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## A Pretty Smart Answer: Justifying the Secretary of the Interior's "Seminole Fix" for the Indian Gaming Regulatory Act

Austin R. Vance

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## A PRETTY SMART ANSWER: JUSTIFYING THE SECRETARY OF THE INTERIOR’S “SEMINOLE FIX” FOR THE INDIAN GAMING REGULATORY ACT

Austin R. Vance\*

*[W]ith great reluctance . . . I am supporting [the Indian Gaming Regulatory Act].*

— John McCain, United States Senator<sup>1</sup>

*[W]hen we get North America back I'll be satisfied.*

— Kevin Washburn, Former Assistant Secretary of Indian Affairs<sup>2</sup>

### *I. Introduction*

When Senator John McCain questioned Kevin Washburn about a casino’s proposed location, the Assistant Secretary of Indian Affairs responded, “Senator, it was your bill. You wrote the language. We’re just applying it.”<sup>3</sup> Senator McCain, in turn, retorted, “You know something, Mr. Washburn, that is a pretty smart ass answer.”<sup>4</sup> While the opposing ideologies of Washburn and McCain alone could spur hostile conversation, this contentious questioning was the result of the Indian Gaming Regulatory Act (IGRA), a law that has caused numerous political and legal controversies since its conception.<sup>5</sup> The dispute surrounding IGRA has

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\* Third-year student, University of Oklahoma College of Law. Thanks are owed to Paula Hart and Maria Wiseman of the Department of the Interior—Office of Indian Gaming and Dr. Neil Metz of the University of Central Oklahoma for their contributions to this comment.

1. S. REP. NO. 100-446, at 33 (1988).

2. *Indian Gaming 2015: Keynote Address by Kevin Washburn*, NAT’L INDIAN GAMING ASS’N (Apr. 1, 2015), <http://www.indiangaming.org/media-releases/2015/4/2/indian-gaming-2016-keynote-address-by-kevin-washburn>.

3. *Keep the Promise Act of 2014, Hearing on S. 2670 Before the Senate Committee on Indian Affairs*, 113th Cong. 7 (2014) (statement of Kevin K. Washburn, Assistant Secretary of Indian Affairs, U.S. Dep’t of Interior).

4. *Id.*

5. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 436 (2001).

been unaided by the fact that Indian gaming has exploded from a centuries old cultural practice into an industry that generates nearly 30 billion dollars a year.<sup>6</sup> Nonetheless, Mr. Washburn's "smart ass answer" had merit, as the Assistant Secretary of Indian Affairs—acting on behalf of the Secretary of the Interior (Secretary) and the President of the United States—executes IGRA despite its various ambiguities,<sup>7</sup> and recent court decisions have been far from helpful.<sup>8</sup>

More specifically, the political dispute about IGRA often revolves around the authorization of tribes to conduct class III gaming, which is composed of high-revenue casino-style gaming, such as blackjack and slot machines.<sup>9</sup> This authorization was restricted, however, as class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."<sup>10</sup> These compacts are merely agreements that clarify the legal jurisdiction between a tribe and a state over a casino to prevent confusion.<sup>11</sup>

Unfortunately, Congress was unaware that it could not force states to compact with tribes as that was "beyond its authority."<sup>12</sup> In *Seminole Tribe of Florida v. Florida* (*Seminole*), the Supreme Court of the United States held that IGRA could not abrogate a state's right to sovereign immunity, meaning that tribes could not sue states unwilling to negotiate class III

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6. See *id.*; 2014 Tribal Gaming Revenue by Gaming Operation Revenue Range, NAT'L INDIAN GAMING COMM'N, <http://www.nigc.gov/images/uploads/reports/2014GGRbyGamingOperationRevenueRange.pdf> (last visited Sept. 24, 2015); Brian P. McClatchey, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto" for Gaming on "After-Acquired Lands"*, 37 U. MICH. J.L. REFORM 1227, 1239 (2004).

7. See 5 U.S.C. § 301 (2012); 25 U.S.C. § 2 (2012).

8. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 (1996); see also *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). 548 (2009). Rev. 527, 548 (2009). The case ion Acting and tent of IGRA to provide for economic sustainability and tribal self-dete

9. Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 46 (2007) (noting the transition to "lucrative casino-style gaming"); Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 164 (2005) ("Class III gaming has historically produced the largest revenues for Indian tribes."); Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y REV. 125, 127 (1997).

10. 25 U.S.C. § 2710(d)(1)(C) (2012).

11. JEFF CORNTASSEL & RICHARD WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD* 16-17 (2008) (Defining the tribal-state compact as "agreements that 'provide for the application of civil, criminal, and regulatory laws of either entity over Indians and non-Indians as the parties may see fit to agree.'").

12. *Seminole Tribe of Fla.*, 517 U.S. at 76.

aming compacts.<sup>13</sup> Consequently, IGRA's original purpose of tribal economic sustainability and self-determination was in jeopardy, as numerous states refused to negotiate with tribes unless the tribes made massive economic and legal concessions.<sup>14</sup>

In response to that decision, the Department of the Interior (Department) propagated the "Class III Gaming Procedures."<sup>15</sup> These new regulations provide a mechanism to circumvent a state's refusal to negotiate compacts with tribes.<sup>16</sup> Specifically, the Class III Gaming Procedures provide that 180 days after a tribe and state fail to negotiate a compact, and a state invoked sovereign immunity to avoid suit in federal court, then the tribe may invoke the Class III Gaming Procedures to allow class III gaming.<sup>17</sup>

Absent these regulations, IGRA reaches an impasse,<sup>18</sup> as the Secretary can only take action if a federal court determined a state negotiated a compact in bad faith,<sup>19</sup> but the Class III Gaming Regulations must omit that requirement to circumvent state sovereign immunity.<sup>20</sup> A paradox arose as federal courts can no longer make a bad faith determination because *Seminole* held that states are immune to suits under IGRA.<sup>21</sup>

As a result, class III gaming cannot occur without the Class III Gaming Procedures, which demonstrates their necessity.<sup>22</sup> Some believe, however, that the Department of the Interior acted outside of the scope of IGRA when it published the Class III Gaming Procedures, because IGRA itself

13. *Id.* at 75,548.(2009). Rev. 527, 548 (2009).he case ion Acting adn tent of IGRA to provide for economic sustainability and tribal self-dete

14. *See* S. REP. NO. 100-446, at 1-2 (1988); Sean Cunniff, *Texas v. United States: Mind the Gap*, 39 N.M. L. REV. 527, 531 (2009) ("Congress's findings upon enacting the legislation reflected the spirit of the self-determination era and the promise of gaming for tribal economic development."); *see also* Fletcher, *supra* note 9, at 42 (discussing how bargaining power heavily favored the states over tribes).

15. 25 C.F.R. § 291.1-15 (2016); Cunniff, *supra* note 14, at 527; *New Mexico v. Dep't of the Interior*, 1:14-CV-00695-JAP, 2014 WL 10298036, at \*1 (D.N.M. Oct. 17, 2014) (also referred to as "Secretarial Procedures" or "Part 291 Regulations").

16. 25 C.F.R. § 291.1-15.

17. 25 C.F.R. § 291.1-15; *New York v. Jewell*, 2013 U.S. Dist. LEXIS 185653 (N.D.N.Y. Sept. 11, 2013).

18. Cunniff, *supra* note 14, at 548.

19. 25 U.S.C. § 2710(d) (2012); Gregory R. Mulkey, *Texas v. United States: The Legality of the Secretarial Procedures Following Seminole Tribe of Florida v. Florida*, 33 AM. INDIAN L. REV. 525, 528 (2008-2009).

20. *See generally* 25 C.F.R. § 291.1-15.

21. Cunniff, *supra* note 14, at 548; *see also* Mulkey, *supra* note 19, at 547.

22. Cunniff, *supra* note 14, at 548; *see also* Mulkey, *supra* note 19, at 547.

does not authorize the regulations.<sup>23</sup> Given that class III gaming is already under tremendous political pressure,<sup>24</sup> federal courts remain split on the legitimacy of the Class III Gaming Procedures, which only adds to the confusion of IGRA.<sup>25</sup>

Thus, this comment seeks to justify the Secretary of the Interior's authority to circumvent the requirement that a federal court must determine that a state negotiated in bad faith before authorizing class III gaming without a tribal-state compact under IGRA.<sup>26</sup> There are four sections to this analysis: The Legal History of IGRA, The De Facto Federal Court Split, The Policy Arguments Concerning the Class III Gaming Procedures, and The Conclusion. The crux of this analysis will focus on how the Class III Gaming Procedures fulfill the original intent of IGRA to provide for economic sustainability and tribal self-determination. Before that discussion one must understand how IGRA came to its current political state.

## II. The Legal History of IGRA

### A. American Indian Legal History Prior to IGRA

Usually, analysis of Indian gaming begins around 1987, when the Supreme Court decided *Cabazon v. California*.<sup>27</sup> The major fault of that approach is that it overlooks the structural reasons for which Indian gaming exists in the first place, as self-determination and economic sustainability would have completely different meanings if Indian tribes were sovereign nations.<sup>28</sup> Moreover, ignoring pre-*Cabazon* history does not allow for a complete contextual understanding of the combative state versus tribe

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23. *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007); Rebecca S. Lindner-Cornelius, *The Secretary of the Interior As Referee: The States, the Indian Nations, and How Gambling Lead to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. § 291*, 84 MARQ. L. REV. 685, 686 (2001) ("This Comment argues that these regulations are unconstitutional because the Secretary has exceeded the authority of its office.").

24. See Fletcher, *supra* note 9, at 39-40.

25. Compare *Texas*, 497 F.3d at 511 with *the Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

26. 25 C.F.R. § 291.1-15.

27. E.g., Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 161 (2005).

28. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 52, 89-90 (2005).

relationship that is at the heart of the *Seminole* problem within IGRA.<sup>29</sup> Certainly, encompassing all of federal Indian legal history is too broad of a task for any comment; however, this comment's genesislike "[s]tudents of American Indian law cannot--and should not--escape from . . . the opinions we now refer to as the 'Marshall Trilogy.'"<sup>30</sup>

*1. The Marshall Trilogy, or Forgive Marshall for He Knows Not What He Did*

The Marshall Trilogy probably represents John Marshall's greatest blunder, evidenced by the fact that it only took three cases for the Supreme Court to create and then attempt to undermine the Discovery Doctrine.<sup>31</sup> The Trilogy begins with *Johnson v. M'Intosh*, where the Supreme Court had to decide whether title to land vested to individuals from tribes, before the formation of the United States, held legal validity.<sup>32</sup> While this case would more properly have been decided based on the British law that was in effect at the time the disputed title vested, it was instead decided on the newly asserted Discovery Doctrine, which established that "absolute title of the crown, [was] subject only to the Indian right of occupancy, and recognize[d] the absolute title of the crown to extinguish that right."<sup>33</sup>

Aside from the decision's blatant racism,<sup>34</sup> Marshall's analysis is also an ahistorical interpretation based on his own impression as the "first nationalist historian,"<sup>35</sup> which merely echoed the American history he crafted for his book *Life of George Washington*.<sup>36</sup> This repetition might be forgivable if it did not create the principals that "established and validated

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29. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 51 (1996); *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("[S]tates where they are found are often [Indian tribes'] deadliest enemies.").

30. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006); see also AMERICAN INDIAN LAW DESKBOOK § 1:1-2 (2016).

31. Compare *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 517 (1832); see also Fletcher, *supra* note 30, at 661-62 (citing LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 133 (2005)).

32. *Johnson*, 21 U.S. (8 Wheat.) at 563.

33. *Id.*; Fletcher, *supra* note 30, at 634.

34. Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207, 216 (2008).

35. Joshua L. Seifert, *The Myth of Johnson v. M'Intosh*, 52 UCLA L. REV. 289, 302 (2004).

36. *Id.* at 305-06 (quotation omitted).

the United States in America.”<sup>37</sup> Unsurprisingly, this case has been the subject of much criticism by American Indian legal advocates.<sup>38</sup>

Relying on the decision in *Johnson*, Georgia realized that the Cherokee Nation occupied much of its land mass and sought to attempt a mass eviction.<sup>39</sup> The Cherokee Nation responded in turn by taking its battle to the federal courts, leading to the second case of the Marshall Trilogy, *Cherokee Nation v. Georgia*.<sup>40</sup> Prior to presenting its claim, however, the Cherokee Nation was stifled because the Supreme Court only has original jurisdiction with cases involving a foreign state.<sup>41</sup> The Court discussed Indian tribes as political quagmires—neither domestic nor foreign—before ultimately identifying them as domestic dependent sovereigns.<sup>42</sup>

Having lost the ability to sue Georgia directly, the Cherokee Nation needed a new legal strategy that would avoid Marshall’s “sleight of hand” for avoiding legal controversies at that time.<sup>43</sup> Ironically, missionaries would become the heroes of the Cherokee’s legal ambitions, as the governmental desire to remove the Tribe created a barrier to religious conversion.<sup>44</sup> To aid in the Tribe’s efforts, Samuel Worcester, along with other missionaries, would challenge Georgia’s removal-oriented laws by living on Cherokee land without a license from the Governor of Georgia.<sup>45</sup> Predictably, Georgian authorities arrested, convicted, and sentenced Worcester to four years of manual labor.<sup>46</sup> This was all a part of the plan, however, as Samuel Worcester and fellow defendant Elizur Butler refused pardons from Georgia in order to bring the final case in the Marshall Trilogy, *Worcester v. Georgia*.<sup>47</sup>

This case gave Marshall a platform to undo the injustice he had originally caused through the Discovery Doctrine.<sup>48</sup> The Chief Justice spoke plainly, as he mocked Georgia’s idea of title to Indian lands as, “[t]he extravagant and absurd idea, that the feeble settlements . . . acquired

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37. *Id.* at 306.

38. *See generally id.*

39. Fletcher, *supra* note 30, at 634 (quotation omitted).

40. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 (1831).

41. *Id.* at 15-17.

42. *Id.*

43. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 113 (7th ed. 2011).

44. *Id.* at 101.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544-45 (1832).

legitimate power . . . to govern the people, or occupy the lands from sea to sea.”<sup>49</sup> He continued by asserting property rights of European discoverers had always been, “the exclusive right of purchasing such lands as the natives were willing to sell.”<sup>50</sup> Victory for Sam Worcester and the Cherokee Nation was—for the moment—secured when Marshall announced that “‘the laws of [a State] can have no force’ within reservation boundaries.”<sup>51</sup>

Unfortunately, the Cherokee won the battle but lost the war, as Jackson would successfully initiate the Trail of Tears, removing more than 16,000 Cherokee from Georgia to present-day Oklahoma.<sup>52</sup> To add insult to injury, the legal ruling established in *Worcester* would be short lived, as the modern conception of tribal sovereignty “does not exclude all state regulatory authority on the reservation.”<sup>53</sup> Indeed, history has repeated itself, as modern American Indian legal advocates still argue the issues of the Marshall Trilogy today.<sup>54</sup> *Seminole* is an excellent example of this,<sup>55</sup> but the Marshall Trilogy is far from the conclusion of relevant federal Indian legal history.

## 2. *The Indian Allotment Act of 1887: The Dawes Act*

Life for American Indians did not improve much by 1887, as the disposition of settler society had barely changed since the Jackson era.<sup>56</sup> The official federal policy became the manifestation of “kill the Indian, save the man” as taking Indian children from their families, forcing tribes onto reservations, and indoctrinating tribal communities into Western religion was merely the civilized thing to do.<sup>57</sup> This atmosphere of hostility

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49. *Id.*

50. *Id.*

51. *Ward v. New York*, 291 F. Supp. 2d 188, 201 (W.D.N.Y. 2003) (citation omitted).

52. Getches et al., *supra* note 43, at 126.

53. *E.g.*, *Ward*, 291 F. Supp. 2d at 201 (citation omitted).

54. Fletcher, *supra* note 30, at 648.

55. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

56. See Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 615 (2011).

57. See Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 523 (2013); Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953, 968 (1987) (“[V]iolent Indian-white conflicts led to the settlement of Indian tribes on reservations . . .”); “*Kill the Indian, and Save the Man*”: *Capt. Richard H. Pratt on the Education of Native Americans*, HISTORY MATTERS: THE U.S. SURVEY COURSE ON THE WEB, <http://history.matters.gmu.edu/d/4929/> (last visited Sept. 15, 2015) (discussing that “kill the savage, and save the man” was the guiding philosophy behind federal government policy).



toward “Indianness” led Congress to view the communal conception of tribal land as the root barrier preventing “civilization” from coming to Indians.<sup>58</sup> Thus Congress passed the Indian Allotment Act of 1887 (Dawes Act) to separate communally held land from tribes and divide it into individual members’ possession.<sup>59</sup>

While it is difficult to calculate the exact damage of the Dawes Act, a fair assessment would describe it as devastating.<sup>60</sup> To start with, the allotments created by the Dawes Act undermined the tribes’ ability to achieve economic self-sufficiency by dividing tribal lands among individual Indians with the surplus sold to non-Indians.<sup>61</sup> Consequently, the total land mass held by American Indians diminished by 86 million acres in less than fifty years; by 1934 tribes possessed less than fifty percent of their land holdings prior to the Dawes Act.<sup>62</sup> By design, the Dawes Act targeted the land base intertwined with American Indian religion and successfully acted as “a mighty pulverizing engine for breaking up the tribal mass.”<sup>63</sup>

Similar to the Marshall Trilogy, the Dawes Act created the conditions that make class III gaming even more necessary for Indians and their tribes.<sup>64</sup> Economic development and self-sufficiency under the Dawes Act became nearly impossible for tribes as it functionally dissolved their governments during allotment.<sup>65</sup> These negative effects are still felt today, as economists have noted allotment is one of the federal policies that drove

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58. See Wilkinson, *supra* note 57, at 965; JODI BYRD, TRANSIT OF EMPIRE xv-xvii (2011) (“[D]efinitions . . . of “Indianness” regulated and produced by U.S. settler imperialism . . . created conditions of possibility for U. S. empire to manifest its intent.”); VINE DELORIA, CUSTER DIED FOR YOUR SINS 7 (2d ed. 1988) (describing allotment as “God’s foreordained plan to repopulate the continent . . . with the goals of the tribes as they were defined by their white friends”).

59. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 629 (2009).

60. BYRD, *supra* note 58, at 159 (“[T]he Dawes Act [was] the primary source of the further impoverishment of native peoples and implicated allotment in increasing the rates of disease and infant mortality.”).

61. Pommersheim, *supra* note 57, at 520-22.

62. *Id.* at 522.

63. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting); see also Berger, *supra* note 59, at 629.

64. Mark D. Poindexter, *Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment*, 14 B.C. THIRD WORLD L.J. 53, 55 (1994).

65. Pommersheim, *supra* note 57, at 523.

the extreme poverty in modern Indian Country.<sup>66</sup> It would take almost half a century for Congress to recognize the failure of the Dawes Act, and an alternative to allotment would not arrive until recommended by the Commissioner of Indian Affairs, John Collier, in 1934.<sup>67</sup>

### 3. *The Indian Reorganization Act, or Our Mistake*

Since its conception, the purpose of the Indian Reorganization Act (IRA) has always been clear: “to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands.”<sup>68</sup> To accomplish this, the Act contained a number of provisions that made restoring and reconsolidating communally held tribal land a top priority.<sup>69</sup> For example, the IRA contained provisions that made the transfer of title to non-Indians nearly impossible and restored surplus lands to tribes, among other protections.<sup>70</sup>

The IRA is not without criticism. Jodi Byrd, Professor of English and Gender Studies at the University of Illinois, states that the Act “sought to centralize tribal governance within a Western democratic structure in order to streamline the annuities paid to a tribe under treaty agreements and to effectively control land deals for non-native prospectors interested in natural resources and eventually nuclear-waste dumping.”<sup>71</sup> Moreover, the IRA’s definition of a “tribe” differs widely from many American Indians’ definitions, as it consolidated many distinct tribes into larger political entities.<sup>72</sup> For example, the Cheyenne-Arapaho Tribes of Oklahoma are a single tribal entity to the federal government<sup>73</sup>, but citizens of the Tribe would likely disagree with that concept.

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66. See Randall K.Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 185, 188-89 (2015); see also *The Indian Reorganization Act – 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 7 (2011) [hereinafter *Hearings*] (statement of Frederick Hoxie, History Professor, University of Illinois).

67. BYRD, *supra* note 58, at 159.

68. *Hearings*, *supra* note 66, at 1 (opening statement of Sen. Daniel Akaka, Chairman, Senate Committee on Indian Affairs).

69. See G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

70. *Id.* at 579-80.

