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Indian Bingo: Federal Protection of Indian Autonomy

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INDIAN BINGO: FEDERAL PROTECTION OF INDIAN AUTONOMY

With their resources and acquired knowledge, the Europeans appropriated to themselves most of the advantages which the natives might have derived from the possession of the soil and the Indians have been ruined by a competition which they had not the means of sustaining. They were isolated in their own country, and their race only constituted a little colony of troublesome strangers in the midst of a numerous and dominant people.[1]

This statement, made by Alexis de Tocqueville in 1831, aptly describes the predicament in which the Indians found themselves with the onslaught of an aggressive culture. Today, the Indians are *still* "isolated in their own country" in a number of respects and continue to resist the control of a dominant people.

The case of *California v. Cabazon Band of Mission Indians*[2] (*"Mission Indians"*), illustrative of such resistance to control, involved the state of California attempting to regulate gambling on Indian reservations. This case is also illustrative of the present federal policy of encouraging tribal self-determination and autonomy, a policy that can be traced directly to the earliest commitments made by the United States to the Indian tribes,[3] one that most Indian leaders support.[4] Specifically, the United States Supreme Court held that although state laws may be ap-

1. A. TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 448 (H. Reeves trans. 6th ed. 1879).

2. __ U.S. __, 107 S. Ct. 1083 (1987).

3. The United States government's very first treaty with an Indian tribe promised them political autonomy:

> The United States do engage to guarantee to the aforesaid nation of Delawares and their heirs, all their teritoreal [sic] rights in the fullest and most ample manner . . . as long as the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into. And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, that nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.

Treaty, Sept. 17, 1778, United States-Delawares, art. VI, 7 Stat. 13.

4. *See, e.g., The Longest Walk Manifesto-Affirmation of Sovereignty of the Indigenous People of the Western Hemisphere, reprinted in* 124 CONG. REC. H7458 (daily ed. July 27, 1978) (remarks of Rep. Dellums).

plied to tribal Indians on their reservations if Congress has expressly consented, Congress had not done so here.

STATEMENT OF THE CASE

The Cabazon and Morongo Bands of Mission Indians[5] occupy reservations in Riverside County, California.[6] Each band, pursuant to an ordinance approved by the Secretary of the Interior, conducts bingo games on its reservation.[7] The Cabazon Band has also opened a card club at which draw poker and other card games are played. The games are open to the public and are played predominantly by non-Indians coming onto the reservations. The games are a major source of employment for tribal members and the profits are the tribes' sole source of income.[8]

The state of California ("State") sought to apply California Penal Code section 326.5[9] to enjoin the tribes' activity until they met certain

5. Both are federally recognized Indian tribes. The governing bodies of both tribes have been recognized by the Secretary of the Interior. The Cabazon Band has twenty-five enrolled members and the Morongo Band has approximately 730 enrolled members. *Mission Indians,* 107 S. Ct. at 1086 n.1.

6. An Executive Order of May 15, 1876 originally set apart the Cabazon Reservation for the "permanent use and occupancy" of the Cabazon Indians. The Morongo Reservation also was first established by Executive Order. In 1891, in the Mission Indian Relief Act, 26 Stat. 712, Congress declared reservations "for the sole use and benefit" of the Cabazon and Morongo Bands. The United States holds the land in trust for the Tribes. *Mission Indians,* 107 S. Ct. at 1086 n.1.

7. The Cabazon ordinance authorizes the Band to sponsor bingo games within the reservation "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that net revenues from the games shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well-being of the Cabazon Indian Reservation and for other tribal purposes." *Mission Indians,* 107 S. Ct. at 1086 n.2. The ordinance further provides that no one other than the Band is authorized to sponsor a bingo game within the reservation, and that the games shall be open to the public, except that no one under 18 years old may play. *Id.* The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates revenues to programs to promote the health, education, and general welfare of tribal members. It additionally provides that the games may be conducted at any time but must be conducted at least three days per week, that there shall be no prize limit for any single game or session, that no person under 18 years old shall be allowed to play, and that all employees shall wear identification. *Id.*

8. *Mission Indians,* 107 S. Ct. at 1086.

