

GAMBLING—VICE OR VIRTUE?: THE FEDERAL INDIAN  
GAMING REGULATORY ACT PREEMPTS THE NEW  
YORK CONSTITUTION’S BAN ON COMMERCIAL  
GAMBLING. *Dalton v. Pataki*,  
835 N.E.2d 1180 (N.Y. 2005).

*Wesley D. Huber\**

I. INTRODUCTION

In *Dalton v. Pataki*,<sup>1</sup> the New York Court of Appeals concluded that a law enacted to permit commercial gambling conducted in accordance with a valid agreement between the State and an Indian<sup>2</sup> tribe did not violate article I, section 9 of the New York Constitution.<sup>3</sup> The court determined that the

---

\* J.D. Candidate, Rutgers University School of Law-Camden, May 2007; C.P.A., California, 2002; B.S., California Polytechnic State University, San Luis Obispo, 2000. This Comment is dedicated to my family for all their love, support, and encouragement.

1. 835 N.E.2d 1180 (N.Y.), *cert. denied*, 126 S. Ct. 742 (2005).

2. Understandably, there is political sensitivity to using the term “Indian.” However, in the interest of consistency, this Comment uses the same terms as written by Congress, the states, and the courts.

3. *Dalton*, 835 N.E.2d at 1185, 1191, 1198-99. The New York Constitution provides, in relevant part:

[N]o lottery . . . or any other kind of gambling, except lotteries operated by the state, . . . the net proceeds of which shall be applied exclusively to or in aid or support of education, . . . and except pari-mutuel betting on horse races, . . . shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. CONST. art. 1, § 9, cl. 1. The New York Constitution continues, in relevant part:

[A]ny [municipality] may . . . authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto; . . . (b) games in which prizes are awarded on the basis of a winning number, . . . color, . . . or symbol . . . determined by chance from among those previously selected or played, whether determined as the result of

Federal Indian Gaming Regulatory Act of 1988 (“IGRA”)<sup>4</sup> effectively preempted the state’s laws relating to the type of gambling at issue in the case.<sup>5</sup> Therefore, the court concluded, the state law granting the governor the power to enter into an agreement between the State and various Indian tribes for gaming on Indian lands was indeed constitutional.<sup>6</sup> The court also determined that the implementation of video lottery terminals and the State’s involvement in a multi-state lottery were both lawfully enacted pursuant to the legislature’s authority under the New York Constitution.<sup>7</sup>

This Comment focuses on the state constitutional question of whether the IGRA preempts the New York Constitution.<sup>8</sup> In doing so, this Comment looks at the majority’s lack of detailed discussion in its regulatory/prohibitory analysis.<sup>9</sup> This Comment also points out that a more substantial comparison to other state constitutions and case law on this issue would have provided more solid support for the court’s decision. Additionally, this Comment addresses the majority’s failure to consider in-depth the two different approaches currently used by both state and federal courts: the categorical approach (i.e., the regulatory/prohibitory distinction)<sup>10</sup>

---

the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions: . . . (1) only bona fide religious, charitable or non-profit organizations . . . shall be permitted to conduct such games . . . . The legislature shall pass appropriate laws to effectuate the purposes of this subdivision[ and] ensure that such games are rigidly regulated to prevent commercialized gambling . . . .

N.Y. CONST. art. 1, § 9, cl. 2.

4. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168 (2000); 25 U.S.C. §§ 2701-2721).

5. *Dalton*, 835 N.E.2d at 1198-99.

6. *Id.* at 1189.

7. *Id.* at 1192-99. Because this Comment focuses on the constitutional issue regarding the IGRA, a brief discussion involving the video lottery terminals and the multi-state lottery occurs in the notes to this Comment. *See infra* notes 15-16.

8. *See generally* Bennett Liebman, *New York’s Expanded Gambling Statute Survives Judicial Scrutiny: A Closer Look at Dalton v. Pataki*, 9 GAMING L. REV. 579, 579-91 (2005) (providing similar analysis of *Dalton v. Pataki*, but focusing more on areas of the law that were left unanswered).

9. Also known as the “categorical approach,” this analysis “requires courts to first review the general scope of gaming permitted by the state. If the state permits any form of Class III gaming, the tribe must negotiate to offer all forms of Class III gaming because the state is merely ‘regulating,’ rather than ‘prohibiting,’ this type of gambling.” *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) (citations omitted), *order granting reh’g en banc vacated*, 429 F.3d 934 (10th Cir. 2005) (noting the panel’s opinion has no precedential value beyond the application to the facts of the particular case).

10. *See supra* note 9.

and the game-specific approach.<sup>11</sup> Finally, this Comment discusses why the dissent's analysis was flawed despite its detailed legal comparison between New York and other states on the issue of gambling.

## II. STATEMENT OF THE CASE

Aiming to “counter[] the anticipated negative economic effects of the terrorist attacks of September 11th and [to] generat[e] revenue,”<sup>12</sup> the New York Legislature enacted Chapter 383 of the Laws of 2001 in late October 2001.<sup>13</sup> In particular, Parts B,<sup>14</sup> C,<sup>15</sup> and D<sup>16</sup> of Chapter 383 greatly expand

---

11. Unlike the categorical approach, the “game-specific” approach requires courts to review whether state law permits the specific game at issue. If the state allows a particular game for any purpose, it must negotiate with the tribe over that specific game. Similarly, if the state entirely prohibits a particular game, the state is not required to negotiate with the Tribe as to that game, even if the state permits other games in the same category. Under this approach, the state's permissive treatment as to one type of Class III game does not mean that the state must negotiate with tribes as to all Class III games.

*N. Arapaho Tribe*, 389 F.3d at 1311 (citations omitted).

12. *Dalton*, 835 N.E.2d at 1184.

13. Approved October 29, 2001, Chapter 383 of the General Laws of 2001 contains Parts A through AA. Act of Oct. 29, 2001, ch. 383, 2001 N.Y. Sess. Laws 750, 750-813 (McKinney).

14. *Id.* pt. B, §§ 1-6, 2001 N.Y. Sess. Laws at 750-55 (codified as amended in scattered sections of N.Y. EXEC. LAW, N.Y. STATE FIN. LAW, N.Y. PENAL LAW, and N.Y. GEN. MUN. LAW (McKinney)). Part B, the focus of this Comment, “authorize[s] the Governor [of New York] to enter into ‘a tribal-state compact with the Seneca Nation of Indians pursuant to the [federal] Indian Gaming Regulatory Act of 1988 . . . consistent with a memorandum of understanding between the [parties].’” *Dalton*, 835 N.E.2d at 1184 (third and fourth alterations in original) (quoting pt. B, § 2, 2001 N.Y. Sess. Laws at 753 (codified as amended at N.Y. EXEC. LAW § 12(a) (McKinney 2002))).