71. BYRD, *supra* note 58, at 160.

72. DELORIA, *supra* note 58, at 16-17.

73. *Id.*

Taken together these criticisms demonstrate that the federal government's road to hell is paved with good intentions as it has demonstrated an ineptitude to aid American Indians repeatedly.<sup>74</sup> From a more pragmatic point of view, however, no single legislative act could undo the damage done to American Indians throughout the centuries, and the IRA remains a tribe's primary mechanism for asserting sovereignty and achieving self-determination through the land-to-trust process.<sup>75</sup> Moreover, its implications on Indian gaming are enormous as IGRA states that class III gaming "shall be lawful on Indian lands."<sup>76</sup>

### *B. The Creation of IGRA*

From the "Wind-Talkers" of World War II to the Termination Era in the 1950s, the years between the enactment of the IRA in 1934 and the *Cabazon* decision in 1987 held many important milestones (both positive and negative) for American Indians;<sup>77</sup> however, it would be the 1960s before Indian gaming as we know it would come into existence.<sup>78</sup> In the early days, Indian gaming took the form of bingo halls, which worked as a means for tribes to generate money and reduce dependence on the federal government.<sup>79</sup> Furthermore, many tribes were comfortable operating bingo halls without state approval because it was understood that "state laws have no force in Indian Country" at the time.<sup>80</sup> As history progressed, more and more tribes caught onto the idea, and gaming began spreading across the country.<sup>81</sup> It did not take long for states to take note and for legal clashes to begin, as tribes started looking to card games to generate more revenue.<sup>82</sup>

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74. Rice, *supra* note 69, at 589 (examining the general failure of the IRA to restore tribal land).

75. Pommersheim, *supra* note 57, at 520.

76. 25 U.S.C.A. § 2710(d)(1) (Westlaw through Pub. L. No. 114-115).

77. See Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 404-405 (2006); Robert Sandoval, *Math 187: Introduction to Cryptography: Navajo Windtalkers*, UC SAN DIEGO DEP'T OF MATH, <http://math.ucsd.edu/~crypto/Projects/RobertoSandoval/NavajoWindtalkers.pdf> (last visited Sept. 23, 2015).

78. Fletcher, *supra* note 9, at 45.

79. *Id.*

80. Fletcher, *supra* note 9, at 45; see McClatchey, *supra* note 6, at 1227.

81. Fletcher, *supra* note 9, at 45-46.

82. *Id.* at 45; see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987).

This scenario echoed across all of Indian Country and set the stage for one of the most celebrated cases in Indian gaming—*Cabazon*.<sup>83</sup>

*1. Cabazon v. California, or the Indians Win One*

By the mid-1980s, Indian gaming reached a tipping point as the Supreme Court heard arguments from the Cabazon and Morongo Bands of Mission Indians against Riverside County, California.<sup>84</sup> The issue revolved around whether California could enforce its statutory laws that prevented non-charity based gambling on the Tribes' reservations.<sup>85</sup> California and the County were in a unique position to argue that jurisdiction would be proper because California had express authority from Congress to assert criminal and civil jurisdiction over Indian Country.<sup>86</sup>

California's congressional authority notwithstanding, the Supreme Court found for the Tribes.<sup>87</sup> Specifically, the Supreme Court decided that Congress intended for California to have jurisdiction "over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority."<sup>88</sup> The Court further recognized that to grant the state the broad civil authority it sought "would result in the destruction of tribal institutions and values."<sup>89</sup> With all of this taken together, the Court decided that if California regulates rather than prohibits gaming, then the conduct is distinct from the general criminal or specific civil jurisdiction that Congress granted to certain states with regard to Indian Country, and thus the regulation would not apply.<sup>90</sup> Additionally, the Supreme Court reaffirmed that state laws only apply to Indian Country "if Congress has expressly so provided."<sup>91</sup>

The tribes were victorious, if only briefly. *Cabazon* marked "a new era of judicially approved Indian gaming, [and] sparked previously unseen economic development on tribal lands."<sup>92</sup> Congress, however, would not merely step aside for unregulated Indian gaming to come to fruition and instead opted to pass the Indian Gaming Regulatory Act.

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83. *E.g.*, Brown, *supra* note 27.

84. *California*, 480 U.S. at 204.

85. *Id.* at 205-07.

86. Fletcher, *supra* note 9, at 47.

87. *California*, 480 U.S. at 222.

88. *Id.* at 208 (citation omitted).

89. *Id.*

90. *Id.* at 209-11.

91. *Id.* at 207.

92. Brown, *supra* note 27, at 163.

## 2. *Indian Gaming Regulatory Act, or The Double-Edged Sword*

Although Congress debated gaming regulations for many years,<sup>93</sup> there was never substantial progress for a coherent piece of legislation to address Indian gaming. In a fit of irony, the *Cabazon* decision created congressional momentum for regulating Indian gaming by creating a beacon for lobbyists of commercial gaming, religious organizations, and the “anti-Indian gaming effort” within Congress.<sup>94</sup> With speed, usually unknown to Congress, IGRA passed in a little over a year after the *Cabazon* decision.<sup>95</sup>

The Act itself, in many ways, operates as a doubled-edged sword. On one side, it solidified the ruling in *Cabazon* that tribes could operate the same types of games that states allowed elsewhere.<sup>96</sup> The Act also provided clarification in the way gaming shall proceed into the future by creating three classes of gaming, and establishing rules for each class.<sup>97</sup> On the other hand, IGRA also increased federal regulation of gaming by creating the National Indian Gaming Commission (NIGC), and required tribes to negotiate with states to conduct class III gaming, among other things.<sup>98</sup> From that point on, Indian gaming would progress as business as usual within Indian Country for the better half of a decade, until Florida refused to negotiate.<sup>99</sup>

### III. *The De Facto Federal Circuit Split*

#### A. *The Seminole Tribe of Florida v. Florida*

##### 1. *The Supreme Court’s Decision*

After the *Cabazon* decision, there was not another major redefinition of Indian gaming by the Supreme Court until *Seminole*. The story is straightforward enough; the State of Florida refused to negotiate with the

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93. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 112 (2010).

94. *Id.* at 160; Washburn, *supra* note 5, at 428.

95. Compare Ducheneaux, *supra* note 93, at 169 (“The bill was signed into law by the President on October 17, 1988.”), with *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (decided on February 25, 1987).

96. Washburn, *supra* note 5, at 428.

97. 25 U.S.C. § 2710 (2012); see Washburn, *supra* note 5, at 50-52; see also Fletcher, *supra* note 9, at 51 (describing that class I gaming is traditional tribal games or gaming that would be regulated by Indian tribes, class II gaming is high-stakes bingo, and class III gaming is all other gaming).

98. Fletcher, *supra* note 9, at 51-52.

99. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 52 (1996).

Seminole Tribe of Florida (Seminoles) for class III gaming.<sup>100</sup> This led to the Seminoles filing suit in 1991.<sup>101</sup> After a series of appeals, the Supreme Court decided the case on March 27, 1996.<sup>102</sup> There were two main claims forwarded by the Seminoles.<sup>103</sup> First, the Tribe claimed that the Indian Commerce Clause, in conjunction with *Pennsylvania v. Union Gas Co.*, meant that Congress had the authority to abrogate sovereign immunity of the states with regard to IGRA.<sup>104</sup> Second, the Seminoles argued that in the event Congress could not abrogate the states' sovereign immunity, then the tribe could sue the Governor of Florida directly for injunctive relief, relying on the Court's decision in *Ex parte Young*.<sup>105</sup> The Seminoles lost both claims in a 5-4 decision.<sup>106</sup>

The divided Court overruled *Pennsylvania v. Union Gas Co.*, announcing that Congress in fact did not have the ability to abrogate states' sovereign immunity under the Indian Commerce Clause.<sup>107</sup> Furthermore, tribes could not use an *Ex parte Young* action to sue the governor of a state for violating IGRA, because Congress's intent was for tribes to sue states directly, which foreclosed *Ex parte Young* actions.<sup>108</sup> Consequently, tribes are at the mercy of states under IGRA,<sup>109</sup> as states following *Seminole* require massive legal and economic concessions to even initiate negotiations.<sup>110</sup> And, if a tribe successfully negotiates a compact with a state the negotiated terms or concessions could be interpreted as a state tax,

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100. *Id.*

101. *Id.* at 51.

102. *Id.* at 44.

103. *Id.* at 47.

104. *Id.* at 60.

105. *Id.* at 73.

106. *Id.* at 76.

107. *Id.* at 108.

108. *Id.* at 74-76; see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 511 (1997) ("Under *Ex parte Young*, a suit to secure future compliance with federal law, brought against a state officer, is not regarded as one against the State for purposes of the Eleventh Amendment.").

109. Ducheneaux, *supra* note 93, at 177 ("This decision upset the delicate balance Congress had adopted in the Tribal-State Compact provision and, as feared by Congress, put the tribes at the mercy of states in compact negotiations.").

110. Cunniff, *supra* note 14, at 531 ("Congress's findings upon enacting the legislation reflected the spirit of the self-determination era and the promise of gaming for tribal economic development."); see also *S. Rep. No. 100-446*, at 1-2 (1988); see also Fletcher, *supra* note 9, at 42 (discussing how bargaining power heavily favored the states over tribes).

which IGRA forbids, rendering the compact void.<sup>111</sup> Today these issues remain, and dissecting the flaws of *Seminole* reveal the frustration American Indian legal advocates have with these decisions and demonstrates the necessity of the Class III Gaming Procedures.

Be forewarned, attempting to unravel this decision results in many perplexing observations. First, why has Congress not fixed the loophole for states to block class III gaming created by *Seminole*?<sup>112</sup> Moreover, while the Supreme Court referenced the legislative intent of IGRA,<sup>113</sup> it overlooked the intent of the Chairman of House Interior and Insular Affairs, Morris Udall, when he stated that, “I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the Supreme Court's time-honoring rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.”<sup>114</sup>

Certainly, a 5-4 decision demonstrates that there was ambiguity in IGRA's application,<sup>115</sup> but nowhere in the decision does it appear that the majority knew the canons of construction existed.<sup>116</sup> Frustration quickly ensued as Udall's statement illustrated that Congress intended the Supreme Court to resolve any ambiguity, and the Supreme Court, in turn, replied, “If that effort is to be made, it should be made by Congress.”<sup>117</sup> This criticism is far from isolated, as one only needs to look to the dissent—more than three times the length of the majority opinion—to find further fault.<sup>118</sup>

It makes sense to begin with the first critic of the case, Justice Stevens.<sup>119</sup> “This case is about power” he began,<sup>120</sup> setting a stern tone toward the majority. Justice Stevens sought to persuade the Court that the Constitution does not cement states sovereign immunity in “all cases.”<sup>121</sup> Moreover, the

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111. 25 U.S.C.A § 2710(d)(4) (Westlaw through Pub. L. No. 114-114 (excluding Pub. L. No. 114-94, 114-95 and 114-113)); Fletcher, *supra* note 9, at 42-43.

112. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 289 n.19 (2004) (“[B]ecause the issue is fraught with such political peril - one or more important constituency will be angered by any significant amendment to the law - Congress has since been unable to seriously re-examine its legislation.”).

113. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996).

114. Ducheneaux, *supra* note 93, at 169.

115. *See Seminole Tribe of Fla.*, 517 U.S. at 76 (Stevens, J., dissenting); *see also id.* at 100 (Souter, J., dissenting).