9. CAL. PENAL CODE § 326.5 (West Supp. 1987). Section 326.5 provides in pertinent part:

> (b) It is a misdemeanor for any person to receive or pay a profit, wage, or salary from any bingo game authorized by Section 19 of Article IV of the State Constitution . . . .
>
> . . . .
>
> (g) All bingo games shall be open to the public, not just to the members of the authorized organization.
>
> (h) A bingo game shall be operated and staffed only by members of the author-

requirements. That statute does not entirely prohibit the playing of bingo, but instead permits it when the games are operated and staffed by members of designated charitable organizations who may not be paid for their services. In addition, profits must be kept in special accounts to be used only for charitable purposes and prizes may not exceed $250 per game. California asserted that the bingo games on the two reservations violated each of these restrictions and insisted that the tribes comply with state law.[10] Riverside County ("County") also sought to apply its local Ordinance No. 558[11] regulating bingo, as well as its Ordinance No. 331.[12]

The Tribes then sued the County in federal district court seeking a declaratory judgment that the County had no authority to apply its ordinances inside the reservations and an injunction against their enforcement. After the State intervened and the parties stipulated to the facts, the district court granted the Tribes' motion for summary judgment, holding that neither the State nor the County had any authority to enforce its gambling laws within the reservations. The Court of Appeals

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ized organization which organized it. Such members shall not receive a profit, wage, or salary from any bingo game.

(i) No individual, corporation, partnership, or other legal entity except the organization authorized to conduct a bingo game shall hold a financial interest in the conduct of such bingo game.

. . . .

(j) With respect to other organizations authorized to conduct bingo games pursuant to this section, all proceeds derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. . . . Such proceeds shall be used only for charitable purposes, except as follows:

(1) Such proceeds may be used for prizes . . . .

. . . .

(n) The total value of prizes awarded during the conduct of any bingo games shall not exceed two hundred fifty dollars ($250) in cash, kind, or both, for each separate game which is held.

(o) As used in this section "bingo" means a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random. Notwithstanding Section 330c, as used in this section, the game of bingo shall include cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes. The winning cards shall not be known prior to the game by any person participating in the playing or operation of the bingo game . . . .

Id.

10. The Tribes admitted that their games violate the provision governing staffing and the provision setting a limit on jackpots. They disputed the State's assertion that they do not maintain separate funds for the bingo operations. *Mission Indians,* 107 S. Ct. at 1086 n.3.

11. Riverside County Ord. 558 art. 1 § 14 (1969) regulates bingo in a manner similar to CAL. PENAL CODE § 326.5 (West Supp. 1987).

12. Riverside County Ord. 331 § 3 (1951) prohibits the playing of draw poker and other card games.

for the Ninth Circuit affirmed. The State and the County appealed.[13]

Justice White, writing for the majority of the United States Supreme Court, held that Public Law 280,[14] which grants the State criminal jurisdiction over the reservations, did not authorize the enforcement of the statute regulating bingo, since the statute constituted regulatory rather than criminal law. Furthermore, application of the State and County gambling laws to tribal bingo enterprises was not authorized by the Organized Crime Control Act. Finally, the majority concluded that the State's interest in preventing infiltration of tribal bingo enterprises by organized crime did not justify state regulation of such enterprises in light of the compelling federal and tribal interests supporting them.

REASONING OF THE COURT

Justice White began the majority opinion by recognizing that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.[15] While the State insisted that Congress has twice given its express consent in this area, first in Public Law 280 in 1953[16] and again in the Organized Crime Control Act in 1970,[17] the Court disagreed.

Public Law 280

Justice White first addressed the Public Law 280 question, explaining that the intent and interpretation of the law indicated that the states were allowed criminal jurisdiction over Indian reservations, but virtually no civil jurisdiction.[18] Congress expressly granted six states, including California, jurisdiction over specified areas of Indian country.[19] In section 2, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the state.[20] Section 4 granted civil jurisdiction[21] and was limited by the deci-

13. Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900 (9th Cir. 1986). Morongo Band of Mission Indians v. County of Riverside, State of California, 783 F.2d 900 (9th Cir. 1986).

14. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended in 18 U.S.C. § 1162 (1979), and 28 U.S.C. § 1360 (1977)).

15. *Mission Indians,* 107 S. Ct. at 1087.

16. *See supra* note 14.

17. Organized Crime Control Act, Pub. L. No. 91-452, Title VIII, Part C, § 803(a), 84 Stat. 937 (1970) (codified as amended at 18 U.S.C. § 1955 (1979)).

18. *Mission Indians,* 107 S. Ct. at 1087-88.

