The Impact of *Seminole Tribe* Twenty Years Later

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Abstract: This paper examines the controversial Supreme Court decision *Seminole Tribe* and how it has affected tribal gaming in the United States. The paper will first give a brief overview of the origins of tribal gaming and the subsequent attempts to regulate it by both state and federal government. The paper will then move on to a discussion of the Seminole Tribe and its experience with tribal gaming. An overview of the litigation between the Seminole Tribe and the State of Florida will follow, ending with an analysis of the *Seminole* decision. The paper will then examine how tribal gaming has been shaped by the *Seminole* decision. The paper will end with a brief look at the Seminole Tribe now and the strides it has made in self-sustenance.

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Introduction

The *Seminole Tribe of Florida v. State of Florida* case is a landmark case that defined the relationship between states and Indian tribes on the subject of gaming. The decision was hailed by states as a win for state sovereignty's immunity guaranteed under the Eleventh Amendment. However, the decision had far-reaching impacts on the economic status of Indian tribes. Gaming holds a significant position among Indian tribes in the USA. Owing to the numerous disadvantages that tribes have in terms of access to economic activities, the federal government considers the use of gaming as a viable option for the tribes to achieve self-sustenance. The contradicting needs of the tribes and the state government presents major hurdles for the establishment and running of tribe gaming facilities. At the heart of the issue is state sovereignty and right to regulate anything within its boundaries. On the other hand, the tribes have inherent sovereignty in regulating conduct on their own lands. When passing the IGRA's clause on negotiation of compacts and the ability of tribes to sue states for refusing to negotiate in good faith, Congress believed it was balancing powers between two sovereigns. The striking down of this clause places tribes at a disadvantage.

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History and Intent of the Indian Gaming Regulatory Act of 1988

This section examines the history of tribal gaming before the Indian Gaming Regulatory Act of 1988. At its onset, tribal gaming serves as an opportunity for tribes to generate income and reduce dependency on federal assistance. Initially, tribes had complete regulatory control over gaming operations on their reservations. Congress limited the inherent tribal sovereignty to regulate conduct on occurring on Indian lands by enacted Public Law 280. Congress limited tribal sovereignty even further through the enactment of the Indian Gaming Regulatory Act of 1988. While tribal gaming has a long history, high stake bingo in the 1970s is a good starting point for the modern concept of tribal gaming.

High Stakes Bingo

In the 1970s, Indian tribes in California, Florida, Maine, New York and Wisconsin began opening high-stakes bingo halls.[1]At its inception, Indian gaming functioned as a means for tribes to generate income and reduce dependence on the federal appropriations.[2] Bingo halls, "with low start-up costs and high rates of return on investment," proved to be successful economic enterprises for tribes. [3] Tribes began to expand their gaming operations, and soon began to offer bigger prizes and operate for longer hours.[4]

As more tribes began to get wind of the opportunity to generate their own income, more and more bingo halls opened up across the United States.[5] The States eventually began to take notice of these tribal gaming operations. Eventually, some states and local law enforcements took strides to shut down the bingo halls.[6] To the States, development of tribal casinos within their borders represented an infringement of states' rights. They needed to be blocked, if not

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[1] Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON. LEGIS. 39, 45 (2007) [hereinafter Fletcher].

[2] *Id*. at 45.

[3] Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 Nev. L.J. 262, 271 (2004) [hereinafter Light & Rand, Reconciling the Paradox of Tribal Sovereignty].

[4] Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 271.

[5] Fletcher, *supra* note 1, at 45-46.

[6] *See* Steven Andrew Light & Kathryn R. L. Rand, *Indian Gaming And Tribal Sovereignty: The Casino Compromise* 40 (2005) [hereinafter Casino Compromise]

severely limited.[7] To the tribes, gaming represented an opportunity for economic development that needed to be protected and expanded.[8]

Public Law 280

As interpreted by the Supreme Court, The Indian Commerce Clause[9] grants Congress plenary and exclusive jurisdiction over Indian affairs.[10] States, on the other hand, may only legislate over Indian affairs when delegated the authority to do so from Congress.[11] Congress delegated some of this authority to the states by enacting Public Law 280[12] in 1953. Public Law 280 extended state civil and criminal jurisdiction to Indian Country in five states: California, Nebraska, Minnesota, Oregon, and Wisconsin. Under Public Law 280, the five states' courts had the authority to enforce "criminal violations and civil causes of action committed or arising on Indian Reservations."[13] At the time Public Law 280 was enacted, it was commonly believed that tribal governments lacked suitable judicial infrastructure and that state courts, therefore, were the preferred alternative to federal courts, which were often hard to access from

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[7] Jerry C. Straus, *Florida's War on Indian Gaming: An Attack on Tribal Sovereignty*, 13 St. Thomas L. Rev. 259 (2000).

[8] *Id*.

[9] *U.S. Const.,* art. I, § 8.

[10] *Morton v. Mancari*, 417 U.S. 535, 551-53 (1974).

[11] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57 (1978).

[12] *Pub. L. No*. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. §1162, 25 U.S.C. §§ 1321-26 and 28 U.S.C. § 1360 (2006)).

[13] *Id*.

Indian reservations.[14] By allowing states jurisdiction over conduct occurring on Indian lands, Congress constricted tribes' inherent sovereignty.

California v. Cabazon Band of Mission Indians

In *California v. Cabazon Band of Mission Indians*, the Supreme Court resolved the issue of whether or not states had jurisdiction to shut down or regulate Indian bingo halls.[15] The case arose because the State of California sought to apply the California Penal Code[16] to the Cabazon and Morongo Bands of Mission Indians, who operated high stakes bingo halls on their reservations.[17] The California Penal Code, however, did not entirely prohibit bingo, but instead permitted it certain circumstances for charitable organizations.[18]

The Supreme Court, after examining the nature and scope of Public Law 280 and its impact on tribal sovereignty, held that where a state law was civil or regulatory in nature, Public Law 280 does not permit enforcement on an Indian Reservation.[19] The Court reasoned that where a state did not prohibit a specific type of gambling altogether, the state was barred from regulating the gambling on Indian reservations.[20]

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[14] Jacob Berman, *Such Gaming Causes Trouble: Constitutional and Statutory Confusion with the Indian Gaming Regulatory Act*, 23 Seton Hall J. Sports & Ent. L. 281, 282 (2013).

[15] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[16] Cal. Penal Code Ann. § 326.5 (West).

[17] *Cabazon*, 480 U.S. at 205.

[18] *Id*.

[19] *Id*. at 207-08.

[20] *Id*. at 210-11.

In coming to its decision, the Court attempted to balance conflicting interests: "tribal and federal interests in tribal self-sufficiency and reservation economic development, weighed against the state's interest in regulating gambling to prevent the infiltration of organized crime."[21] The Court determined that California's interest was insufficient to overcome the federal and tribal interests.[22] The Court reasoned that permitting state civil regulation of tribal gaming would "impermissibly infringe on tribal government."[23] Of particular relevance to the Court was the fact that California encouraged certain state-based gaming, such as state lottery and non-Indian card rooms, but was seeking to criminally prosecute tribes involved in similar gaming operations.[24]

While the *Cabazon* decision was an unexpected victory for tribes, it would be short lived because Congress now recognized the potential regulatory issues stemming from Indian gaming.[25] While tribes were principally opposed to state or federal regulation of Indian gaming on sovereignty grounds, tribes preferred federal regulation to state regulation.[26] The federal government and

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[21] Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 271 (citing *Cabazon*, 480 U.S. at 208-12, 216-22 (1987)).

[22] *Cabazon*, 480 U.S. at 221.

[23] *Id*. at 222.

[24] *Id*.. at 210.

[25] Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 271 (citing Sioux Harvey, *Winning the Sovereignty Jackpot: The Indian Gaming Regulatory Act and the Struggle for Sovereignty*, in Indian Gaming: Who Wins? 18).

[26] *Id.*

tribes shared a common interest in preserving Indian gaming as a method of improving economic development and increasing opportunity for tribal self-sufficiency.[27] On the other hand, States, as well as non-Indian gaming interests, demanded state regulation of Indian gaming.[28] In the year following the *Cabazon* decision, Congress enacted the Indian Gaming Regulatory Act of 1988[29] (IGRA).

The Indian Gaming Regulatory Act of 1988

Purpose and Intent

After *Cabazon*, Congress recognized that clarification of the degree to which state regulation was applicable to tribal was "extremely important."[30] Congress enacted IGRA under the authority of the Indian Commerce Clause and created a novel scheme for regulation of Indian gaming. [31] IGRA functioned as a compromise among the competing interests of the federal government and tribes, and those of the states identified in *Cabazon*.[32]

At the time of enactment, over eighty tribes were conducting bingo and card game operations throughout Indian country. [33] Even at this early stage,

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[27] See I. Nelson Rose, Commentary, The Indian Gaming Act and the Political Process, in Indian Gaming and the Law 4-5 (William R. Eadington ed., 2d ed. 1998) [hereinafter Rose Commentary].

[28] *Id*.

[29] 25 U.S.C. 2701*et seq.*, (Pub.L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467).

[30] S. Rep. No. 100-446, at 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3093.

