

THE OPERATION AND LICENSING OF COMMERCIAL AND TRIBAL CASINOS IN THE U.S.: A COMPARATIVE OVERVIEW OF LAW AND POLICY

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Abstract: The \$73 billion U.S. casino gaming industry is comprised of two major markets: the commercial sector and the tribal sector. Commercial casinos are subject to state law and regulation, and casinos owned and operated by American Indian tribal governments are subject to tribal, federal, and state law and regulation with distinct policy goals. For the 460 commercial casinos in 24 states, and the nearly 500 tribal gaming operations in 28 states, determining the exact requirements for a specific issue related to licensing or operations requires careful and thorough research. In this paper, we provide an overview of the law and policy that governs the operation and licensing of both commercial and tribal casinos, and note important distinctions between the two sectors of the U.S. casino industry.

Keywords: Casino regulation; gaming; gambling; casino licensing; commercial gaming; Indian gaming; tribal gaming.

I. Introduction

Once widely regarded as a vice, gambling in various forms has been



prohibited in nearly all 50 states throughout much of U.S. history. As prohibition has given way to legalization and accompanying regulation, legalized gambling has expanded rapidly and in myriad forms, including commercial casinos, state lotteries, bingo palaces, pari-mutuel betting, poker tournaments, online and mobile gaming sites, civic and charitable gaming, American Indian tribal government gaming (commonly referred to as “Indian gaming”), and, most recently, sports wagering. Casino gaming continues to spread in the U.S., with both commercial and tribal operators seeking new markets.¹

In 2017, some 460 commercial casinos – 347 land-based casinos, 63 riverboat casinos, and 50 racinos – were authorized in 24 states. Last year, the commercial casino industry earned \$40.28 billion in gross gaming revenue, the highest amount in history and a year-over-year increase of 3.4 percent.² At the same time, 242 tribes operated 494 tribal casinos in 28 states. In 2017, the Indian gaming industry also marked record revenue, earning \$32.4 billion, a 3.9 percent increase from 2016.³

Market expansion for casinos has depended almost exclusively on government support through repeal or modification of anti-gambling laws, the institution of regulatory schemes, and the ratification of public policy goals. The march toward legalization has been continuous and inexorable, facilitated also by the intersections of public approval and technological innovation. In 2017, a number of states adopted laws expanding legalized gaming, including authorization of sports books in anticipation of the U.S. Supreme Court’s decision striking down a federal law prohibiting sports betting.⁴ Generally, government

1 In the U.S., casino gaming consists of two major markets. The first major market, casinos operated by commercial operators, includes land-based casinos such as those in Las Vegas or Atlantic City, riverboat casinos such as those in Illinois and Mississippi, and “racinos,” or race tracks that offer both pari-mutuel betting on horse or dog racing along with casino games. The second major market, casinos operated by American Indian tribes, includes both Class II and Class III gaming facilities under the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21, discussed below.

2 AMERICAN GAMING ASSOCIATION, 2018 STATE OF THE STATES REPORT 6, 14, available at https://www.americangaming.org/sites/default/files/AGA%202018%20State%20of%20the%20States%20Report_FINAL.pdf. Illegal gaming by all estimates is an even larger market, propelled by online and offshore poker and illegal sports betting.

3 See National Indian Gaming Commission, Press Release, *2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion* (June 26, 2018), available at <https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion>.

4 See AMERICAN GAMING ASSOCIATION, *supra* note 2, at 7; *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. __ (2018) (holding that the ban on state authorization of sports betting in the federal Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 *et seq.*, is unconstitutional).

regulation of gambling is intended to ensure the integrity of the games offered and protect the public by minimizing negative externalities like crime or gambling disorders while promoting public and societal good through economic growth and development and allocation of tax revenue toward positive policy goals. The legalization of gambling in most jurisdictions creates different legal and regulatory regimes, which overlap in complex ways.

In the U.S., “[e]ach of the fifty states has taken a distinctive approach to gambling, ranging from the complete ban on legal gambling in Hawaii, Utah, and Tennessee [which has since authorized a state lottery] to New Jersey and Louisiana’s embrace of casinos, lotteries, pari-mutuel betting, and charitable bingo.”⁵ In other words, the operation and licensing of casinos in the U.S. follows multiple sets of laws and regulations that vary by state as well as by whether the casino is commercial or tribal. In this paper, we provide an overview of the law and policy governing casino gaming in the U.S., comparing the approaches to commercial casinos and tribal casinos.

