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Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic"

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I. INTRODUCTION

Reservation gaming is big business in the 1990s. Although almost nonexistent ten years ago,[1] high-stakes gambling on Indian reservations is rapidly becoming the "new buffalo"—the staple of modern tribal economies.[2] More than 200 of the

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† *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

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1. While there were a few reservation casinos before passage of the Indian Gaming Regulatory Act, *see, e.g.*, Chet Barfield & John Gaines, *Indians Defy Ban on Video Gambling*, SAN DIEGO UNION-TRIB., May 5, 1995, at B2 (casino on the Rincon reservation in California opened in 1983), the first to operate under the Indian Gaming Regulatory Act did not commence operation until 1990. Penny Parker, *Casino Queen*, DENVER POST MAG., Aug. 27, 1995, at 12.

2. Tim Giago, *Indian Gaming Is the New Buffalo*, OMAHA WORLD HERALD, Oct. 9, 1995, *available in* 1995 WL 4090884; Kenan Pollack, *Mashantucket Pequots: A Tribe That's Raking It In*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 59.

The rapid growth in reservation gaming parallels the explosion in the gaming industry nationwide. According to one expert:

> From 1988 to 1994, national total yearly casino revenues nearly doubled—from $8 billion to $15 billion. The number of American households visiting casinos also doubled, from 46 million in 1990 to 92 million in 1993. By 1993, Americans spent nearly $400 billion a year on all forms of legalized gambling, a figure which had grown at an average annual rate of almost 15 percent a year between 1992 and 1994.

The Gambling Impact Study Commission Act: Hearing on S. 704 Before the Senate Comm. on Governmental Affairs, 104th Cong., 1st Sess. (1995) [hereinafter *Gambling Impact Hearings*] (testimony of Robert Goodman), *available in* 1995 WL 647890. Indian gaming represents "only about 7% of the entire legal gaming industry in the United States." *Id.* (statement of Richard G. Hill, Chairman of the National Indian Gaming Association), *available in* 1995 WL 647934, at *3.

nation's approximately 550 recognized Indian Tribes participate in some form of high-stakes reservation gaming.[3] Indian gaming produces about $7 billion in gross revenues annually, of which the Tribes net between $750 million and $1 billion.[4] Drawing 45,000 visitors each day,[5] the Mashantucket-Pequot Tribe's Foxwood Casino in Connecticut is one of the largest casinos in the world.[6] The Tribe's 11,000 employees make it one of the largest employers in the state.[7]

Reservation gaming is also a hot legal topic in the 1990s. Since passage of the Indian Gaming Regulatory Act[8] (IGRA) in 1988, state, federal, and tribal governments have been involved

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3. Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 502 n.4 (1995) (citing Prepared Testimony of Anthony J. Hope, Chairman, National Indian Gaming Commission, Before the Senate Comm. on Indian Affairs, FED. NEWS SERV., May 17, 1994). In November 1995, the Chairman of the National Indian Gaming Association reported that 130 Tribes have class III Indian gaming enterprises. *Gambling Impact Hearings*, *supra* note 2 (statement of Richard G. Hill), *available in* 1995 WL 647934. The difference between the two figures is explained, at least in part, by the fact that high-stakes bingo games are class II, rather than class III gaming enterprises. The larger number obviously includes both class II and class III enterprises. For an explanation of the current gaming classification scheme, see *infra* notes 148-154 and accompanying text.

4. Tyrone Beason, *Republicans Look at Indian Casinos as New Tax Source*, SEATTLE TIMES, Sept. 16, 1995, at A1.

5. Bob French, *Connecticut Tribe Credits Gambling for its Salvation*, FT. LAUDERDALE SUN-SENTINEL, Oct. 8, 1995, at 13A; Jonathan Rabinovitz, *Second Tribe to Open a Casino, This One with Wall St. Money*, N.Y. TIMES, Sept. 30, 1995, at A26.

6. The relative size of casinos is apparently somewhat in flux. One account states that the Foxwood casino is "the world's largest casino." Joseph Tydings & Peter Reuter, *Casino Gambling: Bring in the Feds*, WASH. POST, Feb. 6, 1996, at A15. Another categorizes it as "the largest in the Western Hemisphere." Bruce Alpert, *Casinos Playing National Politics; GOP Has Been Top Beneficiary*, TIMES-PICAYUNE (New Orleans), Feb. 23, 1996, at A1.

7. French, *supra* note 5, at 13A. Some tribes and tribal members have benefited greatly from reservation gaming operations. Members of the Pequot Tribe are guaranteed employment on the reservation and "all their health care, child care and educational expenses are paid from kindergarten through graduate school." Pollack, *supra* note 2, at 59. Each adult member of the Shakopee Mdewakanton Sioux Tribe received more than $400,000 in 1994 as a result of the operation of the Mystic Lake and Little Six casinos near Minneapolis. Megan Garvey, *Wealthy Minnesota Tribe is at Odds over Quarters: Faction Wins Tribal Vote to Open Membership Rolls*, WASH. POST, Apr. 21, 1995, at A3.

Other tribes, however, have not been as successful. The Hualapai Tribe of northwestern Arizona closed its casino eight months after it opened. Carol Sowers, *Hualapai Tribe Closes Casino; Revenue Less Than Expected*, ARIZ. REPUBLIC, Oct. 21, 1995, at A14. Assistant Interior Secretary of Indian Affairs Ada Deer, estimates that only twenty reservation casinos are prospering. Chet Barfield, *Indians Told to Fight Budget Cuts*, SAN DIEGO UNION-TRIB., Nov. 1, 1995, at B1.

8. 25 U.S.C. §§ 2701-2721 (1994).

in numerous lawsuits, many of which deal with the scope of the States' regulatory authority over gaming activities in Indian Country.[9] In some instances, the States have directly challenged the constitutionality of several features of the rules the federal government has enacted to limit States' roles in the process.[10]

Although Indian gaming is a relatively new phenomenon, federal-state disputes concerning the extent of state authority over activities occurring in Indian Country and the degree to which Indian policy will be shaped by centralized national authority instead of more decentralized state authority are not. Such disputes have been raging for more than two hundred years, with the first volleys being fired before the American Revolution. Reservation gaming is simply the most recent round in this ongoing struggle.

This Article attempts to place the current controversy concerning reservation gaming into perspective by viewing it not solely as a 1990s battle over casinos in Indian Country, but as the latest round in a much longer and larger struggle among the federal, state and tribal governments over the States' role in governing Native American groups within state borders. The history of federal Indian policy over the past 300 years cannot fully be explained in a short Article. However, some understanding of the general trends in its development enables us to view the current dispute with a wider, more accurate vision concerning the real interests involved as well as the factors that will likely shape the gaming controversy's outcome.

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9. *See, e.g.*, Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1995); Ysleta Del Sur Pueblo v. Texas, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1358 (1995); Wisconsin Winnebago Nation v. Thompson, 22 F.3d 719 (7th Cir. 1994); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir.), *cert. denied*, 115 S. Ct. 298 (1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); Coeur D'Alene Tribe v. Idaho, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876, *cert. denied*, 116 S. Ct. 305 (1995); Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292 (D. Ariz. 1992); Lac du Flambeau Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (9th Cir.), *cert. denied*, 506 U.S. 829 (1992).

10. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (Eleventh Amendment challenge to IGRA); Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994) (Tenth and Eleventh Amendment challenges to IGRA); Spokane Tribe v. Washington, 27 F.3d 991 (9th Cir. 1994) (Eleventh Amendment challenge to IGRA); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) (Tenth and Eleventh Amendment challenge to IGRA).

A brief review of some of the prior skirmishes in this ongoing battle reveals that they often follow a pattern. The conflict generally begins as a dispute between the Tribes and the States, with the Tribes primarily interested in preserving their autonomy and the States primarily interested in gaining control of the economic assets under tribal control. While the States' principal concern has usually been their ability to share in the material wealth generated on tribal lands, they have often argued in terms of abstract notions of tribal and state sovereignty and the proper relationship between the federal and state governments in deciding those issues.

Posed between the two main entities in this conflict is the federal government, whose plenary power over the Tribes[11] and supremacy over the States[12] enable it to resolve each particular conflict according to its desires. However, the federal government's resolution of these skirmishes is usually not the result of a thoughtful balancing of the Tribe's sovereignty and

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11. The current conventional view, as bluntly stated by one federal judge, is that "an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less." United States v. Blackfeet Tribe, 364 F. Supp. 192, 194 (D. Mont. 1973). At times, courts and scholars have linked federal supremacy over Indian tribes to various constitutional grants of congressional authority. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (stating that "the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making"); [Nell J.] Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 199 (1984) (noting that "[t]he Plenary Power Doctrine . . . can be traced not only to [the constitutional] commerce power but also to the treaty, war, and other foreign affairs powers, as well as the property power"). At other times, courts have tied this federal supremacy to notions of conquest and consent. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (positing that as a result of European discovery of America, tribal "rights to complete sovereignty, as independent nations, were necessarily diminished"); Duro v. Reina, 110 S. Ct. 2053, 2066 (1990) (Brennan, J., dissenting) (suggesting that "[w]hen the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised"). At one time, the Supreme Court employed a trust theory to justify federal regulations. *See* United States v. Kagama, 188 U.S. 375 (1886). That idea largely has been abandoned. [Robert N.] Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 STAN. L. REV. 979, 1002 (1981).

Kevin J Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1278 n.24 (1991).

12. U.S. CONST. art. VI, cl. 2.

the States' economic concerns, but rather depends on larger, more global events which prompt the federal government to be more or less respectful of state rights on a variety of issues. Often, though not always, the direction of the federal government on these more global issues is indicated by trends among the judiciary. Although the judiciary is often the first branch of the national government to deal directly with a state-tribal conflict, the courts rarely have the final say on the matter. Congress generally steps in to resolve the particular dispute, again guided more by general legislative and political trends in federal-state relations, than by the merits of the particular state-tribal controversy.

Although the exact details of this pattern are not followed in every tribal-state dispute, the general outline has become so familiar it is arguable that the course of federal Indian policy is usually not determined by whether the nation is more interested in preserving tribal sovereignty than in promoting local economic interests or vice versa, but instead on the general political climate of federal-state relations at the time. When state and local control is a popular and accepted concept at the federal level because of events unrelated to Indian policy, federal policy generally favors States' economic interests over tribal cultural or sovereignty interests. Conversely, the Tribes have their best chance of enlisting federal support, and therefore prevailing in a particular dispute, when the federal government is unwilling to trust the States on other non-Indian issues.

In short, this Article argues that federal-state relations on non-Indian issues often shape federal Indian policy more than a thoughtful consideration of the proper balance between state economic and tribal autonomy issues. What may begin as a dispute about tribal-state relations on a particular matter, often becomes part of a larger ongoing debate between the federal and state governments, with the larger debate dictating the outcome of the particular tribal-state controversy.

While no simple model can explain or predict all the twists, turns, and nuances of such a complex field as federal Indian policy, historical examples demonstrate that this pattern has repeated itself more than once. It may therefore provide a fairly accurate model for predicting the forces that will shape the reservation gaming debate and its course in the 1990s.

Part II of this Article provides examples of the recurrence of this pattern over the past 300 years and the varying

influences of different aspects of the pattern. Part III then illustrates that the reservation gaming controversy has followed the first steps of the pattern, and analyzes both the course the controversy will follow and the key factors that will determine its outcome if the pattern continues to apply.