15. Pt. C, §§ 1-4, 2001 N.Y. Sess. Laws at 755-57 (codified as amended at N.Y. TAX LAW §§ 1612, 1617-a (McKinney 2004)). Part C establishes the authorization to install and use video lottery terminals (“VLT”) at several racetracks. *Dalton*, 835 N.E.2d at 1184-85, 1192. In determining the constitutionality of Part C, the court looked at whether the operation of a VLT was an electronic lottery or a slot machine. *Id.* at 1192-93. The court explained that the state constitution requires the sale of tickets in order to operate a lottery and that the operation of a slot machine is barred because it would put a single player against a single machine. *Id.* The court also noted that VLTs are operated in such a way as to require purchase of electronic tickets to enable competition among multiple players vying for a predetermined winning set of numbers randomly distributed among a finite pool. *Id.* at 1193. The court explicitly stated that “[i]t is of no constitutional significance that the tickets are electronic instead of paper.” *Id.* The court concluded that the VLTs are nothing more than “mechanical devices for the implementation of [a] lottery,” and are therefore constitutional under article I, section 9 of the New York Constitution. *Id.*

the number of gaming<sup>17</sup> facilities within the State of New York. The plaintiffs,<sup>18</sup> seeking to invalidate all three parts as unconstitutional, moved for summary judgment in the New York Supreme Court.<sup>19</sup> That court denied the motion and found all three parts to be in accord with the New York Constitution.<sup>20</sup> In its reviewing decision, the New York Supreme Court, Appellate Division declared Part C unconstitutional, but otherwise affirmed the trial court's decision.<sup>21</sup> The New York Court of Appeals modified the order of the Appellate Division and declared all the challenged portions of Chapter 383 constitutional.<sup>22</sup> Specifically, the New York Court of Appeals determined that Part B was valid because the IGRA effectively preempts New York's constitution and laws prohibiting commercial gaming when such gaming is conducted on an Indian reservation or land held in trust for an Indian tribe.<sup>23</sup>

---

Judge R.S. Smith, however, opined that Part C was unconstitutional because the statutory language was too vague in defining "administrative expenses," thus allowing the possible circumvention of the constitutional requirement that net proceeds be applied toward education. *Id.* at 1219-20 (R.S. Smith, J., dissenting).

16. Pt. D, §§ 1-4, 2001 N.Y. Sess. Laws at 757 (codified as amended at N.Y. TAX LAW §§ 1604, 1612, 1617 (McKinney 2004)). Part D authorizes the New York Division of the Lottery to enter into an agreement with other states to conduct and participate in a multi-state lottery. *Dalton*, 835 N.E.2d at 1185, 1197. In determining the constitutionality of Part D, the court addressed the issue of whether the multi-state agreement would fulfill the constitutional requirements of being operated by the state and having the net proceeds from ticket sales applied exclusively toward education in the state. *Id.* at 1197-98. The court noted that while the state does not have exclusive control over every aspect of the agreement, the state does operate the lottery within New York. *Id.* Furthermore, the court determined that proceeds from sales occurring within the state remain in the state once certain administrative expenses are paid. *Id.* at 1198. The court concluded that because the lottery proceeds become net proceeds after payment of necessary administrative expenses, the multi-state lottery agreement complied with the constitution's requirements. *Id.* at 1198-99.

17. The court uses the word "gaming," which is legally synonymous with the word "gambling." See BLACK'S LAW DICTIONARY 701 (8th ed. 2004). This Comment uses both terms interchangeably throughout.

18. The "[p]laintiffs are a group of citizen taxpayers, state legislators and not-for-profit organizations opposed to the spread of gambling." *Dalton*, 835 N.E.2d at 1185 (internal quotation marks omitted).

19. *Id.* The plaintiffs asserted that Parts B, C, and D of chapter 383 violated article I, section 9 of the New York Constitution on the basis that the constitution "generally bans gambling in the state with certain exceptions." *Dalton v. Pataki*, 780 N.Y.S.2d 47, 52 (App. Div. 2004), *aff'd in part, modified in part*, 835 N.E.2d 1180 (N.Y.), *cert. denied*, 126 S. Ct. 742 (2005).

20. *Dalton*, 835 N.E.2d at 1185.

21. *Id.*

22. *Id.* at 1185, 1199.

23. *Id.* at 1189.

## III. HISTORY OF GAMBLING REGULATION AND PROHIBITION

A. *State Regulation of Gambling on Indian Land*

The application of state laws on Indian lands has always been limited.<sup>24</sup> When enacting the IGRA,<sup>25</sup> Congress continued this limited application by

---

24. See generally Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 144-82 (1999) (discussing and analyzing various Supreme Court cases, New York State cases, federal congressional statutes, and New York State statutes, and the interaction of all these with various Indian tribes). Although the federal government retains the sole power "[t]o regulate Commerce with . . . the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, the Constitution is silent on any other powers to govern interactions with the Indian tribes. Specifically, "the Constitution makes no provision for the states to exercise authority inside the Indian territory located within [a state's] borders." Porter, *supra*, at 125. Instead, the federal government retains plenary and supreme power over the Indian tribes because of various constitutional powers afforded to the United States. See *United States v. Blackfeet Tribe of Blackfeet Indian Reservation*, 364 F. Supp. 192, 194 (D. Mont. 1973) ("The blunt fact . . . is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less."); see also Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History are Worth a Volume of Logic,"* 1996 BYU L. REV. 407, 410 & nn.11-12 ("[C]ourts and scholars have linked federal supremacy over Indian tribes to various constitutional grants of congressional authority."). Thus, Congress is expressly empowered to allow the states to extend certain legal jurisdiction over Indian land located within the state's borders. See, e.g., Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 588-90 (1953) (providing express grants of jurisdiction to certain states over "Indian country" and providing for assumption of jurisdiction by other states) (codified as amended at 18 U.S.C. § 1162 (2000); 28 U.S.C. § 1360). However, Congress has never extended unlimited jurisdiction by the states in all legal matters. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08 (1987) (noting that Pub. L. No. 83-280 granted California broad criminal jurisdiction but limited civil jurisdiction). Thus, while discussing the IGRA, prior to its passage by Congress, the Select Committee on Indian Affairs noted:

It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

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

25. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721). The enactment of the IGRA was specifically in response to the Supreme Court's decision in *Cabazon*. S. REP. NO. 100-446, at 2, as reprinted in 1988 U.S.C.C.A.N. at 3071-72. In *Cabazon*, the Court held that California's penal laws relating to gaming were regulatory and not criminal (i.e., prohibitory) in nature. 480 U.S. at

expressly prohibiting jurisdiction of some state gambling laws<sup>26</sup> and by creating the framework for an Indian tribe to request a state to extend the reach of its other gambling laws.<sup>27</sup> The IGRA defines three types of gaming—notoriously known as Classes I, II, and III—and subjects each to different levels of regulation.<sup>28</sup> Class I games are traditional ceremonial Indian games and fall squarely within the realm of Indian tribe jurisdiction only.<sup>29</sup> Class II is limited to bingo or bingo-style games, and is subject only to federal regulation.<sup>30</sup> Class III includes all other games that are not Class I or II.<sup>31</sup> Furthermore, the IGRA allows Class III games only in a state that

---

211. Therefore, California law could not be used to bar for-profit bingo games conducted on Indian lands. *Id.* at 221-22.

Additionally, Congress expressly chose to identify the purposes for which it enacted the IGRA. Section 3 of the IGRA provides, in pertinent part, that “[t]he purpose of this [Act] is . . . to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development[ and] self-sufficiency.” § 3, 102 Stat. at 2467 (emphasis added) (codified at 25 U.S.C. § 2702 (2000)). An excellent example of the IGRA resulting in the promotion of tribal economic development and self-sufficiency can be found in the State of Washington on the Tulalip Tribes Reservation. *See* Margaret Graham Tebo, *Betting on Their Future*, A.B.A. J., May 2006, at 32-37, 65. The Tulalip Tribes have built “the first federally chartered municipality since Congress incorporated the District of Columbia in 1871,” called Quil Ceda Village. *Id.* at 34. The Quil Ceda Village is basically a strip mall, with “a Wal-Mart, a Home Depot, a McDonald’s and an outlet mall. This being a reservation, there’s also a large, bustling casino in the middle of it all.” *Id.* It is “[b]ecause of gaming [that the Tulalip Tribes] now have the money to venture out and develop businesses that cost of millions of dollars but contribute to the tribes’ long-term stability.” *Id.* (internal quotation marks omitted) (quoting Stanley Speaks, Northwest Regional Director for the Federal Bureau of Indian Affairs).

26. *See supra* note 24.

27. *See* Linda King Kading, *State Authority to Regulate Gaming Within Indian Lands: The Effect of the Indian Gaming Regulatory Act*, 41 DRAKE L. REV. 317, 327-29 (1992).

28. *Id.* at 329-31. The IGRA created the National Indian Gaming Commission charging it with certain duties and powers, but only as they relate to the regulation of Class II gaming. S. REP. NO. 100-446, at 7, *as reprinted in* 1988 U.S.C.C.A.N. at 3077.

29. Kading, *supra* note 27, at 329. The purpose behind subjecting Class I gaming to tribal jurisdiction only stems from historical tradition. *See* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING & TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 39 (2005) (“Historically, tribes have used games as a means of redistributing wealth and circulating possessions within a community.”).

30. Kading, *supra* note 27, at 329-30; *see also supra* note 28.

31. 25 U.S.C. § 2701(8) (2000). A Senate bill introduced in July 2005 would amend the definition of Class III gaming to exclude commercial gambling in states that prohibit commercial gambling. S. 1518, 109th Cong. § 1 (2005). When introducing the bill, Senator Voinovich stated this bill “will close a loophole in the Indian Gaming Regulatory Act.” 151 CONG. REC. S9087, 9186 (daily ed. July 27, 2005) (statement of Sen. Voinovich). Additionally, Senator Voinovich noted that in Ohio, the state he represents, the state

permits this type of gaming generally.<sup>32</sup> Class III gaming is also only permitted on Indian land or land held in trust for a tribe and only if the Indian tribe and the state reach a negotiated agreement.<sup>33</sup> It is through this system of negotiations and agreements that Congress allows a state to regulate gambling on Indian land.<sup>34</sup>

### B. State Prohibition of Gambling in New York

Beginning in 1821 with an amendment to its constitution, New York banned lotteries outright<sup>35</sup> and, with another amendment in 1894, expressly prohibited *all* gambling.<sup>36</sup> In 1939, with changes in attitude toward the sport

---

constitution prohibits “gambling for commercial purposes” but permits “pari-mutuel racing and lotter[ies] . . . as well as charitable gambling on a very limited and controlled basis.” *Id.* at 9187. For the definition of pari-mutuel racing and betting, see *infra* note 38.

At first glance, it appears that Senator Voinovich would be correct. The Ohio Constitution provides, in relevant part: “Except as otherwise provided, . . . lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.” OHIO CONST. art. XV, § 6. However, the Ohio Constitution “prohibits only one type of gambling—namely, lotteries. Therefore, the [Ohio L]egislature can pass laws legalizing other forms of gambling.” State *ex rel.* O’Brien v. Pathfinder Serv. Ass’n, No. 02AP-305, 2003 WL 1699868, at \*6 (Ohio Ct. App. Mar. 1, 2003). Thus, while Ohio and New York may appear to have similar structures in the language of their constitutional gambling prohibitions, Ohio courts have interpreted theirs more liberally, at least under the IGRA in its present form.

32. 25 U.S.C. § 2710(d)(1)(B).

33. Although the IGRA allows for a few different ways in which an Indian tribe may operate Class III gaming, the most typical, and easy, method is to conduct negotiations with the state and enter into a “Tribal-State Compact.” See Kading, *supra* note 27, at 331.

34. Sean Brewer, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L.J. 469, 470 (1995).

35. See PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 55 (G. Alan Tarr ed., 1991). Prior to 1821, several New York statutes prohibited private lotteries while allowing public, state-run, lotteries. SUBCOMM. ON LEGISLATIVE POWERS & FUNCTIONS, N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 417 (1938). During the mid-1700s for example, the New York Legislature authorized numerous public lotteries to raise funds for various public-use projects. *Id.* It was the eventual “corruption, scandal and . . . inherent contradiction between the condemnation of private lotteries and the proliferation of public ones [that] brought the practice [of using lotteries to raise funds] into disfavor, and the Constitution was amended” to ban all lotteries. N.Y. Op. Att’y Gen., No. 84-F1, 1984 WL 186643, at \*3 (1984).