[31] 25 U.S.C. 2701*et seq.*, (Pub.L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467).

[32] See Harry Reid, Commentary, The Indian Gaming Act and the Political Process, in Indian Gaming and the Law 15, 19 (William R. Eadington ed., 2d ed. 1998).

[33] Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits"*

Indian gaming facilities were generating a yearly income of over $110 million without slot machines or complex casino-style gaming.[34] By enacting IGRA, Congress intended to regulate this booming market by codifying the *Cabazon* decision and authorizing tribes to conduct casino-style gaming in states open to it.[35]

There were three main purposes behind the enactment of IGRA.[36] The first purpose was to establish a statutory framework that would allow gaming to generate tribal revenues as a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[37] The second purpose was to shield tribal gaming from "organized crime and other corrupting influences." [38] The third purpose was to establish the National Indian Gaming Commission (NIGC), as an independent federal regulatory authority for gaming on Indian lands.[39]

Classes of Gaming

In order to implement IGRA, Congress developed three categories of gaming, identified as Classes. Congress defined Class I gaming as social games

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Test, 54 S.D. L. Rev. 419, 420 (2009) [hereinafter Fletcher, Negotiating Meaningful Concessions].

[34] See Kathryn R.L. Rand & Steven Andrew Light, *Indian Gaming Law and Policy* 17, 23 (2006); Rose Commentary, *supra* note 27 at 4.

[35] Fletcher, *supra* note 1, at 50-51.

[36] 25 U.S.C. §2702.

[37] 25 U.S.C. § 2702(1).

[38] 25 U.S.C. § 2702(2).

[39] 25 U.S.C. §2702(3).

played for prizes of minimal value, and traditional tribal games played for ceremonial purposes.[40] Tribes retained exclusive jurisdiction to regulate Class I gaming.[41] While tribes may exercise complete regulatory control without interference from state or federal government, it typically does not generate worthwhile amounts of revenue to be profitable on its own.[42]

Class II gaming also remained under tribal jurisdiction but was subject to provisions of IGRA.[43] Congress defined Class II gaming as various forms of bingo and any card games allowed in the state.[44] Class II does not include banking card games, including blackjack, or electronic facsimiles of any game, or slot machines.[45] Essentially this provision codified the *Cabazon* decision to the extent that tribes were granted exclusive regulatory authority over gaming permitted in the state. IGRA did impose additional requirements on tribes, therefore limiting the *Cabazon* decision somewhat. Ultimately, tribes were authorized to engage in Class II gaming so long as (1) the state permitted such gaming[46]; and (2) the tribe adopted an ordinance or resolution concerning the regulation of the gaming.[47]

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[40] 25 U.S.C. §2703(6) (1988).

[41] 25 U.S.C. §2710(a)(1) (1988).

[42] Mark. J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 Fla. Tax Rev. 345, 382 (2004).

[43] 25 U.S.C. §2710(a)(2) (1988).

[44] 25 U.S.C. §2703(7)(A) (1988).

[45] 25 U.S.C. §2703(7)(B) (1988).

[46] 25 U.S.C. §2710(b)(1)(A) (1988).

[47] 25 U.S.C. §2710(b)(1)(B) (1988).

Class III gaming is the gaming Class most intensely regulated under IGRA. Additionally, Class III gaming is the gaming Class that has the potential to be the most lucrative for tribes.[48] Class III gaming is all forms of gaming that are not Class I or Class II, including casino style gaming such as poker, craps, and blackjack.[49] In addition to the requirements established for Class II gaming, tribes were required to enter into a Class III gaming compact with the governor of the state where tribes hoped to commence gaming.[50] The compact would describe the basic issues resolved between the tribe and state, such as which authority would be responsible for regulation of the facility and what types of games would be played. [51] Continuing to incorporate the *Cabazon* holding, Congress prohibited Class III gaming in states where these forms of gaming were illegal.[52] For example, in Nebraska and Texas, operation slot machines was completely prohibited, tribes were not authorized to conduct Class III gaming.[53]

Compacting Process

IGRA created a detailed process for parties developing Class III compact. The tribe initiates the process by sending a request to the state to negotiate a compact.[54] Upon receipt of the tribes request, states must negotiate with the

[48] Fletcher, *supra* note 1, at 52.

[49] 25 U.S.C. §2703(8) (1988).

[50] 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3) (1988).

[51] 25 U.S.C. § 2710(d)(3)(C) (1988).

[52] 25 U.S.C. § 2710(d)(1)(B) (1988).

[53] See Op. Neb. Att'y Gen. No. 02001 (2002); Op. Tex. Att'y Gen. No. GA-0278 (2004).

[54] 25 U.S.C. §2710(d)(3)(A) (1988).

tribe in good faith.[55] In anticipation for states refusal to negotiate Class III compacts with tribes, Congress incorporated several safeguards into the compacting process.[56]

Principally, Congress placed the burden to negotiate on the states.[57] Additionally, Congress developed an enforcement mechanism in the event that a state refused to negotiate in good faith. Congress granted the federal courts jurisdiction to hear claims brought by tribes with whom the states refused to negotiate in good faith.[58] In developing this enforcement mechanism, Congress intended to preserve the opportunity of a tribe to commence a Class III gaming operation despite being blocked by a state.[59] A complete failure to negotiate has been held to be a violation of good faith.[60] However, failure to negotiate would constitute a violation of good faith where states are not required to enter into a compact because Class III gaming is prohibited in the state, or if a tribe requests

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[55] 25 U.S.C. §2710(d)(3)(A) (1988).

[56] *The Impact of the U.S. Supreme Court's Recent Decision in Seminole v. Florida on the Indian Gaming Regulatory Act of 1988*, 104th Cong. 175-176 (1996) (statement of Franklin Ducheneaux) (The problem for the negotiators [of IGRA] was how to permit the state to have a role in regulation of Indian Class III gaming, which *Cabazon* precluded, through the requirement for a compact without placing tribes at the mercy of a state which would not act in good faith").

[57] 25 U.S.C. §2710(d)(3)(A) (1988).

[58] 25 U.S.C. §2710(d)(7)(A) (1988).

[59] S. Rep. No. 100-446, at 5-6, 18-19 (1988).

[60] *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990).

to conduct activities that extend beyond the "scope of gaming."[61] If the court determines that state has refused to negotiate or has failed to negotiate in good faith, the tribe and state will be ordered to negotiate and complete a compact within sixty days.[62]

In the event where a tribe and state failed to reach an agreement within the prescribed timeframe, IGRA requires the parties to submit to mediation.[63] Under mediation, both the tribe and the state are each required to submit a best proposal to the mediator.[64] The mediator simply chooses between the two proposals, he does not attempt to reach a compromise between the parties.[65] The proposed compact is then submitted to both the tribe and the state.[66] If the state does not consent to the proposed compact, the mediator notifies the Secretary of the Interior, who prescribes procedures under which the tribe may conduct Class III gaming.[67] The Secretary is only permitted to reject a proposed compact if it violates IGRA, another federal law, or national Indian policy.[68]

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[61] *Rumsey Indian Rancheria of Wintun Indians, et.al, v. Wilson*, 64 F.3d 1250, 1255-58 (9th Cir. 1994).

[62] 25 U.S.C. §2710(d)(7)(B)(iii) (1988).

[63] 25 U.S.C. §2710(d)(7)(B)(iv) (1988).

[64] *Id*.

[65] *Id*.

[66] 25 U.S.C. §2710(d)(7)(B)(v) (1988).

[67] 25 U.S.C. §2710(d)(7)(B)(vii) (1988).

[68] 25 U.S.C. §2710(d)(8)(B) (1988).

On the surface, the Gaming Act may be thought to be advantageous to the Indian tribes in allowing unwanted casino gambling on Indian lands located in any of the states. However, this is not the case. First, Congress extends the Act only to states that allow the type of gaming a tribe wants to start. Secondly, Congress has plenary power.[69] As such, Congress preserved the right to apply its own laws to Indian lands and preempt state laws. Congress' decision to balance state interests and Indian interests is what resulted in the controversy of the IGRA. Should Congress have enacted a law to authorize casino gambling on Indian lands without having to pass through states, the controversy could not have existed. The fact that states had a measure of control over Indian gaming that they had been previously denied by the Indian Commerce Clause showed that states were the winners after enactment of the IGRA.[70] Effectively, the requirement for a "compact" between the state and tribe gave states the authority to regulate gaming on Indian lands.[71]

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[69]*Cabazon*, 480 U.S. at 221-22 (1987) (holding that the state has no authority to regulate gambling on Indian lands); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (regulation of activities on Indian lands is the exclusive province of federal law); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (holding state law not generally applicable on Indian lands except where Congress so permits). This doctrine of exclusive federal sovereignty dates back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

[70]S. Rep. No. 100-446, at 2-3, 5 (1988).

[71]Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?,* 26 Creighton L. Rev. 387, 395-403 (1993).

Waves of Litigation

The enactment of IGRA resulted in enormous amounts of litigation.[72] The first wave of litigation was comprised of tribes and states seeking to strike down the act as an invalid exercise of congressional authority.[73]However, these constitutional claims were largely unsuccessful, and none reached the Supreme Court.

