ABSTRACT

POLITICAL SCIENCE

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TRIBAL SOVEREIGNTY: A CASE STUDY OF CASINO GAMING BY THE POARCH BAND OF CREEK INDIANS IN ALABAMA

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This case study examined casino gaming by the Poarch Band of Creek Indians (PCI) in Alabama within the context of tribal sovereignty. It critiqued tribal developments over a five-year period beginning in 2009 with the opening of their first multi-million dollar casino and hotel. No previous studies on gaming or tribal sovereignty for this tribe existed. There were only a few studies on this dual topic for other Indian tribes but none of which utilized a political science theoretical approach.

The study found that tribal sovereignty existed since American Indian tribes existed and sovereignty was strongest during the early treaty-making period. Thereafter, tribal authority and self-determination of Indian tribes became limited as it was redefined by federal policies, Congressional actions and Supreme Court decisions.

When treaty-making ended, the political history for Indian tribes became a narrative of termination, relocation and assimilation. The Poarch Band of Creeks Indians were a small group that remained poor and obscure after the Indian removal period. Casino gaming has given them an economic and political resurgence. The early legal interpretation of tribes' political status was that of "domestic dependent nations" which continues to influence federal Indian policy today and thus the parameters of tribal sovereignty as well.

While the level of federal dependency for some gaming tribes has been reduced, tribes are not fully self-sufficient. Similar to other industries, casino gaming is impacted by supply, demand and increased competition and thus long-term permanent gains cannot be predicted. For the Poarch Band Creeks, gaming increased their political awareness and led to greater political involvement in lobbying. It also created new community and business partnerships. Gaming also prospered the Poarch Band Creeks not only in terms of improving their quality of life but they now have financial resources to sustain legal battles to protect their sovereignty from intrusion by the state of Alabama. Alabama was successful in closing all non-Indian casinos but not when it attempted to close Indian casinos. This study highlights the political strategies and sovereignty protections utilized by the Poarch Creek Indians in their response to contemporary political challenges by the state of Alabama.

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CHAPTER I

RESEARCH DESIGN

Statement of the Problem

Casino gaming by Indians is less than a 30-year phenomenon and the impact on tribes has not been well studied. Because of their sovereign status, tribes are only accountable to the federal government and public information on tribal affairs is not readily available. There is a unique situation surrounding gaming by the Poarch Band of Creek Indians (PCI Gaming) in Alabama. They operate casinos in a state that has declared casino gaming to be illegal. This research study describes and critiques the controversial events that unfolded regarding their casino gaming. Prior to August 2010, there were several non-Indian gaming operations in Alabama that offered electronic bingo including four large non-Indian casinos. They were eventually declared illegal by the former anti-gaming republican Governor Bob Riley who established a Task Force Against Gambling with a goal of ending gambling in the state including tribal gaming by the Poarch Creek Indians. By August 2010, all non-Indian casinos were forced to close their doors as well as several smaller non-Indian charitable organizations. Federal protections for sovereignty thwarted his efforts to close gambling by the Poarch Creeks. However, he continued to challenge the legality of the tribal casinos in Alabama and lawsuits were filed by the state of Alabama against PCI Gaming.

At issue is whether electronic bingo that resembles slot machines is Class II or Class III (high stakes) gambling. Electronic bingo had been operating in Alabama on a smaller scale, especially at the non-Indian casinos for more than five years. Governor Riley argued that electronic bingo should be classified as high stakes gambling and thus should not be allowed. The Poarch Band Creeks first began offering bingo games in 1985. They were allowed to do so because the 1901 Alabama Constitution allows them to offer bingo if it is already allowed elsewhere. Electronic bingo utilizes technological advances but is still referred to as form of "bingo" because patrons are allegedly playing the game of bingo against other patrons. Controversy existed regarding how bingo is defined and specifically whether or not electronic bingo is Class II gaming or high stakes Class III gaming (slot machines). The Poarch Band argued that their electronic bingo is Class II and therefore not illegal. In order for them to offer more advanced gaming such as Class III slot machines, a tribal-state compact would be required. However, Governor Riley adamantly refused to negotiate a compact since taking office in 2002. While Alabama courts upheld Governor Riley's closing of non-Indian gaming facilities and his position that they were illegal, the National Indian Gaming Commission (NIGC) which regulates Indian gaming ruled in favor of PCI's operations as Class II gaming. Governor Riley expressed hopes that the Indian casinos would also be forced to close since electronic bingo was no longer operated by non-Indian enterprises.[1] Such an adverse action would have set a precedent in Indian gaming nationally.

1. "Riley Targets Poarch," *Brewton Standard News*, Escambia County, October 26, 2010.

Indian gaming is only subject to federal law and regulations by the 1988 Indian Gaming Regulatory Act (IGRA) that is regulated by the National Indian Gaming Commission (NIGC). Since the passage of IGRA, Indian gaming has grown across the country and has continued to expand. It is changing the economic status of some gaming tribes and promoting greater participation in electoral politics and lobbying. There is a general view held by many non-Indians that gaming is making Indians rich. Among Indians it is often referred to as the new buffalo. Significant economic gains were made by a few gaming tribes such as the Pequot in Connecticut. However, while the Pequot prospered quickly, they were not able to sustain their prosperity on a long term a basis. Gaming has become a key economic resource but also poses political challenges. It increased the political savvy of some tribes but others are being manipulated and controlled by management groups, lobbyists and other special interest groups. Based on the research, it seems that only 2-3 percent of gaming tribes with casinos may be highly successful.[2] The rural geographic remoteness of reservation land on which gaming occurs is often problematic for most tribes. According to the NIGC website, in 1999, ten years after the passage of IGRA, there were 150 gaming Indian tribes in 24 states. The website indicates that ten years later, this number grew to over 250 gaming tribes in 28 states by 2009.

Most literature on Indian gaming highlights political issues in states such as California, Oklahoma, New Mexico and Connecticut. There are some journal articles on Class III gaming by the Mississippi Choctaw but they primarily focus on the tribe's

2. Eve Darian-Smith, *New Capitalists, Law, Politics & Identity Surrounding Casino Gaming on Native American Land* (Belmont, CA: Wadsworth, 2003), 64.

involvement with lobbyist Jack Abramoff who was arrested after manipulating dealings with the Choctaw and other Indian tribes. Some sources allege that former Alabama Governor Bob Riley received campaign contributions through Jack Scanlon, a lobby associate of Jack Abramoff, in exchange for his assurance that he would deny gaming privileges to the Poarch Band Creeks. If allowed, it would create competition for their Choctaw neighbors. Scanlon was arrested in 2010 including for his role in illegal lobby activity.[3] Thus far, no precedent by another state or Indian tribe could be located in the literature where gambling (including electronic bingo) was allowed and then later disallowed or deemed illegal.

Only two secondary sources were identified that address the dual politics of tribal sovereignty and Indian gaming: *Indian Gaming, Tribal Sovereignty and American Politics* by W. Dale Mason and *Indian Gaming and Tribal Sovereignty, the Casino Compromise* by Steve Andrew Light and Kathryn Rand. [4] However, both of these sources focus on Class III gaming and not Class II gaming the latter of which is operated by the Poarch Band Creek Indians. Articles on Indian gaming in law and business journals as well as in Native American journals were reviewed but they also primarily focus on Class III gaming. After a thorough search was conducted, a few theses and dissertations on Indian gaming were identified but they were ethnographic studies or focused on gaming tribes in the west and mid-western part of the country. Several news articles were

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3. Peter Stone, *Superlobbyist Jack Abramoff, His Republican Allies and the Buying of Washington* (New York: Farrah, Strauss and Giroux, 2006), 126.

4. W. Dale Mason, Indian Gaming, Tribal Sovereignty and American Politics (Norman: University of Oklahoma Press, 2000), 1-259; Steven Andrew Light and Kathryn R. L. Rand, *Indian Gaming and Tribal Sovereignty, The Casino Compromise* (Lawrence: University Press of Kansas, 2005), 1-162.

available in local Alabama newspapers including the *Montgomery Advertiser,* the *Tuskegee News, Birmingham News,* the *Atmore Advance* and the *Brewton Standard News*.

While brief news and journal articles are available, there is an absence of regional research studies on Indian gaming in the southeast. No primary or secondary political science sources were located on the Poarch Band Creek Indians. Only one historical secondary source was found, *The Rise of the Poarch Band of Creek Indians*. [5] It is primarily a historical narrative and only briefly references PCI Gaming. It was not located through traditional sources such as bookstores or Amazon. Com. It was found in the gift shop at the Wind Creek Casino and Hotel in Atmore, Alabama.

The research study was a timely interdisciplinary study on the intersection of politics, law and government in Alabama within the context of gaming and tribal sovereignty. It included a discussion regarding pro and anti-gaming sentiment in Alabama, state and federal laws pertaining to gaming and specifically the Indian Gaming Regular Act (IGRA). It also summarizes several lawsuits and Supreme Court decisions pertaining to Indian gaming. An addendum was added at the end of the study that lists all of the court cases referenced. The study concludes with a discussion on gaming strategies by the Poarch Band Creeks to protect and utilize their sovereign status to promote and expand their gaming interests.

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5. Lou Vickery and Steve Travis, *The Rise of the Poarch Band of Creek Indians* (Charleston, SC: Upward Press, 2009), 1-211.

Central Research Question

RQ1: What are the political challenges to the exercise of tribal sovereignty through gaming by the Poarch Band of Creek Indians?

Sub-Questions

RQ2: What is the socioeconomic and political history of the Poarch Band of Creek Indians and PCI Gaming in Alabama in the wake of gaining federal recognition in 1984?

RQ3: What state legislative and judicial decisions relative to non-Indian gaming had a negative or positive political impact on Poarch tribal gaming and sovereignty?

RQ4: What federal legislative and judicial decisions relative to tribal gaming have a negative or positive impact on Poarch tribal gaming and sovereignty?

Major Concepts

Casino "gaming" is the term most often used in the literature by the National Indian Gaming Association (NIGA) and in the Indian Gaming Regulatory Act (IGRA). The terms "gaming" and "gambling" are used interchangeably in the gaming industry when referring to gambling or betting with the use of money. Both terms, gaming and gambling, are interchangeably used in this study.

Class I gaming, according to IGRA (Section 2703), is described as traditional forms of Indian bingo or social games with minimum prize amounts. Traditional bingo is bingo played with bingo cards such as the games that are often played in churches.

Class II gaming, according to IGRA, is described as bingo and related games which are explicitly authorized by the state or not explicitly prohibited by the state. IGRA further describes Class II games as played in conformity with those laws and regulations regarding hours of operation and limitations on wagers or pot sizes. Class II games do not include banking card games such as blackjack or electronic games of chance such as slot machines. (The Poarch Creek Indians have Class II gaming in their casinos.)

Class III gaming, according to IGRA, is everything else including banking card games such as blackjack, slot machines and table games including roulette and craps. Class III games are high stakes games such as those offered in Las Vegas. (In order for Indian tribes to offer Class III gaming, they must negotiate a compact with the state.)

Electronic bingo was not initially described in IGRA but defined by those that offer it, as a form of bingo and a game of competition between patrons that utilizes electronic equipment. Electronic bingo machines resemble slot machines but allegedly they are not games of chance. This definition was taken from some of the gaming literature and particularly from the March 2009 ruling by St. Clair County Alabama Circuit Judge Charles Robinson in which he outlined "certain elements" that must be present to define bingo. It is also the definition provided by gaming representatives in Alabama including pro-gaming advocate and former Tuskegee Mayor and State Legislator, Johnny Ford.

Gaming proponents include casino owners, their representatives and employees as well as some local leaders and legislators that sponsored and/or supported gaming bills.

Gaming opponents include former Alabama Governor Bob Riley and vocal anti-gaming groups such as the Citizens for a Better Alabama, Christian Coalition and the Alabama Policy Institute, a conservative think tank.

Political impact is defined as actions that effect change causing some type of consequence whether beneficial or non-beneficial to tribal authority.

The terms **Indian, tribe, and Native American** are interchangeably used depending upon the reference. However, the term "Indian" is most often used, as it is more readily used by Indians themselves as well as by Indian organizations including in organizational titles such as the National Congress of American Indians. The term "Indian" is also widely used in federal Indian law including in the Indian Gaming Regulatory Act. It is the most common term used by federal agencies such as the Bureau of Indian Affairs. While the term "Native Americans" appears in some of the literature, it includes Hawaiians, a group that is not applicable to this study.

Theoretical Framework

Tribal sovereignty is the theoretical framework that guided this study including the extent and limits thereof. Tribal sovereignty is interchangeably used with the term "tribal authority." The meaning and parameters of tribal sovereignty used in the study are consistent with those used by noted Indian leaders and Indian attorneys such as Vine Deloria Jr., David E. Wilkins, and Clifford M. Lytle.[6] The attributes of tribal sovereignty by the Poarch Band were critiqued in terms of four concepts: (a) self governing –

6. Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within, The Past and Future of American Indian Sovereignty* (Austin: First University of Texas, 1984), 1-293; David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court, the Masking of Justice* (Austin: University of Texas Press, 1997), 19-79.

independence in exercising authority and control over their political, social and economic interests, (b) maintenance of territorial jurisdiction, (c) exemption from state oversight and (d) federal protections and benefits as a sovereign Indian nation. The study explains how these concepts were maintained, limited and/or negotiated by the Poarch Band and particularly as it related to gaming.

