

Lost in the Shuffle: State-Recognized Tribes and the Tribal Gaming Industry

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“Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished What is not expressly limited remains within the domain of tribal sovereignty.”

—Felix S. Cohen¹

FEDERAL RECOGNITION of Native American tribes, and the rights that attend such recognition, has rarely been the subject of such widespread interest as it is today. Tribes are redefining their place in society based on the influx of money and power that has come with tribal gaming—a right currently afforded only to federally-recognized tribes. In just fifteen years, between 1988 and 2003, the tribal gaming industry has grown from \$100 million to more than \$15 billion.² According to one

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1. FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. of N. M. Press 1971) (1942) [hereinafter COHEN'S 1971 HANDBOOK].

2. See Press Release, U.S. Dep't of Justice, Fed. Bureau of Investigation, The Indian Gaming Working Group, Protecting Indian Country from Crime (June 30, 2004), *available at*

recent report, tribal gaming generated a staggering \$18.5 billion in 2004 alone.³ But what gaming rights may be afforded to, and exercised by, state-recognized tribes?⁴

There is a subset of America's tribal population whose rights have been largely overlooked. This subset consists of Indian tribes that have been subjugated but never officially recognized by the federal government. Their continued existence has been so obvious, however, that the states where they reside have officially recognized them as sovereign governments that continue to this day.

This category of Native America's organized political tribal groups, called "state-recognized tribes," occupies an even less understood legal status than its federally-recognized counterpart. Today, thirteen states—Alabama, California, Connecticut, Georgia, Louisiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oklahoma, and Virginia⁵—recognize Indian tribes not acknowledged by the federal government. State-recognized tribes face an inconsistent and uncertain scope of state powers that varies dramatically between states.

In this Article, we argue that state-recognized tribes, like those with formal federal recognition, have a legal right to engage in gaming under state law. We also profile two state-recognized tribes—the Gabrielino-Tongva of California and the Shinnecock Indian Nation of New York—to showcase the historical similarities between federal and state tribes and to illustrate the inequities involved in preventing state tribes from opening casinos of their own.

Tribe-state relations have been contentious for centuries, fueled by a conflict over resources, such as land and other natural resources, held by tribes but desired by the general population. Accordingly, most federal tribal law is built on the premise that state governments and tribes oppose

<http://www.fbi.gov/pressrel/pressrel04/063004indiangaming.htm>.

3. See NAT'L INDIAN GAMING ASS'N, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2004, at 2 (2004), available at http://www.indiangaming.org/NIGA_econ_impact_2004.pdf (last visited June 10, 2005); see also Doug Abrahms, *State's Indian Casinos Earn \$4.2 Billion*, DESERT SUN (Palm Springs), July 7, 2004, at A1 (reporting the findings of Alan Meister for Analysis Group, which noted that in 2003, tribal gaming generated \$4.2 billion in California alone, and \$16 billion nationwide).

4. Tribes that have achieved formal federal recognition are also recognized by the states in which they reside, and therefore are also "state-recognized." For the sake of clarity, however, we refer to tribes that have not received formal federal recognition as "state-recognized" or "state tribes" and those that have achieved the additional level of federal recognition as "federally-recognized" or "federal tribes."

5. This list was compiled through online and statutory research, as well as a series of phone interviews with state organizations responsible for coordinating tribal interaction with their respective state.

one another, and the federal government must protect Indians from the depredations of state governments and the general populace.⁶ Today, a new model is forming as state and tribal governments realize the mutual economic and social benefits that can result from tribal gaming. When states and state tribes want to work together, federal “protection” becomes not only unnecessary, but may hinder the very rights the federal government purportedly wishes to protect.

The argument that state-recognized tribes should be able to game under state law also reflects broad principles of federalism: Can the federal government limit the rights of tribes it does not acknowledge, especially in an area such as gaming, which has traditionally been subject to state control? Should states have the right to compact with tribes that the state recognizes as government entities, based upon state and tribal sovereignty alone? Beneath these themes also lie fundamental notions of civil and natural rights: When the system of federal recognition takes decades to complete, should non-federally-recognized tribal governments be forced to forego much needed economic opportunities for their members?

The history of Indian gaming is already well documented and can be found in the sources upon which this Article builds.⁷ Instead, Part I of this Article briefly reviews the well-documented history of two state-recognized tribes—the Gabrielino-Tongva Tribe of California and the Shinnecock Tribe of New York—to provide context for our arguments. As these profiles clearly indicate, the histories of state tribes are often no less documented or legitimate than those of their federally-recognized counterparts, even though these two tribes continue to be denied recognition as sovereigns by the United States. Absent federal acknowledgment and the political rights acknowledgement bestows, such state tribes are unnecessarily prevented from providing a better life for their

6. For example, the Indian Nonintercourse Act, 25 U.S.C. § 177 (2000), gave the federal government exclusive authority over the disposition of all tribal lands, in order to provide oversight of land transfers by Native American political groups. Congress specifically passed the Act to protect tribes from the predatory efforts of states and other entities that took advantage of tribal poverty to extract valuable tribal lands from Indian tribes at cheap prices. See 41 AM. JUR. 2D *Indians* § 112 (1995).

7. For a general overview of the history of tribal gaming, see Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 287 (2004) (explaining that Indian gaming originated with bingo operations in California and Florida in the 1970s). For a more detailed overview of how Indian gaming evolved in California, see, for example, *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 996–98 (Cal. 1999); MICHAEL LOMBARDI, *LONG ROAD TRAVELED III: CALIFORNIA INDIAN SELF RELIANCE AND THE BATTLE FOR 1A* (2000), http://www.cniga.com/facts/History_of_CA_Gaming_Part_3.pdf (last visited July 28, 2005); K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Initiative*, 36 U.S.F. L. REV. 1033 (2002).

tribal members.

In Part II, we present a five-part argument in support of state tribal gaming. We explain that (1) the regulation of gaming is generally a state right, (2) state tribes are sovereign governments with the right to game, except as preempted by the federal government, (3) federal law does not preempt gaming by state tribes, and thus states have the intrinsic power to enter into gaming compacts with the state tribes they recognize, (4) state tribal gaming does not violate equal protection guarantees, much as gaming by federally-recognized tribes complies with Fourteenth Amendment mandates, and (5) significant policy arguments weigh in favor of permitting gaming by state tribes under state law.⁸

I. The Histories Behind Two State-Recognized Tribes Demonstrate the Arbitrariness of Federal Recognition

Unfortunately, many tribes with extremely well-documented histories and longstanding relationships with their respective states and the federal government remain unrecognized, despite years of effort to gain official recognition from the United States. Many such tribes reside in close proximity to tribes with similar histories—tribes who have enjoyed recognition for decades. As stated by Joe Saulque, who chaired the Advisory Council on California Indians, whether a tribe has formal recognition today has depended in large part on “luck.”⁹ The stories of two such tribes are detailed below, to demonstrate the arbitrariness of the federal recognition process.¹⁰

A. The State-Recognized Gabrielino-Tongva Tribe of the Los Angeles Basin

Of the tribes that have never been granted formal federal recognition,

8. This Article does not reach or otherwise consider the parallel argument that state tribes may conduct gaming based solely upon their limited but inherent sovereign powers.

9. See *Tribal Contract Support Cost Technical Amendments of 2000: Oversight Hearing on H.R. 946, H.R. 2671, and H.R. 4148 Before the H. Comm. on Resources*, 106th Cong. 51 (2000) (statement of Rep. Lynn C. Woolsey, Member of Cong.), available at <http://commdocs.house.gov/committees/resources/> (follow the “hii68434.000” hyperlink) (last visited Jan. 10, 2006) (concerned with making “technical amendments to the provisions of the Indian self-determination and education assistance act relating to contract support costs, and for other purposes,” noting “luck often determined whether a tribe got recognized”); see also Stephen Magagnini, *‘Lost’ Tribes: Why Must We Prove We’re Indians?*, SACRAMENTO BEE, July 1, 1997, at A1, available at http://www.sacbee.com/static/archive/news/projects/native/day3_main.html (last visited Nov. 13, 2005).

10. See *infra* Part II.E.2, for an overview of the federal recognition process, and the myriad hurdles involved in obtaining such recognition.

the Gabrielino-Tongva Tribe,¹¹ which was recognized by California in 1994, is one of the best documented. The Gabrielinos once occupied villages from Topanga Canyon in Malibu south to the Newport Beach estuary, and inland to just shy of the city of San Bernardino.¹² Over 2800 archeological sites, state and federal historical records, and Catholic church records confirm the Tribe's history in the Los Angeles basin.¹³ The Bureau of Indian Affairs ("BIA") identified and registered hundreds of members of the Gabrielino-Tongva Tribe in the published California Indian Rolls of 1928, 1950, and 1972.¹⁴ Additionally, "Blood Quantum Certificates" have been awarded to two more generations of children,¹⁵ many of whom are now adult members of the 900-member Tribe.

The Tribe's relationship with the United States is equally well

11. The Gabrielino-Tongva Tribe is alternately referred to as "Gabrielino-Tongva" or "Tongva" throughout this Article. Reference is also made to the Gabrielino Indians, a more general characterization. This larger category of American Indians encompasses the Gabrielino-Tongva Tribe, however it also encompasses additional Gabrielino groups, such as the San Gabriel Band of Gabrielino Indians, a small group of Indians in Beaumont, California, who are not affiliated with either the Tongva or San Gabriel entities. *See* Tongva Tribe, Gabrielino-Tongva Tribal Membership Rolls, <http://www.tongvatribes.org/Members/Members.cfm> (last visited Nov. 21, 2005) [hereinafter Tongva Tribe Website, Members] (briefly describing the different Gabrielino Indian groups in California).

12. According to Thomas Blackburn, "The territory occupied by the wider Gabrielino group included the greater portion of Los Angeles County, half of Orange County, parts of San Bernardino and Riverside Counties, and the islands of Santa Catalina, San Clemente, and probably San Nicolas." Thomas Blackburn, *Ethnohistoric Descriptions of Gabrielino Material Culture*, in 5 UNIV. OF CAL. L.A., UNIVERSITY OF CALIFORNIA, LOS ANGELES: ARCHEOLOGICAL SURVEY ANNUAL REPORT 8-9 (1963).

13. *See id.* Physical evidence of Gabrielino-Tongva culture in Los Angeles is widespread. For example, the State of California has registered an historical site in West Los Angeles where Tongva tribal members shared spiritual natural groundwater springs in 1770 with one of the two expeditions that led to the founding of the City of Los Angeles. *See* Tongva Tribe, Tribal History, http://www.tongvatribes.org/TribalHistory/tribal_history.cfm (last visited Dec. 21, 2005) [hereinafter Tongva Tribe Website, History]. Loyola Marymount University dedicated a garden to Tongva history in 2000, and its main library permanently exhibits artifacts from Tongva village sites unearthed during campus construction. *See* Loyola Marymount Website, *Gabrielino/Tongva Indians: The First Angelenos Outdoor Memorial and Library Exhibit*, <http://www.lmu.edu/Page5460.aspx> (last visited Dec. 21, 2005). Other historic sites have been uncovered at California State University at Long Beach, the Sheldon Reservoir in Pasadena, the Los Encinos State Historical Park in Encino, and most recently by ongoing construction at the City of Los Angeles megaproject, Playa Vista. *See* Cecilia Rasmussen, *L.A. Scene: Southern California Then and Now*, L.A. TIMES, Feb. 28, 1994, at B3; *see also* California State University, Long Beach, *About Puvunga: Background on Puvunga and the Sacred Site Struggle*, http://www.csulb.edu/~eruyle/puvudoc_0000_about.html (last visited Apr. 2, 2004); Nick Madigan, *Developer Unearths Burial Ground and Stirs Up Anger Among Indians*, N.Y. TIMES, June 2, 2004, at A13.

14. *See* Tongva Tribe Website, Members, *supra* note 11.

15. *See id.*

documented, despite the Tribe's lack of federal status. Around the time that California gained statehood in 1850,¹⁶ the Gold Rush and the explosion of non-native and non-Spanish populations created an immediate desire to define and delimit aboriginal rights.¹⁷ During 1851 and 1852, President Millard Fillmore appointed three United States Government Treaty Commissioners to quickly sign eighteen federal treaties with California tribes, including Treaty D with the Gabrielinos.¹⁸ The treaties were intended to reserve eight and one half million acres of reservation land for California Indian tribes, in exchange for the Indians' quitclaim of aboriginal title to a total of seventy-five million acres of California land.¹⁹ The reservation promised in the Gabrielino's treaty included tens of thousands of acres known as the San Sebastian Reserve at the Tejon Pass at the edge of modern Los Angeles County.²⁰

The federal government, through these eighteen treaties, sought to bring order and protection, no matter how minimal, to the Native American populations pressed by the rapid disappearance of the California frontier. However, after lobbying by California business interests, the United States Senate refused to ratify any of the eighteen treaties and instead placed an injunction of secrecy on their existence.²¹ After the Gabrielino treaty failed ratification, the San Sebastian reserve was illicitly transferred and became the personal property of the Superintendent of the Bureau of Indian Affairs, Edward Beale, who renamed the property "Tejon Reserve."²²

The eighteen "lost treaties" were ultimately discovered in the Senate

16. See State of Cal., History and Culture of California, at <http://www.ca.gov> (follow hyperlink "History and Culture of California") (last visited Jan. 25, 2006).

17. See CAL. DEP'T OF PARKS & RECREATION OFFICE OF HISTORIC PRES., FIVE VIEWS: AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA: A HISTORY OF AMERICAN INDIANS IN CALIFORNIA: 1849-1879 (1988), available at http://www.cr.nps.gov/history/online_books/5views/5views1c.htm (last visited Nov. 20, 2005) [hereinafter FIVE VIEWS].

18. See Tongva Tribe Website, Members, *supra* note 11.

19. See FIVE VIEWS, *supra* note 17.

20. San Sebastian was a 75,000-acre reservation to which a number of Gabrielino families were relocated. For more information on San Sebastian Reserve, see Ridge Route Communities Historical Soc'y & Museum—Tejon Page, <http://www.frazmtn.com/~rrchs/tejonie.html> (last visited July 28, 2005) [hereinafter Ridge Route]. See also 18 Treaties-California, <http://www.angelfire.com/nt2/kawaiisu/18treaties.html> (last visited Jan. 14, 2006) (confirming that the reserve encompassed 75,000 acres and providing a link to historical maps of the reserve).

21. See FIVE VIEWS, *supra* note 17; see also *Indians of Cal. v. United States*, 98 Ct. Cl. 583, 585 (1942), 1942 WL 4378 (noting the Senate's refusal to ratify the treaties).

22. See FIVE VIEWS, *supra* note 17 ("Tejon Reserve"); see also Ridge Route, *supra* note 20 (calling the property "Tejon Ranch" in the section entitled "After the War").

Archives in 1905.²³ Upon their discovery, a series of flawed legal efforts were made over the next seven decades to redress the subjugation of the Gabrielinos and other California Indians.²⁴ Treaty-less, and now landless, the Gabrielino-Tongva Tribe was never subsequently acknowledged by the United States, despite the unofficial recognition of their tribal status through the treaties authorized by President Millard Fillmore in 1851.