19. Indian country is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . ." 18 U.S.C. § 1151 (1979).

20. Pub. L. No. 280, § 2(a) (codified at 18 U.S.C. § 1162(a) (1979)). Section 2(a) provides:

sion in *Bryan v. Itasca County*[22] (*"Bryan"*). The Court in *Bryan* interpreted section 4 to grant states jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority.[23] The Court in *Bryan* further stated that Congress' primary concern in enacting Public Law 280 was combating lawlessness on reservations.[24] The Act was clearly not intended to effect total assimilation of Indian tribes into mainstream American society.[25]

In *Mission Indians,* Justice White reiterated the *Bryan* reasoning regarding the underlying federal policy of protecting Indian society and autonomy: "[a] grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."[26] He concluded that when a state seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must determine whether the law is criminal in nature, and thus fully applicable to the reservation under section 2, or civil in nature, and therefore applicable only as it may be relevant to private civil litigation in state court.[27]

Justice White further stated that the Minnesota personal property tax at issue in *Bryan* was definitely civil in nature whereas the California bingo statute was not so easily categorized.[28] California law permits bingo games to be conducted only by charitable organizations and other specified organizations and their members; however, these members may not receive any wage or profit. The prizes must be limited to a given dollar amount. Receipts are to be segregated and used only for charita-

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> Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

Id.

21. Pub. L. No. 280 § 4(a) (codified at 28 U.S.C. § 1360(a) (1977)). Section 4(a) provides:

> Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

Id.

22. Bryan v. Itasca County, 426 U.S. 373 (1976).
23. *Id.* at 385.
24. *Id.* at 379-80.
25. *Id.* at 387.
26. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1088 (1987).
27. *Id.* at 1088.
28. *Id.*

ble purposes. Violation of any of these provisions is a misdemeanor.[29] California argued that sponsoring high stakes, unregulated bingo, conduct which might attract organized crime, is a misdemeanor in California and may be prohibited on Indian reservations.[30]

In refuting this assertion, Justice White followed the reasoning of the court of appeals in this case and an earlier case, *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*[31] (*"Barona"*) and concluded that the California law was civil in nature, and was therefore inapplicable to the reservations by way of Public Law 280.[32]

In *Barona,* which also involved the applicability of Section 326.5 of the California Penal Code to Indian reservations, the Ninth Circuit Court of Appeals similarly rejected the State's argument,[33] applying the civil/criminal dichotomy of *Bryan.* The court distinguished state "criminal/prohibitory" laws from state "civil/regulatory" laws.[34] According to the court, if the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction. If, however, the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation.[35] The court of appeals then classified Section 326.5 as regulatory rather than prohibitory.[36]

Justice White also found the prohibitory/regulatory distinction sound and consistent with *Bryan's* construction of Public Law 280.[37] However, while he noted that it is not a "bright-line" rule and a strong argument could be made that the bingo statute is prohibitory rather than regulatory,[38] Justice White stated that since, in the present case, the Ninth Circuit had reexamined the state law and reaffirmed its holding in *Barona,* he was "reluctant to disagree with that court's view of the nature

29. CAL. PENAL CODE § 326.5 (West Supp. 1987).

30. *Mission Indians,* 107 S. Ct. at 1089.

31. 694 F.2d 1185 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983).

32. *Mission Indians,* 107 S. Ct. at 1089.

33. *Barona,* 694 F.2d at 1188-89.

34. *Id.*

35. *Id.* Justice White, in the present case, noted that the analysis in *Barona* was employed with similar results by the Fifth Circuit Court of Appeals in Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (1981), *cert. denied,* 455 U.S. 1020 (1982), and that the Ninth Circuit found this analysis persuasive. *Seminole* involved an action by the Seminole Tribe for a declaratory judgment that the Florida bingo statute did not apply to its operation of a bingo hall on its reservation.

36. *Barona,* 694 F.2d at 1188-89.

37. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1089 (1987).

38. *Id.*

and intent of the state law at issue here."[39]

Nevertheless, Justice White further noted that persuasive evidence indicated that California regulates rather than prohibits gambling in general and bingo in particular.[40] The majority stated that the test is whether the activity violates the state's public policy. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, the majority concluded that the state only regulates bingo.

California insisted, however, that since this is unregulated bingo, it is a misdemeanor under California Penal Code Section 326.5. Since this statute can be enforced by criminal means, the State argued that it must be criminal in nature. Justice White disagreed, reasoning that just because an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Public Law 280.[41] This construction is crucial. Otherwise, the distinction between section 2 and section 4 of that law could be avoided and total assimilation of the Indians permitted. Therefore, the Court concluded that Public Law 280 does not authorize California to enforce California Penal Code Section 326.5 within the Cabazon and Morongo Reservations.[42]

Organized Crime Control Act

California also argued that the Organized Crime Control Act ("OCCA") authorized the application of its gambling laws to the tribal bingo enterprises. The OCCA makes certain violations of state and local

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39. *Id.*

40. *Id.* Justice White noted that California clearly does not prohibit all forms of gambling:

> California itself operates a state lottery, . . . and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting . . . Although certain enumerated gambling games are prohibited under California Penal Code Annotated § 330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Also, as the court of appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games must be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total.

Id. (citations omitted).

