee, and Lemon Grove) (asking California's governor to renew negotiations

This proposal finds its motivation in the fact that the social and economic consequences of Indian gaming extend beyond the reservations. Not only does Indian gaming adversely impact nearby off-reservation economies, but tribal casinos also cater overwhelmingly to non-Indians who gamble on the reservation and then return home with gambling-related problems.⁴⁰¹ Moreover, the local communities that ultimately bear the social, economic, and environmental costs of high-stakes tribal gambling do not reap any tax benefits. At least off-reservation casinos provide some direct economic benefit to the surrounding community in the form of additional tax revenue.

This proposed statutory revision of IGRA should grandfather for a limited period those tribes that already have opened Class III gaming facilities in states that ban commercial casino gambling. Such a clause would ensure that before the revised regulations take effect, tribes whose gaming operations are at risk will have an opportunity to re-evaluate their financial strategy and consider investing in nongaming ventures. It also would give them time to present a case to the state concerning why the surrounding community should exercise its opt-out option under the new regulation. By encouraging tribes to engage in nongaming enterprises, this proposal also is consistent with the notion, with which many tribal leaders agree, that "gambling is not an end in and of itself, it is only a means. Gaming is not the whole answer, but it does act as a stepping stone and catalyst for other economic development activities."⁴⁰² In fact, in anticipation of the possibility that the government might limit high-stakes tribal gaming, several tribes that own highly profitable Class III gaming operations already have begun to diversify into nongaming industries.⁴⁰³

Given the widespread perception of Indian reservations with casinos as "boom towns,"⁴⁰⁴ the public might believe that this proposal unfairly restricts the freedom of tribes to engage in an economic activity that magically could end decades of widespread Indian impoverishment. This objection, however, derives from a common

with tribes seeking to conduct casino gaming so that their cities can derive the anticipated economic benefits from the tribal gaming).

⁴⁰¹ See *id.* at 144 (statement of National Governors Ass'n) ("Although the gambling activities conducted under IGRA occur within the boundaries of tribal lands, they are designed to attract nontribal patrons, and the effects of these activities are felt far beyond the geographic boundaries of the reservations.").

⁴⁰² Wilson, *supra* note 117, at 383; William Claiborne, *Tribes' Big Step: From Casinos to Conglomerates*, WASH. POST, Aug. 14, 1998, at A1 ("Ultimately, we'd like gaming to be a footnote to our history . . . [M]y hope is that someday we can phase out gaming completely." (quoting David J. Matheson, chief executive officer for gaming of the Coeur d'Alene tribe)).

⁴⁰³ See Claiborne, *supra* note 402 (discussing various nongaming businesses that many tribes have entered using casino profits); *supra* notes 177-85 and accompanying text.

⁴⁰⁴ Peter T. Kilborn, *For Poorest Indians, Casinos Aren't Enough*, N.Y. TIMES, June 11, 1997, at A1.

misperception of tribal gaming's effects.⁴⁰⁵ Although gaming clearly has brought fantastic economic benefits to some tribes,⁴⁰⁶ for the overwhelming majority, it has not produced this result.⁴⁰⁷ Some tribes, such as the Lummi Indian Nation in northwest Washington State, actually have shut down their sluggish casinos.⁴⁰⁸ Even the president of the National Congress of American Indians has testified that "[t]ribal governmental gaming is not the solution to all the problems of Indian Country."⁴⁰⁹

To date, tribal gaming supports just one percent of the nation's Indians.⁴¹⁰ Of the 142 tribes in twenty-four states that had entered

