

INDIAN GAMING

Ch. 9

Sec. C

Section C. Indian Gaming

Indian gaming has produced perhaps the most dramatic *positive* political and financial development in the history of federal Indian law and policy. Since the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*, page ___, *infra*, and Congress's reaction in enacting the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.A. §§ 2701–2721, in 1988, the literal fortunes of hundreds of Indian tribes nationwide changed. Prior to developing gaming enterprises, many tribes had only a minimal governmental revenue base with budgets composed almost entirely by federal appropriations and grants. They were able to provide few governmental services on the reservation. The tribes that turned to gaming were generally able to use of the new revenues to expand their governmental services and other exercises of sovereignty. But with this influx of gaming revenues came both benefits and detriments.

Gaming revenues have been unevenly distributed among tribes and within them. A few Indian nations became wealthy but increasing tribal revenues did not always mean relieving the poverty of individuals. Many members of gaming tribes, however, did move from poverty to the lower middle class and in some tribes members become the beneficiaries of enormous per capita distributions. At the same time, state governments became intensely interested capturing a share of tribal gaming revenues. And changes – such as in the public perception of Indian tribes – were felt throughout Indian country, even for tribes that have very limited or no gaming activities. See generally Steven Andrew Light & Kathryn R. L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (2005); Jessica R. Cattelino, *High Stakes: Florida Seminole Gaming and and Sovereignty* (2008).

Before the decision in *Cabazon*, Indian tribes in California, Florida, Maine, New York, and Wisconsin had been operating on-reservation bingo halls since the early 1970s and perhaps even as far back as the late 1960s. See generally Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 45-55 (2007). As Dean Kevin Washburn wrote, Indian gaming likely would not exist but for legal and policy choices by state governments, which have treated gambling as a vice and have strictly regulated the industry. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 Nev. L. J. 285 (2003-2004). And since states generally had no authority to prohibit or regulate on-reservation activities, even gaming, the market for Indian gaming mushroomed. This is not to say that gambling was legal in Indian Country – the Johnson Act banned most gaming on reservations. See Kathryn R. L. Rand & Steven Andrew Light, *Indian Gaming Law and Policy* 65-67 (2006). But states had no authority to enforce the Johnson Act.

Tribal gaming was growing in the early 1980s. For example, the Grand Traverse Band of Ottawa and Chippewa Indians enacted an ordinance purporting to regulate tribally-owned bingo

and, later, Las Vegas-style casino gambling, in 1984. Grand Traverse Band Ordinance No. 84-001 (Sept. 4, 1984). Moreover, Congress considered Indian gaming legislation as early as 1983. During this era, statements on federal Indian policy encouraged Indian tribes to engage in creative means of generating governmental revenue. In his 1983 federal Indian policy statement, President Reagan said, "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983). This fit the President's goal of reducing the size of government and cutting federal appropriations. This agenda indirectly fueled the movement toward Indian gaming. Then, state challenges to on-reservation gaming reached the Supreme Court, first from a Public Law 280 state.

1. THE SUPREME COURT'S APPLICATION OF PUBLIC LAW 280'S REGULATORY-PROHIBITORY DISTINCTION

California v. Cabazon Band of Mission Indians

Supreme Court of the United States, 1987.

480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244.

* * *

JUSTICE WHITE delivered the opinion of the Court.

The Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, occupy reservations in Riverside County, California. Each Band, pursuant to an ordinance approved by the Secretary of the Interior, conducts bingo games on its reservation.² The Cabazon Band has also opened a card club at which draw poker and other card games are played. The games are open to the public and are played predominantly by non-Indians coming onto the reservations. The games are a major source of employment for tribal members, and the

²The Cabazon ordinance authorizes the Band to sponsor bingo games within the reservation "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that net revenues from the games shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes." The ordinance further provides that no one other than the Band is authorized to sponsor a bingo game within the reservation and that the games shall be open to the public, except that no one under 18 years old may play. The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates revenues to programs to promote the health, education, and general welfare of tribal members. It additionally provides that the games may be conducted at any time but must be conducted at least three days per week, that there shall be no prize limit for any single game or session, that no person under 18 years old shall be allowed to play, and that all employees shall wear identification.

profits are the Tribes' sole source of income. The State of California seeks to apply to the two Tribes Cal.Penal Code Ann. § 326.5 (West Supp.1987). That statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations who may not be paid for their services. Profits must be kept in special accounts and used only for charitable purposes; prizes may not exceed \$250 per game. Asserting that the bingo games on the two reservations violated each of these restrictions, California insisted that the Tribes comply with state law. * * *

