**Distributive Justice in Indian Country:**

**Should Indian Tribes Share Casino Revenues?** [[1]](#footnote-1)

Sarah S. Works, J.D. [[2]](#footnote-2)

ABSTRACT: *This case examines the philosophical concept of distributive justice and its role in debates about whether or not revenue from Native American casino operations should be shared, with whom, and why. This case illustrates the complexities associated with questions of distributive justice within Indian Country. Specifically, this case presents issues raised in tribal-state negotiations regarding whether tribal gaming revenues can or should be shared with either State governments or other Indian tribes.*

1. Distributive Justice and the Concept of Sharing

The topic of distributive justice concerns the way that goods and services are distributed among individuals and groups in society. When we think about the different types of principles (or values) that could be used to divide resources among people, we are engaging in a philosophical conversation. In this sense, philosophical discussions are an activity with room for many perspectives and a wide array of theories and opinions.

One of the most famous American philosophers to focus on the topic of distributive justice was John Rawls (1921-2002). In A Theory of Justice (1971), Rawls argued in favor of an economic and social theory known as “Justice as Fairness.” Under this theory, each person has an equal right to basic liberties. In addition, “[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged…, and (b) attached to offices and positions open to all under conditions of air equality of opportunity.” (Rawls 1971).

The part of Rawls’ theory that addresses economic inequalities is often referred to as the “Difference Principle.” The Difference Principle is intended to be a guide that will help determine when it is acceptable - from a moral perspective - for the economy to be structured in a manner that allows some people to have more money and resources than other people. Similarly, the Difference Principle serves as a guide for understanding when it is morally permissible for some people to have greater work obligations or greater tax burdens than others.

The core mandate of the Difference Principle is this: an unequal allocation of economic benefits and burdens is acceptable so long as the economic system as a whole serves to benefit the least advantaged people in society. In other words, economic differences in wealth among people are justified only if the economic system as a whole functions to benefit people with the least resources.

Rawls’ approach to issues of distributive justice can be seen in contrast to other famous theories of distributive justice. Marxism, for example, focuses on a preference for common ownership of manufacturing resources by the people who use them, and argues that it is bad for society when only a small number of people profit from the labor of workers. Under a philosophical theory referred to as strict egalitarianism, it is argued that all members of society should have an exactly equal amount of resources. By contrast, libertarian theory argues that each individual has the absolute right to earn whatever she is able to earn through the use of her own talents and efforts.

In addition to these foundational theories concerning distributive justice, additional types of thinking have come into philosophical debates to question and analyze how each theory of distributive justice would impact particular groups of people. Feminist studies, for example, aim to evaluate and analyze the impact of economic systems on women, and sometimes also children or families. Similarly, critical race studies explore the impact of economic systems on particular economic groups.

While there is no one perfect path to issues of economic justice and fairness, this spectrum of theories and ideas helps guide the evaluation of economic systems from a variety of perspectives. For this reason, moral questions about sharing economic resources in society can be quite complicated. The ultimate answer for each particular thinker will depend in large part on which philosophical theory (or theories) each thinker believes to be true.

Thus, the activity of philosophical debate about economic justice may have many destinations, and is sure to cause each participant in the debate to re-think and refine her own beliefs by listening to others and considering what may be accurate or inaccurate in each particular set of premises and conclusions. From a philosophical perspective, it is important to think carefully about both ideas you do agree with and ideas you do not agree with. By examining multiple perspectives in a philosophical debate, the debate itself grows in strength.

With regard to Indian gaming, unique considerations come into play when thinking about whether – from a moral perspective – Indian tribes should share casino revenue with anyone. Further, if tribes should share revenue, would it be better for a tribe to share casino revenue with state governments or with other Indian tribal governments?

1. Development of Indian Gaming Regulation in the United States

American federalism is best understood as a three-part system consisting of the federal government, the State governments, and the Indian tribal governments. Under this system of government, Indian tribal governments are sovereign entities that are generally subject to federal law, but independent with regard to State law and the basic governance of communities within Indian Reservations.

The history of Native American casino development in the United States has involved tremendous battles for jurisdiction between Indian tribal governments and state governments. These battles for jurisdiction are tied to laws regarding tribal sovereignty and the ability of tribal governments to make their own laws and be ruled by those laws. State governments have proven hungry for both the power to regulate gaming activity on tribal lands, and for a share of money generated by tribes through the operation of Native American casinos.

