NOTES

CONFLICTS IN SOVEREIGNTY: THE NARRAGANSETT TRIBE IN RHODE ISLAND

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American Indian tribal sovereignty is important to both tribal members and the states in which they reside. Historically, the line between tribal sovereignty and state jurisdiction is not easy to find. Jurisdictional conflicts are a sign of healthy sovereigns, as a weak sovereign cannot defend against encroachments upon its jurisdiction. The federal courts have greatly increased the scope of tribal sovereignty in several cases, notably clarifying state tax exemptions.[1] Congress has also played a role in re-establishing defunct tribes as sovereign entities and passing statutes such as the Indian Gaming Regulatory Act of 1988 that clarify tribal rights to operate enterprises without state government interference.[2] The United States Supreme Court clarified federal law further stating that a state government may prohibit all gambling as a matter of public policy. It may not, however, allow some gambling while disallowing Indian gambling because that would essentially be a regulatory act.[3] Re-establishing a tribe is the ultimate act of jurisdictional re-balancing in favor of tribal sovereignty. After all, a weak jurisdiction cannot defend against encroachment any more than a moribund jurisdiction could bring itself back to life. Frequently these re-established tribes are not immediately given the same full status as other tribal sovereignties.

The Narragansett Tribe of Rhode Island is just one such reestablished Tribe that now seeks to assert its full sovereign rights. Roger Williams, the founder of Rhode Island, initially purchased land from the tribe but as the number of colonists grew, friction with the tribe grew proportionately.[4] Rhode Island and the Narragansett have a long and tumultuous history, including a war in 1675 in which the colonists defeated the Narragansett.[5] The Tribe claims that the

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1. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).
2. Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2000).
3. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209-11 (1987).
4. Jack L. Davis, *Roger Williams Among the Narragansett Indians*, 43 NEW ENGLAND Q. 593, 598-99 (1970).
5. Ethel Boissevain, *The Detribalization of the Narragansett Indians: A Case Study*, 3 ETHNOHISTORY 225, 226 (1956).

state of Rhode Island illegally annexed Narragansett land in what is now Charlestown, Rhode Island and unjustly detribalized the Narragansett.[6] Some historians would disagree, stating that while the process did not have Congress' sanction, it was desired by the remaining 119 tribal members in 1880 as a way to gain access to Rhode Island public schools and to abolish a tribal council that had squandered the tribe's holdings.[7] Congress did not approve what essentially was a unilateral action by the Rhode Island state government.

The Narragansett tribe re-asserted its right to both land and sovereignty in the 1970s. In 1974, Congress passed the Rhode Island Indian Claim Settlement Act in an attempt to right this wrong.[8] Congress assigned over 1,800 acres to the Narragansett[9] and began the process of federally recognizing the tribe.[10] In the statute Congress grants Rhode Island full sovereignty over the Narragansett land.[11] The passage of the Indian Gaming Regulatory Act began a new controversy as the Narragansett sought to build a casino, only to be thwarted by the state of Rhode Island's prohibition on gaming and its position that it was the only sovereign.[12] The legal challenges include numerous actors, namely the Narragansett tribe, the state of Rhode Island, the people of Rhode Island through the ballot initiative process, and the federal courts. The ultimate resolution is still in doubt, but the lessons gleaned from a re-established tribe will be useful in resolving future conflicts over tribal sovereignty.

The Narragansett tribe's attempts to fully assert its sovereign rights and establish a casino is at least partially motivated by the success of the Pequot tribe of Connecticut. The Pequots, from a reservation nearly extinguished by neglect and due to the research of a charismatic and driven leader, were able to build one of the largest and most successful casinos in the world.[13] The Pequots did not re-establish their tribe until 1983, when President Reagan granted them federal recognition.[14] However, their success bred controversy,

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6. Narragansett Tribe Online, Illegal Detribalization, *at* http://www.narragansett-tribe.org/history.htm (last visited Sept. 6, 2005).

7. Boissevain, *supra* note 5, at 232-33.

8. 25 U.S.C. § 1708 (2000).

9. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 798 (D.R.I. 1993).