116. *See generally id.* at 57-76.

117. *Compare Ducheneaux*, *supra* note 93, at 169, with *Seminole Tribe of Fla.*, 517 U.S. at 76.

118. *Compare Seminole Tribe of Fla.*, 517 U.S. at 44-76, with *id.* at 76-185.

119. *Id.* at 76 (Stevens, J., dissenting)

120. *Id.*

121. *Id.* at 82.

majority misunderstood the precedent they relied on, as sovereign immunity is more fluid than they conceived.<sup>122</sup> In an effort to demonstrate the error of the Court's decision, Justice Stevens turned to the consequences of *Seminole*, claiming that this case would set a precedent barring a broad-range of citizen claims against their own state, including everything from environmental to bankruptcy, copyright, and patent laws.<sup>123</sup> Despite his dissent, Justice Stevens remained optimistic by concluding that the tribe still had the procedures established in IGRA<sup>124</sup>—the predecessor to Class III Gaming Procedures—and he was confident that “Justice Souter’s far wiser and far more scholarly opinion will surely be the law one day.”<sup>125</sup>

As to be expected, Justice Souter’s dissent was no more forgiving than Justice Stevens’ was. Joined by Justices Ginsburg and Breyer, Justice Souter initiated his argument by observing that the Court held “for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right.”<sup>126</sup> First, he critiqued the majority’s conclusion by demonstrating that within the Constitutional Framers’ intent there is “no record that anyone argued . . . the Constitution would affirmatively guarantee state sovereign immunity against any congressional action to the contrary.”<sup>127</sup> Echoing Justice Stevens’ dissent, Justice Souter’s textual reading of the Constitution reveals that out of the plausible readings of the Eleventh Amendment, barring actions of a citizen against their own state is not one of them, and thus the majority was misled in *Seminole*.<sup>128</sup>

Any discussion of tribes’ special legal status within the United States struck like lightning—and disappeared as quickly—in Justice Souter’s concise argument about tribal sovereignty.<sup>129</sup> Specifically, the majority’s view on state sovereign immunity comes into direct conflict with the Court’s rulings in *Cabazon* that states lack the power to regulate gaming.<sup>130</sup> Furthermore, other cases (such as *Worcester*) held that only the federal government had authority within Indian Country.<sup>131</sup> Taken together, these

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122. *Id.* at 83 (“[I]t was by no means a fixed view at the time of the founding that Article III prevented Congress from rendering States suable in federal court by their own citizens.”).

123. *Id.* at 77.

124. *Id.* at 99.

125. *Id.* at 100 (Stevens, J., dissenting).

126. *Id.* (Souter, Ginsburg, Breyer, JJ., dissenting).

127. *Id.* at 106.

128. *Id.* at 114-15.

129. *Id.* at 147-49.

130. *Id.* at 148.

131. *Id.* at 147 n.40 (Souter, Ginsburg, Breyer, JJ., dissenting).



conventional rules of federal Indian law demonstrate that the majority's opinion functionally ignored the special status that tribes hold within American jurisprudential history.<sup>132</sup> In summation, Justice Souter concluded that, "States have no sovereignty in the regulation of commerce with the tribes, [thus] there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce."<sup>133</sup>

Hopefully, these arguments give an adequate sampling of the frustration American Indian legal advocates hold with regard to the *Seminole* decision. While more could be dedicated to the decision's flaws, it would not change the fact that *Seminole* remains "good" law.<sup>134</sup> Further discussion of the case would be useful only as an academic exercise; thus legal analysis would be better served by fixing the "gap in IGRA" created by *Seminole*.<sup>135</sup> Luckily, the Eleventh Circuit's decision in *Seminole* provides the genesis and legitimacy of the Class III Gaming Procedures necessary to accomplish that goal.<sup>136</sup>

## 2. *The Eleventh Circuit's Decision, or "The Answer . . . Is Simple"*<sup>137</sup>

It may seem odd to discuss the Eleventh Circuit analysis of *Seminole* after the Supreme Court's decision, but it was actually the Eleventh Circuit that planted the seeds for the Class III Gaming Procedures.<sup>138</sup> For the most part, the Eleventh Circuit's decision follows the same general legal analysis as the Supreme Court<sup>139</sup> and does not warrant repetition.<sup>140</sup> While both courts' held that the Eleventh Amendment sovereign immunity prevented tribes from suing states under IGRA, the Eleventh Circuit—near the end of

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132. *Id.* at 148.

133. *Id.*

134. *See* Tohono O'odham Nation v. Ducey, No. CV-15-01135-PHX-DGC, 2015 WL 5475290, at \*3-4 (D. Ariz. Sept. 17, 2015).

135. *Santee Sioux Nation v. Norton*, No. 8:05CV147, 2006 WL 2792734, at \*5 (D. Neb. Sept. 26, 2006).

136. *Seminole Tribe of Fla.*, 517 U.S. at 99 (Stevens, J., dissenting) ("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.").

137. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996).

138. *Id.*

139. *Compare generally Seminole Tribe of Fla.*, 11 F.3d 1016 with *Seminole Tribe of Fla.*, 517 U.S. 44.

140. *See generally Seminole Tribe of Fla.*, 11 F.3d at 1029.

its opinion—noted that it was comfortable reaching that decision because it believed tribes did not need the federal courts for relief.<sup>141</sup>

In short, the Eleventh Circuit's comfort came from the belief that the Secretary always had the power to propagate the Class III Gaming Procedures.<sup>142</sup> The Court decided that, “[i]f the state pleads an Eleventh Amendment defense . . . The Secretary then may prescribe regulations governing class III gaming on the tribe's lands.”<sup>143</sup> The decision went so far as to state that such regulations were justified under “IGRA and serves to achieve Congress' goals.”<sup>144</sup> Nevertheless, even with authorization from a federal circuit court of appeals, the Class III Gaming Procedures remain far from legally solidified,<sup>145</sup> as the Supreme Court did “not tell us whether it agrees or disagrees with that disposition.”<sup>146</sup>

Given the implications of the Eleventh Circuit's holding, it is not exactly clear why the Supreme Court would not address that portion of the opinion directly. Even Justice Stevens noted that it was unwise for the Supreme Court not to review the power the Eleventh Circuit recognized within the Secretary.<sup>147</sup> Regardless of Supreme Court's reasoning, it would appear that Justices Stevens' concerns were justified, because federal courts remain in disarray with regard to the Class III Gaming Procedures.<sup>148</sup>

### 3. *The Decade After Seminole*

Following the decision in *Seminole*, the Secretary of the Interior took the Eleventh Circuit on its word, and in 1999 propagated the Class III Gaming Procedures.<sup>149</sup> Since then, Class III Gaming Procedures have remained a hot button issue,<sup>150</sup> but most states and tribes are willing to work through

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Fletcher, *supra* note 9, at 65.

146. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 99 (1996) (Stevens, J., dissenting).

147. *Id.* (“In my judgment, it is extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive Branch is a proper exercise of judicial power.”).

148. Compare *Seminole Tribe of Fla.*, 11 F.3d at 1029, with *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007); see *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 605 (Fla. 2008) (discussing that the Class III Gaming Procedures “validity remains questionable”).

149. 25 C.F.R. § 291.1 (1999).

150. Cunniff, *supra* note 14, at 548.

the negotiation process and establish gaming compacts pursuant to IGRA for a variety of reasons.<sup>151</sup>

Realistically, many modern tribes and states have amicable relationships that make compact negotiations non-issues.<sup>152</sup> In many cases, the tribes and states negotiate over material that would be mutually beneficial, such as a revenue sharing in exchange for exclusive gaming rights for tribes.<sup>153</sup> Consequently, in cases where both sides feel benefited, litigation would be unlikely to result.

Additionally, economic theory offers another explanation for why litigating the Class III Gaming Procedures is rare—the risk and cost of litigation. More specifically, litigation is an economic disincentive,<sup>154</sup> because of its cost, the arbitrary probability of winning,<sup>155</sup> and the magnitude of losing complete authority over class III gaming have a negative impact on potential litigators.<sup>156</sup> This economic disincentive, in turn, results in tacit collusion.<sup>157</sup> Unlike a legal definition of collusion, tacit collusion does not require explicit communication for a desired result, but rather results when it is economically beneficial for both actors to engage in certain conduct they would not otherwise engage in.<sup>158</sup> As applied to the Class III Gaming Procedures, the tribe and state are the actors, and both benefit from negotiating class III gaming compacts (colluding).

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151. Fletcher, *supra* note 9, at 81-82.

152. *Id.*

153. See Tribal Gaming Compact, Oklahoma-Cherokee Nation, at 22-23 (2004).

154. See Mireille Kingma, *Economic Incentive in Community Nursing: Attraction, Rejection or Indifference?*, PMC: U.S. NAT'L LIBRARY OF MED. (Apr. 14, 2003), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC166116/> (reprint from *Human Resources for Health*, vol. 1, no. 2) (“An economic disincentive is the absence of adequate payment or concession, or its withdrawal, thus discouraging action or effort in work.”); see also Laurel Hudson & Paul Bloom, *Potential Consumer Research Contributions to Combating Drinking and Driving Problems*, ASS'N FOR CONSUMER RESEARCH, <http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=6330> (last visited Sept. 30, 2016) (reprint of 11 ADVANCES IN CONSUMER RESEARCH 676 (1984)) (defining economic disincentive as “tangible punishments for performing certain behaviors”).

155. *Compare* Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994) (noting that IGRA permits the Secretary of the Interior to circumvent non-negotiating states) with *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007) (noting that IGRA does not permit the Secretary of the Interior to circumvent non-negotiating states).

156. See *Seminole Tribe of Fla.*, 11 F.3d at 1029; see *Texas*, 497 F.3d at 511.

157. Marc Ivaldi et al., *The Economics of Tacit Collusion*, in FINAL REPORT FOR DG COMPETITION, EUROPEAN COMMISSION 4-5 (Mar. 2003), [http://ec.europa.eu/competition/mergers/studies\\_reports/the\\_economics\\_of\\_tacit\\_collusion\\_en.pdf](http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf).

158. *Id.* at 4 n.2.