Research Method

The research method was a single case study on gaming by the Poarch Band of Creek Indians (PCI Gaming). It is descriptive, explanatory and prescriptive. According to Robert Yin, the case study method is most appropriate for explaining and answering questions of "how, who, what, and when."[7] This method facilitates answering of questions such as how tribal sovereignty is exercised, what poses challenges to tribal sovereignty and why certain events occurred. This method allows for sequential events (i.e. gaming developments) to be traced and analyzed in a specific geographical area (Alabama) over a particular period of time (2009–2015). According to Yin, the case study method is the preferred method for examining contemporary issues and challenges within a real life context rather than historical ones.[8] The method forced this researcher to clearly think through the rationale for the study. By engaging in this contemplative process, the initial number of sub-questions was reduced from five to three questions and the main research question was refined. It also led this researcher to engage in the type of

7. Robert K. Yin, *Case Study Research, Design and Methods* 2nd ed., Applied Social Research Methods Series, Vol. 5, (Thousand Oaks, CA: Sage Publications, 1994), 1-15.

8. Ibid., 13.

preliminary analysis that Yin suggests. [9] The case study method was appropriate for applying the theoretical framework of tribal sovereignty to the analysis. Three sources of evidence were utilized: a comprehensive literature review, field work observations and interviews. As suggested by Yin as well as by Van Evera, particular attention was paid to gaming events that occurred between a particular period building on explanations over a period of time thus increasing internal and external validity and reliability.[10] The study utilized qualitative data collected from several secondary sources including journals, newspaper articles, books, theses, dissertations and government records (treaties and records from Senate hearings). It included a comprehensive review of legal cases and court decisions as well as primary data gathered from observations and interviews. This researcher did not hold any bias relative to the topic or cultural group studied and had a grasp of the issues to be further studied. The literature review included the political history of the Poarch Band Creek Indians. A few preliminary interviews were conducted between January 2010 and April 2010, prior to finalizing the research design. After that time, news articles on non-Indian gaming and Indian gaming in Alabama were regularly followed on a monthly basis including electronic subscriptions to three online newspapers, the *Brewton Standard, Atmore Advance* and the *Montgomery Advertiser*. Given the volume of information, several news articles were printed and organized in five large time dated binders. Since PCI Gaming opened their first large scale casino in January 2009, 2010 census data could not be utilized as it would not an indicator as to

9. Ibid., 22.

10. Ibid., 33-37; Van Evera, *Guide To Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997), 89-95.

whether significant socioeconomic changes had occurred such as poverty levels and unemployment rates. 2020 census data would be better indicator for these variables. Data on quantitative tribal benefits from gaming are not public record. Thus, the study was solely a qualitative one. The research techniques involved an extensive literature review process highlighting historical and contemporary events as well as observations and interviews. Representatives of the Poarch Band of Creek Indians did not show interest in the research study when preliminary information was requested in January 2010. Additional strategies were utilized to arrange a meeting with a tribal official. Emphasis was placed on reviewing materials written by Native Americans and published in Native American journals such as Indian Country Today. It was important to include the "Indian" point of view when reviewing secondary sources. However, non-Indian perspectives on Indian gaming and non-Indian gaming were also included.

Several visits were made to Alabama for the purpose of visiting and observing casino operations and conducting interviews with public officials and Poarch Creek tribal representatives. Face–to-face 60 minute interviews were conducted with the Wetumpka mayor, a former Tuskegee mayor and state representative as well as with the tribal council treasurer and the tribal cultural director. The researcher attended a tribal council meeting, an annual powwow and the grand opening for the tribe's second large casino in Wetumpka. Telephone interviews were conducted with federal representatives of the National Indian Gaming Commission to discuss PCI gaming challenges. The researcher also attended an Alabama legislative session when a casino bill was to be presented and observed a pro-gaming rally in response to the closing of non-Indian casinos. In April

2010, letters were mailed to state legislators where Indian casinos were located to explain the research project and to seek their positions regarding gaming. However, only a few legislators responded. Those that did respond declined to be interviewed. An FBI probe was underway at that time regarding legislative voting on a gaming bill which may have deterred them from participating.

A topic outline was provided to each person interviewed to help guide interview discussions. When the tribal treasurer was interviewed, a list of interview questions was provided to him in advance. Consent forms were also utilized as required by the Institutional Review Board (IRB) of Clark Atlanta University and interviewees were informed that the purpose of the consent forms was to ensure confidentiality, anonymity if requested and to help maintain professional ethics. Some note-taking occurred during interviews but none of the interviews were recorded. Notes were also taken after visiting and observing casinos and after attending a tribal council meeting. When visiting casinos, observations focused on the size of the casino, expansions, patron utilization and observable demographics of patrons (i.e. old, young). License plates on cars in the parking garages indicated how far patrons travelled to come to the casino. Casino visits by the researcher took place at various times of the month to gain a balanced view of patron demographics and casino popularity. Notes were not written while at the casinos to prevent attracting attention. Notebooks were maintained in a safe location in the researcher's home. None of the data collected will be discarded as it may become useful at a later date.

Reporting and Analyzing Research Findings

Information collected through the comprehensive literature review as well as from interviews and observations was used to answer the sub-questions and the primary research question in a sequential narrative format.

An entire chapter focuses on the theoretical framework of tribal sovereignty followed by the political history of the Poarch Band of Creek Indians, an analysis of tribal gaming from a national perspective and also a discussion on non-Indian commercial gaming. These discussions highlight the pros and cons of gaming and identify some gaming proponents and gaming opponents. The research findings highlight the political challenges to tribal sovereignty citing several Supreme Court decisions that shaped federal Indian law and redefined the limits of tribal sovereignty. These legal decisions were critiqued in terms of whether they strengthen or weaken tribal sovereignty. The government structure of the Poarch Band Creek Indians including the tribal council, tribal benefits and tax exemptions are also criticized. The literature review sought to compare gaming challenges faced by the Poarch Band Creeks and with those faced by other Indian tribes. However, this comparison could not be made as literature was not available for other tribes operating only Class II gaming. Since the tribe is not required to disclose their earnings publically, only limited financial information was available.

The growth of the Poarch Creek Indians (PCI) gaming as a gaming monopoly in the state is discussed as well as intertribal conflicts between the Poarch Band Creeks and other Indian tribes. The research conclusions summarized and critiqued the political

outcomes of local, state and national legislation and judicial actions relative to tribal gaming and offer some policy recommendations. The conclusions identify areas where further research is needed and suggests areas in which gaming tribes should invest.

Significance of the Research

Casino gaming by Indian tribes is less than a 30 year phenomenon that gathered momentum after the passage of IGRA in 1988. There continues to be a lack of research on tribal gaming perhaps because tribes are not willing to share information with researchers. This research study is the first of its kind with regard to gaming by the Poarch Band of Creek Indians. There is a lack of literature in general relative to the dual topics of gaming and tribal sovereignty and particularly for southeastern gaming tribes. This study offered a contemporary perspective for a growing casino enterprise by a small tribe that was previously poor and obscure. It becomes more relevant within the context of southern politics in Alabama, a state that has a history of cultural discrimination and Republican leadership. The Alabama legislature has been debating bingo bills for several years. However, the closure of non-Indian casinos in 2010 was a landmark decision and created a gaming monopoly for the Poarch Creek Indians.

This study presents an outside view of a very controversial issue. According to the National Indian Gaming Commission, there is not a precedent in any other states for the events that occurred in Alabama as it relates to gaming. The case study examined those events within the context of the protections and ambiguities of IGRA and tribal sovereignty. The study creates a framework for re-examining tribal-state relationships as well as tribal-local relationships not only in terms of tribal gaming but as it relates to

other Indian economies that are being developed through the use of gaming revenue. It provides clarity to the term or myth of the “rich Indian” by reporting gaming successes and losses. Lastly, the study suggests areas in which tribes should invest as well as employee- management issues that could be better addressed. The research report is not simply an exercise of theoretical jargon nor does it restate the obvious but advances the discussion on Indian gaming which is the main purpose of political science.

CHAPTER II

LITERATURE REVIEW PART ONE - SOVEREIGNTY

Theories of Sovereignty

The concept or theory of "sovereignty" has European origins dating back to the 17th century when kings held supreme authority over their subjects. It began with the reign of Louis XIV, King of France between 1643 and 1715. According to John Lock, sovereignty exists when the people of a nation consciously make a contract with a ruler or king to govern them. Although this contract is made, it still reserves certain individual rights which cannot be taken away. Lock's theories heavily influenced the founding fathers in this country. Jean Jacque Rousseau and his social contract theory further defined sovereignty. Rousseau viewed sovereignty as an agreement among people to combine their individual and common interests into a general will. The concept of popular sovereignty or popular consent for a government's legitimacy was interpreted by the Swiss jurist Enrich de Vattel as having a range of meanings. From Vattel's point of view, popular sovereignty entailed three primary components: (1) sovereign power rests with all the people and is founded on consent and mutual trust, (2) the people exercise their sovereignty by establishing the form and specific powers of their government, and (3) popular sovereignty does not require any particular form of government.[1]

1. Paul K. Conkin, *Self Evident Truths* (Bloomington: Indiana University Press, 1974), 25-26.

Thus, the doctrine of sovereignty became a blended theme of the ancient idea of popular consent as the foundation of government. Sovereigns could not define themselves prior to the idea of borders. In the international arena, sovereignty refers to exclusive domestic jurisdiction. A more general way of explaining the concept of sovereignty is the special quality that nations have which enable them to govern themselves.[2]

American Sovereignty

When thirteen American colonies gained independence from Britain after the American Revolution, the Declaration of Independence in 1776 became the catalyst for American sovereignty through the adoption of the American Constitution in 1787. The framers of the Constitution intended for the national government to primarily use its sovereignty or powers when involved in foreign affairs while states would retain primary jurisdiction over almost all domestic matters.[3] State sovereignty primarily gives states the right to maintain internal order and ensure state prosperity. States held jurisdiction over the lives, liberties and properties of its people. Choo argued that states are "quasi-independent sovereigns" or subordinate governments.[4]

American sovereignty is based in the US Constitution and practiced through a political system of federalism with a division of authority between the federal/national government and the states. It involves a sharing of sovereign powers in what can

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2. John R. Wunder, ed., *Native Americans and the Law, Native American Sovereignty* (New York and London: Garland Publishing, 1996), 3.

3. Mark R. Killenbeck, ed., *The Tenth Amendment & State Sovereignty, Constitutional History and Contemporary Issues: Sovereignty Then and Now* (Berkeley, CA: Berkeley Public Policy Press, 2002), 164.

4. Ibid., 172.

sometimes become a complicated balance between national interests versus states rights. While both levels of government have certain powers and both are different agents or trustees of the people, nether has supreme authority over the other. In addition to the United States, Australia, Canada and Switzerland also have a federal system of government.[5]

James Wilson postures that "Since the adoption of the Constitution in 1787, the single most persistent source of political conflict has been the relations between the national and state governments."[6] The Tenth Amendment states, "The powers not delegated to the U.S. by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." The Tenth Amendment was an afterthought but obviously an important piece of legislation. Interpretations of its meaning are often referenced in legal cases where political authority of a state and the national government are in question. It is also referenced in litigation involving lawsuits between states and Indian tribes. Chief Justice John Marshall who was described as a staunch Hamiltonian, advocated for national supremacy over state authority. Marshall's interpretation of the intent of the Tenth amendment influenced many of his early decisions regarding disputes between states and the national government. Within the federalist system, the Supreme Court serves as an arbiter or interpreter of the meaning of the Constitution.

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5. James Q. Wilson, *American Government, Institutions and Policies*, 5th ed. (Los Angeles: University of California, 1992), 46-49.

6. Ibid., 45.

Unfortunately, the founding fathers did not draw clear distinctions between national and state responsibilities.[7]

After the Civil War there was much debate about the meaning of federalism and particularly as it relates to the commerce clause of the Constitution. Not long thereafter, a concept of "dual federalism" emerged but it was short lived. It re-affirmed that the national government was supreme in its sphere but also that states were equally supreme within their borders and the two powers needed to remain separate.[8] Dual federalism implied that interstate commerce (transporting products and services between states) could be regulated by Congress while intrastate commerce was within the domain of state authority. When unclear, the court could differentiate. However, the Court's interpretation of interstate commerce is complex, impossible to explain, and difficult to summarize.[9] Some ambiguity still exists.

Meyerson made an argument that the Civil War and the Fourteenth Amendment (adopted in 1868) which abolished slavery, forever altered the political relationship between states and the federal government.[10] Ex-slaves were granted citizenship and due process. One could also argue that the Fifteenth Amendment (adopted in 1870) also became a test of states' rights versus federal authority which lasted for several years until the dramatic change that occurred with the passage of the Voting Rights Act in 1965

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7. Ibid., 67.