The California legislature made one such effort to address the Tribe's plight by passing the California Jurisdiction Act of 1928 ("Jurisdiction Act").²⁵ The Jurisdiction Act authorized the California Attorney General to represent "landless Indians" seeking compensation for their unresolved equitable and land claims in the United States Court of Claims.²⁶ Nevertheless, two salient characteristics doomed the effectiveness of the land claims settlement effort. First, no land claims settlement was offered to the Tribe as a whole, only to individual tribal members and their descendants who were deemed "landless Indians." Second, money, *not land*, was offered—thus avoiding the ticklish question of federal status and acknowledgment of the treaty-less Tribe.²⁷

Fourteen years later, in *Indians of California v. United States*,²⁸ a federal court acknowledged the arguments of the young California Attorney General Earl Warren, agreeing that "a promise [was] made to these tribes and bands of Indians and accepted by them but . . . was never fulfilled."²⁹ Acting to recognize the equitable claims of the Gabrielinos and "all the Indians of California," the court awarded seven cents per acre as compensation to individual "landless Indians" for the 8.5 million acres of reservation lands that would have been set aside for federal Indian reservations under the eighteen lost treaties.³⁰ At the time of the treaties' drafting, some ninety-four years earlier, no public lands had been

23. See Danny Ammon (Personal Home Page), Previous Recognition by the United States Government of the Tsnungwe Tribe, <http://www.dcn.davis.ca.us/~ammon/tsnungwe/treaties.html> (last visited July 27, 2005). Because of these and similar violations of established treaties, California Indians now own less than one-sixth of the land on a per capita basis of tribal members in other states. See Koenig, *Gambling*, *supra* note 7, at 1052 n.141 (citing Alliance of Cal. Tribes, California Indians Past and Present, <http://www.allianceofcaltribes.org/californiaindians.htm>).

24. See Tongva Tribe Website, History, *supra* note 13.

25. Jurisdiction Act, ch. 624, 45 Stat. 602 (1928), amended by ch. 222, 46 Stat. 259 (1930).

26. See *id.*

27. See *id.*

28. 98 Ct. Cl. 583 (1942), 1942 WL 4378.

29. *Id.* at 592.

30. *Id.* at 589, 601 (noting the total acreage and referring the case to a commissioner of the court to determine the value of the contested land).

purchased by the United States for less than \$1.50 per acre—*twenty-one times* what was ultimately awarded.³¹ No compensation was offered for the seventy-five million acres of California land actually taken from California Indian tribes, other than payment for the 8.5 million acres of reservation lands, and no federal acknowledgment was given to the Indian tribes who had signed the eighteen lost treaties. The court awarded no interest for the ninety-four year period between signature of the 1851–52 treaties and 1944.³²

After World War II reminded the public of the sacrifices of Native American soldiers, the 1944 settlement amount was deemed inadequate, and a second effort to settle land claims began. Congress established the Indian Claims Commission, which was empowered to hear a broad range of claims by landless Indians against the United States, including claims against the United States for taking aboriginal title to lands.³³ In addition, \$10,000 of the “Indians of California” funds in the United States Treasury was earmarked for services to be rendered by an attorney in accordance with any contract of employment that might be approved by the Secretary of the Interior.³⁴ The Gabrielino-Tongva and other Southern California tribes filed a land claim suit before the Indian Claims Commission, known as Docket 80.³⁵ The Southern California tribes were known as “Mission Indians”³⁶ because of their prior enslavement by the Spanish to build the historic Catholic missions of Southern California. The Mission Indians were a separate classification from the “Indians of California” and were comprised of survivors of the forty-six bands of Gabrielino, Diegueno, Luiseno, Serrano, and Juaneno tribes of Mission Indians.³⁷

After years of pursuing their case in the Indian Claims Commission, the Mission Indians received an offer for an out-of-court settlement made by the United States to all California Indians.³⁸ The land claims settlement awarded \$633 to each federally-registered member of the Gabrielino Tribe, which was paid in 1972,³⁹ some 121 years after the Gabrielino-Tongva

31. See Tongva Tribe Website, History, *supra* note 13.

32. See *Indians of California*, 98 Ct. Cl. at 594–95, 1942 WL 4378, at *12–13.

33. Indian Claims Commission Act, Pub. L. No. 79-726 (1946).

34. Interior Department Appropriation Act, ch. 529, 60 Stat. 348, 361 (1946).

35. See, e.g., *Baron Long (El Capitan) & Other Bands of Mission Indians of Cal. v. United States*, 217 Ct. Cl. 668 (1978).

36. *Id.* at 668.

37. *Id.*

38. See Florence C. Shipek, *Mission Indians and Indians of California Land Claims*, AM. INDIAN Q. 409, 417 (1989).

39. See Tongva Tribe Website, History, *supra* note 13.

Tribe signed their treaty. No attempt, however, was made to consider or resolve the federal status or the land claims of the Gabrielino-Tongva Tribe itself.

The failure of the 1946 Indian Claims Commission to adequately address the Tribe's sovereign status or to settle the Tribe's land claims may be explained, in part, as a long-lasting by-product of the Eisenhower Administration's "assimilation policy," begun in the early 1950s and later expressed legislatively as House Concurrent Resolution 108 of 1953.⁴⁰ Under this policy, the United States Government terminated thirty-eight federal Indian tribes in California.⁴¹ The tribal members were paid cash for the sale of their land and otherwise encouraged to "assimilate," as if they were part of an amorphous immigrant group rather than a subjugated tribal sovereign.⁴² Notably, the Gabrielino's settlement and the "assimilation policy" were both administered by Commissioner of Indian Affairs Dillon S. Myer, who had previously served as Chief Administrator of the Japanese internment camps in California.⁴³ In 1983, the unlawfulness of the Eisenhower "assimilation policy" was recognized by the federal government, which stipulated in *Hardwick v. United States*⁴⁴ to reinstate federal acknowledgment to seventeen terminated tribes.⁴⁵ Unfortunately, because the Gabrielino-Tongva Tribe was not a terminated rancheria tribe, the reversal of the assimilation policy provided them no remedy.

Today, however, the Tribe and its 900 members continue as a political group, thanks in part to the State of California. California officially recognized the Gabrielino-Tongva as a California Indian tribe in Joint Resolution Number 96, Chapter 146 of the Statutes of 1994.⁴⁶ The

40. *Id.* For an overview of the text and purpose of House Concurrent Resolution 108, see Digital History, Native American Voices, House Concurrent Resolution 108, http://www.digitalhistory.uh.edu/native_voices/voices_display.cfm?id=96 (last visited Nov. 21, 2005). H.R. Con. Res. 108, 83d Cong. (1953), 67 Stat. B132 (enacted).

41. *See* Alliance of Cal. Tribes, California Indians Past and Present, <http://www.allianceofcaltribes.org/californiaindians.htm>.

42. *See* Salish Kootenai Coll., The Termination Era (1950-1960), http://www.sk.edu/netbook/10-termination_era.htm (last visited Dec. 21, 2005).

43. *See, e.g.*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221-22 (1986) (explaining that Commissioner Meyer was in charge of the federal government's overall termination plan).

44. *Hardwick v. United States*, No. C-79-1910-SW (N.D. Cal. 1983) (stipulation for entry of judgment), available at <http://sorrel.humboldt.edu/~nasp/hardwick.html> (last visited June 8, 2005).

45. *Id.*

46. S.J. Res. 96, 1993-1994 Leg. Spec. Sess., ch. 146 (Cal. 1994).

resolution made the Gabrielino-Tongva Tribe one of only two non-federally-recognized tribes recognized by California.⁴⁷ The Resolution reads:

[B]e it . . . Resolved by the Assembly and Senate of the State of California, jointly, [t]hat the State of California recognizes the Gabrielinos as the aboriginal tribe of the Los Angeles Basin and takes great pride in recognizing the Indian inhabitation of the Los Angeles Basin and the continued existence of the Indian community within our state.⁴⁸

Despite the Tribe's state recognition, its well-documented history of physical evidence in the Los Angeles Basin, and its equally well-documented history of interaction with the United States, the federal government has yet to formally "acknowledge" the Gabrielino-Tongva as an Indian tribe.⁴⁹ The Gabrielino-Tongva's lack of federal status prevents the Tribe from acquiring federal rights or assistance granted to 109 other California Indian tribes, many of which share a similar history.⁵⁰ The Tribe began the formal federal recognition process in 1994,⁵¹ but like the hundreds of other tribes waiting for federal acknowledgment, resolution of their federal status is still years, if not decades away, due to the time that it takes to satisfy all of the BIA's requirements for federal recognition, and because the BIA generally only resolves two petitions for recognition a year.⁵²

Today, the Gabrielino-Tongva Tribe hopes to establish gaming under state law. The Tribe is taking a cooperative approach to gain the right to engage in gaming to generate revenue to support its tribal government and its 900 tribal members. The Tribe hopes to establish a cultural museum and catacomb to preserve the many archaeological and human remains now owned by the Tribe, and to bring much needed jobs and increased

47. The Juanenos Tribe of Orange County has also received state recognition. See S.J. Res. 48, 1993-1994 Leg. Sess., ch. 121(Cal. 1993).

48. Cal. S.J. Res. 96.

49. For a list of federally recognized tribes that excludes the Gabrielino-Tongva Tribe, see Bureau of Indian Affairs, 67 Fed. Reg. 46328-33 (July 12, 2002), available at <http://www.census.gov/pubinfo/www/FRN02.pdf> (last visited Nov. 21, 2005).

50. California's tribes have had an especially difficult time: "[A]lthough California Indians make up twelve percent of Indians nationwide, they receive less than one percent of all federal general assistance funds." Koenig, *Gambling*, *supra* note 7, at 1033 n.6; see also Alliance of Cal. Tribes, *supra* note 41.

51. See 500 Nations, Petitions for Federal Recognition, http://www.500nations.com/tribes/Tribes_Petitions.asp (last visited Nov. 21, 2005) (providing a list of federal recognition petitions for all tribes currently involved in the recognition process).

52. See Magagnini, *supra* note 9, at A1. For a partial explanation of why the federal recognition process is so time-consuming, see *infra* Part II.E.2.

tourism to Los Angeles County.⁵³

B. The State-Recognized Shinnecock Indian Nation of New York

Unlike the landless Gabrielino-Tongva Tribe, the 1300-member Shinnecock Indian Nation of New York has managed to retain approximately 1200 acres of their original lands in the form of a state-recognized reservation near the east end of Long Island.⁵⁴ Nevertheless, even this acreage represents a significant decrease in lands compared to the acreage the tribal nation once governed. In 1703, the Tribe had exclusive control over approximately 3600 acres secured through a 1000-year lease with the Town of Southampton.⁵⁵ That holding dwindled to a mere 800 acre reservation in 1859 in a largely one-sided deal designed to extend the Long Island Rail Road through the Tribe's property.⁵⁶

As noted by the Tribe, it is "among the oldest self-governing tribes of Indians in the United States."⁵⁷ Despite more than 200 years of official recognition by the State of New York, almost 400 years of contact with white settlers, and thousands of years in the greater New York area,⁵⁸ the Tribe has yet to be recognized by the United States federal government. The Tribe first applied for formal recognition with the BIA in 1978; more than twenty-seven years have already passed without resolution.⁵⁹

Over the last several decades, the Tribe has undertaken several forms

53. Minutes of [Gabrielino-Tongva Tribe] December 18, 2005 Tribal Council Meeting (Dec. 18, 2005) (on file with author).

54. See Shinnecock Indian Nation, *Shinnecock Indian Nation: An Ancient History and Culture*, <http://www.shinnecocknation.com/history.asp> (last visited July 14, 2005) [hereinafter *Shinnecock Indian Nation History*].

55. See Michael Powell, *Old Money and Old Grievances Clash in Haven of the Very Rich; Tribe's Lawsuit Seeks Return of 3,600 Acres of Prime Long Island Land*, WASH. POST, June 25, 2005, at A03 (noting the Tribe is now trying to recover their original 3600 acres); see also *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005).

56. See Tom Morris, *Newsday*, Long Island Our Story, *Shinnecock Reservation: A Painful but Enduring Story of a People*, <http://www.newsday.com/community/guide/lihistory/ny-historytown-hist008f0,7048517.story> (last visited Nov. 28, 2005); see also Powell, *supra* note 55, at A03.

57. *Shinnecock Indian Nation History*, *supra* note 54.

58. See Harriet Crippen Brown Gumbs, *Shinnecock*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* (Frederick E. Hoxie ed., 1996), available at http://college.hmco.com/history/readerscomp/naind/html/na_035800_shinnecock.htm (last visited Dec. 16, 2005); see also *Shinnecock Indian Nation*, 400 F. Supp. 2d at 489 (noting that "whether the Shinnecock Indians were and are an Indian Tribe was decided in New York by the enactment of a law by the New York State legislature and signed by the Governor in 1792, and that law remains in effect today").

59. See *Shinnecock Indian Nation History*, *supra* note 54.

of economic development to provide for its continued governance and the prosperity of its people. Nevertheless, long term efforts to lease land to nearby farmers have been hampered by pesticide leakage, which severely polluted the Tribe's drinking water.⁶⁰ A shellfish hatchery, which took advantage of the Tribe's coastal location, also had to be terminated due to pollution.⁶¹ An annual powwow is now the Tribe's greatest money maker, but even that has proven inconsistent thanks to uncertain weather.⁶² Even in good years, income from the powwow must be supplemented with state grants.⁶³ Consequently, the Tribe is working to secure the right to open a casino to generate the funds needed to help their government and members thrive.⁶⁴

As one of the biggest proponents of gaming by state-recognized tribes, the Tribe is currently involved in extensive litigation to determine whether it has the right to open a casino on its tribal lands, despite its lack of federal recognition.⁶⁵ At least one federal judge appears to have sympathized with the Tribe's frustration at its lack of federal recognition and inability to game without such recognition. In *New York v. Shinnecock Indian Nation*,⁶⁶ the United States was ordered to appear as an "involuntary plaintiff," which would have effectively made the court's orders binding upon the federal government.⁶⁷ Judge Thomas C. Platt suggested he might eventually require the United States to formally recognize the Shinnecock Tribe.⁶⁸

60. *See id.*

61. *See id.*

62. *See id.*

63. *See Gumbs, supra* note 58.

64. *See* Shinnecock Indian Nation, FAQs About Indian Gaming, <http://www.shinnecocknation.com/faq.asp> (last visited Jan. 10, 2006); *see also* Bruce Lambert, *Shinnecock Tribe Plans Suit, Claiming Land in Hamptons*, N.Y. TIMES, June 12, 2005, available at 2005 WLNR 9303809.

65. *See Shinnecock Indian Nation*, 400 F. Supp. 2d at 488 (E.D.N.Y. 2005); *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003). Another vocal proponent of state tribal gaming is the state-recognized Unkechaug Nation, which has also been trying to open a casino without federal recognition. *See, e.g., Carruthers v. Flaum*, 365 F. Supp. 2d 449 (S.D.N.Y. 2005); Steve Israel, *Unkechaug Nation Buys Land Near Kulscher's*, TIMES HERALD-RECORD (Middletown, N.Y.), available at <http://www.recordonline.com/archive/2004/06/15/siunkbac.html> (free registration is necessary to access this hyperlink).