II. THE HISTORICAL BATTLE FOR CONTROL OF INDIAN COUNTRY

A. *Round 1: Pre-Revolutionary Attempts at Centralization*

During most of the colonial period, Indian affairs were controlled by the individual English colonies without much interference from the central government.[13] Each colony was free to determine how to deal with the Native American Tribes within what it perceived to be its jurisdiction. As each colony pursued its own policy, conflict with the Tribes quickly ensued. By and large, the colonies were interested in two things—trade and land.[14] The Tribes, on the other hand, were principally concerned with minimizing the adverse impact of the arrival of these new settlers on their autonomy.[15]

Slowly, however, the British government realized that colonial control of Indian affairs might not be in the best interests of the national government.[16] Westward expansion by the colonies resulted in continuing encroachment upon Indian lands and increasingly hostile feelings by Native Americans

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13. WALTER H. MOHR, FEDERAL INDIAN RELATIONS 1774-1788, at 4 (1933).

14. FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 18 (1984) [hereinafter PRUCHA, THE GREAT FATHER]; *see also* J.P. KINNEY, A CONTINENT LOST—A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA 17-18 (1975).

15. From the beginning treaties between the Tribes and the United States made clear that the Tribes "wanted to be left to themselves." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 16 (1987). "Several treaties provided that the [T]ribes would be guaranteed 'absolute and undisturbed use and occupation' or that 'no persons except those herein so authorized to do . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.'" *Id.* (citing examples of treaties). As one Quapaw chief explained, "we want to continue . . . anywhere, even in the swamps where the whites will never settle. If our Great Father will grant our request, he may keep our money, we will give it all to him." *Id.* at 16 (quoting Treaty with the Quapaw Indians, May 13, 1833, 7 Stat. 424, Speech of Head Chief of Quapaw Tribe in Council Meeting Connected with the Negotiation of a Treaty (May 10, 1833)).

16. FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, at 10 (1962) [hereinafter PRUCHA, AMERICAN INDIAN POLICY]; Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1067 (1995).

toward the English Crown and the individual colonies.[17] Rivalry among the colonies for Indian trade prevented the development of any uniform rules governing trade with Native Americans, causing both widely varying restrictions on the flow of firearms and liquor to the Tribes and intra-colonial disputes and tribal-colony misunderstandings.[18]

As would often be the case in subsequent rounds, the judiciary provided the first hint of the national government's leanings. In 1703, Oweneco, a member of the Mohegan Tribe, petitioned the Queen in Council, claiming that colonial land grants by Connecticut officials violated the Mohegans' aboriginal title.[19] The case dragged on for more than seventy years, with the Mohegans ultimately losing title to most of their lands. However, various rulings during the litigation indicated sympathy for increased centralization of control over Indian-colonial relationships.[20]

Following a pattern which would be repeated in later disputes, the judiciary's initial pronouncements were not dispositive. The legislative and executive branches of the national government soon joined the debate, as other events began to dictate the course that Indian policy would take. As tensions mounted between the Indians and colonists, war erupted between France and Britain.[21] This war became the catalyst for more centralized intervention unrelated to the judicial sympathies for centralized control expressed in the Mohegan land dispute.[22] Indian displeasure with British prewar decentral-

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17. Clinton, *supra* note 16, at 1067.

18. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 11. Current rivalry among the states for reservation gaming revenues provide a significant parallel. A bill in the 104th Congress would establish a commission to review the national policies toward gambling. The justifications for the commission include the existence of

> a competitive environment between Indian tribes and States to legalize and develop casinos at a swift pace[;] . . . a competitive atmosphere developing between States and Indian tribes, between States and other States, and between States and bordering countries, particularly Canada, to attract the gambling dollar; and . . . dramatic growth in the political influence of gambling advocates in [local governments], where governments must act as both regulator and profiteer of gambling.

H.R. 462, 104th Cong., 1st Sess. (1995).

19. Clinton, *supra* note 16, at 1067. Clinton notes that "[t]his often overlooked case was perhaps the first formal litigation of North American Indian rights." *Id.*

20. *Id.* at 1068.

21. KINNEY, *supra* note 14, at 18.

22. MOHR, *supra* note 13, at 5.

ized colonial management was clear; for the most part, Indians either remained neutral or allied themselves with the French.[23] Disturbed by the effect Indian opposition might have on its ability to deal adequately with the French threat,[24] the British Crown began an effort to centralize control of Indian affairs in the national government soon after the war ended.[25]

A 1763 Proclamation designated certain lands as "Indian Country"[26] and severely restricted colonial control over and access to those lands.[27] The Proclamation prohibited colonial governors and commanders-in-chief from issuing warrants for surveys or patents for lands in the area and prohibited non-Indians from making purchases or settlements therein.[28] In 1764, the Board of Trade,[29] a London-based administrative body with authority to review and disapprove all legislation passed by the colonies,[30] proposed a plan under which all trade with the Indians in Indian Country was to be carried out

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23. *Id.*; PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 11.

24. Restraining the local colonists from encroaching on Indian lands was seen as crucial to peace with the Indians and maintaining British power in the region. Proclamation of 1763 (Oct. 7, 1763), *reprinted in* 3 THE AMERICAN INDIAN AND THE UNITED STATES 2135, 2137 (Wilcomb E. Washburn ed., 1973) (stating that it was "essential to [British] interest and the security of our colonies" that no further encroachments against the Indians take place); KINNEY, *supra* note 14, at 20; PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 11-15; Clinton, *supra* note 16, at 1069.

25. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 57 (1982 ed.); KINNEY, *supra* note 14, at 18; Clinton, *supra* note 16, at 1088. The central government's formulation of a unified Indian policy served many functions. With large debts following the war, the Crown could no longer afford to simply appease the Indians by frequent gifts. Further, the French traders were still inciting the Tribes against the British Crown and its colonies, and the English colonists were still defrauding the Indians in trade and in land transactions. All these concerns dictated a uniform Indian policy that would respect Indian sovereignty if the British Crown was to retain power in the region. MOHR, *supra* note 13, at 6.

26. The Proclamation of 1763 was the "first official delineation and definition of the Indian Country." PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 13. While the geographic details of the concept varied over time, the idea of a separate "Indian Country" was eventually codified in the U.S. Code. *See* Trade and Intercourse Act of 1796, ch. 30, 1 Stat. 469. The current definition is found in 18 U.S.C. § 1151 (1994).

27. Proclamation of 1763, *supra* note 24, at 2137; MOHR, *supra* note 13, at 6-7.

28. MOHR, *supra* note 13, at 7; PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 14.

29. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 21-22.

30. Forrest McDonald, *The Framers' Conception of the Veto Power*, *in* PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 2-3 (1988).

under the direction and inspection of superintendents appointed by the Crown.[31] The proposed plan mandated the repeal of all colonial laws regulating commerce with the Indians and provided for "the regulation of Indian Affairs both commercial and political . . . upon one general system, under the direction of Officers appointed by the Crown."[32] Although the 1764 plan was never formally adopted by Parliament, the superintendents used it as their guide in conducting Indian affairs for several years,[33] much to the irritation of the colonists, who resisted efforts to adopt a uniform policy of trade and land acquisition.[34] Trade abuses and land encroachments by colonists continued largely unabated.[35]

Thus, the first concerted effort by a national government in North America to restrict local governments from regulating commerce and land transactions in areas over which Indian Tribes were recognized as sovereign was not prompted by concern over the rights of Native Americans, but by fear that colonial action would unduly interfere with the central government's ability to protect its interests in the area.

This initial effort toward centralization proved largely unsuccessful. Opposition to the Proclamation of 1763 and the proposed Plan of 1764, as well as to the subsequently announced Stamp Act used to finance the British garrisons needed to enforce the Proclamation, created great dissatisfaction with British rule in the Colonies,[36] contributing to the discontent culminating in the American Revolution.[37] Accordingly, the first round of the battle was resolved in favor of the colonies. Yet notably, no conscious political decision concerning the proper extent of tribal and colonial sovereignty or the merits of central control over the development of Indian policy, brought about this resolution. Rather, other differences between the national and local governments that finally reached the boiling point motivated the colonies' successful overthrow of central

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31. RAY A. BILLINGTON, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 145-46 (4th ed. 1974); MOHR, *supra* note 13, at 7.

32. Clinton, *supra* note 16, at 1093 (quoting DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 634-41 (E.B. O'Callaghan ed., 1955)).

33. MOHR, *supra* note 13, at 7-8.

34. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 13-25.

35. Clinton, *supra* note 16, at 1097.

36. BILLINGTON, *supra* note 31, at 146-49.

37. *See* KINNEY, *supra* note 14, at 25-26; ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 233-51 (1990).

British rule, not only on Indian issues, but on all political matters.

The pattern was thus set. State economic interests conflicted with tribal autonomy interests. The judiciary intervened to resolve at least some of the specific problems created, but the larger state-federal (or in this case colonial-Crown) conflict eventually caused difficulties for the national government on other issues, and the national executive and legislative branches intervened to resolve the tribal-state conflicts. Ultimately, the issue was resolved not on the merits of the Tribes' and States' positions on the issues nor on a thoughtful consideration of the proper accommodation of those interests, but rather as the result of a larger battle (in this case literally) between the national and state (or colonial) governments over the proper relationship between those two entities in general on a wide variety of issues, which were largely unrelated to the specific concerns of the then-current Indian law dispute. While discontent concerning British Indian policy contributed to the Revolutionary War, it was "no taxation without representation," not "stay out of Indian affairs," that was the rallying cry of the revolutionists. Because of their success in this larger struggle, the colonies prevailed in round one of the battle for supremacy in Indian Country. However, the pattern of conflict was set, and the battle was far from over.

B. Round 2: Articles of Confederation—A Failed Compromise

Although the British Crown was now out of the picture, the tension between "local desires for economic profit and land and the necessity for coordination and centralization in Indian regulation" that had in part fueled the Revolution did not dissolve.[38] In many respects the battle simply continued with the new national government taking the place of the British Crown. Once again, the States' interests were primarily economic and the Tribes were mainly concerned about preserving their autonomy. Once again, while the battle initially focused on the proper scope of state-tribal authority, it ultimately was resolved based on larger trends and concerns involving the relationship between the national and state governments.

Both the status of Indian lands and the extent of state and federal control over them were hotly contested issues during

38. Clinton, *supra* note 16, at 1098; *see also* KINNEY, *supra* note 14, at 27.

the Articles of Confederation period.[39] Although it was generally agreed that some degree of centralization over Indian affairs was necessary,[40] advocates of state control argued "that trade with the Indians was too profitable to be committed to the national government."[41] The States wanted as much control over, and as much profit from economic development in Indian Country as was possible, given the practical need to recognize tribal autonomy required by the military might of the Tribes.

The framers of the Articles of Confederation attempted to adopt a compromise acceptable to advocates of both more centralized and less centralized positions. Article IX thus provided:

> The United States in Congress assembled shall have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.[42]

With one hand, the provision gave Congress exclusive authority over Indian affairs; with the other it took it away by giving the States full legislative control over their geographic areas. This "obscure and contradictory" provision was scorned by James Madison, who observed that "how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction[,] can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible."[43]

This basic inconsistency in the Articles of Confederation led to an unending series of disputes between the States and the national government on Indian issues. When the United States entered into a treaty with the Six Nations of the Iroquois Confederacy in 1784, New York objected because it had

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39. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, at 150 (1940); MOHR, *supra* note 13, at 182; Clinton, *supra* note 16, at 1099.