8. Ibid., 53.

9. Ibid., 53-54.

10. Michael I. Meyerson, *Liberty's Blueprint, How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World* (New York: Basic Books, 2008), 201.

almost a century later. The Fifteenth Amendment did not confer the right to vote on anyone. It merely prevented the denial of the right to vote based on race alone. However, some states and primarily southern states, found ways to avoid complying by instituting roadblocks such as literacy tests. The Voting Rights Act suspended the use of these tests, assessed a criminal penalty for anyone interfering with an individual's right to vote and also appointed federal examiners who could register blacks.

Congress can pass legislation to regulate almost any economic activity in the country. Thus, the theory of dual federalism is virtually extinct. During the post-industrial era and especially during the 1950s and 1960s, the role of the federal government expanded to protect the national rights of citizens and especially in southern states where racism, segregation, and discrimination designated second-class citizenship to blacks. For example, when former Alabama Governor George Wallace proclaimed it a state right in 1963 to continue to discriminate against blacks, he undermined Alabama's claim to state legitimacy and federalism itself.[11] Actions such as these forced federal intervention and the need for the Voting Rights Act.

When writing about federalism in 1975, William Riker deduced that "the main beneficiaries have undoubtedly been southern whites, who could use their power to control state governments to make policy on blacks that negated the national policy…Clearly…in the United States, the main effect of federalism since the Civil War

11. Everett Carl Ladd, *The American Polity: Federalism in the Post-Industrial Era*, 5th ed. (New York: W.W. Norton & Company, 1993), 121.

has been to perpetuate racism."[12] Extensive federal legislation followed that attested to the eroded position of states. National power was further expanded through numerous Supreme Court decisions to ensure certain freedoms were protected such as those needed for voter registration which was the purview of the states. Thus, federalism and the separation of powers have been essential to protecting individual freedoms. During his 1980 presidential campaign, Ronald Reagan visited Mississippi at the site where three civil rights workers had been killed in 1964. He told those who were present, "I believe in states' rights," which at the very least was insensitive.[13] This statement was also viewed as him supporting racist ideology. In 1987 after he was elected, President Reagan declared that "federalism" was "rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government."[14] This has been an ongoing position of the Republican Party and viewed by some liberals as simply a smokescreen for a conservative political agenda. The lines between state and federal authority cannot always be clearly drawn. They are more fluid than solid. The Federalist papers reflect a great deal of time spent by the founding fathers debating and delineating the competing roles for state governments and the national government. The need for a system of checks and balances is clear in their arguments. Meyerson noted that the relationship between the federal and state government as described within the Federalist Papers, is guided by three principles that are not entirely consistent: (1) In addition to

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12. William Riker, "Federalism," in *Handbook of Political Science*, Vol. 5, eds. Fred I Greenstein and Newton W. Polsby (Reading, PA: Addison-Wesley, 1975), 154.

13. Meyerson, *Liberty's Blueprint,* 195.

14. Ibid., 195-196.

state responsibility for local concerns, they must also provide security against abuse of power by the national government, (2) the national government must be "energetic" or aggressive and enthusiastic enough to accomplish its assigned tasks and, (3) unlike the separation of powers within the three branches of government, the division of powers between national and state governments must be fluid, as it was expected and intended that there would be some overlapping areas.[15]

In the *Federalist*, Madison stated, "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite." It was his view that the federal government would be concerned with commercial and international affairs including the military. He described state responsibilities to "extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state."[16] (It is likely that the term "prosperity of the state" will or has been used to frame arguments in litigation by states against tribes regarding gaming.) Madison in particular, repeatedly emphasized the likeliness of abuse of governmental power if controlled by one entity and thus, his statement that "ambition must be made to counteract ambition" was perceptive and incisive.[17]

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15. Ibid., 198.

16. Bill Bailey, "The Federaist Papers Project, James Madison *vs* Alexander Hamilton." *Federalist* 51 (February 8, 1788): 238-241, accessed June 20, 2013, http://www.thefederalistpapers.org)

17. Bill Bailey, "The Federalist Papers Project: James Madison," *Federalist* 45 (February 8, 1788): 212-215, accesed June 20, 2013, http://wwwthefederalistpapers.org.

Meyerson described the manner in which state power was delineated in the Federalist Papers as in the "negative." Federal responsibilities were clearly delineated while state responsibilities were not. Hamilton felt that the Constitution preserved "certain exclusive and very important portions of sovereign power" for states including "the ordinary administration of criminal and civil justice."[18] However, state authority and responsibilities are not enumerated in the Constitution as they are for the federal government. The Bill of Rights and specifically, the Tenth Amendment attempted to clarify the authority of state power. It reads, "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, the Tenth Amendment and its vagueness have not prevented the Supreme Court from restricting or limiting federal power that intrudes on powers restricted to the states. The exclusive powers of the states have become fewer as Congress and the courts have interpreted the Constitution to allow wider exercise of federal power.[19] States have consistently maintained their authority in areas such as infrastructure, education and law enforcement. They are also the governmental overseers of state and federal funding provided to the cities so they must remain closely aligned or "fluid" with the federal system. Health care also was within the scope of state authority but even that has now expanded to a federal program.

The term sovereignty was interpreted by Mike Myers, a Seneca consultant to the Institute for the Development of Indian Law, as "the unrestricted right of groups of

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18. Bill Bailey, "The Federalist Papers Project: Alexander Hamilton," *Federalist* 9 (February 8, 1788): 48-51, accessed June 20, 2013, http://wwwthefederalistpapers.org.

19. Wilson, *American Government, Institutions and Policies*, 642-643.

people to organize themselves in political, social and cultural patterns that meet their needs." He further emphasized that it is the right of the people to freely define ways in which to use their land, resources and manpower for the common good and that above all, sovereignty is the right of people to exist without external exploitation or interference.[20]

The concept of sovereignty from a state, national and international perspective places emphasis and importance on the common good, self organization and self governance by the sovereign. Myers expanded the definition to include the right of a sovereign to protect itself from outside forces in order to protect the common good. The early concept of sovereignty was constrained by the imperative of survival. Thus, the use of force was a discretionary judgment. Article 2 (4) of the United Nations Charter founded in 1945 clarified that a nation can use force but only for individual or collective "self-defense."[21] Despite sovereign status, no nation is completely independent. Even the United States is dependent upon small oil rich nations. Thus, a semi-dependent relationship with other nations exists for many sovereigns. American sovereignty as a paradigm cannot be compared or contrasted to the paradigm of tribal sovereignty. Unlike Indian tribes, America is part of the international community, can wage war and print currency. Tribal sovereignty in America existed from "time immoral" while the American sovereignty matriculated after international relations between Indian tribes and foreign powers in this county ended. The relationship between the American federal

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20. Wunder, *Native Americans and the Law*, 2.

21. Tom Farer, ed., *Beyond Sovereignty, Collectively Defending Democracy in the Americas*, (Baltimore and London: John Hopkins University Press, 1996), 6.

government and states is one of dual sovereignty. Each has limited authority conferred by the United States Constitution but they are dependent upon and accountable to each other.

The concept of American sovereignty and the dichotomy of national-state power sharing are necessary for understanding federal-tribal relations and state-tribal relations within the federalist system of government. Both states and tribes have a form of parallel sovereign authority. Neither is subordinate to the other and both are constrained by federal authority. Their co-existence within the same boundaries without a formalized relationship creates some tensions and ambiguity.

The American Constitution and specifically the Commerce Clause and the Treaty Clause are the basis for the recognition of tribal sovereignty in this country. The Commerce Clause (Article 1, Section 8, Clause 3) gives Congress the authority to regulate commerce between and among foreign nations, states, and with Indian Tribes.[22] The Treaty Clause (Article 6, Clause 2) describes treaties as the supreme law of the land.[23] It defines existing treaties as valid and acknowledges that treaties should be respected.

Tribal Sovereignty

Tribal sovereignty in America is best defined as the inherent authority of federally recognized Indian nations or tribes to govern themselves within the boundaries of their territory (reservation or reserved lands) located within an American state. Inherent tribal sovereignty is based on Indian occupancy as original natives of the land but not on

22. Constitution of the Unites States of America: Article. 1.

23. Constitution of the United States of America: Article. 6.

ownership. Tribal sovereignty is a political anomaly that is not equivalent to state or federal sovereignty. Tribal sovereignty exercised as independent authority by Indian tribes in the U.S. has undergone various theoretical interpretations by the Supreme Court. One can argue that tribal sovereignty held greater political status during the treaty-making era prior to 1871, as Indian tribes were treated similar to that of foreign nations. Both Indian tribes and foreign powers had the power to negotiate treaty terms.

In the past century, federal Indian policy within the context of tribal sovereignty has undergone significant changes at various periods including policies of assimilation, removal, termination of federal obligation, separation and self-determination. Tribal sovereignty was redefined, limited and redefined over the years depending upon the political economy. These policy periods include: (a) federalism (tribal-federal) and Indian removal (pre-1870s), (b) policy of land allotment (1880s–1930s), (c) Indian reorganization for political and economic purposes (1930s–1950s), (d) termination of federal obligation to tribes and urban relocation (1950s–1960s), and (e) self-determination and political activism (1960s–present). Each political period is summarily described on the following pages.

Period One: Treaty-Making and Federalism (1778 - 1870s)

The tribal-federal relationship began with treaty-making between representatives of the federal government and Indian tribal leaders and continued for one hundred years. One of the first treaties between the federal government and a tribe occurred with the Delaware Indians on September 17, 1778, Treaty with the Delaware Indians. Unlike later treaties, this first treaty did not negotiate any land cessions by the Delaware Indians but

was needed to ensure the safety of Confederate troops passing through Indian land in order to attack British troops.[24] The federal government authorized commissions to negotiate with Indian tribes similar to their treaty-making with foreign nations. Indian sovereignty at that time, held a high political status because treaty-making gave Indian tribes equal negotiating power not only with foreign powers but with federal representatives as well. Indians did not always agree to the terms proposed and Congress did not always approve and ratify negotiated treaties. The Trade and Intercourse Act of 1790 required Congressional approval for all transactions related to Indian lands including treaties. A series of later statutes to this act were passed between 1793 and 1834 to enforce the regulations of the Act and to enforce its authority to punish U.S. citizens that violated the Act in their interactions with Indians.[25]

During the post American Revolutionary era, Indian land was very desirable and hostilities often arose between Indians and American settlers. At that time Indian affairs were treated as domestic military matters rather than as foreign or diplomatic issues. Treaties were utilized to negotiate terms. Foreign powers such as France, Spain and Britain also negotiated treaties with American Indians during this period.
Some of the early treaties between the federal government and Indian tribes were also simultaneously joint treaties with foreign powers. A 1784 Treaty with the Creeks and federal government was also a Treaty with Spain. Many Indian nations had already been

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24. Vine Deloria Jr., *Behind the Trail of Broken Treaties, An Indian Declaration of Independence* (Austin: University of Texas Press, 1985), 118.

25. Ward Churchill and Glenn T. Morris, "Key Indian Laws and Cases," in *The State of Native America, Genocide, Colonization and Resistance,* ed. Annette M. Jaimes (Boston: South End Press, 1992), 13.

recognized as legitimate sovereigns by European countries due in large part to the fact that Indian nations held a balance of power along the western border. Government to government relations existed early between Indian tribes and foreign powers as well as between Indian nations and the Continental Congress. Between 1778 and 1868, the U.S. Senate ratified 367 treaties with Native American governments.[26]

During the American Revolution (1775–1783), many Indian tribes including the Creeks, were allies of the British. This alliance extended into the War of 1812 and during the Creek Wars of 1812–1814. By the end of the American Revolution, Britain no longer had a vested interest and thus, their military support of and treaty-making with Indians decreased. The U.S. Constitution adopted in 1787, specifically outlined the distinct political relationship between the federal government and Indian tribes. Article 1, Section 2, Clause 3 states that "Representatives and direct Taxes shall be apportioned among the several states…excluding Indians not taxed."[27] This language indicates that at that time, Indians were not citizens of the states in which they were located and thus they were viewed as separate entities perhaps similar to foreign powers. Article 1, Section 8 states, "Congress shall have the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes."[28] This language also affirms that Indian tribes were separate entities from states and foreign nations and implies that they had equal political status for purposes of commerce. Implied within the Commerce Clause is

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26. Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Los Angeles: University of California Press, 1994), 1.

27. Constitution of the United States of America: Article 1.

28. Ibid.

the plenary power of Congress which gives Congress complete authority over all Indian affairs. At any time, the federal government has the power to alter tribal status if it chooses.