The second wave of litigation following the enactment of IGRA focused on states refusing to negotiate Class III compacts with tribes in good faith.[74] Filing suit in federal court, tribes across the United States sued states and their

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[72] *Seminole Tribe*, 181 F.3d at 1239 (referring to IGRA as a "litigation-spawning juggernaut").

[73] See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650 (7th Cir. 2004) (court rejected tribe's claim that IGRA violated Tenth Amendment); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (court rejected State's claim that IGRA violated Tenth Amendment); *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9 (D.D.C. 1990) (court rejected tribe's claim that IGRA violated Fifth Amendment and federal trust responsibility).

[74] *See Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995); *Ponca Tribe of Okla. v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), cert. denied, 514 U.S. 1016 (1995); Wis. Winnebago Nation v. Thompson, 22 F.3d 719 (7th Cir. 1994); *Rhode Island v. Narragansett Tribe*, 19 F.3d 685 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147 (6th Cir. 1993); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991).

governors.[75] In response, states asserted their Eleventh Amendment immunity.[76] On the issue of whether the congressional waiver of immunity was lawful, the lower courts remained split.[77] In *Seminole*, the Supreme Court decided the issue, ending the 'bad faith' wave of litigation.[78]

Seminole Tribe of Florida v. State of Florida

Seminole was one of the first tribes to conduct gaming. Upon enactment of IGRA, the tribe tried to negotiate a "compact" with the state of Florida. However, the state wanted to prohibit certain forms of gaming within its borders. The ensuing litigation culminated with the controversial Supreme Court decision. The decision changed the relationship between states and the Indian tribes looking to conduct gaming. The ruling secured the rights of states to control gaming within their boundaries and ushered in an era of exploitation of tribes. The following section shows the history of Seminole's gaming industry and its struggle to acquire the benefits of good faith bargaining enshrined in the IGRA.

[75] Fletcher, *supra* note 1, at 56.

[76] *Id*. at 56.

[77] *Id*.at 57.

[78] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Seminole's History of Gaming in the State of Florida

The Seminole Tribe of Florida began opening smoke shops and selling cigarettes tax-free in 1979 to generate revenue and establish a tribal economy.[79] While the sale of tobacco generated approximately $1.5 million in the early years, the Seminole Tribe sought another avenue to shift away from reliance on the federal government.[80] Gaming represented a potential sustainable income for the Seminole Tribe, which would allow for tribal independence and sovereignty.[81]

In 1979, the Seminole Tribe opened Hollywood Seminole Bingo, the first tribally owned, high stakes bingo hall in North America, on their Hollywood reservation.[82] Bingo revenue reached $1 million per month within a year of the bingo hall opening.[83] As a primary source of income, the profits from bingo "enabled the Seminole Tribe to enhance the health, housing, education, law enforcement, and communications needs of the tribal members." [84] Bingo

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[79] Harry A. Kersey, Jr., *An Assumption Of Sovereignty: Social And Political Transformation Among The Florida Seminoles1953-1979* at 117 (1996) [Hereinafter Kersey, An Assumption Of Sovereignty].

[80] Kersey, An Assumption Of Sovereignty, *supra* note 79 at 127.

[81] *See id*.

[82] Jessica R. Cattelino, *High Stakes: Florida Seminole Gaming And Sovereignty* at 1 (2008).

[83] Tom Tiede, *Seminoles Testing Florida Sovereignty*, HARLAN (KY.) DAILY CENTER, Jan. 14, 1981, at 8B.

[84] Brief for Seminole Tribe of Florida & the Fond Du Lac Band of Lake Superior Chippewa of Minnesota as Amici Curiae Supporting Appellees, *California v. Cabazon Band of Mission Indians*, 480, U.S. 202 (1987)(No. 85-1708), 1986 WL 728102.

revenues functioned as an integral element in the Seminole Tribe's "ability to enhance and protect the lives of its members."[85]

Local government backlash to the Seminole Tribe's gaming operations, however, was typical of the time. The Broward County Sheriff Robert Butterworth threatened to shut the facility down by force through making arrests[86], argued that tribal bingo violated state and local law, and asserted that there were links to organized crime.[87] Despite Sheriff Butterworth's aggressive efforts to control Seminole gaming through litigation, the Seminole Tribe prevailed under the same theory later adopted in *Cabazon*: bingo was not within the scope of criminal law under Public Law 280.[88] The court concluded that because the Florida statute governing bingo was civil regulatory, not criminal prohibitory, it was not applicable to the Seminole Tribe.[89]

IGRA was adopted eight years following that decision. The Seminole Tribe hoped to expand their gaming facilities to include lucrative casino style gaming. At that time in Florida, slot machines and banking games were plainly illegal

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[85] *Id.*

[86] Kersey, An Assumption Of Sovereignty, *supra* note 79 at 128.

[87] Janet Guyon, *Those Pesky Indians Are Causing Trouble Again- with Bingo: A Florida Sheriff Attempts To Close Seminole Parlor: A 'Nightmare' for Lawmen*, WALL ST. J., Sept. 9, 1980 at 1.

[88] *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Circ. 1981), *cert. denied,* 455 U.S. 1020 (1982).

[89] *Id.*

while poker and roulette were not.[90]Therefore, the Seminole Tribe would need to negotiate a Class III gaming compact with the State of Florida. However, the State was refusing to negotiate with the Seminole Tribe, essentially blocking the tribe's ability to conduct Class III gaming in the state.[91] The Seminole Tribe had even offered to pay 45% of its gambling profits to the State in an attempt to persuade the Governor into compact negotiations. [92] The Governor, however, continued to refuse to enter into negotiations with the Tribe.[93]

District Court Decision

Invoking the right to sue a state in federal court for failure to negotiate in good faith,[94] the Seminole Tribe brought suit against the State of Florida in 1991. [95] The Seminole Tribe sought to remediate the failure of the State to conduct Class III compact negotiations.[96] Florida claimed that while they did enter into good faith negotiations with the tribe, the negotiations were fruitless due to the fact that gaming activities under consideration were prohibited under Florida

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[90] Lourdes Rodriguez-Florido, *Rolling the Dice: Seminole Explore Ways to Bring Casino Games to Reservation*, S. FLA. SUN-SENTINEL, June 28, 1991.

[91] *Id*.

[92] Jeff Testerman, *Indian Casinos Lawsuit Likely*, ST. PETERSBURG TIMES, April 11, 1999, *available at* 1999 WLNR 2608483.

[93] *Id.*

[94] 25 U.S.C. §2710(d)(3)(A).

[95] *Seminole Tribe of Florida v. State of Florida*, 801 F. Supp. 655, 656 (S.D. Fla. 1992), rev'd, 11 F.3d 1026 (11th Cir. 1994), aff'd, 116 S. Ct. 1119 (1996).

[96] *Id.*

law.[97] The State of Florida moved to dismiss the action, however, asserting that the Eleventh Amendment barred the suit.[98]

The Eleventh Amendment provides states with sovereign immunity, protecting states from private actions.[99] However, three exceptions to state sovereign immunity exist. First, a state may consent to suit or waive its immunity.[100] Second, Congress may abrogate state's immunity when it possesses the power to do so.[101] Finally, state officials may be sued in their official capacities in certain circumstances.[102]

The Tribe's central argument against the State's motion to dismiss was that Congress, in enacting IGRA abrogated state's 11th amendment immunity. Florida claimed that Congress did not possess the authority to abrogate this state sovereign immunity by explicitly providing the Tribe a judicial remedy against the State to enforce 'good faith' compact negotiations.[103]

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[97] *Id.*

[98] *Id.*

[99] *U.S. Const*. amend. XI, (The Judicial power of the U.S. shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the U.S. by Citizens of another State, or by Citizens or Subjects of any Foreign State).

[100] *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991).

[101] *Pennsylvania v. Union Gas Co*., 491 U.S. 1, 13–23, 109 S.Ct. 2273, 2280–86, 105 L.Ed.2d 1 (1989).

[102] *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[103] *Seminole Tribe*, 801 F. Supp. at 656.

The District Court for the Southern District of Florida took a two-prong approach in its analysis of the case: (1) Did congress express an unequivocal intention to abrogate States' sovereign immunity; and (2) did Congress possess valid constitutional authority to abrogate States' sovereign immunity?[104]

The court found that Congress, by extending federal jurisdiction to tribes for claims to compel good faith negotiations with states, expressed clear intention to abrogate States' sovereign immunity.[105] In fact, the language of the statute was so "unmistakably clear,"[106] that every court faced with this particular issue reach the same conclusion.[107]

The court's analysis of whether Congress possessed the constitutional authority necessary to abrogate States' sovereign immunity was more complex.[108] Congressional authority to abrogate States' sovereign immunity had been found consistently where Congress acted pursuant to a plenary grant of

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[104] *Id*. at 657-58.

[105] *Id*. at 658.

[106] *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242, 105 S.Ct. at 3147.

