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A SUMMARY AND ASSESSMENT**

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Dalton v. Pataki: A Summary and Assessment

I. Introduction

In Dalton v. Pataki¹ decided on May 3, 2005, the New York State Court of Appeals put to rest, for the time being, the issue of the constitutionality of the State legislature's major expansion of gambling in 2001. The Court found all aspects of the 2001 gambling expansion to be constitutional. Thus, six additional Indian casinos, video lottery terminals at most of the State's racetracks, and a multi-State lottery were all found to be constitutional. The Court further found that the procedure under which the bill was passed rapidly by the legislature was also valid. This note will attempt to explain the decision and note the areas where future concerns are still possible.

II. The Legislation

After the catastrophic events of September 11, 2001, the State of New York quickly recognized that it was facing a potentially enormous revenue shortfall. In order to enhance future revenues, the Governor and the legislature agreed to a major expansion of gambling. An 81 page Governor's program bill² was introduced in both houses of the legislature on October 24, 2001. The Governor issued a message of necessity authorizing an immediate vote on the bill.³ The Senate passed the bill on the evening of October 24 by a vote of 52-8, and the Assembly passed the legislation on the morning of October 25 by a vote of 92-41. Governor Pataki signed the legislation on October 29, 2001.⁴ Besides the gambling provisions, this law, which had 27 separate parts, dealt with such issues as universal pre-kindergarten, New York tourism councils, school tax relief, child health insurance, and medical malpractice.

Three parts of the legislation dealt with the gambling issues. Part B authorized up to six additional Indian casinos in New York State. Three were with the Seneca Nation of Indians in western New York. These casinos were to be consistent with a memorandum of understanding dated June 20, 2001 between the tribe and the Governor. These casinos would be deemed ratified by the legislature if the Governor certified that the agreements provided for a civil recovery system, adequate liability insurance, and certain rights of access to the casinos for labor unions.⁵

1 Dalton v. Pataki, 2005 N.Y. LEXIS 1059 2005 WL 1017641 (N.Y.), 2005 N.Y. Slip Op. 03581 (N.Y., 2005). All references to pagination in this case will refer to the Lexis numbers.

2 Senate Bill No. 5828, Assembly Bill No. 9459

3 Article 3, Section 14 of the New York State Constitution requires that a bill must be on the desks of the legislators for three days before it can be passed. This three day requirement can only be circumvented if the Governor issues a message of necessity stating the "facts which in his or her opinion necessitate an immediate vote thereon."

4 Chapter 383, L. 2001.

5 See generally Executive Law, Section 12(a).

Additionally, up to three casinos were authorized for the counties of Ulster and Sullivan in the area of New York State commonly known as the Catskills. The tribes authorized for these Catskills casinos were not specified, and these compacts would similarly be deemed adopted once the Governor certified that the compacts provided for a civil recovery system, adequate liability insurance, and additional rights for labor unions to organize at the casinos.⁶

Part C authorized video lottery terminals at many of the State's racetracks. The term "video lottery" was undefined in the legislation.⁷ Some tracks (Vernon Downs, Aqueduct, Monticello and Yonkers) were given the automatic right to have OTB's. Others were totally prevented from having video lottery terminals (Belmont Park, the Syracuse Mile and the Saratoga thoroughbred track), and a third class would have the right to have video lottery terminals if approved by their local county. The vendor's fee would be between 12% and 25% of terminal revenues and would be set by the State's lottery division.⁸ The vendor's fee would not simply be given to the racetracks but would also be shared by the State's horsemen and breeders. Horsemen would receive higher purses due to video lottery revenues, and breeders would receive higher awards.

Part D authorized New York to participate in a multi-jurisdiction and out-of-state lottery game.⁹ While the summary filed with the bill calls the interstate game "powerball", Powerball actually is one of the two major interstate lotto jackpot games played in the United States. The New York State Lottery ended up not choosing to enter the Powerball game. Instead, it opted to join Powerball's competitor, "The Big Game." This game changed its name and design when New York joined and is now known as "Mega Millions."¹⁰

III. The Lawsuit

In January of 2002, the plaintiffs in Dalton brought suit challenging the constitutionality of Parts B, C, and D of Chapter 383. The plaintiffs additionally charged that Chapter 383 was passed improperly by the legislature. The plaintiffs claimed that the message of necessity issued by Governor Pataki which accompanied the legislation was defective. The

6 Executive Law, Section 12(b). The rights of labor unions at the Catskill casinos are greater than the rights given labor unions at the Seneca Nation casinos. Besides the rights possessed by the unions involved with the Seneca Nation casinos, the labor unions in the Catskills have: (a) the rights to obtain the names and addresses of casino employees, (b) tribal/management neutrality in labor union organizing campaigns, and (c) the right to binding arbitration of labor disputes. See Executive Law Section 12(b)(i) (3) and (5).

7 Tax Law, Section 1617-a.

8 Tax Law, Section 1612. The 2001 legislation was amended by Chapter 85, L. 2002, Chapters 62 and 63, Laws 2003, and most recently by Chapter 61, Laws 2005.

9 Tax Law, Section 1617.

10 Shaila K. Dewan, "This Week, New York Plans To Join Multistate Lottery," New York Times, May 12 2002, Section 1 Pg. 30. See <http://www.megamillions.com> [last visited June 2, 2005]

message submitted by the Governor for Chapter 383 stated that "because the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit their immediate consideration." The plaintiffs argued that the Governor simply issued a truism and submitted no facts as required by Article 3, Section 14.