41. *Id.*

42. *Id.*

gambling laws violations of federal law.[43]

The majority rejected this argument, stating that enforcement of the OCCA is an exercise of federal rather than state authority. There is nothing in the OCCA indicating that states are to have any part in enforcing federal laws or are authorized to make arrests on Indian reservations that in the absence of the OCCA they could not effect.[44] The majority went on to state that it was unaware of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations. There are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the federal government.[45] Justice White concluded that "there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes."[46]

Preemption

Justice White noted that state and local laws may be applied to reservation activities of tribes and tribal members under certain circumstances without express authorization from Congress.[47] The issue of whether the State may prevent the Tribes from making high stakes bingo available to non-Indians coming from outside the reservations ultimately

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43. Organized Crime Control Act ("OCCA"), 18 U.S.C. § 1955 (1979), provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) illegal gambling business means a gambling business which—
>
> (i) is a violation of the law of State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

Id.

44. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1090-91 (1987).

45. *Id.*

46. *Id.*

47. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983). *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). In those decisions the Court held that, even in the absence of express congressional permission, a state could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers. Both cases involved non-Indians entering and purchasing tobacco products on the reservations. The state interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the state was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators.

turns on one question—whether state authority is preempted by the operation of federal law.[48]

Justice White reiterated the preemption test applicable to state jurisdiction over Indian reservations as set forth in the case of *New Mexico v. Mescalero Apache Tribe*[49] (*"Mescalero"*): "State jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[50] The test is to consider the state's interest in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development.[51]

Justice White first discussed the federal and tribal interests and then went on to discuss, and dismiss, the State's sole interest. The federal and tribal interests were represented by a long list of policies and actions.[52] These policies and actions reflected the federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development. The majority considered such policies and actions of particular relevance in this case since the tribal games provide the sole source of revenues for the operation of the tribal governments. In addition, the games are the major source of employment for tribal members.[53]

The State sought to diminish the importance of these federal and tribal interests by asserting that the Tribes were merely "marketing an

48. *Mission Indians,* 107 S. Ct. at 1092.

49. *Mescalero,* 462 U.S. at 333-34. In that case, the Court held that the application of New Mexico's laws to on-reservation hunting and fishing by nonmembers of the Tribe is preempted by the operation of federal law. *Id.* at 330-44. The Court also held that the exercise of concurrent jurisdiction by the state would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers; interfere with the comprehensive tribal regulatory scheme; and threaten Congress' overriding objective of encouraging tribal self-government and economic development. *Id.* at 338-41.

50. *Id.* at 334-35.

51. *Id.*

52. These policies included: (1) The President's 1983 Statement on Indian Policy: "It is important to the concept of self-government that the tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983); (2) The Department of the Interior's implementation of these policies by promoting tribal bingo enterprises; (3) Grants and guaranteed loans from the Secretary of the Interior for the purpose of constructing bingo facilities; (4) The Department of Housing and Urban Development and the Department of Health and Human Services provision of financial assistance to develop tribal gaming enterprises; and (5) The Secretary of the Interior's appointment of tribal ordinances establishing and regulating the gaming activities involved. *Mission Indians,* 107 S. Ct. at 1092-93.

53. *Mission Indians,* 107 S. Ct. at 1093.

exemption" from state gambling laws, relying on *Washington v. Confederated Tribes of the Colville Indian Reservation*[54] (*"Confederated Tribes"*). In that case the Court held that the state could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services. The Court reasoned that the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere."[55]

Justice White distinguished *Confederated Tribes* from the present case.[56] He pointed out that *Confederated Tribes* involved a situation where the Tribes were importing a product for immediate resale to non-Indians. The Court in *Confederated Tribes* said that the goods were not tax exempt because their value was "not generated on the reservations by activities in which the Tribes have a significant interest."[57] In the present case, however, the Tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, thus generating value on the reservation; they do not import a product and produce revenue merely because of the product's tax exemption.[58]

Justice White sought to analogize the tribal bingo enterprises to the resort complex operated by the Mescalero Apache Tribe in *Mescalero,* which features hunting and fishing.[59] The Mescalero project generates funds for essential tribal services and provides employment for tribal members. In *Mescalero,* the Court rejected the notion that the Tribe was merely marketing an exemption from state hunting and fishing regulations and concluded that New Mexico could not regulate on-reservation fishing and hunting by non-Indians.[60] In the present case, White concluded that the Cabazon and Morongo Bands were similarly generating value on the reservation through activities in which they have a substantial interest.[61]

The State also sought to diminish the federal and tribal interests by relying on *Rice v. Rehner* (*"Rice"*).[62] In that case, the Court held that California could require a tribal member and a federally-licensed Indian trader operating a general store on a reservation to obtain a state license