⁴⁰⁵ See, e.g., *Revisions to Indian Legal System: Testimony on S.1691 Before the Senate Comm. on Indian Affairs*, 105th Cong. (1998), available in 1998 WL 11517584 (statement of Wendell Chino, President of Mescalero Apache Tribe) (noting "the misperception that Tribes are getting rich off Indian Gaming"); ROGERS, *supra* note 13, at 81 (noting the nation's positive, but inaccurate, perception of tribal reservations that have casino gaming); Julian Schreibman, *Developments in Policy: Federal Indian Law: Native American Trusts*, 14 YALE L. & POL'Y REV. 353, 384 (1996) ("Indian gaming has created a popular impression of Native American nations as economically vibrant; with a few exceptions, such as the Pequots (who number only 300), this is not the case."); Johnson, *supra* note 180 ("Most reservations with gambling still have high rates of poverty and unemployment. The image of Indians made rich by casino wealth is wildly overdrawn; the notion is amplified by a few atypical but highly publicized little tribes with big operations near metropolitan regions like the Mashantucket Pequots' Foxwoods . . .").

⁴⁰⁶ See *supra* text accompanying notes 177-85; see also David L. Vinje, *Native American Economic Development on Selected Reservations: A Comparative Analysis*, 55 AMER. J. OF ECON. & SOC. 427, 427-28 (1996) (cataloging the positive impact of tribal gaming). Vinje notes that

Indian gambling is the fastest growing source of economic activity on the reservations. It is providing a much needed source of reservation jobs, and it is generating tribal revenues that have gone to support reservation projects encompassing improved housing, educational scholarship, medical clinics, repurchase of reservation land held by non-Indians and the establishment of industrial parks for new business opportunities.

Id.

⁴⁰⁷ See 144 Cong. Rec. S3919-02, S3923 (daily ed. Apr. 30, 1998) (statement of Sen. Cleland) ("The current statistical profile of Indian people is poor and shows little sign of improvement. Despite the popular belief that gaming has made millionaires of all Indians, the reality is otherwise as most Indian gaming revenues are more like church bingo than like Las Vegas or Atlantic City."); Timothy Egan, *Hunting 'the New Buffalo'*, N.Y. TIMES, Sept. 7, 1997, § 4 (Week in Review), at 3 ("[G]ambling was supposed to be the 'new buffalo.' But in the nearly 10 years since Congress opened the door to widespread tribal gambling, it has proven to be a mixed blessing, bringing great wealth to a handful of well-located tribes and little else to most Indians.").

⁴⁰⁸ See Egan, *supra* note 407.

⁴⁰⁹ GRIA Hearing, *supra* note 177, at 150 (statement of W. Ron Allen, President, National Congress of American Indians); cf. Vallen, *supra* note 14, at 58 (noting that some tribes regard Indian gaming as "cultural erosion," fear that it "may create cultural conflicts," and worry that it "has brought unscrupulous investors, corruption, and infighting to many reservations"). In all fairness, however, Allen also stated that because tribal gaming has provided jobs, revenue for health care, education, and housing, it should remain available to all tribes. See *id.* (statement of W. Ron Allen, President, National Congress of American Indians).

⁴¹⁰ See Schreibman, *supra* note 405, at 383.

into 164 Class III compacts as of 1997,⁴¹¹ "only a small percentage . . . derive benefits from casino operations."⁴¹² In 1996, only eight of those tribal casinos accounted for forty percent of the total national revenue from Class III gaming facilities.⁴¹³ Even the few tribes that own profitable casinos do not keep most of the revenue that their gaming operations generate. According to some accounts, as much as eighty-five percent of that money ultimately flows to the pockets of non-Indians, such as the professional management companies that tribes have hired to operate their casinos.⁴¹⁴

In the last decade, moreover, the proliferation of tribal gaming has failed to reduce Indian poverty rates; in fact, it actually has coincided with a rise in reservation poverty.⁴¹⁵ The overwhelming majority of tribes that conduct gaming remain deeply impoverished and continue to battle severe unemployment.⁴¹⁶ Indian reservations currently battle a thirty-one percent poverty rate.⁴¹⁷ Fifty percent of Indians on reservations remain unemployed⁴¹⁸—a figure that is six times the national average.⁴¹⁹ Additionally, "[t]ribal infrastructures for roads, community water and sewer services, and other amenities that most non-Indian communities take for granted are either absent or woefully inadequate."⁴²⁰

The bottom line is that on most reservations, especially reservations that are not within the vicinity of sizable feeder markets such as New York or Boston,⁴²¹ gaming has been an economic disappointment. This experience is hardly surprising. Before the rise of high-stakes tribal casino gaming, a 1987 study of fifty-four tribes that conducted bingo found that the "most important factor affecting the success of tribal high-stakes bingo operations was the density of the non-

⁴¹¹ See Christiansen, *supra* note 7, at 43.