While Dalton was still before the trial court, the Court of Appeals decided the related case of Saratoga County Chamber of Commerce, Inc. v. Pataki,¹¹ which featured the same plaintiffs' attorneys as the Dalton case. In Saratoga Chamber, the court found that the Indian gaming compact entered into between the St. Regis Mohawk Tribe and Governor Cuomo (and then modified by the tribe and Governor Pataki) was invalid for its failure to be ratified by the legislature. The court's plurality decision did not reach the broader issue of whether Las Vegas style Indian casino gaming¹² was authorized in New York State. In a separate concurring decision, Judge George Bundy Smith, writing for himself, found that commercialized casino style Indian gaming was invalid under the New York State Constitution.¹³ Judge Susan Read writing for herself and two other judges dissented and found that such commercialized Indian gaming was authorized in New York under the Indian Gaming Regulatory Act.[hereinafter referred to as IGRA]¹⁴

Soon after the Saratoga Chamber case was decided, Supreme Court Justice Joseph Teresi granted summary judgment to the defendants in the Dalton case. In an unpublished 11 page decision, he found, citing Judge Read's dissenting opinion, that Indian casino gaming was authorized and that the video lottery terminals were true lotteries and not slot machines.¹⁵

11 100 N.Y.2d 801 (N.Y., 2003)

12 This is the issue raised by Part B of Chapter 383, L. 2001.

13 100 NY 2d at 825.

14 Id. at 842. IGRA is codified at 18 USC Sections 1166 – 168 and 25 USC Sections 2201 – 2721. Enacted in response to the decision of the Supreme Court in California v. Cabazon Band of Mission Indians, 480 US 202 (1987), IGRA is intended to preempt the law on Indian gaming. Broadly speaking, it divides Indian gaming into three categories. Class I gaming involves traditional tribal and social games and is subject to only tribal controls. Class II gaming involves bingo, lotto, pull tabs, and certain non-banking card games. These games are only authorized in states where such gaming is permitted for any purpose. Class II gaming is under the jurisdiction of the federal government and the tribe. Class III gaming is all other forms of gaming and is permitted when authorized by a tribal resolution, located in a State where the gaming is legal and conducted pursuant to a tribal-state compact. Class III gaming is subject to federal, state, and tribal regulation.

15 Tom Precious, "Ruling Benefits Gambling Advocates," Buffalo News, July 18, 2003 Pg. C1. See also John Caher, "Casinos, Video Lottery OK in State, Judge Says," New York Law Journal, July 18, 2003 Pg. 1.

IV. The Appellate Division Decision

Justice Teresi's decision was appealed to the Appellate Division. An unanimous court found most, but not all, of the gambling provisions of Chapter 383 to be constitutional.¹⁶ The Appellate Division quickly disposed of the "message of necessity issue" finding that while the message was brief, it conformed to other messages that had received court approval in the past.¹⁷ The court found that since New York authorized casino-style gaming for charitable purposes, casino style gaming for Indians was authorized in New York State under the Indian Gaming Regulatory Act.¹⁸ The multi-jurisdiction lottery was operated by the Division of the Lottery within New York State and was thus, not a violation of the constitutional requirement that a lottery had to be operated by the State.¹⁹

On the video lottery terminal issue, the Appellate Division hedged its bets. It found that the video lottery terminals were legitimate lotteries. It found that the VLT's were "simply a new method of presenting lottery games to the public."²⁰ The court found that in addition to the elements of consideration, chance, and prize, a New York lottery had to involve tickets and multiple participation.²¹ Under these conditions, the specifications for VLT's in New York met the constitutional requirement of a lottery.²²

On the other hand, the Appellate Division found that the vendor fee authorized by the VLT laws was unconstitutional.²³ The vendor fee system authorized some of the fee to be shared by the horsemen and breeders who, unlike the racetracks, were not the actual vendors of the VLT games. The State constitution requires that the net proceeds of the lottery were to be distributed exclusively to education.²⁴ By diverting, or perhaps euphemistically "reinvesting," the vendor fees to non-vendors, the Appellate Division determined that the net proceeds were being improperly distributed to non-educational sources. Additionally, the Appellate Division several times in its opinion suggested that the fee paid to vendors had been artificially inflated by this process under which vendor fees were shared or reinvested with other participants in the racing industry.²⁵ The Appellate Division determined that it could not sever the improper vendor fee

16 Dalton v. Pataki, 11 A.D.3d 62 (3rd Dept, 2004)

17 Id. at 66 –67.

18 Id. at 67 and at 68 –83.

19 Id. at 102 –106.

20 Id. at 90.

21 Id. at 92.

22 Id. at 93 –94.

23 By the time, the case was decided at the Appellate Division, the percentage of the revenue from video lottery terminals to be distributed to the racing industry had been increased to 29%. See Chs .62 and 63 , L. 2003.

24 Article 1, Section 9.1. of the Constitution provides that net proceeds of a lottery "shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe."

25 Id. at 68, 98, 100, 101, 102, and 106.

situation from the remainder of the valid VLT provisions and found that VLT provisions of Chapter 383 were unconstitutional in toto.

V. Court of Appeals Decision

The Court of Appeals in its decision found all of the gambling additions of Chapter 383 to be constitutional in an opinion by Judge Ciparick. It unanimously found that the message of necessity was proper and that a multi-jurisdiction lottery was constitutional. By a vote of 8-1 with only Judge George Bundy Smith in dissent, it found Indian casinos to be constitutional, and by a vote of 7-2 (with Judges George Bundy Smith and Robert Smith) it found that the VLT's were similarly constitutional.