Accordingly, both also understand that “any deviation from the collusive path would trigger some retaliation,” in this case, litigation.<sup>159</sup>

Realistically, many economic theories run the risk of having bias created by the analyzer’s desired result rather than objectively representing the world as it exists.<sup>160</sup> Despite this admission, the conditions seem to accurately represent an economic disincentive resulting in collusion, as the cost, arbitrary nature, and risk of litigation is too great for most rational actors to attempt.<sup>161</sup> Moreover, because litigation is so “likely and costly [it outweighs] the short-term benefits from ‘cheating’ on the collusive path,” and tacit collusion results.<sup>162</sup>

While the Class III Gaming Procedures have not gone off without a hitch, tacit collusion—at least partially—explains why litigation in the decade following *Seminole* never reached fruition.<sup>163</sup> Unfortunately, Texas would prove that not all states follow the same rationale.<sup>164</sup>

#### B. Texas v. United States

It would take a decade for any substantive judgment about the Class III Gaming Procedures to arrive, but the Kickapoo Traditional Tribe of Texas (Kickapoo) actually started pursuing class III gaming in 1995.<sup>165</sup> Subsequently, the Kickapoo filed suit, but after years of litigation, the case was eventually dismissed pursuant to the *Seminole* decision.<sup>166</sup> In 2004, the Kickapoo initiated the Class III Gaming Procedures to conduct class III gaming, and Texas filed this suit in order to challenge the legitimacy of the regulations.<sup>167</sup>

In this case, the Fifth Circuit based its substantive analysis of the Class III Gaming Procedures via the *Chevron* doctrine.<sup>168</sup> Under *Chevron*, a

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159. *Id.* at 5.

160. Fabrizio Ferraro et al., *Economics Language and Assumptions: How Theories Can Become Self-Fulfilling*, 30 ACAD. MGMT. REV. 8, 12 (2005) (“[T]he assumptions and ideas of economics come to create a world in which the ideas are true because, through their effect on actions and decisions, they produce a world that corresponds to the assumptions and ideas themselves.”).

161. *Compare Texas*, 497 F.3d at 511 with *Seminole Tribe of Fla.*, 11 F.3d at 1029; *supra* note 154.

162. Ivaldi et al., *supra* note 157, at 5.

163. *See Alabama v. United States*, 630 F. Supp. 2d 1320, 1324 (S.D. Ala. 2008).

164. *See Texas*, 497 F.3d 491.

165. *Id.* at 495.

166. *Id.*

167. *Id.*

168. *Id.* at 501.

regulation—such as the Class III Gaming Procedures—is justified if “(1) a statute is ambiguous or silent concerning the scope of secretarial authority and (2) the regulations reasonably flow from the statute when viewed in context of the overall legislative framework and the policies that animated Congress’s design.”<sup>169</sup>

Analyzing the first prong of *Chevron* as applied to IGRA, the Fifth Circuit held that the text of IGRA “is clear and unambiguous,” and moved on to the second prong.<sup>170</sup> The Court then turned to address the question that often divides federal courts;<sup>171</sup> whether *Seminole* created the conditions necessary for IGRA to be interpreted as ambiguous.<sup>172</sup> The Fifth Circuit responded to that claim by stating, “neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken.”<sup>173</sup> In a flippant manner, the court seems to decide that Congress should predict all possible Supreme Court decisions ahead of time, despite the impossibility of such a task.<sup>174</sup>

When addressing the second prong of the *Chevron* analysis, the Fifth Circuit stated that even if the Class III Gaming Procedures satisfied the first prong of *Chevron*, they would have still failed because they “do not reasonably effectuate Congress’s intent for IGRA,” to give the states authority over Indian gaming.<sup>175</sup> Consequently, the Class III Gaming Procedures “stand in direct violation of IGRA.”<sup>176</sup> In concluding, the Fifth Circuit addressed the argument that, in the alternative, the Secretary had been delegated the power to propagate regulations for federal Indian law due to the general trust relationships tribes have with the United States government.<sup>177</sup> The court responded to that contention by stating that Congress delegated to the Secretary the power to prescribe “regulations that implement ‘specific laws,’ and that are consistent with other relevant

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169. *Id.*

170. *Id.* (quotation omitted).

171. *E.g.*, *New Mexico v. Dep’t of the Interior*, 126 F. Supp. 3d 1201, 1212 (D.N.M. 2014) (“*Texas v. United States* . . . is less persuasive on this point, since only one judge on the three-judge panel found IGRA’s jurisdiction-granting clause unambiguous under step one of the *Chevron* analysis.”).

172. *Texas*, 497 F.3d at 503.

173. *Id.* at 502.

174. *Id.* at 503 (deciding that all ambiguity “must have been ‘left open by Congress,’ not created after the fact by a court”).

175. *Id.* at 506.

176. *Id.* at 509.

177. *Id.*

federal legislation,”<sup>178</sup> which was the Secretary’s intention behind the Class III Gaming Procedures. Regardless, the regulations were ruled invalid.<sup>179</sup>

Still, this judgment was not unanimous, as Judge Carolyn King concurred with majority conclusion although disagreeing that IGRA was unambiguous following *Seminole*.<sup>180</sup> Judge King found common ground with majority opinion in agreeing that the Secretary had exceeded her power by “creating an alternative remedial scheme that allows the Secretary to issue Class III gaming procedures without Congress’s chosen prerequisites . . . goes beyond the mere effectuation of IGRA’s provisions into the realm of wholesale statutory amendment.”<sup>181</sup> More specifically, Judge King noted that by omitting the federal court determination of bad faith from the Class III Gaming Procedures “the Secretary’s method fails to preserve the core safeguards by which state interests are protected in Congress’s ‘carefully crafted and intricate remedial scheme.’”<sup>182</sup> It is noteworthy, however, that the concurrence had a more sympathetic tone than the majority, as Judge King stated that the Class III Gaming Procedures existed “for understandable reasons,” and following *Seminole* states had an “unforeseen and unintended ability to prevent the necessary court involvement.”<sup>183</sup> Thus, while the majority carries the day in *Texas*, other courts have found the lack of solidity less persuasive,<sup>184</sup> which is why the dissent in this case is so noteworthy.

Judge James Dennis took a hardline against the majority,<sup>185</sup> stating that if “circumstances imply that Congress would expect an agency to be able to speak with the force of law, even though Congress may not have expressly delegated authority or responsibility to implement a particular provision, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority.”<sup>186</sup> Furthermore, the argument that *Seminole* “created” the ambiguity in IGRA, rather than Congress, misconstrues the function of the judiciary, as the “prevailing view is that the judicial power vested in the federal courts allows them to declare what the law already is,

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178. *Id.* at 510.

179. *Id.* at 511.

180. *Id.* (King, J., Concurring).

181. *Id.* at 512.

182. *Id.*

183. *Id.*

184. *New Mexico v. Dep’t of the Interior*, No. 1:14-CV-00695-JAP/SC, 2014 WL 10298035, at \*11 (D.N.M. Sept. 11, 2014).

185. *Texas*, 497 F.3d at 513 (Dennis, J., dissenting).

186. *Id.*

rather than to create new law as the Chief Judge's argument presupposes that the Court did in *Seminole*.<sup>187</sup> Judge Dennis skillfully continued to layer his argument by illustrating that it is impossible for *Seminole* to create the gap in IGRA, as the Supreme Court decisions do not create law, but rather recognize the "controlling interpretation of federal law" that always existed.<sup>188</sup> And, this is the prevailing view of other circuit courts that have applied the *Chevron* doctrine.<sup>189</sup> For all of those reasons, the Class III Gaming Procedures within the context of IGRA would properly fulfill the first prong of the *Chevron* doctrine.<sup>190</sup>

As for the second prong of *Chevron*, Judge Dennis noted that IGRA is not limited to the states' interest because its explicit purpose was to promote "tribal economic development, self-sufficiency, and strong tribal governments."<sup>191</sup> Additionally, the notion that Congress must foresee an ambiguity within their own statute beforehand is "unpersuasive and circular" to Judge Dennis.<sup>192</sup> He further notes that, "[i]t is inherent in the policymaking process that some unforeseen event, or 'case unprovided for,' could render a portion of a statute ambiguous or meaningless."<sup>193</sup>

Judge Dennis continues his assault beyond the *Chevron* doctrine by addressing the general legal theories and arguments of the majority.<sup>194</sup> For example, he explained that the Class III Gaming Procedures do not eliminate the federal courts from the compact process. In fact, a state must invoke a federal court by raising an Eleventh Amendment defense to dismiss the case before the Class III Gaming Procedures.<sup>195</sup> Judge Dennis also observed that even if the Secretary of the Interior under IGRA was not authorized to propagate the Class III Gaming Procedures, Congress delegated the necessary power when it codified that the Secretary has the power to "prescribe such regulations as he [or she] may think fit for carrying into effect the various provisions of any act relating to Indian affairs."<sup>196</sup> There is nothing to suggest, however, that IGRA diminished the

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187. *Id.* at 515.

188. *Id.*

189. *Id.* at 516.

190. *Id.* at 517.

191. *Id.* at 521-22 (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006)).

192. *Id.* at 516 (citation omitted).

193. *Id.*

194. *See id.* at 517-22.

195. *Id.* at 523.

196. *Id.* at 514 (citing 25 U.S.C. § 9).

power that the Secretary has possessed since the Marshall Trilogy.<sup>197</sup> In conclusion, Judge Dennis states that the Fifth Circuit has “no business rejecting the Secretary’s exercise of his generally conferred authority.”<sup>198</sup>

While not mentioned in Judge Dennis’ dissent, it is striking that the Fifth Circuit only quickly references the Eleventh Circuit’s analysis in *Seminole* in a footnote,<sup>199</sup> as the decision concerns the Secretarial power to propagate regulations and is directly related and responsive to the arguments in *Texas*.<sup>200</sup> For example, the majority in *Texas* ironically stated, “The Eleventh Circuit has suggested without any analysis that if a state asserted Eleventh Amendment immunity against a tribe’s lawsuit, the judicial good-faith determination was severable.”<sup>201</sup> But when weighed and measured, the Fifth Circuit is the only court lacking analysis, as the Eleventh Circuit highlighted that IGRA’s “explicit severability clause” would allow the severance of parts of IGRA that were “held invalid.”<sup>202</sup> Within this context, the Eleventh Circuit clearly established that severing part of IGRA was necessary to resolve the gap created when “an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit.”<sup>203</sup> Yet, the Fifth Circuit attempts to claim that, “Nowhere does the Eleventh Circuit claim that a state’s exercise of Eleventh Amendment sovereign immunity creates a statutory gap,”<sup>204</sup> when the analysis of the gap created by *Seminole* (as quoted above) is the justification for enacting the severability clause of IGRA.<sup>205</sup>

All of this taken together demonstrates that Judge Dennis is not alone in his frustration with the majority opinion, as others have found similar flaws with the Fifth Circuit’s decision in *Texas*.<sup>206</sup> Some even contend that the decision threatens the whole Indian gaming industry since it reaffirms the fears of *Seminole*,<sup>207</sup> but that has not proven to be the case just yet.<sup>208</sup>

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197. Cunniff, *supra* note 14, at 543-44.

198. *Texas*, 497 F.3d at 525 (Dennis, J., dissenting).

