Is There a Lucky Seven in Florida’s Future?

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I. INTRODUCTION

A jackpot close to eighty thousand dollars awaits one of the many who flock to the Seminole reservation with hopes of picking the lucky eight numbers.¹ Although the Florida Constitution prohibits gambling except for

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¹ The Seminole reservation conducts a do-it-yourself bingo whereby a person can win the jackpot if he correctly chooses eight numbers ranging from one to seventy-five, and those
pari-mutuel games\(^2\) and state-run lotteries,\(^3\) approximately twelve hundred persons each night gamble at the Seminole reservation, which offers casino-style entertainment.\(^4\) The Seminoles are a federally recognized tribe and are therefore subject to the plenary power of the federal government. Thus, the State of Florida plays a limited role in regulating the tribe.\(^5\)

In 1988, the Indian Gaming Regulatory Act ("IGRA") was enacted by Congress to provide clear standards for the conduct of gaming on Indian lands.\(^6\) The purpose of IGRA is to promote tribal economic development, self-sufficiency, and a strong tribal government.\(^7\) IGRA has prompted many tribes nationwide, including the Seminole Tribe of Florida, to conduct casino-style gambling operations.\(^8\) However, many casino-style games the tribes wish to operate must first be negotiated under a Tribal-State compact.\(^9\) Presently, the Seminole Tribe of Florida is engaged in litigation against the State of Florida, claiming that the state has violated IGRA by failing to negotiate in good faith.\(^10\) In *Seminole Tribe of Florida v.*

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3. *Id.* art. X, § 15.
4. The Seminoles offer 162 electronic video machines. The electronic machines include modem-style slot machines and Superpick Lotto. Superpick Lotto is played by choosing six numbers ranging from zero to nine; if at least two of the player's numbers correspond to the numbers displayed by the machine, the player receives credits which can be exchanged for money. The video machines carry a jackpot close to $21,000. Furthermore, the Seminoles offer high-stakes bingo. A regular session of bingo consists of twenty games which offer a prize to a single winner as high as $1199. (The above statistics are based on personal observations of the author.)
7. *Id.* § 2702(1).
8. Tom Davidson & Bob French, *Support for Casino Gambling, Bingo Evident at Tribal Powwow*, *SUN-SENTINEL*, Jan. 10, 1992, at B1. Since IGRA, there have been at least 23 casino-style operations opened. *Id.* In 1992, there were at least 140 Indian gambling operations in business in the United States, which were estimated to bring in $1.3 billion dollars in revenue. *Id.*
9. 25 U.S.C. § 2710(d)(1)(C) (1988). Furthermore, the United States Code provides: Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations . . . of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.
the parties disagree as to which games are permitted by the state and are thereby negotiable under the Tribal-State compact. The state maintains that "slot machines" are not negotiable under the compact because Florida law does not permit such machines to be operated within the state. The tribe asserts that the machines are in fact permitted within the state, and are therefore negotiable under the compact. Meanwhile, the Seminoles continue to offer the electronic gambling machines at the reservation despite the absence of a Tribal-State compact.

Indian gaming plays an interesting role in the development of gambling in Florida. This article examines the history of gambling in Florida, including the undertaking of illegal gambling, the corruption of law enforcement agencies, and the subsequent changes to the Florida Constitution due to changing public opinion. This article also explores the emergence of Indian gaming in Florida, the federal enactments pertaining to tribes, and a particular decision of the United States District Court for the Southern District of Florida which held in favor of the state. Finally, this article discusses the future of gaming in Florida and the probable outcome of full-scale casino gambling within the state.

II. FLORIDA’S GAMBLING HISTORY

In the early 1800’s, lotteries were common in many states as a means of raising revenue. In 1828, the territorial legislature of Florida created Union Academy in Jacksonville, and authorized its trustees to raise revenue by conducting a lottery. However, lotteries were short-lived in Florida when the Legislature, in 1832, enacted the first statute pertaining to gambling. This statute prohibited and punished the playing and betting of

11. Id.
12. Id. Under the IGRA, class III gaming activities include banking card games, electronic facsimiles of any game of chance, or slot machines. 25 U.S.C. § 2703(8) (1988). In order for class III games to be lawful, the activities must be authorized by an ordinance adopted by the governing body of the tribe, meet approval by the Chairman of the National Indian Gaming Commission, and be an activity which is located within a state that permits it by any person, organization, or entity. Id. § 2710(d)(1).
14. Id.
15. Greater Loretta Improvement Ass’n v. State, 234 So. 2d 665, 667 (Fla. 1970). In 1823, Maryland authorized a state lottery for the purpose of raising revenue for Washington College, a statue of George Washington, and turnpike roads. Id.
16. Id.
any game of cards, dice, checks, billiards, or any other instrument used for the purpose of betting.\textsuperscript{17} Furthermore, even though lotteries had proven to be a worthwhile source of revenue for the creation of many educational institutions,\textsuperscript{18} a large number of states, including Florida, instituted constitutional bans against state lotteries.\textsuperscript{19} In 1885, Florida's Constitution provided that "the authorization of lotteries by the legislature is inhibited, and the sale of lottery tickets shall not be allowed."\textsuperscript{20} This lottery prohibition, according to the Florida Supreme Court, was in response to the widespread infestation that the lottery preyed upon the hard earnings of the poor.\textsuperscript{21}

The prohibition against lotteries accomplished its intended goal of morality for a while, but a much stronger force brought the Legislature to a realization; the Great Depression and failing tourism were debilitating state revenue.

In 1931, Florida legalized pari-mutuel betting on horses, which guaranteed state and local governments millions of dollars of revenue to help relieve the paralysis of the Depression.\textsuperscript{22} The Legislature had become by that time a full-fledged partner in the gambling business by authorizing track-run betting pools and taking cuts off the top.\textsuperscript{23} The

\begin{itemize}
  \item 17. Lee v. City of Miami, 163 So. 486, 490 (1935).
  \item 19. By 1885, 29 state constitutions had prohibited lotteries. \textit{See, e.g.,} ARK. CONST. art. V, § 41 (1868); FLA. CONST. art. III, § 23 (1885); IOWA CONST. art. III, § 28 (1857); MICH. CONST. art. IV, § 27 (1850); N.J. CONST. art. VII, § 2 (1844); R.I. CONST. art. IV, § 12 (1842); TENN. CONST. art. XI, § 5 (1834); WIS. CONST. art. IV, § 24 (1848).
  \item 20. FLA. CONST. art. III, § 23 (1885).
  \item 21. Lee, 163 So. at 489.
  \item 22. \textit{See ch. 14832, 1931 Fla. Laws 679. According to the First Research Corporation, "the state's desire for a new source of revenue so desperately needed overshadowed any moralistic concept that this taxation would serve as a control for some sort of unwanted gaming thought distasteful to the citizenry." FLORIDA RESEARCH CORP., \textit{STUDY OF THE PARIMUTUEL INDUSTRY: STATE OF FLA.} 4 (1968). The legislation stipulated that each of the 67 counties would share equally in the revenue derived from pari-mutuel racing. \textit{Id}. Today the games contribute over $105 million to the state. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 33.