The Northwest Ordinance that was promulgated in 1789 disavowed any federal intent to exercise the doctrine of discovery or right to conquest with Indians. It also pledged to conduct Indian affairs with good faith. However, it seems that this ordinance was only a strategic response by the government to prevent the threat of war by Shawnee Indian leader, Tecumseh. Shortly thereafter, the doctrine of discovery would redefine and limit Indian sovereignty.[29] The Trade and Intercourse Acts of 1790 that were followed by several other statutes in 1793, 1796, 1799, 1802, and 1834, provided the federal government with the necessary tools and regulations to enforce the Commerce Clause with its citizens in their interactions with Indians. Later statutes passed in 1802 and 1834 provided the necessary legislation for the federal government to punish individuals who violated the Commerce Clause in Indian Territory.[30]

Tribal sovereignty was consistently tested and legally clarified as states began to challenge Indian authority including the state of Georgia. Georgia attempted to assert state authority over the Cherokees residing within the state border. These challenges forced the highest judiciary to clarify the authority of tribal sovereignty versus state sovereignty in three Supreme Court decisions decided by Chief Justice John Marshall between 1823 and 1832. The Marshall trilogy consisted of the following three cases:

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29. Churchill and Morris, *Key Indian Laws and Cases*, 13.

30. Ibid.

Johnson v. McIntosh (1823), *Cherokee National v. Georgia* (1831) and *Worcester v. Georgia* (1832).

In the first case *Johnson v. McIntosh* (1823), the U.S. Supreme Court laid the groundwork for diminishing the sovereign rights of Indians. Marshall ruled that tribes had no power to sell land to anyone without the approval of the federal government even though they were the rightful occupants of the land. The ruling further claimed that because the federal government held title to all Indian lands which had been discovered by Europeans, the rights of Indians to complete sovereignty over their land was limited. In *Cherokee Nation v Georgia* (1831) the Supreme Court ruled that Indians were neither citizens of the United States nor foreign nations: instead, they were "domestic dependent nations" and "whose relationship to the U.S. resembles that of a ward to his guardian."[31] This ruling set a precedent that is still often referenced in legal decisions concerning the political status of Indians. The ruling also explained the trust relationship between Indian tribes and the federal government which requires the U.S. to provide certain benefits and services for Indian tribes and Indian people. Recent interpretations of the phrase "domestic dependent nations" emphasize the "domestic dependent" rather than the "nation" aspect of Marshall's term which diminishes inherent tribal sovereignty. Marshall's reasoning also served to protect Indians against power intrusions by states. One year after Marshall's ruling in Cherokee Nation v. Georgia, he decided in *Worcester v. Georgia* (1832) that the state of Georgia had no authority over persons and their actions within the boundaries of the Cherokee Nation. The decision also clarified that

31. *Cherokee Nation v Georgia* 30 U.S. (5 Peters) 1 (1831).

state laws did not extend into Indian Country. This latter ruling further clarified that Indian tribes were under the protection of the federal government and thus, only Congress, not the states had plenary or overriding power with regard to Indian tribes. However, it also reaffirmed that Congress has the power to change the scope and definition of tribal sovereignty through the exercise of its plenary power.

Since these three decisions, the rules of engagement between the federal government and Indian tribes have continued to change with U.S.-tribal relations swinging like a pendulum depending upon the political mood of the country and the stakes involved. However, the term "domestic dependent nations" still remains as the legal interpretation of Indian political status. It seems that as long as Indians remained poor, yet friendly to whites and relinquished large tracts of their land, their sovereignty continued to entitle them to some level of independence and self-governance but only on their land reserves. Over the past 170 years, the U.S. Supreme Court reaffirmed tribal sovereignty in numerous court decisions often referencing one or more cases of the Marshall Trilogy and especially *Cherokee Nation v Georgia*. However, state governments have historically been hostile to the concept of tribal sovereignty particularly when it pertains to state efforts to control native lands or other resources and assets. Indian gaming, which is described in a later chapter, has been at the forefront of many state-tribal controversies.

During the 1830s when intervention by the U.S. Supreme Court was needed to settle tribal-state disputes, some southern Indian tribes including the majority of Creeks and Cherokees were described as friendly traders with early American settlers. Some

factions of these tribes were not friendly and viewed the encroachment of American settlers as threatening particularly after gold was discovered in Georgia. The state of Georgia attempted to assert its authority over Cherokee land which was dismissed by Marshall's decision in *Cherokee Nation v Georgia* on jurisdictional grounds.

It can be argued that friendly Indian leaders maintained a greater degree of authority than non-friendly or hostile Indians. Friendly Indians also received more favorable treaty terms than Indians that were deemed hostile. This disparity is reflected in some of the early treaty language. While the friendlier tribes such as the Creeks and Cherokees still had to cede large tracts of land, they often retained large portions of their land for hunting and fishing purposes. The Treaty Between the Creek and Georgia, November 1, 1783 states," Whereas a good understanding and union between the inhabitants of the said State, and the Indians aforesaid is reciprocally necessary and convenient, as well on account of a friendly intercourse and trades, as for the purposes of peace humanity."[32] This treaty redrew the boundaries of the tribe's hunting grounds specifying which land still solely belonged to the Creeks and it also relinquished Creek title to some land east of the line granting it to the state. The treaty also dissolved differences between Indians and settlers as well as debts by the Creeks. The emphasis on "perpetual peace, harmony and friendship" is also found in several later treaties including one negotiated three years later with the Creek leaders in Georgia, dated November 3,

32. Vine Deloria Jr. and Raymond J. DeMallie, *Documents of American Indian Diplomacy, Treaties, Agreements and Conventions, 1775-1979*, vol. 1 (Norman: University of Oklahoma Press, 1999), 183.

1786.[33] This 1786 treaty aimed to resolve a crime that had occurred when six Indians murdered six whites, an act that violated the previous treaty terms. The terms of this new treaty included an agreement that the six Indian perpetrators would be put to death but it also reiterated the land boundaries for the Indian hunting grounds. A 1784 Treaty (negotiated May 31–June 1) with the Creek aimed at promoting peace by renouncing the practice of taking scalps as well as renounced making slaves of whites. It also stipulated in Article 8 of the treaty that the Creek would "not admit deserters, nor negro nor mulatto slaves, fugitives" into their establishments.[34] This 1784 treaty further stipulated that the Creeks must facilitate not only the immediate apprehension of fugitive soldiers but also the immediate apprehension of slaves by their masters. Thus, it was strategic for the war department to negotiate treaties with Indian tribes in order to help maintain slavery and loyal soldiers. The manner in which treaties were negotiated required considerable planning and forethought. Congress would authorize a commission to be sent to meet with tribal leaders with goals including obtaining land concessions, establishing peace, settling intertribal quarrels and settling quarrels between Indians and settlers. Prior to the creation of the Interior Department, the commission members were selected by the Secretary of War, who informed the commission of the president's goals and interests.

Thereafter, treaty-negotiating powers were exclusively within the domain of the executive branch and the president could take the initiative to make treaties with Indian nations. Treaty-terms often included some form of financial compensation for the tribe.

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33. Ibid., 88.

34. Ibid., 122-124.

Treaty-terms could also be strongly influenced by the president's political views and particularly during times of war. The plenary power of Congress relative to Indian policy would later be recognized. Thus, racial biases toward Indians by American leaders such as Andrew Jackson, a well know Indian fighter who later became president, were often reflected in treaty terms that took advantage of the Indian Nations particularly by forcing them to cede lands without equal compensation. The State Department was responsible for preserving treaty documents similar to how documents with foreign nations were maintained. When treaty-making ended in 1871, federal jurisdiction was still extended over Indian Nations. While agreements were still being negotiated with some Indian Nations after 1871, tribes were no longer recognized or treated as "independent nations."[35] These later agreements were often more detailed than some of the earlier treaties. One such agreement was made with the Creeks on March 8, 1900, "Agreement with the Creeks" by the Commission to the Five Civilized Tribes. Henry Dawes, a Commission representative at that time, was involved in negotiating this agreement.[36] The Dawes Act, named after Henry Dawes, had been passed thirteen years earlier in 1887. It allotted tracts of nontaxable land to individual Indians enrolled in a tribe at that time. This land allotment policy was a direct affront to the Indian communal way of life.

When treaty-making ended, the legal status of Indian tribes had been diminished from their earlier status as on par with foreign nation to that of "domestic dependent nations." While this phrase and the trilogy of three Supreme Court case rulings were

35. Ibid., 234.

36. Ibid., 423-432.

earlier mentioned, the background on how these cases evolved needs some discussion. In 1831, the Cherokees in Georgia filed a case after the state tried to force them to leave their Georgia homelands in the early 1830s during the period of Indian removal policies. Their argument challenged the authority of the state of Georgia alleging that it did not have authority over the tribe to force their removal from the state. The Cherokee sought a federal injunction against new state laws that deprived Cherokees of their sovereign rights within their land boundaries. The Supreme Court ruled that it could not hear the case on its merits because it had no original jurisdiction over the matter but it was not in favor of the state forcing their removal. The court further clarified that the Cherokees were a "dependent nation" with a relationship to the US like that of a ward to its guardian.[37] This ruling made clear that Indian sovereignty was neither equal to that of foreign nations nor equal to state sovereignty. After the court's ruling in *Cherokee Nation v. Georgia* the Cherokees began to realize that the Supreme Court could not or would not protect their sovereign rights despite their friendliness and their efforts to contradict the prevailing white view of them as "savages." They formed a democratic government structure and adopted other white practices including slavery. However, despite these efforts, they were eventually removed to the west. One year after Justice Marshall's ruling in *Cherokee v. Georgia*, he acknowledged Indian sovereignty as an inherent right in *Worcester v. Georgia* (1832). However, it can be argued that this latter ruling did not intend to legally acknowledge full or supreme Indian sovereignty but simply protected the rights of two white missionaries. This latter case involved the imprisonment of two

37. Jill Norgren, *The Cherokee Cases, The Confrontation of Law and Politics* (New York: McGraw Hill: 1996), 98-111.

white missionaries (Samuel Worcester and Elihu Butler) that lived and worked on the Cherokee reservation in Georgia. When Georgia passed an act requiring all white men to obtain special permits from the state to live on the Cherokee Nation, these two missionaries refused. According to Jill Norgren, if they had applied for permits, their applications would most likely have been refused because they did not support Cherokee removal. They were imprisoned and sentenced to serve four years in jail. The Cherokees appealed the decision to the U.S. Supreme Court in *Worcester v. Georgia*. This time Justice Marshall upheld that the state of Georgia could not impose its laws on the Cherokee Nation's reservation that was located within the borders of the state. The ruling described the political status of Indian tribes at that time as "distinct political communities, having territorial boundaries, within which their authority is exclusive."[38] While the Supreme Court ruled in favor of the missionaries, Georgia refused to acknowledge the Supreme Court decision and would not release the missionaries. This was a major test of state authority versus federal authority. The missionaries were finally released when Governor Lumpkin took office a year later and they left Georgia immediately upon their release. They missionaries were not officially pardoned by the state of Georgia until 161 years later in 1992 by the State Board of Pardons under Governor Zell Miller.[39]

While on the surface, Marshall's decision in *Worcester v Georgia* appeared to be a victory for the Cherokees, his decision was not implemented by the state nor did the

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38. Ibid., 112-130; Stephen Pevar, *The Rights of Indians and Tribes, The Basic ACLU Guide to Indian and Tribal Rights*, 2nd ed. (Carbondale: Southern Illinois University Press, 1992), 79.

39. Norgren, *The Cherokee Cases, The Confrontation of Law and Politics*, 1-2.

federal government assert its authority to make the state comply. This case demonstrated that the early Supreme Court could not force a state to implement its ruling. It is important to note that the judiciary may not have wanted to force the hand of the president, then Andrew Jackson, a well know Indian fighter. This court ruling also came on the heels of South Carolina threatening to leave the union and nullification. Thus, the Supreme Court was perhaps reluctant to challenge states rights at that time. It seems that maintaining the union took precedence over the rights of Indian tribes. *Johnson v. McIntosh* (1823) was the first case in the Marshall trilogy and was decided ten years prior to the two Cherokee cases. It did not involve the Cherokees or other southern tribes. However, this early opinion was also decided by Justice Marshall and involved the important issue of Indian title and property rights. This case challenged the authority of a western Indian tribe to sell land to a private party. Justice Marshall concluded that Indian tribes did not have the right to convey lands to private parties without the consent of the federal government. In this ruling, Marshall upheld the doctrine of discovery and conquest and clarified Indian sovereignty by explaining that after conquest by the Europeans and the establishment of the United States the rights of tribes to complete sovereignty were diminished. He referenced the Norman yoke and the Doctrine of Discovery.[40] The defendants' attorney in this case argued that the Indians were not "civilized' and "roamed" about on the land as a people that were not "cultivated." Robert Williams, a professor of law and American Indian studies, describes the ruling in this

40. *Johnson v McIntosh* 21 U.S. (8 Wheat.) 543 (1823); Norgren, *The Cherokee Cases, The Confrontation of Law and Politics*, 92-96.

case as a "medievally grounded discourse on racism."[41] Daniel Webster represented the plaintiffs who were land speculators representing the interests of an Illinois based company. Webster argued in favor of Indian natural "inherent" rights. This case tested the validity of Indian "inherent" rights but according to Williams, not only did it deny the inherent rights of Indians because they were viewed as "savages" and "uncivilized," this viewpoint became "an integral part of the fabric of United States federal Indian law" and more importantly, it "ensured that future acts of genocide would proceed on a rationalized legal basis."[42]

Vine Deloria Jr., a noted political scientist, historian and former Executive Director of the National Congress of American Indians, critiqued Marshall's legal opinions and offered some interesting insights. Deloria, a member of the Dakota Sioux, postured that while Marshall referenced the Doctrine of Discovery in his early decisions, this doctrine assumes the lands discovered to be vacant. Marshall ruled that discovery of the land by the Europeans gave them "exclusive right" to extinguish land title of occupancy either by purchase or by conquest." Marshall had reduced Indian title to simply as one of occupancy and not ownership and also conferred protection to Indians only "while in peace."[43] Deloria further notes that after making this initial determination in *Johnson v McIntosh,* Justice Marshall then applied or shifted the emphasis from vacant lands to all lands. This shift gave the inhabitants (Indians) only an occupancy title and precluded any

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41. Robert A. Williams, Jr., *The American Indian in Western Legal Thought, The Discourses of Conquest* (New York: Oxford University Press, 1990), 311, 325.