66. *Shinnecock Indian Nation*, 400 F. Supp. 2d at 490 (E.D.N.Y. 2005).

67. *Id.* at 491 (noting that the court impleaded the government).

68. *See* Ann Givens, *Not Confined to the Reservation: Shinnecock Case Could Set National Precedent*, NEWSDAY, Jan. 26, 2004, at A08, available at <http://www.shinnecocknation.com/news/news74.asp> (last visited Mar. 22, 2004) (discussing the potential role of the judiciary in the federal recognition process of the Shinnecock Tribe); *see also* Michael Colello, *Shinnecock Casino Trial Begins in Spring*, INDEPENDENT (East Hampton), Jan. 27,

Although the court eventually dismissed the United States with prejudice,⁶⁹ the Tribe's efforts continue. The Shinnecock Nation, pursuing a different route than the Gabriellino-Tongva Tribe, no longer passively sits back and wait out the legal process. Instead, in 2003, the Tribe took controversial first steps towards opening a casino without having secured federal recognition, including preparing a site for casino construction.⁷⁰ Most recently in early 2005, the Tribe demonstrated its frustration with the lack of recognition of its gaming rights by commencing a spectacular lawsuit claiming up to \$150 billion dollars of "back rent" for current and past use of aboriginal land in the Hamptons.⁷¹ Several sources have suggested that the Tribe's true goal is to abandon the lawsuit in exchange for recognition of its right to open a casino.⁷²

In November 2005, as this Article was being edited for publication, the Tribe experienced a significant and controversial victory in the courts. On November 7, Judge Platt held that the Shinnecock qualify as a "tribe" for gaming purposes, despite their lack of federal recognition, and determined that accordingly the Tribe is not obligated to garner approval from the United States before developing their New York properties.⁷³ While this opinion may be overturned at the appellate level,⁷⁴ Judge Platt's decision is strong validation of the Shinnecock's claim for recognition.

II. States and State-Recognized Tribes Have the Authority to Enter into Gaming Compacts Outside of the Indian Gaming Regulatory Act ("IGRA")

The conclusion that state-recognized tribes, such as the Gabriellino-Tongva Tribe and the Shinnecock Indian Nation, may engage in gaming

2004, available at <http://www.shinnecocknation.com/news/news75.asp> (last visited Nov. 12, 2004) (noting a trial may decide whether the tribe should be granted federal recognition status).

69. *Shinnecock Indian Nation*, 400 F. Supp. 2d at 491 (noting the government ultimately chose to opt out of the case).

70. See Lambert, *supra* note 64; see also *Shinnecock Indian Nation*, 400 F. Supp. 2d at 488.

71. *Nation in Brief*, WASH. POST, June 16, 2005, at A30 (noting the Tribe is "seeking billions of dollars for 150 years' worth of back rent on land it inhabited for 12,000 years in New York state in one of the largest lawsuits of its kind").

72. See Ann Givens & Andrew Metz, *Shinnecoaks Stake a Hamptons Claim*, NEWSDAY.COM, June 12, 2005, <http://www.newsday.com> (last visited Jan. 4, 2005) (stating that "[e]xperts familiar with the Shinnecock case say the tribe's endgame is probably not to evict [anyone] from its land, but to force action on the tribe's bids for federal recognition and a South Fork casino).

73. *Shinnecock Indian Nation*, 400 F. Supp. 2d at 491 (E.D.N.Y. 2005).

74. See Katie Thomas, *The Judge Behind the Ruling*, NEWSDAY.COM, Nov. 8, 2005, <http://www.newsday.com/news/local/longisland/ny-lijudg1109,0,1255709.story?coll=ny-top-headlines> (last visited Nov. 21, 2005).

under state law is built from traditional theories of tribal political rights and the constitutional sovereignty of the states that recognize them. This conclusion is based on five points:

First, while the federal government generally has jurisdiction over tribal practices that impact non-tribal populations, gaming is a “vice activity,” a private liberty right regulated by states pursuant to their authority under the Tenth Amendment.⁷⁵ Vice activities such as gaming fall within the constitutional purview of state authority in the federalist system. Thus, the regulation of gaming will only fall under federal authority where the federal government has preempted the field.

Second, state-recognized tribes are sovereign governments with limited but inherent sovereign powers, including the right to conduct gaming activities, unless they are regulated as a “vice activity” by the state or preempted by the federal government. Alternatively stated, state tribes enjoy the same private liberty rights to conduct gaming as other state citizens, subject to state or federal regulation.

Third, according to a growing line of federal case law, the Indian Gaming Regulatory Act (“IGRA”)⁷⁶ only preempts the field of gaming by federally-recognized tribes on federal “Indian land.” Gaming by state tribes, by other state-authorized parties, and even by federally-recognized tribes that is not conducted on federal “Indian lands,” is not reached by IGRA. Thus, gaming by a state tribe on state-dominion land, such as a State Indian reservation, remains within the purview of Tenth Amendment state authority.

Fourth, gaming by state-recognized tribes does not violate equal protection laws that forbid state governments from discriminating in favor of one racial group, because like federal tribes, state tribes are government entities and not a racially-defined group of individuals.

Finally, significant policy arguments, consistent with IGRA policies to support the economic well-being of federal tribes, also support gaming by state-recognized tribes.

Opponents of state tribal gaming may argue that (1) federal law preempts the field of Indian gaming in its entirety, whether or not the federal government recognizes the Indian tribe in question, (2) federal law only permits gaming by federally-recognized tribes, and state-recognized

75. *See* *United States v. Darby*, 312 U.S. 100, 124 (1941) (“all is retained [by the states] which has not been surrendered”); *see also* *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 737 (2003) (stating that the regulation of gambling as a “vice activity” is a legitimate state interest).

76. 25 U.S.C. §§ 2701–2721 (2000).

tribes have no inherent right to conduct gaming in the absence of federal approval, and (3) allowing state-recognized tribes to conduct gaming to the exclusion of the general population violates equal protection mandates, by granting a “race-based” preference to a Native American racial or ethnic group.⁷⁷

As explained below, while federal law does preempt the field of tribal gaming by federally-recognized tribes—those tribes that the federal government recognizes as subjugated tribal sovereigns and whose gaming IGRA was designed to regulate and foster—federal law does not preempt gaming by state-recognized tribes. Additionally, gaming by state-recognized tribes does not violate equal protection guarantees, because such gaming is permissibly based on a state-recognized tribe’s status as a state-recognized sovereign government—not the race or ethnicity of the tribe or its individual members. As a result, states and the tribal sovereigns they recognize have the right to enter into mutually beneficial agreements to allow for tribal gaming in accordance with state law.

A. The Regulation of Gaming Is Generally a State Power

To understand the various rights involved in gaming, it is important to understand the layers of state, tribal, and federal jurisdiction upon which current tribal gaming rights are built.

External tribal affairs—those extending beyond tribes’ internal self-governance—are generally subject only to federal jurisdiction.⁷⁸ Consequently, states usually have no power to regulate tribe-related activities without Congress’s express consent. It has been argued that this precludes states and state-recognized tribes from entering into gaming compacts, since Congress has not expressly authorized these gaming agreements.⁷⁹ This view, however, may be too simplistic and may place too severe a limit on state and tribal rights.

States have constitutional authority to regulate vice activities conducted on state land pursuant to powers reserved by the United States Constitution’s Tenth Amendment.⁸⁰ At the heart of this is a state’s power to

77. These arguments have been raised during the authors’ work advocating on behalf of state-recognized tribes.

78. See *infra* Section II.B for a discussion of the relationship between tribes and the federal government.

79. Meeting with Bill Lockyer, Cal. Attorney Gen., in Sacramento, Cal. (April 2004) (arguments made by attorneys from the California Department of Justice).

80. According to the Tenth Amendment, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

regulate all forms of gambling that have not been expressly prohibited by the federal government, which has been recognized repeatedly.⁸¹ As recently stated by the Ninth Circuit, “circuits . . . have, by and large, held that ‘the regulation of gambling lies at the heart of the state’s police power.’”⁸²

The first layer of our analysis, then, recognizes that any commercial or tribal gaming conducted within state borders (as opposed to the borders of a federal Indian reservation) would be a vice activity generally regulated under state, and not federal, jurisdiction. One Eighth Circuit case recognized that this reserved state power even applies to Indian gaming if such gaming is conducted outside a federal Indian reservation and on land subject to state dominion.⁸³ As we explain below, the states’ federalist authority to regulate vice activities extends not only to gaming by private parties operating on lands under state dominion, but to state-recognized Indian tribes operating on a State Indian reservation or on other state lands.

CONCLUSION ONE: Gaming is a “vice activity,” a private liberty right regulated pursuant to state authority under the Tenth Amendment. Vice activities such as gaming fall within the constitutional purview of state authority in the federalist system, and so gaming conduct falls under federal authority only where the federal government has expressly preempted the field.

B. Tribes Are Sovereign Governments with Inherent Rights Including the Right to Game, Except as Preempted by the Federal Government

Sovereign tribes generally have the power to regulate and engage in gaming within their borders, except when that right has been expressly

81. See, e.g., *Ah Sin v. Whitman*, 198 U.S. 500, 505–06 (1905) (“The suppression of gambling is concededly within the police powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a ‘clear, unmistakable infringement of rights secured [sic] by the fundamental law.’”); *People v. Sullivan*, 141 P.2d 230, 233 (Cal. Ct. App. 1943) (“The Supreme Court of the United States recognizes the right of the State to prohibit or regulate gambling and other acts which may affect public morals.”); *Mansker v. State*, 1 Mo. 452, 459 (1824) (“It certainly will not be denied, that, under our federal system, each state has a right to regulate its own internal policy, on all subjects, when they are not limited by the Constitution of the United States.”).

82. *Artichoke Joe’s Cal. Grand Casino v. Norton (Artichoke Joe’s II)*, 353 F.3d 712, 737 (9th Cir. 2003) (quoting *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003)).

83. See *Nixon v. Coeur d’Alene Tribe*, 164 F.3d 1102, 1108–09 (8th Cir. 1999) (noting that IGRA does not preempt all forms of tribal gaming, including off-reservation internet gaming conducted by an Indian tribe).

preempted by the federal government.⁸⁴ The parameters of tribal jurisdiction over gaming activities, that is, the authority to conduct gaming activities unless otherwise prohibited by positive enactment, is the next layer of analysis. In particular, we must determine what gaming rights *state* tribes enjoy, absent federal preemption.

We begin by examining the powers of a sovereign tribe, whether or not it is federally acknowledged. Sovereignty is one of the most powerful concepts in Indian life and government, as well as Indian law. BLACK'S LAW DICTIONARY defines a "sovereign" as "[a] person, body or state vested with independent and supreme authority."⁸⁵ The dictionary further defines "sovereign state" as "[a] state that possesses an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is subject."⁸⁶ A recent article describes sovereignty as "supreme legal authority."⁸⁷ While these definitions suggest that tribal sovereigns, like national sovereigns, should be able to do whatever they want within their borders, a tribe's sovereign relationship with the United States is more complex.

The United States holds dominion over all Indian tribes within its borders because, unlike sovereign nations, Indian tribes were conquered by the United States. At some point, directly or indirectly, all Indian tribes were subjugated by force. As a result, as noted by the preeminent tribal scholar Felix S. Cohen, tribal authority is not supreme because tribal authority can be limited by federal law.⁸⁸

The next layer of our analysis must then ask, in what ways tribal sovereignty has been subordinated by the federal government, and in what ways is that authority still supreme? What sovereign powers still exist, and which have been extinguished? The answers do not come from the literal language of the United States Constitution. The Constitution mentions Indian tribes only twice, once to exclude Indians from the per capita assessments used for distributing representatives and tax dollars⁸⁹ and once to include commerce with Indian tribes within the federal Commerce

84. See, e.g., S. REP. NO. 100-446, at 5-6 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76.

85. BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

86. *Id.*

87. Peter d'Errico, *Sovereignty: A Brief History in the Context of U.S. "Indian Law,"* in 2 THE ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS (Jeffrey D. Schultz, et al. eds., Oryx Press, 2000), available at <http://www.umass.edu/legal/derrico/sovereignty.html> (last visited Nov. 12, 2004).

88. See COHEN'S 1971 HANDBOOK, *supra* note 1, at 123.

89. See U.S. CONST. art. I, § 2, cl. 3.

Power.⁹⁰ Rather, traditional and time-honored concepts of a limited tribal sovereignty arise from judicial interpretations of constitutional principles and principles of common law.

Judicial opinions repeatedly recognize the right of subjugated tribal sovereigns to govern their internal affairs. The United States Supreme Court first acknowledged that an Indian tribe possesses an inherent sovereign right to tribal self-government in an 1832 case involving the Cherokee Nation, *Worcester v. Georgia*.⁹¹ The Court explained that the Cherokee Nation possessed inherent or self-evident powers as the supreme governmental authority over its members, but also that its authority was necessarily limited by the Cherokee Nation's "dependency" on the United States.⁹² The Supreme Court found an historic harmony in the relationship between the Tribe and the federal government, not unlike the federalist model and its balancing of state and federal powers.⁹³ The *Worcester* Court recognized that sovereign powers of an Indian tribe were self-evident, arising from an Indian tribe's original status as a self-governing sovereign.⁹⁴ Sovereign powers are not granted by external powers such as the federal government, or by the act of federal recognition, but are partly based on natural law and partly historical.⁹⁵ The Supreme Court also found federal law formed a natural limitation to an Indian tribe's sphere of authority, by merit of its subjugation.⁹⁶ The independent sovereign was conquered, but still possessed those natural and historical powers of sovereignty that the conqueror had not confiscated.

Over the next 170 years, additional judicial interpretations coalesced this notion of tribal sovereignty into three foundational principles:

- (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state.
- (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government.
- (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal

90. See U.S. CONST. art. I, § 8, cl. 3.

91. 31 U.S. 515, 581 (1832).

92. *Id.* at 556–61; COHEN'S 1971 HANDBOOK, *supra* note 1, at 124.

93. *Worcester*, 31 U.S. at 549–61.

94. See COHEN'S 1971 HANDBOOK, *supra* note 1, at 122–23 (explaining that Indian nations have supreme authority over their internal affairs, and that such tribes are under the federal government's protection).

95. *Id.* at 122.

96. *Id.* at 123.

sovereignty are vested in the Indian tribes and in their duly constituted organs of government.⁹⁷

Thus, tribes have authority to do as they wish on their tribal lands, including conduct gaming, except where those rights have been expressly subordinated to an active federal power.