* * *

In Pub. L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States. In § 2, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State. Section 4's grant of civil jurisdiction was more limited. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. * * * Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

* * *

Following its earlier decision in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (1982), cert. denied, 461 U.S. 929 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals * * * drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory. * * *

We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan's* [*Bryan v. Itasca County*, 426 U.S. 373 (1976), page ___, supra] construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. * * *

[However,] California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Gov't Code Ann. § 8880 *et seq.* (West Supp.1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal.Bus. & Prof.Code Ann. § 19400–19667 (West 1964 and Supp.1987). Although certain enumerated gambling games are prohibited under Cal.Penal Code Ann. § 330 (West Supp.1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card

club flourish in California, and the State does not dispute this fact. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. * * * In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.¹⁰

California argues, however, that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted. * * * Accordingly, we conclude that Pub.L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp.1987) within the Cabazon and Morongo Reservations.

California and Riverside County also argue that the Organized Crime Control Act (OCCA) authorizes the application of their gambling laws to the tribal bingo enterprises. The OCCA makes certain violations of state and local gambling laws violations of federal law.¹² The

¹⁰Nothing in this opinion suggest that cock fighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory. The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in *United States v. Marcyes*, 557 F.2d 1361, 1363–1365 (C.A.9 1977), the Court of Appeal adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Act, 62 Stat. 686, 18 U.S.C. § 13. The Court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature. See also *United States v. Farris*, 624 F.2d 890 (C.A.9 1980).

¹²2 OCCA, 18 U.S.C. § 1955, provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(i) is a *violation of the law of a State or political subdivision* in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such a business; and

(iii) has been or remains in substantially continuous operations for a period in excess of thirty

Court of Appeals rejected appellants' argument * * * The court explained that whether a tribal activity is "a violation of the law of a state" within the meaning of OCCA depends on whether it violates the "public policy" of the State, the same test for application of state law under Pub.L. 280, and similarly concluded that bingo is not contrary to the public policy of California.

* * * And because enforcement of OCCA is an exercise of federal rather than state authority, there is no danger of state encroachment on Indian tribal sovereignty. This latter observation exposes the flaw in appellants' reliance on OCCA. That enactment is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction. There is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government. * * *

* * *

Because the state and county laws at issue here are imposed directly on the Tribes that operate the games, and are not expressly permitted by Congress, the Tribes argue that the judgment below should be affirmed without more. They rely on the statement in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170–171 (1973), that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply" (quoting U.S. Dept. of the Interior, Federal Indian Law 845 (1958)). Our cases, however, have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent. "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–332 (1983).

* * *

This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero*, 462 U.S., at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic

days or has a gross revenue of \$2,000 in any single day." (Emphasis added.)

development.

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy. More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises. Under the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982 ed. and Supp.III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. § 81, and has issued detailed guidelines governing that review.

These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

California seeks to diminish the weight of these seemingly important tribal interests by asserting that the Tribes are merely marketing an exemption from state gambling laws. * * * Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. The tribal bingo enterprises are similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources. *New Mexico v. Mescalero Apache Tribe*, 462 U.S., at 341.

* * *

The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime. To the extent that the State seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted. The State insists that the high stakes offered at tribal games are attractive to organized crime, whereas the controlled games authorized under California law are not. This is surely a legitimate concern, but we are unconvinced that it is sufficient to escape

the pre-emptive force of federal and tribal interests apparent in this case. California does not allege any present criminal involvement in the Cabazon and Morongo enterprises, and the Ninth Circuit discerned none. * * *

We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. Congress has not pre-empted California's prohibition against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so. While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cock fighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises. As the law now stands, I believe tribal entrepreneurs, like others who might derive profits from catering to non-Indian customers, must obey applicable state laws.

* * *

Notes

1. Like California, all other Public Law 280 states allow gambling under certain circumstances and subject to certain limits. In *Cabazon*, the two tribes conducted bingo games and draw poker which were permitted by state law under strictly defined conditions, including volunteer staffing of bingo games and a maximum \$250 prize. The tribes did not comply with these conditions and, according to the Court, they need not. Suppose a California tribe conducts card games besides poker and the few others permitted under California state law. For instance, if a tribe operated a casino with every form of gambling found in Las Vegas, would the Court allow it? Once a state allows a little regulated gambling, perhaps a lottery or low-stakes church bingo or free plays for winners in pinball games, is the door open to unlimited gambling on Indian reservations under the Court's decision in *Cabazon*? See *Lac du Flambeau Band of Indians v. Wisconsin*, 743 F.Supp. 645 (W.D.Wis.1990).