42. Ibid., 317.

43. *Johnson v McIntosh,* (21 U.S. 8 Wheat 543) (1823).

type of valid ownership title.[44] Deloria further argued that given Marshall's definition of Indian tribes as domestic dependent nations in his later opinion in *Cherokee Nation v Georgia*, if the Indians ever wanted to sever their tribal-federal relationships, their lands would be at risk of confiscation by the federal government. Treaties were interpreted by the U.S. as simply real estate contracts.[45] It is important to note that the Supreme Court decision in *Cherokee Nation v Georgia* was not unanimous. There were two justices that agreed with Marshall but two that dissented. Justice Johnson agreed with Marshall's interpretation that the Cherokee Nation was not a foreign state and thus could not initiate a legal action against a state. Justice Johnson compared the Cherokee status to that of the Israelites as "inhabiting the desert without a land they can call their own.[46] It is likely that the two dissenting judges, Thompson and Story, viewed the Cherokees as a foreign nation based on their interpretation of the Constitution. They viewed the Cherokees as weak but independent with sovereign status given that they were self-governed and had independent authority.

Deloria's position was that the federal government viewed Indian treaties not only as real estate agreements but more importantly as documents recording political surrender by the Tribes in return for annuities from the government and reservations on their traditional homelands. Deloria challenges this assumption when referencing the terms of the first treaty between an Indian tribe and the U.S. negotiated in 1778 between the

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44. Deloria Jr., *Behind the Trail of Broken Treaties,* 102, 113.

45. Ibid.

46. Ibid., 114.

Delaware Nation and the Confederacy which was discussed previously. However, it is important to also acknowledge that this first treaty actually invited the Delaware Nation to join the Confederacy and have representation in Congress in exchange for safe passage of their troops. Confederate troops needed to travel through Indian lands in order to attack British troops in southern Canada.[47] In one source written by Deloria, he reports that the majority of Indians of the Five Civilized Tribes (Creek, Cherokee, Choctaw, Chickasaw and Seminole) served on the Confederate side during the Civil War by default. He reports that these tribes first offered to join Union forces but were denied because it was thought that they would barbarically slaughter whites.[48] Due to this rejection by the Union and their regional proximity, these Indian tribes then signed treaties with the Confederates. After the Civil War, they had to agree to enroll their freed slaves as citizens of their tribes. According to Deloria, the ward status of tribes was never established in treaties but merely articulated and interpreted as their political status in the jurisprudence of Supreme Court justices. A treaty was found that referenced Indians as wards. However, it was not a federal treaty. It was The Treaty with the Creek, A Treaty of Friendship and Alliance, dated July 10, 1861 that is contained in the two-volume source co-authored by Vine Deloria Jr. and Raymond J. DeMallie.[49] This treaty reads as follows: "The Congress of the Confederate States of America, having, by An Act for the protection of certain Indian tribes, approved…offered to assume and accept the protection

47. Ibid., 118.

48. Ibid., 131.

49. Deloria Jr. and DeMallie, *Documents of American Indian Diplomacy*, 588-603.

of the several nations and tribes…and to recognize them as their wards, subject to all the rights, privileges and immunities, titles and guarantees with each of said nations and tribes under treaties made with them by the United States of America; and the Creek Nation of Indians having assented thereto upon certain terms and conditions."[50] While it recognized Indians as wards, it also recognized all of the rights conferred to them by prior treaties. It also declares the institution of slavery as legal and existing from time immemorial and described slaves as personal property. A supplemental was added to the treaty to address annuities to be paid and losses suffered by the Creek and Seminole in Florida. This treaty and the supplemental were ratified by Congress on July 10, 1861. The discrepancy regarding the use of the term "ward" may be due to the treaty being negotiated by the Confederacy rather than by the federal government. Deloria may have been referring only to treaties negotiated by the federal government. In the prelude to this same treaty, written by Deloria and DeMallie, they state that only a "portion of the members of the Five Civilized Tribes sympathized with the southern cause at the time of the Civil War – perhaps because they had adopted the southern way of life and held slaves, but more probably because they believed their commercial fortunes lay with the agricultural South."[51] The term "portion" seems to imply that only a minority of the southern tribes were southern sympathizers. These two writers further acknowledge that the western tribes looked for guidance and political leadership from the Five Civilized Tribes and thus, as a result of the southern alliance of tribes with the Confederacy,

50. Ibid., 588.

51. Ibid.

"several western tribes also agreed to support the South in the war."[52] Lastly, Deloria and DeMallie conclude that while the terms contained in such "temporary treaties" with the southern Confederacy were considerably more generous than those offered by the north, they "probably would not have been kept either if the Confederacy had won the war."[53] It can be argued that this particular treaty was not a federal treaty and thus held no real status after the war. There had been earlier treaties negotiated between states and tribes that were deemed valid or at least honored until the federal government replaced territorial governments. There are a number of "miscellaneous" treaties that also fall into this category including those negotiated between states and tribes. One such treaty was made on behalf of the United States and the state of Alabama in Tallapoosa County with the Creeks, dated August 28, 1836. It was signed by marks made by Indian representatives and Thomas S. Jesup, Major General of the Commanding Army of the South. This treaty conveyed Indian lands in Alabama through quit claim.[54] During times of war, treaties with Indians were not only made by federal agents but also by other governmental representatives. It seems that if it resulted in the benefit of the non-Indian party and the disadvantage of Indians, it was deemed valid. One would need to look at all treaties and their terms to determine a clear understanding of this issue, given that even early treaties that were deemed valid were sometimes negotiated by various governmental representatives rather than one consistent agent or agency. Deloria strongly

52. Ibid., 587,

53. Ibid.

54. Vine Deloria Jr. and Raymond J. DeMallie, *Documents of American Indian Diplomacy, Treaties, Agreements and Conventions, 1775-1979*, vol. 2 (Norman: University of Oklahoma Press, 1999), 1491-1492.

argues that Indian sovereignty can best be protected by a return to treaty-making with the American government and argued that it is the only way to restore Indian dignity.[55] A great deal of discussion focused on the treaty-making era because Indian sovereignty was strongest at that time. Tribes could wage war and they had their own form of currency including wampum and the fur trade. They also had a much larger land base at that time. A return to treaty-making would first require action by Congress to redefine Indian nations as quasi nations or nations within a nation under the protection of the U.S. and tribes would need a form of international status. The trust relationship between tribes and the federal government would need to change from an active to a passive trust relationship.

Another key component of Deloria's idealistic but well thought out argument was his call for a reduction in federal bureaucracy within the Department of the Interior which he argued would reduce spending, release some liability of the federal government and place it on tribal governments. Regional treaties could replace some legislation to define or clarify relationships between tribes and states. Vine Deloria Jr. authored several books prior to his death on November 13, 2005, at age 72. His contributions including political ideas are well respected among political scientists and particularly within the Indian community.

The trust relationship between Indians tribes and the federal government is an important aspect of tribal sovereignty. In exchange for their land, the federal government promised to protect the safety of Indians and guaranteed permanent reservation lands.

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55. Deloria Jr., *Behind the Trail of Broken Treaties*, (Austin: University of Texas Press, 1985), 249-263.

The Supreme Court has held that such promises created a "trust relationship" and a "duty of protection" by the federal government.[56] Thus, the federal government has a duty through its trust responsibility not only to protect the safety of Indians but also to advance their interests through self-determination. The federal government is the fiduciary of Indian resources.[57] Indian resources include their land reservations and water rights as well as hunting and fishing rights. Land in trust refers to land set aside or designated exclusively for use by the tribe but owned by the United States. It can only be used, leased, mortgaged, sold or developed with federal consent. State taxes and zoning laws do not apply to Indian trust lands. Through increased economic resources acquired from gaming, some tribes including the Poarch Band Creek have purchased additional land.

In 1871, the sovereign status of Indian tribes was diminished when Congress eliminated treaty-making with Indian tribes. The act expressly stated that "Hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[58] The end of treaty-making was the beginning of a new political era for tribes and reflected a paradigm shift in the tribal-federal relationship. After 1871, agreements continued to be negotiated with some tribes but the negotiating power of the tribes had greatly diminished. Indian removal during the 1830s had laid the ground work for tribes to be contained and controlled and thus the previous threat no longer existed.

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56. Pevar, *The Rights of Indian Tribes*, 26-33.

57. Ibid.

58. James M. Johnson, "Indian Sovereign Immunity Should be Restricted," in *Native American Rights, Current Controversies*, ed. Bruno Leone (San Diego: Greenhaven Press, 1998), 171.

Most southern tribes had been completed relocated to the West where they were apportioned specific tracts of land while some other tribes were dissolved through the removal process. Many died along the way and some died after arriving in Oklahoma. It is a painful period of Indian history. Some tribal members remained in the south and became citizens of the state particularly those that had intermarried with whites. Small bands of Indians avoided removal west by becoming obscure including a band of Cherokees that hid in the North Carolina mountains and the Poarch Band Creeks, descendants of the Oklahoma Creeks, that remained obscure in poor rural Alabama areas after Indian removal and intermarried with whites. There was also intermarriage between Indians and blacks (freemen) and escaped slaves. Some Indians sought to escape removal and blacks sought to escape slavery. It can be argued that they shared a joint fate. Mulattos and Indians shared similar skin color and would have been difficult to differentiate. However, this history is not well documented. In addition to the quest for land and the discovery of gold in the south, the maintenance of southern slavery may have also played a role or prompted the removal of southern Indian tribes during the 1830s. Holm notes from his research that "indigenous nations such as the Creeks and Seminoles made it a standing practice, until their forced removals during the 1830s, to take in and adopt as their own the steady stream of African slaves escaping from European plantations."[59]

In order for sovereignty of an Indian tribe to be recognized by the U.S. government, the tribe must first gain federal recognition. Federal recognition places their

59. Tom Holm, "Patriots and Pawns," in *State of Native America: Genocide, Colonization & Resistance*, ed. M. Annette Jaimes (Boston: Smith End Press, 1992), 356.

reserve land in trust status and gives them other protections and federal funding. The Poarch Band of Creek Indians applied for federal recognition on May 15, 1975 and continued to submit official documents for five years later. The Poarch were not recognized as a tribe until almost ten years later on August 11, 1984. Their ability to demonstrate cohesiveness in order to gain federal recognition was largely attributed to records maintained by Saint Ana's Episcopal Church. The Poarch Creeks are the only federally recognized Indian tribe in Alabama.[60] The process of Poarch gaining federal recognition is discussed in greater detail in the next chapter.

In 1789 Congress placed the responsibility for Indian Affairs under the War Department and by 1806 had appointed a Superintendent of Indian Trade within the War Department responsible for the factory fur trading network with Indians. In 1824 the Bureau of Indian Affairs (BIA) which was first called the Office of Indian Affairs was created by Secretary of War John Calhoun. The position of Commissioner of Indian Affairs was later established in 1832. A Native American was appointed to this position in 1869, Eli Samuel Parker. In 1849, the BIA became a separate division under the Assistant Secretary of Indian Affairs in the Department of the Interior. The primary responsibility for the BIA at that time was the education of Indian children and the assimilation of Indians. Indian children were prohibited from using their indigenous languages as well as their religious and cultural practices. They were removed from their homes and sent to Indian schools and some Indians were beaten for practicing cultural traditions including praying.

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60. Vickery and Travis, *The Rise of the Poarch Band of Creek Indians* (Charleston: Upword Press, 2009), 186.

In 2014, the BIA was serving 566 federally recognized tribes through four offices: (1) The Office of Indian Services (OIS) which handles the administration and management of land held in trust by the United States as well as the general assistance fund, disaster relief, Indian child welfare, tribal government, Indian Self-Determination and the Indian Reservation Roads Program, (2) The Office of Justice Services (OJS) that directly funds law enforcement BIA police agencies and tribal police agencies, tribal courts, and detention centers on Indian lands, (3) The Office of Trust Services (OTS) that works with tribes and individual Indians to help them manage their trust lands, assets and resources, and (4) The Office of Field Operations, (OFO) that oversees 12 regional offices and 83 agencies which carry out the mission of the Bureau at the tribal level. The regional office for the Poarch Band of Creek Indians would be the Eastern office, as a southeastern office does not exist.