In the fiscal year 1931-1932, state revenue from pari-mutuel racing amounted to $737,301, or 4.25% of the total pari-mutuel handle. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 33. Total paid attendance at the pari-mutuel games was 1,157,161 through 462 racing days. \textit{Id}. This figure steadily increased, as did the

legalization of pari-mutuel racing was not only an answer for the much needed revenue, but was also an indication of what the public desired. However, the legalization of horse racing neither fulfilled the public’s hunger for gambling entertainment nor solved Florida’s revenue problems. As a result, the Legislature in 1935 legalized slot machines.\(^{24}\)

Although slot machines existed throughout the state prior to legalization, the state was now in a position to regulate their use and derive revenue from their operation. Nonetheless, two years later the law was repealed.\(^{25}\) Slot machines had proven to be an attraction to tourists and a worthwhile source of revenue to Floridians. Consequently, illegal gambling enterprises flourished in South Florida.\(^{26}\)

Illegal gambling was considered a solution to the plight brought to South Florida by the bust of the land boom in 1925, the hurricane destruction in 1926 and 1928, the stock market crash of 1929, and the Great Depression.\(^{27}\) Local politicians and law enforcement agencies protected the illegal operations in order to bolster tourism and satisfy their constituents.\(^{28}\)

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\(^{24}\) See ch. 17257, 1935 Fla. Laws 1085 (repealed 1937). The law permitted the operation of automatic coin-operated vending “slot machines” and required the person intending to set up operation of the device to obtain a license. \(\text{id.}\) The reason for the legalization of the “slot machines,” according to Carl W. Burnett, a representative of Madison County, was the realization that “slot machines [were] here and nobody [had] been able to stop them and we can get revenue from them under this bill.” FLA. HOUSE OF REP. J. 981 (May 21, 1935) (statement by Carl W. Burnett, Rep. Madison).

\(^{25}\) See ch. 18143, 1937 Fla. Laws 909.

\(^{26}\) Dan Ray, Sheriff Was a Sure Bet, MIAMI HERALD, Nov. 18, 1985, at C1. In Dade County, the S&G syndicate operated a series of bookmaking houses, while in Palm Beach County, the Beach Club was known to attract the wealthy to its gaming tables. \(\text{id.}\) Broward County housed many casino operations: the Colonial Inn, the Lopez Restaurant, the Casa Grande in Hallandale, the Club Greenacres, the It Club near Port Everglades, and the Valhalla Club in Hollywood. \(\text{id.}\)

\(^{27}\) \(\text{id.}\)

\(^{28}\) See id. Walter R. Clark, Broward County Sheriff from 1933 to 1950, was part-owner of a slot machine company and permitted the illegal casino operations to flourish throughout South Florida. Ray, supra note 26, at C1. Clark maintained that he looked the other way because he was “elected on the liberal ticket, and the people want it [casinos] and they enjoy it.” \(\text{id.}\) J.B. Wiles Jr., a county commissioner from 1941 to 1949, commented on the authorities who authorized the illegal gambling, and stated that “they were running the
However, casino gambling in South Florida soon came to an end in 1950 when the United States Senate Hearings, conducted by Estes Kefauver of Tennessee, informed the nation of South Florida's illegal gambling operations and exposed its governmental corruption. The Kefauver committee hearings led to the shutdown of South Florida casinos in 1950.

Although illegal casinos had been effectively closed by Kefauver and South Florida's economy had made a steady recovery, the public's pursuit of legalized gambling still had not subsided. Consequently, with the passage of the 1968 Constitution, Florida's tight grip on prohibiting lotteries had weakened. Pari-mutuel pools, which included horse racing, dog racing, and jai-alai, were now permitted within the state. Shortly thereafter, Florida again weakened its stand against gambling when the pari-mutuel games, permitted under article X, section 7 of the Florida Constitution, were now extended to include bingo. This extension was the result of an interpretation of the constitution by the Florida Supreme Court in Greater Loretta Improvement Ass'n v. State. The supreme court concluded that the same legislature that passed the bingo statute and that permitted certain charitable, nonprofit organizations to conduct bingo games was instrumental in the writing and passage of the 1968 constitution. Therefore, the court concluded, bingo must have been included with horse racing, dog racing, and jai-alai as exceptions to the lottery prohibition. The court's determination to declare the bingo statute constitutional came in response to changing public opinion in favor of legalized gambling in Florida.

Over the next decade, the public's desire for legalized gambling was evident by its repeated attempts to amend the Florida Constitution by
Although Florida may not have been prepared to permit casino gambling within the state by 1986, the public was more than ready to permit a state-run lottery for education. On November 4, 1986, a proposal to authorize a state-run lottery was placed on the ballot for general election.  

37. Article XI, section 3 of the Florida Constitution provides the public with the means of revising or amending the state constitution by initiative. A petition containing a copy of the proposed amendment must be signed by a number of electors in each of one-half of the congressional districts of the state. Of the state as a whole, the number of signatures must be equal to eight percent of the votes cast in each of the respective districts in the last preceding election in which presidential electors were chosen. FLA. CONST. art. XI, § 3.

In 1978, a proposed amendment to permit casinos on Miami Beach was placed on the statewide ballot. Article X, section 15 of the Florida Constitution would have provided:

Casino Gambling: The operation of state regulated privately owned gambling casinos is hereby authorized only within the following limited area:

That area of Dade and Broward Counties, Florida, bounded on the East by the Atlantic Ocean; on the West by the centerline of...Collins Avenue from its intersection with 5th Street southerly to Biscayne Street and the southerly prolongation of the centerline of Collins Avenue to an intersection with the centerline of Government Cut; bounded on the South by the centerline of Government Cut; and bounded by the North by the North line of Lot 1, Block 14, Beverly Beach, according to the Plat thereof recorded in Plat Book 22, Page 13, Broward County Records.

Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 338 (Fla. 1978). The plan was defeated in large part by then-governor Reubin Askew; the vote was 71% to 29% against casinos. Paul Anderson, New Pro-Gambling Drive Kicks Off Soon, MIAMI HERALD, June 23, 1983, at B6. In 1980 and 1984, Charles Rosen, president of Florida Casinos Inc., initiated drives to legalize casinos in Florida, but was unsuccessful in placing the proposal on the ballot. Id.

In 1986, a proposal to allow individual counties to determine whether to permit casino gambling was placed on the ballot, but was defeated by 68.4% of the voters. William L. Leary, The Florida Lottery Act, 15 FLA. ST. U. L. REV. 731, 732 n.12 (1987).

38. Leary, supra note 37, at 732. Ralph Turlington, former Commissioner of Education, was responsible for and succeeded in obtaining the required number of signatures necessary for the proposal to appear on the ballot in the general election. Id. The proposed amendment to article X read as follows:

Section 15. State Operated Lotteries.—

a) Lotteries may be operated by the State.

b) If any subsections of the Amendment to the Florida Constitution are held unconstitutional for containing more than one subject, this Amendment shall be limited to subsection (a) above.

c) This amendment shall be implemented as follows:

1) Schedule - On the effective date of this Amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.
and was overwhelmingly adopted by the citizens of Florida.\(^{39}\)

Indicative of the public's desire to gamble, the Florida lottery set national sales records within the first twenty-four hours of operation,\(^{40}\) and since its inception, the lottery has brought in much needed revenue with Dade and Broward Counties leading the state in sales.\(^{41}\) Recently, however, the lottery has declined in sales.\(^{42}\) Legislative revenue forecasters maintain that the public's interest in the lottery has peaked.\(^{43}\)

In 1986, the state lottery may have temporarily fulfilled the public need for gambling entertainment, but recent public interest in the lottery has dulled.\(^{44}\) When the enthusiasm for horse racing dwindled in the 1930's, the public turned to illegal gambling for excitement. Today, Floridians have lost interest in the state lottery and have turned their attention towards a new gambling enterprise: casino gambling on Indian reservations.\(^{45}\)

### III. Florida Indian Gaming and Regulations Before IGRA

The Florida Seminoles own more than 200,000 acres in South Florida;
however, because most of the land is not productive, the tribe’s ability to generate income is limited. In 1934, Congress passed the Wheeler-Howard Bill, better known as the Indian Reorganization Act, which sought to protect the land base of the tribes and enable them to create their own governments. In 1935, the Wheeler-Howard Bill went into effect, and although not important to the Seminoles at the time, the Act exempted the tribe from paying state and local taxes. This exemption has led the tribe to conduct various money-making operations on their land, including the first high-stakes bingo operation in the country. Although the state authorizes certain charities to conduct bingo games, high-stakes operations are prohibited. In *Greater Loretta Improvement Ass’n v. State*, the Florida Supreme Court determined the constitutionality of Florida’s charitable bingo statute and provided the reasoning which ultimately enabled the Seminoles to engage in high-stakes bingo operations.