[T]reaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers This is but an application of the general principle that “[i]t is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror.”⁹⁸

Ultimately, the federal government, when it directly or indirectly subordinated tribes, only took certain rights and left other “sovereign rights” intact. In this sense, tribal sovereigns are comparable to the fifty state sovereigns, whose inherent powers are reserved by the Tenth Amendment. Judicial opinions have created a protective penumbra of case law around the notion of inherent, natural, historical, or self-evident tribal sovereignty, albeit one more permeable to active federal enactment than state powers. Accordingly, Indian tribes today remain self-governed entities that retain all powers of governance, including the power to conduct or permit gaming activities within their sphere of operation that have not been expressly preempted by Congress.⁹⁹

The next layer of the analysis must then investigate whether this subordinate sovereign status applies equally to both federal and state tribes. The answer must be yes. State tribes and federal tribes were both subjugated, directly or indirectly, by force, and both were true sovereigns prior to that subjugation. Applying the three principles above, (1) a state tribe (like a federal tribe) initially possessed all the powers of any sovereign state, (2) conquest rendered the tribe subject to the legislative power of the United States, (3) making the state tribe’s powers subject to qualification by treaties and by express legislation of Congress, but except as expressly qualified, full powers of internal sovereignty must still be vested in the state tribes and their duly constituted organs of government. Certainly in the case of the Gabrielino-Tongva, whose 1851 treaty was signed but never ratified, their inherent sovereignty was recognized by at least one President,¹⁰⁰ helping to establish that the United States government once

97. *Id.*

98. *Id.* at 122 (partially quoting *Wall v. Williamson*, 8 Ala. 48, 51 (1845)).

99. This Article does not consider the related issue of whether either state or federal tribes possess the right to conduct gaming without a state compact.

100. *See infra* Part I.A (discussing President Millard Fillmore’s appointment of three commissioners to sign eighteen federal treaties with California tribes, including the Gabrielinos).

acknowledged them as a bona fide tribe.

None of the three principles above suggest that federal recognition is a prerequisite to a tribe's inherent sovereignty.¹⁰¹ Federal acknowledgment is one important way that the superior federal power has exercised its legislative power, but nothing in the Indian tribe's lack of federal status appears to dissolve this inherent, self-evident, natural, and historical authority. This argument garners additional support from Felix S. Cohen: "From the earliest years of the Republic the Indian tribes have been recognized as 'distinct, independent, political communities,' and, as such, qualified to exercise powers of self-government, *not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.*"¹⁰² Since such powers do not depend on the federal government for their existence, state tribes such as the Gabrielinos and Shinnecocks must still be sovereign, irrespective of federal recognition. Treaties and legislation merely confirm sovereign status—they do not grant it. Federal recognition, as the name implies, is a *gestalt* reflection of the inherent power of state tribes; federal acknowledgement is neither its creation nor its source.

Ultimately, then, since tribal sovereignty is inherent, self-evident, natural, and historical, it is independent of the sanction of federal law and continues to exist even in the absence of federal recognition.¹⁰³ Because state-recognized tribes were subjugated just like federally-recognized tribes, state-recognized tribes must retain the same inherent sovereign rights as those that are federally-recognized. What state tribes would not qualify for are those government benefits that the federal government grants solely to those tribes it recognizes. As demonstrated above, state tribes' inherent sovereign power would include the power to conduct vice activities such as gaming, except where the federal government has affirmatively provided otherwise. For state tribes, within that sphere of tribal authority must lie the power to enter into an agreement with the state sovereign that recognizes the tribe, absent an express federal prohibition otherwise. As explained below, while the federal government has placed express limits on the gaming activities of *federally-recognized* tribes, federal law has not so limited this sovereign power of state-recognized tribes.

CONCLUSION TWO: State-recognized tribes are sovereign

101. *But see, e.g.,* New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003) (suggesting that the BIA is in the best position to determine whether a tribe is, in fact, sovereign).

102. COHEN'S 1971 HANDBOOK, *supra* note 1, at 122 (emphasis added).

103. *But see* Carruthers v. Flaum, 365 F. Supp. 2d 448, 467 (S.D.N.Y. 2005) (stating that because the Unkechaug tribe is only state-recognized, and not federally-recognized, the tribe is not sovereign).

governments with limited but inherent sovereign powers, including the right to conduct gaming activities, except as regulated as a vice activity by the state or preempted by the federal government.

C. The Federal Government Has Only Preempted the Field of Gaming by Federally-Recognized Tribes, Not Gaming by State Citizens, State Corporations, or State-Recognized Tribes

The next layer of analysis addresses federal preemption. If state tribes, like federal tribes, hold inherent, self-evident, natural, or historical sovereign powers to conduct gaming we must look to where federal enactments limit tribal and state sovereignty.¹⁰⁴

Preemption is “[t]he principle . . . that a federal law can supersede or supplant any inconsistent state law or regulation.”¹⁰⁵ There are two federal acts that directly apply to federal tribal gaming and so arguably might preempt gaming by a state tribe: IGRA¹⁰⁶ and the Johnson Act.¹⁰⁷ As explained below, neither act applies to state tribes. Therefore, neither act preempts gaming by a state tribe pursuant to a compact with its respective state.

1. Indian Gaming Regulatory Act of 1988

a. Background to IGRA: The *Cabazon* Case

The seminal case that led to the creation of IGRA and provides context to preemption challenges in an Indian gaming setting is the 1987 United States Supreme Court case *California v. Cabazon Band of Mission Indians*.¹⁰⁸ The *Cabazon* case concerned several federally-recognized California tribes that were running bingo operations, even though California law prohibited such a vice activity within state borders.¹⁰⁹ No federal enactment prevented gaming on federal Indian reservations, and the Tribes were frustrated at the State’s insistence that state law applied to

104. The related question of where a state tribe may conduct gaming activities is not broached. For the purpose of argument, it is assumed that the state tribe will choose to conduct gaming activities with the express agreement of the state that recognizes it.

105. BLACK’S LAW DICTIONARY 1216 (8th ed. 2004).

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

107. Johnson Act, 15 U.S.C. §§ 1171–1178.

108. 480 U.S. 202, 215–21 (1987).

109. *Id.* at 204–06.

make gaming conducted on federal reservations unlawful.¹¹⁰ The Tribes argued that they had the sovereign power to conduct gaming on their sovereign lands, which were under federal and not state control; California argued the Tribes' bingo operations illegally conflicted with the State's anti-gaming laws.¹¹¹

The Supreme Court ultimately found in favor of the Tribes,¹¹² explaining that state law only applies on federal Indian reservations in certain circumstances: "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."¹¹³ The Court concluded that gaming fell within the limited sphere of tribal sovereignty, and no positive federal enactments applied to limit the scope of Indian gaming.¹¹⁴ California's gaming laws could only be applied on lands under the dominion of California, not on federal Indian lands.¹¹⁵

The Court in *Cabazon* also looked at whether the State's jurisdiction over gaming had been preempted by federal law.¹¹⁶ It noted that "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."¹¹⁷ The Court weighed the federal and tribal interests in encouraging tribal self-sufficiency and economic development and found them complimentary.¹¹⁸ However, the State's interest in regulating tribal gaming, illustrated by California's purported purpose to prevent organized crime from infiltrating tribal gaming operations, conflicted with federal and tribal interests.¹¹⁹ Because the federal interest in furthering tribes' economic well-being was paramount, the state law was preempted.¹²⁰ Allowing state regulation to intrude, in this case, would be inconsistent with tribal and federal interests

110. *Id.*

111. *Id.*

112. *Id.* at 207.

113. *Id.* (citations omitted).

114. *Id.* at 221–22.

115. *See id.* at 207–12.

116. *Id.* at 203, 216.

117. *Id.* at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983)).

118. *Id.* at 216–19.

119. *Id.* at 219–22.

120. *Id.* at 221–22.

in tribal self-sufficiency, and thus was impermissible.¹²¹

Ultimately, *Cabazon* left two lasting contributions to the long line of judicial interpretations delimiting tribal sovereignty. First, it affirmed that in the absence of a positive federal enactment to the contrary, tribal governments are the supreme authority to conduct and regulate gaming on Indian lands under their jurisdiction. *Cabazon* thus falls in line with traditional notions of tribal sovereignty as an inherent, self-evident, natural, and historical power possessed by Indian tribes but limited by federal enactment. Second, *Cabazon* set forth a preemption analysis applicable to tribal gaming, becoming the first of several cases to apply a federal preemption analysis to tribal gaming and thereby illustrating the interplay between tribal, federal, and state jurisdictions.

b. Framework of IGRA

After the *Cabazon* case was published, the absence of recognized state authority on federal Indian gaming terrified and infuriated California and other states.¹²² In many instances, federal Indian reservations were within easy driving distance of major metropolitan areas. State anti-gaming laws now had big, geographic holes in which Indian tribes and entrepreneurial casino developers might develop casinos to generate large sums of cash to the exclusion of others. In response to state outcry over the nearly instantaneous growth of Indian gaming on federal Indian lands, Congress established IGRA in 1988¹²³ to expressly “grant[] states some role in the regulation of Indian gaming”¹²⁴ and thereby balance state interests in regulating gaming within state borders with federal interests in allowing federal tribes to operate casinos on federal Indian reservations to support

121. *Id.* at 222.

122. See Koenig, *Gambling*, *supra* note 7, at 1038–39; see also Nat’l Indian Gaming Comm’n, Home Page, <http://www/nigc.gov> (last visited Nov. 20, 2005).

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

124. *Artichoke Joe’s Cal. Grand Casino v. Norton (Artichoke Joe’s II)*, 353 F.3d 712, 715 (9th Cir. 2003). According to the Ninth Circuit:

IGRA was Congress’ compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide “a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . .” IGRA is an example of “cooperative federalism” in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

Id. at 715 (quoting *Artichoke Joe’s v. Norton (Artichoke Joe’s I)*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)).

tribal economies.¹²⁵

With IGRA, Congress asserted its dormant federal powers over tribal sovereigns and established the first formal non-Indian regulation of Indian casinos. IGRA organized tribal gaming into three classes, each of which became subject to different degrees of regulation. It delegated a major regulatory role to states through the requirement of a state tribal compact to engage in the highest class of gaming, Class III. This class, which includes the use of highly lucrative slot machines, may only be conducted by a tribe if the state allows such gaming within its borders and a tribal gaming agreement (or “compact”) is entered into with the state.¹²⁶ In contrast, Class II gaming consists of bingo and non-electronic card games¹²⁷ and is subject to IGRA and tribal jurisdiction, but does not require the tribe to enter into an express compact with the state.¹²⁸ Finally, Class I gaming, which primarily includes traditional Indian games,¹²⁹ is exempt from state and federal oversight and remains within the exclusive jurisdiction of tribes.¹³⁰

Some 354 Indian casinos, all run by federally-recognized tribes, are now operating under the IGRA framework, pursuant to compacts negotiated by the governors of twenty-eight states.¹³¹

c. IGRA Does Not Preempt State Tribal Gaming Because IGRA Does Not Apply to State-Recognized Tribes

While IGRA explicitly preempts the state regulation of gaming by federally-recognized tribes on federal Indian reservations, IGRA does not preempt gaming by state tribes on state-dominion lands, as explained below.¹³² Accordingly, states should be free to reach gaming agreements

125. *See* Hotel Employees & Rest. Employees Int’l Union v. Davis, 981 P.2d 990, 998 (Cal.1999).

126. 25 U.S.C. § 2710(d)(1)(c).

127. 25 U.S.C. § 2703(7).

128. 25 U.S.C. § 2710(a)(2).

129. 25 U.S.C. § 2703(6).

130. 25 U.S.C. § 2710(a)(1).

131. *See* Nat’l Indian Gaming Ass’n Library & Resource Ctr., Indian Gaming Facts, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml> (last visited June 18, 2005).

132. *See, e.g.*, S. REP. NO. 100-446, at 5 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3075 (noting in its discussion of IGRA that “today, tribal governments retain all rights that were not expressly relinquished”). In a painstakingly researched article that scrutinizes the origins of the federal government’s power over Native Americans, scholar Mark Savage posits the novel theory that the United States Constitution never granted the federal government plenary power (and therefore preemptive power) over even federally-recognized tribes. In his article, he argues that:

with state tribes to pursue gaming under state law and on state-dominion lands, such as a State Indian reservation.

State gaming is not preempted by IGRA for two reasons: (1) gaming by state tribes falls outside IGRA's field of preemption, which only covers gaming by federally-recognized tribal sovereigns on federal Indian lands, and (2) even if gaming by state-recognized tribes falls within IGRA's parameters, state jurisdiction is compatible with IGRA itself. Thus, even assuming *arguendo* that IGRA did preempt the field of gaming for all Indian tribes on all lands, state and tribal regulation of gaming by state-recognized tribal sovereigns must still be allowed.

i. State-Authorized Gaming by a State Tribe on State-Dominion Lands Falls Outside IGRA's Preemptive Field

Traditional preemption analysis has two steps. First, any potentially relevant federal legislation is analyzed to see what "field" is preempted.¹³³ If the state or tribal activity falls outside the preempted field, the activity stands.¹³⁴ If the target activity falls within the preempted field, the second step is to determine whether state or tribal regulation conflicts or interferes with federal regulation.¹³⁵ If there is no such conflict or interference, then such regulation may coexist side-by-side with federal regulation, and again the activity stands.¹³⁶

The United States—its President, its Congress, and its Supreme Court—can exercise no power over Native Americans unless the Constitution grants it. Examination of the text of the Constitution, the intentions of the Framers, contemporary notions about sovereignty, the records of the Continental Congress, and contemporary treaties with Native American nations makes it clear that the Constitution has never granted to the United States a plenary power over Native Americans.

Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 115–16 (1991) (citations omitted). Consequently, he argues that "[t]wo hundred years of decisions by the Supreme Court and legislation by Congress and the President lack constitutional authority." *Id.* at 60. Although years of precedent ignoring this history have rendered his position moot, as advocated by Savage this argument may still be used "to challenge exercises of state and federal power over Native Americans and their lands and thus to accomplish the ends of self-determination and self-government." *Id.* at 118.

133. See 41 AM. JUR. 2D *Indians; Native Americans* §47 (2005) (noting that "[s]tate jurisdiction or regulatory authority over activities . . . is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law") (partially citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)).

134. See *id.*

135. See *id.*

136. See *id.*; see also, e.g., *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960) ("In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its

So what field of gaming does IGRA preempt? Clearly, IGRA does *not* preempt state authority over non-Indian vice activities. States retain their inherent constitutional police power over vice activities within their borders, including exclusive authority over non-tribal gaming. For example, Nevada and New Jersey continue to allow extensive gaming activities in Las Vegas and Atlantic City under their respective state laws. Such gaming lies outside IGRA's preemptive field. California allows more limited gaming activities by card rooms and horse racing tracks.¹³⁷ In addition, California itself runs a state lottery¹³⁸ and permits gaming for non-profit purposes.¹³⁹ IGRA, by its own terms, applies *only* to gaming conducted on federal "Indian lands"¹⁴⁰ and by federal "Indian tribes."¹⁴¹ Neither term appears to reach state-recognized tribes or gaming under state law on state-dominion lands.

IGRA defines "Indian lands" in two parts. "Indian lands" are, first, "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power,"¹⁴² and second, "all lands within the limits of any [federal] Indian reservation."¹⁴³

The first part of the definition explicitly references a federal jurisdiction requirement by limiting "Indian lands" to those held in trust or subject to restriction by the United States. The lands of state-recognized tribes, however, are generally not held in trust by the federal government due to the fact that the tribe is not federally-recognized.¹⁴⁴ Absent federal acknowledgment of an Indian tribe, one is hard-pressed to argue that any State Indian reservation or other gaming facility would fall under federal

regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." (quoting *Savage v. Jones*, 225 U.S. 501 (1912)).