II. U.S. Gambling Law and morality policymaking

As historian David Schwartz has observed, “the U.S. has long been a gambling nation.”⁶ By the late twentieth century, though, the U.S. had transformed from a country in which gambling was largely prohibited to one in which nearly every state had legalized some form of gambling. In 1996, Congress sought to take stock of legalized gambling’s impacts on “people and places” by charging a nine-member National Gambling Impact Study Commission (NGISC) “to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States” on communities, social institutions, and individuals, and assess the role of government.⁷ Although the mission and composition of the Commission were not without political controversy, the NGISC’s 1999 report on gambling’s social and economic impacts is the most comprehensive government-sponsored attempt to capture the empirical effects of gambling. In its report, the NGISC noted that at the time, “86 percent of Americans report having gambled at least once during their lives. Sixty-eight percent of Americans report having gambled at least once in the past year. In 1998, people gambling in this country lost \$50 billion in legal wagering, a figure that has increased every year for over two decades, and often at double-digit rates. And there is no end in sight: Every

5 JOHN LYMAN MASON & MICHAEL NELSON, *GOVERNING GAMBLING* 1 (2001).

6 DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* xviii (2006).

7 NATIONAL GAMBLING IMPACT STUDY COMMISSION, *FINAL REPORT* 12 (1999), available at <https://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.



prediction that the gambling market was becoming saturated has proven to be premature.”⁸ That last sentence continues to ring true in the twenty years since as legalized gambling—and, in particular, casinos—has continued to spread in the U.S., both responding and contributing to Americans’ proclivity toward gambling.

Laws authorizing the expansion of gambling in the U.S. reflect the tension between gambling’s popularity and lingering moral objections. As sociologist Jerome Skolnick has explained, the moral ambivalence toward gambling makes law and policy governing gambling dynamic, unpredictable, and less tethered to either consensus or evidence.⁹ Additionally, the development of gaming law in the U.S. regarded gambling “as something different, requiring special rules and treatment, and enhanced scrutiny by government and citizens alike. . . . Unlike other businesses in which the market is the principal determinant, the shape and operation of legalized gambling has been largely a product of government decisions.”¹⁰ The NGISC described the reach of government regulation over the U.S. gambling industry:

Governments determine which kinds of gambling will be permitted and which will not; the number, location, and size of establishments allowed; the conditions under which they operate; who may utilize them and under what conditions; who may work for them; even who may own them. All of this is in addition to the normal range of governmental activity in areas such as taxes, regulations, and so forth. And, because governments determine the level and type of competition to be permitted – granting, amending, and revoking monopolies, and restricting or enhancing competition almost at will – they also are a key determinant of the various industries’ potential profits and losses.¹¹

Further, because authority over gambling generally is a state rather than federal power in the U.S. constitutional system, approaches and changes to gambling law vary markedly by state jurisdiction. The practicalities of state lawmaking coupled with the characteristics of morality policymaking result in peculiar outcomes, such as the decision in some states to authorize casinos that float on boats, but not casinos that stand on land.¹²

8 *Id.* at 1-1.

9 Jerome H. Skolnick, “The Social Transformation of Vice,” 51 *Law & Contemporary Problems* 9-30 (1988); see also Jerome H. Skolnick, “Regulating Vice: America’s Struggle with Wicked Pleasure,” in *GAMBLING: WHO WINS? WHO LOSES?* (Gerda Reith, ed., 2003).

10 NATIONAL GAMBLING IMPACT STUDY COMMISSION, *supra* note 7, at 1-4.

11 *Id.*

12 See *id.* at 1-5. As the NGISC observed, “Far from a single actor with a clear-eyed vision and unified direction, [“government” in the U.S. system] is in fact a mix of authorities, with functions and decisionmaking divided into many levels – federal, state, local, and others, including tribal. Each of these plays an active role in determining the shape of legalized gambling. . . . And almost



III. Overview of commercial casino regulation

Regulation of commercial casinos in the U.S. falls under state law. Until relatively recently, only two states had legalized casinos – Nevada and New Jersey. While both states strived to maintain the integrity of the gaming facility along with fairness to the public, the approach in each state gave rise to separate regulatory models.