**A. Greater Loretta Improvement Ass’n v. State**

In 1967, the Florida Legislature enacted section 849.093 of the Florida Statutes, which permits certain charitable, nonprofit organizations to conduct bingo games. In *Greater Loretta Improvement Ass’n v. State*, the

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46. James C. Clark, *An Unpopular Act Became a Boon to the Seminoles*, ORLANDO SENTINEL, May 17, 1992, Florida at 8. During the 1800’s, the Seminoles survived by hunting and fishing in the Everglades; however, the Seminoles were deprived of a valuable part of their holdings when a project to drain the Everglades began in 1906. *Id.*
49. Clark, *supra* note 46, at 8. Unless tribes voted not to be included, the act was to go into effect in 1935. *Id.* Out of the 500 eligible voters in Florida, only 21 went to the polls. *Id.* The voters unanimously voted for the measure despite the discouragement from tribal leaders. *Id.*
50. *Id.*
51. Clark, *supra* note 46. In the 1970’s, the Seminoles initiated the tax-free sale of cigarettes. *Id.*
54. 234 So. 2d 665 (Fla. 1970).
55. *See* id.
58. 234 So. 2d 665 (Fla. 1970).
Florida Supreme Court was faced with the issue of whether the bingo statute was constitutional under the prohibition against lotteries contained in the 1885 and 1968 constitutions. The court reasoned that when the Legislature imposed a license tax on certain gaming in 1879, including the bingo-like game of "keno," the Legislature had legalized the game by making it a source of revenue for the state. This reasoning was upheld when the exact language of the anti-lottery provision of the 1868 constitution was written into the new constitution in 1885. Therefore, the court determined "[s]ince the Florida Legislature was empowered in 1879 to legalize and license the bingo-like game of keno, it was empowered in 1967 to legalize bingo. Precedent commands this conclusion." The supreme court concluded the bingo statute was not in violation of the constitutional provision prohibiting lotteries. Bingo became another type of pari-mutuel pool permitted by the state under Florida's Constitution article X, section seven. This decision proved instrumental in Seminole Tribe of Florida v. Butterworth, which provided the Seminoles with the authority to conduct high-stakes bingo operations.

59. Id. The 1885 constitution provided for the prohibition of lotteries within the state, while the 1968 constitution provides for the prohibition of lotteries with the exception of pari-mutuel pools authorized by law. Fla. Const. art. III, § 23 (1885); Fla. Const. art. X, § 7.

60. Keno is a game which is played and won by a player when he or she has five numbers in a row on a card purchased by him or her corresponding with numbers on balls, drawn from a globe, or other receptacle. Greater Loretta Improvement Ass'n, 234 So. 2d at 668 [hereinafter "Loretta"].

61. Id. at 669. The Supreme Court relied upon an earlier decision which held that the Legislature did have the power to impose a license tax on this game resembling bingo, and as a result, the game was now legalized. See Overby v. State, 18 Fla. 178 (1881). Overby was later verified by the Legislature when it expressly repealed all laws in conflict with its licensing statute. See Loretta, 234 So. 2d at 669.

62. Loretta, 234 So. 2d at 669.

63. Id.


65. Loretta, 234 So. 2d at 671.

66. Id. Article X, section 7 of the Florida Constitution reads: "Lotteries, other than the types of pari-mutuel pools authorized by law . . . are hereby prohibited in this state." Fla. Const. art. X, § 7.


68. See id.
B. *Seminole Tribe of Florida v. Butterworth*

In 1979, the Seminoles were offering bingo prizes of $10,000 as well as new cars\(^{69}\) despite the existence of a state law limiting bingo prizes to $100.\(^{70}\) Subsequently, Sheriff Butterworth’s attempt to prevent Seminole gaming by enforcing the bingo statute was circumvented in *Seminole Tribe of Florida v. Butterworth*.\(^{71}\) The Seminoles sought to permanently enjoin the Sheriff of Broward County from enforcing Florida’s bingo statute\(^{72}\) on Indian Land.\(^{73}\) The tribe had just constructed a $900,000 bingo hall, which was in operation six days per week and delivering jackpots unquestionably in violation of the bingo statute.\(^{74}\) Florida sought to prevent the Seminoles from violating the statute by exercising criminal jurisdiction over the tribe pursuant to Public Law 280.\(^{75}\) The Fifth Circuit, relying on the Supreme Court case of *Bryan v. Itasca County*,\(^{76}\) determined that states do not have...

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70. *Id.* Section 849.093 of the Florida Statutes, which was repealed in 1992, stipulated that:

(4) The number of days during which such organizations as are authorized hereunder may conduct bingo or guest games per week shall not exceed two.

(5) No jackpot shall exceed the value of $100 in actual money or its equivalent, and there shall be no more than one jackpot in any one night.

(6) There shall be only one prize or jackpot on any one day of play of $100. All other game prizes shall not exceed $25.

(7) Each person involved in the conduct of any bingo or guest game must be a resident of the community where the organization is located and a bona fide member of the organization sponsoring such game and shall not be compensated in any way for operation of said bingo or guest game.

73. *Butterworth*, 658 F.2d at 311.
76. 426 U.S. 373 (1976). The United States Supreme Court determined that Public Law 280 granted civil jurisdiction to the states only to the extent necessary to resolve private disputes among Indians and between Indians and private citizens. *Id.* at 383. Utilizing legislative history, the Court determined Public Law 280 does not give states general regulatory powers over the Indian tribes because if Congress had intended to provide the states with the power, it would have expressly said so. *Id.* at 390.
general regulatory powers over Indian tribes under Public Law 280. According to the *Butterworth* court, in order to apply Florida's bingo statute to the Seminoles, the bingo statute would have to be criminal/prohibitory in nature, and not merely civil/regulatory. 77 Since the Florida Supreme Court, in *Loretta*, had previously determined that the bingo statute did not violate the Florida Constitution, 78 and the Legislature has "seen fit to permit bingo as a form of recreation . . . but has chosen to regulate by imposing certain limitations to avoid abuses," 79 the court held the playing of bingo was not against public policy, and therefore, was regulatory in nature. 80

This authorization of high-stakes bingo on the Seminole reservation triggered the rapid increase in Indian gaming enterprises across the country, 81 Native Americans had found a way to raise revenue and to replace the lost federal aid desperately needed to build schools and health-care clinics. 82 Although Indian tribes around the country had found a method to finally become self-reliant, many states sought to prevent the tribes from conducting the games. 83 Subsequently, in 1987 the United States Supreme Court in *California v. Cabazon Band of Mission Indians* [hereinafter "Cabazon"], 84 provided the support desperately sought by many tribes around the country. 85