54. 447 U.S. 134 (1980).
55. *Id.* at 155.
56. *Mission Indians,* 107 S. Ct. at 1093-94.
57. *Confederated Tribes,* 447 U.S. at 155.
58. *Mission Indians,* 107 S. Ct. at 1093-94.
59. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983).
60. *Id.*
61. *Mission Indians,* 107 S. Ct. at 1094.
62. 463 U.S. 713 (1983).

in order to sell liquor for off-premises consumption. Justice White distinguished *Rice* from the present case by reasoning that the *Rice* decision rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic to the exclusion of the states. Congress had plainly anticipated that the states would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations but there was no such traditional federal view governing this case.[63]

Finally, Justice White examined the sole interest asserted by the State. The State insisted that the high stakes offered at the tribal games are attractive to organized crime, which the State wanted to discourage. The majority held that, to the extent that the State sought to prevent all bingo games on tribal lands while permitting regulated off-reservation games, the asserted State interest in preventing the infiltration by organized crime was irrelevant and the State and County laws were preempted.[64] Even to the extent that the State and the County sought to regulate short of prohibition, the laws were preempted since the asserted state interest was insufficient to escape the preemptive force of the federal and tribal interests apparent in this case.[65]

The dissent argued that the plain language of Public Law 280 did authorize California to enforce its prohibition against commercial gambling on Indian reservations.[66] Justice Stevens conceded that *Bryan*[67] limited the applicability of Public Law 280 and recognized the importance of preserving the traditional aspects of tribal sovereignty over the relationships among reservation Indians. However, Justice Stevens pointed out that the Court's more recent cases have made it clear that commercial transactions between Indians and non-Indians, even when conducted on a reservation, do not enjoy blanket immunity from state regulation.[68] The dissent cited two cases relied upon by the majority opinion and took a different view of them—*Rice*[69] and *Confederated Tribes*.[70] The dissent asserted that, based on its view of these two cases,

63. *Mission Indians,* 107 S. Ct. at 1094.

64. *Id.*

65. *Id.*

66. Justice Stevens wrote the dissenting opinion, joined by Justice O'Connor and Justice Scalia.

67. Bryan v. Itasca County, 426 U.S. 373, 383-86 (1976).

68. *Mission Indians,* 107 S. Ct. at 1095-96.

69. Rice v. Rehner, 463 U.S. 713 (1983).

70. Washington v. Confederated Tribes of the Coville Indian Reservation, 447 U.S. 134 (1980).

State authority in this area has been recognized and the Tribes were indeed marketing an exemption to the State's gambling laws.

Justice Stevens rejected the distinction the majority drew between the present case and *Rice.* The majority argued that the divergent outcome in *Rice* rested on the ground that Congress had never recognized any sovereign tribal interest in the regulation of liquor traffic to the exclusion of the states. Justice Stevens, however, insisted that in *Rice,* the Court "recognized the State's authority over transactions whether they be liquor sales or gambling, between Indians and non-Indians."[71]

Similarly, in *Confederated Tribes,* the Court held that a State could impose its sales and cigarette taxes on non-Indian customers of smokeshops on Indian reservations.[72] Justice Stevens found the majority's attempt to distinguish the reasoning in *Confederated Tribes* unpersuasive. The majority reasoned that importing cigarettes, unlike operating gambling facilities, was not a situation where the Tribes were generating revenue on the reservations with activities in which the Tribes had a significant interest. The dissent argued that aside from offering the tax exemption, the tribal smokeshops offered their customers the same products, services and facilities that other tobacconists offered to their customers. In addition, although the smokeshops were more modest than the bingo palaces, they were equally the product of tribal labor and tribal capital.[73]

Justice Stevens then analogized the success of the smokeshops with the success of the gambling enterprises. The smokeshops were successful because of the value of the exemption that was marketed to non-Indians "who would normally do their business elsewhere."[74] Similarly, Justice Stevens argued that the value of the Tribes' asserted exemption from California's gambling laws is the primary attraction to customers who would normally do their gambling elsewhere.[75] Therefore, just as the State had authority to assert its taxing power upon the sales activities in *Confederated Tribes,* the State should have authority to assert jurisdiction over the Tribes' gambling activities in *Mission Indians.*[76]

The dissent also addressed the majority's assertion that the State had no legitimate interest in requiring the Tribes' gambling businesses to comply with the same standards that the operators of other bingo games

71. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1096 (1987).
72. *Confederated Tribes,* 447 U.S. at 154.
73. *Mission Indians,* 107 S. Ct. at 1096-97 (Stevens, J., dissenting).
74. *Confederated Tribes,* 447 U.S. at 155.
75. *Mission Indians,* 107 S. Ct. at 1097 (Stevens, J., dissenting).
76. *Id.*

must observe. The dissent pointed out two State interests which justified imposition of State authority: an economic/protective interest and an interest in preventing organized crime infiltration.[77]

The dissent reasoned that the State has an interest in generating revenues for the public treasury and certain charities. Any revenues the tribes receive from their unregulated games drain funds from the state-approved recipients of lottery revenues.[78] Similarly, the tax-exempt cigarette sales in the *Confederated Tribes* case diminished the receipts that the state would otherwise have received.[79]

The dissent also gave more weight than the majority did to the State's interest in preventing organized crime infiltration. The dissent reminded the Court that the State requires that charitable bingo games be operated and staffed only by members of designated charitable organizations and that proceeds from the games may be used for charitable purposes only.[80] The dissent argued that "these requirements for staffing and dispersal of profits provide bulwarks against criminal activity; neither safeguard exists for bingo games on Indian reservations."[81]

Justice Stevens concluded that, unless Congress had dictated otherwise, the State had a legitimate law enforcement interest in regulating commercial gambling ventures on Indian reservations which cater to non-Indians. Justice Stevens conceded that gambling facilities may well be a sensible way to generate revenues that are sorely needed by reservation Indians but he asserted that the decision to define the contours of a federal policy concerning Indian gambling should be made by the Congress of the United States, and not the Court.[82]

HISTORY AND ANALYSIS

The turmoil that persisted between the Indian and non-Indian communities during the embryonic days of the nation's development demanded that some kind of action be taken to define the status of Indian nations.[83] Clearly, this was a responsibility to be shouldered by the federal government because of persistent state attempts to extend their laws

77. *Id.*
78. *Id.*
79. *Id.*
80. CAL. PENAL CODE § 326.5 (West Supp. 1987).
81. *Mission Indians,* 107 S. Ct. at 1097 (Stevens, J., dissenting).
82. *Id.* at 1098.
83. The turmoil which arose between the Indian and non-Indian communities stemmed primarily from territorial conflicts due to the continuous development and westward expansion of the new American nation. *See generally* J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA (1937); A. DEBO, A HISTORY OF THE INDI-

into Indian country and the unanswered question of a federal right to Indian lands. Thus, in 1823, the Supreme Court stepped in to play a more active role in defining the relationship between Indian nations and the United States government in *Johnson v. McIntosh*[84] (*"Johnson"*). Chief Justice Marshall's opinion in *Johnson* reflected his theory of Indian subservience to the federal government. While paying lip service to the notion of Indian autonomy, Chief Justice Marshall reasoned that conquest gave the white man ownership and title to Indian lands.[85] With the exercise of power came responsibility, and *Johnson* articulated for the first time a judicially recognized federal responsibility over Indian affairs. Indeed, much of the power which the federal government exercises over Indian affairs today emanates from the concept of federal ownership of, and sovereignty over, Indian land.

This notion constituted the basis upon which the Court, in *Cherokee Nation v. Georgia*[86] (*"Cherokee Nation"*), developed its theory of federal guardianship over Indian affairs. In *Cherokee Nation,* Chief Justice Marshall reasoned that the condition of Indian people was unlike that of any other people in existence. Using the federally owned land theory discussed in *Johnson,* Chief Justice Marshall noted that while the Indians possessed an unquestionable right to occupy the land, the lands were still within a territory to which the United States asserted a title independent of the Indians' will. This led to Marshall's characterization of Indian tribes as "domestic dependent nations."[87] Indians resided in a state of pupilage. Their relation to the United States resembled that of a ward to his guardian.

The first three decades of the nineteenth century were fragile ones in the history of the American government. The national government was far from strong and it was continuously faced with recalcitrant states challenging its authority.[88] It was during this period of political turmoil

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ANS OF THE UNITED STATES (1970); R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980).

84. 21 U.S. 543 (1823).

85. *Id.* at 546. This was subject, however, to the continued right of Indian occupancy and use. Thus, while the Indian's interest in their lands was not completely extinguished, it was altered significantly in that the federal government became the owner of the soil.

86. 30 U.S. 1 (1831).

87. *Id.* at 16.

88. The Articles of Confederation had originally reserved to the Continental Congress the sole power of managing affairs with the Indians and regulating trade. However, because of ambiguous language, the Articles of Confederation were thought by some to reserve to the states limited sovereignty over Indians within their borders. Due to the need for peaceful relations with the tribes, many members of the Continental Congress felt that Indian affairs should be left exclusively to the federal government. The lack of clearly defined state boundaries and states' western claims made state governments eager to extinguish Indian title to land

that the *Johnson* and *Cherokee Nation* cases arose. Despite the Supreme Court's articulation of federal responsibility over Indian affairs in these cases, there was continuing friction between state and federal governments concerning the extent of state power over Indian country. The *Mission Indians* case is illustrative of recent conflict between state and federal governments.