This era of early federalism occurred concurrently with the Indian Removal Act of 1830 which resulted in the forced removal of five southern Indian Nations (Cherokees, Creeks, Choctaws, Chickasaws and Seminole) as well as other Indian Nations to Oklahoma that would not voluntarily go. The Act (ch. 148. 4 Stat. 411) was passed on May 28, 1830 and provided for the "exchange of lands with any of the Indians residing in any of the states and territories, and for their removal west of the river Mississippi."[61] Indian removal from the southeast was needed to open up the land for farming and agricultural use by whites with their black slaves. It is important to note that the Indian removal era began forty years before treaty-making ended but earlier treaties did not prevent Indian removal nor did the Cherokees legal appeal to the Supreme Court in

61. Ibid., 14.

Cherokee Nation v Georgia. While the Supreme Court ruled against the state's right to force Cherokee removal it also noted that it did not have the authority to protect them from removal. The executive department held by President Andrew Jackson, a former Indian fighter refused to send federal troops to implement the court's decision. Thus, tribal sovereignty in terms of land occupancy rights had been greatly diminished by the time of Indian removal. After Indian removal and on the heels of the Reconstruction period, treating making ended in 1871, through a rider by Congress. It was attached to the annual Indian Appropriations Act, which ironically purported to guarantee the terms and obligations of prior treaties.

In addition to Vine Deloria Jr., there are other respected Indian leaders that contributed to the narrative on tribal sovereignty. There seems to be consensus among them that tribal sovereignty was strongest during treaty-making. However, it was clear from the Indian removal process that treaty terms were blatantly broken, disregarded and/or simply not respected. Ward Churchill, a Creek/Cherokee and Glenn Morris, a Shawnee, indicate that despite the "suspension" of treaty-making, the U.S. continued to send treaty commissions to negotiate with Indians until at least 1905.[62] It is interesting that Churchill and Morris use the term "suspension" rather than "ending" as they too may be hopeful of treaty-making returning in some form. Churchill and Morris are co-directors for the Colorado Chapter of the American Indian Movement. Both are long term political activists for American Indian rights.

62. Ibid., 14.

Period Two: Land Allotments and Western Expansion (1880s – 1930s)

The allotment period began not long after Indian removal had occurred and treaty-making ended. Beginning in the 1880s, there was pressure on Congress to divide up more Indian land for western expansion and white settlement including for immigrants. Railroad development was also underway particularly in the western part of the country including in Oklahoma which had been designated as Indian Territory. The expansion of the railroads facilitated the shipment of agricultural goods to the east and west coasts. Oklahoma or "Indian Country" was surrounded by whites. Missionaries had been ineffective in breaking up Indian religious traditions and encouraging assimilation. The General Allotment Act also known as the Dawes Act or Dawes Severalty Act was passed in 1887. It divided up reservation lands into parcels of land for individual tribal members and especially tribes that were relocated to Oklahoma territory. It also granted surplus lands to non-Indian homesteaders. Indians were compelled to accept these parcels in order to have any land at all. The allotment process was guided by a racist coded policy that identified Indians by blood quantum and forced some of them to live among non-Indians. It also reconstructed their cultural traditions of shared land use into individual properties. It is interesting to note that full-blood Indians were treated more disparately than mixed-blood Indians in the allotment process. Full-bloods were deeded with small trust patents for their land over which the government had full control for 25 years while the patents of mixed-bloods were larger and fee simple over which they exercised immediate control. However, they had to accept U.S. citizenship. Thus, these disparities

in land size and land control encouraged intermarriage between Indians and whites resulting in a greater number of mixed-blood Indians. It also fostered deep divisions among tribal members.[63] The Burke Act that was later passed in 1906 amended the Allotment Act by reducing the 25 year land trust period for full-blood Indians to a term that ended when an Indian was deemed capable of handling his own affairs. Between the years 1887-1934, the Dawes or Allotment Act resulted in the loss of approximately two thirds (100 million acres) of all Indian-reserved land.[64] The Bureau of Indian Affairs was also leasing out a great deal of Indian land that had been previously allotted to "incompetent" Indians.[65]

The Curtis Act that passed in 1898 allotted tribal lands to the Five Civilized Tribes (that included the Creeks) in Oklahoma and terminated their tribal governments, which resulting in further erosion of tribal sovereignty. Tribal chiefs and other principal leaders were then appointed by the president to oversee the final distribution of tribal property. Most traditional Cherokee and Creeks resisted this process.[66]

Just prior to the Allotment Act, the Major Crimes Act had been passed two years earlier in 1885 and granted federal jurisdiction on Indian lands for crimes committed by Indians. The Major Crimes Act gave the United States jurisdiction over Indian lands within Indian Territory for the first time. Prior to this act, as part of their sovereignty,

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63. Lenore A Stiffarm and Phil Lane Jr., "The Demography of Native North America, A Question of American Indian Survival" in *The State of Native America, Genocide, Colonization and Resistance,* ed. Annette M. Jaimes (Boston: Smith End Press, 1992), 41.

64. Churchill and Morris, "Key Indian Laws and Cases," 14.

65. Deloria Jr., *Behind the Trail of Broken Treaties*, 190.

66. Ibid., 11.

only Indians exercised control over crimes within their territory. Thus, during this era, tribal authority or sovereignty was greatly diminished.

Every Supreme Court ruling thereafter upheld the legality of the Major Crimes Act. This is noted in *U.S. v. Kagama* (1886), the first case that tested the Major Crimes Act. It confirmed the plenary power of Congress over all Indian affairs including within Indian Territory. *Talton v Mayes* (1896) also held that tribal sovereign powers were inherent and not constrained by the provisions of the Constitution but were subject to Congress's general authority over tribes. Thus Indian sovereignty continued to be usurped and diminished and it remained under federal authority. In *Lone Wolf v Hitchcock* (1903), it was decided that through its plenary power, Congress had power to unilaterally abrogate tribal treaty rights. *Winters v U.S.* (1908) recognized the implied reserved rights of Indians as only allowing enough water to fulfill the needs and purposes of their reservations. The trust responsibility acknowledged in the Snyder Act of 1921 required the Bureau of Indian Affairs (BIA) under the supervision of the Secretary of the Interior to "direct, supervise and expend such moneys as Congress may from time to time appropriate, for the benefit, care and assistance of Indians throughout the United States."[67] Lastly, the Indian Citizenship Act of 1924 conferred U.S. citizenship to reservation and non-reservation Indians. Federal citizenship status would later be referenced by the Supreme Court to deny the sovereign status of Indians. The Indian Citizenship Act in 1924 conferred citizenship on all Indians that may have been missed by the General Allotment Act or Indian Removal Act similar to a cleanup measure. It

67. National Congress of American Indians, "Trust Relationship," Introduction to Indian Nations in the Unites States, Washington, DC, accessed August 20, 2012, http://wwwncai.org.

unilaterally conferred citizenship on all non-citizen Indians born in any territory of the U.S. including those on Indian reservations. It is interesting to note that in 1992, there were still two Indian tribes, the Hopi and the Onondaga that refused to acknowledge the Citizenship Act as binding. They continue to exercise their tribal sovereignty including the issuance of their own passports.[68] The Hopis have reserve land in Arizona. The Onondaga are part of the Six-Nation Iroquois Confederacy in New York.

Period Three: Indian Reorganization (1930s – 1950s)

This twenty-year era of Indian reorganization began with Herbert Hoover as President for the first three years but Indian affairs were more greatly impacted by the later presidency of Franklin D. Roosevelt for the next twelve years between 1933 and 1945. The reorganization era ended with Harry Truman in office. By 1932, there was tremendous national pressure for change in Indian policy. The Indian Reorganization Act (IRA) also known as the Wheeler-Howard Act was passed in 1934 under President Roosevelt and largely influenced by his Commissioner of Indian Affairs, John Collier. It is important to note that this era occurred during the Great Depression and the onset of World War II. Foreign issues rather than domestic matters were the priority at that time.

Through the IRA, Indian tribes were encouraged to organize themselves for political and economic purposes for the first time in fifty years. Many tribes developed their own constitutions and governments including tribal courts. However, the older traditional Indians or full-bloods were skeptical of IRA. The Act was viewed by some Indians as supplanting traditional forms of indigenous government, as it supported a

68. Ward and Morris, *Key Indian Laws and Cases,* 15.

tribal council structure similar to the American corporate model. Implementing this model created divisiveness between traditional Indians and progressive Indians. However, many Indian tribes, beginning with those in the northern plains, established this form of government which continues to be in place today for sovereign Indian nations. The final version of the IRA was an adapted version of an earlier bill developed by John Collier. Congress basically gutted Collier's bill and even after the passage of IRA, they were reluctant to support it through federal funding. Collier viewed the IRA as restoring sovereignty while Indian traditionalists did not. He was a former social worker from New York that had spend some time immersed in the way of life of the Pueblo and Navajo Indians and he felt a sense of duty to develop a plan that would respect tribal sovereignty. His original bill included the following principles: self-government for Indian Nations implemented by a tribal constitution with bylaws, exemption from state and federal taxes, the promotion of tribal enterprises and education that acknowledged Indian culture and tradition. It also prohibited future land allotments and restored tribal land ownership of surplus lands with a $2 million fund for Indian land purchases and created land reserves for landless Indians.

Collier's proposed bill denied land inheritance to individual Indians with land reverting back to tribal title, creating a hiring preference for Indians at the BIA and lastly, it recommended a court of tribal affairs with seven justices appointed by the court that would serve a 10-year period.[69] When the final bill was passed by Congress in 1934, it eliminated the court of tribal affairs, dropped the ban on inheritance and added a requirement for tribes to vote within one year whether to accept the legislation and

69. Deloria Jr., *Behind the Trail of Broken Treaties*, 194-197.

organize a tribal government. In further stipulated that those refusing to vote would be counted as affirmative support. Collier's bill led to the meeting of the first Indian Congress which took place in South Dakota on March 2, 1934. It was attended by northern plains Indians who reluctantly supported the bill.[70] Congress continued to restrict funding for the Act and some members tried to repeal it even until the 1950s. They also challenged the legitimacy of the tribal governments. In 1934, the federal government had ended the practice of forcing Indians to accept individual land allotments. Communal sharing of land had been the traditional practice of Indians.

As mentioned previously, the IRA was not welcomed nor trusted by all Indians. It was described by Churchill and Morris as supplanting "traditional forms of indigenous governance" and "rigged" by John Collier.[71] However, Deloria disagreed with Churchill and Morris and argues that this contention is not accurate. Deloria describes IRA as the most misunderstood legislation subverted by bureaucracy and most subject to criticism by many of the Congresses. In support of his position, Deloria stated, "The present contention of Indian activists and others that the Indian Reorganization Act was a step away from the traditional right of Indians to govern themselves is inaccurate if they mean that the scope of powers was reduced by the adoption of the act."[72] Deloria viewed the Act as a major change in federal policy as it confirmed the inherent and aboriginal right of self government to Indian tribes.[73] Deloria later drew parallels to Collier's initial bill

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70. Ibid., 200-201.

71. Churchill and Morris, "Key Indian Laws and Cases," 13.

72. Deloria Jr., *Behind the Trail of Broken Treaties*, 204.

73. Ibid., 205.

with the twenty points that were later outlined almost forty years later by Indian leaders that led a caravan of Indians to Washington, DC during the Trail of Broken Treaties, November 3–9 in 1972. Included in the twenty points was a request for the restoration of treaty-making with Indian tribes. The twenty points were rejected by the White House which proposed some alternatives but they were not acceptable to Indian leaders. The return to treaty-making was rejected largely on the basis that the Indian Citizenship Act of 1924 had made all Indians U.S. citizens. It is likely that the twenty points remained alive for some Indian leaders including with Vine Deloria Jr., until his passing on November 13, 2005. It is also highly likely that the rejection of the IRA by some Indians was based on a general distrust of the federal government given the harsh realities that Indian tribes had undergone during the previous one hundred years including forced removal from their original homelands and land allotments that significantly changed their communal way of life. Additionally, according to Deloria, some Indians and particularly traditionalists romanticized a return to the way that things originally were and could not accept the fact that the world had changed.[74] In 1912, about 10 percent of the Cherokees had still refused their land allotments. In 1940, the Supreme Court extended the common law sovereign immunity doctrine (immune from suit) to Indian tribes, although in scope it is not equal to that of other sovereigns and in 1946, the Indian Claims Commission Act was passed as an offer of monetary retribution for the Indian lands illegally taken by the U.S. By the end of this era, tribes were likely hopeful that the nation

74. Ibid., 206.

sought to restore their sovereignty and tribal authority. However, that was not the case, as the era that followed further eroded tribal sovereignty.