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77. *Butterworth*, 658 F.2d at 313.
78. See *Loretta*, 234 So. 2d at 665.
79. *Butterworth*, 658 F.2d at 314 (quoting in part *Carroll v. State*, 361 So. 2d 144 (Fla. 1978)).
80. *Id.*
81. See 133 CONG. REC. S2241 (daily ed. Feb. 19, 1987). Within six years after *Butterworth*, 100 bingo operations had opened on Indian lands and were estimated to generate $100 million in annual revenues. *Id.*

According to the National Indian Gaming Commission, at least 140 Indian gambling operations are in business in the United States. Tom Davidson & Bob French, *Support for Casino Gambling, Bingo Evident at Tribal Powwow*, SUN-SENTINEL, Jan. 10, 1992, at 1B.
82. Davidson & French, supra note 81, at B1.
83. In *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981), Wisconsin sought to prevent the Oneida Tribe from conducting high stakes bingo. The state was unsuccessful in enforcing the state bingo law. *Id.* Subsequently, Wisconsin sought to prevent the Lac du Flambeaus from operating their bingo hall. The court, in *Lac du Flambeau Band v. Williquette*, 629 F. Supp. 689 (W.D Wis. 1986), held the bingo laws were civil/regulatory in nature and unenforceable under Public Law 280. *Id.* In *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), the court determined the state was without jurisdiction over the small tribe, and could not enforce the state law. *Id.*
85. *Id.*
C. California v. Cabazon Band of Mission Indians

The reinforcement of inherent tribal sovereignty was delivered by the United States Supreme Court when California, under Public Law 280, sought to prevent the Cabazon and Morongo bands of Mission Indians from conducting high-stakes bingo on their reservations. California asserted that the tribes had violated the restrictions of the state’s bingo statute by failing to set limits on jackpots and providing payment to staff members for their services. Although the tribes admitted their games violated the statute, they claimed the state had no authority to apply its gambling laws within the reservations. After recognizing that “a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values,” the Court concluded that Public Law 280 “was not intended to effect total assimilation of Indian tribes into mainstream American society.” Because California did not prohibit all forms of gambling, but actually permitted a substantial amount of gambling, including pari-mutuel betting, bingo, and a state-operated lottery, the state merely “regulates rather than prohibits gambling in general and bingo in particular.”

The Supreme Court, by utilizing the same regulatory analysis for Public Law 280 as was applied in Butterworth, prudently favored tribal self-sufficiency and self-government over the states’ need to regulate. However, because Cabazon virtually depleted the power of the states to regulate under Public Law 280, and existing federal law failed to provide clear standards for tribal gaming operations, in 1988 Congress enacted the Indian Gaming Regulatory Act to provide a remedy.

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86. Id.
87. CAL. PENAL CODE. § 326.5 (West Supp. 1987). The statute permits charitable organizations to conduct bingo games provided that the jackpots not exceed $250 per game and staff members conducting the games are not paid for their services. Id.
88. Cabazon, 480 U.S. at 206.
89. Id.
90. Id. at 208.
91. Id.
94. CAL. CONST. art. IV, § 19(d).
95. Cabazon, 480 U.S. at 211.
IV. THE INDIAN GAMING REGULATORY ACT

The Indian Gaming Regulatory Act ("IGRA") was introduced to resolve the competing interests between tribes and states, which had become the subject of considerable litigation. With the enactment of IGRA, Congress sought to facilitate tribal self-sufficiency through Indian gaming operations and to provide an adequate shield from corruption. IGRA categorizes gambling into three classes: 1) unregulated class I gaming includes social games or ceremonial celebrations for prizes of minimal value; 2) class II gaming includes bingo and some card games provided they are explicitly authorized and played in conformity with the laws and regulations of the state; and 3) class III gaming encompasses all other forms of gambling including slot machines and banking card games.

In order for class III gaming to be legally conducted on tribal lands, the activity must: 1) be authorized by a tribal resolution and approved by the Chairman of the National Indian Gaming Commission; 2) be located in a state that permits such gaming for any purpose by any person, organization, or entity; and 3) be conducted in conformity with a Tribal-State compact

99. 133 CONG. REC. E387 (daily ed. Feb. 5, 1987). State officials expressed a need to regulate Indian gaming because the activity attracted organized crime. Id. Meanwhile, the tribes wish to raise revenue, and have resisted these assertions of state jurisdiction. Id.

100. See 25 U.S.C. § 2702 (1988). The purpose of IGRA is:
   1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; 2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and 3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.


102. Id. § 2703(7)(A). "Class II gaming" includes those nonbanking card games where players play against each other rather than the house, e.g. poker; "Class II gaming" does not include banking card games, including baccarat, chemin de fer, or blackjack. 25 U.S.C. § 2703 (7)(B)(i) (1988).

103. Id. § 2703(7)(A).

104. Id. § 2703(8).
entered into by the Indian tribe and the state. Any Indian tribe having jurisdiction over Indian lands that wishes to conduct class III gaming must request that the state in which the lands are located enter into negotiations for the purpose of entering into a Tribal-State compact. Upon receiving notice, the state is obliged to negotiate with the Indian tribe in good faith to enter into the compact.

Furthermore, IGRA provides for federal jurisdiction of any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations, or failure to negotiate in good faith with the tribe. In the event the court determines that the state failed to negotiate in good faith with the tribe, the court may order the parties to conclude a compact within a sixty-day period. Furthermore, if the parties fail to reach an agreement, a court appointed mediator may select the proposed compact that best complies with IGRA. Although IGRA was envisioned to be a solution to the myriad of litigation between tribes and states, the provision allowing class III gaming under a Tribal-State compact has prompted the Seminoles, as well as other tribes, to file suits against their respective states.

V. SEMINOLE TRIBE V. FLORIDA

In Florida, the Seminoles have once again found themselves in opposition with the state concerning reservation gambling. The Semi-
The Seminoles have recently brought suit against the State of Florida claiming that it failed to negotiate in good faith a Tribal-State compact. As a defense, Florida claimed immunity under the Eleventh Amendment, but the United States District Court, despite case authority to the contrary, held state immunity under the Eleventh Amendment was abrogated by Congress under the Indian Commerce Clause. Basically, Congress had the power to permit tribes to sue states under IGRA notwithstanding the Eleventh Amendment, which prevents states from being sued in federal court.

A. The Seminole's Arguments

1. A Regulatory Policy Towards Class III Gaming Compels Negotiation

The Seminoles, who conduct gaming on tribal lands in Tampa and Hollywood, maintain that negotiations for gambling machines (slot machines) and casino-gambling are mandatory to conclude a Tribal-State

113. See Seminole Tribe of Fla. v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992). The Eleventh Amendment to the U.S. Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commence or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
115. Seminole Tribe of Fla., 801 F. Supp. at 657. The court determined the existence of three exceptions to state immunity under the Eleventh Amendment: 1) a state may consent to suit in federal court, or waive its immunity; 2) Congress may abrogate state immunity when possessing the power; and 3) state officials, in their official capacities, may be sued to obtain prospective relief. Id.
116. Id. The Seminole court reasoned that both the Indian and Interstate Commerce Clauses are found in the same delegation of legislative authority. Id. Therefore, under the Indian Commerce Clause, Congress had the power to abrogate state immunity. Seminole Tribe of Fla., 801 F. Supp. at 657.
compact, if any Class III gaming is permitted in Florida.\textsuperscript{117} Because Florida expressly permits pari-mutuel wagering\textsuperscript{118} and a state-operated lottery,\textsuperscript{119} both class III gaming activities, the Seminoles assert that all class III gaming is negotiable for a Tribal-State compact.\textsuperscript{120} Relying upon the Cabazon analysis, and the holdings in Mashantucket Pequot Tribe v. Connecticut\textsuperscript{121} and Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,\textsuperscript{122} the Seminole tribe argues that, basically, all class III games can be negotiated in the compact process unless Florida, as a matter of criminal law and public policy, prohibits class III gaming activities.\textsuperscript{123}