2. In the absence of Public Law 280's consent to state jurisdiction, how do the principles of tribal sovereignty and preemption discussed in *Cabazon* apply?

2. THE CONGRESSIONAL RESPONSE TO CABAZON: THE INDIAN GAMING

REGULATORY ACT

In the wake of *Cabazon*, Congress responded to state concerns and passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. The Act recited Congress's reading of the *Cabazon* holding as its predicate: "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." Id. § 2701(5). It goes on to limit and regulate the authority that tribes would have under the immunities from state law recognized in *Cabazon*. The IGRA's reference to whether a state's policy prohibited gambling was borrowed directly from *Cabazon*'s application of Public Law 280 under which criminal jurisdiction, but not civil regulatory jurisdiction, in Indian country had been extended to California. Thus, state policy attitudes became the key point of reference under IGRA and states were given an expanded role in allowing tribally-sanctioned gaming within their boundaries.

The IGRA, which is extraordinarily complex and detailed, is designed to deal with gaming enterprises going considerably beyond bingo, lotto, and card games. Indian gaming under the IGRA is divided into three classes. Class I games include "social games" for prizes with nominal value and traditional tribal gaming. These games are subject solely to the jurisdiction of the Indian tribe.

Class II games include bingo, instant bingo, lotto, punch boards, tip jars, pull-tabs, and other games similar to bingo. Class II also includes manually conducted card games which are legal and played anywhere in a state and are not played against the house. Accordingly, blackjack (21), baccarat, and chemin de fer are excluded from Class II. Class II card games are fully subject to the laws and regulations of the state governing hours of operation as well as wager and pot size limitations. Class II games are regulated by Indian tribes jointly with the National Indian Gaming Commission established within the Department of the Interior. A tribe may conduct or license and regulate Class II gambling if it occurs in "a State that permits such gaming for any purpose by any person" and it is not prohibited by federal law.

Class III games include all other gambling, such as electronic or electromechanical facsimiles of permissible Class III games, card games which are played against the house such as blackjack and baccarat, casino games, pari-mutuel racing, and jai alai. Class III gaming activity may be conducted or licensed and regulated by a tribe "in a State that permits such gaming," subject to an allocation of regulatory authority between the state and tribe set forth in a tribal-state compact. The compact may provide for enforcement of agreed rules and regulations, cross-deputization, tribal taxes equal to those of the state, and procedural remedies for breach of the compact.

The IGRA also establishes the National Indian Gaming Commission which has broad regulatory and investigative authority to assure that Indian gaming is not subject to the influences of organized crime. The Commission is funded by an assessment on Indian Class II gaming enterprises. The assessment cannot exceed 5% of the gross revenues in excess of \$1,500,000.00. A compact may authorize a state to levy an assessment upon tribes that engage in Class III gaming in an amount equal to the state's costs of regulating tribal gaming.

The requirement that tribes and states negotiate a compact in order for a tribe to conduct Class III gaming activities has triggered a number of high-stakes lawsuits. Under IGRA as enacted by Congress in 1988, a tribe, in order to initiate the state-tribal compact procedure, contacts the state with a request to enter into negotiations. Following the request, the parties are given 180 days to arrive at the terms of the compact. In the event that an agreement is not reached within such period, the tribe is authorized by IGRA to file an action in United States District Court to determine whether or not the state has negotiated in "good faith." Under IGRA, the state has the burden of proving it negotiated in good faith. If the court finds the state failed to do so, a mediator is appointed who, after reviewing the positions of both the tribe and the state, presents a "last offer" to the state which the state may either accept or reject. If the state rejects the last offer, the Secretary of the Interior is empowered unilaterally to determine and impose the terms of the compact upon consultation with only the Indian tribe.

The complicated and tenuous compromise that IGRA proposed between tribes, state governments, and the United States came to an abrupt conclusion in 1996 when the Supreme Court undermined a major component of the statute. As a result, the law now operates much differently from what Congress expected.

Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*

44 Harv. J. on Legis. 39, 55-60, 65-71 (2007)

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II. The Rupture: *Seminole Tribe*

A. The End of Equal Bargaining Power

Congress spoke in great detail about its efforts to provide a careful balance between states and tribes in IGRA. The Senate Report notes that the tribal-state compacting process "is a viable mechanism for settling various matters between two equal sovereigns." Congress balanced "the strong concerns of states [regarding] state laws and regulations relating to sophisticated forms of class III gaming ... against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands." Congress made clear that it had considered state and tribal interests and that, despite state interests, states should not be allowed to preclude Indian tribes from conducting class III gaming in accordance with IGRA:

A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its

citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes. [S. Rep. No. 100-446, at 13 (1988).]

As might be expected, IGRA's complicated balancing act involving three sovereigns, divisive political and cultural questions, and large amounts of cash and lawyers generated incredible amounts of litigation. The first wave of litigation can be labeled the "constitutional wave," where several tribes and states sought to overturn the statute as an invalid exercise of congressional authority. These lawsuits were unsuccessful and never reached the Supreme Court, although there are some derivative suits regarding the authority of the NIGC that remain open.

The second wave of litigation can be labeled the "bad faith wave," where tribes accused several states, including California, Florida, and Michigan, of refusing to negotiate gaming compacts in good faith. The tribes filed suit in federal courts against the states and, later, their governors. The states responded by asserting their Eleventh Amendment immunity. When the lower courts split on the effect of the congressional "waiver" of state immunity in light of the Eleventh Amendment, the Supreme Court stepped in and decided *Seminole Tribe of Florida v. Florida* [517 U.S. 44 (1996)]. *Seminole Tribe* ended the "bad faith wave."

In *Seminole Tribe*, the Seminole Tribe of Florida sued the State of Florida and its governor in accordance with IGRA's requirements. The defendants sought to dismiss the suit on the theory that the Eleventh Amendment precluded the suit. The Supreme Court held that IGRA provided an "'unmistakably clear' statement of [congressional] intent to abrogate" state sovereign immunity. However, the Court held that Congress, in enacting IGRA under the Indian Commerce Clause, had no authority to waive state sovereign immunity using its Indian Commerce Clause power. In short, Indian tribes no longer had a legal recourse that would allow them to operate casino-style games where states refused to negotiate in good faith for a gaming compact.

B. Revenue Sharing Agreements

Following *Seminole Tribe*, Indian tribes remained free to exploit their class II gaming opportunities where no gaming compact was required, but where states refused to negotiate for class III gaming, tribes no longer could sue the states to force negotiations. Indeed, "[t]ribes have a right without a remedy." Reports indicate that no tribe was able to finalize a gaming compact for over two years after the *Seminole Tribe* decision. Some tribes responded by threatening to close down roads in order to force negotiations. Other tribes sought to amend state law via public referendum to force negotiations. These measures, however, were ineffective.

Both states and tribes had reasons to seek agreement. Indian gaming had too much potential to generate government revenue for states to ignore it. While the states could still afford to reject gaming in most instances, Indian tribes could not because they often did not have a sufficient alternative tax base. The financial advantage for the states was obvious—they could generate revenue without doing much to earn it. Additionally, after *Seminole Tribe*, states could dictate terms to the tribes.

Not surprisingly, many states began to extort Indian tribes. For example, they demanded a cut of the profits from class III gaming. Other states demanded treaty rights and tax negotiation concessions. Some compacts written after *Seminole Tribe* contain interesting or unusual provisions that extract money from tribes, yet are theoretically consistent with IGRA. * * * Some states in compliance with IGRA also demanded “pay-as-you-go” revenue sharing provisions, such as the Confederated Tribes of the Grand Ronde Community’s agreement to pay the expenses incurred by the Oregon state police in patrolling their gaming operation.

Tribal and state negotiations and compacts after *Seminole Tribe* have one major commonality—revenue sharing with states and state subdivisions. For example, most California tribes operating more than 200 slot machines must contribute seven to thirteen percent of their average net winnings per machine to the State of California’s Special Distribution Fund, and must also participate in revenue sharing arrangements with other tribes. As Professors Light and Rand report, “All told, in 2003 alone, tribes provided \$759 million to state and local governments” [Light & Rand, *The Casino Compromise*, supra.]

Under the post-*Seminole Tribe* regime, revenue sharing is justified as an arm’s length transaction in which the state receives a revenue sharing provision and the tribes receive access to exclusive gaming markets. The problem, as the following examples show, is that revenue sharing percentages have increased while exclusive gaming markets have begun to disappear.