[107] See *Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90–611, 1992 WL 71384, at *4 (W.D.Mich. Mar. 27, 1992) ("IGRA demonstrates specific Congressional intent that states be subject to suit in federal courts based upon violations of IGRA. This Court finds that the Act is a clear statement of waiver of sovereign immunity."); *Poarch Band of Creek Indians v. State of Alabama*, 776 F.Supp. 550, 557 (S.D.Ala.1991) ("[T]his Court has little doubt but that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation.... It is difficult to imagine a clearer statement of Congress' intent to subject states to lawsuits in the federal courts.").

[108] *Seminole Tribe*, 801 F. Supp. at 658.

power clearly expressed in the Constitution.[109] The court found that the Indian Commerce Clause of the Constitution provided Congress with plenary power over Indian affairs.[110] The court reasoned that Congress' plenary power over Indian affairs was a sufficient basis upon which to find congressional authority abrogate States' sovereign immunity.[111]

The court also considered the principles articulated in *Pennsylvania v. Union Gas*[112] in its analysis of the issue. The Supreme Court, in *Union Gas*, determined that Congress possessed the power to abrogate States' immunity when legislating pursuant to the Interstate Commerce Clause.[113] In this case, the court reasoned that Congress's authority under the Indian Commerce Clause was at least as broad as that under the Interstate Commerce Clause.[114] The State of

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[109] See *Pennsylvania v. Union Gas Co*., 491 U.S. at 15.

[110] *Seminole Tribe of Florida v. State of Florida*, 801 F. Supp. at 658, citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1715–16, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs...."); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234–35, 105 S.Ct. 1245, 1251–52, 84 L.Ed.2d 169 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law." (citing The Federalist No. 42)); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause....").

[111] *Seminole Tribe*, 801 F. Supp. at 660.

[112] *Pennsylvania v. Union Gas Co*., 491 U.S. at 15.

[113] *Id.*

[114] *Seminole Tribe*, 801 F. Supp. at 661.

Florida argued that distinction between the Interstate and Indian Commerce Clauses prevented equal application in this context.[115] Florida's arguments failed to persuade the court that Congressional authority to abrogate States' sovereign immunity was greater in the area of interstate commerce than Indian commerce. [116] The court reasoned that because "both interstate and Indian commerce derives from precisely the same Constitutional clause," there was no convincing reason to treat them differently.[117]

Ultimately the court determined that Congress had both the intent and the authority to abrogate States' Eleventh Amendment sovereign immunity.[118] The court denied the State of Florida's motion to dismiss. [119]

Court of Appeals Decision

The State of Florida appealed the district court decision denying its motion to dismiss.[120] The Eleventh Circuit Court of Appeals reversed the lower court decision, holding that Congress lacked the power to abrogate the States' sovereign immunity when it enacted IGRA pursuant to the Indian Commerce

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[115] *Id*., citing principally to Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, 109 S.Ct. 1698, 1715–16, 104 L.Ed.2d 209 (1989), where the Supreme Court observed that "[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications."

[116] *Seminole Tribe*, 801 F. Supp. at 662.

[117] *Id.*

[118] *Id*. at 656.

[119] *Id.*

[120] *Seminole Tribe of Fla. v. State of Fla*., 11 F.3d 1016 (11th Cir. 1994), aff'd sub nom. Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996)

Clause.[121] In coming to this decision, the court of appeals conducted the same two-prong inquiry as the lower court.[122] The court of appeals found that while Congress sufficiently expressed intent to abrogate States' sovereign immunity, it did not possess the power to do so when it enacted IGRA.[123] The court of appeals found that *Union Gas* did not extend Congress' abrogation powers to laws passed under any other clause than the Interstate Commerce Clause.[124] The court of appeals went on to find, however, that even if *Union Gas* applied, state negotiations with tribes were clearly within the "typical realm" of state authority.[125] Supreme Court jurisprudence clearly demonstrated, according to the appellate court, that federal jurisdiction over states is permissible only when the state's conduct is outside "typical realm" of state authority. Ultimately, holding that Congress did not have the authority to abrogate States' sovereign immunity when it enacted IGRA, the court of appeals dismissed the Seminole Tribe's appeal.[126]

Supreme Court Decision

The Seminole Tribe appealed the court of appeals' decision. The Supreme Court granted certiorari. The Court affirmed the appellate court's dismissal in a

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[121] *Id*. at 1024.

[122] *Id.*

[123] *Id.*

[124] *Id*.at 1027.

[125] *Id*. at 1028.

[126] *Id.*

controversial 5-4 decision.[127] The majority held that Congress lacked authority under the Indian Commerce Clause to abrogate a state's sovereign immunity under the Eleventh Amendment.[128] The Court confirmed the findings of the two lower courts with regard to Congress' obvious intent to abrogate States' sovereign immunity.[129]

The court set out to determine whether there was a valid constitutional provision that would allow Congress to pass IGRA. An earlier court decision supporting this was *Pennsylvania v. Union Gas Co*. In this case, a divided Supreme Court had decided that Congress had the authority to abrogate a state's sovereign immunity under the Interstate Commerce Clause. The court reasoned that the Interstate Commerce Clause was indistinguishable from the Indian Commerce Clause since the two wording of the two was nearly identical. As a result, the court felt that the same rules would apply. In fact, Congress had relied on the ruling of Union Gas Co. that gave it the power to override state sovereign immunity in enacting the IGRA.[130] In fact, considering the similarity between the two Acts, Congress could not conceive of a different outcome after enacting the IGRA.[131] As such, Congress unequivocally expressed its intent to

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[127] *Seminole*, 517 U.S. 44 (1996).

[128] *Id.*

[129] *Id.*

[130] *Pennsylvania v. Union Gas Co*., 491 U.S. 1, (plurality opinion).

[131] Comparison of U.S. Const. art. I, §8, cl. 3 ("The Congress shall have Power ... [t]o regulate commerce ... among the several States ...."), with U.S. Const. art. I, §8, cl. 3 ("The Congress shall have Power ... [t]o regulate commerce ... with the Indian Tribes.").

abrogate state sovereign immunity by enacting IGRA and authorizing a cause of action against any state that failed to negotiate a compact in good faith.[132]

However, instead of certifying Congress' authority owing to the precedence set by *Union Gas Co.,* the Supreme Court reversed its earlier decision.[133] The court rejected the divided opinion of Union Gas Co. stating that it was a solitary deviation[134] from the established jurisprudence of the Supreme Court. Further, the Supreme Court ruled that the solitary deviation was causing confusion in the lower courts.[135] The court held that such a decision would be contrary to the Eleventh Amendment, which placed a general limitation on the questions of sovereignty of state.[136]

In overruling *Union Gas*, the Supreme Court effectively declared itself concerning Congress' authority to abrogate state sovereign immunity. The Supreme Court continued in its jurisprudence of narrowly allowing exceptions to

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The Supreme Court's reading of Congress's plenary power over Indian affairs under the Indian Commerce Clause is debatably of wider scope than its authority under the Interstate Commerce Clause. See *Seminole Tribe*, 517 U.S. at 59-62 ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.").

[132]*Seminole*, 517 U.S. at 56-57; see also *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991) (stating that where Congress exercises its power to abrogate state sovereign immunity, it must do so "with unmistakable clarity").

[133] *Seminole*, 517 U.S.at 64 (1996).

[134] *Id.*

[135] *Id.*

[136]Michael Grant, *Seminole Tribe v. Florida - Extinction of the "New Buffalo?",* 22 Am. Indian L. Rev. 171, 176 (1997).

the state immunity under the Eleventh Amendment.[137] Based on the court's ruling, it was clear that neither Interstate Commercial Clause nor Indian Commerce Clause reached the threshold of eliminating the states' sovereign immunity. The court felt that the longevity of state sovereignty could not be so short to an extent of dissipating when face with a subject such as Indian commerce, which was under Federal Government's control.[138] The court thus protected the Eleventh Amendment stating that the sovereign immunity of a state would bar a tribe from bringing action against it unless the state consented to the suit.[139] Therefore, suits emanating from tribes were not going to reach the threshold for the federal courts to decide suits against states.

This does not imply that holes cannot be poked into the blanket that is state sovereignty. In fact, Union Gas was not the first time that the immunity veil had been lifted. The Supreme Court in *Fitzpatrick v. Bitzer*[140] held that Congress

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[137] *Seminole*, 517 U.S.at 72.

[138] *Id.*

[139] *Id*. at 73-76 (The tribe also asserted that the "Ex parte Young exception" to state sovereign immunity permitted the suit against Florida's governor for injunctive relief based on a violation of federal law, specifically IGRA's provision requiring the state to negotiate in good faith. Under Ex parte Young, 209 U.S. 123 (1908), state sovereign immunity does not extend to state officials acting unconstitutionally or contrary to federal law, so that they may be sued for prospective injunctive relief despite the state's immunity from suit. However, the Court held that Ex Parte Young exception did not grant the Tribe a cause of action against the governor for failure to enter into good faith negotiations).

[140] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)

had the authority to abrogate state sovereign immunity under its powers in §5. The provisions of §5 are very narrow and they give Congress very limited powers to abrogate state sovereign immunity. The section provides that Congress can only abrogate state immunity where a state legislation is contrary to a provision of the Fourteenth Amendment.[141] The decision in Fitzpatrick was thus confined in law. However, there was no proper law to support the decision in *Union Gas*[142], which brought a lot of difficulties when trying to apply the same in the lower courts. Subsequently, Congress' dependence on the Union case left it on shaky grounds in terms of the laws supporting the case. The IGRA was not based on any provision under the Fourteenth Amendment. Therefore, Congress could not invoke its powers under Section 5 of the amendment. Therefore, the Supreme Court showed that it will always be reluctant to lift the veil of state sovereign immunity and that the threshold for that is quite narrow.

