

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL  
**GOVERNMENT LAW ONLINE**

---

**JUDGE SMITH, LEGAL HISTORY AND  
SARATOGA CHAMBER V. PATAKI**

**JUNE 2003**



Government Law Center  
Albany Law School UNION UNIVERSITY

80 New Scotland Avenue  
Albany, NY 12208

[www.als.edu](http://www.als.edu)

GOVERNMENT LAW ONLINE publications are available at [www.governmentlaw.org](http://www.governmentlaw.org)

# **JUDGE SMITH, LEGAL HISTORY AND SARATOGA CHAMBER V. PATAKI**

**Bennett Liebman, Esq.  
Coordinator/Staff Attorney  
Racing and Gaming Law Program**

**JUNE 2003**

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

## **Judge Smith, Legal History and Saratoga Chamber v. Pataki**

Last week, the New York State Court of Appeals issued its decision in Saratoga Chamber of Commerce v. Pataki,<sup>1</sup> which challenged the authority of the governor to enter into casino compacts with the Indian tribes in New York State. The decision was obviously a difficult one for the full court. It held two long oral arguments on the issues presented by the case. The court ended up voting 4-3 to find that the governor lacked authority to enter into a gaming compact without legislative approval.

The four judge majority in a decision by Judge Rosenblatt found that: (a) the issue presented by Governor Pataki's 1999 amendment to the St. Regis Mohawk Indian gaming compact were moot, (b) Governor Cuomo's approval of the 1993 compact was not a moot issue, (c) the plaintiffs had standing to pursue the case, (d) the statute of limitations did not preclude the suit, (e) the doctrine of laches did not prevent the suit, (f) the St. Regis Mohawk tribe was not an indispensable party, (g) the governor lacked authority to approve into compacts, and (h) the legislature did not ratify the compact.<sup>2</sup>

In his opinion, writing only for himself and two other judges, Judge Rosenblatt refused to reach the ultimate question: whether the casinos were unlawful under Article 1, §9 of the State Constitution. He found that "it is better for this Court not to resolve constitutional questions unaddressed by the lower courts."

Judge Smith, in a separate decision concurred with Judge Rosenblatt on all issues other than the decision not to decide the ultimate constitutionality of Indian casinos in New York State. He found that the issue of Article 1, §9 should have been decided by the court and that the "State Constitution clearly forbids the gambling permitted by the 1993 Compact."

Writing for a three judge dissent, Judge Read took issue with many of the findings of Judge Rosenblatt. She suggested that laches should have applied and found that the tribe was an indispensable party. In the absence of a dismissal, she suggested that the legislature had de facto ratified the compacts. She found that the governor did not act improperly when he signed this compact since he "was merely implementing pre-existing federal and State policy choices" and that the compact did not violate Article 1, §9 of the Constitution.

While much of the oral argument focused on the proper remedy sought by the plaintiffs, there is no mention of any remedy in the opinion. While only the federal government can shut down a casino, what happens to the revenue the state receives from the casinos? Is there any obligation for the tribe to continue payments? Do the Racing and Wagering Board and the State Police – which have regulatory jurisdiction under the

---

<sup>1</sup> The text of the decision is available at <http://www.courts.state.ny.us/ctapps/decisions/42opn03.pdf>

<sup>2</sup> While the analysis only dealt with the St. Regis Mohawk compact, it clearly could have applied equally to the 1993 compact between Governor Cuomo and the Oneida Indian Nation.

compacts - have any authority? Can these agencies spend any state monies in enforcing the compacts, which according to the Court of Appeals have no force and effect?

The minority opinion also has its own loose ends. While chiding the majority for not reaching a decision on Article 1, §9, Judge Read's opinion contains only a limited analysis of why the compact is constitutional. Additionally, in a footnote, Judge Read expresses "no opinion as to the constitutionality of any of the games included in the 1993 Compact."<sup>3</sup> Thus, the dissent after claiming to take a stand on the ultimate issue actually ends up punting on the ultimate issue.

Nonetheless, while the majority and the dissenting opinion are subject to significant questions, Judge Smith's decision should be subject to severe criticism. Without taking a position on whether casino gaming is authorized by Article 1, Section 9 of the State Constitution, Judge Smith's analysis of the constitutional history of New York's law and the law of other states is often silly and occasionally just plain wrong.

To illustrate the many problems with the opinion, we'll take quotes from Judge Smith's decision followed by our analysis of the quotes. Judge Smith's opinion runs for 13 pages, and by using the full quotes we are trying to avoid the charge that we are hurling major cheap shots at Judge Smith.

