



Defending a State's Constitution Against Gambling

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Legalized Gambling
Baltimore, MD, 2003

I am not here to talk about public policy implications of gambling or whether it is, or is not, a panacea for the economic woes that may beset a particular region. I also don't want to sit up here as some kind of hypocrite or pious fraud and tell you what brought me into this arena was necessarily a passion against gambling. I indeed have patronized racetracks in my lifetime. I have gone to Las Vegas. I've gone into casinos. Fortunately I guess for me, I don't have and maybe this is presumptuous, I could, certainly, listening to some of the previous speakers, line up some day as a compulsive gambler. I don't think I'm afflicted, so I wasn't driven by necessarily some strong moral force against gambling.

However, I have become educated and I won't say that I'll never go into a casino again, but I am much more educated than I was when I was first introduced to this issue, in a legal form, and realized the dark underside of gambling.

As much as all of us who are opposed to the spread of gambling (and certainly the people in this room) there are people that will accuse you of hypocrisy. They will talk and accuse you of being anti-development, anti-jobs. Gambling will be held out as the cure-all, the panacea for some of the economic woes. Why stand in the way because a few people have a problem? You're standing in the way of economic progress for the many. That's the way people will try to frame the political debate.

Fortunately, it's a little easier for lawyers sometimes to talk about that (without the passion of whether it is good or evil) and simply focus on the question of whether it is legal or not. On some of the previous speakers my remarks, to some extent, are going to be a little bit anti-climatic. I feel that I've been preempted by two very articulate presenters ahead of me.

I was particularly interested in Miss Dixon's observation about how gambling gets sold as good public policy because if it is otherwise maybe a little bit of a necessary evil - look we're going to do it for education so it's alright, or we're going to do it for health care. We're going to do it for causes that have apple pie, the American flag and motherhood written all over them. So this is the way gambling gets sold indeed.

The experience in New York is very similar to that. As far back as 1894, our New York State Constitution prohibited gambling completely, and all forms of gambling. But as that constitutional prohibition evolved over the years the first chink in the armor, or so to speak, was an amendment in the 1930's that allowed para mutual wagering on horseracing. We have, as you have, the Preakness and Pimlico, and we have Saratoga. Saratoga is a venue for the rich and the powerful, and the beautiful in a lovely little town about thirty or forty miles north of Albany, New York State's Capitol, where I'm from. It is a beautiful setting, and every year in August it is the rite of summer for them to come to Saratoga. In the 1930's horse racing was officially legalized in New York, provided that sufficient revenue was derived there from to support the operations of government.

Then in the late 60's, following New Hampshire's example, I think they were the pioneer state with respect to a lottery, New York State then carved out a second exception. This exception permitted lotteries again (provided that the lotteries were to be devoted solely to the support of education within the state). Then as you see now again, it's always related to the support of government.

Maybe gambling is a necessary evil, but gambling becomes gaming, some kind of euphemism when the state does it, it's gaming - when a private industry does it, it's gambling. I've never understood the distinction, but in any event, in the late 60's New York amended the constitution to accommodate gambling for education. They also carved out an exception. I made one mistake, in the 50's they also carved out an exception, which they expanded on in the 70's to allow bingo and other "quote" games of chance to again for small, not for proper religious, volunteer firemen, or local rescue squads. Again in the 50's for bingo, and in the 70's it was expanded to include other games of chance.

But once again the way it was sold was - well its okay because it's for a good cause, and if we don't do it, there's always going to be the underworld that's going to do it, organized crime will do it. So if it's going to be done, it's like a sin tax. It's like a vice we can't stop. So if we can't stop, let's regulate it - let's tax it, and let's make some money from it. Let's turn the proceeds over for a good cause. That always gets a lot of traction. I mean no matter how passionate you may feel about it, there are people out there - look at what happened with prohibition. Prohibition was a disaster because it was unrealistic to have a flat-out prohibition.

There may be a lot of you in the audience that disagree with me and I would respect that disagreement, but try to be politically realistic. Sometimes when you go all the way, and you try to be totally purist with respect to it, you may run into a lot of opposition and criticism. Say if you're not realistic about this issue because it's going to go on anyway. If it's going to go on, let's make sure that it's done right, and should be regulated. It's very difficult, there's a lot of tension in that debate. Not everybody's going to agree I'm sure with what is a prevailing

sentiment within this room. But again, rather than try to resolve those with a public policy type of approach, there are certainly legal approaches that are available and are being used across the country to fight the spread of gambling, and certainly while one may justify gambling when the state heavily regulates it and taxes it. When does it become so big, and so large that the exceptions consume the rule?