The *Seminole* judgment set states free from Congress's requirement for them to negotiate with tribes on compacts in good faith.[143] Owing to this decision, the state had all the control and authority to determine the conditions under which Indian tribes would set up Class III gaming. The state would decline to negotiate a tribal-state compact without fear of being sued. Also, states were

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[141] *Amendment XIV, Section 5*

[142] *Pennsylvania v. Union Gas Co.*, 491 U.S 1 (1989)

[143] Commentators generally agree that IGRA's severability clause protects IGRA's remaining provisions, so that Seminole invalidates only the tribe's cause of action against the state, rather than the entire Act. See 25 U.S.C. §2721.

free to set out any terms for tribes that wish to set up Class II gaming.[144] The Supreme Court's decision was self-defeating. Considering that it is in the interest of federal courts and Congress to defend the Indian tribes, this decision effectively removed the decision making power and refereeing role from Congress and federal courts respectively. Instead, state governments became solely responsible for determining the conditions they want for Class III gaming.[145]

Seminole Aftermath

The expected benefits of IGRA were the provision of an equal footing for tribes when negotiating with the state. Considering that the federal courts could be effectively given the supervisory role to determine whether the state was negotiating in good faith, it was possible to ensure that tribes got their fair share after setting up Class III gaming spots. The *Seminole* decision closed the curtains for equal bargaining. The Secretary of Interior's powers to intervene were curtailed. The states would take advantage of negotiations without fear. This also increased the level of politicizing of Indian gaming with tribes lobbying for changes in state laws to provide them the required benefits.

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[144][144] See Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. 427, 430 (2001) [hereinafter Washburn, Recurring Problems].

[145]Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marq. L. Rev. 971, 979–81 (2007) [hereinafter Rand, Caught in the Middle].

The decision also threw Indian tribes into limbo concerning the remedies available to tribes when states fail to negotiate a compact in good faith. The states also got an upper hand and took the opportunity to re-negotiate the tribal state compacts they had made before the ruling. As a result of this, states started demanding higher amounts of revenue from tribes by enacting controversial agreements.[146] Owing to this, it is clear that the careful balance Congress wanted to achieve through IGRA had been upset.

After *Seminole* ruling, Indian tribes continued exploiting the Class II gaming opportunities as they did not require any compact agreements for them to be set up.[147] The tribes could no longer sue states when they refused to negotiate gaming compacts in good faith. While the tribes have a right, it is a right without a remedy.[148] After the *Seminole* decision, no tribe was able to finalize a gaming compact for more than two years.[149] Tribes took to extra-judicial actions such as closing down roads in the bid to force negotiations with

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[146]Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, Fed. Law. April 2013, at 35, 37.

[147] 25 U.S.C. §§ 2710(a), 2710 (b) (2000).

[148]Washburn, Recurring Problems, *supra* note 144 at 441.

[149]Casino Compromise, *supra* note 6 at 50; see also Ron M. Rosenberg, *When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-Pima Maricopa Gaming Compact*, 4 HARV. NEGOT. L. REV. 283, 294 (1999) ("In August 1998, the Salt River Pima Maricopa Indian Community and the State of Arizona entered into the first post-Seminole Tribe compact in the United States.").

the state.[150] For others, they sought legislative measures within the state legislature. Some went to the extent of calling for public referendums in order to force negotiation.[151] The measures, however, were not effective.[152]

Secretary Involvement Limited

The Department of the Interior, through delegation by federal statute, has long held the role as trustee on behalf of Indians and Indian tribes.[153] With respect to Indian gaming, the trust relationship is made explicit.[154] Under IGRA, the Secretary of the Interior maintained a significant role in the negotiation of

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[150] Jacob Viarrial, *Remarks of Pojoaque Pueblo Governor Jacob Viarrial*, 14 T. M. COOLEY L. REV. 533, 534 (1996) ("Our thinking was, if the Governor did not have the authority to sign the gaming compacts, then none of the other agreements that he had ever signed with us were legal either. That included any agreements where we granted the state the right to put highways through our land .... I might add that because of the road closing, the United States Attorney came back and told us that if we would agree not to close the roads, he would agree not to shut our casinos down. We could all agree to that. So we kept our casinos open.").

[151] K. Alexa Koenig, Comment, Gambling on Proposition 1A: The California Indian Self-Reliance Amendment, 36 U.S.F. L. REV. 1033, 1036 (2002); Rosenberg, supra note X, at 296-97 (discussing Arizona's Proposition 201).

[152] Bryan J. Nowlin, Note, Conflicts in Sovereignty: The Narragansett Tribe in Rhode Island, 30 AM. INDIAN L. REV. 151, 161-64 (2005-2006) (discussing how state referenda were unhelpful to the Narragansett Tribe in Rhode Island).

[153] 25 U.S.C. §§ 2, 9 (2000); 25 U.S.C. §§ 2, 9 (2000).

[154] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (relying on *United States v. Mitchell*, 463 U.S. 206 (1983) for the reasoning that the trust relationship created in Tucker Act, 28 U.S.C. § 1491 (2000), provides a waiver of sovereign immunity and therefore creates a right of action against the United States).

Class III compacts.[155] Prior to the *Seminole* decision, the Secretary had the authority to enforce and implement Class III gaming compacts selected by a mediator. Following the *Seminole* decision, the Secretary attempted to reformat the Secretary's role under the new, limited IGRA.[156] The Secretary proposed a rule that would function as an administrative fix to *Seminole*. [157]

Under the proposed rule, if a state refused to negotiate a Class III gaming compact in good faith and invoked its Eleventh Amendment immunity from suit, the tribe would be permitted to invoke a procedure whereby the Secretary would promulgate Class III gaming procedures for the tribe.[158] This procedure would function as an effective tool for tribes to bypass the inflexibility posed by states refusing to enter into good faith negotiations.[159] Ultimately, the rule was struck down as an invalid exercise of the Secretary's authority.[160] Without this, the tribes no longer had a remedy if states refused to negotiate in good faith.

End of Equal Bargaining Power

Through the enactment of IGRA, Congress was able to create a balance of power between tribal and state interests by requiring "government-to-

[155] 25 U.S.C. §2710(d)(7)(B).

[156] Fletcher, *supra* note 1, at 65.

[157] Class III Gaming Procedures, 64 Fed. Reg. 17,535 (Apr. 12, 1999) (codified as 25 C.F.R. pt. 291 (2004)).

[158] *Id.*

[159] Fletcher, *supra* note 1, at 65.

[160] *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1211 (10th Cir. 2017).

government" negotiation of Class III gaming compacts.[161] The compact requirement functioned as a vehicle to settle issues between "two equal sovereigns," and balanced the concerns of both the tribes and states in regard to regulating of complex Class III gaming.[162] Indian interests in respect to gaming include generating income to finance governmental services for the benefit of the tribe, promoting public safety and law enforcement on tribal lands, forwarding the goals of economic self-sufficiency and self-determination, and regulating conduct occurring within its jurisdictional borders.[163] State interests in respect to gaming include "interplay of such gaming with 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."[164] Following thoughtful consideration of the interests, Congress concluded that states should not be permitted to preclude tribes from conducting Class III gaming in accordance with IGRA.

Despite lack of constitutionally granted jurisdiction, States have gained and exerted significant authority over regulating one of the few opportunities available to tribes to generate revenue.[165] The states took advantage of the legal

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[161] Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 274.

[162] S. Rep. No. 100-446, at 13.

[163] *Id.*

[164] *Id.*

[165] *See* Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 274-75.

lacuna left by the defeat of the *Seminole* case. The provisions set out concerning negotiating compacts with the state were the only threat from which the IGRA hang. The fact that the state could not be sued after violating other provisions of IGRA gave it room to exploit the tribes. The decision in *Seminole* did not give the tribes any direction on where to seek remedies when states failed to give them a fair negotiation.

As a result, states became increasingly emboldened in their negotiations with tribes for Class III gaming compacts.[166] Tribes are no longer able to force compact negotiations with states, but states are now able to strong-arm tribes into accepting less than favorable terms within the compacts.[167] States have taken advantage of this new position of power and pushed tribes to relinquish elements of tribal sovereignty, in exchange for a Class III gaming compacts.[168] Other states have refused to negotiate altogether, effectively blocking tribal gaming from taking place within their borders.[169]

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[166] Alan E. Brown, Ace in the Hole: Land's Key Role in Indian Gaming, 39 Suffolk U. L. Rev. 159, 170 (2005) [hereinafter Brown, Ace in the Hole].

[167] *Id.*

[168] Light & Rand, Reconciling the Paradox of Tribal Sovereignty, *supra* note 3 at 275.

[169] Kathryn R.L. Rand, There are No Pequots on the Plains: Assessing the Success of Indian Gaming, 5 Chapman L. Rev. 47, 52 (2002); Washburn, Recurring Problems, *supra* note 144 at 430.