**1. Before the first New York State Constitution was written in 1777, gambling in New York was forbidden. p. 3**

This is manifestly false. As the United States Supreme Court noted, Lotteries "were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes."<sup>4</sup> In New York State frequent use was made of lotteries in colonial times. While private lotteries were disapproved of, public libraries were widespread.

By 1746, a lottery bill to fortify New York City was passed "and created a precedent that would be repeated for almost two decades."<sup>5</sup> Lincoln's Constitutional History of New York states, "Lotteries for the purpose of raising funds for various public purposes was authorized by numerous statutes beginning in 1746 and continuing through seventy-five years until the adoption of the Constitution of 1821."<sup>6</sup> In fact, Lincoln lists a litany of lotteries that were authorized by the legislature in both colonial and post-colonial eras.<sup>7</sup> There is absolutely no doubt that gambling was legal in New York in colonial times.

---

<sup>3</sup> Footnote 10 in the dissent of Judge Read.

<sup>4</sup> *Stone v. Mississippi*, 101 U.S. 814, 818 (1879); See Hovenkamp, "Law and Morals in Classical Legal Thought," 82 *Iowa L. Rev.* 1427, 1447 (1997).

<sup>5</sup> Kammen, *Colonial New York – A History* 288 (1975)

<sup>6</sup> III *Lincoln's Constitutional History of New York* p. 34 (1906)

<sup>7</sup> *Id.* at 36–37.

**2. Colonial Governor Tryon was appointed by the King of England in February 1771. He served as Governor until after the Revolution began, leaving office on March 23, 1780.p.3**

Why would anyone care that Governor Tryon left office in March of 1780? After the Declaration of Independence was signed, it is impossible to find that Governor Tryon possessed any authority in New York State. If he served as Governor until 1780, what was George Clinton doing as governor from 1777 –1780? If Governor Tryon was really the governor, then contrary to Judge Smith's views, he must have been responsible for the 1778 law which authorized a lottery for the Ulster County courthouse.<sup>8</sup>

**3. The commission and instructions issued to Tryon upon his appointment prohibited gambling, referred to as "lotteries:**

**"Whereas, a practice hath of late years prevailed in several of our colonies and plantations in America of passing laws for raising money by constituting public lotteries, and whereas, it hath been unto us that such practice doth tend to disengage those who become adventurers therein from that spirit of industry and attention to their proper callings and occupations on which the public welfare so greatly depends, and whereas, it further appears that this practice of authorizing lotteries by acts of legislature hath been also extended to the enabling private persons to set up such lotteries, by means whereof great frauds and abuses have been committed, it is therefore our will and pleasure that you do not give your assent to any act or acts for raising money by the institution of any public or private lotteries whatever until you shall have first transmitted unto us by one of our principal secretaries of state a draught or draughts of such act or acts, and shall have received our direction thereupon." pp. 3-4.**

This is Judge Smith's sole evidence of a gambling ban in colonial New York. Its language does not support the existence of any gambling ban. Instead it says that lotteries have been a problem; so before you agree to a lottery, ask us first. There is no ban in this letter. All it says in its last few lines is for Governor Tryon to get direction on lotteries from the people who appointed him. It is not authority for Judge Smith's proposition.<sup>9</sup>

**4. Lotteries were again specifically prohibited in the Second Constitution, approved in 1821. p. 4**

---

<sup>8</sup> Chapter 32, L. 1778.

<sup>9</sup> It apparently was helpful in further tightening the laws against private lotteries. See Colonial Chapter Law 1542, 1772.

Lotteries were first outlawed by this prohibition. There were numerous lotteries that were authorized by the State legislature after independence until 1821.<sup>10</sup> Additionally, it should be noted that even after the 1821 amendment, there were still some authorized lotteries in existence under the theory that terminating these contracts for lotteries would amount to an improper impairment of contracts.<sup>11</sup> For example, in 1823, the legislature reauthorized a lottery for a yellow fever hospital.<sup>12</sup>

**5. In 1938 the Fifth and current Constitution was approved. This Constitution maintained the general prohibition against gambling but did authorize a limited range of gambling. p.5**

Nope. The 1938 Constitutional Convention authorized no changes in the constitutional provisions banning gambling. The amendments which added four exceptions to this provision (for horse racing, for bingo, for a state lottery, and for games of chance) were all added in the years after the convention.<sup>13</sup>

**6. Additionally, subdivision two provides that "[t]he legislature shall pass appropriate laws to effectuate the purposes of this subdivision, [and] ensure that such games are rigidly regulated to prevent commercialized gambling" (emphasis added).**

**Consistent with this latter provision, the Legislature has outlawed most forms of gambling (see Penal Law article 225). p.6**