A. Message of Necessity

Judge Ciparick paid scant attention to the message of necessity issue. Instead, she simply wrote that it was constitutional under Maybee v. State,²⁶ which was argued at the same time as Dalton. In Maybee, a majority of the court determined that “the sufficiency of the facts stated by the Governor in a certificate of necessity is not subject to judicial review.”²⁷ Accordingly, the message of necessity issued in support of Chapter 383, while it may have been of minimal substance, clearly was certainly sufficient under Maybee.²⁸

B. Multi-Jurisdiction Lottery

Judge Ciparick also had relatively little difficulty in handling the issue of whether a multi-jurisdiction lottery violated the provisions in the State Constitution requiring that the a lottery be operated by the stat and that the net proceeds of a lottery be used exclusively for education. In making this assessment, Judge Ciparick looked primarily at the agreement with other state engaged in the Mega Millions game rather than at the terms of the statute itself.²⁹ In reviewing the Mega Millions agreement, she found that “New York retains sufficient control over the sale of Mega Millions tickets so that it operates the lottery within the state.” The fact that many states share in the administrative costs of the Mega Millions case did not change the position that the game was operated by New York State inside New York State. The court found that the Lottery regularly contracted with outside parties to help assist in the operation of the

26 2005 N.Y. LEXIS 1026 (N.Y., 2005)

27 Id. at 4.

28 Dalton at 46.

29 In the other significant state cases that had decided that a multi-jurisdiction lottery was constitutional, there had been fact-finding hearings to determine how the lottery was to be operated. See Tichenor v. Missouri State Lottery Commission, 742 S.W.2d 170 (Mo. 1988); State ex rel. Ohio Roundtable v. Taft, 2003 Ohio 3340 (Ohio Ct. App., 2003), discretionary appeal not allowed by 100 Ohio St. 3d 1484 (2003).

lottery, and this outside assistance did not affect the operation of the lottery by New York State. “While the State may not have exclusive control over every aspect of the Mega Millions lottery, it operates the multi-state lottery within New York as required by the Constitution.”

On the issue of net proceeds from the multi-state lottery, the court similarly dismissed the issue quickly. It found that New York State’s expenses were used to pay the overall administrative expenses of the Mega Millions game. There was “no indication that the funds are used to advance the governmental purposes of other states.”³⁰ Thus, there was no diversion of net proceeds from the New York lottery to other states.

C. Indian Gaming

Judge Ciparick paid far more attention to the issues raised by Indian gaming. After stating that the “State Constitution expressly prohibits commercial gambling,”³¹ her analysis is focused on whether the Indian Gaming Regulatory Act preempts this prohibition. She provided a history of legislative history of Indian gaming reviewing the Cabazon case and the Congressional enactment of the Indian Gaming Regulatory Act. The court countered the plaintiffs’ primary assertion that since the New York State constitution did not authorize commercial gambling, that commercial Indian casino gambling could not be authorized in New York. Judge Ciparick’s chief point was that the purpose behind the gaming was irrelevant. “Since New York allows some form of Class III gaming -- for charitable purposes -- such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact.”³² Thus, assuming that New York only authorized charitable gaming, that gaming meant that New York could offer full scale casino gambling under the Indian Gaming Regulatory Act. She cited several cases as indicating that the purpose behind the gambling was not relevant.

While this essential theory of the plaintiff’s case was quickly shot down, Judge Ciparick also devoted considerable time to some of the more esoteric arguments raised by the plaintiffs. The plaintiffs argued that under IGRA state laws pertaining to the prohibition of gambling were to apply in Indian country. The court’s response was that this law did not apply to Class III gambling.³³

The plaintiffs suggested that there was a Tenth Amendment problem in that IGRA improperly forced the State of New York to negotiate with Indian tribes over Class III gambling.

30 Dalton at 46.

31 Id. at 10.

32 Id. at 19.

33 Id. at 20.

The court found no issue here since it viewed IGRA as conferring “a benefit on the state by allowing it to negotiate and to have some input on how Class III gaming will be conducted.”

The plaintiffs also raised a number of issues dealing with off reservation gambling. In dealing with Indian gaming in the Catskills, the plaintiffs maintained that Chapter 383 required the Governor to assent to any application for off-reservation gambling in the two counties of the Catskills. This assent, according to the plaintiffs, would be improper under both the State Constitution and State policy. The court determined that the gubernatorial approval required under IGRA did not involve the legality of Indian gaming but dealt with the issues of the social and economic consequences of Indian gaming on the surrounding community.³⁴

Finally, the court found that Chapter 383 did not improperly delegate the power of the legislature to ratify Indian compacts to the Governor. The law which deemed the compacts ratified if certain provision were included, “made the necessary policy determinations as to what the tribal-state compacts must contain and has authorized the Governor to implement those policy determinations...”³⁵

D. Video Lottery Terminals

Judge Ciparick also found that the video lottery terminals authorized by Part C of Chapter 383 were allowed. In response to the plaintiff’s argument that the VLT’s were actually unauthorized slot machines, the Court responded that the issue was whether the machines could properly be classified as lotteries.³⁶ If they were lotteries, it did not matter whether the machines were de facto or de jure slot machines.