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C. The Secretarial Procedure

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After the decision in *Seminole Tribe*, the Secretary of the Interior sought to reshape the Secretary’s role under the new legal regime. Following the understanding of congressional staffers familiar with the negotiations leading up to the enactment of IGRA, such as Alex Skibine, former deputy counsel on Indian Affairs for the House Interior Committee, and citing IGRA and 25 U.S.C. §§ 2 and 9, the Secretary promulgated a rule, now codified at 25 C.F.R. Part 291, that allows a tribe to invoke a secretarial procedure akin to that of 25 U.S.C. § 2710(d)(7)(B)(vii) if a state refuses to negotiate a class III gaming compact in good faith and invokes its Eleventh Amendment immunity from suit. However, the Secretary’s authority to promulgate the rule has been challenged.

If Part 291 is a valid exercise of the Secretary’s authority, the procedure would be a very effective tool that tribes could use to avoid the intransigence of a state refusing to engage in good faith compact negotiations. However, nothing in the text of IGRA allows the tribe or the Secretary to bypass the requirement of IGRA that a federal court make a determination that the state “has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities” As the Secretary asserted in promulgating the final rule, Part 291 restores a critical portion of IGRA and fulfills Congressional intent, but is that enough to authorize the rule? The Ninth Circuit suggested,

without ruling, that this procedure would not have been valid in the pre-*Seminole Tribe* legal world, but that, in a post-*Seminole Tribe* world, the procedure might be a valid exercise of secretarial discretion in promoting the Congressional intent behind IGRA. Some states and legal commentators, on the other hand, have attacked the procedure as an invalid exercise of secretarial discretion.

The criticisms by states and commentators are not without foundation. Like revenue sharing agreements, nothing in the text of IGRA or even the legislative history expressly authorizes the secretarial procedure. As a result, this proposed solution, like that of revenue sharing agreements, rests on tenuous ground at best.

D. IGRA's Imbalance and National Backlash Against Indian Gaming

[T]he controversy surrounding Indian gaming continues bitterly. The acrimony between states and tribes has intensified as political pressures have mounted and has led, at best, to inefficiency in Indian gaming.

Seminole Tribe made it possible for states to exploit Indian tribes by exacting massive revenue sharing payments. To generate compensating revenue, tribes have had to expand their gaming operations outside of their existing reservation lands to reach more valuable markets. These gaming markets, of course, were created because "restrictive state gaming laws create barriers to entry that provide Indian tribes with an artificial monopolistic market" Additionally, it has been suggested that the increasing political influence of Indian tribes has induced some state legislators "to act in the interests of these tribal constituents." An explanation that is at least as likely, however, is that non-Indian political leaders see independent political value in encouraging and helping some tribes expand their gaming operations to urban areas.

The expansion or even the mere possibility of expansion of Indian gaming operations into urban areas has contributed significantly to the controversy concerning and resistance towards Indian gaming. Local newspaper articles covering Indian gaming expansion to off-reservation areas describe a potential or actual "backlash" against the tribal interests in most instances. As could be expected, this backlash has spilled into the halls of Congress[, which has responded] to the growing national concern over "reservation shopping," a political code word that links off-reservation Indian gaming expansion to smarmy non-Indian gaming developers and greed. Senator Dianne Feinstein's comment in April 2005 aptly described this concern:

Attempts at off-reservation gaming and the practice of "reservation shopping" have increased dramatically in my State over the past five years and it is now estimated that there may be up to 20 proposals to game outside of tribal lands in California.

There is ... reason to be concerned about off-reservation gaming and its effect on the surrounding communities. I have watched as out-of-state gaming developers have sought out tribes offering to assist them in developing casinos near lucrative sites in urban areas and along central transit routes--far from any nexus to their historic lands.

What is "off-reservation gaming"? In short, "off-reservation gaming" is not gaming itself but any *proposal* to conduct Indian gaming on lands not already located within an Indian reservation

or on lands held in trust by the federal government for the benefit of Indian tribes. By definition, Indian gaming cannot occur on off-reservation lands--it must be conducted, in accordance with IGRA, on "Indian lands." "Indian lands" are defined as trust lands or reservation lands. Once land is acquired by the Secretary for the benefit of an Indian tribe, that land is considered "Indian land" and the tribe can conduct gaming operations there. In reality, the term "off-reservation gaming" is oxymoronic and instead refers to an expansion of Indian land to accommodate increased gaming.