40. KINNEY, *supra* note 14, at 27; Clinton, *supra* note 16, at 1099.

41. Clinton, *supra* note 16, at 1100. Others argued that this loss would be offset by the federal government assuming the duty to defend against Indian uprisings. *Id.*

42. ARTICLES OF CONFEDERATION art. IX, *quoted in* KINNEY, *supra* note 14, at 27.

43. THE FEDERALIST NO. 42, at 268-69 (James Madison) (Clinton Rossiter ed., 1961).

already arrived at its own agreement with the Tribes.[44] Georgia and North Carolina also objected to federal treaties with Tribes located within their borders.[45] Within three months after Congress had restated its position that the national government had the sole and exclusive right to enter into treaties with Indian Tribes, Georgia signed its own treaty with a portion of the Creek Tribe, in which tribal members ceded their claims to lands in Georgia.[46]

Although often framed by the States as a debate concerning the proper extent of state sovereignty, these disputes did not involve "merely abstract claims of sovereignty, but competing state claims to authority over lucrative Indian land cessions and trade."[47] In 1788, Henry Knox complained to Congress that the citizens of North Carolina were openly violating the provisions of the treaty between the United States and the Cherokee Tribe because of the citizens' "avaricious desire of obtaining the fertile lands possessed by said [I]ndians."[48]

This round largely ended in a draw when the Constitutional Convention jettisoned the Articles in favor of the Constitution. Yet in some respects it followed the pattern established by the pre-revolutionary round. Thirst for the resources associated with Indian lands and trade caused the States to push for greater local control over Indian policy. At the same time, however, disputes between state and national governments on other issues soon overtook the Indian law debate, and dissatisfaction with other aspects of the status quo led the legislative branch (in this case, the constitutional and state ratifying conventions) to adopt sweeping changes that dramatically affected the Indian law debate.

C. Round 3: Early Attempts at Constitutional Resolution

Consistent with its overall move toward greater centralized government, the Constitution provided the federal government with greater control over relations with Indian Tribes than did the Articles of Confederation. During the Constitutional Convention, Madison cited the Indian situation as an example of

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44. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 34.
45. *Id.* at 35-37.
46. *Id.*
47. Clinton, *supra* note 16, at 1105.
48. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 39 (quoting Journals of the Continental Congress, XXXIV, 342-44).

the shortcomings of the Articles of Confederation, noting that "by the federal articles, transactions with the Indians appertain to [Congress]. Yet in several instances, the States have entered into treaties [and] wars with them."[49] He proposed that the Constitution provide Congress with the power "to regulate affairs with the Indians, as well within as without the limits of the United States."[50] The Committee on Detail changed the wording so that under the Constitution, Congress was given the authority to "regulate commerce with foreign nations, and among the several States, . . . and with the Indian [T]ribes."[51]

This constitutional provision seemed to grant the federal government exclusive control over relations with Indians residing in Indian Country, even when that Indian Country was located within the boundaries of organized States. The States objected to this implication, framing their objections in theoretical terms of sovereignty and objecting to the conceptual plausibility of the existence of an enclave of exclusive federal control—a state within a state,[52] or a "domestic dependent nation[]" as the Supreme Court would later call it.[53] However, it soon became clear that the States' concern was not so much with the theoretical correctness of exclusive federal control of Indian affairs as with its practical impact on the local economy.[54]

Besides denying non-Indians the natural resources found on tribal lands within the State,[55] tribal control over Indian lands also served to create an intrastate haven for fugitive

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49. *Id.* at 42 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911-1937) [hereinafter FEDERAL CONVENTION]).

50. *Id.* (quoting 2 FEDERAL CONVENTION, *supra* note 49, at 321).

51. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 3.

52. PRUCHA, THE GREAT FATHER, *supra* note 14, at 189; RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 3 (1975). Some argued that tribal lands within state boundaries violated Article IV, § 3 of the Constitution, which provides that "no new State shall be formed or erected within the Jurisdiction of any other State." KINNEY, *supra* note 14, at 55. President Jackson made this point in his first message to Congress in 1829. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 238.

53. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

54. This does not mean that the non-economic sovereignty concerns were not real. As one historian has noted, "The concern about [S]tates' rights and the fear of a bitter federal-state jurisdictional contest that might even lead to military conflict was not simply a rationalization for base economic motives but a very real issue in the pre-Civil war period." PRUCHA, THE GREAT FATHER, *supra* note 14, at 197.

55. BILLINGTON, *supra* note 31, at 312-14; PRUCHA, THE GREAT FATHER, *supra* note 14, at 195.

slaves, which southern States found particularly troubling.[56] Some state residents warned that if the States lacked authority to retrieve slaves from tribal lands within state boundaries, and if the federal government refused to allow States to remove Indians from within their boundaries, then the federal government might also presume authority to emancipate those slaves,[57] which would cause untoward impact on the southern economy. The continuing tension between federal and state power over slavery and Indian lands erupted in Georgia into a "'crisis . . . hardly less grave than the later nullification controversy'" involving South Carolina.[58] When coupled with the discovery of gold on Cherokee lands in the state,[59] the issue could no longer be contained.

As in the pre-constitutional round, the judiciary was the first branch of the national government to deal with the tribal-state conflict in this round of the battle. Ignoring the clear language of the Constitution, Georgia enacted a series of laws designed to give it complete and exclusive jurisdiction over Cherokee lands within its borders.[60] When the issue finally reached the Supreme Court,[61] the Court held that the federal

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56. SATZ, *supra* note 52, at 4. The problem of slaves escaping to the Spanish-controlled Indian country of Florida had vexed slave owners for many years. Georgians mounted "slaving raids" into tribal lands to recover the fugitives. These raids were often violent, and increased the tensions between the Georgians and the Indians. Shortly before Florida was purchased by the United States in 1819, General Andrew Jackson invaded the Indian lands of Florida to retrieve escaped slaves and to punish the belligerents. After peace was made with the Florida Indians and Florida was purchased from Spain, Georgians insisted that the remaining fugitive slaves be retrieved or compensation be made. GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 315-19 (2d ed. 1953).

57. SATZ, *supra* note 52, at 4.

58. *Id.* at 8 n.8 (quoting JAMES W. SILVER, EDMOND PENDLETON GAINES: FRONTIER GENERAL 129 (1949)). This "conflict among the Cherokee Nation, the state of Georgia, the United States Supreme Court, and the President . . . became one of the greatest constitutional crises in the nation's history." COHEN, *supra* note 25, at 81.

59. KINNEY, *supra* note 14, at 62; PRUCHA, THE GREAT FATHER, *supra* note 14, at 195.

60. COHEN, *supra* note 25, at 81; KINNEY, *supra* note 14, at 69-70.

61. After Georgia enacted these laws, "a state court tried and convicted George Tassel, a Cherokee, of murder committed on Cherokee land. The United States Supreme Court granted a writ of error to review Tassel's conviction, but the state refused to honor the writ and Tassel was hanged." COHEN, *supra* note 25, at 82. The Tribe then sought an injunction against Georgia law by filing an original action in the United States Supreme Court, under the Court's "foreign nations" jurisdiction. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *see* U.S. CONST. art. III, § 2. Georgia refused to appear in the case and asserted its sovereign immunity. COHEN, *supra* note 25, at 82. The Court found that Indian tribes were not

government and not the States had authority over the Indian Tribes. Chief Justice Marshall asserted in *Worcester v. Georgia*[62] that the Constitution

> confers on [C]ongress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian [T]ribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.[63]

In a related case, the Court indicated that Indian Tribes retained some sovereignty over their own affairs in Indian Country. The Court noted that the Cherokee Nation, though located within the boundaries of the state of Georgia, was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[64] Tribal sovereignty was not unlimited, however. The Court indicated that the Tribe was not a foreign nation, but rather a "domestic dependant nation[]" that "occup[ies] a territory to which we assert a title independent of their will" and that "look[s] to our government for protection; rel[ies] upon its kindness and its power; [and] appeal[s] to it for relief to their wants."[65]

Applying these principles to Georgia's efforts to apply its laws to Cherokee lands within its borders, the Court struck down the state laws, noting:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this nation, is, by our

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foreign nations within the meaning of the Constitution, and thus the Court lacked original jurisdiction. *Cherokee Nation*, 30 U.S. at 19. It was not until the following year, when white missionaries were indicted for violating state law on Indian lands, that the Court spoke on the merits of the issue. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

62. 31 U.S. (6 Pet.) 515 (1832).

63. *Id.* at 559.

64. *Cherokee Nation*, 30 U.S. at 16.

65. *Id.* at 17.

> [C]onstitution and laws, vested in the government of the United States.[66]

For the first time in three rounds, the central government seemed to have scored a victory.

That such a victory would come through decisions authored by Chief Justice Marshall was not surprising, given Marshall's general views on federalism.[67] Among the branches of the federal government at that time, only the judiciary was an advocate of a strong federal government.[68] As would often be the case in future rounds, the Supreme Court's views on federalism generally provided a helpful clue as to its resolution of state-tribal conflicts concerning jurisdiction over Indian Country.

However, as in previous and subsequent rounds, judicial decision did not end the controversy. State desire for control over the economic benefits flowing from Indian lands, coupled with a surge in States' rights claims in other contexts, made the judicial victory short-lived.[69] Once the executive and legis-

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66. *Worcester*, 31 U.S. at 561.

67. Joyotpaul Chaudhuri, *American Indian Policy: An Overview*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 15, 24-25 (Vine Deloria, Jr. ed., 1985); *see also* JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 89 (1992) (observing that Marshall "was a supporter of a strong national government and exerted great influence on the development of the national governance system"). Marshall, however, was also aware of the limits of a then-weak judicial branch in comparison to a more powerful and pro-state executive branch. *See* Chaudhuri, *supra*, at 24-25.

68. ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 15 (1945) ("If the Federalists were expelled from the executive and legislative branches, at least they still had the judiciary, and John Marshall proposed to make it an impregnable fortress.").

69. While the Cherokee Tribe's victory in *Worcester* provided little concrete benefit to the Tribe at the time, the Court's rulings in both *Worcester* and *Cherokee Nation* have proven to be of great benefit to all Tribes since. Despite the many changes in federal Indian policy in the following years, these early Supreme Court cases have never been overruled, and they continue to provide the fundamental principles of federal Indian law that are relevant to current Indian law controversies, including the Indian gaming issue.

The first of these principles is that Indian tribes are sovereigns with inherent authority to regulate activities occurring on lands recognized by the federal government as Indian Country. "The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'*" United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.)). "Indian Country" as currently defined in the United States Code, includes, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151 (1994). Although § 1151 appears in the federal criminal code, the Supreme Court has indicated that the statute's definition of

lative branches joined the battle, its course changed dramatically.

President Andrew Jackson, who was an advocate of state sovereignty on a wide variety of issues,[70] refused to enforce the Supreme Court's decision in *Worcester*.[71] Prior to the

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"Indian Country" generally applies to questions of civil jurisdiction as well. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

Second, even though Indian tribes retain a measure of inherent sovereignty over their members and territory, that sovereignty is subject to complete defeasance by the federal government. "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Treaties and federal common law can also limit the tribes' sovereignty.

Third, as a result of the prior two principles, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

Fourth, although the *Worcester* rule that state law can have no effect in Indian Country has been considerably modified by modern cases, state law still does not apply within Indian Country to the same extent that it does off the reservation. "[C]ongressional authority and the 'semi-independent position' of Indian tribes . . . [are] two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Rice v. Rehner, 463 U.S. 713, 718-19 (1983) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)). As a result of the first barrier—Congressional authority—state law will often be held to be preempted by federal law, under "a flexible pre-emption analysis" involving a "'particularized examination of the relevant state, federal, and tribal interests.'" Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989) (quoting Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 838 (1982)). As a result of the second barrier—the Indian tribes' semi-independent position—a state may not enact legislation that "'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them,'" absent "'governing Acts of Congress.'" New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171-72 (1973)).