The Penal Law provisions were in no way added as part of the rigid regulation requirement to prevent commercialized gambling. Indeed, the substance of these penal provisions were in place well before the state authorized charitable bingo and games of chance. "The current Penal Law substantially revised the structure of the statutes defining the gambling offenses while keeping the changes of substance to a minimum."<sup>14</sup> The basic structure of the Penal Law provisions on gambling was established in 1965<sup>15</sup> and the structure antedates the games of chances laws by more than a decade.<sup>16</sup> The regulatory provisions which the legislature passed to prevent commercialized games of chance are in Article 9-A of the General Municipal Law. The criminal provisions on

---

<sup>10</sup> For a list of authorized post-colonial lotteries, see Gillett, Index of the Laws of the State of New York, pp. 403-404.

<sup>11</sup> See Trustees of Dartmouth College v. Woodward, 17 US 518 (1819)

<sup>12</sup> Chapter 82, Laws 1823.

<sup>13</sup> For a review of the provisions of Article 1, §9 authorized by the Constitutional Convention, see 4 Journal of the Constitutional Convention, p. 538 (1938)

<sup>14</sup> Donnino, McKinney's Practice Commentary, Article 225, Penal Law 195 (2000)

<sup>15</sup> Chapter 1030, L. 1965.

<sup>16</sup> The existence of the games of chance provision in the Constitution is the basis of the claim that Indian casinos are authorized by the application of the Indian Gaming Regulatory Act to New York law.

gambling were not established as part of the legislature's intention to enforce the rigid regulation requirement of Article 1 §9 (2).

**7. The Indian Gaming Regulatory Act, 25 USC § 2703, does not require that gambling be imposed upon states where it is forbidden. p. 6**

First of all, 25 USC §2703 simply contains the definitions in IGRA. This cannot be the basis for Judge Smith's views on the scope of IGRA. Nothing in §2703 says word one on how and where gambling may be imposed.

Far more importantly, this should not and cannot be the gist of Judge Smith's argument on constitutionality. Given his position on IGRA's limited reach, one would expect Judge Smith to be saying that IGRA mandates that gambling not be imposed upon states where it is forbidden. Instead, he makes IGRA appear to be permissive. He seems to be saying that gambling need not be imposed on New York but that IGRA might permit it to be enacted in New York. Judge Smith needlessly weakens his own argument by this language here.

**8. 25 USC § 2701 (5) provides: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (emphasis added) <sup>3</sup>**

**Footnote 3 While the dissent cites Connecticut as support for its position that Type III gambling should be permitted here, the Connecticut Constitution does not have anti-gambling provisions similar to those in the New York Constitution. pp. 6-7**

This quote derives from the legislative findings section of IGRA. It is not a substantive provision. It does not create or establish any rights. All it does is restate the holding in the Cabazon <sup>17</sup> decision. As stated subsequently, Cabazon may be the reason for IGRA, but IGRA rather than Cabazon is now the governing law. The quoted section is in no manner a statement of a tribe's rights under IGRA. It restates the law before IGRA.

A further problem lies in the footnote. Judge Smith is seeking to distinguish Connecticut law from New York law because the Second Circuit used the existence of charitable games of chance as the basis for authorizing Indian casinos in Connecticut. <sup>18</sup> Connecticut does not have a provision in its Constitution on gambling. Instead, it had and has significant, extensive penal laws covering illegal gambling. The fact is that

<sup>17</sup> California v Cabazon Band of Mission Indians, 480 US 202 (1987)

<sup>18</sup> Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990); cert denied 499 U.S. 975 (1991) Judge Read relies on this case as the basis for legalizing Indian gaming in New York.

Connecticut's penal laws were every bit as anti-gambling as New York's.<sup>19</sup> At the time of the Mashantucket decision, Connecticut's laws on charitable games of chance were very similar to New York's.<sup>20</sup> IGRA refers directly to a state's penal laws in a section that Judge Smith emphasized. It is difficult to imagine that there is any meaningful distinction between Connecticut which had a provision legalizing charitable games of chance and penal laws banning "commercial" games of chance and New York State which had both a Constitutional provision and a regulatory provision authorizing charitable games of chance and a penal provision banning games of chance that were not conducted by authorized charitable organizations. In both states, charitable games of chance were legal, and games by unauthorized organizations were criminal. There is no distinction between Connecticut and New York.