The backlash associated with off-reservation gaming is tied to the *Seminole Tribe* decision. Anti-Indian gaming interests regularly turn to the courts to prevent gaming expansion or to strike down gaming compacts under state law. This has politicized and weakened IGRA, an already weak and creaky structure.

* * *

The focus on off-reservation gaming misses the point. If Indian tribes had the ability to force states to negotiate in good faith, they would not need to expend millions of dollars on lobbyists such as Jack Abramoff and Michael Scanlon. Nor would tribes need to seek quality time with powerful politicians and lobbyists such as former Representative Tom DeLay, Grover Norquist, and Ralph Reed. If Indian tribes could force states to negotiate gaming compacts, they would be less inclined to exploit class II gaming in attempts to expand revenue streams when facing states that stonewall class III gaming compacts. All parties involved would benefit from a more cooperative approach, which would protect and promote the interests of the tribes as well as the interests of state, federal, and local governments.

Notes

1. While calling the Court's holding in *Seminole* "remarkable," Professor Martha Field, a leading scholar of federalism, like a number of other commentators, has stated that the case will not have "much impact at all" on Indians and their interests:

Seminole is probably not of major significance in regard to federal-Indian-state relations. It is designed to be, and is, a major decision about the meaning of the Eleventh Amendment and about federal-state relations, judicial and congressional. The decision does, obviously, affect the IGRA. But the scheme that replaces the one held unconstitutional in *Seminole* could prove more advantageous to Native Americans rather than less.

Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 Ariz. St. L. J. 3, 3-4 (1997).

The scheme referred to by Professor Field as replacing the one held unconstitutional in *Seminole* was described by Justice Stevens, in his dissent:

If each adversary adamantly adheres to its understanding of the law, if the District Court determines that the State's inflexibility constitutes a failure to negotiate in good faith, and

if the State thereafter continues to insist that it is acting within its rights, the maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution. 25 U.S.C. § 2710(d)(7)(B). As the Court of Appeals interpreted the Act, this final disposition is available even though the action against the State and its Governor may not be maintained. 11 F.3d 1016, 1029 (C.A.11 1994) (The Court does not tell us whether it agrees or disagrees with that disposition.)

Id. at 99.

Shortly after the *Seminole Tribe* decision, the Spokane Tribe of Washington argued before the Ninth Circuit that the good-faith lawsuit portion of IGRA that had been struck down as unconstitutional meant that whole of IGRA was no longer valid. In *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), the court rejected the claim, but found a great deal of merit in the tribe's position, and vacated the district court's injunction against the tribe's casino operations. Judge Kozinski, writing for the court, noted:

IGRA, however, remains valid and, under some circumstances, it may function close enough to what Congress had in mind to be enforceable by way of injunction. Most obviously, a state might waive sovereign immunity and allow a tribe to sue it in district court; IGRA would then function exactly as intended and there would be no reason not to give it full effect. Here, however, Washington invoked its rights under the Eleventh Amendment and caused the Tribe's suit to be dismissed, distorting the IGRA process. Or, the United States might sue on behalf of a tribe and force the state into a compact. If it did so, IGRA could work as intended and any IGRA violation by the tribe could be enjoined.

* * *

None of the circumstances that might justify enforcing IGRA according to its terms appears to be present here. We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now. Under the circumstances, IGRA's provisions governing class III gaming may not be enforced against the Tribe. However, because the court and the parties below operated under incorrect legal assumptions (largely because *Seminole Tribe* had not yet been decided), it's possible that there are facts of which we are ignorant. For instance, perhaps the Department of Justice had evidence that it was the Tribe that had failed to bargain in good faith. Or perhaps the Department of the Interior determined that no class III gaming should be allowed on the reservation because state law prohibits all such gambling. ... Or, there may be new developments since the district court's decision. We cannot say with certainty that IGRA does not support an injunction against the Tribe; it simply doesn't on this record. If the United States persists in seeking relief, the district court will have to revisit the question and engage in a new factual investigation guided by a

correct legal analysis.

Id. at 1301-02.

2. Technological advances have created an interesting market in so-called Class II “slot machines” in the wake of *Seminole Tribe*. In states where the government refuses to negotiate a Class III gaming compact in good faith, tribes and their business partners developed “technologic aids” to make Class II bingo and pull-tab games more marketable. IGRA defines Class II games as including “the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith). . . .” 25 U.S.C. § 2703(7)(A)(i).