199. *Id.* at 503 n.10 (Jones, C.J.).

200. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

201. *Texas*, 497 F.3d at 503 n.10.

202. 25 U.S.C. § 2721 (2012); *Seminole Tribe of Fla.*, 11 F.3d at 1029.

203. *Seminole Tribe of Fla.*, 11 F.3d at 1029.

204. *Texas*, 497 F.3d at 503 n.10.

205. *Seminole Tribe of Fla.*, 11 F.3d at 1029.

206. Cunniff, *supra* note 14, at 548 (“The court failed to find any ambiguity in the IGRA statute despite it being fundamentally altered by the U.S. Supreme Court in *Seminole*. The court also failed to see a link between Congress’s desire to enable tribal Class III gaming and the Secretarial Procedures.”).

207. *Id.*



C. Federal Courts Since *Texas v. United States*

In the wake of *Texas*, the Secretary has not given up on the Class III Gaming Procedures,<sup>209</sup> and federal courts are far from unanimous on their validity.<sup>210</sup> While the Fifth Circuit's decision certainly influences other federal judges' decisions,<sup>211</sup> its reception has not been overwhelmingly warm.<sup>212</sup> For example, in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger (Rincon)*, Judge Jay Bybee of the Ninth Circuit Court of Appeals (Ninth Circuit) does not appear to have much confidence in the Fifth Circuit's holding.<sup>213</sup> He noted that the Class III Gaming Procedures were "hardly a settled issue,"<sup>214</sup> and a divided Fifth Circuit has done little to deter the Department of the Interior.<sup>215</sup> Judge Bybee further stated that "no other circuit court—including the Second, Sixth, Tenth, and Eleventh Circuits (home to Connecticut, Michigan, New Mexico and Oklahoma, and Florida, respectively)—has held the Part 291 regulations to be invalid."<sup>216</sup> It is also telling that Judge Bybee's criticism is found in a ruling that does not address the Class III Gaming Procedures,<sup>217</sup> which seems to indicate that he is eager to attend to the issue.

The lower federal district courts have not been much more forgiving of the Fifth Circuit's decision.<sup>218</sup> For example, in *Alabama v. United States*, the United States District Court for the Southern District of Alabama heard arguments for the Department of the Interior's motion for summary judgment regarding the Class III Gaming Procedures.<sup>219</sup> In this case, Alabama sought to block the Poarch Band of Creek Indians (Poarch Band) from invoking the Class III Gaming Procedures.<sup>220</sup>

This case had striking similarities to *Texas*, as a state was attempting to block the Class III Gaming Procedures before Secretary made a final

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208. *E.g.* *Alabama v. United States*, 630 F. Supp. 2d 1320, 1331 (S.D. Ala. 2008).

209. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1073 (9th Cir. 2010) (Bybee, J., dissenting).

210. *Id.*

211. *New Mexico v. Dep't of the Interior*, No. 1:14-CV-00695-JAP, 2014 WL 10298036, at \*4 (D.N.M. Oct. 17, 2014).

212. *See Rincon Band*, 602 F.3d at 1073 (Bybee, J., dissenting).

213. *See id.*

214. *Id.* at 1073 n.27.

215. *Id.*

216. *Id.*

217. *See id.* at 1026.

218. *See, e.g., Alabama v. United States*, 630 F. Supp. 2d 1320, 1331 (S.D. Ala. 2008).

219. *Id.* at 1324-25.

220. *Id.* at 1323-24.

determination.<sup>221</sup> The Southern District Court of Alabama, however, granted the Department's motion for summary judgment.<sup>222</sup> In reaching its decision, the court substantively referenced *Texas* while discussing ripeness and concluded, "whatever extent *Texas* represents a supportable alternative view, the Court rejects it in favor of the clear majority position."<sup>223</sup> Because ripeness was the basis of granting summary judgment in this case, the Fifth Circuit and the Southern District Court of Alabama are at opposite ends of the table, at least with regard to determining when final agency action has occurred,<sup>224</sup> and at most with the Class III Gaming Procedures at large.<sup>225</sup>

It is also noteworthy that while the Southern District Court of Alabama falls within the jurisdiction of the Eleventh Circuit, the District Court made no mention that the Eleventh Circuit's ruling in *Seminole* was the source of the Class III Gaming Procedures.<sup>226</sup> One can only speculate at their reasoning—perhaps to preserve a veil of objectivity—but regardless, the Southern District Court of Alabama's decision reaffirms the Eleventh Circuit finding that the Secretary had the power to propagate the Class III Gaming Procedures.<sup>227</sup>

Even when a federal district court does follow the Fifth Circuit's decision in *Texas*, it is not without criticism.<sup>228</sup> In *New Mexico v. Department of the Interior*, the story was much the same as *Texas* and *Alabama*.<sup>229</sup> The Pueblo of Pojoaque (Pojoaque) sought to conduct class III gaming, and New Mexico did not want to engage in compact negotiation.<sup>230</sup> The Pojoaque wanted to use the Class III Gaming Procedures propagated by the Secretary of the Interior and New Mexico sued.<sup>231</sup> In this case, unlike *Alabama*, the United States District Court of the District of New Mexico followed the ruling in *Texas* finding that the Class III Gaming

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221. *Id.* at 1330-31.

222. *Id.* at 1332.

223. *Id.* at 1331.

224. *Id.* at 1330-31.

225. Compare generally *Alabama*, 630 F. Supp. 2d 1320 with *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

226. See generally *Alabama*, 630 F. Supp. 2d at 1323.

227. Compare *Alabama*, 630 F. Supp. 2d at 1323 with *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

228. *New Mexico v. Dep't of the Interior*, No. 1:14-CV-00695-JAP, 2014 WL 10298036, at \*4 (D.N.M. Oct. 17, 2014).

229. E.g., *id.*

230. *Id.* at \*4-\*5.

231. *Id.*

Procedures were invalid under IGRA.<sup>232</sup> This recent holding certainly is worrisome, as it demonstrated that the Fifth Circuit was not in complete isolation in its reasoning.<sup>233</sup>

Despite this, the District Court of New Mexico was not without criticism.<sup>234</sup> For example, the majority in *New Mexico* disagreed with the majority in *Texas* that the Class III Gaming Procedures subject Texas to the jurisdiction of the Department of the Interior, but still found that New Mexico had standing.<sup>235</sup> Moreover, the court also observed, “the persuasive value of *Texas* is diminished by the fact that only one judge (Chief Judge Jones) on the three-judge panel concluded that IGRA was unambiguous.”<sup>236</sup> Realistically, differences in the majorities’ analysis in *Texas* and *New Mexico* are mostly dicta—far from Earth shattering—but they do signal that federal courts that are willing to strike down the Class III Gaming procedures are not solidified in their reasoning, which is a fracture left to be exploited.

#### *D. Walking On: Legal Arguments for the Class III Gaming Procedures*

As time rolls on, federal courts are still taking up class III gaming cases and deciding how compact negotiations are going to be resolved.<sup>237</sup> And because federal courts remain divided on the Class III Gaming Procedures, the best method for constructing future arguments will be to revisit the previously mentioned cases and the future cases to be decided. There certainly are lessons from majorities, concurrences, and dissents that American Indian legal advocates, policy makers, and judges should consider when constructing their arguments and decisions. For example, while tribes lost *Texas*, the dissent and concurrence both offer arguments that can be built upon to defend the Class III Gaming Procedure in other federal courts.<sup>238</sup> One could go on with examples, but the purpose is to demonstrate that while some dismiss the Class III Gaming Procedures (as with much of federal Indian law) as dying a slow death after *Texas*,<sup>239</sup> nothing is final until the Supreme Court makes a ruling.

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232. *Id.* at \*14.

233. *Id.*

234. *See id.*

235. *Id.* at \*6-\*7.

236. *Id.* at \*4.

237. *E.g. North Fork Rancheria of Mono Indians v. California*, No. 1:15-cv-00419-AWI-SAB (E.D. Cal. March 17, 2015).

238. *See generally Texas v. United States*, 497 F.3d 491, (5th Cir. 2007).

239. *E.g., Cunniff, supra* note 14, at 548 (“The state compacting provisions in IGRA are essentially moot in the face of a recalcitrant state within the Fifth Circuit’s jurisdiction.”).

#### IV. Policy Arguments Concerning the Class III Gaming Procedures

Regardless of personal views of the Class III Gaming Procedures, it is clear that the regulations did not occur within a political vacuum; rather, they were the Secretary's response to the perceived need that tribes would face following *Seminole*.<sup>240</sup> Undoubtedly, political opinions are tenacious, but by exploring the policy implications of the Class III Gaming Procedures, political opinions may change. Moreover, tribal sovereignty has historically been a bipartisan issue,<sup>241</sup> and—to the late Justice Antonin Scalia's displeasure<sup>242</sup>—politics often influence Supreme Court decisions.<sup>243</sup>

##### A. States' Rights v. Equity

It is often ignored that originally states had no right to regulate Indian gaming.<sup>244</sup> But much has changed, and today at the heart of any discussion of IGRA and the Class III Gaming Procedures are states' rights.<sup>245</sup> Indeed, it is hardly an avoidable issue, as the Supreme Court in *Seminole* based its decision on a state's right to sovereign immunity.<sup>246</sup> Even more than 200 years since the conception of the United States, the judiciary is still resolving where tribal sovereignty ends and states' rights begin.<sup>247</sup> With all of that said there are particularized policy reasons that the Class III Gaming Procedures are necessary to ensure equity between the tribes and states and are key to ensure IGRA's intent with regard to states' rights.

As discussed earlier, Cabazon greatly reduced states' ability to regulate Indian gaming until the passage of IGRA.<sup>248</sup> This action on the part of

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240. *Id.* at 534.

241. *Indian Gaming: The Next 25 Years: Hearing Before the Senate Committee on Indian Affairs*, 113th Cong. 7 (2014) (statement of Kevin K. Washburn, Assistant Secretary of Indian Affairs, U.S. Dep't of Interior).

242. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant.").

243. JAMES MIDGLEY & MICHELLE LIVEMORE, *THE HANDBOOK OF SOCIAL POLICY* 34 (2008).

244. *Fla. House of Representatives v. Crist*, 990 So. 2d 1035, 1038 (Fla. 2008).

245. *E.g.*, Lindner-Cornelius, *supra* note 23.

246. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

247. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

248. *See Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 997 (9th Cir. 1994), *cert. granted, judgment vacated sub nom. Washington v. Spokane Tribe of Indians*, 517 U.S. 1129 (1996) ("The IGRA was passed to fill a void in Indian gaming regulation that arose

Congress has multiple policy implications. For instance, with states lobbying, Congress required compacts for class III gaming.<sup>249</sup> Moreover, the language of IGRA seems to indicate that Congress conceives of Indian Country as being “located in a State,” as delegating power to states would be nonsensical otherwise.<sup>250</sup>

Despite any ethical objection, general policy concerns support state jurisdictional control, as it is difficult to conceptualize many sovereign nations existing within America.<sup>251</sup> And from a practical stand point, policing would be extremely difficult (if not impossible) with a patchwork of sovereign nations located so closely together<sup>252</sup>—although Europe seems to manage. The policy interests within IGRA demonstrate that the legislation was drafted with state protection in mind, but that does not mean that state interests should be all that matter.

United States House Representative Morris Udall spoke about IGRA with intent to protect Indian interests in the face of a powerful states’ lobby.<sup>253</sup> If nothing else, this demonstrates that Indian interests were not isolated from the bill in its conception—Fifth Circuit notwithstanding.<sup>254</sup> Nevertheless, that leaves IGRA in a policy conundrum as both parties interests are opposing<sup>255</sup>.

IGRA’s delegation of power to the states does offer a resolution to this paradox, however, as States have never had an inherent power to intervene in tribal affairs—consider *Worcester v. Georgia*. Consequently, the waiver of sovereign immunity granted in IGRA is not an abrogation of inherent power within the states, but rather a condition placed on the delegated power.<sup>256</sup> A less abstract explanation is that if Congress can take a power away from a state, then it, by definition, is not inherent.<sup>257</sup> This seems to be consistent with federal Indian legal theory at large as the Ninth Circuit used

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from the states’ dependence on Congress for any authority to regulate tribal affairs.”) (citation omitted).

249. See 25 U.S.C. § 2710 (2012).

250. *Id.*

251. See Bryan T. Andersen, *South Dakota v. Yankton Sioux Tribe: Sewing A Patchwork Quilt of Jurisdiction*, 3 GREAT PLAINS NAT. RESOURCES J. 99, 110 (1998).

252. *Id.*

253. Ducheneaux, *supra* note 93, at 169.

254. See *id.*

255. Compare Ducheneaux, *supra* note 93, at 169, with *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007).

256. Washburn, *supra* note 5, at 430 (“With this right came a responsibility. Congress imposed upon states the responsibility of engaging in good faith negotiations.”).

257. *Id.*

this same analysis—echoing the Eleventh Circuit—justifying the Secretary of the Interior’s ability to propagate regulations in response to *Seminole*.<sup>258</sup>

*B. Department of the Interior Objectivity*

It is undoubtedly true that the Department of the Interior, acting on behalf of the Executive branch, carries the fiduciary duties of the United States federal government as the guardian of the numerous American Indian tribes within the continental United States.<sup>259</sup> This is not merely to document a well-known fact, but to point out that the particular relationship the Department of the Interior has with tribes has caused some speculation about its ability to act as both guardian and objective adjudicator of the Class III Gaming Procedures.<sup>260</sup> It is even arguable that federal Indian law supports this criticism, as the Supreme Court has already recognized the legal difficulty in the United States acting as both trustee and sovereign.<sup>261</sup>

That hastily drawn conclusion misunderstands both the intent of IGRA as well as the Department’s ability. First, the Department’s trustee obligations would only be an issue under a narrow reading of IGRA, whereas under a broader analysis numerous courts have noted that IGRA’s primary objective was “fostering tribal economic self-sufficiency,” not addressing state concerns.<sup>262</sup> Second, the expertise of the Department as an arbitrator of Indian affairs is unmatched, as it must regularly balance competing interests between tribes.<sup>263</sup>

Third, the Class III Gaming Procedures avoid tribes going before federal courts to have their interest adjudicated. This is important as many American Indian legal advocates—such as John Echohawk, Director of the Native American Rights Fund, and Jefferson Keel, President of the National Congress of American Indians—believe that the federal courts are actually

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258. *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 997 (9th Cir. 1994), *cert. granted, judgment vacated sub nom. Washington v. Spokane Tribe of Indians*, 517 U.S. 1129 (1996).

259. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2341 (2011).

260. Lindner-Cornelius, *supra* note 23, at 695.

261. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980).

262. Cunniff, *supra* note 14, at 542.

263. Letter from Kevin Washburn, Assistant Secretary of Indian Affairs, to Jay Inslee, Governor of Washington (Jun. 15, 2015), <http://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-030640.pdf> (discussing that the Department of the Interior must act as trustee for both tribes involved in a dispute).

the biased adjudicator, stating that the Supreme Court has ruled against tribes “three out of every four” times since the 1970’s.<sup>264</sup>

Fourth, there is no reliable data that the Department of the Interior lacks objectivity concerning tribal interests.<sup>265</sup> For example, there are some that claim the Office of Indian Gaming approves an almost unanimous amount of land into trust applications for gaming purposes,<sup>266</sup> those numbers do not include the tribes that withdrawal their applications to avoid rejection.<sup>267</sup> There are also numerous instances where the work product that comes out of the Department of the Interior represents the middle ground between the state and tribal interests.

Finally, the appearance of a lack of objectivity within the Class III Gaming Procedures functions more broadly than originally conceived, because if states truly doubt the fairness of the regulatory process or the Department, then they have the option to go to court.<sup>268</sup> This ensures both the adjudication of claims arising under IGRA, and that the state gets to choose the forum. Truthfully, a more generous legal avenue for states is difficult to imagine.

### C. IGRA’s Intent

As discussed previously, IGRA’s intent was not merely to give states more rights in Indian gaming, but was to create a regulatory scheme that would provide states, as an interested party, an ability to engage tribes in an agreement that would allow tribes to develop economic sustainability and self-determination through gaming.<sup>269</sup> This reiteration is important, because Circuit Courts are not blind to the fact that IGRA has since become a tool of mass exploitation.<sup>270</sup> While IGRA originally intended to aid tribal “economic development, self-sufficiency, and strong tribal

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264. Susan Shannon, *NARF and NCAI Advise Tribes to Stay Away from Supreme Court*, KGOU (Sep. 27, 2013), <http://kgou.org/post/narf-and-ncai-advise-tribes-stay-away-supreme-court#stream/0>.

265. *See infra* Appendix.

266. *Id.*

267. *Id.*

268. *Alabama v. United States*, 630 F. Supp. 2d 1320, 1323-24 (S.D. Ala. 2008) (explaining that the Class III Gaming Procedures “establish how he would proceed to develop procedures for Class III gaming should a state stand on its Eleventh Amendment rights”).

269. Cunniff, *supra* note 14, at 542.

270. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1030 (9th Cir. 2010).

governments,”<sup>271</sup> states have used *Seminole* to hijack IGRA to extort tribes.<sup>272</sup> And Congress has done nothing about it.<sup>273</sup>

The compact process for class III gaming is an excellent example of IGRA’s perverted intention.<sup>274</sup> Compacts are possibly illegal, and take tribal resources earned as “revenue sharing” to avoid the tax prohibition Congress established within IGRA.<sup>275</sup> Nonetheless, besides the Class III Gaming Procedures, revenue sharing remains the only realistic mechanism to entice states to negotiate compacts.<sup>276</sup> The ultimate irony is that to compensate for revenue sharing within compacts, tribes expand their gaming operations to include off-reservation gaming facilities, which is what states allegedly opposed in the first place.<sup>277</sup> Additionally, revenue sharing and Class III Gaming Procedures both derive from the intent of IGRA rather than its text, meaning that many opponents of the Class III Gaming Procedures would logically leave tribes with no avenue for class III gaming.<sup>278</sup>

#### *D. Tribal Sovereignty*

Although definitions of tribal sovereignty may differ, it is often the case that sovereignty is closely related to tribal economic development and self-determination.<sup>279</sup> This relationship is hardly coincidental as tribal sovereignty exercised through self-determination provides opportunities for economic development, and economic development, in turn, provides revenue for tribes to pursue self-determination.<sup>280</sup> Moreover, when tribes are dealing with poverty, health issues, and other social welfare issues,

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271. TOMAC, *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006).

272. Cunniff, *supra* note 14, at 548.

273. *Id.*

274. Ducheneaux, *supra* note 93, at 177-78.

275. *Id.*

276. Fletcher, *supra* note 9, at 40 (“[T]he imbalance created by the stronger bargaining position of state governments relative to Indian tribes . . . allows state governments to impose revenue sharing agreements of dubious legal validity on Indian tribes in exchange for the right to commence gaming operations.”).

277. *Id.* at 66-67.

278. *Id.*

279. *E.g.*, Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 607-08 (2004).

280. *Compare* Graham, *supra* note 279, at 606-08 with S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 673 (2010).



economic development could not be more important.<sup>281</sup> For example, the Pine Ridge Indian Reservation—formally Prisoner of War Camp 334—faces the worst living conditions in North America.<sup>282</sup>

Gaming offers some tribes the ability to determine their own economic futures, while reinforcing the principle of inherent sovereignty.<sup>283</sup> Economic development—such as gaming—requires that tribes have the ability to make their own sovereign decisions for two main reasons.<sup>284</sup> First, tribal decision makers are “directly accountable to their constituency, as opposed to federal officials whose objectives may be different than the tribes they represent.”<sup>285</sup> Second, sovereignty in itself is “a major development resource, since it offers ‘distinct . . . market opportunities, from reduced tax and regulatory burdens’ as well as ‘unique niches [in areas such as] gaming.’”<sup>286</sup>

Moreover, there cannot be a singular approach to tribes, as all tribes encompass unique traits, both culturally and geographically.<sup>287</sup> Consequently, all forms of potential economic development should be available to all tribes as there is no one size fits all solution.<sup>288</sup> The Class III Gaming Procedures may be the only avenue some tribes have to access economic development, and are thus vital for tribal sovereignty.<sup>289</sup>

### V. Conclusion

It is of dire importance that the opponents of the Class III Gaming Procedures reconsider their views. As long as hundreds of tribes remain economically devastated due to the ongoing ramifications of allotment and removal, then the first priority within the modern era should be economic development of tribes. It is a goal that should appeal to the small

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281. Graham, *supra* note 279, at 604.

282. Aaron Huey, *America's Native Prisoners of War*, TED (Nov. 2010), [http://www.ted.com/talks/aaron\\_huey/transcript?language=en](http://www.ted.com/talks/aaron_huey/transcript?language=en) (“Unemployment on the Pine Ridge Reservation fluctuates between 85 and 90 percent. . . . The life expectancy for men is between 46 and 48 years old – roughly the same as in Afghanistan and Somalia.”).

283. Thompson, *supra* note 280, at 672-73.

284. *See* Graham, *supra* note 279, at 607.

285. *Id.*

286. *Id.*

287. *See infra* Appendix.

288. *Id.*

289. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-19 (1987).

government desires of traditional conservatives as well as the altruistic need of modern liberals, and yet Congress has done nothing to fix *Seminole*.