As State governments developed and operated state lotteries to generate money for governmental operations and programs in the 1970’s and 1980’s, Indian tribal governments also began to develop gaming operations that could help pay for governmental operations and programs needed in impoverished Indian communities. Among these tribal operations were two bingo parlors and a poker room operated by two small tribes with reservation lands near Palm Springs, California.[[3]](#footnote-3)

The State of California wanted to shut down these tribal operations, arguing in court that the tribes were not properly following California state law in their tribal bingo operations, and that California state law prohibited the card room operations altogether. This case eventually made its way to the United States Supreme Court, which held in 1987 that the State of California could not regulate the tribal gaming operations at issue. The court reasoned that California State law did not prohibit gambling as a criminal act – and in fact encouraged it via the state lottery – so the State had no regulatory power over the tribal bingo operations and poker room. California v. Cabazon Band of Mission Indians (1987).

Although the Court’s ruling forbid State governments from regulating Indian gaming activities on tribal lands, it upheld the federal government’s ability to exercise its plenary power[[4]](#footnote-4) over Indian tribes by passing a federal law to govern Indian gaming activities. Because the Supreme Court ruled that only federal law could regulate Indian gaming, the State governments lobbied the United States Congress to give State governments a role in Indian gaming under federal law.

The resulting federal law, passed in 1988, is known as the Indian Gaming Regulatory Act (or, “IGRA”). IGRA established three classes of Indian gaming activity, with a different type of regulation for each type of activity.

“Class I” games are defined under federal law to include traditional native games and social games conducted among tribal members for minimal prizes. Federal law directs tribes to regulate Class I games by themselves, with no assistance from federal or state regulators.

IGRA defines “Class II” games to include games like bingo and card games that are played directly against other players, without the use of a house bank to hold bets and pay winnings.[[5]](#footnote-5) Federal law directs tribes to regulate Class II games in accordance with a tribal gaming ordinance that receives federal approval. Federal approval for tribal gaming ordinances is granted by the National Indian Gaming Commission, a federal government entity that also retains a certain amount of oversight authority for the operation of Class II games on tribal lands.

IGRA defines Class III games in a broad manner, including all forms of gaming that are not Class I games and are not Class II games. Games such as slot machines, craps, roulette and blackjack fall into this category. Federal law requires tribal governments and State governments to create a tribal-state gaming compact to govern the regulation of Class III games. *Indian Gaming Regulatory Act* (1988).

 Even though the United States Supreme Court ruled that State governments are not necessarily entitled to a role in the regulation of Indian gaming, the federal government chose to give State governments a limited role with regard to Class III gaming through IGRA. IGRA sets forth several requirements for these tribal-state compacts, and states that the compact negotiated between the State government and the tribal government may address topics such as the application of civil and criminal laws of both the tribe and the State, standards and licensing requirements for the operation of gaming facilities, remedies for breach of the compact by either the State or the tribe, and payments to be made from the tribe to the State for costs that the State incurs in carrying out its regulatory work agreed to by both parties under the compact. *Indian Gaming Regulatory Act* (1988).

Importantly, the terms of IGRA limit State demands for payments to the costs actually incurred by the State government in carrying out the State’s regulatory functions agreed to in the tribal-state compact. Other than such payments, IGRA gives State governments no “authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.” Further, “[n]o State may refuse to enter into the negotiations” for a tribal-state gaming compact “based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.” *Indian Gaming Regulatory Act* (1988).

1. Growth of State Government Demands for “Revenue Sharing”

Despite this prohibition against States demanding a share of tribe’s gaming revenues beyond actual regulatory costs, many States have made exactly that type of demand. Even though federal law clearly states that Indian tribal governments are under no obligation to share gaming revenues with State governments, State governments routinely try to circumvent that federal law and push tribal governments to either give a share of tribal gaming revenues to the State government or face years of litigation (and lost revenue) trying to enforce the federal law in court.

In California, for example, the State government has a long history of requiring tribes to give a percentage of casino revenues to the State’s general fund in exchange for favorable terms in a tribal-state compact. The favorable terms offered to tribes by California in exchange for these payments to the State government have included terms such as an increase in the number of slot machines allowed in each casino and the promise that the State government will not allow competition by non-Indian casino operations.

In a particularly blatant example, the State of California demanded that the Rincon Band of Luiseno Indians located near San Diego pay a percentage of its casino revenue to the State’s general fund in order for the State to agree to an increase in the number of slot machines that would be operated at the tribe’s casino. According to the State’s calculation, the tribe would be able to increase its gross revenue by two million dollars, while providing the State government with thirty eight million dollars for the State general fund through the addition of more slot machines to the tribe’s casino. Rincon Band of Luiseno Indians v Schwarzenegger (2010).