The National Indian Gaming Commission and the United States Department of Justice frequently litigated the question of whether electronic “aids” that transformed standard paper bingo into an electronic form of bingo that resembled electronic slot machines were actually electronic “facsimilies” of Class III games, and therefore *not* Class II games. The litigation came to a head when the Tenth Circuit decided *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), in favor of the tribe, and when the Eighth Circuit decided *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003) (en banc), also in favor of the tribe. The United States Department of Justice petitioned the Supreme Court to grant certiorari in both cases, but the Court denied the petition in both cases. See *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218 (2004); *United States v. Santee Sioux Tribe of Nebraska*, 540 U.S. 1229 (2004).

3. In *Texas v. United States*, 497 F.3d 491 (5th Cir 2007), cert. denied, *Kickapoo Traditional Tribe of Texas v. Texas*, 129 S. Ct. 32 (2008), the Fifth Circuit held over a strong dissent that the Secretarial procedures in 25 CFR Part 291 were not authorized by IGRA and struck them down. See *id.* at 509. The majority reasoned that Congress never would have intended the Secretary to have so much power under IGRA:

The role the Secretary plays and the power he wields under the Procedures bear no resemblance to the secretarial power expressly delegated by Congress under IGRA. First, IGRA interposes, before any secretarial involvement, the requirement that an impartial factfinder determine whether the state has negotiated in good faith. See § 2710(d)(7)(B)(iii). Under the Secretarial Procedures, however, it matters not that a state undertook good-faith negotiations with the tribe: The Secretary may prescribe Class III gaming irrespective of a state's good faith. See 25 C.F.R. § 291.7-.8. This result contravenes the plain language of IGRA.

Second, under IGRA, if mediation is ordered, it is undertaken by a neutral, judicially-appointed mediator who objectively weighs the proposals submitted by the state and tribe. See § 2710(d)(7)(B)(iv). Under the Procedures, however, the Secretary selects the mediator. 25 C.F.R. § 291.9. In light of the Secretary's statutory trust obligation to protect the interests of Indian tribes, this aspect of the Procedures is stacked against the objective interest-balancing Congress intended

and creates the strong impression of a biased mediation process. *See, e.g., Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1499 (D.C.Cir.1995) (noting that “the Secretary was not in a position to champion the State's position in view of his trust obligations to the tribe.” (citing *Heckman v. United States*, 224 U.S. 413, 444-45, 32 S.Ct. 424, 433-34, 56 L.Ed. 820 (1912))). Common sense dictates that the Secretary cannot play the role of tribal trustee and objective arbiter of both parties' interests simultaneously. Congress did not intend this incoherent result.

Third, whereas under IGRA's remedial scheme the court-appointed mediator essentially defines the regulations that the Secretary may promulgate, the Procedures enable the Secretary to disregard not only the mediator's proposal, but also the proposals of the state and tribe. IGRA's remedial process makes clear that Congress did not intend to delegate to the Secretary unbridled power to prescribe Class III regulations.

Fourth, the Secretarial Procedures contemplate Class III gaming in the absence of a tribal-state compact-directly in derogation of Congress's repeated and emphatic insistence. *See, e.g., S.REP. NO. 100-446*, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 (“[IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact.”). The only exception to the compact requirement Congress envisioned was the promulgation of procedures after a bad-faith determination and in concert with the proposal selected by a court-appointed mediator. Yet in spite of this single statutory exception-the product of IGRA's complex and balanced remedial scheme-Appellees maintain it is equally reasonable to assume that Congress intended a waiver of liability under the Johnson Act and 18 U.S.C. § 1166 even *without* a judicial determination of bad faith; *without* the participation of a court-appointed mediator; and *without* the requirement that the regulations ultimately promulgated be “consistent with the proposed compact selected by the [court-appointed] mediator.” § 2710(d)(7)(b)(vii)(I).

Id. at 508-09.

Circuit Judge Dennis dissented, noting:

The IGRA was enacted with more than the interests of the states in mind. It was enacted “in large part to ‘provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.’ ” *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C.Cir.2006) (quoting 25 U.S.C. § 2702(1)). It was also designed to ensure that a tribe was the primary beneficiary of any gaming operations. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, No. 06-5354, 2007 WL 1892080, at *1 (D.C.Cir. Jul. 3, 2007). “IGRA was designed primarily to establish a legal basis for Indian gaming as part

of fostering tribal economic self-sufficiency, not to respond to community concerns about casinos....” *Id.* at *10; *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1308 (D.C.Cir.2007) (holding that the purpose of the IGRA was to ensure economic development and self-sufficiency of Indian tribes through gaming).