137. See *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 1008 (Cal.1999) (comparing the types of gaming permitted in Nevada and New Jersey with that permitted in California).

138. CAL. CONST. art. IV, §19, cl. d.

139. CAL. CONST. art. IV, §19, cl. f (referring to the Constitution's second clause f).

140. 25 U.S.C. § 2702(3) (2000).

141. 25 U.S.C. § 2702(1)-(2).

142. 25 U.S.C. § 2703(4)(B).

143. 25 U.S.C. § 2703(4)(A).

144. Thirteen states have state Indian reservations: Alabama, California, Connecticut, Georgia, Louisiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oklahoma, and Virginia. See Alexa Koenig & Jonathan Stein, 2004 Survey of State-Recognized Tribes 2 (2004) (unpublished report, on file with the authors).

restriction.

The second part of the definition, “Indian reservation,” generally refers to federal, not state, reservations. As explained in *Enlow v. Bevenue*,¹⁴⁵ “[g]radually the term [Indian reservation] has come to describe ‘federally-protected Indian tribal lands,’ meaning those lands which Congress has set apart for tribal and federal jurisdiction.”¹⁴⁶ Under IGRA, the Secretary of the Interior recognizes Indian lands by calling the lands “reservations.” For example, gaming is permitted on lands acquired after October 17, 1988 when “lands are taken into trust as part of . . . the initial reservation of an Indian tribe *acknowledged by the Secretary under the Federal acknowledgment process*, or . . . the restoration of lands for an Indian tribe that is restored to *Federal recognition*.”¹⁴⁷ Also, “[a]n Indian reservation is a reservation of land *that Congress has withdrawn from the public domain for a variety of purposes, including Indian autonomy*.”¹⁴⁸ Therefore, IGRA only reaches Indian gaming on federally supervised Indian land.

As a result, gaming on state-dominion lands, including a State Indian reservation, falls outside IGRA. A similar conclusion was reached in the 2005 case, *Nixon v. Coeur d’Alene Tribe*.¹⁴⁹ In *Nixon*, a federal Indian tribe conducting gaming on federal lands decided to undertake a new gaming activity, internet gaming, but from a location off their reservation and within the state-dominion lands of Missouri.¹⁵⁰ The State sued to stop internet gaming by the Tribe, but the Tribe argued that IGRA preempted state law and prevented Missouri from stopping the Tribe’s gaming activity.¹⁵¹ The court found IGRA did not preempt state jurisdiction, even though the Tribe was federally-recognized and did conduct other gaming under IGRA, because the internet gaming was conducted outside federal “Indian lands”:

IGRA established a comprehensive regulatory regime for tribal gaming activities *on Indian lands*. Both the language of the statute and its legislative history refer only to gaming on Indian lands Once a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State’s historic right to regulate this controversial class of economic activities. For example, if the State of Missouri sought an injunction

145. 4 Okla. Trib. 175 (Muscogee (Creek) Sup. Ct. 1994).

146. *Id.* at 182 (citations omitted).

147. 25 U.S.C. § 2719(b)(1)(B)(ii)–(iii) (emphasis added).

148. *Goodman Oil Co. v. Idaho State Tax Comm’n*, 28 P.3d 996, 1000 (2001) (emphasis added).

149. 164 F.3d 1102 (8th Cir. 1999).

150. *Id.* at 1104.

151. *Id.*

against the Tribe conducting an internet lottery from a Kansas City hotel room, or a floating crap game in the streets of St. Louis, the IGRA should not completely preempt such a law enforcement action simply because the injunction might “interfere with tribal governance of gaming.” . . . If the Tribe’s lottery is being conducted on its lands, then the IGRA completely preempts the State’s attempt to regulate or prohibit. But if the lottery is being conducted on Missouri lands, the IGRA does not preempt the state law claims—indeed, it does not even appear to provide a federal defense—and the case must be remanded to state court.¹⁵²

Pursuant to the Tenth Amendment and the inherent state authority to regulate vice activities, gaming by state citizens, state corporations, state tribes, and even federal tribes on lands other than federal Indian lands can be conducted under state law. If state law allows these activities, the state law itself is not preempted by federal regulation under IGRA.

Further, just as IGRA does not reach beyond federal Indian lands to lands under state jurisdiction, IGRA does not reach beyond federally-recognized tribes to state-recognized tribes. By its own terms, IGRA only regulates gaming by an “Indian tribe,” a term defined within IGRA as

any Indian tribe, band, nation, or other organized group or community of Indians which . . . is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and . . . is recognized [by the Secretary of Interior] as possessing powers of self-government.¹⁵³

This Secretary of the Interior recognition requirement limits the scope of the definition to those tribes that have attained formal federal acknowledgment.

Case law confirms that IGRA only applies to federal tribes. As explained in *First American Casino Corp. v. Eastern Pequot Nation*:¹⁵⁴

IGRA does not apply [to the parties’ agreement] because defendant has not attained formal federal recognition and therefore is not an “Indian tribe” within the meaning of IGRA. Unless and until defendant obtains federal acknowledgment, its activities are not regulated by IGRA Because IGRA’s text unambiguously limits its scope to gaming by tribes that have attained federal recognition, [IGRA] does not apply to defendant’s gaming-related activities.¹⁵⁵

First American Casino Corp. was a breach of contract case involving a gaming management contract entered into by the defendant Eastern

152. *Id.* at 1108–09 (internal citations omitted) (emphasis in original).

153. 25 U.S.C. § 2703(5)(A)–(B) (2000) (emphasis added).

154. 175 F. Supp. 2d 205 (D. Conn. 2000).

155. *Id.* at 208–10 (citing *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 792 n.4 (1st Cir. 1996) (“[IGRA] has no application to tribes that do not seek and attain formal federal recognition.”)).

Pequots, a state tribe that sought to conduct gaming under IGRA but lacked formal federal recognition.¹⁵⁶ The plaintiff argued that the defendant Tribe had breached the agreement by negotiating with third parties to find someone other than the plaintiff to finance, develop, and manage the Tribe's future casino.¹⁵⁷ The defendant Tribe removed the case to federal court on the theory that the federal court had subject matter jurisdiction, since the management contract necessarily implicated IGRA.¹⁵⁸ The court ultimately disagreed and held there was no subject matter jurisdiction—IGRA did not apply because the Eastern Pequots had not yet received formal federal recognition.¹⁵⁹

The court also rejected the Eastern Pequot's additional argument that IGRA completely preempted the field of tribal gaming, including gaming by a state tribe. The court stated:

The issue here is whether defendant has shown a clear congressional intent in IGRA to completely preempt plaintiff's state law claims. Two cases from the Eighth Circuit indicate that IGRA completely preempts the field of regulating Indian gaming when the statute applies However, both cases also indicate that IGRA has no such power if it does not apply Because IGRA's text unambiguously limits its scope to gaming by tribes that have attained federal recognition, the statute does not apply to defendant's gaming-related activities. Accordingly, plaintiff's state law claims are not completely preempted by IGRA.¹⁶⁰

The court explained that the Supreme Court has found complete preemption in only three areas, and Indian gaming is not one of them.¹⁶¹

Other cases support the thesis that IGRA does not reach gaming by state tribes. In 2003, the Ninth Circuit found "[t]he *operative terms* of IGRA expressly relate only to *tribes*, not to individual Indians Indeed . . . only *federally recognized* tribes are covered."¹⁶² It also noted, "IGRA pertains to Indian lands and to tribal self-government and [the] tribal status of federally recognized tribes."¹⁶³ Thus, gaming by a state tribe that is not

156. *Id.* at 206.

157. *Id.* at 207.

158. *Id.* at 206.

159. *Id.* at 206–08.

160. *Id.* at 209–10 (internal citations omitted).

161. *Id.* at 209. The three fields that have been completely preempted are (1) employer-labor organization contract violations (preempted by the Labor Management Relations Act); (2) benefit claims made under employee benefit plans (preempted by the Employee Retirement Income Security Act); and (3) Indian tribes' aboriginal lands claims (preempted by federal law for purposes of 28 U.S.C. § 1331, 1362). *Id.*

162. *Artichoke Joe's Cal. Grand Casino v. Norton (Artichoke Joe's II)*, 353 F.3d 712, 734 (9th Cir. 2003) (third emphasis added).

163. *Id.* at 736.

federally-recognized would not lie within IGRA's preemptive field. Accordingly, such gaming would remain within the purview of state authority and the state's recognized tribes. Gaming by a state tribe on state-dominion land remains within the constitutional purview of state and tribal authority, and state-recognized tribes may conduct gaming activities pursuant to a gaming agreement with the state that recognizes them.

ii. Even if Gaming by State-Recognized Tribes Falls Within IGRA's Preemptive Field, Gaming by State Tribes Under State Law Should Still Be Allowable Since Such Gaming Would Not Conflict with IGRA's Underlying Purposes

The body of case law described above only addresses the first step of the preemption analysis. Despite our conclusion, since no case has expressly confirmed that gaming by state tribes falls outside IGRA's preemptive field, it is important to turn to the second step, which examines whether activities that fall *within* the preempted field are, in fact, preempted. Assuming for the sake of argument that gaming by state tribes lies within the preempted field, it must be determined whether the state or tribal regulation that would authorize the state tribal gaming conflicts with IGRA.¹⁶⁴ If not, then such regulation may still coexist with IGRA and would not be preempted.¹⁶⁵

Several cases involving Indian gaming analyze when an assertion of state authority would be consistent with, and therefore not preempted by, IGRA.¹⁶⁶ For example, in *Hotel Employees & Restaurant Employees International Union v. Davis*,¹⁶⁷ the California Supreme Court stressed that IGRA does not exempt gaming on Indian lands from state regulatory laws and, therefore, does not preempt state laws regulating gaming, *even by federal tribes on federal Indian reservations*.¹⁶⁸ "IGRA does not exempt gambling on Indian lands from state regulatory laws. Indeed, section 23 of IGRA provides that 'for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian

164. See, e.g., *Hotel Employees and Rest. Employees Int'l Union v. Davis*, 981 P.2d 990 (Cal. 1999); *Salt River Pima-Maricopa Indian Cmty. v. Hull*, 945 P.2d 818 (Ariz. 1997). Both cases are discussed throughout this section. See also Elizabeth D. Lauzon, *Jurisdiction Issues Arising Under Indian Gaming Regulatory Act*, 197 A.L.R. FED. 459, 488-95, 510-17 (2005).

165. See *id.*

166. See, e.g., *Hotel Employees*, 981 P.2d at 1011 (holding the final sentence of Proposition 5 was not preempted by IGRA because it was "consistent with and furthers the purposes of IGRA").

167. *Id.*

168. *Id.* at 1008.

country.”¹⁶⁹

In *Hotel Employees*, a number of parties, including a labor union, sought to invalidate Proposition 5, the Tribal Government Gaming and Economic Self-Sufficiency Act of 1998.¹⁷⁰ Proposition 5 was a voter initiative authorizing Las Vegas-style gaming in tribal casinos.¹⁷¹ The Union argued that the proposition conflicted with state and federal law and, therefore, was invalid.¹⁷² The California Supreme Court agreed, explaining the proposition authorized forms of gaming that the California Constitution prohibited.¹⁷³ The Tribes countered, arguing that regardless of the California Constitution, IGRA preempted the regulation of Indian gaming by California including the state constitution’s anti-casino provision.¹⁷⁴ The California Supreme Court disagreed and found that IGRA itself preserved state authority; IGRA’s provisions limited its own preemptive reach by requiring that Indian gaming comply with state gambling laws.¹⁷⁵ The court noted only one exception to that general rule—the portion of IGRA permitting Class III gaming under tribal/state compacts.¹⁷⁶

Thus, even IGRA’s own language appears to limit its power to exclude state law from regulating vice activities on state-dominion land; IGRA itself establishes that state gambling laws may apply within the preempted field of gaming on federal Indian lands unless the state’s regulatory scheme conflicts or interferes with a tribal-state compact under IGRA.¹⁷⁷ Even then, according to IGRA’s own language, the parameters of gaming permitted by that compact must be compatible with state law. *A priori*, state gambling laws must operate freely on non-federal lands under state control. States should be able to authorize gaming on such lands by non-federal tribes, just as they could authorize such gaming for any other party.

*Salt River Pima-Maricopa Indian Community v. Hull*¹⁷⁸ further illuminates when the assertion of state authority in the Indian gaming context does not conflict with, and therefore is not preempted by IGRA. In *Salt River*, the court considered an Arizona proposition that mandated the terms of a tribal gaming agreement irrespective of what the Governor or Legislature

169. *Id.*

170. *Id.* at 994–95.

171. *Id.* at 994.

172. *Id.* at 995.

173. *Id.* at 1009.

174. *Id.* at 1008.

175. *Id.* at 1009.

176. *See id.*; 18 U.S.C. § 1166(c) (2000) (explaining the exception).

177. *See Hotel Employees*, 981 P.2d at 1009.

178. 945 P.2d 818 (Ariz. 1997).

might wish to negotiate.¹⁷⁹ Arizona's Governor argued that the proposition was preempted by IGRA's specific provisions regarding how compacts must be negotiated, because the Arizona proposition removed the Governor's IGRA-based authority to negotiate the terms of such compacts and thus directly conflicted with those provisions.¹⁸⁰ The court found no such preemption, even though the proposition clearly entered IGRA's preemptive field.¹⁸¹ The court upheld the proposition as compatible with IGRA because the state could still negotiate compact terms; the proposition just set a minimum for what the state could offer.¹⁸² The court stressed that the purpose of IGRA is "to give Indian tribes a mechanism through which to force a reluctant state government to the bargaining table and require it to negotiate a compact in good faith."¹⁸³ Thus, even though the state gaming proposition fell within the preempted field, its purpose was sufficiently consistent with IGRA to be upheld.

In light of *Salt River*, assuming arguendo that a state law authorizing a state tribe to conduct gaming on state-dominion lands was within IGRA's preemptive field, the state law would not be preempted so long as it was compatible with IGRA's purpose: to balance state interests in regulating gaming within state borders with federal interests in allowing federal tribes to operate casinos on federal Indian reservations and support tribal economies.¹⁸⁴ One way IGRA fulfills this mission is by encouraging states to negotiate with tribes to create tribal gaming compacts to regulate gaming within state borders.¹⁸⁵ By agreeing to enter into a gaming compact with a state tribe, however, a state would already be at the bargaining table, and thus IGRA is unnecessary to compel such negotiation.

Once again, this Article addresses the situation of a state and state tribe that wish to engage in gaming, *not* a state attempting to stop an Indian tribe from gaming—the latter of which IGRA was needed to address.

179. *Id.* at 819–21.

180. *Id.* at 821.

181. *Id.* at 824.

182. *Id.* at 822.

183. *Id.* at 823 (quoting *Wis. Winnebago Nation v. Thompson*, 22 F.3d 719, 724 (7th Cir. 1994)).

184. *See Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 998 (Cal. 1999).