⁴¹² ROGERS, *supra* note 13, at 81.

⁴¹³ See Christiansen, *supra* note 7, at 43.

⁴¹⁴ See ROGERS, *supra* note 13, at 82. But see Christiansen, *supra* note 7, at 43 ("[T]he lion's share of Indian Gaming Regulatory Act (IGRA) revenues stay on reservations. . . . Direct tribal revenues . . . from Class III gaming probably totaled \$1.7 billion in 1996.").

⁴¹⁵ See ROGERS, *supra* note 13, at 81.

⁴¹⁶ See Kilborn, *supra* note 404. It is noteworthy that Christiansen's comprehensive review of the success of tribal gaming cites only two tribes—the Pequots and the Mille Lacs Band of Ojibwe—that have had this positive experience. See Christiansen, *supra* note 7, at 44.

⁴¹⁷ See *Sovereign Immunity: Field Hearing Before Senate Comm. on Indian Affairs*, 105th Cong. (1998), available in 1998 WL 12760541 (statement of Susan M. Williams) [hereinafter Williams].

⁴¹⁸ See 144 Cong. Rec. S3919-02, S3923 (daily ed. Apr. 30, 1998) (statement of Sen. Cleland).

⁴¹⁹ See Williams, *supra* note 417.

⁴²⁰ See *id.*

⁴²¹ See Kilborn, *supra* note 404. But see Dao, *supra* note 183 (reporting the immense success of the Oneida Nation's Turning Stone casino despite its location in cold, windy, isolated Central New York).

Indian population in the region surrounding the bingo hall."⁴²² That single factor appears to remain very significant. In South Dakota, for example, the isolated casino of the Ogalala Sioux of the Pine Ridge Tribe generates one million dollars annually. But the tribe's reservation—with seventy-five percent unemployment—remains a place of "bone-crushing poverty."⁴²³

This widespread failure of gaming to improve economic conditions likely will not change because the new Indian casinos cater primarily to local residents and day-trippers whose average length of stay lasts typically for only a few hours.⁴²⁴ History teaches that an area can benefit from legalized casino gambling only when its casinos attract out-of-state visitors who stay for extended periods of time.⁴²⁵ Two factors account for this pattern. First, a casino in a nontourist destination "acts like a black hole, sucking the money out of the local population."⁴²⁶ Second, few casino day-trippers leave the casinos to explore shops and to sample restaurants in the surrounding area.⁴²⁷ The absence of these circumstances explains why Las Vegas, a city that draws its gamblers overwhelmingly from tourists who stay for several days on average,⁴²⁸ is arguably the only jurisdiction in the entire nation actually to have benefited from legalized casino gambling on a long-term basis.⁴²⁹

⁴²² Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. STATE L.J. 205, 231 (1997).

⁴²³ Kilborn, *supra* note 404.

⁴²⁴ See Rose, *supra* note 41, at 104; Christiansen, *supra* note 7, at 17; Shapiro, *supra* note 235, at 56 ("[M]ost places overestimate the amount of tourism they eventually get. Most gambling appears to be by local people.").

⁴²⁵ See Worsnop, *supra* note 13, at 774 ("The only way an area can benefit from gambling is to develop a tourism industry that brings in out-of-state visitors."). Indeed, every jurisdiction that has ever allowed casinos to draw from the local population has ultimately been forced to ban gambling altogether. See Rose, *supra* note 41, at 104. For example, the casino now located in Monte Carlo originally was in a small town, but had to relocate to Monte Carlo after it had "pauperized" the local residents. See *id.* at 104 n.73.