36. GALIE, *supra* note 35, at 55. This is considered the high point of gaming prohibition in the State of New York. *Id.* Some of this sentiment was fueled by an increase in the dishonest horseracing created in the absence of a central oversight body. See ROGER LONGRIGG, THE HISTORY OF HORSE RACING 229 (1972). If New York still outright banned all gambling today, then it is likely that the *Dalton* case would never have reached the New York Court of Appeals.

of horseracing,<sup>37</sup> the people of New York amended the state constitution to allow pari-mutuel betting.<sup>38</sup> Less than twenty years later, in 1957, the people of New York amended the state constitution once again to allow the conducting of bingo, lotteries, and other “Vegas-style”<sup>39</sup> games by charitable organizations *only*.<sup>40</sup> Prior to *Dalton v. Pataki*, the New York Court of Appeals had not addressed the question of whether conducting “Vegas-style” gaming on Indian lands for the economic benefit of the Indian tribe violated the state constitution’s ban against commercial gambling.<sup>41</sup>

---

37. Although horseracing has been around for centuries, the sport ebbed and flowed in the United States until after the Civil War. *See generally* JOAN S. HOWLAND & MICHAEL J. HANNON, A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS AND PARTICIPANTS 1-8 (1988). During the decade following the Civil War, New York became “the primary nucleus for the sport due to the superiority of the state’s race courses as well as its social and financial advantages.” *Id.* at 6. Nevertheless, “[b]etween 1897 and 1908, the number of race tracks in the United States decreased from 314 to a mere 25.” *Id.* at 7 (citing LONGRIGG, *supra* note 36, at 230). In fact, in 1911 and 1912, “there was no racing in New York State” at all. LONGRIGG, *supra* note 36, at 230. During the 1920s and 1930s, horse racing became popular again, due in part to the “free-wheeling atmosphere . . . following the recent military victory in Europe and the perceived boom economy” and “a variety of innovations” helping to reduce the illicit activity previously associated with the sport. HOWLAND & HANNON, *supra*, at 9. Some of those “innovations” included the creation of state racing commissions and the use of pari-mutuel betting machines. *See* LONGRIGG, *supra* note 36, at 230. In addition, it has been said that it was the reopening of the Belmont and Saratoga tracks in 1913 that led to the eventual amendment of the New York Constitution to allow pari-mutuel gambling. *See id.*

38. Pari-mutuel betting, invented in France, essentially “permits participants to bet among themselves, and then the winners divide the money wagered in proportion to their individual wagers.” HOWLAND & HANNON, *supra* note 37, at 8. The 1939 constitutional amendment created “an exception to the general prohibition which had theretofore removed all gambling from the scope of legislative sanction or permission.” *In re* Application of Stewart, 22 N.Y.S.2d 164, 166 (Sup. Ct.), *aff’d*, 23 N.Y.S.2d 226 (App. Div. 1940). “The [l]egislature was freed from its former restraint and it became competent for it to authorize, if it deemed proper, and to regulate, pari-mutuel betting on horse races.” *Id.* (emphasis added).

39. The term “Vegas-style” refers to games such as, but not limited to, roulette, craps, slot machines, blackjack, poker, and all other similar games played with cards, dice, or the spinning of a wheel. *See generally* Answers.com, <http://www.answers.com/topic/casino-game> (last visited July 3, 2006); *see also* N.Y. CONST. art. I, § 9, cl. 2. For the relevant language of the New York Constitution, see *supra* note 3.

40. GALIE, *supra* note 35, at 56.

41. *See Dalton v. Pataki*, 835 N.E.2d 1180, 1184 (N.Y.), *cert. denied*, 126 S. Ct. 742 (2005). The court has previously addressed at least one related issue arising under the intersection of the IGRA and New York law. In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, the New York Court of Appeals addressed whether the governor could unilaterally enter into an agreement with an Indian tribe under the IGRA where the legislature did not previously authorize such negotiations. 798 N.E.2d 1047, 1049 (N.Y. 2003). The court in *Saratoga* concluded that the governor’s unilateral actions “violated separation of powers

## IV. THE OPINIONS

## A. Judge Ciparick's Majority Opinion

The New York Court of Appeals<sup>42</sup> began its discussion by noting that the court had previously left open the question of “whether casino gaming permitted by such . . . compacts violated the . . . [c]onstitution and whether [the] IGRA preempts in this area.”<sup>43</sup> After discussing the provisions of the law challenged by the parties<sup>44</sup> and the procedural history of the case,<sup>45</sup> the court summarized the part of the state constitution relevant to the case.<sup>46</sup> The court followed this with an in-depth discussion of the background and purpose of the IGRA.<sup>47</sup>

The court then looked at whether the IGRA preempts New York state law, particularly the state constitution.<sup>48</sup> The court concluded that the New York “state constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with [the] IGRA and governed by a valid tribal-state compact.”<sup>49</sup> In reaching this conclusion, the court noted that the IGRA states that Class III gaming, when conducted pursuant to an

---

principles,” and thus the governor could *not* unilaterally enter into a compact. *See id.* at 1061. The court also expressly declined to address the anti-gambling constitutional provision argument presented to, and now decided by, the court in *Dalton*. *See id.*

42. Judge Ciparick authored the majority opinion and was joined by Chief Judge Kaye and Judges Rosenblatt, Graffeo and Read. *Dalton*, 835 N.E.2d at 1220. Judge G.B. Smith filed a separate dissenting opinion with respect to the majority’s decision declaring Part B of Chapter 383 constitutional. *Id.* Judge R.S. Smith, also in a separate opinion and joined by Judge G.B. Smith, dissented with respect to Part C of Chapter 383. *Id.*

43. *Id.* at 1184; *see also supra* note 41.

44. *Dalton*, 835 N.E.2d at 1184-85 (discussing Parts B, C, and D of Chapter 383).

45. *Id.* at 1185.

46. *Id.* at 1185-86; *see also* discussion *supra* Part III.B.

47. *Dalton*, 835 N.E.2d at 1186-89; *see also* discussion *supra* Part III.A.

48. *Dalton*, 835 N.E.2d at 1189.