Therefore, the Court needed to define what a lottery was. The Court chose to use the lottery definition established by the Appellate Division in Dalton. The Court started with the Penal Law definition of a lottery which included the elements of consideration, chance, and a prize. Since this definition covered all forms of gambling, the Court determined that there were other requirements needed to create a lottery. The Court, accordingly, added the requirements of multiple participation and a ticket that the Appellate Division had established.³⁷

Under this definitions, the VLT’s were clearly lotteries. In addition to the gambling components, the Court found that the VLT’s used tickets. The fact that the tickets received by the players were electronic and not paper was of no consequence. Multiple participation was

34 Id. at 24.

35 Id. at 26.

36 Id. at 28.

37 Id. at 29 –30.

satisfied in that the VLT's were linked to a central system where players played against each other. "VLT's are simply mechanical devices for the implementation of the video lottery."³⁸

Similarly the reinvestment issue was also not a problem for the Court majority. The Constitution required only that net proceeds (defined as gross proceeds minus charges and expenses) be applied to education. "It is for the Legislature to determine the necessary expenses incurred in operation of the lottery, and thus, what remaining portion of the total lottery revenue will constitute net proceeds."³⁹ The reinvested portion was not a separate fee but was part of the vendor fee which the State decided to regulate, and in the horse racing arena, the legislature has frequently required the reinvestment of racetrack funds.⁴⁰ The vendor's fee for VLT's amounted to only 2.9% of sales which was less than the general 6% fee for vendors in the traditional lottery, and the fact was that the vendor's fees for VLT's in New York were significantly lower than the vendor's fees paid to VLT operators in other states.⁴¹

Finally, the Court found that the manner under which certain racetracks did not require county approval for VLT's was not an equal protection violation. The arrangement was only subject to rational basis scrutiny, and "it would have been rational for the legislature to determine that certain racetrack communities, were in greater need of the potential revenue"⁴² and thus would not be required to get local approval.

Judge Ciparick's decision, in this manner, found all of the gambling portions of Chapter 383 to be constitutional.

VI. The Dissents

A. Indian Gaming

Judge George Bundy Smith, writing only for himself, wrote a lengthy opinion finding Indian casinos to be illegal in New York State. Judge Smith found that the State Constitution prohibited the legislature from enacting legislation authorizing commercialized gambling, and IGRA did not authorize the Legislature to enact commercialized casinos for Indians.

Reviewing the State Constitution, Judge Smith first found that New York's constitutional and statutory scheme clearly prohibited commercialized gambling. Judge Smith reviewed the legislative and constitutional history of New York to find that "the Legislature cannot pass legislation authorizing the Governor to enter into agreements for the establishment

38 Id. at 31.

39 Id. at 36.

40 Id. at 37.

41 Id. at 39.

42 Id. at 33.

of commercial gambling facilities.”⁴³ He then found that IGRA did not provide any grant of power to the New York State legislature to authorize commercialized casinos. He took the position that “IGRA presupposes that the New York State Legislature has the authority to enact such laws.”⁴⁴ “At most, the State would be required to permit Class II Indian gaming on Indian lands for charitable purposes.”⁴⁵ He distinguished California and Connecticut from New York as they were states which did not have clear anti-gambling policies. He accordingly found that the majority improperly concluded that IGRA supplanted New York State’s sovereignty.⁴⁶ Since the legislature did not have the authority to empower the Governor to enter into an agreement with the tribes for commercialized gambling, Part B of Chapter 383 was unconstitutional. “While it is clear that the Federal government has preempted the field in how gaming is to be conducted on Indian lands, it does not follow that that preemption forces the New York to have its Governor and Legislature approve commercial gambling in spite of the New York State Constitution.”⁴⁷

B. Video Lottery Terminals

In a short dissent, Judge Robert Smith, in an opinion joined by Judge George Bundy Smith, found that the reinvestment portion of the video lottery terminal legislation was unconstitutional. Judge Smith found that this issue was simple. You could not direct a diversion of funds from a vendor’s fees to non-educational purposes. “The Legislature could not have appropriated lottery funds for racetrack purses or horse breeding and should not be allowed to accomplish the same end by directing vendors to ‘reinvest.’”⁴⁸

VII. The Loose Ends on Indian Gaming

A. Commercialized Gambling

Both the majority and the dissent agree that the State Constitution bans commercialized gambling. This is a central proposition of the dissent, and the majority opinion concurs with the

43 Id. at 64.

44 Id. at 88.

45 Id. at 89.

46 Judge Smith’s opinion might have benefited from a more thorough analysis of 10th Amendment cases since his basic position appears to be that this Amendment would prevent Congress in IGRA from forcing New York State – in violation of New York’s laws - to offer commercialized gambling to Indian tribes. Assuming that this was Judge Smith’s position, he should more properly have dealt with the federal cases that found no 10th Amendment violations in IGRA. See Ponca Tribe v. Oklahoma, 37 F. 3d 1422, 1434 (10th Cir. 1994) vacated on other grounds 517 US 1129 (1996); Cheyenne River Sioux Tribe v. South Dakota, 3 F 3d 273 (8th Cir. 1993); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 259 F. Supp. 2d 783, 799 (W.D. Wis., 2003), Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz., 1992).

47 Dalton at 104.

48 Id. at 105.

existence of this ban on commercial gambling on a number of occasions. For example, Judge Ciparick's decision states, "However, the inquiry is different as to Part B, given that the State Constitution expressly prohibits commercial gambling. For Part B, we must instead determine whether IGRA preempts this constitutional proscription because the State allows Class III gaming for certain charitable and other purposes."⁴⁹ Judge Ciparick similarly states, "Thus, the State Constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact,"⁵⁰ and that "the constitutional ban on commercial gambling, according to this dissent, cannot be preempted by federal statute and can only be affected through a constitutional amendment."⁵¹

But, is there in reality a ban on commercialized gambling in New York? The State Constitution authorizes pari-mutuel wagering on horse races, and nearly all of the State's racetracks are commercial operations. Initially, from 1940 until the authorization of the New York Racing Association as a nonprofit racing association in 1955, all the racetracks in New York were commercial operations. Pari-mutuel wagering is Class III gambling under IGRA, and it ought to be obvious that some Class III commercial gambling is specifically constitutional in New York.