⁴²⁶ Rose, *supra* note 41, at 104; see also PADAVAN, *supra* note 191, at 11 ("What governments have to learn is that gambling is good for economic development only if you can import gamblers. Otherwise, the government is fostering a system that merely redistributes income from the local citizens to the people who own the machines and the tables." (internal quotation marks omitted)); Koughan, *supra* note 8, at 36 (pointing out that casinos in Joliet, Illinois generate more than eighty percent of their revenue from locals who "can then no longer spend that money in areas stores buying clothes or furniture or groceries").

⁴²⁷ Cf. Worsnop, *supra* note 51, at 643 (identifying this pattern in Atlantic City).

⁴²⁸ See GOODMAN, *supra* note 13, at 19; Rose, *supra* note 41, at 104; Christiansen, *supra* note 7, at 13, 17; Koughan, *supra* note 8, at 32.

⁴²⁹ Cf. Koughan, *supra* note 8, at 32 ("As a result of casino gambling, Las Vegas is now the fastest-growing city in America, boasting 11 of the 12 largest hotels in the world."); *supra* notes 268-69. Even in Atlantic City, the Las Vegas of the east, casino gambling has not spurred the economic development that New Jersey voters anticipated when they approved casino gambling in 1976. See Worsnop, *supra* note 51, at 641. As one gambling expert put it: "Atlantic City used to be a slum by the sea. . . . Now it's a slum by the sea with casinos." PADAVAN, *supra* note 191, at 6 (quoting I. Nelson Rose of Whittier Law School).

CONCLUSION

In October 1988, Congress transformed the United States into a casino gambling nation when it authorized Indian tribes to conduct high-stakes gaming on their reservations to the extent that their states permit for some purpose. At that time, IGRA did not turn many heads. In fact, neither the *Washington Post* nor the *New York Times* even mentioned IGRA by name until mid-1990, almost a full two years after its enactment.⁴³⁰

But today, IGRA generates widespread attention and its significance is hardly so unknown. IGRA bears responsibility for the introduction of casino gambling into states in which such gambling had not existed for most of this century. Since Congress enacted IGRA a decade ago, the number of states that are home to some form of high-stakes casino gambling has jumped from two to twenty-seven. Of the twenty-three states that now host high-stakes tribal casino gaming, only Nevada had casino gambling when IGRA became law.⁴³¹ More Americans now gamble at casinos than ever before, and high-stakes casino gambling has become the nation's newest pastime.

Many commentators argue that the new gambling activity represents a desperately needed answer to financial hardship for some revenue-starved communities and economically-deprived Indian tribes. But this unprecedented growth of high-stakes casino gambling has had a devastating impact on the economic and social well-being of communities across the nation. During this nationwide explosion of tribal and commercial casino gambling, it has become increasingly evident that the federal government must intervene to contain the trend's undesirable consequences. This Note proposes that Congress revisit its 1988 statutory misdeal and limit tribal casino gaming to those games that a state allows for general commercial purposes, but allow communities surrounding a proposed Indian casino to permit its operation despite any statewide ban on casino-style gambling.

This disappointment results because the typical gamblers who visit Atlantic City are daytrippers who arrive by bus and "usually spends all or most of their time inside a casino or on the Boardwalk." See Worsnop, *supra* note 51, at 643. As a result, the Atlantic City casinos have forced many retail businesses and restaurants out of business, and only about 10% of the stores that had surrounded the casinos when the city approved gambling are still open. See Grey, *supra* note 239.

⁴³⁰ To replicate this observation, access the New York Times and Washington Post databases on LEXIS and search for "Indian Gaming Regulatory Act" with a date restriction of after September 1, 1988.

⁴³¹ See Ota, *supra* note 32, at 193 fig.