\textit{a. Mashantucket Pequot Tribe}

\textit{Mashantucket Pequot Tribe v. Connecticut}\textsuperscript{124} was the first case to apply the Cabazon analysis of Public Law 280 to class III gaming activities under IGRA. The Mashantucket Pequot Tribe sought to operate casino-type games of chance on its reservation, and requested that the State of Connecticut enter into negotiations to form a Tribal-State compact in accordance with IGRA.\textsuperscript{125} The tribe asserted that since the state permitted “Las Vegas Nights” under its constitution,\textsuperscript{126} class III gaming could properly be the subject for negotiation of a Tribal-State compact.\textsuperscript{127} According to the

\textsuperscript{117} Id. The tribe maintains “permits such gaming” means if any class III gaming is located within the state then all “class III gaming is up for negotiation.” Seminole Tribe’s Reply Memorandum in Support of Its Motion for Summary Judgment at 2, Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

\textsuperscript{118} See FLA. CONST. art. X, § 7.

\textsuperscript{119} See id. art. X, § 15.


\textsuperscript{121} 913 F.2d 1024 (2d Cir. 1990), cert. denied, 111 S. Ct. 1620 (1991).

\textsuperscript{122} 770 F. Supp. 480 (W.D. Wis. 1991).


\textsuperscript{124} 913 F.2d at 1024.

\textsuperscript{125} Id. at 1025.

\textsuperscript{126} See CONN. GEN. STAT. § 7-186a-p (1989). The statute permits “Las Vegas Nights” to be conducted by any nonprofit organization, association, or corporation. Such entities may promote and operate games of chance to raise funds for the purposes of such organization, association, or corporation, subject to specified conditions and limitations. Id.; see also Mashantucket Pequot Tribe, 913 F.2d at 1029.

\textsuperscript{127} Mashantucket Pequot Tribe, 913 F.2d at 1027.
state, the limited authorization of “Las Vegas Nights” conducted by nonprofit organizations did not satisfy the condition under IGRA that the activity had been “permitted” by the state;128 therefore, because casino gambling was actually against the public policy of Connecticut, there was no obligation to negotiate a Tribal-State compact.129

In determining whether casino-type gaming should be the subject of negotiation, the court examined both congressional findings and legislative history.130 According to the congressional finding in 25 U.S.C. section 2701(5) of IGRA, “[i]ndian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”131 Not only did the court determine the congressional finding was consistent with the Supreme Court’s rationale in Cabazon, but according to legislative history,132 the requirement that class II gaming be “located within a State that permits such gaming for any purpose by any person, organization or entity”133 was likewise specifically adoptive of the Cabazon rationale.134 The Mashantucket court applied the legislative intent behind class II gaming requirements, and assimilated its basis to class III gaming due to the fact that both provisions contain identical language.135 Under this statutory construction, the court concluded that class

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128.  Id. According to IGRA, class III gaming activities shall be lawful on Indian lands only if such activities are “located in a State that permits such gaming for any purpose by any person, organization, or entity “ 25 U.S.C. § 2710(d)(1)(B) (1988).

129.  Mashantucket Pequot Tribe, 913 F.2d at 1029.

130.  Id.

131.  Id.


134.  Mashantucket Pequot Tribe, 913 F.2d at 1029. The court referred to United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 365 (8th Cir. 1990), for an interpretation of the legislative history as to section 2710(b)(1)(A) and class II gaming. Mashantucket Pequot Tribe, 913 F.2d at 1029. The court in Sisseton revealed that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity. Sisseton-Wahpeton Sioux Tribe, 897 F.2d at 365.

135.  Mashantucket Pequot Tribe, 913 F.2d at 1030. Both sections require that “such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity” 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B) (1988).

Under a settled principle of statutory construction, “when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one
III gaming should be negotiated in the compact process unless the state, "as a matter of criminal law and public policy, prohibit[s] [class III] gaming activity." The Mashantucket court held the state's approach to class III gaming was regulatory rather than prohibitory because Connecticut not only permitted "Las Vegas nights," but also a state-operated lottery, bingo, jai-alai, and other forms of pari-mutuel betting. Therefore, "such gaming is not totally repugnant to the state's public policy," and should be the subject of negotiations for a Tribal-State compact. As a result of this ruling, the state was forced to negotiate casino gambling, and the Mashantucket Pequots now run one of the largest tribal casinos in the country with an estimated revenue intake of $100 million a year.

b. Lac du Flambeau Tribe

A case frequently cited by the Seminole Tribe of Florida is Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin. The Flambeau Tribe filed suit against the state of Wisconsin under IGRA alleging that it failed to negotiate in good faith for a Tribal-State compact. The tribe sought to conduct casino games, including video gaming machines, roulette, slot machines, poker, and craps on their reservation. Pursuant to the requirements of IGRA, the tribe submitted a written request for Tribal-State compact negotiations. With the exception of lotteries and on-track pari-mutuel wagering, the state refused to negotiate class III gaming with the tribe because those activities were prohibited in Wisconsin. Once again, the issue centered around the meaning of section 2710(d)(1)(B) which requires that class III gaming activities are "located in a State that permits such gaming for any purpose.

place, it will be construed to have the same meaning in the next place." Mashantucket Pequot Tribe, 913 F.2d at 1030 (quoting United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978), cert. denied, 436 U.S. 930 (1978)).

136. Mashantucket Pequot Tribe, 913 F.2d at 1030 (alteration in original).
137. Id. at 1031-32.
138. Id.
141. Id. at 483.
142. Id.
143. Id.
144. Lac du Flambeau Band of Lake Superior Chippewa Indians, 770 F. Supp. at 484 [hereinafter "Flambeau"].
by any person, organization or entity . . . ."145 According to the state, because casino gambling, video games, and slot machines were not permitted for any purpose by any person, organization, or entity within Wisconsin, it was not required to negotiate their use.146 The state maintained it need only negotiate those particular activities that were operating legally within the state.147

The court, in accord with Mashantucket Pequot Tribe,148 resolved the issue using the Cabazon analysis.149 The court concluded "[t]he initial question in determining whether Wisconsin 'permits' the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory."150 If the policy is to prohibit all forms of class III gaming by anyone, then the policy is characterized as criminal/prohibitory, and the activities are not subject to negotiation.151 If the state allows some forms of class III gaming, even subject to extensive regulation, then its policy is considered civil/regulatory and such activities necessitate negotiation.152

In determining Wisconsin's public policy, the court found that for more than a century, Wisconsin's Constitution had banned lotteries.153 The prohibition was defined as the operation or playing of any game, scheme or plan involving the element of prize, chance and consideration.154 In 1987, voters amended the Wisconsin Constitution to allow for a state-operated lottery and pari-mutuel on-track betting.155 According to the court, the authorization of a state-operated lottery "removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration . . . ."156 As a result, Wisconsin's public

146. Flambeau, 770 F. Supp. at 484.
147. Id. at 485.
148. Mashantucket Pequot Tribe, 913 F.2d at 1024. The Flambeau court and the Mashantucket court utilized identical analysis of legislative history and congressional findings in order to determine that the Cabazon analysis should interpret 25 U.S.C § 2710(d)(1)(B) of the IGRA. See id; Flambeau, 770 F. Supp. at 485.
149. See Flambeau, 770 F. Supp. at 485.
150. Id. at 486.
151. Id.
152. Id.
153. Id.
155. Id.
156. Id.
policy toward class III gaming was deemed regulatory in nature, and the state was required to negotiate the requested activities.\textsuperscript{157}

2. Florida Permits Class III Games Sought for Negotiation

To further support the right to negotiate casino gambling, the Seminoles alternatively argue that the activities they wish to conduct are permitted by the State for three reasons. First, the Florida Lottery as well as many Florida pari-mutuel facilities are permitted to utilize machinery which is considered "illegal" under Florida statutes.\textsuperscript{158} According to the Seminoles, the prohibition of certain gambling devices defined under Florida Statutes section 849.16 are actually permitted by the state\textsuperscript{159} and are the proper subject for negotiations on a Tribal-State compact.\textsuperscript{160} Second, the

\textsuperscript{157} Id.