70. SATZ, *supra* note 52, at 9 ("Upholding the Republican doctrine of state sovereignty, Jackson envisioned the federal government as one of severely limited purposes."); *see also* SCHLESINGER, *supra* note 68, at 36 (Jackson "committed himself definitely against the premises of federalism. 'I am one of those who do not believe that a national debt is a national blessing,' he said, 'but rather a curse to a Republic; inasmuch as it is calculated to raise around the administration a moneyed aristocracy dangerous to the liberties of the country.'" (quoting correspondence of Andrew Jackson to L.H. Colman (April 26, 1824), *in* JAMES PARTON, LIFE OF ANDREW JACKSON, III, at 35-36 (1860)).

71. KINNEY, *supra* note 14, at 71; PRUCHA, AMERICAN INDIAN POLICY, *supra* note 16, at 245; SCHLESINGER, *supra* note 68, at 350. President Jackson is reported to have stated, "John Marshall has rendered his decision; now let him enforce it." FOREMAN, *supra* note 56, at 235. Whether Jackson actually said those words is highly questionable. *See* PRUCHA, THE GREAT FATHER, *supra* note 14, at 212 n.61. However, it is clear that Jackson believed that the Executive Branch lacked authority to enforce the Supreme Court's decision, since federal action first required a written refusal from the state court to obey the Court's ruling. *Id.* at 212; SATZ, *supra* note 52, at 49-50. Furthermore, no one disputes that Jackson stated that "the decision of the supreme court has fell still born, and they find that they can-

Court's ruling, he had advocated legislation authorizing removal of the Tribes from within state boundaries.[72] Following the decision, he moved to implement that policy by negotiating a treaty for removal with one faction of the Cherokee Tribe.[73] Removal of the Tribes from the Southeastern States eliminated the perceived threat to state sovereignty from having a distinct political society within a sovereign state,[74] and, more importantly from the States' standpoint, made the resources of tribal lands available to local non-Indians. Most of the Cherokee, along with other southern Tribes, were removed from state boundaries to the Indian Country that is the present-day State of Oklahoma.[75] Significantly, the States' de facto legislative victory paralleled a shift in the Supreme Court's views on federalism, as the nationalist Marshall was replaced by the more States-rights oriented Roger Taney.[76] Thus, for nearly thirty

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not coerce Georgia to yield to its mandate." PRUCHA, THE GREAT FATHER, *supra* note 14, at 212 (quoting correspondence of Andrew Jackson to John Coffee (April 7, 1832)).

Some Cherokee leaders predicted Jackson's reaction. While others were celebrating the victory in *Worcester*, John Ridge cautioned that "the Chicken Snake Andrew Jackson has time to crawl and hide." ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 122 (1970).

72. KINNEY, *supra* note 14, at 62-66. "Jackson was convinced that Indians were entitled only to the property they actually occupied as individuals, not the vast tribal tracts 'on which they have neither dwelt nor made improvements, merely because they have seen them from the mountain or passed them in the chase.'" BILLINGTON, *supra* note 31, at 301. Of his available options, "extermination offended [Jackson's] sense of human decency, assimilation had proven unworkable, and preservation of the tribes under federal protection on ancestral lands was impossible given the social climate of the South." *Id.* at 301-02.

Many tribes were removed from their lands during the late 1820s and early 1830s. *See* KINNEY, *supra* note 14, at 72-74. Removal came to dominate national Indian policy from 1828 to 1840. COHEN, *supra* note 25, at 79 n.143.

73. Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478. One faction of the Tribe headed by John Ridge negotiated the treaty. DEBO, *supra* note 71, at 123. The Tribal council unanimously rejected the treaty, and sent John Ross, leader of a different faction, to Washington to negotiate more favorable terms. *Id.* While Ross was in Washington, federal officials called another council meeting, attended only by members of the Ridge faction, in order to sign the rejected treaty. That treaty was the one ratified by Congress. *Id.* at 123-24.

74. SATZ, *supra* note 52, at 10.

75. S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 64 (1973).

76. Chief Justice Taney's tenure marked a shift in the Court's jurisprudence toward greater favor for stetes' rights claims, as represented by such decisions as Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 326 (1837) (upholding the creation of a state-owned bank); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (broadening the states' police powers); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (leaving some details of interstate commerce regulation to the states' discretion); and Dred Scott v. Sandford, 60 U.S. (19 How.) 393,

years, neither the legislature nor the judiciary acted to change the policy of removing Tribes to areas outside the borders of existing States.

However, the States' success in this part of the round, while longer-lasting than their defeat in the earlier part, was still only temporary. As other conflicts between States' rights and national control proliferated on non-Indian issues, the dispute between state and national governments for the second time turned into a literal armed conflict—the Civil War. As in the Revolutionary War, Indian issues quickly took a back seat to other more global issues as the war commenced and was waged.[77] However, unlike the Revolutionary War, the Civil War resulted in a victory for those advocating more, rather than less, national control. The stage seemed to be set for a resurgence of tribal power vis-à-vis the States. Yet with the major threat to national security from the States' rights claim abated and the coincidence of federal economic interests with those of the States, the potential for change was not realized.

D. Round 4: Post-Civil War Westward Expansion

In fact, following the Civil War, tribal autonomy reached a low point. Initially, more Tribes were relocated into the Indian Territory of Oklahoma and thousands of non-Indians moved there illegally,[78] but later expansion to California rendered further removal to areas outside state boundaries useless. Federal policy shifted first to the use of reservations within state boundaries and then to the use of allotments to break up the reservations.[79] Reservations initially set aside a distinct area of land for various Tribes;[80] later, the allotment policy as-

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405 (1856) (holding that Congress may not prohibit slave ownership and a former slave's state citizenship does not create United States citizenship). *See* ZIMMERMAN, *supra* note 67, at 90-91; *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 72-88 (1993).

77. Ironically, members of some of the southern Tribes relocated in Oklahoma sided with the Confederacy, causing internal rifts in those Tribes. DEBO, *supra* note 71, at 168-83; *see also* PRUCHA, THE GREAT FATHER, *supra* note 14, at 419-23. As a result of treaties with the Confederacy, "a Choctaw-Chickasaw, a Creek-Seminole, and a Cherokee delegate sat in the Confederate Congress throughout the war." DEBO, *supra* note 71, at 172. The alliance of the tribes with the southern Confederacy gave the federal government opportunity to accuse the tribes of treason and subsequently force them to "surrender most of western Oklahoma." BILLINGTON, *supra* note 31, at 571.

78. COHEN, *supra* note 25, at 772-73.

79. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 146-52 (3d ed. 1991).

80. John M. Findlay, *An Elusive Institution: The Birth of Indian Reservations*

signed parcels of that land to individual tribal members and made them alienable in the future.[81] Allotments served the dual purpose of allowing non-Indians eventual ownership of the lands and of assimilating Indians into American society.[82] By privatizing the land, allotments also served to give States jurisdiction over much of the allotted land.

Across the nation, allotments had become "a virtual necessity" because the federal government was unable and unwilling to protect Indian lands from local non-Indian interests or from the needs of the railroad industry.[83] By 1893, Oklahoma tribal lands were allotted to Indians individually rather than to the Tribes.[84] Eventually, Congress passed the Curtis Act, suspending the Cherokee Tribe's governing authority and nullifying the force of Cherokee law.[85] Just as prior Eastern Indian lands had been attractive for their location, lumber, and minerals, tribal lands in Oklahoma also became attractive for their oil reserves, and in 1902 the Secretary of the Interior authorized the first oil and gas lease on Oklahoma tribal lands. Within six years, 23,000 such tribal land leases had been exe-

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in Gold Rush California, *in* STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY 13, 15-16 (George P. Castile & Robert L. Bee eds., 1992) [hereinafter STATE AND RESERVATION].

81. TYLER, *supra* note 75, at 95-96.

82. COHEN, *supra* note 25, at 128.

83. GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45, at 4 (1980); *see also* BILLINGTON, *supra* note 31, at 718-21. As others have noted:

> During this period, as in the preceding period, pressure on Congress to accelerate Indian [land] expropriation came from hordes of impoverished farmers, from the railroads and speculators and merchants. Mining and timber interests also wanted access to Indian lands, and therefore the speculators focused on the timber and mineral country of the Rocky Mountains and the Pacific Northwest, and the oil lands of Oklahoma as well as on the agricultural lands always sought. . . . In response to the mining and timber interest, various presidents throughout the period . . . used the executive order to alienate reservation lands and allocate them to the public domain. In this way, large timber and mining companies could exploit the lands without having to deal with the more intricate Indian land-leasing procedures.

Lawrence D. Weiss & David C. Maas, *Primitive Accumulation, Reservations, and the Alaska Native Claims Settlement Act*, *in* STATE AND RESERVATION, *supra* note 80, at 189, 195 (quoting Klara B. Kelley, *Federal Indian Land Policy and Economic Development in the United States*, *in* ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS 33 (Roxanne D. Ortiz ed., 1979)).

84. TAYLOR, *supra* note 83, at 4.

85. Act of June 28, 1898, ch. 517, §§ 26, 28, 30 Stat. 495, 504.

cuted.[86] During that time, in another violation of the removal treaty with the Cherokee, Oklahoma became a state.[87]

That this lowpoint for tribal autonomy should occur so soon after the blow to States' rights occasioned by the Civil War is, at first glance, counter to the model posited at the outset. While it may be explained as an aberration dependent on unique facts concerning Native Americans at the time,[88] it seems to be largely the result of two more global factors that shaped federal-state relations in a unique way during the post-Civil War period.

First, the increase in national power occasioned by the Civil War was not as dramatic and decisive as might have been expected. Although the Reconstruction period was marked by constitutional amendments that gave the federal government greater power over the States,[89] Supreme Court interpretations of those amendments made the federal victories somewhat hollow.[90] By the 1870s,

> [t]he country was tiring of the extensions, and, in some circumstances, usurpations of Federal power which had been the natural outcome of war and of war necessities. The [Court's] decision [in the Slaughterhouse cases?] marked the end of the great centralizing, Nationalistic movement, and the beginning of a reaction towards the enhancement of the powers of the States.[91]

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86. S. Lyman Tyler, A Study of the Changes in Policy of the United States Toward Indians 17 (1964) (unpublished manuscript on file with the authors).

87. COHEN, *supra* note 25, at 774.

88. For example, the fact that some of the Oklahoma tribes had decided, for the first, and perhaps only, time to side with the states' rights forces during the Civil War, *see supra* note 77, clearly led to federal recriminations against those tribes. This aberration in tribal allegiance in the federal-state dispute may represent a unique paradigm shift that explains the demise in the fortune of those particular tribes. However, the shifts in federal policy were not solely directed to those tribes. Accordingly, some broader explanation is required.

89. *See* U.S. CONST. amends. XIII-XV.

90. For example, the Court's 1873 Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), disappointed many nationalists in its refusal to extend the Fourteenth Amendment's scope to protect against a state statute that granted a monopoly. The Court's interpretation was seen as contrary to the drafters' intent. CHARLES WARREN, 3 THE SUPREME COURT IN UNITED STATES HISTORY 1856-1918, at 261-64 (1922).