185. *See, e.g.*, 25 U.S.C. § 2710(d)(3)(A) (2000) (establishing that tribes "having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities," and that "[u]pon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact").

State tribal gaming also comports with at least one other purpose expressly stated in IGRA—“to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”¹⁸⁶ By allowing state tribes to generate much needed revenue through gaming agreements under state law, such tribes would be able to further their economic development and self-sufficiency, and thereby strengthen their governments. Ultimately, *state* interests in supporting the economic development and self-sufficiency of a state tribal government are consistent with Congress’s interests in economic development and tribal self-sufficiency in *federal* Indian gaming.¹⁸⁷

In *Cabazon*, the Supreme Court noted the Tribes’ and federal government’s interests in tribal economic development, emphasizing their extreme importance: “The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.”¹⁸⁸ Similarly, in *Hotel Employees*, the California Supreme Court emphasized IGRA’s interest in “promoting tribal economic development, self-sufficiency, and strong tribal governments.”¹⁸⁹

Here, it is also tribal self-sufficiency and economic development that are at stake. Since a state compact with a state tribe apparently parallels the purposes underlying IGRA, such agreements should not be preempted, even if IGRA occupies the field.

Ultimately, gaming by a state tribe on a State Indian reservation under state law could be carefully tailored to allow state-recognized tribes the same economic development opportunities as those provided by IGRA for federal tribes operating casinos on federal “Indian lands.” The state laws might parallel IGRA’s provisions, the games allowed might parallel existing gaming at IGRA-licensed casinos, and the agreements between states and their recognized tribes might parallel states’ existing gaming compacts with federal tribes. Such gaming could be strictly limited to state-recognized tribes on state-dominion lands, including existing or newly

186. 25 U.S.C. § 2702(1).

187. *See, e.g.*, S. REP. NO. 100-446, at 3 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3072–73 (noting the federal government’s interests in fostering tribal gaming based on the benefits that accrue to tribes).

188. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–19 (1987).

189. *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 981 P.2d 990, 998 (Cal. 1999) (quoting 25 U.S.C. §2702(1) (1994)).

created State Indian reservations.¹⁹⁰ Thus, carefully tailored state law and state gaming compacts could be made comparable to IGRA to avoid any conflicts with federal Indian gaming regulation.

2. State Tribal Gaming Is Also Not Preempted by the Federal Johnson Act

A second federal act that preempts some forms of tribal gaming is the Johnson Act, which reads in relevant part: “It shall be unlawful to . . . sell, transport, possess, or use any gambling device . . . within Indian country as defined in section 1151 of Title 18”¹⁹¹ The Act makes several means of gambling, including the use of slot machines, illegal in “Indian country.”¹⁹²

Ultimately, the definition of “Indian country” limits the preemptive effect of the Johnson Act in the same manner that the definition of “Indian lands” limits the preemptive effect of IGRA. The Johnson Act does not apply to most state tribes because most state tribes’ lands are state-dominion lands that simply do not qualify as “Indian country.”

“Indian country” is a term of art defined by federal statute:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹⁹³

First, under subsection (a), since state tribes’ lands are not under federal jurisdiction, their state reservations would not qualify as a reservation under the jurisdiction of the United States government.

Second, under subsection (b), most state tribes’ lands would not qualify as “dependent Indian communit[ies].” The United States Supreme Court,

190. Tribal lands that may be considered State Indian reservations currently exist in Alabama, Connecticut, Louisiana, Massachusetts, New Jersey, New York, Oklahoma, Ohio, and Virginia. Koenig & Stein, *supra* note 144, at 2.

191. 15 U.S.C. § 1175(a) (2000).

192. One exception to this general prohibition on gaming within Indian country is for those tribes that have a valid compact under IGRA. *See* 25 U.S.C. § 2710(d)(6)(A)–(B). Nevertheless, since IGRA does not apply to state tribes, if the Johnson Act applies, it *would* present a barrier to a state-recognized tribe’s Class III gaming efforts.

193. 18 U.S.C. § 1151.

in *Alaska v. Native Village of Venetie Tribal Government*,¹⁹⁴ explained that the term “dependent Indian communit[y]” “refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.”¹⁹⁵ In *Venetie*, a Tribe’s original reservation had been revoked and therefore could not satisfy a federal set-aside requirement.¹⁹⁶ With revocation, federal superintendence over the land had been eliminated.¹⁹⁷ Even the federal government providing the tribe with “‘desperately needed’ social programs [could not] support a finding of Indian country.”¹⁹⁸

In our case, where a state tribe would conduct gaming on a State Indian reservation, a finding that the State Indian reservation qualified as “Indian country” would be difficult. Most state tribes’ traditional reservations have been revoked, and most existing lands would not have been set aside by the federal government, as the tribes are not federally-recognized. Instead, it is often the state government that has recognized them and set aside their tribal lands. For example, if the Gabrielino-Tongva Tribe were to regain its tribal lands through state legislation, such a State Indian reservation would not automatically be subject to federal superintendence. The Gabrielino’s reservation at San Sebastian was lost long ago and only that land would come close to the requirement of “federal superintendence.”¹⁹⁹ Thus, a new State Indian reservation for the Gabrielinos would not qualify as a dependent Indian community, or as “Indian country” under the Johnson Act.

Third, under subsection (c) above, most state tribes’ lands would not be “Indian allotments . . . titles to which have not been extinguished.”²⁰⁰ An Indian allotment is land owned by an individual Indian that was parceled out of a larger federal reservation.²⁰¹ Most allotments originated during the first half of the twentieth century following passage of the Indian

194. 522 U.S. 520 (1998).

195. *Id.* at 527.

196. *Id.* at 532.

197. *Id.* at 533.

198. *Id.* at 534.

199. *Id.*

200. 18 U.S.C. § 1151 (2000).

201. *See* Internal Revenue Serv., Indian Tribal Governments: FAQs Regarding Terminology, <http://www.irs.gov/govt/tribes/article/0,,id=108431,00.html#A4> (last visited Aug. 12, 2004) [hereinafter IRS Website].

General Allotment Act or “Dawes Act.”²⁰² The Act was part of a President Eisenhower’s “assimilation policy” designed to incorporate Indians into mainstream western culture.²⁰³ Tribal lands were broken up into a series of individual “allotments” that were then issued to individual tribal members who could live on or sell the land at will.²⁰⁴ This program failed, however, because most tribal members—many of whom were cash poor—sold their land to non-Indians for small sums of money that were quickly spent, and the Act never made the tribal members self-sufficient as was originally planned.²⁰⁵ The Reorganization Act²⁰⁶ was passed by Congress in 1934 to put an end to the allotment program.²⁰⁷ Since tribal title to most allotments was extinguished during the first half of the twentieth century, however, State Indian reservations would not fall within this definition.

3. Preemption Argument Conclusion

Since both IGRA and the Johnson Act—the two primary federal acts that regulate Indian gaming—do not apply to state tribes, it is unlikely that the federal government has preempted the field of gaming for all state tribes. General policy supports this argument. Originally, the conflict over whether tribes could conduct gaming was a state/tribal issue, not a federal one. The main reason behind federal gaming legislation was to encourage states and tribes to “get along.” Where a state seeks to foster Indian gaming by a state tribe, rather than prohibit it by a federal tribe, such acts are not needed, and were never intended to apply. Likewise, where gaming is permitted on state-dominion lands rather than on federal Indian reservations, the application of such acts is both unneeded and unintended.

CONCLUSION THREE: Gaming by state tribes, by other state-authorized parties, and even by federally-recognized tribes that is not conducted on federal “Indian lands” is not reached by IGRA or the Johnson Act. Thus, gaming by a state tribe on state-dominion land, such as a State Indian reservation, remains within the constitutional purview of state authority. As a result, state-recognized tribes may conduct gaming activities where acceptable under state law.

202. An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment or Dawes Act), ch. 119, 24 Stat. 388–91 (1887) (codified as amended at 25 U.S.C. §§ 331–381 (2000)) (repealed 1934).

203. See IRS Website, *supra* note 201.

204. See *id.*

205. See *id.*

206. Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

207. See IRS Website, *supra* note 201.

D. Gaming by State-Recognized Tribes Does Not Violate Equal Protection

After federal preemption, the most significant argument raised by state tribal gaming opponents is that Class III gaming by state tribes would violate equal protection. Opponents argue that giving state tribes gaming rights through express compact between the state and the tribe—rights not enjoyed by other state citizens or corporations—would be an unlawful racial preference that violates the Fourteenth Amendment’s guarantee that all be treated equally, and that no one be denied “equal protection of the laws.”²⁰⁸

Analysis of federal precedents provides a strong counterargument. Today, *most* legislation benefiting federal tribes does not violate equal protection. For example, IGRA and other federal statutes have repeatedly withstood equal protection challenges even though they benefit Native American tribes to the exclusion of other groups, because such discrimination is based upon a political classification, the tribes’ governmental status—not race.²⁰⁹ As shown below, the same argument protects state laws that allow gaming by State Indian tribes based upon their governmental status.

1. The Mancari Doctrine and Artichoke Joe’s

*Morton v. Mancari*²¹⁰ is the seminal authority that explains when laws favoring American Indians do not violate equal protection.²¹¹ In *Mancari*, the Supreme Court held that a BIA hiring preference for Indians did not violate equal protection because “[t]he preference, as applied, [was] granted to Indians not as . . . discrete *racial* group[s], but, rather, as members of quasi-sovereign *tribal entities*.”²¹² The Court reasoned that “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally-recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”²¹³ With this statement, a “political versus racial”

208. U.S. CONST. amend. XIV, § 1. Unverified Confidential Meeting with Bill Lockyer, Cal. Attorney Gen., in Sacramento, Cal. (April 2004) (argument made by attorneys from the California Department of Justice).

209. See *infra* Part II.D.1.

210. 417 U.S. 535 (1974).

211. See, e.g., *Artichoke Joe’s Cal. Grand Casino v. Norton (Artichoke Joe’s II)*, 353 F.3d 712, 732 (9th Cir. 2003) (recognizing *Mancari* as the starting point for equal protection analysis).

212. *Mancari*, 417 U.S. at 554 (emphasis added).

213. *Id.* at 553 n.24.

distinction became the litmus test for whether rational basis should be applied to tribal-friendly legislation, or whether such legislation should be reviewed with strict scrutiny.²¹⁴ If a rational basis test is applied, federal legislation helping federal tribes is usually found to complement governmental objectives, and easily found constitutional; conversely, if strict scrutiny is applied, such legislation is usually found unconstitutional.²¹⁵ Thus, parties involved in applicable cases tend to battle over whether application of strict scrutiny or a rational basis test is most appropriate.

The tribal gaming jurisprudence that built on *Mancari* has followed the *Mancari* Court's approach. *Mancari* was applied by the Ninth Circuit in 2003 in perhaps the most important equal protection case addressing Indian gaming: *Artichoke Joe's California Grand Casino v. Norton* ("*Artichoke Joe's II*").²¹⁶ In *Artichoke Joe's II*, plaintiff card rooms and charities challenged the validity of the tribal gaming compacts between California and a large number of federally-recognized Indian tribes.²¹⁷ Plaintiffs argued that allowing only tribes to operate Las Vegas style casinos to the exclusion of non-tribal casino operators violated the latter's equal protection rights under the Fifth and Fourteenth Amendments by creating an impermissible race-based preference in favor of the tribes.²¹⁸ The court applied *Mancari* to determine whether the tribal compacts represented a race-based preference, or one that was political.²¹⁹ Based on *Mancari*, the court found allowing tribal governments to have a monopoly on Class III gaming was predicated on a political, not racial, designation and, therefore, did not violate equal protection.²²⁰

Ultimately, as declared in *Artichoke Joe's II*, a tribal gaming equal protection analysis

requires . . . answer[ing] two questions. First, [it must be decided] whether the distinction between Indian and non-Indian gaming interests is a political or a racial classification, so we can determine the proper level of deference that is owed to the classification. Second, [it must be decided] whether, under the applicable standard of review, legitimate state interests justify the grant to Indian tribes of a monopoly

214. *Id.* at 553–55.

215. *Artichoke Joe's Cal. Grand Casino v. Norton* (*Artichoke Joe's II*), 353 F.3d 712, 731–32 (9th Cir. 2003) (noting rational basis review as “deferential,” and referring back to *Mancari* as the starting point for analyzing when tribal preferences should be subject to rational basis versus strict scrutiny).

216. *Id.* at 712, 732.

217. *Id.* at 714.

218. *Id.* at 731.

219. *Id.* at 732.

220. *Id.* at 742.

on class III gaming.²²¹

As explained below, gaming by state-recognized tribes arguably satisfies both tests.

2. Application of *Mancari* and *Artichoke Joe's II* to Gaming by State-Recognized Tribes

a. The Distinction Between Gaming by State-Recognized Tribes and Non-Indian Gaming Interests Represents a Political Classification

State laws favoring gaming by state tribes should be subject to rational basis review and not strict scrutiny, similar to laws favoring federally-recognized tribes. State tribes, like their federal counterparts, are political entities and not racial groups. Similar to federal recognition, state recognition “operates to exclude many individuals who are racially to be classified as ‘Indians’”—the *Mancari* test for when a preference “is political rather than racial in nature.”²²² Like federally-recognized tribes, state tribes must earn formal recognition by an independent government entity: in this case, the state. Consequently, not all self-defined, non-federally-recognized tribes would qualify. In fact, most would not. Like federally-recognized tribes, state-recognized tribes are subject to whatever screening criteria states deem critical for recognizing a tribe. The only difference is that a state government has recognized the tribe in lieu of the federal government.

Opponents nonetheless will argue that the rational basis standard advocated in *Mancari* was dependent not so much on the “political versus racial” distinction, but on the fact of *federal recognition*. There is support for that argument in *Mancari*: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.”²²³

However, it is not clear that Congress’s recognition was the primary determining line for the *Mancari* Court, which also stressed the importance of distinguishing political entities from individual Native Americans.²²⁴ While the Court found that federally-recognized tribes qualify as political

221. *Id.* at 731.

222. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

223. *Id.* at 555.

224. *Id.* at 553 n.24.

entities for purposes of applying the less rigorous rational basis scrutiny on the basis of Congress's recognition of their government status,²²⁵ that does not necessarily mean that the "political versus racial" distinction cannot be applied to other Indian groups to see if they might also qualify as political entities. This approach makes sense in particular because equal protection jurisprudence generally operates to avoid impermissible "race-based" classifications, and usually has little to do with "Congress' unique obligation[s]."²²⁶

Opponents may also argue that because *Mancari* dealt only with a subset of the tribal population—federally-recognized tribes²²⁷—its precedential value should be limited to that population. Nevertheless, *Mancari* does not have to be interpreted so narrowly. As noted in *Arakaki v. Lingle*,²²⁸ the *Mancari* Court "did not have before it any question as to whether the [N]ative Americans being given the preference were from federally recognized Indian tribes."²²⁹ Consequently, there was no reason to explicitly include state-recognized tribes—especially when state-recognized tribes are a minor, and often overlooked, subset of the Native American tribal population.