\textsuperscript{158} Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 7, Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). The Florida Lottery operates electronic machines for certain "on-line" lottery games such as Cash 3, Play 4, Fantasy 5, and Lotto. \textit{Id.} The terminals print out lottery tickets showing numbers chosen by the consumer or randomly chosen by the computer. \textit{Id.} If the ticket reveals the winning numbers selected in Tallahassee, the holder is entitled to receive money in exchange for the ticket. \textit{Id.} Furthermore, fifteen pari-mutuel facilities utilize automated machines (SAMS) which enable a bettor to select his or her desired number or combination by inserting money, vouchers, or credit cards into the machine. \textit{Id.}


\textsuperscript{159} Id. Section 849.16 of Florida Statutes defines the machines and devices which come within the provision of the law as:

1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him, may:

a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade . . . . 

\textit{Fla. Stat.} \textsection\textsuperscript{} 849.16 (1991).

state expressly permits casino gambling when one-day gambling cruise ships are authorized to use Florida ports for the expressed purpose of offering casino-style entertainment on the high seas. Finally, various charities in Florida have conducted “Casino Nights,” which include raising money through the use of blackjack tables, roulette wheels, crap tables, and other casino equipment. However, the state has repeatedly failed to enforce the prohibition against casino gambling. The Seminoles urge that the authorization of these activities indicate that Florida “permits such gaming” under IGRA and, therefore, gaming machines and casino gambling should be negotiable for a Tribal-State compact.

B. The State’s Counter-Arguments

1. The State is Not Obligated to Negotiate Any Class III Game Not Expressly Permitted

In sharp contrast, the state urges that the Supreme Court analysis in California v. Cabazon Band of Mission Indians, which was relied upon by the legislature with respect to class II gambling, cannot be applied to class III gaming due to the substantial difference between the two classes of activities. Primarily, the state’s reasoning hinges on the fact that class II

161. Seminole Tribe of Florida’s Motion for Summary Judgment and Supporting Memorandum at 8, Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). Section 849.231(3) of the Florida Statutes provides for an exception to the prohibition against the possession of gambling devices. See FLA. STAT. § 849.231(3) (1991). “This section . . . [does] not apply to a vessel of foreign registry or a vessel operated under the authority of a country except the United States, while docked in this state or transiting in the territorial waters of this state.” Id.

Presently, three of the more than 47 cruise ships, which sail from Florida ports offering casino gambling, are day cruises. Bob LaMendola, All Aboard for Big Bucks Cruise Ships Reel in Money With Casino Games, SUN-SENTINEL, May 17, 1992, at A1. The day cruises haul approximately 920,000 passengers each year, accounting for about one-third of South Florida’s cruise trade. Id. The day cruises travel out three miles beyond Florida waters, and sail around for a few hours in order to provide casino gambling. Id. The cruise ships do not contribute any gambling revenue to the state. Id.


163. Id. at 4.


gaming involves mainly "social" gambling, while class III gambling is "hard core." 166 The state simply asserts that the Mashantucket and Pequot courts have erred in their legislative analysis of class III gaming, and alternatively argues that legislative history indicates that states, during the compact process, are to provide their expertise in gaming in order to instruct the tribes as to appropriate regulation. 167 Therefore, it is argued that states are not required to negotiate class III games which they do not permit because states could not possibly render instruction on gaming they have not experienced. 168

2. The Activities Permitted in Florida Do Not Necessitate Negotiation

Although the state has proceeded to negotiate certain class III gaming like horse racing, dog racing, and jai-alai, it has refused to negotiate on gaming machines or casino gambling. 169 The state maintains that negotiations hinge on activities which are "legal" within the state, and since slot machines and casino gambling are illegal in Florida, 170 the state need not negotiate for their use. 171 First, the state maintains that the machines utilized by the Florida Lottery and various pari-mutuel facilities do not fit within the context of the Florida Statute, 172 and are not gambling machines as the tribe asserts. 173 According to the state, "[t]he statute requires that the machine make the player entitled to receive some prize by reason of any element of chance or of any other outcome of such operation unpredictable

166. Id.
168. Id.
169. Id. at 2.
170. Pursuant to section 849.16 of the Florida Statutes, illegal gambling devices include those which operate by insertion of money or an object, and by reason of chance, the player may become entitled to receive money, or a ticket which may be exchanged for money. FLA. STAT. § 849.16 (1991).
by him." Therefore, because the machines utilized by the Florida Lottery and pari-mutuel facilities do not operate to determine the prize, e.g. the horse race, or the lottery numbers chosen in Tallahassee, the state does not "permit" gambling machines as attested to by the Seminoles. Furthermore, the state asserts that casino gambling conducted by foreign flag vessels who use Florida ports is only permitted in international waters, and is a limited exception to the statute, which criminally prohibits the general possession of gambling paraphernalia. Finally, the state refutes the Tribe's argument concerning charity "Casino Nights" by indicating that Florida "does not 'permit' casino gambling merely because a charitable activity in violation of the state's statutory prohibition is not high on local law enforcement priorities."

VI. SEMINOLE TRIBE V. FLORIDA: THE DISTRICT COURT DECISION

Recently, the United States District Court for the Southern District of Florida has ruled against the Seminoles, concluding that the state did not negotiate in bad faith under IGRA when the state refused to negotiate casino gambling in the compact process. The court agreed with the tribe "that the legislative history relating to the phrase as found in the provision governing Class II gaming is instructive regarding the meaning of the language found in the provision governing Class III gaming." As a result, the court concluded that "Congress intended the

175. Id.
178. See FLA. STAT. § 849.231 (1991) (prohibiting possession of gambling paraphernalia); id. § 849.08 (prohibiting gambling in general); id. § 849.01 (prohibiting the keeping of a gambling house).
181. Id. at *12.
prohibitory/regulatory analysis found in *Cabazon* to be consistent with and to be applied to the IGRA provisions covering both Class II and Class III gaming.\(^{182}\)

The district court, however, refused to accept the tribe’s argument that the permissance of any class III gaming activity within the state opens negotiations for all class III activities; in doing so, the court narrowly interpreted the cases upon which the tribe relied in support of its position.\(^{183}\)