91. WARREN, *supra* note 90, at 265. Even though the Court was in many ways an advocate of States' rights, its views on the precise balance of power between the federal government and the States during this period would continue to fluctuate consistent with other periods of American history. The 1880s, for example, brought new Justices to the Court and a renewed interest in strengthening federal

Second, during much of the post-Civil War period a more basic political trend, the doctrine of manifest destiny, unified state and federal views on Indian policy.[92] Since the earliest days of the republic, many European-Americans had believed that the Indian Tribes would ultimately have to yield to the increasing demands of the new nation.[93] Initially, removal of the Tribes from the Eastern States satisfied the States' desire for resources.[94] As it became clear after the Civil War that the western frontier would soon become more populated,[95] demands to dispossess the Indians of their reservations increased.[96] And as the economic interests of the state and the federal government coalesced, so did their approaches to the Indian land issue. The allotment and assimilation policies gave non-Indians access to former Indian lands,[97] as the States desired. Because such a transfer of lands did not adversely affect any national interests (and indeed furthered them to the extent it encouraged westward settlement), the federal government offered no resistance to the pressure for opening up Indian lands for sale, and indeed, facilitated the transfer. The massive flow of lands from Native Americans to non-Native Americans thus proceeded almost without interruption. By 1932, the 1887 Indi-

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power. As the railroad and telegraph increased possibilities for interstate commerce, the Federal government's Commerce Clause authority grew rapidly. *Id.* at 347-48.

92. The term "manifest destiny" was coined in the 1840s "to describe the process of American expansion." REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 219 (1981).

93. For example, Andrew Jackson expressed a popular view in his defense of the Indian removal policy when he asked "if any American 'would prefer a country covered with forests and ranged by a few thousand savages' over the United States, now 'embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization, and religion.'" THOMAS R. HIETALA, MANIFEST DESIGN: ANXIOUS AGGRANDIZEMENT IN LATE JACKSONIAN AMERICA 136-37 (1985). It was obvious that the Tribes would have to relent. "Many . . . by the mid-1840s . . . regarded nonwhites who held desirable land as obstacles to progress rather than worthy beneficiaries of humane assistance." *Id.* at 137.

94. *See id.* at 142.

95. *See* DAVID M. WROBEL, THE END OF AMERICAN EXCEPTIONALISM: FRONTIER ANXIETY FROM THE OLD WEST TO THE NEW DEAL 17 (1993).

96. HIETALA, *supra* note 93, at 142. In relation to Indian policy, the anxiety over the closing of the American West culminated in the allotment acts of the late 1800s. WROBEL, *supra* note 95, at 17.

97. WROBEL, *supra* note 95, at 17.

an land base of 139 million acres had shrunk to 52 million acres.[98]

While this round of the battle over control of Indian lands was won decisively by the States at a time when States' rights were not particularly in ascendancy, the devastating results for the Tribes underscore what seems to be a fundamental concept of federal Indian policy—when the federal government does not intervene to prevent state interference with tribal autonomy, States will expand their influence at the expense of the Tribes. When the federal government actively encourages such interference, as occurred in this round, the Tribes are left almost defenseless.

The Tribes' post-Civil War experience also confirmed that tribal court victories are always tenuous at best. While the legislative branch was busily engaged in the process of breaking up the reservation, the Supreme Court in *Ex parte Crow Dog*[99] held that federal courts lacked jurisdiction over crimes committed by Indians against Indians on the reservation.[100] Shocked by the federal government's lack of control over the reservation, Congress soon passed legislation granting federal jurisdiction on the reservation over "major crimes."[101] While neither the judical decision nor the legislative reaction directly affected the tribal-state relationship in Indian Country (since neither the decision nore the statute granted any authority to the state), the sequence of events was consistent with the pattern developing in state-tribal disputes—tribal court victories were to be short-lived and soon to be overturned by Congress.

F. Round 5: The Twentieth Century

The shifts in Indian policy in the twentieth century provide further support for the hypothesis that tribal autonomy rises and falls based on factors outside the Tribes' control, principally on whether federal or state governments prevail in federalism disputes unrelated to Indian law issues. Although the

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98. WILKINSON, *supra* note 15, at 20.

99. 109 U.S. 556 (1883).

100. *Id.* at 572.

101. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (1994)); *see* COHEN, *supra* note 25, at 129. The current version of the law provides federal jurisdiction over "the following offenses" committed by Native Americans in Indian Country: "murder, manslaughter, kidnapping, maiming, [rape, involuntary sodomy], incest, assault with intent to commit murder, assault resulting in serious bodily injury, arson, burglary, robbery, and [theft]." 18 U.S.C. § 1153 (1994).

nineteenth-century-initiated allotment policy succeeded in allowing non-Indians access to Indian lands, by the 1920s it was evident that the allotment program had failed to assimilate Native Americans into American society as had been intended. Several studies and congressional hearings demonstrated the extreme poverty of most Native Americans and the persistence of the tribal identity.[102] Perhaps of greater importance, however, was the Great Depression which placed many non-Indians in relative poverty and caused many Americans to look to the federal government for solutions to numerous problems with which the States seemed unable to cope.[103] The New Deal era in American government created a new level of federal power and responsibility[104] vis a vis the States on a whole host of issues and with it renewed life for tribal sovereignty.[105]

As federal power increased on a number of fronts, federal interests aligned to pass the Indian Reorganization Act of 1934 (IRA).[106] The IRA halted further allotment[107] and authorized Tribes to develop tribal constitutions and governments.[108] Although the IRA received mixed reviews from the Tribes,[109] it stands in contrast to previous legislation that sought to destroy the tribal unit, assimilate Native Americans into society, and subject them to state control. The IRA but-

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102. WILKINSON, *supra* note 15, at 7; *see also* TAYLOR, *supra* note 83, at 5.

103. As one author states:

> Giant industries prostrate, nationwide crises in production and consumption, the economy in a state of virtual collapse—if ever there was a need for exertion of federal power, it was after 1929. The market and the states had found the crisis beyond their competence. The choice was between federal action and chaos.

SCHWARTZ, *supra* note 76, at 233.

104. Anthony J. Badger, *The New Deal and the Localities*, *in* THE GROWTH OF FEDERAL POWER IN AMERICAN HISTORY 102, 102 (Rhodri Jeffreys-Jones & Bruce Collins eds., 1983).

This period also marked another shift of the Supreme Court's views on federalism. The expansion of federal power was hampered by the Court's holdings that some New Deal statutes were unconstitutional. President Franklin D. Roosevelt responded with his Court-packing plan to "appoint another judge for every federal judge who was over seventy and had not retired." SCHWARTZ, *supra* note 76, at 233. Coinciding with increased pressure from the executive branch, by 1937 the Court "commenced . . . uphold[ing] the constitutionality of the New Deal statutes." ZIMMERMAN, *supra* note 67, at 92.

105. PRUCHA, THE GREAT FATHER, *supra* note 14, at 917-19.

106. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994 & Supp. 1996)).

107. 25 U.S.C. § 461.

108. *Id.* §§ 476-478.

109. COHEN, *supra* note 25, at 150.

tressed tribal authority against pressures of state sovereignty and efforts to control tribal resources.

Coming at the height of perhaps the most massive surge in federal power in American history, this 1930s revival of tribal autonomy serves as a prime example of the way in which state-federal relations on non-Indian issues determine the resolution of state-tribal issues. It is doubtful that such a dramatic change in federal Indian policy would have occurred in a setting in which States' rights were on the rise. Indeed, with the conclusion of World War II and the lessening of States' economic dependence on the national government, the trend in favor of tribal autonomy ended.

The backlash to the IRA began in the 1940s. Critics of the Act cited both practical problems in the application of the statute[110] and philosophical differences over its content as grounds for a change.[111] The major thrust for greater state control over Indian Country, however, was fueled by familiar concerns, with significant opposition to the IRA being mounted by business interests that were threatened "with losing the use of Indian land and resources under the [IRA-associated] programs."[112] As the nation gradually recovered from the Great Depression, and as federal control appeared less necessary to protect the interests of non-Native American citizens, these economic arguments became more influential in Congress.[113] The fundamental legal objection to control of Indian lands, however, was again couched in terms of abstract notions of state sovereignty. Echoing sentiments of the Jackson era, a House Report concluded:

> Fundamentally the [IRA] attempts to set up a state or a nation within a nation which is contrary to the intents and purposes of the American Republic. No doubt but that the Indians should be helped and given every assistance possible but in no way should they be set up as a governing power within the United States of America. They shall be permitted to have a part in their own affairs as to government in the same way as any domestic organization exists within a State

110. *Hearings on S. 2103 Before the Comm. on Indian Affairs*, 76th Cong., 3d Sess. (1940) [hereinafter *Hearings on S. 2103*], *quoted in* CLINTON, *supra* note 79, at 155-57.

111. COHEN, *supra* note 25, at 153.

112. *Id.* at 153-54.

113. *See id.* at 154.

> or Commonwealth but not to be independent or apart therefrom.[114]

In 1949, an executive branch report recommended the total assimilation of Indians into American society by terminating legal recognition of tribal organizations, repeating Recontruction-era attempts to force assimilation. Although the IRA remained for the most part intact, certain Tribes were subjected to state law[115] and the legal status of other Tribes was completely terminated.[116] Termination policies were advocated as a "reflection of 'post-war optimism, faith in free enterprise, and belief in the goodness of *local* government.'"[117] Once again, the popular view that States could be trusted with control over a variety of non-Indian issues permitted the States to exercise greater control over Indian issues as well.

By the early 1960s, however, the assimilation and termination policies were found to be ineffective, and political sentiment began to shift once again, in tandem with prevailing views of federalism.[118] Reflecting the decline in faith in the

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114. *Hearings on S. 2103*, *supra* note 110, at 156-57.

115. CLINTON, *supra* note 79, at 157.

116. TYLER, *supra* note 75, at 172-181.

117. COHEN, *supra* note 26, at 156 (emphasis added).

118. For example, President Eisenhower's 1961 State of the Union Address warned of the "dangerous drift toward centralization of governmental power in Washington." Michael D. Reagan, *Federal-State Relations During the 1960's: Unplanned Change*, *in* CHANGING PATTERNS IN AMERICAN FEDERAL-STATE RELATIONS DURING THE 1950'S, THE 1960'S & THE 1970'S, at 31, 32 (Lawrence E. Gelfand & Robert J. Neymeyer eds., 1985). In 1961 President Kennedy also took office, and "urged federal aid to education, substantial aid to the cities, and the creation of the Department of Housing and Urban Affairs. . . . [These] were clearly tho proposals of a president who looked toward an enlarged rather than a diminished national government." *Id.* at 33.

And once again, this period marked another shift in the Supreme Court's views of federalism. In the judicial branch, the expansion of federal power had begun in the early 1950s when Earl Warren took the bench. The Warren Court's pro-national government decisions include Brown v. Board of Education, 347 U.S. 483 (1954); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the 1964 Civil Rights Act prohibition of racial segregation in public places); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding 1965 Voting Rights Act which required state and local governments within the Act to receive federal approval before changing election laws); Malloy v. Hogan, 378 U.S. 1 (1964) (adopting a policy of selective incorporation of the bill of rights against the states). *See* ZIMMERMAN, *supra* note 67, at 93-94; *see also* SCHWARTZ, *supra* note 76, at 276-84.

In the context of Indian law, the Warren Court's decision in Williams v. Lee, 358 U.S. 217 (1959), stands out as a important limitation of state power in relation to the Indian tribes. This case revived the principle of tribal sovereignty es-

goodness of local governments, the era of Presidents Kennedy and Johnson were marked by federal enforcement of civil rights against state governments and by President Johnson's "War on Poverty,"[119] both of which fundamentally presumed a need for the federal government to exercise some control over local affairs.[120] Not surprisingly, this period marked the end of the federal government's anti-tribal autonomy policy of termination[121] and the beginning of a renewed federal policy that presumed that Tribes should determine their own affairs.[122] Following the trend toward more federal government involvement at the local level on non-Indian issues,[123] many federal programs were implemented in the 1960s and 1970s to benefit Indians and solidify their position as distinct communities.[124]

The 1980s manifested a renewed concern for the size and spending of the federal government, as well as the rise of a New Federalism.[125] Once again, the shift in federal-state relations on non-Indian issues affected the balance of power in the ongoing struggle between States and Tribes. With a new consciousness of federal budget deficits, the Reagan administration often sought to shift the functions of federal Indian programs to "more general, often state administered . . . programs, or to eliminate federal funding altogether."[126] Reagan's 1983 State-

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tablished in *Worcester* and thwarted an attempt by a state court to exercise civil jurisdiction on a reservation. COHEN, *supra* note 25, at 269.