Additionally, the bingo law and the games of chance law in New York allow for authorized commercial lessors to lease property to authorized organizations to maintain bingo and games of chance operations.⁵² By 1973, under the constitutional provision authorizing bingo, commercialization was so systematic that the legislature found in New York City that "there presently exists an emergency with regard to the licensing of new commercial lessors to lease premises for the conduct of bingo in the city of New York caused by the proliferation of commercial bingo halls and the consequent diversion of the net proceeds of bingo from the charitable, educational, scientific, health, religious, civic and patriotic causes and undertakings sponsored by the authorized organizations conducting bingo to and for the profit of such commercial lessors."⁵³ The bingo law was amended so that the City of New York had to find that there was both a "public need and that public advantage will be served by the issuance of" a commercial lessor's license.⁵⁴ Thus, under the Constitutional provisions governing bingo – which are the same as those governing games of chance⁵⁵ – there was and continues to be a

49 *Id.* at 10.

50 *Id.* at 20.

51 *Id.* at 22. See also "Here, plaintiffs urge that both the constitutional provision and New York's public policy against commercial gambling prevent the Governor from agreeing that there would not be a detrimental effect on the communities at issue if casinos were located in those areas." *Dalton* at p. 24.

52 See General Municipal Law Section 476.9, 480.2, 481.1.(b) for bingo and Sections 186.8, 190.2, and 191.1.(b) for games of chance.

53 Ch.142, Section 2, Laws 1973,.

54 *Id.* This requirement was extended to the entire State by Ch. 629, Laws1995.

55 Constitution, Article 1 Section 9.2

strong element of commercialism in the operation of these games.⁵⁶ The notion that commercialized gambling is banned in New York is not supported by any review of Article 9, Section 1 of the State Constitution and its history.⁵⁷

B. Good Faith Negotiations

Both the court opinion⁵⁸ and the dissent⁵⁹ seem to take no notice of the issues surrounding the federal Interior Department's rules when a state refuses to negotiate in good faith over Class III gaming. Both opinions seem to assume that the Interior Department can impose Class III gambling on a state.

Yet, ever since the Supreme Court decision in Seminole, tribes have largely been unable to sue states to enforce their gaming rights. After Seminole, "the Department of the Interior subsequently promulgated a regulation for dealing with tribal-state compacts when a state and tribe cannot reach an agreement and the state will not waive its Eleventh Amendment immunity. Alabama, Florida, and Kansas, however, have filed suit challenging the new regulation."⁶⁰

Thus, in Coyote Valley Band of Pomo Indians v. California⁶¹ the 9th Circuit said "The Seminole decision has thrown the compacting process and Indian gaming itself into some disarray. While tribes may not lawfully engage in Class III gaming without a compact, tribes now lack the power to force states to come to the table to negotiate."⁶²

56 See James Odato, "Gambling Official Under State Scrutiny," Albany Times Union, April 18, 2005 Pg. A1.; Michele Morgan Bolton, "Bingo City's at square 1, Once Again," Albany Times Union, November 9, 2001 Pg. F1.
57 A further argument can be made that gaming authorized under IGRA is not commercialized gambling. IGRA in 25 USC Section 2710(b) made applicable to Class III gaming by 25 USC Section 2710(d)(2)(A) places significant limitations on the uses of net revenues from tribal gaming. These uses which include funding tribal operations, providing for the general welfare of the tribes, and making donations to charities are not much different from the New York constitutional requirement that the entire net proceeds of the charitable bingo and games of chance be devoted to the lawful purposes of the charitable organization, See Article 1, Section 9.2(b)(2). See General Municipal Law Sections 186.5 and 476.6 which provide for the definitions of lawful purposes.

58 Dalton at 19.

59 Id. Dissent at 88 and Note 18.

60 Watson, "Indian Gambling in Ohio: What are the Odds?," 32 Cap. U.L. Rev. 237, 258 (2003). See Linder-Cornelius, "Comment: The Secretary Of The Interior As Referee: The States, The Indian Nations, And How Gambling Led To The Illegality Of The Secretary Of The Interior's Regulations In 25 C.F.R. § 291," 84 Marquette L. Rev. 685 (2001), Laxague, "Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?," 25 J.Legis. 77 (1999). See also 25 C.F.R. Section 291.

61 In re Indian Gaming Related Cases Chemehuevi Indian Tribe, 331 F.3d 1094, 1116 (9th Cir., 2003)

62 Id. at Note 5 quoting Washburn, "Frontier Justice Symposium Article: Land & Water Law Division: Recurring Problems in Indian Gaming," 1 Wyo. L. Rev. 427, 430 (2001)

It was not until Texas v. United States,⁶³ decided two weeks after Dalton that there was a court case validating the Department of Interior's promulgation of rules under which the Department could impose a gaming compact on a state that had not bargained in good faith.⁶⁴ There are still considerable legal questions regarding the power of the Department of Interior to impose a gaming compact on a state, but you would not know it from a reading of Dalton.

C. Indian Commerce Clause

The entire basis for the federal government's authority over Indian gaming derives from the commerce clause of the federal constitution. Article 1, Section 8, Clause III grants Congress power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes [Emphasis Added] This Indian Commerce Clause gives the federal government complete authority over Indian tribes. If Congress simply wished to allow tribes to have any and all forms of gambling, under this clause, Congress would certainly have the power to grant such authorization. Yet, the fact of the Indian Commerce Clause as the basis for the federal authority over Indian gambling is not recognized by either the majority opinion nor the dissent. Instead, the Ciparick decision does not mention the Indian Commerce Clause at all, and the dissent only mentions it in passing while referring to the fact that the Indian Commerce Clause did not allow Congress to abrogate the 11th Amendment in the Seminole case.⁶⁵ The Ciparick decision seems to rely on the federal Supremacy Clause as the basis for imposing IGRA's requirements on the State.⁶⁶

D. Slot Machines

Slot machines are the 800 pound gorillas in this case. The vast majority of the profits at an American casino derive from slot machines.⁶⁷ Without slot machines, it is questionable whether Indian gaming would ever be a significant economic enterprise. Unlike most table games, which have been authorized by the State as permissible for games of chance, slot machines have not been legalized for use by charities, and an argument can certainly be made that slot machines would not be legal under Article 1. Section 9 of the Constitution since they would not fall into any of the exceptions regarding the State's general ban on gambling Yet,

63 362 F. Supp. 2d 765 (D. Tex., 2005). But see Spokane Tribe of Indians v. Washington, 28 F. 3d 991, 997 (1994) vacated on other grounds 517 US 1129 (1996).