The court restrictively interpreted *Mashantucket* to stand for the proposition that in order to compel negotiation of a class III gaming activity, that particular activity must be permitted by statute and, therefore, merely regulatory in nature.\(^{184}\) This analysis is not only restrictive of the essential wording in *Mashantucket*,\(^{185}\) but is likewise restrictive of the *Cabazon* analysis.\(^{186}\) When determining a state’s public policy in the context of a particular class III activity requested, the court is to look at whether class III gaming in general is "totally repugnant to the State’s public policy."\(^{187}\) If the state permits other forms of gambling similar in scope, i.e. a state-operated lottery and pari-mutuel racing, the existence of those games reflect upon that state’s tolerance for that class of gaming.\(^{188}\) Therefore, if a state’s public policy towards a class of activities is regulatory in nature, then all class III activities are subject to negotiation provided they are requested for by the tribe.\(^{189}\)
The district court, interpreting Mashantucket, quoted the case, which stated “This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation.”\textsuperscript{190} This statement, in its proper context, does not indicate how the court arrived at its holding, but indicates the state need only negotiate the particular class III activity requested.\textsuperscript{191} An analysis of the Mashantucket holding reveals that, in general, if the state’s treatment of “class III gaming is regulatory rather than prohibitive,” this fact determines whether the state must negotiate the class III activity requested.\textsuperscript{192}

In deciding whether Flambeau was applicable, the district court dismissed that court’s analysis because it had based its decision on an erroneous interpretation of Cabazon.\textsuperscript{193} Once again, the district court’s restrictive interpretation of Cabazon, as well Mashantucket, led to the conclusion that the Flambeau holding was erroneous.\textsuperscript{194} Flambeau stood for the proposition that to determine whether a state must negotiate a particular class III gaming activity, the “issue is not whether the state has given express approval to the playing of a particular game,” but whether the state’s “public policy toward class III gaming is prohibitory or regulatory.”\textsuperscript{195} This proposition is directly in line with the essential analysis in both Cabazon and Mashantucket.\textsuperscript{196}

Furthermore, even if the Flambeau decision was not erroneously based, the district court determined that review of Wisconsin’s public policy towards the disputed gaming activity is necessary under the Cabazon analysis, and that reliance solely on a state’s constitution is not indicative of its public policy towards gambling.\textsuperscript{197} Although this fact may be true, the Seminole Tribe did not rely solely on the similarities between the states’ constitutions in attempting to show an analogous public policy but in fact,

\textsuperscript{190} Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, at *8 (quoting Mashantucket Pequot Tribe, 913 F.2d at 1031-32).
\textsuperscript{191} See Mashantucket Pequot Tribe, 913 F.2d at 1032.
\textsuperscript{192} See id.
\textsuperscript{193} Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, at *8.
\textsuperscript{194} Id.
\textsuperscript{195} Flambeau, 770 F. Supp at 486.
\textsuperscript{196} See supra text accompanying notes 185-86.
\textsuperscript{197} Seminole Tribe of Fla., No. 91-6756, 1993 WL 475999, at *18 n.1.
the Seminoles asserted the similarities of both states’ statutes, which still prohibit various forms of casino gambling. Therefore, the district court, in its determination to find that Flambeau does not control this case, attacked the court’s interpretation of Cabazon and ignored the similarities between both states’ statutory schemes with regard to the particular disputed activity, casino gambling.

The Flambeau court, in determining Wisconsin’s public policy, examined the gradual diminution of that state’s constitutional ban against lotteries, and determined Wisconsin no longer prohibits gaming but rather regulates it. Likewise, Florida has diminished its constitutional stronghold on banning lotteries, which may indicate an analogous public policy towards class III gaming. Historically, both Florida and Wisconsin had constitutional provisions banning all lotteries, but eventually provided for constitutional amendments and statutory provisions designed to permit charitable bingo, pari-mutuel wagering, and state-operated lotteries. Although each state continues to criminally prohibit gambling


202. Both states included constitutional provisions which prohibited lotteries. See Wis. Const. art. IV, § 24 (1848); Fla. Const. art. III, § 23 (1885).

203. In 1968, Florida adopted section 849.093, which permitted certain charitable, nonprofit organizations to conduct bingo games. See Fla. Stat. § 849.093 (1969) (repealed 1992). Furthermore, bingo was interpreted to be included as a parimutuel game under article X, section 7 of the Florida Constitution. See Loreta, 234 So. 2d at 671.

In 1973, the Wisconsin Constitution was likewise amended to permit charitable organizations to conduct bingo. See Wis. Const. art. IV, § 24(3).

204. In 1968, the Florida Constitution was amended to permit pari-mutuel pools to legally function within the state. See Fla. Const. art. X, § 7. The constitutional amendment permitted dog racing, horse racing, and jai alai. Id.

In 1987, the Wisconsin Constitution provided for the legalization of pari-mutuel, and on-track wagering. See Wis. Const. art. IV, § 24(5).

205. In 1987, both Wisconsin and Florida established state-operated lotteries by constitutional amendment. See Fla. Const. art. X, § 15; Wis. Const. art. IV, § 24(6).
activities, this fact alone does not render a state’s public policy as prohibitory. According to the Supreme Court in *Cabazon*, the fact that a state provides criminal punishment for certain gambling activities does not necessarily make a prohibitory policy. Therefore, this gradual acquiescence by both states to legalize gambling indicates a similar regulatory scheme, and the holding in *Flambeau* should have controlled the outcome in *Seminole*.

On the issue of whether the state in fact permits precisely those class III activities the Tribe seeks to negotiate, the district court refused to accept any argument. First, Judge Marcus admitted that “certain Florida charities have conducted casino or Las Vegas nights,” but did not believe that the existence of thirty-three events evinces a public policy permitting casino gambling. Once again, the court was unwilling to look towards the state’s policy in general as to class III activities. Undoubtedly, utilizing the *Mashantucket* and *Flambeau* analysis, the recorded existence of casino gambling permitted by charities, as well as the existence of other class III gaming, evinces a regulatory public policy permitting class III gaming in general. Although the Tribe argued the similarity between the permitting of Las Vegas nights in Florida with those permitted in *Mashantucket*, the district court, consistent with its policy of restrictive interpretation, was quick to point out that Connecticut “officially sanctioned the operation of casino nights by way of statute.”

Next, the *Seminole* court was unimpressed with the tribe’s assertion that one-day gambling ships, which embark passengers from Florida ports with no destination other than the high seas, evinces a regulatory public policy toward casino gambling. The district court relied upon the fact that no gambling occurs within the territorial bounds of the State, but failed to refute the argument that when given the ability to prohibit these specific gambling cruises to nowhere, the state continues to permit the activity to

206. See supra text accompanying note 198.
207. See *Cabazon*, 480 U.S. at 211.
208. Id.
211. See id.
212. See *Mashantucket Pequot Tribe*, 913 F.2d at 1031-32; *Flambeau*, 770 F. Supp. at 486.
214. Id. at *36.
Finally, Judge Marcus, relying upon *Deeb v. Stoutamire*, determined that the machines utilized by the Florida Lottery and various pari-mutuel facilities ("SAMS") are not violative of Florida Statutes section 849.16. The court reasoned:

[T]he unpredictable event or element of chance which determines the winner must be linked to the machine's operation. Thus, the winner at a pari-mutuel facility is determined by the dog or horse race, not by the operation of the SAMS machines. Similarly, the winner of the State Lottery is determined by the weekly drawing in Tallahassee, not by the operation of the individual lottery ticket terminals.

In review of the various issues raised by the tribe, as well as the pattern by which the district court restrictively interpreted the word "permits" under the IGRA, it is apparent that the court has not only misconstrued case law supporting the tribe, but has ignored the basic legislative intent for enacting IGRA. Congress intended to preserve tribal sovereignty while promoting economic development and self-sufficiency.