Ultimately, *Mancari* states principles that reach beyond federally-recognized tribes to address the nature of tribal sovereignty itself. For example, the *Mancari* Court noted that a preference "reasonably . . . related to a legitimate, nonracially based goal . . . is the *principal characteristic* that generally is absent from proscribed forms of racial discrimination."²³⁰ This suggests the Court's concern was truly with racial discrimination, and not with legislative attempts to limit participation in a particular industry to federal tribes. Thus, it is difficult to imply that the Court would use the strict scrutiny test only when faced with federally-recognized tribes, but not state-recognized tribes. Both are tribal sovereigns subjugated by the United States. Whether the United States grants recognition or one of its federalist states grants recognition, a longstanding tribe is nonetheless a "quasi-sovereign entity" and not just a racial group.

In applying the "political versus racial" analysis to the state-recognized Gabrielino-Tongva or Shinnecock tribes, there is a strong argument that formal state recognition of the tribes is recognition of a sovereign political

225. *Id.* at 554.

226. *Id.* at 555.

227. *Id.* at 553 n.24.

228. 305 F. Supp. 2d 1161 (D. Haw. 2004), *rev'd on other grounds*, 423 F.3d 954 (9th Cir. 1995).

229. *Id.* at 1168.

230. *Mancari*, 417 U.S. at 554 (emphasis added).

community, not a specific racial group. Using the Gabrielino-Tongva as an example, the relevant *racial* classification would consist of a much larger group of individuals, such as “Mission Indians,” “Shoshone Indians,” or “Native Americans.” These are classifications that cross tribal government boundaries. In California, several different tribes include members who can be classified as Mission Indians, as Shoshone Indians, or as Native American. Just as Asian-Americans of Japanese heritage (the racial and ethnic classifications) can also be citizens of a particular state (the political or government classification), Native Americans (the racial classification) may be citizens of a particular tribe (the government classification). Similarly, the Gabrielino-Tongva Tribe excludes many Mission and Shoshone Indians and certainly most Native Americans. The character of the Gabrielino-Tongva Tribe is political as much because of its organizational attributes as a state-recognized sovereign, as its exclusion of other members of the same racial group. All three of these factors work in the same direction: the Tribe’s external recognition by California, the Tribe’s internal organization as a tribal sovereign government, and the Tribe’s exclusivity independent of other members of the same racial group, all strongly suggest the Gabrielino-Tongva Tribe is not a racially determined entity, but one that is politically defined.

While opponents argue that state recognition cannot stand in as a relevant political classification because it is not as “formal” as federal recognition (in part because criteria for state recognition vary dramatically from state to state), even the *federal government* has recognized that states have the authority to officially recognize tribes. By extending some federal benefits to state-recognized tribes on the basis of their classification as state-recognized, the federal government has arguably legitimized state recognition, and thereby validated state recognition as a classification. Examples of federal regulations that extend federal benefits to state tribes include Health and Human Services Block Grants,²³¹ Administration of Food Stamp Programs on Indian Reservations,²³² Energy Conservation Grant Programs,²³³ and Native American Welfare Programs.²³⁴ These

231. 45 C.F.R. § 96.44(a)–(b) (2004) (providing direct funding to Indian tribes, and defining such tribes as including “organized groups of Indians that the state in which they reside has determined are Indian tribes.” *Id.* § 96.44(b)).

232. 7 C.F.R. § 281.2(a)(1) (recognizing as an “established reservation” those areas “currently recognized and established by Federal or State treaty”).

233. 10 C.F.R. § 455.2 (defining an eligible Indian tribe as “any tribe . . . which . . . is located on, or in proximity to, a Federal or State reservation or rancheria”).

234. 45 C.F.R. § 1336.10 (defining “Indian” as “a member or descendent of a member of a North American tribe . . . who . . . [has] a special relationship with the United States or a State through treaty, agreement or some other form of recognition” (emphasis omitted)).

regulations presumably withstand equal protection scrutiny despite their inclusion of state-recognized tribes, further suggesting federal recognition is not necessary for tribal legislation to survive an equal protection analysis. Additionally, while recognition by state governments may deliver less in the way of concrete rights and obligations than federal recognition, state recognition can be every bit as solemn. The thirteen states that have recognized non-federal Indian tribes have used a variety of methods to do so. These range from the passage of joint resolutions (as in California and Louisiana) to comprehensive statutory frameworks that grant significant substantive rights (as in North Carolina).²³⁵

Finally, state tribal gaming opponents may try to argue that rational basis review can only be applied to *federal* laws that favor Indians, not to state laws that would be necessary to grant a preference to state-recognized tribes to conduct gaming on a State Indian reservation.²³⁶

In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*,²³⁷ the Supreme Court provided the first step toward disarming that argument, although the majority opinion limited the scope of its decision. In *Yakima*, rational basis review was applied to a Washington *State* law favoring federal Indian tribes; however, the court based its application of rational basis review on the fact that a federal law (Public Law 280) had authorized extending that state law into Indian country.²³⁸

Even without the involvement of any federal authority, the political classification argument should survive when applied to state law. As established above, gaming is a vice activity subject to the state's police power to regulate gaming within its sovereign borders.²³⁹ As noted in *Artichoke Joe's II*, under the state's police power, states have great leeway to

235. See, e.g., N.C. GEN. STAT. §§ 71A-3 to 71A-7.2 (recognizing North Carolina's eight state tribes); S.J. Res. 96, 1993-94 Reg. Sess. ch. 146 (Cal. 1994) (recognizing the Gabrielino Tribe of Los Angeles); S.J. Res. 48, 1993-94 Reg. Sess. ch. 121 (Cal. 1993) (recognizing the Juaneno Band of Mission Indians in Orange County); see also generally Koenig & Stein, *supra* note 144.

236. Most of the arguments in this Article assume such gaming is desired by both the tribe and state. IGRA only requires states to negotiate gaming compacts with federally-recognized tribes; neither it nor any other statute compels the state to negotiate such agreements with state-recognized tribes or vice versa. We argue only that compacting over tribal gaming should be an option available to state-recognized tribes and each state, not that it is something that can, or should be, foisted on either sovereign.

237. 439 U.S. 463 (1979).

238. *Id.* at 500-01.

239. See *Artichoke Joe's Cal. Grand Casino v. Norton (Artichoke Joe's II)*, 353 F.3d 712, 737 (9th Cir. 2003) ("The circuits that have given significant attention to equal protection challenges to state gambling laws have, by and large, held that 'the regulation of gambling lies at the heart of the state's police power.'" (partially quoting *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003))).

grant monopolies without violating equal protection considerations: “Where there exists an appropriate connection to the state’s police power, even the grant of a monopoly does not, in itself, offend equal protection principles.”²⁴⁰ So long as state law grants this monopoly to a politically classified group, such as a state tribe, and not a racially classified group, such as all Native Americans, the Fourteenth Amendment rational basis review standard should apply.

Holding otherwise, and denying rational basis review simply because there is no federal authority involved, takes an unnecessarily narrow view of equal protection jurisprudence. Several preeminent scholars in the field of Indian law have similarly suggested that a federal connection is not necessary to justify the application of rational basis review. As argued by Felix S. Cohen,

[T]he Supreme Court held long ago that the federal relationship with tribes does not preclude protective state laws which do not infringe on federally protected rights If Indians are a legitimate classification for protective federal laws, their status is arguably the same for state laws of that character. Such state laws have long been assumed valid.²⁴¹

Ultimately, the only restriction on states appears to be that their preferred classification (such as allowing Class III gaming by state-recognized tribes, and not the general population) be reasonable:

When the subject of legislation falls under the police powers of the State, activities may be prohibited altogether, limited as to place and location, or, where operation is permitted, may be regulated by rules of conduct. These laws enacted under the police powers must be subject to the restriction that the prohibition, limitation or regulation, must apply to all alike who come within a reasonable classification of persons or property. The fact that because of classification the statute does not apply to every person alike is no valid objection to its constitutionality, for classification itself presupposes inequality of application and the courts may only inquire if the classification is reasonable and founded upon some logical, natural, intrinsic or constitutional distinction between people composing a class and others not embraced within it.²⁴²

240. *Id.* at 736–37.

241. FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 659 (Remmard Strickland et al. eds., Michie Bobbs-Merrill 1982) (1942). Carole Goldberg of UCLA has also argued that state legislation can escape strict scrutiny so long as that legislation carries forward established federal policies—in this case, such policies would be tribal economic development and self-sufficiency. While “[h]elping isolated individuals, without any perceptible group impact, will not suffice” she posits that equality based challenges to state legislation can be surmounted so long as the state law “advance[s] group interests in self-determination, encompassing the tribe’s economic, cultural and political advancement.” Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 989 (2002).

242. *People v. Sullivan*, 141 P.2d 230, 232 (1943) (citations omitted) (citing, among others, *Plumley v. Massachussetts*, 155 U.S. 461 (1894); *Barbier v. Connolly*, 113 U.S. 27 (1884);

b. Legitimate State Interests Justify Granting Federal and State-Recognized Tribes a Monopoly on Class III Gaming

Gaming by state-recognized tribes, on state-dominion land, under state law, also passes the second half of the Fourteenth Amendment analysis: whether legitimate state interests justify granting both state and federal tribes a monopoly on Class III gaming. In *Artichoke Joe's II*, after determining that rational basis review applied to the tribal-state compacts, the court concluded the tribal gaming compacts survived equal protection analysis because legitimate state interests were rationally related to granting a Class III gaming monopoly to California's federally-recognized tribes.²⁴³ The court found that the state had two legitimate interests in granting the monopoly: (1) an interest in regulating gaming as a vice activity and (2) promoting "cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency."²⁴⁴

Extending the Class III gaming monopoly to state tribes concords with both interests. As for the first, state tribal gaming could be permitted only under a tribal-state compact, similar or identical to gaming compacts with federal tribes. Accordingly, the state would be able to control the conditions under which such Class III gaming would be conducted and thus would have a hand in regulating state tribal gaming as a vice activity. As in *Artichoke Joe's II*, limiting Class III gaming to a larger category that includes both federal and state tribes would continue to be rationally related to the stated regulatory interest in "foster[ing] California's 'legitimate [state] sovereign interest in regulating the growth of Class III gaming activities in California'" and "limiting Class III gaming operations . . . to defend against . . . criminal infiltration"²⁴⁵

As for the second interest—promoting cooperation with tribal sovereigns and fostering tribal self-sufficiency—extending the gaming monopoly to state tribes similarly helps California enter "a 'new era of tribal-state cooperation in areas of mutual concern.'"²⁴⁶ State tribes, like federal tribes, faced some of the most brutal episodes of genocide, racism, and government-sponsored abuse in our Nation's history—episodes that obliterated many tribes and stripped the government classification from

Patterson v. Kentucky, 97 U.S. 501 (1878)).

243. *Artichoke Joe's II*, 353 F.3d at 736–42. The court did not consider whether this monopoly extended to state-recognized tribes. *See generally id.* The Gabrielino-Tongva tribe argues that it does. *See generally id.*

244. *Id.* at 737.

245. *Id.* at 740.

246. *Id.* at 741.

many others.²⁴⁷ Recognizing the legitimacy of state tribes would help repair the same damage that was done to federal tribes, by reaching those state-recognized tribal sovereigns that, by a fluke of history, never gained federal acknowledgment. As with federally-recognized tribes, allowing state sovereigns to conduct Class III gaming operations would strengthen a “mutually respectful government-to-government relationship that will serve the mutual interests of [the tribes and the state],”²⁴⁸ by helping them build their economic and political foundations.

Artichoke Joe’s II even suggests—albeit indirectly—that gaming by state-recognized tribes on a State Indian reservation under state law could offer an even *stronger* case for allowing a Class III gaming monopoly, than in situations involving federally-recognized tribes. In dicta, the *Artichoke Joe’s II* opinion used the analogy of state subdivisions to marshal its equal protection arguments:

Were the tribal lands a political subdivision of the State, California’s exemption of tribal lands from its state-wide prohibition on class III gaming activities easily would withstand constitutional scrutiny. When enacting substantive regulations or prohibitions of vice activities, the interests implicated lie “at the heart of the state’s police power.” . . . With regard to these activities, a state is free to enact legislation that accords different treatment to different localities, and even to different establishments within the same locality, so long as that differentiation is tied to a legitimate interest in the health, safety, or welfare of its citizens. The state may make such distinctions by local-option laws, or by making the distinction between different areas itself. It may impose more stringent regulations by way of local restrictions, or it may exempt an area entirely Unless such legislative distinctions infringe fundamental rights or involve suspect classifications, they generally survive equal protection analysis.²⁴⁹

In the case of state tribes, a state-created Indian reservation would arguably be a political subdivision of the state and fall squarely within the argument. Consequently, the state would have enormous power to permit Class III gaming on a State Indian reservation to the exclusion of other locales.

Finally, extending the monopoly on Class III gaming from federal tribes to federal *and* state tribes coincides with the general gaming policies of several states that allow exceptions to their anti-casino policies when

247. See, e.g., FIVE VIEWS, *supra* note 17 (discussing the abuses suffered by California’s Indian tribes, several of which are still not federally recognized).

248. *Artichoke Joe’s II*, 353 F.3d at 741 (citing Tribal-State Compact § 1.0(a)).

249. *Id.* at 740 (citations omitted); see also *People v. Sullivan*, 141 P.2d 230, 232 (Cal. Ct. App. 1943) (noting that the states have significant leeway to favor certain groups when legislating with respect to a state police power, such as gaming; the primary limit is that the favored group’s classification be “reasonable”).

proceeds benefit government or non-profit purposes, fulfilling a legitimate state interest in providing funding for such entities.²⁵⁰ For example, California's constitution has long provided exceptions to its anti-gaming provisions by permitting a state lottery to generate income for the state government.²⁵¹ Permitting Class III gaming by California's state-recognized tribes would go a long way toward providing for tribal government coffers, just as the California lottery does for the state.

CONCLUSION FOUR: Gaming by state-recognized tribes does not violate equal protection laws that forbid state governments from discriminating in favor of one racial group, because state tribes are political groups, and not racially-defined entities.

E. Significant Policy Arguments Support Gaming by State-Recognized Tribes

Finally, just as with federal tribal government gaming, numerous policy arguments support recognizing Class III gaming rights for state-recognized tribes. These arguments include generating jobs and revenue for tribal governments and thereby fostering self-sufficiency, raising revenue for and increasing economic activity in surrounding communities, supporting the most documented of the nation's non-federally-recognized tribes while they wait out the often protracted federal recognition process, and upholding the sovereign rights of both states and the tribes they recognize.

1. Proceeds from Tribal Gaming Benefit States and Tribes by Generating Jobs and Revenue

As with federal tribal gaming, state tribal gaming has the potential to provide tremendous social and economic benefits for tribal governments, local communities, and states. Gaming by federally-recognized tribes "has generated thousands of jobs; created a market for local suppliers; raised revenue to benefit local charities; helped remove members of both gaming and non-gaming tribes from welfare rolls; generated millions of dollars in state and federal taxes; provided schools for tribal youth; and reinvested in local communities."²⁵² According to the 2004 Report on Indian Gaming written by Alan Meister ("MEISTER REPORT"), the impact of tribal gaming on the national economy has been significant, contributing 460,000 jobs, \$16.3 billion in wages, \$42.7 billion in output, and \$5.3 billion in tax

250. See CAL. CONST. art. IV, § 19, cl. c (permitting bingo for charitable purposes); CAL. CONST. art. IV, § 19, cl. d (authorizing establishment of a California State Lottery).