While Congress did, as Chief Judge Jones asserts, intend that the mechanism to introduce gaming would be a tribal-state compact, it did not intend to allow, as the *Seminole*-blunted statute does, a situation in which states could refuse to negotiate and thus veto a tribal-state compact. Under the IGRA as passed by Congress, a state that failed to act in good faith, as Texas indisputably has here, could be sued in federal court. 25 U.S.C. § 2710(d)(7). That state would have the burden of proving that it negotiated in good faith. *Id.* at 2710(7)(B)(ii). If the state failed to meet its burden of proof, it would have been ordered to negotiate a compact within 60 days. *Id.* at 2710(7)(B)(iii). If the state continued to refuse to compact, it would have been forced into mediation. *Id.* at 2710(7)(B)(iv). If the state ultimately refused to consent to the results of the mediation, the Secretary of the Interior was empowered to bypass the state and create its own procedures authorizing gambling by the tribe, consistent with the compact proposed during mediation. *Id.* at 2710(7)(B)(vii).

It was thus not just the existence of a compact that was crucial to the balance between states and tribes under the IGRA. “It is quite clear from the structure of the statute that the tribe’s right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless.” *Spokane Tribe*, 139 F.3d at 1300. The right to sue to essentially force a compact gave tribes a crucial piece of leverage against the states-preventing a state from taking the approach of Texas in this case, which has been to utterly refuse to negotiate. Prior to the promulgation of the Secretarial Procedures regulations, states had under *Seminole*’s constitutional interpretation a veto over the tribal-state compact process. *See* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS.. 39, 75 (2007) (describing the stalemate resulting from the elimination of Congress’s intended remedy for tribes faced with a state refusing to negotiate). “Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now.” *Spokane Tribe*, 139 F.3d at 1302.

Id. at 521-22 (Dennis, C.J., dissenting).

4. Shortly before the conclusion of the Bush Administration in 2008, the Department of Interior issued regulations intended to limit the spread of off-reservation gaming. 73 Fed. Reg. 29,354 (May 20, 2008); 25 CFR Part 292. The Secretary now requires that, before the Department will take land into trust for Indian tribes for gaming purposes, the land at issue must be located within 25 miles of tribal government buildings. *See* 25 CFR § 292.12(a)(3) (“restored lands” exception).

IGRA is silent on the location of Indian gaming lands, only noting that they must be on reservation, in trust, or otherwise have a restriction on their alienation applicable to them. It is clear that Part 292 is a response to the political backlash against off-reservation gaming and “reservation shopping.” The origins of Part 292 came from a letter issued by Assistant Secretary for Indian Affairs Carl Artman to regional directors of the Bureau of Indian Affairs asserting that all future Indian gaming trust land applications will be subject to a “commutable distance” requirement, meaning that the Department will not take land into trust for gaming purposes unless tribal members can commute from their reservation homes to the gaming facility on trust property. See Letter from Carl Artman to BIA Regional Directors and George Skibine (Jan. 3, 2008) (“Artman Guidance”). Shortly after the issuance of the Artman Guidance, the Bureau of Indian Affairs rejected the off-reservation trust applications of 11 tribes, asserting that the lands were not close enough for commuting.

Did the Department of Interior ignore its trust responsibility to Indian tribes by interpreting IGRA against the interests of Indian tribes? See generally Alex Tallchief Skibine, Tribal Sovereign Interests Beyond the Reservation Borders, 12 Lewis & Clark L. Rev. 1003 (2008); Matthew L.M. Fletcher, Indian Tribal Businesses and the Off-Reservation Market, 12 Lewis & Clark L. Rev. 1047 (2008).

5. In 2010, a split panel of the Ninth Circuit held that California Governor Schwarzenegger had acted in bad faith by demanding revenue sharing during compact negotiations without satisfying the so-called “meaningful concessions” test. See [*Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*](#), 602 F.3d 1019 (9th Cir. 2010). The “meaningful concessions” test arises not from the text of IGRA but from federal agency statements and the common law of gaming compact revenue sharing arrangements. See Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the “Economic Benefits” Test*, 54 S. D. L. Rev. 419, 431-39 (2009). Over a strong dissent from Judge Bybee, the panel majority invalidated the revenue sharing arrangements in this particular gaming compact. The State of California filed a petition for certiorari.