119. CLINTON, *supra* note 79, at 159; COHEN, *supra* note 25, at 180-81.

120. As President Johnson stated in the 1964 State of the Union Address: "Poverty is a national problem, requiring improved national organization and support. But . . . the war against poverty will not be won here in Washington. It must be won in the field—in every private home, every public office, from the courthouse to the White House . . . ." Reagan, *supra* note 118, at 33. The power to win this battle, however, emanated from Washington. Regarding civil rights, in the same address Johnson stated, "As far as the writ of *Federal law* will run, we must abolish not some but all racial discrimination." *Id.* (emphasis added).

121. COHEN, *supra* note 25, at 180, 186.

122. *Id.* at 184. The Johnson Administration, for example, created the "National Council on Indian Opportunity," which had the responsibility te "review Federal programs for Indians, make broad policy recommendations, and ensure that programs reflect the needs and desires of the Indian people." Michael G. Lacy, *The United States and American Indians: Political Relations*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, *supra* note 67, at 83, 94.

123. *See* CENTER FOR THE STUDY OF FEDERALISM, THE PRACTICE OF AMERICAN FEDERALISM 1-2 (Ellis Katz & Benjamin R. Schuster eds., 1979).

124. *See* COHEN, *supra* note 25, at 188-206.

125. Rhodri Jeffreys-Jones, *1945, 1984: Government Power in Concept and Practice Since World War II*, *in* THE GROWTH OF FEDERAL POWER IN AMERICAN HISTORY, *supra* note 104, at 116, 118-19.

126. CLINTON, *supra* note 79, at 162.

ment on Indian Policy emphasized the need for the "[T]ribes [to] reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government."[127] Federal legislation, however, gave tribal entities many of the tax advantages of other local governments,[128] reflecting the reality that the shift toward greater States' rights on non-Indian issues was far from comprehensive. It was in this era of partial revival of States' rights that the current round of the tribal-state battle commenced.

III. THE CURRENT BATTLE: STATE AUTHORITY TO REGULATE RESERVATION GAMING

A. Commencement of the Current Battle—Following the Pattern

In 1975, the Oneida Tribe in New York opened the first commercial Indian bingo operation,[129] and in 1979, the Seminole Tribe of Florida began conducting high-stakes bingo as a revenue source.[130] In 1982, the Fifth Circuit confirmed that Florida's civil laws did not apply on tribal lands and therefore state officials could not interfere with tribal gaming activities.[131] After this decision, other Tribes began to institute bingo games to compensate for the Reagan administration's budget cuts.[132] Because of gaming revenues, by 1984 the proportion of the Seminole Tribe's budget that came from federal funds had dropped from sixty to twenty percent.[133] By 1986, the Tribe's gross revenues were estimated at forty-five million dollars.[134] State efforts to regulate and prohibit the practice

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127. *Id.* at 163 (quoting 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1983, at 96, 97 (1984)).

128. *Id.* (citing the Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608 (1983) (partially codified as amended at 26 U.S.C. § 7871 (1994))).

129. Eduardo E. Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations*, *in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 205, 212 (Stephen Cornell & Joseph P. Kalt eds., 1992). Representative Udall stated that reservation gaming activities had been conducted "on a regular basis since at least 1974." 133 CONG. REC. 9.

130. Cordeiro, *supra* note 129, at 207.

131. Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

132. Kelly, *supra* note 3, at 503.

133. Cordeiro, *supra* note 129, at 207.

134. *Id.*

met with tribal arguments that such laws interfered with their inherent sovereignty and were inconsistent with current federal policy,[135] and both parties began to look to Congress to resolve the dispute.[136]

Several bills were introduced in Congress to deal with Indian gaming, but as had happened so often in the past, it was the judiciary which acted first.[137] In *California v. Cabazon Band of Mission Indians*,[138] the Supreme Court held that "[s]tate regulation [of on-reservation gaming] would impermissibly infringe on tribal government" and was, therefore, impermissible in the absence of authorization from the federal government.[139] The Court concluded that no federal statute authorized California to apply its gaming laws to bingo, poker, and other gaming operations taking place on the reservations of the Cabazon and Morongo Bands of Mission Indians.[140] As a result of *Cabazon*, Tribes were free to operate gaming activities on the reservation without state regulation or interference. The Tribes had scored the initial victory in the round.

However, in a repeat of the aftermath of the *Worcester* decision, Congress responded to state pleas for relief from a pro-Indian decision by passing legislation on Indian gaming.[141] This time, however, Congress sought to strike a balance between state sovereignty and Native American concerns by being somewhat sensitive to the tradition of tribal sovereignty. This more balanced approach may have been the result of congressional skepticism about the States' true motives. "While the [S]tates attempted to characterize their concern as high-minded and altruistic by claiming that state jurisdiction over Indian gambling was necessary to protect against crime, they really wanted to protect their own economic interests" by

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135. *See* Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1189-90 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Mushantuket Pequot Tribe v. McGoigan, 626 F. Supp. 245, 246 (D. Conn. 1986); Oneida Tribe v. Wisconsin, 518 F. Supp. 712, 714 (W.D. Wis. 1981).

136. Kelly, *supra* note 3, at 503.

137. *Id.* at 504-05.

138. 480 U.S. 202 (1987).

139. *Id.* at 222.

140. *Id.* at 207-14.

141. *Cabazon* was decided February 25, 1987. The Indian Gaming Regulatory Act was passed in October 1988.

gaining taxing authority over Indian gaming operations.[142] As Senator McCain stated:

> [I]t [is] clear that the interests of the [S]tates and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition. . . . Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and the gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe[s] have is negotiable.[143]

Besides the States, the main proponents of the bill were Nevada gambling interests.[144] Here, as in Georgia in the 1830s, Oklahoma in the late 1800s, and elsewhere after the Indian Reorganization Act, opposition to the exercise of tribal sovereignty came from competitors for the tribes' resources, which in this case were gaming revenues. Despite the direct competition between the States and the Tribes for gaming revenues, Congress legislated under the "assumption that the States and Tribes were mutual beneficiaries in Indian gaming."[145] The result was the Indian Gaming Regulatory Act of 1988.[146]

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142. 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, WL*8 (1995).

143. *Id.* at WL*36 n.163 (quoting S. REP. NO. 446, 100th Cong., 2d Sess. 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103). Further, Senator John Evans said:

> We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live. Moreover, Indian tribes may have a competitive economic advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage. Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes.

S. REP. NO. 446, 100th Cong., 2d Sess. 36 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3105, *and quoted in part in* Wolf, *supra* note 142, WL*36 n.163.

144. Kelly, *supra* note 3, at 506-07; Wolf, *supra* note 142, at WL*1.

145. Wolf, *supra* note 142, at WL*3 (citing S. REP. NO. 446, *supra* note 143, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071).

146. 25 U.S.C. §§ 2701-2721 (1994).

Cabazon declared that Tribes could conduct any form of gaming activity, regardless of state law limitations unless the state's public policy prohibited all gaming.[147] IGRA, on the other hand, limits Tribes to conducting only the same category or class *of* gaming activity that is already legal within the state.[148] Under IGRA, reservation gaming is divided into three broad classes, with different jurisdictional rules applicable to each class. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in . . . as a part of . . . tribal ceremonies or celebrations."[149] These games are "within the exclusive jurisdiction" of the Tribe.[150] Class II gaming consists of bingo and certain non-banking card games.[151] Class II gaming is permissible in Indian Country if (1) authorized by an approved tribal ordinance, and (2) conducted "within a State that permits such

147. The reservations in *Cabazon* were already subject to state criminal jurisdiction since California was authorized by a 1953 Act, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (popularly called Public Law 280) to exercise criminal and civil jurisdiction over Indian lands within its borders. The Supreme Court ultimately ruled that Public Law 280's grant of civil jurisdiction extended only to state adjudicatory, and not regulatory, jurisdiction. Bryan v. Itasca County, 426 U.S. 373 (1976). Thus, the question in *Cabazon* was whether California's gambling regulations were "criminal/prohibitory" in nature so as to apply on the reservation under Public Law 280 or merely "civil/regulatory." *Id.* at 208-09. Since California allowed many forms of gambling activities, the Court concluded that California's laws were merely regulatory. *Id.* at 210-11.

148. There is some dispute about how specific the relationship between Indian gaming and gaming permitted by state law must be. For example, IGRA states that class II and class III gaming is lawful in Indian Country if, among other things, such activities are "located in a State that permits such gaming for any purpose by any person." 25 U.S.C. §§ 2710(b)(1)(A), 2710(d)(1)(B). States have contended that the term "such gaming" refers to specific games (meaning, reservation gaming is permissible only if state law permits the specific kind of game the Tribe wants to participate in). Tribes, on the other hand, have argued that the term refers to class II or class III gaming in general (meaning, fo rexample, that if the state permits any class III gaming, all class III gaming is permitted under state law). The Circuit courts that have addressed the issue thus far have adopted the States' position. Rumsey Indian Rancheria Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1995) (indicating that a state permitting some kinds of class III gaming, including a state lottery similar to electronic gambling, does not require negotiation with respect to slot machines and live banking and percentage card games); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 279 (8th Cir. 1993) (holding that the state need not negotiate regarding traditional keno if only video keno is permitted in South Dakota).

149. § 2703(6).

150. § 2710(a)(1).

151. § 2703(7). Non-banking games are those games in which the house has no stake in the outcome.

gaming for any purpose by any person."[152] The State is given no regulatory control over Class II gaming. Class III gaming consists of "all forms of gaming that are not class I gaming or class II gaming,"[153] including slot machines, blackjack, and other forms of casino gambling. Class III gaming is permissible in Indian Country if (1) authorized by an approved tribal ordinance, (2) conducted in "a State that permits such gaming for any purpose by any person," and (3) "conducted in conformance with a Tribal-State compact."[154]

IGRA provides that upon request by a Tribe, "the State shall negotiate . . . in good faith to enter into such a compact."[155] IGRA also grants federal district courts jurisdiction over "any cause of action initiated by an Indian [T]ribe arising from the failure of a State to enter into negotiations with the Indian [T]ribe . . . or to conduct such negotiations in good faith."[156] If the district court determines that the state has failed to negotiate in good faith, it shall order the state and Tribe to conclude a compact within sixty days.[157] If there is no compact at the end of the sixty-day period, the court appoints a mediator, and each party submits its "last best offer for a compact" to the mediator[158]. The mediator then selects the proposed compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court."[159] The mediator then submits the proposed compact to the state.[160] If the state consents, the compact becomes effective.[161] If the state does not consent, the Secretary of the Interior "shall prescribe, in consultation with the Indian [T]ribe," procedures for Class III gaming "which are consistent with the proposed compact . . . [,] the provisions of [IGRA] and the relevant provisions" of state

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152. § 2710(b)(1)(A).

153. § 2703(8).

154. § 2710(d)(1)(B)-(C). Since only Hawaii and Utah have no form of legalized gambling, IGRA has a nationwide impact. David Lightman, *Clinton Supports Panel to Study Effects of Gambling*, HARTFORD COURANT, Nov. 3, 1995, at A17; James Long, *Indian Casinos: What's in the Cards?*, PORTLAND OREGONIAN, Oct. 23, 1995, at A1.