64 Even in this decision the constitutionality of the substance of Interior's rules were was not determined . All that was determined was Interior's authority to promulgate rules on this subject. Id at note 6.

65 Dalton at 71.

66 Id. at 22. Note 5.

67 Thus, for Illinois in 2004, 86% of casino revenues stemmed from electronic gaming devices. See <http://www.igb.state.il.us/revreports/december2004statreport.pdf>. [Last viewed June 2, 2005]

neither the majority or the dissent focus on whether slot machines are legal in New York and whether they could properly be the subject of a Class III tribal gaming compact in New York.

The potential battle over slot machines appeared to be presaged by Judge Read's dissent in Saratoga Chamber. There, she suggested that the issue in determining the validity of individual games was "not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is a 'game of chance' or 'lottery' within the meanings of those terms in our Constitution and laws, and requires a detailed analysis of how each game is played."⁶⁸

The Appellate Division in Dalton avoided Judge Read's issue by noting that "because plaintiffs do not challenge the constitutionality of any of the specific games contemplated by the Seneca Nation compact and none of the parties provides any analysis of how each game is played in their briefs before us, we do not address whether any particular game listed, as opposed to class III gaming in general, is a 'game of chance' within the meaning of NY Constitution, article I, §9..."⁶⁹ The Court of Appeals similarly evaded this slot machine issue by looking at Dalton as a challenge to the authority to enter into gaming compacts in general, rather than a review of particular games.⁷⁰

Thus, the majority decision in Dalton only talks about slot machines in the Indian gaming context as being Class III gaming under IGRA.⁷¹ The dissent, similarly, pays scarcely any attention to the slot machine issue. It only makes passing references to slot machines.⁷² Thus, there is an air of unreality to this decision. Monetarily, Indian gaming is all about the right of tribes to have slot machines, but the Court does not appear to wish to acknowledge even the existence of an issue over whether slot machines are constitutionally authorized in the State of New York.

E. Class III Specific or Categorical Gaming

The Court's evasion of the slot machine issue is made more conspicuous by its treatment of the permissible scope of Class III gaming. One of the traditional issues involving Class III gaming under IGRA is whether a state is required to negotiate on all forms of Class III gaming if it only offers some forms of Class III gaming.⁷³ For example, if a State has pari-mutuel

68 Saratoga Chamber at 844 Note 10.

69 Dalton Appellate Division at 64 Note 6.

70 Dalton at 18 Note 4.

71 Id. at 4.

72 Id. at 55, 66, and 93.

73 This issue is best illustrated by the court discussion in Northern Arapaho Tribe v. Wyoming, 389 F. 3d 1308 (10th Cir., 2004).

wagering on horses and a lottery, must it negotiate on slot machines or a lottery? The issue is whether the analysis should be categorical or game specific.⁷⁴

This debate has its roots in the language of IGRA and the Supreme Court decision in Cabazon. Under Cabazon, the parties looked to the totality of gambling in a whole in a jurisdiction to determine whether gambling was regulated or prohibited in that jurisdiction. If gambling, viewed broadly, was only regulated, then it was permissible for the Indians to offer gambling. If gambling was prohibited in a state then the Indian tribes could not conduct gambling. Under IGRA, Class II gaming can only be authorized where it “is located within a State that permits such gaming for any purpose by any person, organization or entity.”⁷⁵ For Class III gaming to be authorized under IGRA, identical language is used. It must similarly “be located in a State that permits such gaming for any purpose by any person, organization, or entity.”⁷⁶

The difference has been in the interpretation of these Class II and Class III provisions. The analysis of Class II gaming, based on the legislative history, follows the Cabazon reasoning.⁷⁷ If gambling viewed as a whole is regulated rather than prohibited in a state, then Class II gambling (basically bingo, pull tabs, and certain non-banked card games) will be allowed. On Class III gambling there has been a split in the jurisdictions. Some cases have viewed the issue as a categorical one using the Class II rationale that if gambling is regulated in a State, then the State must negotiate with the tribes on all aspects of Class III gaming.⁷⁸

On the other hand, most of the more recent cases have treated Class III gaming differently than Class II gaming.⁷⁹ These cases view the analysis of permissible Class III games as game specific. Thus, if a State offers horse racing but not slot machines, it only has to negotiate on horse racing and not slot machines.

The problem in Dalton is that the Court’s opinion appears to contradict itself. In one note, the Court finds that it need not make the determination as to whether IGRA’s Class III analysis requires a categorical or a game specific analysis.⁸⁰ Nonetheless, the Court in a previous note indicates that Class III gaming is to be analyzed in the same manner as Class II gaming. The

74 Id. at 1311–1312.

75 25 USC Section 2710 (b)(1)(A).

76 25 USC Section 2710(d)(1)(B).

77 See Senate Report No. 446 at 6, 3576.

78 Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (D. Wis., 1991);

Most courts also view Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir., 1990) in the same light.

79 United States of America v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir., 1998); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir., 1994); Coeur D’Alene Tribe v. State, 842 F. Supp. 1268 (D. Idaho, 1994).