251. See CONST. art. IV, § 19, cl. d.

252. Koenig, *Gambling*, *supra* note 7, at 1065.

revenue.²⁵³ Through revenue sharing programs, approximately \$759 million has been forwarded to the states.²⁵⁴ The even more recent Analysis of the Economic Impact of Indian Gaming in 2004, published in 2005 by the National Indian Gaming Association, suggests that those benefits are growing: total revenues generated by Indian gaming have jumped to a staggering \$18.5 billion.²⁵⁵ More than half a million jobs have been created by tribal gaming and ancillary businesses, reducing federal government unemployment benefits and welfare payments by \$1.4 billion.²⁵⁶ More than \$100 million has been generated for local businesses, as well as \$1.8 billion in state government revenue, and \$5.5 billion in federal taxes.²⁵⁷

Gaming by state-recognized tribes would only add to these figures. A recent economic report estimates that 47,200 jobs would be created by the Gabrielino-Tongva Tribe's Tongva Casino & Resort, and over \$4.2 billion in new economic activity would be generated in Los Angeles County, including \$3 billion from increased tourism.²⁵⁸ This new economic activity, and the Tribe's offer to share 20% of their net gaming revenue, is estimated to generate as much as \$648 million annually for federal, state, county, and local government in the first year alone.²⁵⁹ These financial contributions and the Tribe's legal, historical, and equitable arguments have generated support from a diverse coalition of business, labor, and minority groups interested in improving the Los Angeles County economy, and especially its tourist industry.²⁶⁰

253. Abrahms, *supra* note 3, at A1 (quoting THE ANALYSIS GROUP, THE POTENTIAL ECONOMIC AND FISCAL IMPACT OF THE PROPOSED GABRIELINO CASINO RESORT ON LOS ANGELES (2005), available at http://www.tongvatribes.org/EmpiricalStudies/LA_County_full_study_final_7_6_05.pdf (last visited Nov. 10, 2005)).

254. *See* Abrahms, *supra* note 3, at A1.

255. NATIONAL INDIAN GAMING ASSOCIATION, *supra* note 3, at 2.

256. *Id.*

257. *See id.*

258. THE ANALYSIS GROUP, THE POTENTIAL ECONOMIC AND FISCAL IMPACT OF THE PROPOSED GABRIELINO CASINO RESORT ON LOS ANGELES 5 (2005), available at http://www.tongvatribes.org/EmpiricalStudies/LA_County_full_study_final_7_6_05.pdf (last visited Nov. 10, 2005).

259. *See id.*

260. The significant economic and social benefits that can be generated from urban gaming are evident in Michigan, where Proposition E (a 1996 referendum that authorized the creation of three Class III casinos in Detroit, an historically black city with a high poverty rate) helped revitalize the local economy. For information on the history of Proposition E, see, for example, Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 276 F.3d 876, 878 (6th Cir. 2002). *See also* Michigan Gaming Control and Revenue Act, MICH. COMP. LAWS § 432.201–.226 (1997) (interpreting and expanding upon Proposition E).

2. State Recognition Is a Viable Alternative to the Unwieldy Federal Recognition Process

The creation of state tribal casinos would also enable state-recognized tribes—those which arguably have the strongest cases for federal recognition—to strengthen their economies and provide valuable services for their tribal members while they await federal recognition. Securing federal recognition is not a simple alternative for tribes. While there are three possible paths to obtaining such recognition, they are time consuming, difficult, and often enormously expensive to navigate—if they work at all. For many tribes, any chance of federal recognition is decades away—decades during which tribal casinos could do significant good for the tribal government and surrounding communities,²⁶¹ and decades during which their inherent rights as sovereign tribes have been put on pause.

The first option for tribes attempting to become federally-recognized is to try to gain recognition through the federal legislative process. This is so difficult to achieve, however, that Congress has granted recognition to only two California Indian tribes in the last ten years.²⁶²

The second route is for tribes to secure recognition through the executive process, as represented by the BIA and its formal acknowledgement process set forth in 25 C.F.R. § 83.²⁶³ Despite being the most common method of attempting to gain recognition, this route may be the most time consuming. The BIA's process involves a number of steps: each tribe must first file a letter of intent requesting federal recognition and

261. See Koenig, *Gambling*, *supra* note 7, at 1065 (“Tribal gaming has generated thousands of jobs; created a market for local suppliers; raised revenue to benefit local charities; helped remove members of both gaming and non-gaming tribes from welfare rolls; generated millions of dollars in state and federal taxes; provided schools for tribal youth; and reinvested in local communities” (internal citations omitted)); Cal. Nations Indian Gaming Ass’n, *Answers to Common Questions About Tribal Gaming*, <http://www.cniga.com/facts/qanda.php> (last visited Nov. 21, 2005); Cal. Nations Indian Gaming Ass’n, *Research Articles: Economic and Fiscal Benefits of Tribal Gaming* (July 1, 1998), http://www.cniga.com/facts/research_detail.php?id=8 (last visited Nov. 21, 2005). For an overview of the harms implicit in all forms of gaming, tribal and otherwise, see Ben Schnayerson, *As Gaming Industry Grows, Experts See Rise in Gambling Addicts*, THE SUN (San Bernadino County), Dec. 31, 2003, at A1 (noting that tribal casinos have established more opportunities for gambling addicts to gamble). While tribal gaming opponents also assert that tribal casinos bring an influx of crime to surrounding communities, that argument has been largely discredited.

262. See, e.g., 25 U.S.C. § 1300m-1 (2000) (granting federal recognition to the Paskenta Band of Nomlaki Indians in 1994); see also 25 U.S.C. § 1300n-2 (granting federal recognition to the Federated Indians of Graton Rancheria in 2000). Two other tribes, the Ione Band of Miwok Indians and the Lower Lake Tribe, had their recognition clarified administratively. Confidential Unverified E-mail from Cindy Darcy, Senate Subcomm. on Indian Affairs, to Alexa Koenig, Assistant Professor, Univ. of S.F. Sch. of Law (Aug. 1, 2005) (on file with author).

263. 25 C.F.R. § 83 (2004).

noting the tribe's intent to submit a documented petition.²⁶⁴ Second, the tribe must submit the documented petition,²⁶⁵ and third, the tribe must present evidence that demonstrates it can meet the mandatory criteria laid out in 25 C.F.R. § 83.7.²⁶⁶

The Gabrielino-Tongva Tribe has filed several letters of intent, reserving Petition Nos. 140, 140a, 176, and 201, to begin the recognition process.²⁶⁷ Because the BIA operates very slowly,²⁶⁸ the BIA is not expected to consider No. 140—the Tribe's first shot at recognition—for more than a decade.²⁶⁹ The Shinnecock Tribe first filed for recognition in the 1970s; their petition has similarly languished without resolution for years.²⁷⁰ The process has proven so unwieldy, that even the man who created it in 1978 calls it a "monster," admitting that "the standards got to be impossible."²⁷¹

The third option is to try to secure recognition judicially. This route is neither easy nor routine. One type of judicial recognition is "federal common law" recognition. Courts have declared many state-recognized tribes, including the Gabrielino-Tongva,²⁷² federal common law tribes. These are defined as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."²⁷³ Federal common law recognition means that the tribe is recognized as a sovereign tribal entity for limited purposes,²⁷⁴ such as whether a particular court has

264. See 25 C.F.R. § 83.4(a).

265. See 25 C.F.R. § 83.5(e).

266. 25 C.F.R. § 83.7.

267. See 500 Nations, *supra* note 51 (providing a list of federal recognition petitions for all tribes currently involved in the federal recognition process, including the Gabrielino-Tongva).

268. See, e.g., *Bureau of Indian Affairs Tribal Recognition Process: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 107th Cong. (2002) (statement of Barry T. Hill, Director, Natural Resources and Environment), available at 2002 WL 193645 (F.D.C.H.) (noting it could take more than fifteen years to resolve all currently completed petitions).

269. See Indianz.com, Big Workload Looms for BIA on Federal Recognition, <http://www.Indianz.com/News/2005/009485.asp> (last visited Jan. 4, 2006) (noting that several of the tribes listed on the federal government's "ready for consideration" list have been waiting nearly a decade for a determination of their status).

270. See Shinnecock Indian Nation History, *supra* note 54.

271. Magagnini, *supra* note 9, at A1.

272. *Dunlap v. Morales*, No. BC-280605 (Cal. Super. Ct. L.A. County Sept. 22, 2003) (ruling by the Los Angeles Superior Court finding the Gabrielino-Tongva Tribe a federal common law tribe).

273. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

274. See, e.g., *Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814 (Mont. 2003). In *Koke*, Montana's Supreme Court applied the test for federal common law

jurisdiction over the tribe. Nevertheless, federal common law tribes have not traditionally received the full range of benefits that accrue with formal recognition by the BIA, including the right to conduct Class III gaming under federal law.²⁷⁵ While federal common law tribal status provides yet another indication of the strong evidence supporting a tribe's fight for federal recognition and another sign of a tribe's government structure, such recognition falls far short of the measures needed to foster self-sufficiency.

An innovative case recently offered the possibility of expanding the role of judicial recognition. As noted above, in *New York v. Shinnecock Indian Nation*,²⁷⁶ Judge Platt stayed a case that had been brought to enjoin the state-recognized Shinnecock Tribe from building a tribal casino, pending the BIA's determination of the Tribe's federal status. After the BIA admitted that it could not meet the court's eighteen-month deadline, and in recognition of the more than twenty-five years the Tribe has already waited for federal recognition, the court joined the United States as an "involuntary plaintiff" and declared it might determine itself whether the Tribe had to be "acknowledged" as meeting the requirements for formal federal recognition.²⁷⁷ In May 2005, however, the government's motion to be dismissed as a party was granted by the court.²⁷⁸ Consequently, this path to federal recognition remains untested; even if Judge Platt had taken it upon himself to recognize the Tribe through the judiciary, such an act would have been challenged; those unhappy with the decision would have argued that the court exceeded its powers and usurped the right of the

recognition to determine whether a non-federally-recognized tribe was sovereign: if yes, then Montana's state courts would have no authority to adjudicate the case's underlying issues. *Id.* at 816-18. The *Köke* court distinguished between the two types of recognition: "Although [the tribe] has not yet received federal recognition, tribes may still be recognized as such under common law." *Id.* at 816. There, the tribe was ultimately recognized as a federal common law sovereign, even though it was not recognized by the Secretary of the Interior as a tribe for the purpose of receiving federal recognition benefits. *See id.* at 817.

275. *See Montoya*, 180 U.S. at 266; *see also* 25 C.F.R. § 83.12 (2004) (explaining the rights and responsibilities that attend formal recognition).

276. 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

277. *See* Ann Givens, *Shinnecock Case Could Set National Precedent*, NEWSDAY, Jan. 26, 2004, at A08, available at <http://www.shinnecocknation.com/news/news74.aspx> (last visited Mar. 22, 2004) (discussing the potential role of the judiciary in the federal recognition process of the Shinnecock Tribe); *see also* Michael Colello, *Shinnecock Casino Trial Begins in Spring*, INDEPENDENT (East Hampton), Jan. 27, 2004, <http://www.shinnecocknation.com/news/news75.asp> (last visited Mar. 22, 2004) (noting a trial to decide whether the tribe should be granted federal recognition status was likely to start in April 2004). As of June 2005, a determination of the Tribe's federal status was still unresolved. *See generally* Shinnecock Indian Nation, Home Page, <http://www.shinnecocknation.com> (last visited June 13, 2005).

278. *See* Case Docket, *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003) (No. 2:03-cv-03243).

executive branch to acknowledge Indian tribes. The separation of powers argument and the normal appellate process would have prevented resolution for quite some time.²⁷⁹

3. Gaming by State-Recognized Tribes Respects State and Tribal Sovereignty

Finally, permitting states and state-recognized tribes to enter into gaming agreements would honor both state and tribal sovereignty, concordant with modern notions of federalism as well as the time-honored federal policy favoring tribal independence. Congress's express purpose for regulating the tribal gaming industry has been to promote "tribal economic development, self-sufficiency, and strong tribal governments."²⁸⁰ As asserted in IGRA's legislative history, "for those tribes that have entered into the business of [gaming], the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding."²⁸¹ The recognition of gaming rights in federally-recognized tribes has meant increased autonomy for hundreds of tribal governments. It is time for a greater recognition of state authority to recognize tribes, and to allow that authority to address local conditions. Self-sufficiency should be within reach of not only federally-recognized tribes, but also those few that have earned the respect and recognition of the states.

CONCLUSION FIVE: Significant policy arguments, consistent with IGRA policies to support the economic well-being of federal tribes, also support gaming by state-recognized tribes under state law.

Conclusion

Ultimately, in our federalist system, state tribes and the states that

279. In November 2005, as this Article was going to print, Judge Platt took the groundbreaking and controversial step of declaring the Shinnecock Indian Nation a tribe for gaming purposes, calling on the Tribe's centuries of documented relationships with the State of New York and the federal government, and the Shinnecock's status as a tribe under the Montoya federal common law standard. *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005). While this ruling will certainly be contested, Judge Platt's decision adds ammunition to the argument that the BIA's federal recognition process is unwieldy, unworkable, and unfair, and suggests it may be the responsibility of the courts to step in and acknowledge state-recognized tribes as *bona fide* tribes for gaming purposes.

280. *Artichoke Joe's Cal. Grand Casino v. Norton (Artichoke Joe's II)*, 353 F.3d 712, 715 (9th Cir. 2003) (quoting 25 U.S.C. § 2702(1), (2) (2000)).

281. See S. REP. NO. 100-446, at 2-3 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3072 (additional views of Senator John McCain, as indicated in the background of S. REP. NO. 100-446).

recognize them should have the right to decide whether to allow gaming activities on state-dominion land, including State Indian reservations, under state law. This proposition is supported by firm legal precedents: as established above, states have the power to regulate most forms of gaming within their borders, including gaming by non-federally recognized tribes on state dominion lands. This authority has not been expressly preempted by the Federal government and remains a state right under the United States Constitution's Tenth Amendment. Additionally, such a practice would not violate equal protection mandates.

In addition to having a strong legal foundation, gaming by state-recognized tribes is also supported by powerful policy considerations—similar considerations to those that underlie gaming by federally-recognized tribes. Recognizing state and tribal authority to reach an agreement without the sanction of federal involvement would enable state governments and the tribes they recognize to generate revenue for economic stability and diversification. State power, as originally envisioned by the federalist system, would be revived. Additionally, recognizing the validity of state tribal gaming concords with Congress's goal of promoting stronger tribal governments and increased tribal self-sufficiency. By recognizing that states have the right to authorize state tribal gaming to *bona fide* tribes within their borders, important notions of federalism and sovereignty will be advanced, ensuring our nation's most disregarded tribal governments are no longer lost in the shuffle.