After the tribe objected to the State’s demands, the Ninth Circuit Court of Appeals told the State that it could not make such a blatant request for payments into the State’s general fund because that type of request for revenue sharing amounts to a State tax on the tribe, which violates IGRA. This type of payment into the State’s general fund is different than two other types of permissible payments made by gaming tribes in California.

The two types of lawful payments made by gaming tribes in California go into (1) the Revenue Sharing Trust Fund (“RSTF”); and (2) the Special Distribution Fund (“SDF”). These payments have been upheld by the federal court, under the theory that the development of these two funds were primarily motivated by a desire to promote tribal interests. In re Indian Gaming Related Cases (2003).

Money deposited by gaming tribes into the RSTF is redistributed to California tribes that either choose not to engage in large scale gaming operations, or are unable to do so due to the location of remote reservation lands or other factors. Thus, the RSTF can be seen as a type of revenue sharing with other tribes. The concept of tribes sharing revenue with other tribes is also followed in Washington State and Arizona, where tribal-state gaming compacts permit some gaming tribes to increase the number of slot machines in their casinos in exchange for making payments to other tribes through inter-tribal leases of slot machine allocations.[[6]](#footnote-6)

Money deposited by gaming tribes into the SDF, by contrast, are used for the following purposes:

(a) grants for programs designed to address gambling addiction;

(b) grants for the support of state and local government agencies impacted by tribal gaming;

(c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact;

(d) payment of shortfalls that may occur in the RSTF; and

(e) “any other purposes specified by the legislature.

Rincon Band of Luiseno Indians v Schwarzenegger (2010).

The Ninth Circuit Court of Appeals ruled that the SDF is permissible under IGRA “because all uses of SDF funds were earmarked for gaming-related purposes.” The Court determined that IGRA allowed the RSTF funds because, “by redistributing gaming funds from gaming to non-gaming tribes, they are entirely consistent with the IGRA goal of using gaming to foster tribal economic development.” In re Indian Gaming Related Cases (2003).

Continued federal court litigation and tribal-state compact negotiations across the United States will keep alive debates about whether tribes can be legally obligated to share gaming revenue with State governments, and under what conditions. Philosophical discussions about distributive justice can help guide these debates in terms of what tribes should do, from a moral and ethical perspective. In addition, tribal traditions regarding the sharing of resources among Native people may encourage more tribes to follow the emerging models for inter-tribal revenue sharing developed in California, Arizona, and Washington State.

*In deciding how to allocate money generated by a tribe’s gaming enterprise, how would you balance the immediate financial needs in the tribal community against the needs of a State government for revenue to support State services and programs? Do the needs of other tribes come into consideration? Why or why not?*

*Under what circumstances would Rawls’ Difference Principle recommend that a gaming tribe share revenue with a State government?*

*Under what circumstances would Rawls’ Difference Principle recommend that a gaming tribe share revenue with another tribe?*

*At what stage in economic development, if ever, does a gaming tribe have a moral obligation to share its gaming revenue with others?*

*What role should Native values (such as a concern for the well-being of family and the tradition of potlatch) have in debates about the best way to share gaming revenues?*

References

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2. Sarah Works is a lawyer and an educator. She is a former shareholder in the law firm of Williams & Works, P.A., and has served as the Attorney General for both the Hualapai Tribe and the Yavapai-Apache Nation. [↑](#footnote-ref-2)
3. The two tribes involved were the Cabazon and Morongo Bands of Mission Indians. [↑](#footnote-ref-3)
4. The United States Congress has the authority under United States law to exercise plenary power, or complete control, over Indian tribes. For this reason, the recognition of tribal sovereignty and tribal powers under United States law is dependent upon, and subject to, such recognition by Congress. [↑](#footnote-ref-4)
5. These games are known as “non-banked” card games. [↑](#footnote-ref-5)
6. In Arizona, for example, tribes have a limited number of slot machines allocated to each tribe in tribal-state gaming compacts. If one tribe wants to use more slot machines than it has in its own allocation, that tribe can pay another tribe for the right to use slot machines out of that second tribe’s allocation. This system, known as a transfer system, allows tribes with thriving gaming enterprises in metropolitan areas to share the wealth from Indian gaming with impoverished tribes in rural locations that do not have the same opportunity to develop successful gaming enterprises due to remote locations and other factors (such as a lack of infrastructure for development). Tribes in Washington State have a similar ability to transfer gaming rights in compliance with tribal-state gaming compacts. “Tribes can jointly establish a trading plan under which tribes in large markets can lease the rights to deploy lottery player terminals from tribes that choose not to use their rights in a facility of their own.” (Taylor 2005). [↑](#footnote-ref-6)