The traditional rule for state jurisdiction over gambling activities was that states had no criminal or civil jurisdiction over Indians within an Indian reservation.[89] In 1953, Congress delegated to six states some of its power to regulate affairs on Indian reservations by enacting Public Law 280.[90] As the *Mission Indians* majority noted, the Supreme Court has stated that the civil jurisdiction section of Public Law 280 was not intended to grant general state civil regulatory control over activities within Indian reservations.[91] Because states have no civil regulatory authority over gambling activities within an Indian reservation, states must rely on the criminal grant of jurisdiction contained in Public Law 280.

The Supreme Court, in deciding *Mission Indians,* relied on the rationale employed by the Fifth Circuit[92] and the Ninth Circuit[93] in deciding similar cases. The rationale in those cases was that a criminal or prohibitory statute could be applied to gambling activities on an Indian reservation. However, the mere presence of penal sanctions in a bingo statute did not conclusively establish that the law was criminal in nature. In each case, after considering the state's public policy, the court of appeals held that the bingo statute was civil or regulatory and unenforceable within Indian country.[94]

While the precedent relied upon in the *Mission Indians* case seems to indicate that state regulatory laws relating to gambling are unenforceable within Indian country, the rationale is subject to criticism. The Maine Supreme Court, for example, has ruled that Maine's bingo licensing statutes are applicable to the Penobscot Indian Nation.[95] This case turned not on Public Law 280, but on the Maine Indian Claims Settlement

located within or adjacent to their borders. The Continental Congress never fully succeeded in eliminating the friction between the tribes and the states. Comment, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STANFORD L. REV. 979, 992-93 (1981).

89. Comment, *Federal and State Regulation of Gambling and Liquor Sales Within Indian Country,* 12 AM. INDIAN L. REV. 599, 606 (1987).

90. *See supra* note 11.

91. Bryan v. Itasca County, 426 U.S. 373 (1976).

92. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981).

93. Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185 (9th Cir. 1982).

94. *Seminole,* 658 F. 2d at 315; *Barona,* 694 F.2d at 1189.

95. Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983).

Act.[96] The Maine court recognized the precedential value of the *Barona* and *Seminole* cases but noted that they were decided under a specific federal statute, Public Law 280, rather than federal Indian common law.[97] Under Indian common law, an Indian tribe does not have the inherent sovereign power to operate a bingo game contrary to state law.[98]

In addition, one could argue that the analysis used to bar enforcement of state gambling laws within Indian country makes little sense when applied to traditional criminal statutes involving narcotics, dangerous weapons and fireworks. For instance, the Ninth Circuit in *United States v. Marcyes*[99] (*"Marcyes"*) held that Washington's fireworks statutes were enforceable within Indian country. While the Washington statute could be characterized as a civil/regulatory law since the use of fireworks is not completely prohibited, the court held that it was against the state's public policy to possess fireworks. The purpose of the law was to prohibit possession, with limited exceptions, and therefore was not a licensing statute.[100]

The logic used in *Marcyes* is applicable to a bingo case in that the public policy of most states is to prohibit gambling, with bingo statutes regulating the limited exceptions to that policy. Arguably, such a situation exists in the State of California. Indeed, the dissent in *Mission Indians* asserted that the public policy of the State was to prohibit gambling with certain exceptions.[101] The majority had argued that the operation of high stakes bingo games does not run afoul of public policy because the State permits some forms of gambling.[102] The dissent found this approach to public policy "curious, to say the least."[103] The dissent reasoned that to argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling "is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55

96. Pub. L. No. 96-420, 94 Stat. 1758 (codified at 25 U.S.C. §§ 1721-35 (1980)). One of the purposes of the Act was to confirm that all Indian nations and tribes and bands of Indians existing or recognized in the state of Maine would be subject to all laws of the state of Maine. *Id.* at § 1721(b).

97. *Penobscot,* 461 A.2d at 484.

98. *Id.* at 482.

99. 557 F.2d 1361 (9th Cir. 1977).

100. *Id.* at 1365.

101. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1096 (1987). "The State's policy concerning gambling is to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit." *Id.*

102. *Mission Indians,* 107 S. Ct. at 1089.