**9. Type III gaming is against public policy and has been since before this State's first Constitution. p. 9**

I've already shown that the historical part of this sentence is incorrect.<sup>21</sup> Judge Smith forgets, additionally, that the state has horse racing. The majority of the racetracks are commercial enterprises. None are charities. Horse racing is Class III gaming. Since the state has horse racing, the State Constitution does specifically authorize some Class III gaming.<sup>22</sup>

**10. Moreover, Penal Law § 225.05 provides, "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." The Penal Law further defines what constitutes advancing gambling activity: "A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus thereof, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation" (PL § 225.00[4])." pp. 9-10**

---

<sup>19</sup> See CGSA §§ 53-278a – 53-278f.

<sup>20</sup> See CGSA §§ 7-186a – 7-186q. The Connecticut games of chance law was repealed in 2003 as part of a legislative effort to block further Indian casinos in Connecticut. 2003, Jan. 6 Sp. Sess., P.A. 03-1.

<sup>21</sup> Judge Smith ought to focus on the Constitution of 1894 which did purport to ban all gambling. See the extensive argument at 1079-1088 and 1110-1131 of Volume IV of the Revised Record of the Constitutional Convention of 1894.

<sup>22</sup> It is also arguable that many of the games run by the State Lottery, numbers, keno, Quick Draw, and instant tickets also constitute Class III gaming.

The problem here lies in Judge Smith's interpretation of the law. He is arguing that the Penal Law is authority for finding Indian gaming illegal. He seems to ignore the word "unlawful" in §225.05. Gambling activity is indeed defined broadly, but only "unlawful" gambling activity is criminal conduct. "Unlawful" means "not specifically authorized by law."<sup>23</sup> Arguably, if IGRA allows Indian gaming, Indian gaming is authorized by law and is not a violation of the Penal Law. The language of §225.05 is not an argument for finding that Indian gaming is illegal. All it does is say that gambling that is not authorized by law is a crime. It does not begin to tell you what gambling is actually authorized by law.

**11. California v Cabazon Band of Mission Indians (480 US 202 [1987])<sup>4</sup> does not negate the more than 200-year-old New York anti-gambling policy. First, the case did not involve a State like New York with a clear anti-gambling policy. p. 10**

First of all, I am unable to determine why Cabazon is particularly relevant to analysis of this case. Cabazon may be interesting for historical purposes to determine the origins and meaning of IGRA, but the fact is that IGRA is the law of the land and not Cabazon. Whether New York or California had a clearer anti-gambling policy does not seem significant. IGRA governs not Cabazon.

Nonetheless, the notion advanced by Judge Smith that California was not a state with a clear anti-gambling policy makes no sense. At the time of the Cabazon decision, California's constitution<sup>24</sup> (a) banned lotteries, (b) allowed horse racing, (c) allowed charitable bingo, (d) authorized a State lottery notwithstanding subdivision(a), and (e) specifically prohibited "casinos of the type currently operating in Nevada and New Jersey."<sup>25</sup> New York's constitution allows a State run lottery, horse racing, charitable bingo, and charitable games of chance while outlawing other forms of wagering. In reality, the ban on gambling in California in 1987 was broader than the ban in New York. California, unlike New York, had no authorization for games of chance, and California had a specific ban on commercial casinos. The notion of the significance of this ban on commercial casinos became evident in Hotel Employees and Restaurant Employees Intern. Union v. Davis,<sup>26</sup> where the California Supreme Court found that a law established via initiative authorizing Indian casinos was invalid under the California constitution's ban on Nevada and New Jersey type casinos. It took a separate initiative to amend Article 4, §19 to make Indian casinos legal in California.

Judge Smith seems to believe that New York's laws against gaming are pristine. But even before the State lottery and charitable games of chance, the Court of Appeals in New York stated, "The legalization of pari-mutuel betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of "some prevalent

---

<sup>23</sup> Penal Law, §225.00.12

<sup>24</sup> Article 4, §19.

<sup>25</sup> Subdivisions d and e were added by an initiative passed in California in 1984.

<sup>26</sup> 88 Cal. Rptr. 2d 56, 981 P. 2d 990 (1999)

conception of good morals, [or] some deep-rooted tradition of the common weal."  
(*Loucks v. Standard Oil Co.*, *supra*, p. 111.)

The trend in New York State demonstrates an acceptance of *licensed* gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in a community."<sup>27</sup>

If Cabazon is relevant to the resolution of the Indian gaming issue in New York, the fact is that California's law was every bit as strong as New York's – if not more so – in preventing gambling.

The point of this comment is not that a good case against Indian gaming cannot be made in New York. The point is that Judge Smith has not made it. He has misstated the history of the law and made a series of distinctions without any significance.

In the gambling field, it has frequently been said that horse owners leave their brains behind when they enter the racetrack, Let's hope that judges don't similarly leave their brains behind when they enter the casino world.

---

<sup>27</sup> *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 15 (1964)