49. *Id.* The court also noted that while the IGRA does not require a state to enter into a compact with an Indian tribe, it is in the best interests of the state to do so voluntarily as the federal government can effectively require a state to enter into negotiations. *Id.* at 1189-90. Ultimately, it is possible that “if [C]lass III gaming is permitted in the state for any purpose, including a strictly charitable purpose, it will be permitted on Indian land with or without the state’s involvement.” *Id.* at 1190. Failure by a state to negotiate in good faith allows an Indian tribe to seek redress with the Federal Secretary of the Interior, which can ultimately lead to the creation of a compact allowing Class III gaming on the tribe’s land. *See Texas v. United States*, 362 F. Supp. 2d 765, 769-71 (W.D. Tex. 2004) (recognizing the U.S. Supreme Court’s ruling, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that the IGRA’s provision allowing tribes to sue states in federal court is unconstitutional); *see also* Liebman, *supra* note 8, at 585-86.

approved tribal-state agreement, is not considered gambling for purposes of the state statutes that may otherwise impose requirements pertaining to the licensing, regulation, or prohibition of, or punishment for gambling.<sup>50</sup> Additionally, the court briefly addressed an alternative argument to the one put forth by the plaintiffs based on the outright ban on commercial gambling<sup>51</sup> and a final argument based on whether the state legislature properly authorized the governor to negotiate and enter into the compacts.<sup>52</sup>

The court completed its analysis with a detailed explanation as to why it considered Parts C and D of Chapter 383 constitutionally valid.<sup>53</sup> In brief

---

50. *Dalton*, 835 N.E.2d at 1189. The IGRA makes it a crime to gamble on Indian land in a state where gambling is otherwise criminal. 18 U.S.C. § 1166(b) (2000). However, the term “gambling,” as used in that section, does not include Class III gaming conducted under an agreement between an Indian tribe and the state. *Id.* § 1166(c)(2).

51. *See Dalton*, 835 N.E.2d at 1190-91. Because part of the challenged law in the case dealt with possibly allowing up to three casinos in areas that did not currently contain Indian lands, the plaintiffs argued that “gaming is generally prohibited on lands acquired by the [federal government] after the enactment of [the] IGRA and held ‘in trust for the benefit of an Indian tribe.’” *Id.* at 1190 (quoting 25 U.S.C. § 2719(a)). Additionally, the plaintiffs argued that the governor was not allowed, for public policy reasons, to make any assessments regarding the establishment of a gaming facility. *Id.* at 1191. The court responded by noting that gaming would be permitted under the IGRA if there was a determination that a “gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community.” *Id.* at 1190 (internal quotation marks omitted) (quoting 25 U.S.C. § 2719(b)(1)(A)). But, the court explained that “[s]ection 2719(b)(1)(A) does not call for the [g]overnor to make a determination as to . . . legality . . . . Rather, the determination . . . entails an analysis of the potential . . . social or economic consequences.” *Id.* at 1191. Thus, the court concluded, “The [c]onstitution plainly does not prevent the [g]overnor from determining that there would be no detrimental effect on a particular community.” *Id.*

52. *See id.* at 1191-92. The plaintiffs argued that there “was an improper delegation of legislative authority . . . [to] the [g]overnor to execute tribal-state compacts.” *Id.* at 1191. The court rejected the argument by first citing to its decision in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, in which the court held that the governor could not unilaterally enter into IGRA negotiations with Indian tribes. *Dalton*, 835 N.E.2d at 1191 (citing *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1061 (N.Y. 2003)). This was because the “compact[s] involved policy decisions that were within the province of the Legislature.” *Id.* (citing *Saratoga*, 798 N.E.2d at 1061). In *Dalton* however, the court noted that section 2 of Part B of chapter 383 specifically indicated that any agreements entered into by the governor pursuant to the law would be “‘deemed ratified by the legislature upon the governor’s certifications’ that the compacts contained certain provisions.” *Id.* (quoting Act of Oct. 29, 2001, ch. 383, pt. B, § 2, 2001 N.Y. Sess. Laws 750, 754 (McKinney) (codified at N.Y. EXEC. LAW § 12(b) (McKinney 2002))). Furthermore, the mere fact that the legislature did “not specify the names of the tribes or where the casinos will be located” did not change the court’s conclusion that a permissible delegation of duty occurred. *Id.* (citations omitted).

53. *Id.* at 1192-99.

summary, the court held Part C constitutional after determining that the video lottery terminals were not slot machines, but rather nothing more than electronic lottery dispensers.<sup>54</sup> In addition, because the State of New York is in charge of the multi-state lottery operations within its jurisdiction, the court held Part D constitutionally valid.<sup>55</sup>

*B. Judge G.B. Smith's Dissenting Opinion*

The dissent<sup>56</sup> argued that because the New York Constitution and the laws enacted pursuant thereto completely prohibit commercial gambling,<sup>57</sup> the enactment of Part B was unconstitutional.<sup>58</sup> Therefore, the dissent continued, the IGRA could not force the state legislature to enact a law that the legislature did not have the power to enact.<sup>59</sup> The dissent then discussed the methods by which the state completely prohibited commercialized gambling while still regulating gambling in general.<sup>60</sup> The dissent argued that, “[a]t most, the state would be required to permit class III gaming on Indian lands for charitable purposes.”<sup>61</sup>

The dissent also looked at two of the cases relied upon by the state and concluded the cases were neither “controlling nor applicable” to the case at bar.<sup>62</sup> Looking at the first case, *Mashantucket Pequot Tribe v. Connecticut*,<sup>63</sup> the dissent noted that unlike the State of New York, the State of Connecticut “regulate[s] rather than prohibit[s commercial] gambling.”<sup>64</sup> The dissent then distinguished *California v. Cabazon Band of Mission Indians*<sup>65</sup> from the present case on three points. First, the dissent stated that California does “not

---

54. *Id.* at 1193.

55. *Id.* at 1198.

56. The dissent authored by Judge G.B. Smith is the only dissent to the majority’s conclusion that Part B of Chapter 383 was constitutional. Judge G.B. Smith chose to write a complete opinion, including the facts and procedural history of the case. *Id.* at 1199-1219 (G.B. Smith, J., dissenting). Judge G.B. Smith joined Judge R.S. Smith in the latter’s dissent as to Part C. *See supra* note 15. Neither Judge G.B. Smith nor Judge R.S. Smith dissented to the majority’s opinion on Part D of Chapter 383.

57. *Dalton*, 835 N.E.2d at 1207 (G.B. Smith, J., dissenting).