155. § 2710(d)(3)(A).

156. § 2710(d)(7)(A)(i).

157. § 2710(d)(7)(B)(iii).

158. § 2710(d)(7)(B)(iv).

159. *Id.*

160. § 2710(d)(7)(B)(v).

161. § 2710(d)(7)(B)(vi).

law.[162] With the passage of the Indian Gaming Regulatory Act of 1988, the legislative response was in place. The battle shifted once again to the courts.

Dissatisfied with the partial victory granted them by Congress, some States quickly attacked IGRA in the courts. Two types of direct challenges were mounted. First, States challenged IGRA under the Tenth Amendment. Two federal district courts soon ruled that the compacting provisions of IGRA violated the Tenth Amendment rule set forth in *New York v. United States*,[163] that the "Federal Government may not compel the States to enact or administer a federal regulatory program."[164] Those two decisions were reversed on appeal,[165] however, and the only other circuit court of appeals to address the issue agreed that IGRA does not violate the *New York* rule because it only forces the States to negotiate, not to enact or enforce any law.[166]

Second, the States mounted Eleventh Amendment challenges to the provision granting federal courts jurisdiction over suits seeking to enforce the States' obligation to negotiate in good faith.[167] This line of attack proved more successful for the States, as the Supreme Court recently ruled in *Seminole Tribe v. Florida*[168] that because of the Eleventh Amendment, Congress "cannot grant [federal court] jurisdiction over a State that does not consent to be sued" under IGRA.[169]

The rationale employed by the Court in *Seminole Tribe* provides further evidence that the general pattern developed in prior rounds is being repeated.[170] The *Seminole Tribe* Court

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162. § 2710(d)(7)(B)(vii)(I).

163. 505 U.S. 144, 188 (1992).

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

165. *Ponca Tribe*, 37 F.3d at 1434.

166. Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993).

167. 25 U.S.C. § 2710(d)(7)(A).

168. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

169. *Id.* at 1119.

170. Indeed, the Court's decision in *Seminole Tribe* could have been predicted under the model set forth in this Article. The Supreme Court over the last few Terms had indicated an increased willingness to restrict federal legislation intruding on what the States consider their sovereign turf. In New York v. United States, 505 U.S. 144 (1992), the Court breathed new life into some States' rights

did not focus on IGRA or the extent of Congress' power under the Indian Commerce Clause to preempt state authority over Indian Country. Instead, it focused almost exclusively on the propriety of its earlier ruling in *Union Gas v. Pennsylvania*,[171] that Congress could abrogate the States' Eleventh Amendment immunity using its Article I Interstate Commerce Clause powers, a ruling that had nothing to do with Indian law. The *Seminole Tribe* majority used the IGRA dispute in *Seminole Tribe* as a vehicle to overrule *Union Gas*, rather than as a means of resolving the IGRA issues.

Indeed, the Court did not fully resolve the IGRA issue raised in *Seminole Tribe*. The Eleventh Circuit had ruled that if the State could not be sued under IGRA, the remaining provisions of section 2710(d) authorized the Tribes to go directly to the Secretary of the Interior to set the rules regarding its class III gaming opeations. However, the Supreme Court "[did] not consider, and express[ed] no opinion upon, that portion of the decision below that provides a substitute remedy for a [T]ribe bringing suit,"[172] and eventually denied the State's request that it review that portion of the Eleventh Circuit's ruling.[173] Thus, while it is clear that a state cannot be sued under IGRA without its consent, it is very unclear what will happen under the statute when a state refuses—as Florida did—to negotiate on a particular issue. Even though the Court issued its opinion, it is still difficult to determine who really won the case because that depends on the resolution of the IGRA issue the Court did

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claims by striking down a federal statute on Tenth Amendment grounds for the first time in nearly 20 years. In the 1995 Term, in United States v. Lopez, 115 S. Ct. 1624 (1995), the Court struck down federal legislation as being beyond Congress' broad Commerce Clause authority for the first time since the New Deal, relying in part on the fact that the law intruded into areas traditionally reserved for state legislation. *Id.* at 1631 n.3.

This general trend in the Court's federalism jurisprudence paralleled a decline in the Court's receptiveness to Indian tribal claims. Professor Clinton notes that of the 103 "Indian law" cases decided by the Court since 1959, tribes have won close to 50%, with averages for many five-year periods reaching to 60 and nearly 70%. Since 1986, the average is 20%, and since 1990, only 14%. Clinton, *supra* note 17, at 1056-57.

Thus, an analysis of the views of the Justices on federal-state relations and on Indian law issues would have predicted the outcome in *Seminole Tribe* (as it seemed to do in earlier rounds). *See supra* note 67 (regarding the Marshall Court) and note 118 (regarding the Warren Court) and accompanying text.

171. 491 U.S. 1 (1989).

172. *Seminole Tribe*, 116 S. Ct. at 1133 n.18.

173. Florida v. Seminole Tribe, 116 S. Ct. 1416 (1996) (denying the State's petition for certiorari).

not address.[174] The Court's refusal to even consider the IGRA issues which its ruling created and which the parties had raised provides compelling evidence that, even though the case had some impact on tribal-state relations, the Court was not interested in the outcome of the Indian law issue, but only in the federal-state issue of which IGRA was a small part.[175] There are therefore clear indications that the pattern established in prior rounds is unfolding again.

B. The Future of the Battle—Will the Pattern Be Followed?

Now that the Supreme Court has provided all the guidance it intends to give on IGRA at this point, the focus will undoubtedly shift to Congress, as it so often has once the Court ruled in prior rounds. Congress will probably address the issue left open in *Seminole Tribe*. However, it will likely go well beyond

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174. In the absence of a further ruling on the IGRA issues, the exact impact of the *Seminole Tribe* ruling is hard to evaluate because of the unusual fact that the States challenged the only legal basis they have for having any regulatory control over reservation gaming. It is possible, for example, that the entire Act could be unconstitutional, a result that likely would benefit the Seminole Tribe and other Tribes conducting gaming because it would mean that the Tribes could engage in reservation gaming with little or no regulation from the States under the rules set forth in *Cabazon*. Alternatively, if as the Eleventh Circuit concluded, a Tribe can circumvent the Eleventh Amendment problem by taking advantage of the Secretary of the Interior's statutory authority to prescribe regulations governing Class III gaming on Indian reservations whenever a state declines to negotiate n gaming compact, again the ruling would appear to benefit the Indian Tribes rather than States.

On the other hand, the Court could intend that its decision simply strike down the provision authorizing suit against the state and leave the Tribes bound by the other provisions of IGRA. If Indian Tribes are unable to force states to enter into gaming compacts through federal court litigation, their ability to derive the full economic benefit of this new source of revenue would be greatly hindered. The teeth would be pulled from IGRA, and the States would have no incentive to negotiate with the Tribes.

175. The Court's denial of Florida's petition for certiorari on the other aspects of the Eleventh Circuit's decision, *see supra* note 173, may have been compelled by its ruling that the Seminole Tribe's suit was barred by the Eleventh Amendment. Because the language of the Eleventh Amendment is framed in jurisdictional terms ("[t]he Judicial Power of the United States shall not be construed to extend to . . . ." U.S. CONST. amend. XI.), the district and appellate courts arguably lacked jurisdiction to rule on any other aspect of the case if, as the Court ruled, the Eleventh Amendment applied. The extent to which the Eleventh Amendment is a jurisdictional limit rather than a sovereign immunity principle is far from clear, however, as reflected by the opinions of the various justicies in *Seminole Tribe* and *Union Gas*. More importantly, regardless of the reason for the Court's denial, its action leave the underlying tribal-state dispute completely unresolved. *See supra* note 174.

that specific issue and address other aspects of the reservation controversy that have arisen. While IGRA attempted to balance Indian, State, and federal interests in reservation gaming, many States perceive the Act as providing "too great an economic advantage to Native Americans" relative to non-Indian gaming operations within the States.[176] The States are clearly hoping to get a better legislative deal from the current Cognress, with its emphasis on returning power to the States,[177] than they did in 1988 with IGRA.

Recent legislative proposals suggest this possibility. Most of the proposed amendments to IGRA in the 104th Congress have sought to give more power to the States in regulating reservation gaming and compacting with the Tribes.[178] One proposal would require the city council, county commissioner and other governing bodies in the political jurisdiction where the class III gaming is to occur to approve the Tribe-state compact as well as a majority of voters in the next general election.[179] Another bill would require the compact to be approved by the legislature and governor of the state, and would limit the types of class III gaming conducted by the Tribe to the specific types and methods of play available to commercial (not just charitable) entities within the state.[180] None of the bills explicitly provide the States with access to reservation gaming revenues, yet many of the bills do provide the States with greater power in the negotiation process. Greater revenues for the state from Indian gaming may result as the States use this improved bargaining position to extract more economic concessions from the Tribes.

Another indicator of the political winds is a recent federal budget proposal which sought to impose a federal tax on Indian gaming revenues.[181] With easy solutions to the current bud-

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176. Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1110 & n.13 (1995).

177. Kevin Kelly et al., *Power to the States: But Can They Run Programs Better, on Less Money, than the Feds?*, BUS. WK., Aug. 7, 1995, at 48.

178. Senate Bill 487, proposed by Arizona Senator McCain is a notable exception. That bill, as well as House Bill 1578, sponsored by California Representative Torres, would permit Indian tribes to "conduct gaming activities . . . consistent with the decision of the Supreme Court" in *Cabazon*. S. 487, 104th Cong., 1st Sess. § 3(1) (1995); H.R. 1578, 104th Cong., 1st Sess. § 3(4) (1995). These proposals would impose greater federal regulatory burdens on the tribes, but would also remove or limit state regulatory authority. *Id.*

179. H.R. 1364, 104th Cong., 1st Sess. (1995).

180. H.R. 1512, 104th Cong., 1st Sess. (1995).

181. H.R. 2517, 104th Cong., 1st Sess. § 13631 (1995); H.R. 2491, 104th Cong.,

get deficit difficult to find, the Indian casino tax would have raised an estimated $345 million dollars.[182] The specific provision was opposed by several senators,[183] but illustrates that Indian gaming revenues are increasingly seen as an untapped resource for the federal government. Thus, the Tribes may face a situation in which both the federal and state governments will be seeking to take a sbare of the Indian gaming revenues. This would be an especially ominous development for the Tribes. As discussed above,[184] when federal and state interests are aligned, federal and state governments have had no trouble in taking tribal resources.

IV. CONCLUSION

If history is any guide, the Tribes cannot be optimistic about their long-term chances of success in this round. The current revival of States' rights arguments on non-Indian issues in Congress, the current Supreme Court trend favoring States' rights,[185] and the possible convergence of state and federal economic interests concerning reservation gaming[186] all bode ill for any sort of victory for tribal autonomy. If the dispute concerning reservation gaming, like prior disputes in this ongoing battle, is resolved on the basis of larger trends concerning non-Indian issues, the new buffalo is likely to go the way of the old one.

Ultimately, then, the Tribes must hope that the current round of controversy will deviate from the patterns of the past—that the current dispute will be resolved under a new paradigm. There are some indications that this may happen.

First, the increased influence of the New Federalism is not the only difference in the political landscape since IGRA was passed. The Tribes have also gained political influence since that time. Senator McCain faulted the Tribes for the amount of influence the States were given in IGRA. "Unfortunately, Tribes never banded together and offered their own gaming proposal."[187] McCain also saw their apparent refusal to com-

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1st Sess. § 13631 (1995).

182. *Key GOP Senators Back Indians Against Casino Tax*, ARIZ. REPUBLIC, Oct. 11, 1995, at CL26.