Nevada legalized “wide open gaming” in 1931, but the state legislature adopted the current regulatory model in the late 1950s in the wake of the Kefauver Commission’s investigation of organized crime and its ties to Las Vegas casinos. The scope of essentially unlimited high-stakes casino games required aggressive government regulation; the purpose of encouraging strong industry growth (and indirectly, of increasing the state’s “take” through taxation) further shaped Nevada’s regulation of commercial casinos.¹³ Nevada’s approach “seeks to maximize economic benefits of gaming, and allows the industry to meet market demands with little regulatory involvement, including determining the number, location, and size of gaming facilities. Although business decisions are vested with the industry, integrity and suitability issues are strictly regulated.”¹⁴

When New Jersey became the second state to legalize commercial casinos in 1976, the regulatory model adopted by the state legislature sought foremost to minimize gambling’s negative impacts, even at the expense of economic growth, by limiting the size and scope of gaming. The state’s comprehensive regulatory scheme “strictly governs virtually every aspect of the business.”¹⁵ For example, New Jersey law sets limits on a casino’s square footage, and further restricts the space that may be allocated to slot machines or high-stakes games. As one commentator noted, the New Jersey model produced a highly controlled casino

none of the actors coordinate their decisions with one another. . . . In fact, rivalry and competition for investment and revenues have been far more common factors in government decisionmaking regarding gambling than have any impulses toward joint planning. Those decisions generally have been reactive, driven more by pressures of the day than by an abstract debate about the public welfare.” *Id.*

13 Kathryn R.L. Rand & Steven Andrew Light, “Morality Policymaking and Indian Gaming: Negotiating a Different Terrain,” in *GAMBLING: MAPPING THE AMERICAN MORAL LANDSCAPE* (Alan Wolfe & Erik C. Owens, eds., 2009).

14 Cory Aronovitz, “The Regulation of Commercial Gaming,” 5 *Chapman L. Rev.* 181, 190-91 (2002); see also Anthony N. Cabot & Louis V. Csoka, “The Games People Play: Is It Time For a New Legal Approach to Prize Games?” 4 *Nev. L.J.* 197 (2004) (offering alternative regulatory models: the “Player Protection Model,” the “Government Neutral Model,” and the “Government Protection Model,” as well as hybrid versions).

15 Aronovitz, *supra* note 14, at 190-91.



industry, and paid for it through comparatively stunted economic impacts.¹⁶

As described by gaming attorney Cory Aronovitz,

In both models, the administrative investigation and enforcement functions are independent and separate from the administrative decisionmaking. In Nevada, the Gaming Control Board investigates and enforces the gaming law and submits its findings and recommendations to the Gaming Commission for its determination. In New Jersey, the Division of Gaming Enforcement investigates and enforces the gaming law, while the decision function is vested in the Casino Control Commission. Illinois is an example of a hybrid model, midway between the Nevada and New Jersey models. This hybrid regulatory scheme is typical of the “emerging jurisdictions,” including Iowa, Indiana, Missouri, and Louisiana. The hybrid model vests all regulatory functions in one agency and limits the number of casino licenses that may be issued. In addition, the same agency investigates, enforces, and decides all aspects of the gaming environment.¹⁷

Thus, the particulars of gaming regulation, including licensing and operational controls, vary under each model.¹⁸ Over time, though, and perhaps especially in light of the struggling Atlantic City economy, the Nevada model has emerged as the “gold standard” for regulation of casino gambling.¹⁹ The American Gaming Association’s *State of the States* reports detail state regulations, revenue, legal developments, and market predictions for the commercial casino industry.²⁰

IV. Overview of tribal casino regulation

“Indian gaming” is distinct from commercial gaming, as it is not conducted

16 Brigid Harrison, “Legislating Morality: The New Jersey Casino Control Act as ‘Moral’ Public Policy,” 2 *Gaming L. Rev.* 63 (1998).