58. *Id.* at 1218.

59. *Id.* at 1207-08.

60. *Id.* at 1208-13.

61. *Id.* at 1214.

62. *Id.* at 1214-15.

63. 737 F. Supp. 169 (D. Conn.), *aff’d*, 913 F.2d 1024 (2d Cir. 1990).

64. *Dalton*, 835 N.E.2d at 1214 (G.B. Smith, J., dissenting); *see also* *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990).

65. 480 U.S. 202 (1987); *see also supra* note 25.

have as clear an antigambling policy as New York.”<sup>66</sup> The second point was that *Cabazon* dealt with Class II-type gaming, while this case dealt with Class III.<sup>67</sup> The third distinguishing point was that *Cabazon* involved an analysis of whether the statutes were prohibitory or regulatory, while the instant case presented a question of “whether the [l]egislature has the authority to enact legislation that is in direct contravention to the New York State Constitution.”<sup>68</sup>

In its conclusion, the dissent first pointed out that the IGRA could not preempt state law because to do so would go against the rights of the people of New York.<sup>69</sup> This was the real issue, the dissent opined, because the people of New York retain the power to determine how the laws regarding gambling apply within the State of New York.<sup>70</sup> The dissent finished by stating that the legislature could not enact Part B of Chapter 383 because it would be contrary to the constitutional ban on commercial gambling.<sup>71</sup>

## V. ANALYSIS & IMPLICATIONS

### A. *Analysis of the Majority's Opinion*

There should be no question that the majority is correct in its conclusion that the IGRA preempts New York law.<sup>72</sup> The majority did an excellent job

---

66. *Dalton*, 835 N.E.2d at 1214 (G.B. Smith, J., dissenting).

67. *Id.* at 1214-15.

68. *Id.* at 1215.

69. *Id.*

70. *See id.* at 1215-16.

71. *Id.* at 1217-18.

72. The underlying principle here is that Indian lands, as well as land held in trust for Indian tribes, are separate sovereign jurisdictions from that of the states. *See supra* note 24. Except for the IGRA, states lack jurisdiction to apply their civil gaming laws to Indian casinos. The IGRA helps establish a bright-line standard (or at least attempts to do so) where one did not exist before. The Select Committee on Indian Affairs stated that the purpose of the IGRA is “to expressly preempt the field in the governance of gaming activities on Indian lands.” S. REP. NO. 100-446, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Moreover, Congress did not want a judicial balancing test applied in future situations as had been done in *Cabazon*. The Committee noted that “it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands.” *Id.* at 3, *as reprinted in* 1988 U.S.C.C.A.N. at 3073. “Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.” *Id.* at 6, *as reprinted in* 1988 U.S.C.C.A.N. at 3076.

analyzing the IGRA, its background, and its application to the present case.<sup>73</sup> However, the majority could have, and should have, explained how the New York Constitution, while once containing a prohibition on gambling,<sup>74</sup> now does nothing more than establish the overarching regulatory scheme within which the legislature must operate when enacting gaming laws.<sup>75</sup> The court simply glossed over the pertinent constitutional language without fully explaining why the words make gambling in the State of New York subject to regulation and not prohibition. The New York Constitution specifically instructs “[t]he legislature [to] pass appropriate laws to effectuate the purposes of this subdivision[ and to] ensure that [gambling is] rigidly regulated.”<sup>76</sup> By allowing betting on horseracing and “Vegas-style” gambling for charitable fundraising purposes, the State of New York is allowing its citizens to gamble, while ensuring that such activities are done within the confines of laws passed by the legislature. This is the very definition of regulation.<sup>77</sup>

Also absent is a consideration of how courts in other jurisdictions have dealt with this same issue.<sup>78</sup> By choosing not to address other state cases and/or constitutions, the New York Court of Appeals failed to address an important point: the interaction of an Indian tribe with one state often parallels that of a similarly situated Indian tribe in another state. While each state is a separate sovereign jurisdiction within the United States, state-tribe relations are governed by the terms of the U.S. Constitution to ensure uniform treatment of Indian tribes across the entire United States.<sup>79</sup> Federal

---

73. *Dalton*, 835 N.E.2d at 1186-92.

74. *See supra* notes 35-36 and accompanying text.

75. *See supra* notes 37-40 and accompanying text.

76. N.Y. CONST. art. I, § 9, cl. 2 (emphasis added).

77. *See* BLACK'S LAW DICTIONARY 1311 (8th ed. 2004) (defining the term “regulation” as “[t]he act or process of controlling by rule or restriction”).

78. As Rutgers University Professor Robert F. Williams noted in a speech presented at a Symposium regarding New York State Constitutional Law: “New York’s Constitution, and its judicial interpretation, are of great interest to others around the country.” Robert F. Williams, *New York’s State Constitution in National Context*, 14 *TOURO L. REV.* 611, 617 (1998) (citation omitted). Undoubtedly, the New York Court of Appeals feels its interpretation of its own state’s constitution is the correct one, and there exists no need to look outside the “four-corners” of the document and New York judicial decisions. However, in a recent decision, the New York Court of Appeals, in a plurality opinion, immediately referenced other state decisions on the issue of same-sex marriage and noted how those states had decided the same constitutional issue. *See Hernandez v. Robles*, No. 86, 2006 WL 1835429, at \*5 (N.Y. July 6, 2006) (plurality opinion).

79. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45 (1980). *See generally* WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 72-104 (4th ed.

regulation of Indian affairs ensures, as best as possible, equal treatment of the sovereign tribes across the entire United States without reference to a particular state.

Because of the impact of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*<sup>80</sup> upon Congress' decision to enact the IGRA, the New York Court of Appeals should have, at a minimum, addressed the similarities<sup>81</sup> between the New York and the California Constitutions.<sup>82</sup> In both constitutions, the pertinent language begins by stating that all gambling is prohibited, followed by a list of permitted types of gambling.<sup>83</sup> Moreover, both constitutions provide for a state lottery, horse race betting, bingo for charitable purposes, and a specific provision to

---

2004) (providing review of tribal sovereignty law as it developed from early U.S. history to the present day).

80. 480 U.S. 202 (1987).