10. 25 U.S.C. § 1708 (2000).

11. *Id.*

12. Narragansett Casino Proposal, *at* http://harrahsnarragansettcasino.com/west_warwick_casino_proposal.php (last visited Jan. 5, 2005).

13. Kathryn Rand, *There Are No Pequots on the Plains*, 5 CHAP. L. REV. 47, 63 (2002).

14. *Id.* at 61-62.

which may explain Rhode Island's stiff opposition to the Narragansett casino. As Kathryn Rand points out, the Pequots are an infinitely small tribe that is heavily integrated into the surrounding culture.[15] Rand writes:

> Perhaps predictably, much of the criticism attacked the Pequots themselves: the tribe was too successful, and many of its members did not fit popular conceptions of Native Americans. Donald Trump expressed the judgment of many when he stated that the Pequots "don't look like Indians to me and they don't look like Indians to Indians."[16]

The owners of the largest casino in the Western Hemisphere have attracted great attention to both the Indian gaming issue and the existence and re-establishment of defunct tribal sovereignties.

The Narragansett base their claim on the Indian Gaming Act and rights inherent to a federal sovereign tribe against a state government. The Rhode Island Settlement Act appears to block any and all legal relief, as Rhode Island purportedly has full sovereignty.[17] The relevant section of the Rhode Island Settlement Act states, "[T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."[18] Furthermore, the Tribe agreed to Rhode Island's sovereignty in the 1978 Joint Memo of Understanding between the federal government, Rhode Island, and the Tribe.[19] The joint memo states:

> That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.[20]

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15. *Id.* at 61.
16. *Id.* at 64.
17. 25 U.S.C. § 1708 (2000).
18. *Id.*
19. Joint Memorandum of Understanding, by Rhode Island, Town of Charlestown, Narragansett Tibe of Indians and Private Land Holders (1978), *quoted in* Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 799 n.3 (D.R.I. 1993), *aff'd, modified*, 19 F.3d 685 (1st Cir. 1994), *superceded by statute*, Rhode Island Indian Claims Settlement Act Amendment, Pub. L. No. 104-208, 110 Stat. 3008-227, *as recognized in* Narragansett Indian Tribe v. Nat'l Gaming Comm'n, 158 F.3d 1335, 1338 (D.C. Cir. 1998).
20. *Id.*

Therefore, it seems clear from the statutes and the actual settlement that Rhode Island has full sovereignty over Narragansett lands. However, the Narragansett would see success in their initial legal challenges.[21]

The Narragansett Indian Tribe's re-establishment required implementing legislation from the state of Rhode Island. In 1978, the Rhode Island legislature passed the Narragansett Indian Land Management Corporation Act to implement Congressional directives and the settlement with the Narragansett tribe.[22] The Legislature defined the Narragansett as an Indian corporation, "[T]he Rhode Island non-business corporation known as the Narragansett Tribe of Indians."[23] The purpose of the corporation was to hold in trust the land conveyed by the state of Rhode Island for the benefit of the tribal membership.[24] The statute clearly provided for criminal and civil jurisdiction by the state of Rhode Island over all tribal lands.[25] On its face, the statute seems to preclude a casino or any other business venture contrary to the laws of the state of Rhode Island.

In addition, the statute notes that the Narragansett Indian Corporation is to be a temporary entity, one that will expire after receiving federal recognition as an Indian tribe.[26] The statute also notes that such recognition will create, "an Indian tribe with inherent rights, powers, and responsibilities possessed by Indian tribes in the United States."[27] The statute is silent as to any continuing power of civil or criminal jurisdiction over Narragansett lands after federal recognition.[28] Rhode Island's executive branch historically contends that such jurisdiction continues to this day. The Tribe disagrees. Its attorney, as quoted in the *American Indian Report*, states that the Settlement Act was passed when the tribe was just a corporation, and its subsequent recognition by the Federal government means that it now has full sovereign rights. In other words, Rhode Island no longer has any jurisdiction over the Tribe.[29] In July 2003, Governor Carcieri ordered state police to raid a convenience store on the Narragansett

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21. *See e.g.*, Rhode Island v. Narrangansett Tribe of Indians, 816 F. Supp. 796 (D.R.I. 1993).