According to legislative history, the compact process was envisioned to provide a mechanism for "two sovereigns—the tribes and the States—[to] sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands." Legislative history provides no indication that compact negotiations would depend upon what the State thought were appropriate activities for the tribe to engage in, but rather Congress was explicit in reinforcing tribal sovereignty. The district court was obligated to adhere to Congress' intent for enacting IGRA, and should, therefore, have liberally construed the word "permits" in favor of the tribe and not the state. In this case, because the sovereign state reaps the benefits from permitting a variety of class III

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215. Id. at *38.
216. 53 So. 2d 873 (Fla. 1951).
217. See supra text accompanying note 158.
218. See supra note 170.
222. Id. According to legislative history, the IGRA was not intended to be a "blanket transfer to any State of any jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty." Id. at S12650.
gaming activities, which include five forms of pari-mutuel wagering, and four on-line computer games of the state-operated lottery, it is only equitable that the other sovereign entity, the Seminole Tribe, who supposedly is negotiating on “equal terms,” have the facts liberally construed in its favor.

VII. THE FUTURE OF FLORIDA GAMBLING

The Seminoles will undoubtedly seek to negotiate for new machines that conform to those utilized by the Florida Lottery and various pari-mutuel facilities. The thrust of the argument will surely entail the length of the period of time whereby the unpredictable event, which is determined by an independent machine, must take place. The existence of these machines may prove to be just as successful in luring the public as those machines rejected by the Seminole court.

Additionally, the State of Florida has decided to negotiate an agreement with the Seminoles that would allow the tribe to offer poker, pinochle, bridge, and other card games without a pot limit. Players will legally be able to wager thousands of dollars at these games, and the state will not receive any revenue from it. This legalization of tribal card games may be the beginning of what lies ahead for Florida’s gambling future.

Even if the Seminoles lose on appeal, the tribe will continue to offer machines conforming to the district court ruling and provide those card games presently under negotiation. Consequently, many Florida gamblers, as well as curious spectators, will flock to the reservations, and will spend millions of dollars that will elude taxation by the state. As a result, Florida’s inability to tax the tribe creates a loss of potential revenue desperately needed for crime prevention, public schools, and its rebuilding program after Hurricane Andrew. As a solution, Florida should legalize

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223. As of 1992, the state of Florida regulated 5 thoroughbred tracks, 1 quarter horse track, 19 greyhound tracks, 10 jai alai frontons, and 1 harness racing track. 1992 FLA. DEP’T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 23-32. The state received 6.06% of the total pari-mutuel handle from 5321 racing days which generated $105,074,018 in state revenue. Id. at 21.


226. Id.

227. See Clark, supra note 46.
casino gambling within the state and expand its economic base by taxing the
revenue acquired by regulated casino gaming facilities.

Although Floridians have the power to change Florida’s constitutional
prohibition against casino gambling,228 they have been reluctant to do so
for fear that legalization of casinos will bring organized crime and
corruption to the state. These fears are based erroneously on comparisons
with Las Vegas and Atlantic City, neither of which were as big or as
developed as South Florida when their casinos were legalized.229

According to one authority, “Nevada has had the biggest problems
controlling organized crime in casinos for one simple reason: organized
crime built the industry. Inspired by the success of gangster Meyer
Lansky’s casinos in Havana, Bugsy Siegel moved to Las Vegas and founded
a gambling empire.”230 Nevada was a desert with no future, and officials
gladly received casino revenues no matter who was paying.231 Presently,
Nevada has partially succeeded in eliminating organized crime and
corruption; however, the state still employs fewer than two regulatory
workers per licensed casino, thus enabling corruption to linger.232

By contrast, New Jersey employs nearly 100 regulators per casino, with
an annual budget of $50 million a year paid up-front by the casinos.233
In 1976, Atlantic City legalized casino gambling as a solution to its bleak
economy: tourism was failing, seaside hotels were deteriorating, the local
businesses were boarding up, and the unemployment rate was high and
climbing.234 Casino gambling proved to be the solution. Shortly thereafter,
Atlantic City became the most popular destination in America, drawing one-
third more people than Disney World, despite having nothing more to offer
than gambling.235 Casinos have not only provided Atlantic City with the
means for economic development,236 but have also provided the revenue

228. See supra text accompanying note 37.
229. Dave Von Drehle, Facts, Guesses About Casinos Consider Source Each Side Has
230. Dave Von Drehle, Casinos and Crime: Can the House Rules Keep Out the Thugs?,
MIAMI HERALD, Nov. 1, 1986, at A1. The authority was a law professor at the University
of California Berkeley, Jerome Skolnick. Id.
231. Id.
232. Id.
233. Id.
234. Dave Von Drehle, Florida Casino Debate Goes to Boardwalk, MIAMI HERALD,
235. Id.
236. Id. In Atlantic City, casino hotels pay about two-thirds of all property taxes, in
addition to an eight percent tax on gross winnings to the state, plus sales taxes, licensing
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revenue to enforce strict regulations in order to keep organized crime out of the business. Unfortunately, organized crime became involved in casino operations when New Jersey made a tragic mistake with the first licensed casino. When gambling was approved in 1976, politicians promised casinos in two years. Subsequently, political pressure induced the licensing of Resorts International, despite investigative reports which provided evidence showing the applicant’s close ties to organized crime. Presently, the State of New Jersey requires every casino employee to be licensed, and according to New Jersey officials, this has been successful in keeping organized crime and corruption out of the day-to-day operations of casinos.

Florida retains a remarkable feature uncommon to Nevada and New Jersey: diversity. Other than gambling, Nevada and New Jersey possess no qualities that attract tourism. This may explain why visitors to those states remain in hotel casinos while local shops and restaurants suffer. Conversely, if the state of Florida legalized casinos in order to allure tourists, Orlando and South Florida attractions would provide the essential assortment of entertainment to entice visitors to remain longer within the state to fully explore its attributes.

In light of the fact that casinos could provide a solution to Florida’s bleak economy by creating 50,000 jobs, spurring $2.2 billion in new investment, and doubling the tourist trade to $6.6 billion per year, the state’s only option in response to its inability to tax the revenue from Indian gaming is to legalize and regulate casinos within the state. As proven in Atlantic City, the absence of political pressure, along with the strict enforcement of tough regulations, should adequately deter the negatives associated with casino gambling. Therefore, Floridians, who hold the key costs and regulation fees, plus a tax to supply about $800 million in loans over the next 20 years to build low-cost housing. Furthermore, each casino hotel employs an average of 3600 people.

238. Id.
239. Id.
240. Id. From the hotel waiter to the CEO, the state investigates criminal histories, character, integrity, honesty, and finances. Furthermore, administrators are required to completely disclose all holdings, shareholders, bonds, and five years of IRS records. Von Drehle, supra note 230, at A1.
241. Id.
242. Von Drehle, supra note 234, at A7. The average visitor to Atlantic City, who lives less than 150 miles away, stays seven hours and spends $66 dollars. Id.
to a prosperous future, should undoubtedly amend article X, section 7 of the Florida Constitution\textsuperscript{244} in order to provide for the authorization of casino gambling.\textsuperscript{245}

VIII. CONCLUSION

The State of Florida has consistently reduced its constitutional stronghold against gambling when faced with economic crises. As a result, Florida permits pari-mutuel wagering and a state-operated lottery. In light of the fact that the state, with its inability to tax Indian gaming, has foregone a substantial amount of revenue desperately needed for a diminished economy, Florida should once again diminish its stronghold against gambling by legalizing the exact games it is currently trying to prohibit.

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\textsuperscript{244}See article X, section 7 of the Florida Constitution, which provides: "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." Fla. Const. art. X, § 7.

\textsuperscript{245}See supra text accompanying note 37.