80 Dalton, Note 4 at 18.

Court states that “there is no persuasive reason to treat the language in these two sections differently.”⁸¹ Thus while the Court claims in one footnote that it is not deciding the issue of whether the analysis should be game specific or categorical, in a previous footnote, it has de facto adopted the position – by saying that Class III gaming should be analyzed in the same manner as Class II gaming - that the analysis of Class III gambling should be categorical. Assuming that the Court of Appeals has adopted this categorical analysis, it may be that New York tribes can offer their patrons slot machine gambling, a grant of authority which is otherwise not accorded to non-Indians in New York.

VIII. The Loose Ends on Video Lotteries

A. Games of Skill

In most jurisdictions, the issue in determining whether a particular gambling game is a “lottery” rather than general gambling is whether or not there is a component of skill involved in the game.⁸² Thus, in most jurisdictions, games such as pari-mutuel wagering on horses, blackjack, poker, and video poker would not be considered as lotteries, since they all have elements of skill in the game.⁸³ Only games without any skill elements would be lotteries.

Yet under the definition of “lottery” advanced by the Dalton Court, many of these “skill” games could be considered lotteries. As stated previously, under Dalton, a lottery in New York consists of consideration, chance, prize, multiple participation, and a ticket. A pari-mutuel bet on a horse race would certainly meet all these elements. There are the three traditional elements of gambling plus a ticket (a pari-mutuel ticket). The multiple participation element is met by the fact that pari-mutuel wagering on horse racing is a game where multiple participants bet against each other and not against the house. Yet the vast majority of American jurisdictions find that pari-mutuel wagering on animals is not a lottery.⁸⁴ The Court of Appeals in People ex rel. Lawrence v. Fallon,⁸⁵ found that horse racing was not a lottery. Yet under the definition employed in Dalton, pari-mutuel wagering on horse racing is surely a lottery.

81 Id. Note 3 at 17.

82 See generally Johnson v. Collins Entertainment Company, 508 S.E. 2d 575 (S.C. 1998) and 1984 NY Op Attorney General 11.

83 For a definition exploring the attributes of skill, see Ga. Code. Ann. Section 16- 12-35 (a.1).

84 See for example 85 ALR 605; People v. Monroe, 349 Ill. 270 (Ill., 1932); Longstreth v. Cook, 215 Ark. 72 (Ark., 1949). Betting on jai-alai was found not to be a lottery in Opinion of Justices, 385 A.2d 695 (Del., 1978). The court there stated, “For decades, by the great weight of authority, pari-mutuel betting has been held not to be a lottery.” at 702.

85 152 NY 12 17–18 (1897)

Similarly, video poker has an element of skill to it.⁸⁶ In the Dalton opinion, the Court suggested that poker, blackjack, and roulette would be casino games that would not be lotteries.⁸⁷ It further noted that a suggested sports lottery was found unconstitutional by the Attorney General in 1984 because it had an element of skill involved in determining winners.⁸⁸ Yet what if the video poker machine issued a ticket whenever there was a winning hand (thereby qualifying for the ticket requirement)⁸⁹ and also involved a progressive jackpot where many players on different machines competed against each other for a jackpot?⁹⁰ Wouldn't this meet all the requirements of a lottery under the Dalton case? There is consideration, chance, prize, a ticket and multiple participation,

The Dalton Court has posited a very broad definition of what a lottery can encompass. It has suggested at one point that games involving skill would not qualify, but under its broad definition, games utilizing components of skill could clearly qualify as lotteries.

B. The Ticket Requirement

The Dalton Court found that a lottery in New York necessarily involved the sale of tickets.⁹¹ At the same time, it found that the VLT transactions which involved “electronic instant lottery tickets”⁹² qualified as a purchase of tickets. The court stated, “It is of no constitutional significance that the tickets are electronic instead of paper. The particular methods of conducting the lottery are subject to change with time.”⁹³

Yet, the issue becomes if intangible electronic property can qualify as a ticket, what isn't a ticket? Why should the cards dealt in a game of poker or blackjack be thought of as tickets? What if the house in a game of roulette or a craps game developed a system under which it gave the players receipts or maintained an electronic record showing their bets for a particular game? Why couldn't these be considered tickets for purposes of satisfying the lottery requirement?

86 See McRory, Video Poker and the Skill Versus Chance Debate, 6 Gaming Law Review 223 (2002); Dan Paymar, Video Poker: Optimum Play, 3 (2004)

87 Dalton at 29.

88 Id. at 31 See note 80 supra.

89 The ticket might be dispensed in the same manner as the pull tabs authorized in Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n., 327 F.3d 1019 (10th Cir., 2003) cert denied 540 US 1218 (2004) and in Diamond Game Enters. v. Reno, 343 U.S. App. D.C. 351 (D.C. Cir., 2000).

90 See “Progressive Slot Machines” at <http://casinogambling.about.com/library/weekly/aa062600.htm> [Last viewed June 2, 2005]

91 Dalton at 30.

92 Id. at 31

93 Id.

In terms of electronic gaming devices, why isn't the electronic display of results from a slot machine the functional equivalent of an electronic ticket? How does that differ from the electronic ticket in the New York VLT? What if – as mentioned previously under the discussion of games of skill⁹⁴ – the gaming device dispensed a paper ticket or a pull tab every time a player started a game or recorded a winning outcome in a game? Wouldn't that meet the "ticket" requirement?

The Court of Appeals lowered the bar in Dalton so that an intangible electronic display is now deemed a ticket. Given this definition, it is possible to either envision every gambling transaction as involving a ticket or in the alternative creating a virtual or paper ticket for most every gambling transaction.

C. Multiple Participation

The Dalton Court added a "multiple participation" requirement to the definition of a lottery. This is probably the most confusing element of the decision in this case.