103. *Id.*

miles an hour."[104]

Unfortunately, the forced distinction between criminal/prohibitory laws and civil/regulatory laws, and the hair-splitting arguments concerning the nature of state public policy have arisen due to the enactment of Public Law 280. This Act was considered to be unsatisfactory in several aspects by both the states and the Indians. There was no provision for prior Indian consent to state jurisdiction nor was there a provision for return of jurisdiction to the federal government if state control proved unworkable.[105]

The rationale expressed by legislators to support the Act implied that the Indians were on a social parity with other state citizens and that they "should therefore be released from second-class citizenship as well as [from] the paternalistic supervision of the [Bureau of Internal Affairs]."[106] In actuality, there was an absolute lack of serious investigation of the social condition of the affected Indians to determine if they were in fact ready for integration.[107]

Congressional Indian policy has always suffered from the vacillation of national politics and has generally reflected the popular sentiment of the times.[108] The political tide flowed in favor of those favoring assimilation of Indians into the "national" culture during the decade of the 1950's and into the early 1960's.[109] Liberals and conservatives alike have decried the segregation inherent in Indian reservations. Liberals view Indian law as analogous to apartheid in South Africa, while conservatives consider Indian property rights such as hunting and fishing privileges to be reverse discrimination favoring the Indians. Both groups perceive Indian separatism as contrary to the philosophy of egalitarianism and the concept of the melting pot.

In the 1970's, the American Indian Policy Review Commission, established by Congress, issued an extensive report calling for the strengthening of tribal self-government and increased federal protection of tribal resources and separate tribal societies.[110] This signalled a change in fed-

104. *Id.*

105. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 U.C.L.A. L. REV. 535, 558 (1975) [hereinafter Goldberg]. Both defects were subsequently corrected. 25 U.S.C. §§ 1321-1322 (1976).

106. Goldberg, *supra* note 105 at 543.

107. *Id.*

108. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right of Congressional License,* 51 NOTRE DAME L. REV. 600, 608 (1976).

109. *Id.* at 616.

110. AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., 1ST SESS., FINAL REPORT (1977). The Commission, which included federal legislators and Indian leaders, was established by act of Congress in 1975. 25 U.S.C. § 174 (1976). The Commission's report

eral Indian policy. The ruling in the present case is consistent with the revised policy. The present case is also consistent with the Supreme Court's statement in *Bryan* that the courts "are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with what is, after all, an ongoing relationship."[111]

Here, the state interests at stake, though legitimate, were insufficient to justify the assertion of state authority. The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, weigh heavily in this case because the tribal games provide the sole source of revenues for the operation of the tribal governments and are the major sources of employment for tribal members. Federal agencies, acting under federal laws, have sought to implement these interests through policies and actions which promote and oversee tribal bingo and gambling enterprises. The Supreme Court, as a branch of the federal government, has reaffirmed the strong federal interests in this area and its role in promoting those interests by its decision in *Mission Indians.*

CONCLUSION

A state's jurisdiction over gambling activities within Indian country is limited. Congress has not specifically delegated authority to the states to regulate gambling activities within Indian country, but has granted certain specified states criminal and civil jurisdiction. The Supreme Court has held that the civil jurisdiction grant in Public Law 280 cannot be used to regulate activities within Indian country, thus limiting the state's jurisdiction to enforcement of its criminal statutes. State jurisdiction has been further limited by a number of courts, including the Supreme Court, which take a narrow view of what constitutes a criminal

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reflected the current debate over the future of federal Indian policy. While the majority's recommendations supported greater efforts to assure tribal self-determination, Representative Lloyd Meeds, vice-chairman of the Commission, strenuously dissented. He took exception with the Commission's view that tribal self-government was territorial, permitting tribes to exercise general governmental powers over the land and its occupants. Meeds distinguished between the powers exercised by sovereign governments and mere maintenance of tribal integrity and identity, preferring the latter as the working definition of tribal self-government. 1 AMERICAN INDIAN POLICY REVIEW COMM'N, *supra*, at 571-73. Meeds constitutional comments conflict, however, with the Supreme Court's decisions in United States v. Wheeler, 435 U.S. 313 (1978) and Talton v. Mayes, 163 U.S. 376 (1896), in which the Court held that tribal authority over civil and criminal matters derives from the inherent sovereignty of the Indian nation and, in the absence of limiting federal legislation, is not subject to federal scrutiny.

111. *Bryan*, 426 U.S. at 388 (quoting from Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)).

statute—namely that the law must be prohibitory in nature rather than regulatory.

The Supreme Court in this case reaffirmed the narrow applicability of Public Law 280 to gambling activities on Indian reservations, thus reflecting the present federal policy of preserving Indian autonomy and tribal self-government—a system of government which preceded our own in America. The Supreme Court's decision paves the way for similar enterprises on Indian reservations and, hence, furthers the federal interest in Indian self-sufficiency.

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