That's where I think we are headed to in this country which I perceive, and certainly agree with our keynote speaker that it's becoming so big that it's a joke to say, "Well okay, gambling's alright as long as we regulate it, and it's a harmless vice. Harmless vice is an oxymoron. The reason something is a vice is because it causes harm. If it didn't cause harm it wouldn't be a vice to begin with. So what we're seeing now is this proliferation of gambling again being sold on the grounds that it's really for good causes.

Perhaps one of the major developments that I'm sure you're all aware of is the spread of Indian casino gaming. Which again I attribute in part to a collective guilt on the part of our country with respect to the sins and the evils that may have been visited upon the Native American population in the past. If we're objective about our own history we can't deny it. Two wrongs don't make a right. One of the problems is that whatever the sins, and there are many, of discrimination and ill treatment with respect to our Native American population over the first two centuries of our history, the attempt now to sort-of bring our Native American population up by the bootstraps is to encourage economic self-sufficiency. One of the ways it was perceived to do this is to allow Indians (Native Americans) to engage in gambling.

In some respects, the Federal Indian Gaming Regulatory Act was a vehicle by which Native American populations, on their reservations could have, and even off the reservations under the act, could establish casinos provided they enter into a compact with the state in which they were located to allow such gaming. This is what brought me into this debate, and into legal battles that have been waged in New York with respect to this issue.

After the Federal Indian Gaming Regulatory Act was enacted by Congress in the late 1980's allowing, as I said, sophisticated class three Las Vegas style gambling casinos, to be situated in states where gambling of any kind was otherwise permitted. The state again was looking for some kind of way to generate additional revenue. I think some of the state politicians saw this as a vehicle to do it. In any event, in 1993, then Governor Cuomo entered into a compact with the St. Regis Mohawk Tribe (which has a reservation way up in northern New York right on the Canadian border) which purported to allow the tribe to establish the first major casino in the state of New York. Simultaneously, Governor Cuomo also entered into a compact with the Oneida Tribe to establish a casino in central New York, off the New York State thruway. That is actually the first casino that became operational, and the St. Regis Mohawks was

the second. Governor Cuomo did this without any authorization whatsoever from New York State Legislature. One of the provisions, as I mentioned, our constitution prohibits gambling outright, but then carves out four exceptions. But none of which we argue, accommodated the type of gambling the governor had entered into pursuant to the contract with the tribe.

Nobody in those days did anything about it in 1993. Finally in about 1999 when the St. Regis Mohawk Casino compact had been executed (it took a long time for that particular tribe to get up and running) - in 1999 just after they opened they decided that the compact didn't allow for them to operate so called electronic gaming devices: electronic slot machines, video lottery terminals, etc. So they approached the Governor and said, "If we're really going to do well with this we're going (now it's Governor Pataki by the way, because Governor Cuomo is now out of office) we want to expand the gambling." The Governor said, "Well okay, that's great, but if you do we want a piece of the action."

There's a provision in the Federal Indian Gaming Regulatory Act that some construe was saying, the state can't tax the tribe unless (whatever their interpretation was) but they can if they give the tribe the exclusive right and not allow anybody else to do that particular type of gaming, then they're authorized to tax. So this was a way for the state to figure out a way to obtain additional revenue by authorizing this addition.

By that time the forces in New York had coalesced, against gambling, and they approached me ultimately through another lawyer in Albany, to see if I would become involved in litigation to challenge the validity of this particular compact. I really knew very little about Indian gaming or about the gambling industry, but I had a quick education about it.

The reason I think I was approached is because I do, do a lot of litigation against the state albeit in other contexts. So I became immediately fascinated by the case. I found it to be economically or intellectually stimulating. Not necessarily economically rewarding I guess you could say, no matter what you think of lawyers. In any event it was a very interesting challenge, and we have been so far (speaker knocks on wood) pretty successful. I don't mean to suggest to you that we are over the hump at all.

When we brought the litigation in 1999, we brought it in state court challenging the governor's authority to enter into such a compact; which had brought public policy implication without any legislative authorization, and in violation of the State Constitution which prohibits gambling. So we really had two constitutional questions that we raised.

Number one, the governor couldn't do without legislative authority, and number two, even if he had legislative authority it was still unconstitutional.