Perhaps many see a casino as a symbol for greed and crime. Nevertheless, when the worst poverty in North America exists on Indian reservations, there is no time to pass judgment. As far as a moral assessment is concerned, there is nothing more devoid of ethical substance than to judge the means of those in need while enjoying lands and resources taken. The notion that casinos fester with greed and crime seems foreign when one considers that the money it generates provides housing, schools, transportation, jobs, infrastructure, emergency services, and offers tribes a stronger, faster, and better means of economic development.

Are the Class III Gaming Procedures perfect? No. They are an imperfect solution to an exploitive problem. Yet, the baseline question should be “who is going to fix it?” Congress has proven it will not. Federal courts remain split on the issue. The Class III Gaming Procedures are the only viable solution that allow tribes to develop economic sustainability and self-determination.

## APPENDIX

Paula Hart, Director  
Office of Indian Gaming – Department of the Interior  
MS-3657-MIB  
1849 C Street, N.W. Washington, D.C. 20240

Dear Director Hart:

My name is Austin R. Vance, and I am a second year law student at the University of Oklahoma College of Law. I am currently working on a comment for the American Indian Law Review about the "Class III Gaming Procedures" published in 25 C.F.R. § 291.1-15. In order to complete my research, I would greatly appreciate if you took the time to answer the following questionnaire. If you are unable to answer, please give a brief reason for the omission. For example, "the answer contains confidential information" would be a reasonable response. When you have completed the questionnaire, please place your signature at the bottom certifying that the answers were completed to the best of your knowledge and ability.

Let me know if you have any questions or need clarification.

Thank you,

Austin R. Vance

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**Question 1**

*Has the Secretary of the Interior ever used the Class III Gaming Procedures found in 25 C.F.R. §§ 291.1-15? If so, please explain whether or not the Class III Gaming Procedures were successfully administered.*

**Answer**

Since the publication of 25 C.P.R. Part 291 in 1999, the Department has received eight applications for Secretarial gaming procedures under the regulation. The Department has yet to issue class III gaming procedures under Part 291. As explained in greater detail below, two of the

applications were mooted because the tribes concluded compacts that were approved and published in the *Federal Register* (Seminole Tribe of Florida and Confederated Tribes of the Colville Reservation). The Department disapproved one application (Santee Sioux Nation, Nebraska). Two applications have been placed on hold (Miccosukee Tribe of Indians and Poarch Band of Creeks). The United States Court of Appeals for the Fifth Circuit invalidated Part 291 in *Texas v. US.*, 497 F.3d 491 (5th Cir. 2007), which mooted two applications that were pending at the time of the court's decision (Kickapoo Traditional Tribe of Texas and the Jena Band of Choctaw Indians). The Department received an application from the Pueblo of Pojoaque, New Mexico, in 2014, but the Department has been enjoined from processing pending a decision from the Tenth Circuit on the validity of Part 291.

1. In 1999, the Confederated Tribes of the Colville Reservation applied for Secretarial gaming procedures under Part 291. In 2002, the Tribe and the State of Washington reached an agreement on a tribal-state gaming compact, in part, as a result of the procedures process.

2. In 1999, the Seminole Tribe of Florida applied for Secretarial gaming procedures under Part 291. In 2007, the Tribe and the State of Florida reached an agreement on a tribal-state gaming compact, in part, as a result of the procedures process and related federal court litigation.

3. In 1999, the Santee Sioux Nation, Nebraska, applied for Secretarial gaming procedures under Part 291. In 2005, the Department disapproved the Tribe's application because the proposed scope of gaming exceeded the Indian Gaming Regulatory Act's (IGRA) limitation that tribes may only operate games permitted under state law for "any person, organization, or entity." 25 U.S.C. § 2710 (b)(1)(A).

4. In 1999, the Miccosukee Tribe of Indians applied for Secretarial gaming procedures under Part 291. The Tribe did not pursue its request for procedures because the Department's scope of gaming determination found that the Tribe's proposed scope of gaming exceeded the legal scope of gaming allowed in the State of Florida.

5. In 2003, the Kickapoo Traditional Tribe of Texas applied for Secretarial gaming procedures under Part 291. The State of Texas responded to the Department's invitation to participate in the procedures

process under Part 291 by challenging the validity of the regulation in federal court. In 2007, the Court of Appeals for the Fifth Circuit invalidated Part 291, which mooted the Tribe's application. *See Texas v. U.S.*, 497 F.3d 491 (2007).

6. In 2006, the Poarch Band of Creeks applied for Secretarial gaming procedures under Part 291. The State of Alabama later challenged the validity of Part 291 in federal court, but the court upheld the regulation. *See Alabama v. United States*, 630 F. Supp. 2d 1320 (S.D. Ala. 2008). Alabama did not appeal, but the application has been put on hold at the Tribe's request.

7. In 2007, the Jena Band of Choctaw Indians applied for Secretarial gaming procedures under Part 291. Later that year, the Court of Appeals or the Fifth Circuit handed down its ruling in *Texas* that invalidated Part 291 in Louisiana as well as Texas (and Mississippi), and mooted the Tribe's application.

8. In 2014, the Pueblo of Pojoaque, New Mexico, applied for Secretarial gaming procedures under Part 291. The State of New Mexico responded to the Department's invitation to participate in the procedures process under Part 291 by challenging the validity of the regulation in federal court. The district court enjoined the Department's processing of the application pending a decision by the Court of Appeals for the Tenth Circuit on the State's challenge to the regulation.

## **Question 2**

*Was the language of the Class III Gaming Procedures modeled after the Eleventh Circuit's decision in Seminole Tribe of Florida v. Florida? Specifically, I am referring to where the decision states:*

*Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. §*

*2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. 11 F.3d 1016, 1029 (1994).*

**Answer**

Question 2 seems to inadvertently conflate the quoted passage from the Court of Appeals for the Eleventh Circuit's ruling in *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994), with later publication of 25 C.F.R. Part 291. The passage appears to refer to "regulations" in the context of the Secretary prescribing "regulations (aka procedures under IGRA) governing class III gaming *on the tribe's lands*," not the Code of Federal Regulations.

In promulgating Part 291, the Department intended to effectuate congressional intent in the wake of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Under the regulation, if a tribe seeking a compact properly notifies the state and files a timely lawsuit against the state under IORA, and the federal court then dismisses that lawsuit based on the lack of an effective waiver of the state's Eleventh Amendment immunity, the tribe can then submit an application to the Department to adopt procedures that will govern the tribe's class III gaming activities. See 25 C.F.R. § 291.4.

**Question 3**

*A recent Pepperdine Law Review article stated that "100% of the proposed fee-to-trust acquisitions submitted to the Pacific Region BIA from 2001 through 2011 were granted."<sup>290</sup> Is that statistic correct? Please explain.*

**Answer**

During this time period, 150 applications were submitted to the Pacific Regional Office by applicant tribes. Thirty-five of those applications were ultimately withdrawn by the tribes and two applications were denied by the Department.

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290. Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP.L. REV. 251,278 (2012).

In general, regional offices and tribes work together to develop and process applications to acquire land in trust. Not all applications result in a final decision, however. A tribe may withdraw its application for a variety of reasons, including an inability to complete the application process. A regional office may also return an inactive application rather than deny it.

#### **Question 4**

*Some statistics, such as the one in Question 3, seem to indicate that the fee-to-trust process is too easy or "rubber-stamping."<sup>291</sup> Would you explain the difficulty of the fee-to-trust process and give an estimate the time the process takes?*

#### **Answer**

There are a number of factors that determine the length of the review time for the fee-to-trust process. The length of time is dependent on the specifics of each individual tribe and its application; the factual and legal issues involved; the completeness and accuracy of the tribe's application; the length and complexity of the environmental review process pursuant to the National Environmental Policy Act; the type of statutory acquisition authority (on-reservation discretionary, off-reservation discretionary, or mandatory); the number and substantive content of comments from interested parties; and for applications to conduct gaming, a determination whether the land is eligible for gaming pursuant to IORA.

Applications to acquire land in trust are developed and reviewed by BIA's regional and agency offices. The BIA's regulatory review includes, among other things, consideration of a tribe's need for additional land, the purposes for which the land will be used, the potential tax and jurisdictional impacts on state and local subdivisions, and potential land use and jurisdictional conflicts. All applications to acquire land in trust require a determination whether statutory authority exists to acquire the land in trust.

Applications to conduct gaming are submitted to the Department in Washington for final action. This includes an in-depth review and analysis of the often-extensive factual information developed for a

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291. *Id.* at 295.

tribe's application, and a determination whether the application meets statutory and regulatory requirements. For the three most recent fee-to-trust acquisitions for gaming purposes, the Department took, on average, a year and a half to complete the analysis and reach a final decision.

**Question 5**

*Kevin Washburn, Assistant Secretary of Indian Affairs, has been noted as stating that he "couldn't provide a list of disapprovals because the BIA doesn't issue very many of them. If an application has problems . . . the tribe is told and withdraws it."<sup>292</sup> This seems to indicate that statistics on the "rubber-stamping" of the fee-to-trust process would be misleading as they could not take into account various factors, such as applications being withdrawn. Would that be a fair conclusion to draw? Please explain.*

**Answer**

If a tribe's application is incomplete (sometimes due to inadequate funding or resources that prevent the tribe from completing it) or does not meet the requirements of applicable laws and regulations, the Department notifies the tribe. As a result, applications that would be denied are instead sometimes withdrawn by the tribe or returned to the tribe with no further action by the Department.

**Question 6**

*One would assume the Office of Indian Gaming would disagree with the notion that the fee-to-trust process for gaming lacked meaningful standards" of evaluation.<sup>293</sup> However, given the diverse nature of federally recognized tribes, how necessary is flexibility in the decision-making process of the office?*

**Answer**

Because of the unique circumstances of each tribe, including its need for

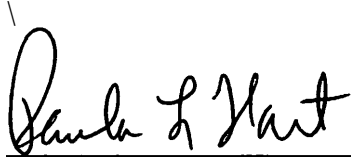
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292. Gale Toensing, "Rep. Don Young is Leading an Assault on Native Rights," May 27, 2015, <http://indiancountrytodaymedianetwork.com/2015/05/27/rep-don-young-leading-assault-native-rights-160494>.

293. Waples, *supra* note 290, at 295.



land and the intended purposes for the land, each fee-to-trust decision inherently requires a case-by-case analysis pursuant to applicable statutory and regulatory requirements. This process complies with applicable law and addresses the needs of each tribe.

A handwritten signature in cursive script that reads "Paula L. Hart". The signature is written in black ink and is positioned above a horizontal line.

Paula Hart, Director Office  
of Indian Gaming  
Department of the Interior

4/27/16  
Date