183. *Id.*

184. *See supra* text accompanying notes 92-98 (discussing the Allotment era).

185. *See supra* note 170.

186. *See supra* text accompanying notes 181-184.

187. S. REP. NO. 446, 100th Cong., 2d Sess. 33 (1988), *reprinted in* 1988

promise and to seek the protection of federal law as a strategic mistake: "I received no more than a handful of letters supporting [McCain's previous legislative proposal that gave the States no power in the process]; only more calls for 'no legislation.' I believe Tribes and tribal organizations share part of the burden for the direction that Indian gaming legislation has taken."[188]

Whether the Senator's specific observations are correct or not, the Tribes are undoubtedly more sophisticated politically today than when IGRA was enacted. For example, for the period from January 1993 to October 1995, the Mashantucket Pequot Tribe ranked first in political contributions from the gaming industry.[189] During that time, the Tribe contributed $465,000 to politicians.[190] The Tribes have also enlisted the aid of professional lobbying firms that are experienced in representing large corporate clients.[191] In addition, the Pequots have taken the strategy of generosity in their dealings with the state. The Tribe once contributed fifteen million dollars to the state of Connecticut to help balance the state budget.[192] As a part of the state-tribal compact, Connecticut receives twenty-five percent of slot machine gross revenues, an annual take of 124 million dollars.[193] These economic factors, along with a political emphasis on minority rights[194] may temper the federal-state relations debate.

Second, while gambling has traditionally been viewed as a state or local issue, there is an increasing tendency to treat it as a nationwide issue with which the federal government

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U.S.C.C.A.N. 3071, 3103.

188. *Id.*

189. Joseph P. Shapiro et al., *America's Gambling Fever*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 55.

190. *Id.* The Mashantucket Pequots contributed $365,000 to the Democratic National Committee and $100,000 to the Republican National Committee. Benjamin Sheffner, *Gambling U.S.A.: Money Talks: The Gaming Industry is Becoming a Major Force in Washington Through the Financing of Congressional Elections*, BALTIMORE SUN, Nov. 26, 1995, at 1F.

191. Among the firms' other reported clients are Exxon, Chrysler, and the Metropolitan Life Insurance Company. Long, *supra* note 154, at A1.

192. Jon Frandsen, *Pequots' Casino Expected to Be Good Bet for Years*, GANNET NEWS SERV., Feb. 6, 1996.

193. Patrick Lakamp, *Time's Running Out: Native Casinos Threatened with Taxes, Regulation*, THE POST-STANDARD (Syracuse, N.Y.), Oct. 13, 1995, at A8.

194. "New York-based casino expert" Eugene M. Christiansen was quoted as saying on this point, "'Politics favors the tribes' . . . . Casino gaming 'might reasonably be said to be the only good thing that has happened to Indians since Columbus landed. Is America now, in our age of minority politics, going to take this good thing away? I doubt it.'" Long, *supra* note 154, at A1.

should deal.[195] Thus, while there has been increased success for States' rights arguments on other issues, the forces with respect to gaming issues—Indian and non-Indian alike—may be moving in the opposite direction, as even political conservatives, who currently favor most States' rights arguments in other contexts, shift the gaming debate to a national level.[196] Instead of becoming part of the larger stream of New Federalism leading to more state control, the reservation gaming issue may become part of a countercurrent toward more national control of gambling in general. Given past history, a Tribe is more likely to prevail in this round of the controversy if the federal government decides it is in its best interest to control all gambling activities in the country.[197]

Finally, and of less certain impact, there are signs that the basic interests of the States and Tribes may be shifting. There are now indications that some Tribes are focusing more on the economic effects of gaming than on its impact on Tribal autonomy,[198] and that in some States, opposition to reservation

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195. As one expert noted, "while illegal gambling was once a state or local problem which was appropriately controlled by the police power of the states, the new legalized gambling is carried out by major corporate enterprises which operate across state lines in interstate commerce. The control and regulation of interstate commerce is one of the core constitutional responsibilities of the federal government; no state or private organization is in a position to carry out this function." *Gambling Impact Hearings*, *supra* note 2 (testimony of Robert Goodman), *available in* 1995 WL 647890. A Maryland state-funded task force likewise concluded that "the problem of legal casino gambling is a national one; Maryland cannot deal with this on its own." Tydings & Reuter, *supra* note 6, at A15.

196. The House of Representatives, after holding extensive hearings, recently passed a bill creating a national Gambling Impact and Policy Commission, authorized to study the nationwide effects of gambling. H.R. 497, 104th Cong., 2nd Sess. (1995). The bill's primary sponsor is Representative Frank Wolf, a conservative Republican from Virginia. Co-sponsors include 93 Republicans and 47 Democrats. Representative Barbara Vucanovich, an opponent to the bill, indicated that it was sponsored by those "opposed to gaming on moral grounds [who] feel that the federal government should step in to regulate or flat out stop legal gaming." Dennis Camier, *Indian Tribes Concerned About Gambling Commission*, GANNET NEWS SERV., Feb. 26, 1996. Representative Barney Frank, another opponent, noted the irony of a "'[S]tates' rights Congress' funding a study of matters that have traditionally been under state jurisdiction." *Id.*

197. It is perhaps for that reason that the Chairman of the National Indian Gaming Association (NIGA), a group composed of 140 Tribes whose tribal governments are involved in gaming enterprises, indicated that NIGA had no objection to a bill proposing a nationwide study of gambling and advocated consideration of the application of federal minimum standards to all gaming nationwide. *Gambling Impact Hearings*, *supra* note 2 (statement of Richard G. Hill), *available in* 1995 WL 647934.

198. For example, when representatives of the New Mexico Indian Gaming

gaming is based more on its adverse impact on the culture of the state than on its economic impact.[199] The traditional roles may be beginning to be reversed, at least to some extent.[200]

Association met with the Economic Forum of New Mexico, a group of business and civic leaders in Albuquerque, to explain why the group should support Indian gaming, the representatives "stress[ed] the economic impact to the local communities" and "assert[ed] that the Indian people . . . need casinos for their economic well being." Memorandum of William B. Keleher to Government Affair Committee of the Economic Forum 5 (Dec. 12, 1995) (unpublished manuscript on file with the authors).

Similarly, when testifying before Congress concerning Indian Gaming, the chairman of the National Indian Gaming Association emphasized the economic benefits generated by such activities, noting that "Indian gaming has proven to be a success for Tribal economies and for the community, local governmental, and state entities," "Indian gaming is economic development," "Tribes are in gaming just like states are in lotteries, to establish an increased revenue for governmental operations and infrastructure," "Every dollar Tribes earn is a dollar from which State and local community benefit," and that "Indian gaming actually serves to reduce the Federal deficit." *The National Gaming Impact and Policy Commission Act: Hearings on H.R. 497 Before the House Comm. on Resources*, 104th Cong., 1st Sess. (1996) (statement of Richard G. Hill), *available in* 1996 WL 81946.

199. For example, Arizona Governor Fife Symington explained his position on Indian gaming by stating: "[W]e've taken a posture where we support limited gaming but we're opposed to the full-blown casino gambling a la Las Vegas because that's quite a cultural change of our state." *Larry King Live: Interview with Fife Symington* (CNN television broadcast, Apr. 13, 1993) (transcript no. 803-2), *available in* LEXIS at *5; *see also id.* at *12 ("We're trying to prevent . . . such large-scale gambling in the state that it will turn our whole state into a gambling paradise.").

200. The "to some extent" limitation should be emphasized. Economic interests continue to have an enormous influence among those opposed to Indian gaming. *See, e.g.*, Jonathan Rabinovitz, *Vote in Hartford by Senate Rejects Bridgeport Casino*, N.Y. TIMES, Nov. 18, 1995, at A1 (asserting that "strongest opposition" to state approval of an off-reservation casino operated by the Mashantucket-Pequot Tribe "came from the parimutuel industry in Connecticut . . . which feared that they could not compete against a casino").

Similarly, several Tribes have rejected reservation gaming proposals, despite projections of economic success, in part out of concern for the resulting impact on their traditional culture. For example, "The citizens of the Navajo Nation, the largest Indian tribe in the country, recently voted to reject gaming as a source of revenue for their government programs, in large part, I suspect, because of the moral arguments." *Gambling Impact Hearings*, *supra* note 2 (statement of Richard G. Hill), *available in* 1995 WL 647934. The Alabama Coushatta Tribe of Texas rejected a plan to bring casinos to the reservation "[d]espite promises of hundreds of jobs and millions in revenue" for the tribe, Dianna Hunt, *Land of Their Future*, HOUS. CHRON., June 26, 1994, at A1, with a tribal spokesperson noting that "moral opposition to gambling probably led to the defeat," Dianna Hunt, *Indians Defeat Plan for Casino on Reservation*, HOUS. CHRON., June 16, 1994, at A1. The Chairman of the Hopi Tribe reported that "the Hopi people . . . voted to reject gaming because it is not consistent with our values." Ferrell H. Secakuku, *Hopi Tribal Chairman: Budget Cuts Will Not Reduce Bureaucracy*, ARIZ. REPUBLIC, Nov. 16, 1995, at B6.

The depth of this role reversal and its impact on the outcome of the controversy cannot be fully evaluated at this time, and certainly not in this short Article. However, if such a shift is taking place, the potential effects on the outcome of the current controversy could be dramatic. If, for example, States' rights arguments are tied to moral concerns and the ability of the state and local governments to preserve their culture, ascending federalism might well help the Tribes because the same arguments justifying more state control—the need to give local governments the necessary leeway to construct a society reflecting the perhaps divergent views of their citizens—could be made a fortiori on behalf of the Tribes in their efforts to prevent further state infringement on tribal jurisdiction. Under such a scenario, States and Tribes could actually become allies for some purposes.

As with almost every issue in Indian law, the complexity of current law and policy resulting from past inconsistencies and current ambivalent feelings prevents much confidence in making any predictions.[201] However, two things appear almost certain. First, even if the paradigm is changing for the reasons outlined above or for others not yet identified, it is highly unlikely that a completely new model will emerge. If there is one overriding lesson to be learned from even a cursory review of the history of Indian policy, it is that in Indian policy history really matters. Despite all the historical twists and turns, no policy has ever been completely separated from its predecessors. New ideas and policies have merely been added onto the preexisting policies layer by layer. There has never been a truly fresh start. It is unlikely that there will be one now.

Even those Tribes that have decided to pursue reservation gaming are not necessarily driven by economic interests as ends in and of themselves. As the Chairman of the National Indian Gaming Association noted, "Indian gaming is not commercial gaming like the Trump Palace of New Jersey or the hundreds of casinos in Nevada. . . . Tribes use their gaming revenues to support tribal government, and a whole host of tribal government programs. . . . [T]his is the reason tribes have gotten into this industry . . . ." *Gambling Impact Hearings*, *supra* note 2 (statement of Richard G. Hill), *available in* 1995 WL 647934.

201. As one scholar observed, "If there is one eternal verity which emerges from Indian Law, history, and policy, it is that, like little Alice [in Wonderland], we are never certain of the 'Rules of Battle.' Consistently, the rules have changed, often for reasons that have little to do with Indian concerns or needs." Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling With Ape on a Tropical Landscape: An Afterword*, 31 ME. L. REV. 213, 218 (1970).

Second, regardless of who prevails in this round, or for what reasons they will win, the battle will almost certainly continue. Nearly 300 years of disputes are not likely to be resolved in the context of a debate about gambling on the reservation. While the fate of the new buffalo is still somewhat unclear, what is not nearly so uncertain is that another new buffalo will sooner or later arise and that when it does the States and Tribes will then once again join in battle.