22. R.I. GEN. LAWS § 37-18-1 (2004).

23. *Id.* § 37-18-2(e).

24. *Id.* § 37-18-4.

25. *Id.* § 37-18-11.

26. *Id.*

27. *Id.*

28. *Id.*

29. Ben Welch, *Shut Down; Narragansett's Quest to Regain Sovereignty Blocked by Courts and Congress*, AM. INDIAN REP., Sept. 2003, at 8-9.

reservation that did not collect the state's tobacco taxes.[30] The ambiguity, as resolved by the Federal courts, seems to favor the Narragansett. However, further Congressional action and new arguments from the state of Rhode Island continue to thwart the Narragansett development plans.[31]

Effect of Federal Recognition

Federal Recognition of the Narragansett occurred in 1983.[32] The Narragansett view is that upon recognition by the Secretary of the Interior and the Rhode Island Secretary of State, the tribe would be a fully sovereign entity within federal framework like other tribes. Upon federal recognition, the Narragansett Indian Land Management Corporation dissolved and the settlement lands transferred title to the new Narragansett tribe.[33] In 1988, the Narragansett tribe transferred title to its lands to the federal government to be held in trust by the Secretary of the Interior.[34] In 1991, on land purchased by the Tribe and transferred to a trust held by the Secretary of the Interior, the Narragansett sought to build a public housing complex without permit or zoning approval from the state of Rhode Island or the town of Charlestown.[35] The state of Rhode Island specifically objected that if such acquired land was held to be outside of the jurisdiction of state law, the land could be used for gambling as authorized by the Indian Gaming Regulatory Act.[36] Distrust between the tribe and the state became readily apparent at this point. In a motion for summary judgment, Rhode Island argued that the authority of the Department of the Interior to acquire lands under trust authority only applied to tribes that were recognized in 1934, the date of the passage of the Indian Reorganization Act of 1934.[37] Such a holding would further Rhode Island's argument of sovereignty over Narragansett lands. The Indian Reorganization Act of 1934 states:

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30. *Id.*

31. *Id.*

32. Carcieri v. Norton, 290 F. Supp. 2d 167, 170 (D.R.I. 2003) (citing Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983)).

33. *Id.* (citing R.I. GEN. LAWS §§ 37-18-12, 13, 14 (2004)).

34. *Id.* (citing 25 U.S.C. § 465 (2000)).

35. *Id.* at 170-71 (citing Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co., 89 F.3d 908, 912 (1st Cir. 1996)).

36. *Id.* at 172.

37. *Id.* at 179 (citing 25 U.S.C. § 465 (2000)).

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands — within or without existing reservations . . . for the purpose of providing land for Indians.[38]

The statute makes no reference to the Secretary's ability to acquire trust lands only for those tribes presently recognized by the United States. The federal district court correctly ruled that the plain language of the statute contains no such limitation and should not be read into the statute.[39] The Tribe also has a history dating from 1614 and was in existence at the time of the passage of the Indian Reorganization Act.[40] Therefore, federal recognition of a tribe's status empowers it with the same status as other federally recognized Indian tribes. This would again seem to upset the balance established by the Rhode Island Settlement Act and its grant of sovereignty to the state of Rhode Island.[41] However, because the Rhode Island Settlement Act "[d]oes not expressly preclude or otherwise restrict the acceptance of non-settlement lands into trust for the benefit of the Narragansetts" it is assumed to be acceptable.[42] In a narrow holding, the court ruled that the state of Rhode Island's sovereignty may be limited by subsequent purchases of land by the Narragansett, but it still may exercise sovereignty over the original settlement lands as outlined in the Rhode Island Settlement Act. The court writes:

> As previously discussed, the Settlement Act was limited in scope to a resolution of the Narragansetts' claims of aboriginal right to lands. It did no more. Specifically, the enactment does not restrict the tribe's ability to exercise its sovereignty over lands that it subsequently acquires by purchase.[43]