81. Because the majority in *Dalton* cited the *Cabazon* case, in a way the majority did address the California Constitution. See *Dalton v. Pataki*, 835 N.E.2d 1180, 1187-88 (N.Y.), *cert. denied*, 126 S. Ct. 742 (2005). Of course, the *Cabazon* case involved state and federal law as they existed prior to the enactment of the IGRA. It would have been to the benefit of the majority in *Dalton* to at least address the current status of the California Constitution, post-IGRA. For example, the Supreme Court of California decided six years prior to *Dalton* that because the California Constitution contains a prohibition against the establishment of "Vegas-style" casinos, a ballot initiative by the people of California to statutorily allow gambling in tribal casinos was void for violating the constitution. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 1009 (Cal. 1999). However, the court held not that the legislature was unable to enter into any tribal/state compact with Indian tribes, only that the model agreement set forth in the people's initiative violated the California Constitution. *Id.*

82. The California Constitution provides, in relevant part:

- (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.
- (b) The Legislature may provide for the regulation of horse races . . . and wagering on the results.
- (c) Notwithstanding subdivision (a) the Legislature by statute may authorize [local municipalities] to provide for bingo games, but only for charitable purposes.
- (d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.
- (e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.

CAL. CONST. art. IV, § 19; *cf.* N.Y. CONST. art. I, § 9. For the relevant language of the New York Constitution, see *supra* note 3.

83. Compare N.Y. CONST. art. I, § 9, with CAL. CONST. art. IV, § 19. The relevant language of each state constitutional provision can be found at *supra* note 3 and *supra* note 82, respectively.

prevent commercial gambling.<sup>84</sup> However, what is different between the two state constitutions is that the California Constitution contains a clause that specifically prohibits the state legislature from authorizing casinos similar to those “currently operating in Nevada and New Jersey,”<sup>85</sup> while the New York Constitution does not.<sup>86</sup> With such striking similarities, the court should have at least looked at the current state of gambling on Indian lands in California.<sup>87</sup>

Additionally, some federal and state courts have addressed the question of IGRA application using the regulatory/prohibitory distinction<sup>88</sup> focused on

---

84. Compare N.Y. CONST. art. I, § 9, with CAL. CONST. art. IV, § 19. The relevant language of each state constitutional provision can be found at *supra* note 3 and *supra* note 82, respectively. When California became a state in 1849, its constitution provided for a complete prohibition of lotteries, and it was not until 1933 that California added the authorization for horse race betting, a mere six years before New York did. Compare JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 103 (G. Alan Tarr ed., 1993), with GALIE, *supra* note 35, at 55.

85. CAL. CONST. art. IV, § 19; see also *supra* note 82. The first place one likely thinks of when discussing gambling in Nevada is Las Vegas, and in New Jersey, Atlantic City. It was near the turn of the twentieth century when Las Vegas began to take its modern shape. History of Las Vegas, <http://www.lvoleg.com/lvoleg/hist/lvhist.html> (last visited Nov. 30, 2006). Although “Nevada was the first state to legalize casino-style gambling,” it passed a strict anti-gambling law in late 1910. *Id.* Like New York, it was during the Great Depression that legalized gambling returned to the State of Nevada, fueled in part by the construction of the Hoover Dam. *Id.* Yet, it was not until the opening of the Flamingo in 1946 that the major casinos began full-fledged operations. *Id.* The growth of casinos and gambling in Atlantic City, on the other hand, did not begin until 1976 with the passage of the New Jersey Casino Gambling Referendum. See Barbara Kozek, *Atlantic City History*, <http://www.atlantic-city-online.com/history/history.shtml> (last visited Nov. 30, 2006).

86. Compare CAL. CONST. art. IV, § 19, with N.Y. CONST. art. I, § 9. The relevant language of each state constitutional provision can be found at *supra* note 3 and *supra* note 82, respectively. Indian tribes in California operated casinos prior to the enactment of the IGRA. When California attempted to close those casinos, the tribes sued in federal court, resulting in the case of *California v. Cabazon Band of Mission Indians* and ultimately in the passage of the IGRA. See *supra* note 25. Beginning in November 1998, the State of California began the process to change the state constitution to authorize casinos on Indian land. See Indian Gaming in California, California Gaming, 1998-2003, <http://www.igs.berkeley.edu/library/htIndianGaming.htm#Topic5> (last visited Nov. 30, 2006). On the March 7, 2000 ballot, California Proposition 1A presented a constitutional amendment specifically exempting from the state constitutional ban on Nevada- and New Jersey-type casinos those casinos established on Indian lands pursuant to a compact entered into under the IGRA. *Id.* The voters passed the proposition by a substantial margin and the exponential growth of gambling on Indian lands in California began. See *id.*

87. See *supra* note 86.

88. See *supra* note 9.

by the majority,<sup>89</sup> while other courts use the game-specific approach.<sup>90</sup> Nevertheless, in this case, the majority barely even mentioned the game-specific approach,<sup>91</sup> and explicitly refused to apply it to New York law.<sup>92</sup> The majority is correct that the categorical approach to analyzing the New York Constitution ends in the conclusion that not all commercial gambling is banned. Because the IGRA allows gambling on Indian land located within states that allow gambling for any purpose, the IGRA preempts New York's state constitutional ban on commercial gambling. Thus, the majority's conclusion is correct while the dissent's opinion is ultimately in error.<sup>93</sup> Nevertheless, what the majority does not discuss is how, in this case, use of either approach in its analysis leads to the same conclusion: the IGRA preempts New York gaming law. Because New York allows the conduct of any type of game for charitable purposes,<sup>94</sup> it would follow that under the game-specific approach analysis, and under the IGRA, all of these games would be allowed for commercial purposes on Indian lands.<sup>95</sup>

### B. Analysis of the Dissenting Opinion

Unlike the majority, the dissent did compare the instant case to other state constitutions,<sup>96</sup> and attempted to address the prohibitory language of the New York Constitution.<sup>97</sup> However, the dissent focused on the state's public policies and how the majority's opinion violated these policies.<sup>98</sup> Nothing

---

89. *Dalton v. Pataki*, 835 N.E.2d 1180, 1188-89 (N.Y.), *cert. denied*, 126 S. Ct. 742 (2005).

90. *See supra* note 11.

91. *Dalton*, 835 N.E.2d at 1188-89.

92. *Id.*

93. Although, at first glance, the New York Constitution does appear to follow the categorical approach and ban all commercial gambling as the dissent suggests. *See supra* note 3.