Revenue Sharing Agreements

In the wake of *Seminole*, states can now dictate terms to the tribes when negotiating Class III gaming compacts.[170] With this new position of power, states have managed to secure millions of dollars annually from Indian gaming within their borders.[171] After *Seminole*, revenue sharing agreements have become a common feature in Class III gaming compacts. In fact, many compacting negotiations are not centered on whether any revenue sharing provisions will be included, but at what percentage of revenue will be required.[172]

Revenue sharing agreements allow states to extract revenue from tribes engaging in Class III gaming within the state. There are two categories of revenue sharing provisions typically found in Class III compacts. In the majority of revenue sharing provisions, the tribe is required to pay an increasing percentage as gaming revenues increase.[173] On the other hand, few revenue sharing provisions require a tribe to pay a fixed rate or flat percentage of gaming revenues to the state.[174]

Indian gaming represents too great an opportunity to generate revenue for tribes or some states to ignore. Alternatively, while states can afford to reject

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[170] Fletcher, *supra* note 1, at 58.

[171] Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 Neb. L. Rev. 263, 272 (1999).

[172] Fletcher, *supra* note 1, at 45.

[173] U.S. Gov't Accountability Office, GAO-15-355, Indian Gaming: Regulation And Oversight By The Fed. Gov't, States, & Tribes (June 2015) at 18 n.17.

[174] *Id.*

gaming, tribes cannot because there is typically no alternative tax base available to the tribes.[175] However, the ability to generate significant revenue without much effort proved irresistible to some states.[176] In fact, states have consistently considered Indian gaming as a means to manage huge budget deficits.[177] Tribes now find themselves between a rock and a hard place, as they are forced to relinquish a percentage of their gaming profits in order to secure the required compact to conduct Class III gaming on Indian lands.[178]

Revenue sharing agreements have been held valid by the Secretary of the Interior "on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state."[179] IGRA provides that states may not "impose any tax, fee, charge or other assessment on Indian tribe" and that states may not "refuse to enter into compact negotiations based upon the state's lack of authority to impose such a tax, fee, charge or other

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[175] Fletcher, *supra* note 1, at 58.

[176] Margaret Graham Tebo, *Betting on Their Future: Flush with Cash, American Indians are Laying the Creative Groundwork for New Ventures*, A.B.A. J., May 2006, at 33, 36.

[177] Kelly B. Kramer, *Current Issues in Indian Gaming: Casino Lands and Gaming Compacts*, 7 Gaming L. Rev. 329, 333 (2003), (citing Erica Werner, *Deficit-Ridden States Eye Indian Gaming Cash*, St. Paul Pioneer Press, Apr. 27, 2003, at 20A.).

[178] Katie Eidson, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 Am. Indian L. Rev. 319, 325 (2005) [hereinafter Eidson, Exclusivity].

[179] *Cohen's Handbook of Federal Indian Law* § 12.05[2], at 891 (Nell Jessup Newton et al. eds., 2012).

assessment."[180] IGRA does not, on the other hand, prohibit provisions that allow for the reimbursement of costs incurred by the state in regulating Indian gaming.[181] Therefore, the validity of these revenue sharing provisions hinges on states providing an exclusive gaming market. The states that engage in revenue sharing from Indian gaming thus formulate their revenue sharing provisions in such a way that they cannot be termed as taxes.[182]

Decreasing Exclusivity of Gaming Markets

One critical issue with the revenue sharing scheme, however, is that revenue sharing percentages have steadily increased while the exclusivity of the gaming markets has consistently decreased.[183]

The expectation from the term "substantial exclusivity" is that Indian tribes will be the only ones allowed to operate Class III gaming in a state's territory.[184] According to the Secretary of Interior's directives, it is only through the provision of exclusive rights to operate Class III gaming that states should get a share of the revenues accrued from this gaming. Therefore, the options of a state should be to prohibit non-Indians from opening gaming sites to compete

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[180] 25 U.S.C. § 2710(d)(4) (2012).

[181] *See id.*

[182] Eidson, Exclusivity, *supra* note 179, at 325–26.

[183] Fletcher, *supra* note 1, at 60.

[184]Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (on file with the Office of Indian Gaming Management, Bureau of the Indian Affairs) [hereinafter Babbitt Press Release], available at http://www.doi.gov/news/archives/indnmcom.html. (Aug. 23, 1997).

with Indian gaming or agree to relinquish payments if non-Indians are allowed to participate by the state.[185] As such, exclusive right to operate does not apply unless the Tribes are the only entities allowed to open gaming sites in the state's territory or the state expressly prohibits other individuals or entities from operating within its territories.[186][187]

A compact is invalid under IGRA if there is no substantial exclusivity, which in this case is the valuable economic benefit that is used in the bargain. When substantial exclusivity is not given, then the state does not have a legal right to ask for revenue sharing as this would be construed as taxation.[188]

Off-Reservation Gaming

In order to compensate for revenue lost in revenue sharing agreements, tribes have begun attempting to reach more valuable markets by expanding gaming operations outside of existing reservation lands.[189] The process of expansion to "off-reservation gaming" is not simple, however. Under IGRA, Indian Gaming is permitted only on Indian lands. By limiting Indian gaming to Indian lands under IGRA, Congress sought to prevent tribes from acquiring land solely for gaming development.[190] IGRA also prohibited on lands acquired after

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[185] *Id.*

[186] *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d, 850, 852 (W.D. Mich. 2000).

[187] Eidson, Exclusivity, *supra* note 179, at 328.

[188] Babbitt Press Release *supra* note 184.

[189] Fletcher, *supra* note 1, at 66-67.

[190] *See* 25 U.S.C. §§ 2703, 2710(d) (2000).

the enactment of IGRA in October 1, 1988.[191] The prohibition is subject to several exceptions.[192] Some exceptions include if the tribe acquired the lands through a settlement claim, if the lands were initial lands of a newly recognized tribe, or if the lands were restored from previously depleted.[193]

Another exception to the prohibition is if the Secretary of the Interior determines that a gaming operation on newly acquired land would be in the best interest of the tribe and would not be detrimental to the surrounding community, after consulting with the tribe, and state and local officials, including officials of nearby Indian tribes.[194]

These types of agreements for "off-reservation gaming" are not common, however. For example, local community support is often the determining factor on whether tribes may establish a gaming facility on after acquired land.[195] Tribes must demonstrate to local communities that establishment of a tribal gaming operation will not negatively impact the community's "social structure, services, economic development, housing, and community character."[196] Additionally, tribes have the burden of demonstrating that the land acquisition is in the best interest of the tribe. This includes establishing the benefits, such as

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[191] 25 U.S.C. § 2719(a).

[192] 25 U.S.C. § 2719 (2000).

[193] 25 U.S.C. §2719(b)(1)(B).

[194] 25 U.S.C. § 2719(b)(1)(A) (2000).

[195] Tim Herdt & Ryan Alessi, *Indians Travel Far from Home in Quest for Casinos*, Ventura County Star, May 6, 2001, at A1.

[196] *Id.*

increased tribal employment, that the tribe will receive through the operation of a gaming facility. [197] Furthermore, it is not uncommon for tribes with existing gaming facilities to contest acquisition of land by tribes seeking to establish competing gaming operations nearby.[198] Finally, the tribes must obtain approval from both the Secretary of the Interior and the Governor of the affected state. [199] The likelihood of tribes obtaining approval from both parties has decreased as the climate surrounding tribal gaming becomes increasingly politicized. [200]

Successfully arguing to fall under an exception has often meant "casino or bust" for many tribes.[201] Significant litigation has stemmed from disputes over how, when and where tribes have acquired land.[202] These exceptions have come under extreme scrutiny and are often viewed as "loopholes that allow for the creation of tribes and the acquisition of lands solely for the purpose of gaming."[203]

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[197] Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 Nev. L.J. 301, 310 (2004).

[198] *Id. at* 311.

[199] *Id.*

[200] *Id.*

[201] Brown, Ace in the Hole, *supra* note 166, at 165.

[202] *Id.* at 166.

[203] *Id.* at 165-166.

The Mechoopda Indian Tribe of the Chico Rancheria Example

The NIGC was tasked in 2003 to determine whether the California Mechoopda Indian Tribe of the Chico Rancheria would conduct gaming[204] in a land that it had acquired in 2001.[205] The NIGC had to determine whether the land fell under the provision of the "restored lands" exception under IGRA.[206] The main issue was the fact that the land was outside the reserves hence creating a grey area concerning its jurisdiction.[207] For the land to fall in the IGRA exception, the NIGC required to see evidence that the Indian tribe exercised authority on it and it had jurisdiction. Recent case law gives tribes jurisdiction of all lands located in "Indian country".[208] Further, 25 U.S.C. § 2703(4) [209] states that any land over which tribes have jurisdiction is deemed Indian land. The tribe presented proposed laws and other ordinances to prove its jurisdiction over the land.[210] The courts extend the definition of Indian Country to include any lands that the government had taken in trust in order to benefit a tribe.[211] At the point

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[204]Memorandum from the NIGC Acting General Counsel to the NIGC Chairman (Mar. 14, 2003) [hereinafter NIGC Memorandum], available at http:// www.nigc.gov/nigc/documents/land/mechoopdamemo.jsp

[205] NIGC Memorandum, *supra* note 204, at 1.