Period Four: Termination, Displacement and Urban Relocation (1950s – 1960)

This era is most notably remembered as a period when Congress attempted to terminate its federal obligations to some Indian tribes as well as to eliminate any vestiges of their tribal authority. When Harry Truman was leaving office in 1952 and Dwight Eisenhower became president in 1953, Congress began its plans to end tribal wardship status and sever federal obligations to the tribes. The Bureau of Indian Affairs submitted a list to Congress of Indian Nations that it felt were ready to undergo complete termination from federal services which would end the federal trust responsibility. It was presented or cloaked as an effort to liberate Indian Nations from federal domination but it actually was a way to terminate tribes and their claims to reservation land.[75] A similar plan had been introduced within the Oklahoma Senate nine years previously in May 1943 by Senator Elmer Davis calling for the unilateral abrogation of all Indian treaties, withdrawal of federal recognition of tribes and the dissolution of the BIA. Other legislators including New Mexico Senator, Dennis Chavez and Idaho Senator, Burton Wheeler supported Davis' plan. Chavez and Wheeler had been co-sponsors of the earlier Indian Reorganization Act.[76] Plans to terminate the federal-tribal relationship came in the form of House Concurrent Resolution 108 that was passed in 1953 as the Termination Act. This Act articulated a federal policy to unilaterally dissolve specific Indian Nations

75. Rebecca L. Robbins, "Self-Determination and Subordination, The Past, Present and Future of American Indian Governance" in *The State of Native America, Genocide, Colonization and Resistance,* ed. M. Annette Jaimes (Boston: South End Press, 1992), 98.

76. Ibid., 98.

and suspend or terminate federal services to some tribes in the west. The tribes affected included the Menominee, Klamath and Western Oregon Tribes. It is important to note that the Menominee and Klamath had extensive timber resources on their large reservations. In total, 109 tribes or elements of tribes were terminated by congressional action between 1953-1958, only a few of which were restored during the 1970s.[77] When Congress passed Public Law 280 in 1954, it placed some non-terminated reservations under state jurisdiction with regard to criminal matters. However, when Congress tried to later terminate its federal relationship with all tribes between 1954 and 1961, Presidents Johnson and Nixon continued to endorse the principals of tribal sovereignty and tribal government.[78] Termination efforts occurred just prior to the onset of the Black Civil Rights Movement which had gained national attention and later led to the passage of Civil Rights legislation. Domestic race relations were at the forefront of politics during the 1960's including with Indian tribes. A Black Power Movement and Red Power Movement were occurring simultaneously by the 1960s which is discussed in greater detail in Period Five that follows.

PL 280 passed in 1954, had preempted tribal law without the consent of tribal governments. This law clarified tribal-state jurisdictional issues at it related to crime when it permitted six states to enforce their criminal laws in Indian country when crimes were committed by or against Indians. However, it did not grant states the power to enforce their civil or regulatory laws in Indian country. While some tribes as well as

77. Churchill and Morris, "Key Indian Laws and Cases," 15.

78. Deloria Jr., *Behind the Trail of Broken Treaties*, 205; Robbins, "Self-Determination and Subordination," 98-99.

members of Congress initially viewed PL 280 as a federal response to tribes' inability to handle crimes, some states began to assert their authority in a manner viewed by Indian tribes as a blatant invasion of tribal sovereignty.[79]

Senator Sam Ervin, a North Carolina Democrat argued that that by giving states this level of control over tribal lands, it would "have the tendency to prevent the desirable objective of having the tribe develop its capacity for self-government."[80] The six states affected by PL 280 were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. It is important to note that California has the most Indian casinos in the country. A California Indian tribe, the Cabazon would later become the catalyst for Indian gaming expansion due to the court's decision in *California v Cabazon Band of Mission Indians* (1987). The Supreme Court ruled that the state of California could not regulate a tribal bingo operation because state regulation would disturb a federal plan for tribal self-sufficiency.[81] This case identified the need for federal regulations and ultimately led to the passage of IGRA a year later in 1988.

During the termination era, the Urban Relocation Program or Relocation Act of 1956 was implemented to move Indian reservation residents to selected urban centers. Once again, Indians were being displaced breaking up any level of cohesiveness that may have existed. While the program offered funding for job training centers and to facilitate relocation to urban areas, it denied funding for such programs on the reservations. Thus, it was simply another federal strategy that resulted in eliminating the reservations and

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79. Wunder, *Native Americans and the Law*, 271-276.

80. Ibid., 272.

81. Pevar, *The Rights of Indians and Tribes,* 99.

thus reservation land ownership by Indians. Indians who availed themselves of these new job training opportunities were usually required to sign agreements confirming that they would not return to the reservation. In two years alone between 1957 and 1959, about 35,000 Indians were relocated from their reservation lands to Boston, Chicago, Denver, Seattle, Los Angeles, San Francisco, Phoenix and Minneapolis. By 1980, a mass exodus had occurred and an Indian Diaspora had resulted with more than half of the 1.6 million Indian population scattered and residing in urban cities across the country.[82] Several mid-western tribes mounted sustained resistance to termination and relocation including lobbying and standoff efforts. They employed attorneys and organized through their own agencies such as the Association of American Indian Affairs and the National Congress of American Indians. As a result, they were able to pressure the Eisenhower Administration to publicly assert that it would not support any further legislation aimed at terminating tribes without their consent.[83] Some Indian tribes that had been terminated were restored such as the Menominee. Indian relocation to urban areas would continue in "full force" until the BIA closed the urban employment centers in 1980.[84] An important and noted result was that not only had termination and relocation resulted in the destruction of tribal governments and Indian sovereignty, but most remaining tribal governments were reluctant and unwilling to challenge federal authority. A key court case decision was also decided during this era that further eroded Indian rights and tribal sovereignty. In *Tee-Hit Ton v U.S.* (1955), the Supreme Court used the same rationale

82. Churchill and Morris, "Key Indian Laws and Cases," 16.

83. Robbins, "Self-Determination and Subordination," 99-100.

84. Ibid., 100.

that had been used in *Johnson v McIntosh* (1823) regarding Indian title. It ruled that the Tee-Hit Ton Band of Indians did not have legal title to 350,000 acres of territory despite the fact that they had always occupied the land since "time immemorial." Since there had not been any treaties with this tribe with the federal government recognizing their land, the court ruled that therefore they were not entitled to the land and that they were also not entitled to the resources on the land. Thus, extinguished Indian title did not mean or trigger legal obligation to make compensation. This case was viewed as effectively gutting or eliminating whatever was left of Indian inherent rights in U.S. jurisprudence.[85] By the end of this era, the political rights and sovereignty of Indian Nations had been subordinated to federal and state governments.

Period Five: Political Activism and Supreme Court Jurisprudence (1960s – Present)

This last era began with civil unrest and was the beginning of a pivotal period in American political history and Indian sovereignty. It represented a response to federal policies by black and Indian activism. President John F. Kennedy took office in 1961 and was assassinated in 1963 three months after Dr. Reverend Martin Luther King Jr. delivered his "I have a dream" speech in Washington, DC to more than 200, 000 people. Later that same year, civil rights activist Medgar Evers was also assassinated. In 1967, the first black Supreme Court Justice, Thurgood Marshall, was appointed by President Lyndon B. Johnson. A year later in 1968, Martin Luther King Jr. and Robert F. Kennedy were assassinated which triggered even greater unrest in urban centers. Subsequent to the Civil Rights Act being passed in 1964, four years later the Indian Civil Rights Act was

85. Churchill and Morris, "Key Indian Laws and Cases," 19.

passed in 1968. The Indian Civil Rights Act made tribal governments a functional part of the federal system. It did not extend any new rights to Indians but only provided relief in federal court against tribal government actions against Indians. The Act was later amended in 1986 to give tribal courts greater power for penalization. U.S. involvement in the Vietnam War also began during this era in 1965 and continued until 1973. In addition to anti-war sentiment, black activism and red activism was also on the rise. The American Indian Movement (AIM) was established in 1968 in Minneapolis by two young Indian political radicals, George Mitchell and Dennis Banks, both of whom were Chippewa Indians. Other radicals joined the movement leadership including Russell Means (Oglala Sioux) and Clyde and Vernon Bellecourt who were also Chippewa. They joined other Indians in the infamous occupation of Alcatraz Island and the battle and standoff at Wounded Knee. This era was marked by a "reaffirmation of Red Power."[86] The FBI used overt and covert actions, including a Counterintelligence Program (COINTELPRO), to suppress uprisings. Leonard Peltier (a Lakota Sioux) from the Pine Ridge Reservation was imprisoned during this period and charged with killing two FBI agents. He maintains his innocence but Peltier remains imprisoned today.

During the 1960s, the BIA created a great deal of controversy in its handling of Indian Affairs and particularly due to its support of controversial tribal leaders. Just as the federal government agreed to concessions and programs for blacks to quiet protests, it took the same strategy with Indians. By 1973, "all attempts at tribal termination officially

86. Lee Irwin, "Freedom, Law and Prophecy," in *American Indians and U.S. Politics*, ed. John M. Meyer (Westport, CT: Praeger, 2002), 83.

ended,"[87] The next important federal legislation to pass during this era that impacted or restricted Indian sovereignty was the Indian Self-Determination and Education Assistance Act in 1975 followed by the Indian Child Welfare Act of 1978 and the American Indian Religious Freedom Act of 1978. The Indian Self-Determination Act was inappropriately named, as it did not construe or promote self-determination for Indians in terms of their social, economic or political status. Instead, it maintained the federal preeminent authority over Indian affairs and simply allowed more Indians to be employed in the federal programs designed to assimilate them. The Indian Child Welfare Act renounced the century-old assimilation policy of the federal government that had forced the attendance of Indian children in compulsory boarding schools run by non-Indians. It also created for the first time, procedures for the adoption and foster care of Indian children. The American Indian Religious Freedom Act reconfirmed the rights of Indians that were already guaranteed to them as U.S. citizens in the Free Exercise Clause of the First Amendment of the U.S. Constitution. The Act was viewed by Indians as simply a gesture toward restoring their religious rights. Ward and Morris argued that since its passage, there have been at least ten cases in the 1980s and 1990s that denied the practice of their indigenous spiritual or religious rights.[88]

Between 1973 and 2004, there were at least seventeen Supreme Court decisions that redefined the limits of tribal sovereignty. Some of these decisions had a direct impact on tribal sovereignty and some had an indirect impact on tribal gaming. In *McClanahan v Arizona State Tax Commission* (1973) the court ruled that states could not impose income

87. Ibid., 84.

88. Ward and Morris, "Key Indian Laws and Cases," 17.

tax on residents of Indian reservations. In *Morton v Mancari* (1974) the court ruled that having a federal "Indian preference" system within the Indian service creates political, not racial classifications that are constitutional, if rationally related to federal obligations to recognized tribes and their members.[89] The year 1978 was a "watershed year" in Indian law. The court retreated from the position that Indian tribes were sovereigns.[90] This change is reflected in the opinions written by Associate Justice William Rehnquist in three landmark cases that year: *Oliphant v Suquamish Indian Tribe, United States v Wheeler* and *Santa Clara Pueblo v Martinez*. The rulings in these three cases created a legal atmosphere for fundamentally changing and reducing the nature and scope of tribal sovereignty. In Oliphant the court ruled that Indian tribes did not have inherent sovereign authority to exercise criminal jurisdiction over non-Indians. In Wheeler the court upheld that an Indian defendant could be prosecuted by both the Indian tribe and the federal government for the same crime. And in Santa Clara Pueblo, the court denied the rights of Indians seeking federal resolution to protect their rights under the Indian Civil Rights Act of 1968. These rulings may have been punitive responses given the timing of the rulings and ongoing political activism by Indians including the 1972 March on Washington or "Trail of Broken Treaties."[91] In contrast to these legal setbacks by the judiciary, it can be argued that the other two branches of the federal government were less punitive to the tribes during this era. Congress passed the Indian Child Welfare Act and the American Religious Freedom Act in 1978. These Acts were not far-reaching as previously noted

89. Bruce N. Duthu, *American Indians and the Law*, (New York: The Penguin Group, 2008), xvii.

90. Ibid., 16-34.

91. Ibid., 16.

and only served as an attempt to correct previous wrongs. The executive branch through the Department of the Interior issued new regulations to facilitate the process by which non-federally recognized tribes could gain federal recognition. These latter regulations were significantly beneficial for Indian Nations and have been well utilized by several Indian tribes to gain federal recognition, reservation status for a land base and to eventually offer gaming on their reservation lands. Other court cases decided during this era that clarified Indian sovereignty in terms of federal-tribal relationships and state-tribal relationships include *U.S. v Sioux Nation* (1980) which found that the taking of recognized title is compensable under the Fifth Amendment. In *Montana v U.S.* (1981) the court ruled that inherent tribal sovereignty cannot support the exercise of civil jurisdiction over nonmembers on reservation lands except in limited circumstances. The ruling stated, "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation."[92] This language makes it clear that tribal sovereignty was limited expressly for the purpose of tribal self-government and did not extend to or control external relationships unless consensual. A year later in *Merrion v Jicarillo Apache Tribe* (1982) the court upheld tribal power to tax non-Indian corporations that operated on reservation trust lands as well as lands owned by non-Indians held in fee simple. Fee simple lands are lands owned by non-Indians that are located on reservation trust lands.