One of the interesting arguments that was interposed in defense was that, wait a minute, the state court can't make this determination without the Indians. The

effective Indian tribes being a party to the litigation because they're going to be affected by the outcome. That argument certainly has a little bit of traction in common sense and fairness. Then wait minute - tribes rights are going to be affected, but they're not at the table. It's not fair to the Indian tribes. The problem however, is that no state court in our country can get a tribe in the state court because they are (they enjoy what is called) quasi sovereign status.

They're not exactly like Britain, and France and Germany as foreign countries, but they are recognized as quote "nation within a nation" and they enjoy some of the attributes of sovereign immunity. We could not sue in state court, Great Britain, or France or Germany, nor can we sue an Indian tribe in state court. So we were presented with an interesting legal argument, somewhat of an anomaly, where the state defended the action and made a motion to dismiss our complaint on the grounds of our state court could not decide the legality under our state constitution of our state governor entering into a compact with a tribe because the tribe was not a party to the action, and we couldn't get jurisdiction over them.

Therefore, the case must be dismissed on the legal technical grounds of indispensable parties. I said, "This is ridiculous, because now you're saying that our governor, or any other state official for that matter, can go off and has absolutely carte blanche entered into an agreement with what is recognized as a foreign nation, or a quasi foreign nation, and neither the courts nor the legislature can do anything about it." This is absolutely inconceivable that Indian tribal sovereignty can be raised to such a level that it would drop a state court jurisdiction over its own state officials.

The lower State Supreme Court Judge, never the less, threw the case out. They appealed it to the appellate division, which is our intermediate appellate court in New York State, and they overruled the judge and returned the case back to him and said, "Decide it on the merits," which the judge then did in our favor. It was re-appealed back to the appellate division which affirms, and then last spring it was appealed to our highest court in the State of New York, which we call our State Court of Appeals, similar to the State Supreme Court in any other jurisdiction. Our state's highest court last June ruled four to three in our favor. Ruling that indeed the governor had violated the states unilaterally constitutional separation of powers by entering into a compact without legislative authorization and secondly no indispensable parties does not deprive the court of jurisdiction otherwise the case would not be resolved at all.

However, that was as significant a victory as that was for us, I don't mean to suggest that by any means resolved the battle because what we wanted the courts to do in addition was go the extra step and declare the compact illegal, not only because the governor lacked legislative authorization because that can be fixed. Indeed it has been fixed because the New York State Legislature has gone back and now given the governor the authorization to enter into compacts, and indeed the governor has pursuant to that entered into a compact with the Seneca Nation and now there is a third casino located in Buffalo.

In the meantime he has appealed to the U.S Supreme Court for what lawyers call "a writ of habeas corpus." My response, brief, and opposition to the petition of writ is due a week from now. I'm now sure I'm going to oppose the writ, I haven't yet decided. I may want the Supreme Court to take this case head on so it resolves the issue not only in the state of New York, it may set the precedent nationally if they take the case.

Meanwhile we have filed a second lawsuit; which addresses straight on, the issue that the court was able to avoid in the first case. Remember I said the other issue was; let's assuming that legislative authorization, the court didn't decide it because it wasn't strictly before them, and they could avoid it, because they had another means to dispose of the case.

Now that there is legislation in place that purports to allow the Governor to enter into the compact; we have attacked that, and we have lost, predictably again, before that State Supreme Court Judge that threw us out in the first instance. I'm not particularly concerned about that. I want to get to the higher courts where I think there may be less political pressure and more of an ability to address this case on the merits.

My time is running short right now, so I'm just going to quickly sum up. Where we are now, in the appellate division, really addresses the issue of whether or not our state legislation can be enacted. Our state legislature can enact laws that are contradictory or inconsistent with our own state constitution, on the grounds that the Federal Indian Gaming Regulatory Act kind of supersedes New York State law, and allows and empowers our legislature to do things that they could not do under a state constitution. I think that's a fundamental state's rights issue, without the updating of a long and elaborate discussion about whether or not our State Constitution can be amended by a legislative law. I think that the present constituency of the Supreme Court is particularly sensitive to states rights and has a majority of the court right now is opposed to federal intrusion upon state sovereignty. In this particular case I don't think Congress can pass a law that would mandate or require a state to defy its own constitution by enacting laws inconsistent with its own State Constitution to accommodate Indian gaming.

I'll close by saying this is not an anti-Native American issue, it is an anti-gambling issue, and it is a constitutional issue. I just happen to think that Native Americans are on the wrong side of this issue.