17 Aronovitz, *supra* note 14, at 191-94.

18 *See id.* (providing a detailed summary of licensing and operational controls). As explained by Aronovitz, “Licensing is governmental control that determines who will profit from gaming activities, and who may associate with the gaming industry. The level of regulatory scrutiny varies, depending on a party’s level of involvement in the gaming industry. Typically, the level of regulatory scrutiny increases when there is an increased level of involvement. . . . Another of the main objectives of gaming regulation is to monitor the casino’s day-to-day operations. To effectively monitor casinos, gaming authorities require that each casino implement and strictly follow a comprehensive system of controls.” *Id.*

19 *See, e.g.,* Jennifer Roberts & Abigail Farris, “History of Gambling in Nevada,” available at https://www.unlv.edu/sites/default/files/page_files/3/History-of-Gambling-in-Nevada.pdf (describing Nevada as having the “gold standard” of regulated casino gaming). A useful handbook of Nevada gaming law and regulations is MICHAEL J. BONNER ET AL., *NEVADA GAMING LAW PRACTICE AND PROCEDURE MANUAL* (2016).

20 AMERICAN GAMING ASSOCIATION, *supra* note 2.



by a for-profit corporation or company under state licensure. Instead, Indian gaming is conducted by American Indian tribal governments under tribal licensure. In this way, Indian gaming is more akin to state-sponsored lotteries. This type of gaming sometimes is called “public” or “public sector” gaming, referring to state or other government-run gaming whose revenues flow into the treasury’s general fund or targeted funds and are earmarked for purposes related to the public welfare, such as public education.

While state law governs commercial casinos, tribal casinos are governed primarily by federal and tribal law under the federal Indian Gaming Regulatory Act of 1988 (IGRA).²¹ As defined by IGRA, “Indian gaming” is gaming conducted by an “Indian tribe” on “Indian lands” in states whose public policy allows for such gaming.²² Through IGRA, Congress intended to balance tribal sovereignty and reservation economic development with state interests in controlling the crime assumed to be associated with high-stakes casino gambling.²³ While the historical treatment of American Indian tribes and people has been overwhelmingly tragic, Indian gaming is an outgrowth of tribal sovereignty and the principle of self-determination in the face of the extreme poverty and joblessness many tribes face. Thus, the congressional purposes served by IGRA were to codify tribes’ right to conduct gaming on Indian lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, while providing sufficient regulation to ensure legality and to protect the financial interests of the tribes.²⁴ IGRA’s statements of public policy and statutory purpose, along with its comprehensive (and, to date, unrevised) regulatory framework, distinguish it from the often unsystematic approach reflected in many states’ gaming laws.

The hallmark of IGRA’s regulatory scheme is its categorization of three classes of gaming. Class II gaming includes bingo and its variants, as well as non-house-banked card games, such as poker, and specifically excludes house-banked card games, slot machines, and other electronic facsimiles of games of chance. Class II gaming falls under tribal and federal regulatory jurisdiction, with federal authority vested in the National Indian Gaming Commission (NIGC) and the U.S. Department of the Interior Secretary. The tribe must adopt a tribal ordinance governing its Class II gaming.²⁵ Class II gaming is legal only in states

21 25 U.S.C. §§ 2701-21. For an in-depth account of relevant law and policy governing tribal gaming, see KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW & POLICY* (2d ed. 2014).

22 25 U.S.C. §§ 2703(5), 2703(4).

23 See RAND & LIGHT, *INDIAN GAMING LAW & POLICY*, *supra* note 21.

24 25 U.S.C. § 2702.

25 A tribe’s gaming ordinance must be approved by the National Indian Gaming Commission



that “permit such gaming,” meaning that a state must have authorized bingo or another Class II game “for any purpose by any person.”²⁶

Class III gaming is a catch-all for all types of gaming not included in Class II. Class III games are typically “high-stakes,” and include slot machines, house-banked card games, pari-mutuel betting, roulette, and similar casino games. As with Class II, Class III gaming is legal only in states that “permit such gaming” and requires the same kind of tribal ordinance.²⁷ Importantly, though, Class III gaming further requires a valid tribal-state compact.²⁸

(NIGC), the federal regulatory agency authorized by IGRA. IGRA’s requirements for the tribal ordinance are broad:

- (2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe’s jurisdiction if such ordinance or resolution provides that:
 - (A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;
 - (B) net revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies;
 - (C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;
 - (D) all contracts for supplies, services, or concessions for a contract amount in excess of \$25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;
 - (E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and
 - (F) there is an adequate system which – (i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and (ii) includes:
 - (I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses; (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and (III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.
- 25 U.S.C. § 2710(b)(2); *see also* National Indian Gaming Commission, Model Tribal Gaming Ordinance (rev. Jan. 2018), available at https://www.nigc.gov/images/uploads/bulletins/Bulletin_2018-1_Revised_Model_Ordinance.pdf.
- 26 25 U.S.C. §§ 2710(b)(1)(A). Class I games, or social or traditional tribal games, are not subject to IGRA. *Id.* § 2710(a)(1).
- 27 *Id.* § 2710(d)(1)(B).
- 28 *Id.* §§ 2703(6)-(8), 2710(b), (d).

For Class III gaming, Congress intended the compact requirement to encourage states and tribes to negotiate, on a government-to-government basis, issues related to the regulation of casino-style gaming on tribes' reservations. Without a compact, a tribe cannot legally conduct casino-style gaming; the compact also allows the state to negotiate regulatory and other conditions and limits on casino-style gaming. As an enforcement mechanism initially intended to overcome state resistance to compacting, IGRA's compact requirement imposes a duty on states to negotiate in "good faith" with tribes toward reaching a Class III compact.²⁹ IGRA requires that compacts are reviewed and approved (or disapproved) by the Secretary of the U.S. Department of the Interior.³⁰

There are hundreds of gaming compacts now in effect; many are based on "model" compacts such that the compact provisions are the same or similar for all tribes within a particular state, while others are more individualized.³¹ Some compacts provide for a robust state role in regulating tribal casinos, while other compacts rely primarily on tribal regulation.³² At the same time, a tribe's own ordinances and regulatory commission also provide day-to-day oversight. Notably, the NIGC has limited authority over Class III gaming.³³

While tribal gaming as a whole is the largest segment of the U.S. casino industry,³⁴ national figures alone obscure the wide range of profitability by state

29 *Id.* § 2710(d)(3).

30 *Id.* § 2710(d)(8).

31 For a (mostly up-to-date) list and links to compacts, see U.S. Department of the Interior, Office of Indian Gaming, "Indian Gaming Compacts," at <https://www.bia.gov/as-ia/oig/gaming-compacts>. Many states make gaming compacts publicly available; see, e.g., State of Wisconsin, Department of Administration, "Tribal Compacts and Amendments," at <https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx>.

32 In 2015, the U.S. Government Accounting Office (GAO) conducted an extensive review of tribal-state gaming compacts with regard to regulatory authority. The GAO found that "the 24 states with class III gaming operations vary in their approach for regulating Indian gaming. Specifically, based on the extent and frequency of state monitoring activities, GAO categorized 7 states as having an active regulatory role, 11 states with a moderate role, and 6 states with a limited role." GOVERNMENT ACCOUNTING OFFICE, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES 1 (GAO-15-355, June 2015), available at <https://www.gao.gov/assets/680/670603.pdf>.

33 In *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (D.C. Cir. 2006), a federal appeals court held that the NIGC did not have authority to issue minimum internal control standards (MICS) for Class III gaming. In response, the NIGC recently released non-binding MICS for Class III gaming. See National Indian Gaming Commission, Bulletin No. 2018-3, Guidance on the Class III Minimum Internal Control Standards (Aug. 14, 2018), available at <https://www.nigc.gov/images/uploads/bulletins/ClassIIIMICSBulletin201803.pdf>.

34 In 2015, tribal gaming accounted for about 44 percent of the casino industry revenue, while



and by tribe. There are 242 sovereign tribes that currently operate nearly 500 gaming facilities.³⁵ Location, customer base, competition, number and types of games offered, and destination amenities all contribute to profit. On one end of what we have labeled the “spectrum of success,”³⁶ tribal gaming in just two states – California and Oklahoma – accounts for 40 percent of total tribal gaming revenue nationwide; the top ten states (California, Oklahoma, Florida, Washington, Arizona, Connecticut, Minnesota, Michigan, Wisconsin, and New York, by rank) account for 85 percent of national revenue. The remaining 15 percent is spread across 18 states and many tribes. Profitability also varies by facility; a relatively few tribal casinos are true destination casino resorts akin to the casino properties on the Las Vegas Strip. More typically, tribal casinos are relatively small, with limited amenities, and located in rural areas. Only 7 percent of tribal casinos earn \$250 million or more each year, and these account for 45 percent of the total. On the other end of the spectrum, 37 percent of tribal casinos earn \$10 million or less each year, accounting for just 2 percent of national revenue.³⁷