94. New York's constitution allows only those "games [won] on the basis of a . . . number, . . . color, . . . or symbol . . . determined by chance . . . whether determined as the result of the spinning of a wheel [(e.g. roulette)], a drawing [(e.g. blackjack and poker)], or otherwise by chance" to be conducted by a charitable organization for charitable purposes. N.Y. CONST. art. I, § 9, cl. 2. This constitutional language is so broadly stated that it makes all variations of games legal when conducted by a charitable organization for charitable purposes.

95. *Compare supra* note 94, *with supra* note 11.

96. Specifically, the dissent compared New York law with that of Connecticut and California. *See supra* notes 62-68 and accompanying text.

97. *Dalton*, 835 N.E.2d at 1207-08 (G.B. Smith, J., dissenting).

98. *Id.* Specifically, the dissent stated:

Because the proposed casino gaming is prohibited under the New York State Constitution . . . and such gaming conflicts with New York State's strong public

can be further from the truth. Historically, there may have been concern for the well-being of the common New York citizen,<sup>99</sup> but in the modern era, other jurisdictions, namely Atlantic City and Las Vegas, now hinder New York's public policies, unless the dissent also seeks to block New Yorkers from ever leaving the state.<sup>100</sup>

Essentially, the dissent seeks to uphold the constitutional prohibition against statewide commercialized gambling by including Indian tribal land under the jurisdiction of the State of New York. This would make sense, but for the IGRA. If current law regarding Indian gaming was still governed under *Cabazon*, then the dissent could likely be correct that New York's prohibition against commercial gaming would extend to Indian land. However, this is no longer true. Instead, because of the Supremacy Clause<sup>101</sup> and the Indian Commerce Clause,<sup>102</sup> the IGRA now governs and effectively preempts the New York Constitution's prohibition against commercial gambling. Whether this is a vice or a virtue remains to be seen.<sup>103</sup>

---

policy against commercialized gambling, *the Legislature did not have the power to enact the instant legislation* authorizing the Governor to . . . enter into compacts with Indian tribes for the establishment of "for-profit" casino gaming in New York State.

*Id.* (emphasis added). Again, this would be true but for the IGRA. The IGRA states that Class III gaming shall be allowed in a state that "permits such gaming for any purpose by any person, organization, or entity, and" is "conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1)(B)-(C) (2000). Because of the "any purpose" wording, if a tribe approaches the State to enter into a compact, the IGRA preempts that state's law prohibiting gambling and thus allows a legislature to enact a law similar to the law challenged in *Dalton v. Pataki*.

99. *See, e.g.*, NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 567 (1821) ("[I]t is the poor man [we should] protect, whose wants and those of his family, require every shilling for the support of life, and whose cupidity is excited by the flattering prospect of enriching himself, . . . without his understanding the chances which make it barely possible that he should gain.")

100. *See supra* note 85. Now in the twenty-first century, New York citizens can easily travel to Atlantic City or Las Vegas to fulfill their gambling whims. *See also* discussion *infra* Part V.C.

101. U.S. CONST. art. VI, § 2.

102. U.S. CONST. art. I, § 8, cl. 3.

103. A vice, a "moral failing," is the quality of being a bad thing. *See* BLACK'S LAW DICTIONARY 1597 (8th ed. 2004). A virtue, on the other hand, is synonymous with morality and is the quality of being a good thing. *See id.* at 1030.

*C. Implications*

While many tribes are benefiting from the economic development resulting from the increase in cash from casino operations,<sup>104</sup> this also means that someone is losing money—the gamblers themselves. It is quite possible that the *Dalton* court chose to yield to political pressures to allow Indian gaming as a way to boost economic activity and revenues for the State of New York. While this may not have been the reason for deciding the case the way it did, the court did eliminate the need for New York citizens to travel away from the physical boundaries of the state to fulfill their gambling whims. The conclusion reached in the *Dalton* case does nothing more than localize “Vegas-style” casino gambling and bring much-needed funds to the State of New York.

Additionally, it would be of no great surprise to see that in a few years time, many other jurisdictions cite this case in their own discussions and analysis of whether the IGRA preempts their state law,<sup>105</sup> for “New York’s Constitution, and its judicial interpretation, are of great interest to others around the country.”<sup>106</sup> Because the application of state laws to the Indian tribes is limited by the U.S. Constitution and federal law, interpretation of how the IGRA applies to each state’s constitution should be as uniform as possible across the entire United States. If such interpretation is completed by the highest state courts, this saves an unnecessary foray into the arena of state constitutional jurisprudence by the federal courts, all of which are likely to defer to, and certify to, the state’s highest court for constitutional interpretation questions anyway.<sup>107</sup> Furthermore, if different states come to different conclusions, resulting in an inconsistent interpretation of the IGRA at the national level, then any single state’s highest court subjects itself to review by the U.S. Supreme Court and possible remand for reconsideration. In other words, it is in the interest of national and local judicial economy for a state to ensure that it properly reviews the IGRA and its application to that

---

104. See *supra* note 25.

105. For example, in December 2005 the U.S. District Court for the District of Oregon cited and discussed the conclusion reached by the majority in *Dalton v. Pataki*. See *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1152-53 (D. Or. 2005). Although *Dewberry* is a federal district court case, some of the facts and some of the arguments are similar to those in *Dalton* and involve an analysis of the Oregon State Constitution. See *id.* at 1138-40, 1152-53.

106. Williams, *supra* note 78, at 617.

107. See, e.g., *Dewberry*, 406 F. Supp. 2d at 1139 (discussing the court’s own certified questions presented to the Oregon Supreme Court).

state's laws while keeping in mind that such application must be as equal as possible across the entire country.

## VI. CONCLUSION

In *Dalton v. Pataki*, the New York Court of Appeals held that the IGRA preempted article I, section 9 of the New York Constitution as it relates to commercial gambling. By adhering to the constitutional allowance of Vegas-style gaming for charitable purposes, the court recognized this also required that similar gaming be allowed on Indian tribe owned land if the governor and the Indian tribe located within New York entered into an agreement under the IGRA. While focusing primarily on the statutory language of both the New York Constitution and the IGRA, the majority and dissenting opinions came to different conclusions. Although the majority lacked support for its conclusion, the dissent incorrectly analyzed the IGRA, a federal law, and its application in New York constitutional jurisprudence. Other jurisdictions' highest state courts should look to this case and the majority's correct analysis of the interaction of the IGRA and the New York Constitution, coupled with a similar look to other jurisdictions, as the dissent does. To do otherwise could likely subject the balance of federal, state, and Indian tribe interests to increased federal scrutiny and possible increased litigation in federal courts.