Courts in America have been deciding lottery cases for over two hundred years.⁹⁵ Yet, the only cases to use the terms "multiple participation" and "lottery" in the same opinion are the Appellate Division and the Court of Appeals decisions in Dalton.

The use of the "multiple participation" requirement derives from one line of a statement made by Senator Thomas Mackell in 1965.⁹⁶ It is the solitary reference to "multiple participation" in the entire debate.⁹⁷ If Senator Mackell, who was one of the sponsors of the Constitutional amendment, was considered the best source of legislative history on the lottery, then perhaps the lottery should have been restricted to a drawing based on horse racing. Senator Mackell also stated in the debate, "We can base it on not four but maybe six or eight, the best, the biggest races throughout the country."⁹⁸ We can "encourage even greater attendance at the races."⁹⁹

In response to the question as to whether the game of policy or numbers was a lottery, Senator Mackell noted that it was not a lottery. According to Mackell, "It is a different

94 See note 87 supra.

95 See Ball v. Dennison, 4 US 163 (1799); Olney v. Arnold, 3 US 308 (1796); Bacon v. Goodsell 2 Root 283 (Conn. 1795); Morgan v. Minor, 2 Root 220 (Conn. 1795)

96 New York State Senate Debate Transcripts, 1965 NY Constitution, June 14, 1965, at 4808).

97 If the Dalton court had been searching for a somewhat more limiting definition, it could have used the language of Senator Marine, another sponsor of the lottery amendment, who said "To me, a lottery is nothing more than a raffle." Id. at 4780.

98 Id. at 4794.

99 Id. at 4795.

operation.”¹⁰⁰ Yet for decades the lottery in New York State has conducted a de facto numbers game as the basis of its Numbers/Pick Three and Win Four Drawings. Senator Mackell also stated that the lottery “would not be a daily occurrence.”¹⁰¹ It is now operating every fraction of a second. While the Court credited Senator Mackell with his statement requiring multiple participation, it discredited his statements on horse racing, non-daily occurrences, and the numbers game. Senator Mackell’s statement on multiple participation is highlighted by the Court, but all his other statements on the intent of the Constitutional amendment have been benignly neglected by the Court.

Nonetheless, the main problem with the use of the “multiple participation” requirement is not simply the use of cherry-picked selected legislative history. It is that the Dalton Court has not really sought to define the meaning of “multiple participation.” The Court used “multiple participation” in contrast to those games involving “a single player pitting his or her own skill against a machine”¹⁰² and “as opposed to a single player competing against a single machine.”¹⁰³ All this contrast accomplishes is to make certain that the traditional slot machine where a player competes against the house at one machine cannot be considered a game of multiple participation. It tells us little about whether “multiple participation” prevails in the technological world of modern gambling.

The most likely meaning of multiple participation is that a multiple participation game would involve a game where the players compete against each other, and the game is not played against the house. Such games – where players play against each other – must of necessity be games of multiple participation. In short, must it be a pari-mutuel game rather than a banking game where the players compete against the house?¹⁰⁴ Yet, the Dalton Court specifically referenced banking games at two other points of its decision.¹⁰⁵ If the court believed that multiple participation games had to be non-banking games, wouldn’t it have said so directly?

If only non-banking games were authorized by the multiple participation requirement, then certain current lottery games could not be considered multiple participation games. The Win 4 game, the Pick 10 game, Quick Draw and the Numbers game in New York are all played against the house.¹⁰⁶ They are not pari-mutuel and do not formally require multiple participation. The non-jackpot portions of the Mega Millions game is played against the house rather than on a

100 Id. at 4709.

101 Id. at 4765.

102 Dalton at 31.

103 Id. at 29.

104 This basically was the decision of the California Supreme Court in Western Telcon Inc. v. California State Lottery, 13 Cal. 4th 475 (1996) finding that banking games could not be lotteries. But see Trump v. Perlee 228 A. D. 2d 367 (1st Dept. 1996) finding the banking game of Quick Draw to be lawful in New York.

105 Dalton at Notes 1 and 12.

106 See generally <http://www.nylottery.org> [Last viewed June 2, 2005]

pari-mutuel basis. Thus, if multiple participation requires a pari-mutuel game, certain existing lottery games will not meet this requirement.

If, however, multiple participation refers to both banking and non-banking games, what does multiple participation mean? Does it only mean that more than one player has to be involved in the game? What if a casino or a group of casinos link a series of slot machines or video poker games to provide progressive jackpots?¹⁰⁷ In effect, these machines would work like the Mega Millions game. The players play against the house for the lower-tiered prizes but compete against each other for the jackpot prize. If Mega Millions is considered a multiple participation game, why wouldn't linked progressive slot machines also be seen as a multiple participation game? What if a casino established a requirement that there had to be more than one player at a blackjack, roulette, or craps table? Would these games now meet the multiple player requirement of Dalton?¹⁰⁸ In short, there is little explanation in the Dalton decision on the actual meaning of the phrase "multiple participation."

IX. Conclusion

The Court of Appeals in the Dalton case made a clear decision affirming the gambling expansion authorized by Laws of 2001, Chapter 383. Yet, while the decision has certainly elated pro-gambling forces in New York State, it is a decision that contains a large number of unanswered questions. Due to these unanswered questions on the scope of Indian gaming and video lotteries, it has likely set the stage for future litigation on the scope of both Indian gambling and video lottery gambling in New York State.

¹⁰⁷ See Note 88 supra.

¹⁰⁸ Again, if this action met the multi-player requirement, and tickets or receipts were given players or electronically recorded on behalf of players, would these games now meet the ticket requirement and therefore all the requirements of the Court of Appeals for a lottery game?