V. Comparing commercial and tribal casino regulation

The law and policy governing commercial and tribal casinos – and thus the regulation of casino licensing and operations – differ in important ways.³⁸

First, tribal casinos are rooted in tribes’ authority within the U.S. governmental system. Tribal governments may conduct gambling on reservations not because a state or Congress has authorized them to do so, but because Indian gaming is an aspect of tribal sovereignty. Under U.S. law, tribal sovereignty is reflected in the general rule that the federal government, rather than the states, has authority over tribes. In enacting IGRA, Congress both recognized Indian gaming as an exercise of tribes’ inherent governmental authority and exercised its own authority to regulate tribal gaming. Although often erroneously identified as the source of tribes’ right to conduct gaming, IGRA actually is a set of limitations on that right, as tribes generally are not subject to state law or regulation. In particular,

commercial casinos accounted for about 43 percent, with the remainder of revenue generated by racinos. Alan Meister, *Casino City’s Indian Gaming Industry Report (2017 Ed.)*, at 13.

35 See National Indian Gaming Commission, *supra* note 3.

36 See STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 9-11 (2005).

37 Meister, *Indian Gaming Industry Report*, *supra* note 34, at 13 (analyzing proprietary data from calendar year 2015).

38 For a more detailed discussion of several points of comparison, see Rand & Light, “Morality Policymaking and Indian Gaming,” *supra* note 13.



under IGRA, in order to operate casino-style gaming, tribes may be required to submit to state regulation through the tribal-state compact requirement.³⁹

Second, as Indian gaming is conducted by tribal governments, it is “public gaming,” making it distinct from both commercial and charitable gaming, and more (but not wholly) akin to state lotteries. As public gaming, Congress intended Indian gaming to serve its primary goal of promoting tribal economic development, self-sufficiency, and strong tribal governments. Thus, government regulation of Indian gaming reflects a markedly different intent than does that for the regulation of commercial gaming, which primarily seeks to facilitate revenue and profit maximization while minimizing infiltration of organized crime and other negative externalities.

Third, as Indian gaming is a tool to achieve the goal of promoting tribal economic development, self-sufficiency, and strong tribal governments, regulation of tribal casinos should be designed to serve this goal. Thus, the success of tribal casinos should not be measured by profits alone, but instead by Indian gaming’s progress toward the stated policy goal through job creation, provision of public services, and economic development.

Finally, connecting these differences leads to the conclusion that tribal casinos should be less vulnerable to the vagaries of the casino market and competition from commercial casinos. Effective regulation of tribal casinos includes serving IGRA’s policy goals, or what we have called the “Indian Gaming Ethic.” As an extension of IGRA’s intent, the Indian Gaming Ethic incorporates three ideals: (1) protection of, respect for, and responsible exercise of tribal sovereignty; (2) promotion of tribal economic development, self-sufficiency, and strong tribal governments; and (3) incorporation of a general understanding of Indian gaming as a means to serve tribes, tribal members, and tribal values, and contribute positively to the surrounding community. The Indian Gaming Ethic encourages Congress, states, and tribes to consider the impact of any proposed legal, regulatory, or policy reforms on tribal sovereignty and tribes’ gaming operations, particularly for tribes that continue to experience high levels of poverty and unemployment.⁴⁰

In sum, the operation and licensing of casinos in the U.S. is governed by a complex, varied, and independent set of laws. Commercial casinos are subject to state law and regulation, and tribal casinos are subject to tribal, federal, and state law and regulation. Determining the exact requirements for a specific issue

39 See generally LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 36.

40 See Kathryn R.L. Rand and Steven Andrew Light, “Indian Gaming on the Internet: How the Indian Gaming Ethic Should Guide Tribes’ Assessment of the Online Gaming Market,” 15 *Gaming L. Rev. & Econ.* 681-91 (2011).



related to licensing or operations requires careful and thorough research and consideration of legal and regulatory factors, as well as intended policy outcomes.