Although this case applies to land purchased for a housing project and public funding, the same principle applies to the Narragansett casino proposal. The Narragansett, with approval of the Secretary of the Interior, may purchase lands in Rhode Island over which the state will have no jurisdiction. All court action since federal recognition holds that the Narragansett sovereignty should

38. 25 U.S.C. § 465 (2000).
39. *Carcieri*, 290 F. Supp. 2d at 179.
40. *Id.* at 181.
41. *Id.*
42. *Id.* at 182.
43. *Id.* at 190.

be the same as that of all federally recognized tribes, regardless of the Rhode Island Indian Claims Settlement Act.

Narragansett Court Arguments

The Narragansett moved quickly to take advantage of the passage of the Indian Gaming Regulatory Act of 1988. The Act allows sovereign Indian tribes to operate casinos provided that they have come to an agreement with the relevant state government via a compact. Should a state refuse to negotiate, the Indian Gaming Regulatory Act creates a right of action for the prospective gaming tribe to sue the state government.[44] Rhode Island rebuffed the Narragansett's request to negotiate. Citing their full sovereignty, the tribe promptly filed suit in federal court. The district court refused to rule upon most of the arguments for sovereignty, as "[i]t would be premature for this Court to analyze the jurisdiction of the State and Town over the settlement lands based upon hypothetical conflicts in the future."[45] The court instead ruled on the only issue with a present conflict, the Indian Gaming Regulatory Act and the Rhode Island Settlement Act.

Judge Pettine ruled, "[t]hus, I conclude that the Narragansett Tribe 'exercises governmental power' and possesses 'jurisdiction' over their lands, as those terms are used in the above-cited sections of the Gaming Act."[46] Rhode Island lost all their arguments due to Judge Pettine's belief that the Indian Gaming Regulatory Act superceded the Rhode Island Indian Claims Act because it would further the Congressional policy of setting, "in motion Indian gaming around the country within a carefully structured three-tiered gaming classification system."[47] Congress did not include any tribe-specific exclusions in the Indian Gaming Regulatory Act.[48] Therefore, any previous statutory authority which denied gaming sovereignty to any tribe was implicitly repealed.[49] When interpreting conflicting and ambiguous statutes, the Federal District Court of Rhode Island looked to the rule in *Berthold Reservation*.[50] The Supreme Court in *Berthold* ruled, "[i]t is a settled principle of statutory construction that statutes passed for the benefit of dependent

44. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000).
45. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 800 (D.R.I. 1993).
46. *Id.* at 806.
47. *Id.*
48. *Id.* at 803.
49. *Id.*
50. *Id.* (citing Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984)).

Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians."[51] The Tribe's judicial success was to be quickly dealt with by Congress, however, it is useful to see why Judge Pettine found Rhode Island's arguments against sovereignty to be unpersuasive.

The state of Rhode Island conceded that the Gaming Act superceded all past state jurisdiction over tribal gaming. Several courts construed the Indian Gaming Regulatory Act as doing so, including the Tenth Circuit in *Keetoowah Band of Cherokee Indians v. Oklahoma*.[52] However, Rhode Island strongly argued that Congress specifically intended to leave the Rhode Island lands out of the new gaming structure. Rhode Island cited legislative history including a question from their own Senator, Claiborne Pell, to the Chairman of the Select Committee on Indian Affairs. The exchange proceeded as follows:

> Mr. Pell: In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.
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> Mr. Inouye: I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that the protections of the Rhode Island Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.[53]

That legislative history clearly states that the Congress did not intend to revoke Rhode Island's jurisdiction over gaming. However, a specific section of the statute would have exempted Rhode Island and the Narragansett settlement from the Indian Gaming Regulatory Act. Judge Pettine notes, however, that such language was deleted before the bill was passed by the Senate.[54] Such assurances as given by the Committee Chairman to Senator Pell may therefore be an incorrect view of final Congressional intent.

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51. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 149 (1984).

52. United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170 (10th Cir. 1991).

53. 134 CONG. REC. S12,650 (daily ed. Sept. 15, 1988) (statements of Sen. Pell and Sen. Inouye), *quoted in* Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 802-03 (D.R.I. 1993).

54. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 803 (D.R.I. 1993).

Rhode Island also claimed that the Narragansett did not exercise governmental power within their lands as required by the Indian Gaming Regulatory Act. The Act states that "Indian lands" are defined as:

> 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.[55]

Rhode Island asserted that because it exercised criminal and civil jurisdiction, the Narragansett did not exercise governmental power as defined in the Indian Gaming Regulatory Act. The Rhode Island federal district court also rejected this argument because of evidence of governmental power presented by the Narragansett.

In his opinion, Judge Pettine cited several actions by the federal government that could be construed as recognizing Narragansett governmental authority. First, the Narragansett was recognized as a tribe by the federal government in 1983.[56] Also, several federal agencies have treated the Narragansett as a tribal sovereign entity.[57] In 1987, the Department of Housing and Urban Development accredited the Narragansett Indian Housing Authority to be eligible to take part in Indian housing programs.[58] The Environmental Protection Agency certified that the Tribe met the criteria to be treated as a state under the Clean Water Act.[59] Also, Judge Pettine noted that the 1st Circuit recently held that the Narragansett tribe possesses common law sovereign immunity.[60] All of these federal actions taken together were enough for Judge Pettine to conclude that the Narragansett exercised governmental authority over their lands.[61] The Judge, however, limited his ruling to just the specifics of Indian gaming and not to greater questions of civil or criminal jurisdiction. The Narragansett victory on gaming sovereignty was short lived.

Three years after the Rhode Island district court's ruling and a breakdown of negotiations with the state of Rhode Island, Congress amended section 1708

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55. 25 U.S.C. § 2703(4)(b) (2000).

56. Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177-05, 6177-78 (Feb. 10, 1983).

57. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796, 805 (D.R.I. 1993).

58. *Id.* at 805.

59. *Id.*

60. *Id.* (citing Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94 (D.R.I. 1992), *aff'd*, 984 F.2d 14 (1st Cir. 1993)).

61. *Id.* at 805-06.

of the Rhode Island Indian Claims Act. The amended section of the statute now reads:

> § 1708. Applicability of State law; treatment of settlement lands under the Indian Gaming Regulatory Act
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> (a) In general. Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.
>
> (b) Treatment of settlement lands under the Indian Gaming Regulatory Act. For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et. seq.), settlement lands shall not be treated as Indian lands.[62]

Congress acted to reverse Judge Pettine's ruling. The Narragansett were left with little recourse and began a campaign to change Rhode Island law including a final and novel legal argument. The Tribe's current position is that since it was merely a corporate entity and not a federally recognized tribe at the time of the passage of the 1978 Rhode Island Claims Act, the Act no longer has any application to them.[63] Judge Pettine's analysis of federal status and its grant of governmental authority shows that this claim may have legal merit.

The 1st Circuit affirmed all aspects of Judge Pettine's ruling in the district court,[64] and the United States Supreme Court denied certiorari.[65] The controversy, however, did not end. The Narragansett and the governor of Rhode Island did negotiate a gaming compact.[66] However, the compact required approval at the ballot box by the citizens of Rhode Island, where it failed in November 1994.[67] The governor who negotiated the compact was simultaneously voted out of office and replaced with an anti-gambling candidate.[68] The dispute continued due to the resistance from both the people and government of the state of Rhode Island. In the intervening ten years,

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62. 25 U.S.C. § 1708 (2000).

63. Ben Welch, *Shut Down: Narragansett's Quest to Regain Sovereignty Blocked by Courts and Congress*, AM. INDIAN REP., Sept. 2003, at 8-9.

64. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796 (D.R.I. 1993), *aff'd*, 19 F.3d 685 (1st Cir. 1994).

65. Rhode Island v. Narragansett Tribe of Indians, 513 U.S. 919 (1994).

66. Keith David Bilezerian. *Ante Up or Fold: States Attempt to Play Their Hand While Indian Casinos Cash In*, 29 NEW ENG. L. REV. 463, 506-08 (1995).