[206] *Id.*; 25 U.S.C. § 2719(b)(1)(B)(iii) (2000).

[207] NIGC Memorandum, *supra* note 204, at 1-2.

[208] *Id.* at 2.

[209] *Id.* at 2.

[210]*Id.* at 4.

[211] *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 511 (1998) (holding lands held in trust "Indian country" because set apart for use of Indians).

when the case was brought before the NIGC, the tribe was trying to transfer the land it had acquired to trust.[212] As such, the land fell within the definition of "Indian country".

The next step for the NIGC was to determine whether the procedure for restoration of the land had been followed in order for it to fall under the exception of 25 U.S.C. § 2719(b)(1)(B)(iii). The section recognizes land taken into trust as a part of the land restoration for an Indian tribe to Federal recognition .[213] The NIGC applied the ordinary meaning of "restored" to show that the land was given back to its original owner after having changed hands. [214] The NIGC followed the history of the Mechoopda tribe and the land in question starting from the mid nineteenth century.[215] It found that an Act of Congress had terminated the tribe in 1958. This was the reason for having lost the land. However, it found that the Assistant Secretary of Indian Affairs reinstate the tribe's status in 1992 after it won a suit. [216] Owing to this, the NIGC concluded that the tribe has been properly restored hence its land was also restored under the requirements of 2719(b)(1)(B)(iii).[217]

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[212] NIGC Memorandum, *supra* note 204 3-4.

[213] *Id.* at 4.

[214] *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 700 (W.D. Mich. 1999) (holding word "restore" has no special meaning).

[215] NIGC Memorandum, *supra* note 204, at 5.

[216] *Id*

[217] *Id*

The last step for the NIGC was to determine the connection between the tribe and the land in question. Not all land that was once occupied by a tribe falls under the requirements for "restored lands" under that 2719(b)(1)(B)(iii).[218] Instead, an explicit connection between the land and the tribe must exist. The tribe's ethnographers identified cultural and historical connections to the land, which showed that the land qualified in the meaning of "restored lands."[219] Having proved that the land was under the requirements of "restored lands", the NIGC declared that the Mechoopda tribe could lawfully conduct gaming on the land.[220] While the Mechoopda tribe did not initiate gaming operations immediately, the case shows the complexity that arises in verifying the IGRA land exceptions when tribes are seeking gaming establishment rights.[221]

Politicization of Indian Gaming

After the *Seminole* decision, much of Indian gaming has become politicized. For example, the political culture of a state has become a determining factor in whether or not tribes conduct casino-style gaming.[222] A governor's attitude towards tribal gaming may dictate the nature or even existence of a gaming compact.[223] Furthermore, the transition to a new governor

[218] *Id* at 5-9.

[219] *Id* at 5-9.

[220] *Id* at 5-9.

[221] *Id,*

[222] Rand, Caught in the Middle, *supra* note 145 at 981 (2007)

[223] *Id.*

may completely alter the state's position on the existing compact or willingness to enter into a new compact.[224]

Controversy has also erupted over the expansion, or even mere possibility of expansion, of Indian gaming.[225] The controversy over "reservation shopping" has extended into Congress. [226] Tribes have expended millions of dollars on lobbyist and political donations in an effort to protect their interests.[227] For example, in Maine, off-reservation was subjected to the ballot in 2003 amid heated debates. [228] The Penebscots tribe wanted to build an off-reservation casino in Southern Maine near the New Hampshire border. [229] The tribe was following an agreement it had made with the state in a 1980 land settlement case. In the case, the tribe had agreed with the state of Maine that would need arise, it would request to be allowed to build gaming facilities outside the reservation. Considering that "Indian gaming" had not commenced by this time[230] , the Maine government must have seen it as a long shot with no real implication. The voters overwhelmingly rejected the request. Most of those who rejected the request believed that building a casino would have negative

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[224] *Id.*

[225] *See* Casino Compromise, *supra* note 6 at 63-65.

[226] Fletcher, *supra* note 1, at 67-68.

[227] *Id* at 71.

[228] Editorial, Maine's Indians Look Beyond Casino's Defeat, Portland Press Herald, Dec. 28, 2003, at C4 (discussion of tribal leaders' reactions to decision and impact on tribe).

[229] *Id* (outlining geographic issues involved in Maine Indian casino debate).

[230] *Id* (setting forth Maine Indian land settlement chronology).

impacts on the surrounding communities and that it would damage the state's wholesome New England image. [231]

The *Seminole* decision taking away the ability of federal courts to force states to negotiate in good faith with Indian tribes has resulted in huge expenses for the Indian tribes as they try to negotiate for better terms when dealing with state governments. They have to seek services worth millions of dollars from lobbyists such as Jack Abramoff and Michael Scanlon. [232] The tribes also have to seek the audience of politicians and lobbyists with the aim of swaying their decisions. [233] If the Indian tribes would be in a position of enforcing good faith in the negotiation of gaming compacts, they would be less likely to try and exploit Class II gaming. Unfortunately, the exploitative nature of states leaves them no option. [234] The states have consistently failed to consider that through fair negotiations, they gain as much as the tribes. The flourishing of the casinos would increase the amount relinquished to them for protecting the exclusionary rights of the Indians. As a result, corporative moves could promote the interests of tribe, state and federal government.[235]

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[231] *Id* (explaining outcome of Maine vote).

[232] Fletcher, *supra* note 1, at 70–71.

[233] *Id.*

[234] See generally Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs, 109th Cong. (Apr. 27, 2005) (statement of Philip N. Hogen, Chairman, Nat'l Indian Gaming Comm.), available at http://indian.senate.gov/2005hrgs/042705hrg/hogen.pdf

[235] Fletcher, *supra* note 1, at 70–71.

State Law Wave of Litigation

Following the *Seminole* decision, a new wave of litigation has taken hold for invalidating Class III gaming compacts.[236] This wave of litigation is centered on the theory that governors do not have the authority to negotiate and execute compacts under the state constitution without authorization from the legislature.[237] Tribes and states have negotiated and executed complex gaming compacts, only to have them struck down under state law.[238] Compacts, including those in place for decades, are now vulnerable to possible legal challenge.[239] This wave of litigation has the potential to disrupt gaming

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[236] *Id* at 69.

[237] See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1069-79 (D. Ariz. 2001) (striking down Arizona compacts), rev'd, 305 F.3d 1015 (9th Cir. 2002); *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 981 P.2d 990, 1002-09 (Cal. 1999) (striking down California compacts); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1183-85 (Kan. 1992) (striking down Kansas compacts); *Taxpayers of Mich. Against Casinos v. Michigan*, 657 N.W.2d 503, 514-17 (Mich. Ct. App. 2002) (upholding Michigan compacts), rev'd, 685 N.W.2d 221 (Mich. 2004), cert. denied, 125 S. Ct. 1298 (2005); *Taxpayers of Mich. Against Casinos v. State*, 708 N.W.2d 115, 121-26 (Mich. Ct. App. 2005) (striking down amendments to Michigan compacts*); State ex rel. Clark v. Johnson*, 904 P.2d 11, 26-27 (N.M. 1995) (striking down New Mexico compacts); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1060-61 (N.Y. 2003) (striking down New York compacts); *Panzer v. Doyle*, 680 N.W.2d 666, 696-97 (Wis. 2004) (striking down Wisconsin compacts).

[238] Fletcher, *supra* note 1, at 69.

[239] *Id.*

operations in a substantial manner and significantly jeopardize revenue streams for both states and tribes.[240]

The Seminole Tribe Post-*Seminole*

Despite being at the center of the controversial litigation that created imbalance in bargaining strength for tribes, the Seminole Tribe has become one of the most economically successful tribes in the country. The success of the tribe demonstrates the impact of Indian gaming on the economics of Indian tribes. After years of offering solely Class II gaming at their facilities, the tribe eventually secured a Class III gaming compact with the state of Florida. Today, the state represents a success story in the arena of gaming, as will be shown.

Continued Class II Gaming

Despite the *Seminole* decision, the Tribe still operated extremely successful bingo halls on reservation land in Hollywood, Tampa, Immokalee and Brighton.[241]

IGRA allows tribes to pursue Class II gaming without negotiating compacts with the state. The only requirement is that the NIGC must oversee the operation of such activities. [242] While Class III gaming has been at the center of controversy in the bid to balance state and tribe interests, tribes have been accruing significant amounts of revenue from Class II gaming. The Seminole

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[240] *Id.*

[241] Jeff Testerman, *Indian Casinos Lawsuit Likely*, ST. PETERSBURG TIMES, April 11, 1999, *available at* 1999 WLNR 2608483.

[242] 25 U.S.C. § 2710(a)-(b) (2006).

Tribe, for example, has generated hundred millions of dollars for the last two decades from Class II gaming. In fact, the financial might of the tribe has grown to an extent that it afforded the purchase of the $965 million worth Hard Rock Café. [243] One advantage of the Seminole Tribe is that its facilities are located near the heavily populated city of Florida. As a result, the tribe's Class II gaming facilities have been flourishing. However, this is not the case for a majority of the other tribes. The reservations of these tribes are located far from the urban centers and games such as bingo may not be that attractive when people are that far. For such tribes, they need to have casino-style (Class III) gaming in order to attract people to their facilities. For such tribes living far from urban centers, the unattractive nature of Class II only leads them to the hands of states that extort them in order to establish Class III gaming owing to the decision in *Seminole*. [244]

Tribal-Corporate Partnerships

The growth of tribal-corporate partnerships has been shown to be of significant economic benefit to the Indian tribes. One such partnership is between the Seminole Tribe of Florida and Hard Rock International. Hard Rock International is a music-based entertainment and leisure company. The company has established casinos, cafes, and hotels in more than 40 countries across the

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[243] *Seminole Tribe Buys Hard Rock Cafe Business: $965 Million Deal Gives Tribe World's Largest Rock Memorabilia Collection*, Associated Press Wire, Dec. 8, 2006, available at www.msnbc.com/id/16090321/.

[244] Fletcher, Negotiating Meaningful Concessions, *supra* note 33, at 432.

globe. Seminole Tribe's acquisition of Hard Rock Hotels and Casinos[245] in Florida and later the Hard Rock brand made it the owner of a global company. [246]The acquisition of the Hard Rock International Company placed the tribe in the position of a millionaire tribe. In fact, Forbes Magazine referred to the Seminole Tribe as the "$12 billion tribe". [247] The success of Seminole Tribe is evident from the fact that the tribe beat 72 bidders among them equity giants and multinational hospitality organizations in order to acquire the global business. [248] The chain of hotels, casinos, and cafes is estimated to have an annual revenue turnover of $5 billion. [249] It is estimated that the tribe will be able to provide over $1.5 billion per year in profits. The benefits of the tribe's investments to the state of Florida are obvious considering that the state has receive revenue-sharing amounting to over $1 billion in the last five years. [250] The tribe has also built well run trust funds for all the Seminole Tribe children. Apart from the

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[245] Alan P. Meister, Ph.D. et. al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. Rev. 375, 392 (2009) [hereinafter Meister, Indian Gaming and Beyond].

[246] Merced, Michael J. de la. "Florida's Seminole Tribe Buys Hard Rock Cafes and Casinos." *The New York Times*, The New York Times, 8 Dec. 2006, www.nytimes.com/2006/12/08/business/08rock.html.

[247] Gensler, Lauren. *An Alligator Wrestler, A Casino Boss And A $12 Billion Tribe*. Forbes Magazine, 25 Jan. 2017, www.forbes.com/sites/laurengensler/2016/10/19/seminole-tribe-florida-hard-rock-cafe/#322fd2ac5bbc.

[248] *Id*

[249] *Id*

[250] *Id*

biweekly dividends of up to $128,000 annually given to the men and women, the children have a trust fund that may run into the millions by the time they are eighteen. [251] As such, the Seminole Tribe is estimated to be worth about $12 billion in total. [252]

Final Compact

The Tribe continued to seek a Class III gaming compact with the State of Florida. A compact was negotiated between the Tribe and Florida Governor Charles Crist. However, the Florida Supreme Court struck the compact as invalid, finding that Governor Crist did not possess the authority to enter into the compact without authorization from the legislature. [253]

The final Class III gaming compact between the Seminole Tribe and Florida was executed in July of 2010.[254] The compact authorized the tribe to conduct gaming at seven of the Tribe's gaming facilities across the state.[255] It is

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[251] *Id*

[252] *Id*

[253] *See Florida House of Representatives v. Crist*, 999 So. 2d 601, 603 (Fla. 2008).

[254] Indian Gaming, 75 Fed. Reg. 38833 (July 6, 2010), *available at* http://www.myfloridalicense.com/dbpr/pmw/documents/2010_Compact-Signed1.pdf, [hereinafter Seminole Compact].

[255] *Id*. at 13, 49. The seven tribally-owned casinos authorized under the compact include: Seminole Indian Casino-Brighton, Seminole Indian Casino-Coconut Creek, Seminole Indian Casino-Hollywood, Seminole Indian Casino-Immokalee, Seminole Indian Casino-Big Cypress, Seminole Hard Rock Hotel & Casino-Hollywood, and Seminole Hard Rock Hotel & Casino-Tampa.

effective for a period of 20 years.[256] Under the compact, the Tribes ability to conduct Class III gaming is limited to only those games specified therein.[257] These games include slot machines, bank card games, raffles and drawing, and any new game authorized by Florida law.[258]

Under the compact, the tribe and state are both responsible for regulating gaming on tribal lands.[259] The Seminole Tribal Gaming Commission (Commission), the Tribe's independent regulatory agency, and the State Compliance Agency (SCA) fulfill these regulatory responsibilities respectively.[260]

The officers of the commission are required to answer to the SCA regarding any irregularities that may have occurred in the tribal facilities. In order to ensure that the tribe's facilities are following the required regulations, the officers of the commission are given unfettered access to all the areas of the facilities. Further, they are expected to be available to the facilities at any hour upon being given reasonable notice. This ensures that they are available to provide guidance on issues concerning the compact. [261] However, under the compact, the state reserves the right to carry out random inspections to ensure that the tribe's operations are in line with the terms prescribed in the compact.

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[256] *Id*. at 13, 49.

[257] *Id*. at 3.

[258] *Id*.at 3-4.

[259] *Id*., at 23.

[260] *Id*. at 3, 12, 24.

[261] *Id*.at 24.

The agents of SCA are given reasonable access to all public areas of the facilities where games are conducted.

The SCA is expected to forward a written report to the commission after completing an SCA inspection. The information provided must contain all no-confidential and non-proprietary information concerning violation of any applicable laws or the requirements of the compact. The SCA reserves the right to withhold any information it deems important for further investigation of a suspected criminal activity.

Under the compact, the Tribe is required to reimburse the State annually "for actual and reasonable costs of the [SCA] to perform its monitoring functions."[262]

The compact does contain a revenue sharing provision whereby the Tribe is required to pay the State a percentage of its revenues derived from its Class III gaming operations, in exchange for "partial but substantial exclusivity."[263] Under the revenue sharing provision of the compact, the Tribe is required transition all its Class II video bingo terminals to Class III slot machines within sixty months of January 1, 2008.[264] For the Initial Period, the first twenty-four months of the compact, the Tribe is required to pay $12,500,000 to the State per month.[265] Following the Initial Period, payments are calculated in accordance with

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[262] *Id*.at 30.

[263] *Id*. at 31-32.

[264] *Id*.at 32.

[265] *Id*.at 32-33.

"Revenue Sharing Cycles," each lasting for a term of twelve months.[266] For the first three Revenue Sharing Cycles, the Tribe is required to pay the greater of the 'Guaranteed Minimum Revenue Sharing Cycle Payment' or an amount equal to the 'Percentage Revenue Share Amount' calculated under the compact.[267] After the third Revenue Sharing Cycle, the Tribe is required to pay the State the "Percentage Revenue Share Amount." For the first five years of the compact, the total revenue-share payments must total at least $1,000,000,000.

The Florida tribal-state compact is an example of the lengths that a state can go in regulating tribal gaming (including Class II gaming) using a valid compact. The state has placed significant restrictions on the manner in which gaming is run in Florida. In order to give the Seminole Tribe exclusivity, the tribe demanded enormous shares in the tribe's gaming revenue. Further, the tribe has to reimburse the amount spent by the state in carrying out its regulations hence running a cost-free regulatory authority. [268]

Conclusion

While tribes like Seminole continue to reap benefits from gaming, the dent left by the *Seminole* decision of the Supreme Court has not gone unnoticed. The fact that states like Florida collect millions of dollars from tribes in order to protect their exclusionary rights shows the lack of good faith in negotiating

[266] *Id*.at 12.

[267] *Id*.at 33.

[268] William H. Holley, *Back to the Negotiating Table: Designing A Tribal-State Compact for Alabama*, 7 UNLV GAMING L.J. 139, 157 (2017).

compacts. The Seminole Tribe is an exception in that it makes considerable profits from Class II gaming by virtue of being located near Florida's urban center. The striking down of the IGRA's good faith requirement leaves tribes that cannot effectively attract customers for Class II gaming exposed to exploitation from states. The millions of dollars that tribes have to use in lobbying could be of great impact in improving the lives of the tribal members living on the reservations. The millions that the tribes are denied through unscrupulous state-tribe compacts mean the end of education assistance, housing assistance, early childhood programs, and elderly programs for the tribes and non-Indians living in the surrounding communities.

Despite the negative impact of the *Seminole* ruling, the Supreme Court made it clear in the ruling that Indian gaming fell under the jurisdiction of the federal government. For this reason, there are opportunities for the federal government to empower the Indian tribes by eliminating the need to go through the state governments to negotiate compacts. After all, most states do not take an active role in mitigating the effects of gaming despite taking a revenue share for the same. The federal government has the opportunity to make Class III gaming only subject to NIGC supervision in the same way that it has made Class II gaming. This would be essential in returning the financial power to the Indian tribes and enable them continue with their social-economic programs.