67. *Id.* at 507.

68. *Id.*

various lawsuits, threats, and counterproposals have been pursued by both the Narragansett and Rhode Island.[69]

In the 2004 legislative session the Rhode Island General Assembly authorized yet another ballot initiative to legalize gaming and to authorize the Narragansett casino, this time to be operated by Harrah's Entertainment in the town of West Warwick, not on the Narragansett reservation.[70] The ballot question itself was to be innocuous and straightforward: "Shall there be a casino in the Town of West Warwick operated by an Affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?"[71] The proposal again caused great controversy and passed over the current governor's veto.[72] The Legislature's proposal included a tax on gross gambling revenues to begin at 25% and increase to 40% if the casino's revenue ever exceeded $900 million.[73] The bill also authorized new gaming at both racetracks in the state, totally unrelated to the Narragansett.[74] Governor Carcieri filed a request to have the Supreme Court of Rhode Island hold the proposed initiative unconstitutional in an advisory opinion. The Rhode Island Gaming Act itself contained a provision that an unfavorable opinion from the Rhode Island Supreme Court would not cancel the referendum thereby attempting to evade judicial review.[75]

The Rhode Island Supreme Court's advisory opinion destroyed the chances for the Narragansett casino for the next year. Governor Carcieri and Rhode Island's Attorney General specifically objected to the constitutionality of the following provision:

> Any decision or act by the general assembly, the secretary of state or the Commission in (I) phrasing or submitting the statewide question, (ii) determining whether a statement of intent is in compliance with the filing and other provisions of this chapter, or (iii) awarding the single casino license, shall be final and binding and shall not be reviewable in any court on any grounds except corruption or fraud."[76]

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69. *See generally* Katie Mulvaney, *Rules Keep Changing in Narragansett's Fight for a Casino*, PROVIDENCE J., Aug. 5, 2004, at A-1.

70. R.I. GEN. LAWS § 41-9.1-9 (2004).

71. *Id.*

72. Scott Mayerowitz, *Casino Vote Still on Track*, PROVIDENCE J., July 24, 2004, at A-1.

73. R.I. GEN. LAWS § 41-9.1.-12 (2004).

74. *Id.*

75. Mayerowitz, *supra* note 72.

76. R.I. GEN. LAWS § 41-9.1-9(f) (2004).

The General Assembly, in consultation with the Narragansett, sought to remove the casino license from the possibility of judicial review.[77] The Rhode Island Supreme Court noted that the United States Supreme Court "has gone to great lengths to give a narrow construction to statutes that appear to restrict the federal judiciary's ability to hear constitutional questions."[78] Further, the Act must also conform to the Rhode Island Constitution. The Rhode Island Supreme Court wrote:

> Any attempt by the General Assembly to determine for itself whether a law is inconsistent with the constitution is an assumption of this Court's right and obligation under the constitution. This assumption of judicial power disrupts the judiciary as a whole in performing its duties, and serves no legitimate purpose in effectuating governmental policy."[79]

The separation of powers issue was natural for a court to latch onto, especially when its own powers were being curtailed. Both the state legislature and the Narragansett sought to remove the casino license from judicial review for the same reason: the Rhode Island Constitution's prohibition of a lottery.[80]

The Rhode Island Supreme Court also attacked the constitutionality of the Casino Act on the basis of its status as a prohibited lottery. Rhode Island case law is replete with examples of interpretations of the constitutional ban on lotteries. The Constitution of Rhode Island states, "All lotteries shall be prohibited in the state except lotteries operated by the state . . . ."[81] The *Roberts* case defines a lottery as "proscribed in either a state constitution or statute is defined as a scheme or a plan having three essential elements: consideration, chance, and prize."[82] Rhode Island Courts interpret a lottery to be any game where chance plays a part in the distribution of prizes, regardless of whether skill is a part of the game.[83] Therefore, any casino game including blackjack, poker, or even bingo would be a prohibited lottery under Rhode Island constitutional law unless operated by the state or allowed by the General

77. *Id.*

78. *In re* Advisory Opinion to the Governor, 856 A.2d 320, 326 (R.I. 2004).

79. *Id.*

80. R.I. CONST. art. VI, § 15.

81. *Id.*

82. Roberts v. Commc'ns Inv. Club of Woonsocket, 431 A.2d 1206, 1211 (R.I. 1981) (citing Goodwill Adver. Co. v. Elmwood Amusement Corp., 133 A.2d 644, 647 (R.I. 1957)).

83. *Id.*

Assembly.[84] While disputed by the Narragansett and members of the General Assembly, the Supreme Court concluded that "even without an explicit authorization to carry on lotteries, it is clear that the proposed casino in that case would have been deemed a 'lottery operation facility' based on the overall nature of the operation and the types of games to be conducted."[85] A simple Act of the General Assembly, even if approved by the people of Rhode Island, cannot override a provision of the Rhode Island Constitution.[86] The Court continued with harsh words for the leaders of the General Assembly when they stated that the Speaker and President Pro-Tempore of the Senate argued that the Casino Act "does not mean what it says."[87] It seems that the Rhode Island Assembly likely knew that the Act was unconstitutional as written, yet it still submitted it for a vote by the people.

The Narragansett casino proposal failed again after a decade of litigation, a vote of the people, three gubernatorial administrations, and numerous acts by the General Assembly. The Rhode Island Supreme Court issued the final blow with their advisory opinion which allowed Governor Carcieri to stop the forthcoming referendum.[88] However, the ultimate problem continues to be the will of the people. Three governors have opposed the casino, one referendum failed, and the state legislature, while eager for more revenue, also remains hostile. All three components are elected by the people of Rhode Island who continually state that they do not want a Las Vegas-style casino regardless of its placement on the Narragansett lands or near an interstate highway in Warwick, the state's second largest city. The failure of the tribe and the people of Rhode Island to come to an agreement is indicative of the clash between sovereignties. Rhode Island represents the popular sovereignty of the people of Rhode Island and the tribe represents a re-established sovereignty. After the state's latest confrontation with the Narragansett, Governor Carcieri issued a press release stating:

> I remain committed to trying to find a solution to the economic problems confronting the Narragansett Indians. I have met with the Chief on several occasions. I instructed Michael McMahon and his economic development team to devise an action plan with specific initiatives to enhance the overall economic condition of the tribe.
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> We will continue our efforts in this regard.

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84. R.I. CONST. art. VI, § 15.
85. *In re* Advisory Opinion to the Governor, 856 A.2d at 329.
86. R.I. CONST. art. VI, § 1.
87. *In re* Advisory Opinion to the Governor, 856 A.2d at 330.
88. *Id.*

> I am equally committed, however, that casino gambling is NOT one of these initiatives. I strongly believe that a casino is not the right course for the tribe or the state.[89]

Were the Narragansett claim for full sovereignty stronger and the people of Rhode Island less vehement in their opposition, the tribal jurisdiction would trump and the casino would already be standing, much like the Pequot Foxwoods Casino in Connecticut.[90] Nevertheless, the conflict is healthy. The failure of the Narragansett proposal proves that the legal principle of re-established tribal sovereignty is strong enough to defend itself in tribunals and the halls of Congress. Its failure in this instance was never a foregone conclusion. Gambling proponents will return to the next legislative session, and Rhode Island will likely come to some new arrangement with the current governor, or perhaps with the next administration. While the Narragansett no longer have the right to unilaterally establish a casino on their settlement lands because of the recent amendments by Congress, their tribal sovereignty is still intact.[91] The ballot initiative with Rhode Island may one day succeed, thereby beginning a new trend of cooperative sovereignty that will be mutually beneficial to both the people of Rhode Island and the Narragansett tribe.

89. Governor Carcieri's Statement on Narragansett Indian Smoke Shop, (July 15, 2003), *available at* http://www.ri.gov/news/pr.php?ID=31.

90. *See generally* Rand, *supra* note 13, at 64 (describing the success of the Pequot Foxwoods Resort Casino).

91. 25 U.S.C. § 1708 (2000).