The importance of *California v Cabazon Band of Mission Indians* (1987) is frequently referenced in this study, given its relevance to and influence on the passage of

92. Ibid., 36-37.

the Indian Gaming Regulatory Act (IGRA) the following year and subsequent gaming expansion. In this case, the court ruled that the state of California did not have the authority to regulate tribal gaming (bingo) activities since these activities did not violate state policy. The next case involved First Amendment rights. *In Lyng v Northwest Indian Cemetery Protective Association* (1988) the court ruled that Indian tribes had no First Amendment religious freedom rights that would stop federal land management practices on public lands that contained sacred tribal spaces.

However, two years later in 1990, the Native American Graves Protection and Repatriation Act was passed to help protect Indian graves and sacred places. In *Mississippi Band of Choctaw Indians v Holyfield* (1989) the court ruled that the tribe has exclusive jurisdiction in adoption matters concerning Indian children born to Indian parents that reside on reservation land even if the child was not born on the reservation. In *Employment Division v Smith* (1990) the court ruled that the state cannot deny unemployment benefits to tribal members fired for using peyote, a cultural tradition. In *Duro v Reina* (1990) the court limited a tribe's authority over non-member Indians when it ruled that tribes do not have inherent sovereign power to prosecute non-member Indians. In *Nevada v Hicks* (2001) the court ruling exempted state officials from being prosecuted by tribes when it determined that tribal inherent sovereign authority did not extend to a state official that was alleged to have committed unlawful acts while on reservation trust lands. In *Atkinson Trading Company v Shirley* (2001) the court ruled that tribal taxing authority did not apply to non-Indians operating on reservation fee lands. This ruling appears to reverse the earlier ruling in *Merrion v Jicarilla Apache Tribe*

(1982). This latter ruling is causing some tribes to reconsider granting tribal membership to non-Indians on reservation fee lands, as it would automatically give the tribe authority over them. Lastly, in *U.S. v Lara* (2004) the court ruled that Congress may relax federal restrictions on inherent tribal sovereignty based on its plenary power rooted in the Commerce Clause of the Constitution. The ruling stated that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians" and as such "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."[93] This ruling overrides or reverses the earlier ruling in *Duro v Reina* (1990). Jurisdictional issues and especially criminal jurisdiction over non-Indians in Indian country has been a controversial issue for a very long time and will likely continue to be. Indian tribes feel that any crime whether civil or criminal that happens on their land should fall under their jurisdiction but this is not the case. Congress had passed the first crime legislation for Indian country, the General Crimes Act in 1834 also known as the Inter-racial Crimes Act. It extended federal criminal jurisdiction to crimes between Indians and non-Indians.

It is important to note that under the federalist structure, exclusive authority over Indian affairs is vested in the federal government. Thus, without Congressional authority, states lack authority to prosecute Indians for crimes committed in Indian country. However, by the early 1950s, there was a perceived lack of law enforcement and judicial services in Indian County. Due to concern by Congress, Public Law 280 was passed in 1953 which transferred legal authority and jurisdiction from the federal government to some state governments which significantly changed the division of authority between

93. Ibid., 47-48.

those states and Indian nations residing within their borders. Public Law 280 required six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) to assume criminal and civil jurisdiction over all or part of Indian country within those states and overrides the General Crimes Act and the Major Crimes Act for those states. P.L. 280 maintained that concurrent jurisdiction was retained by the federal government in the other option states. Due to much controversy over P.L. 280, in 1968 Congress enacted further provisions to limit further extension of P.L. 280. The 1968 provisions require tribal consent by a majority vote of the adult members before any additional states could assume such jurisdiction over areas of Indian country and it authorized states to "retrocede" jurisdiction back to the federal government. Some states had tried to use this new authority over Indian country as a basis for establishing regulations for taxing Indians in Indian Country. This matter was resolved in *Bryan v. Itasca County* (1976) in which the Supreme Court found that states could not use the basis of P.L. 280 or any of its provisions for the purposes of taxing Indians. And as previously noted, in 1987, in *California v. Cabazon Band of Mission Indians*, the Supreme Court explained that P.L. 280 did not authorize California to enforce its gaming laws in Indian Country. It is fair to say that federal Indian policy has largely been established by judicial rulings of the Supreme Court as the final arbiter of the Constitution rather than through congressional actions including legislation.[94]

The passage of the Indian Gaming Regulatory Act (IGRA) in 1988 during the Ronald Reagan administration, reaffirmed tribal sovereignty and its authority and independence. IGRA not only strengthened the political and economic status of gaming

94. Ibid., 48.

tribes but also gave them new negotiating power and political influence in the local communities and states where they reside. IGRA requires that any state allowing gaming must negotiate in good faith with any federally recognized tribe in that state that wants to offer similar gaming. IGRA primarily ignores state laws that pertain to non-Indian gaming. It had strong congressional support from Arizona Senator John McCain, former Chairman of the Senate Committee on Indian Affairs.

Prior to 1985 most gaming enterprises or casinos were non-Indian owned and they operated in two states: Nevada and New Jersey. However, today, most states have some form of non-Indian legalized gaming. In 1996, there were thirty-one states with more than $1 billion dollars in gross wagering. The total wagering that year for all states was more than $590 billion dollars with only $65 billion (less than 10%) being the Indian tribal share. In 1986 there were 85 gambling facilities on Indian reservations. However, in 1997, there were 142 Indian tribes in 24 states operating 281 Class III gambling facilities.[95] After the passage of IGRA in 1988, many Indian tribes upgraded their bingo facilities to higher stakes gambling Class II and/or Class III. Electronic bingo as a Class II game became very popular both in Indian owned and non-Indian owned casinos in Alabama. However, not all Indian gaming is highly profitable. According to a *Washington Post Magazine* article in 1997, at that time only 48 tribes were earning more than $10 million a year from gaming.[96] It seems that the small Pequot Indian tribe in Connecticut which only gained federal recognition in 1983 became the wealthiest gaming

95. Frantz Klaus, *Indian Reservations in the United States* (Chicago: University of Chicago Press, 1999), 294.

96. Ibid., 294.

tribe. Gaming profits have allowed some tribes to purchase additional land and thus expand their reservation land base. They can also request that newly purchased land also be held in trust by the federal government. Gaming profits fund other economic ventures for tribes and promote self-reliance, self-determination and greater independence. It also helps gaming tribes afford attorneys to protect their sovereignty rights. According to Frantz, "the sudden shifts in decades old relationships have upset the rural social order in some areas."[97] He postures that the new wealth of some Indian tribes has led to increased acceptance in non-Indian communities but primarily due to the self-interests of the non-Indians. There is also growing resentment that Indians are no longer at the bottom of the social ladder and this resentment has led to various schemes that attempt to tax Indian revenue. Legislative bills have been proposed in recent years to tax casino profits and/or reduce federal funding to gaming tribes. There are ongoing efforts by opponents to Indian gaming to amend the Indian Gaming Regulatory Act (IGRA).

In 1994, the Tribal Self-Governance Act was passed which amended the Indian Self-Determination and Education Assistance Act. It increased the number of tribes eligible to receive block grants and it significantly reduced the role of the Bureau of Indian Affairs (BIA). The BIA is no longer the manager of reservation resources.[98] If this trend continues, the traditional role of the BIA as the sponsor of Indian education and schools may soon be gone. Federal funding has decreased as more tribes assume greater responsibility for direct control and self-governance. Franz suggests that if Indian tribes do not learn to diversify their economies and increase their role in the private sector by

97. Ibid., 298.

98. Ibid., 293.

transitioning to contemporary economies, their long-term future including profitability from gaming, is not assured.[99] Increased competition in a saturated gaming market (Indian and non-Indian) will erode Indian gaming profits. In light of the profitability of gaming, it is likely that more states will allow and/or expand gaming as an alternative to increasing taxes and thus gaming competition will increase. Criminal jurisdiction issues between tribes and states will likely continue to pose challenges particularly as it relates to crimes committed by individuals (tribal members and nonmembers) at or around tribal casinos that are built on reservation lands.

Regional Indian advocacy organizations were established including United South and Eastern Tribes (USET) in 1969 as a non-profit intertribal advocacy organization to collectively represent and advocate for member tribes on a regional and national level. Similar regional organizations were established in other parts of the country. The goals of USET are to promote Indian leadership, improve the quality of Indian life, protect Indian rights including sovereignty, resources and tribal land and improve the capabilities of tribal governments. USET represents 25 Indian tribes including the former Poarch Band Creeks. The organization first operated out of Emory University in Atlanta. It later moved to Florida and is now based in Nashville, Tennessee. Some of their recent policy issues include strategies to prevent state taxation of improvements to trust land, tax exempt bond financing and ensuring tax exemptions remain for cultural and educational benefits. Coalescence among Indian tribes is paramount to their economic and cultural survival.

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99. Ibid., 298.

The National Congress of American Indians (NCAI) established in 1944 is also a tribal advocacy agency. It is based in Washington, DC and is now located in the new Embassy of Tribal Nations which opened in 2009. NCAI is a national non-profit organization representing twelve regions of the U.S. including the southeast region. It is funded by foundation support, membership fees and donations. NCAI plays a key role in advocating for and promoting the maintenance and integrity of the rights of Native Americans and Alaskan Native rights including tribal sovereignty. NCAI is the oldest, largest and most representative group of Indian and Alaskan natives. Overall, it serves the broad interests of tribal governments and has been protecting tribal sovereignty for 67 years. Some key policy issues addressed by NCAI through policy papers and federal consultations include tribal government, contract support, sovereign immunity and taxation. NCAI gained greater access to federal agencies through Executive Order 13175, issued by President Clinton in November 2000. This order called for regular, meaningful consultation and collaboration with tribal officials in the development of federal policy. In 2009, President Barack Obama issued a Presidential Memorandum declaring his commitment to fulfilling the consultation requirements of Executive Order 13175. The NCAI website has links to relevant Supreme Court cases, gaming compacts, policy papers and federal initiatives. A key policy issue currently being addressed by NCAI is the Tribal Sovereignty Protection Initiative that is in direct response to what they feel is an erosion of tribal sovereignty through court case decisions that occurred between 2000 and 2001 and specifically regarding the limits placed on civil and criminal jurisdiction of tribal governments over non-Indians within their territorial boundaries.

NCAI has also been working together for the past five years with the National Conference of State Legislatures (NCSL) to promote intergovernmental cooperation between states and tribes through a State-Tribal Relations Project to address common interests such as public resources and public services in areas such as education, health and law enforcement. According to the NCAI website, less than half or 224 of the 562 Indian tribes in the U.S. are engaged in some form of gaming with many being very small.[100] This website further reports that according to the National Indian Gaming Commission, gross revenues for Indian gaming in 2003 exceeded $16.7 billion, a $2 billion increase over 2002 gaming revenue. The National Indian Gaming Commission regulates Indian gaming for compliance with IGRA. The Commission resolves disputes or differences and helps to clarify gaming issues that may arise by or between a state and a tribe relative to tribal gaming. Overall, NCAI indicates that the combination of Indian sovereignty coupled with the benefits of gaming has only achieved modest results in improving tribal economies. Tribal self-sufficiency is still lacking for most Indian tribes.

In 2000, there were two legal cases decided that were major setbacks for tribal sovereignty: *Atkinson Trading v. Shirley* and *Nevada v. Hicks*. In Atkinson, the U.S. Supreme Court ruled that tribes lacked authority to tax non-Indian businesses within their reservations and in Nevada, the Court ruled that tribal courts lacked jurisdiction to hear cases brought by tribal members against non-Indians for harm done on tribal land. According to Attorney Richard Guest, "These opinions were devastating in that they struck crippling blows to tribal sovereignty and tribal jurisdiction – the most fundamental

100. National Congress of American Indians, "Gaming," accessed March 6, 2012, http://www.legislativewww.ncai.org/Gaming.

elements of continued tribal existence. These losses were indicative of the Court's steady departure from the longstanding, established principles of Indian law and were among a string of losses suffered by Indian tribes over the past two decades."[101]

In response to legal setbacks, tribal leaders met in Washington, D.C. in September 2001 and established the Tribal Supreme Court Project, as part of the NCAI's Tribal Sovereignty Protection Initiative. The goal of the project is to coordinate tribal legal resources and strengthen tribal advocacy before the Supreme Court by developing new litigation strategies. The project is staffed by over 200 attorneys and academics from around the nation including attorneys from the Native American Rights Fund (NARF) and NCAI. An advisory board of tribal leaders also assists the project by providing the political and tribal perspective to the legal and academic expertise. The financial resources of some gaming tribes have strengthened this sovereignty initiative. Gaming tribes have much to lose with regard to taxation and jurisdictional issues. Indian tribes and especially those with casinos must be well-advised regarding the nuances of litigation that may threaten tribal sovereignty. While IGRA does not require coordination by gaming tribes with local governments, many tribes are doing so and especially in areas of sanitation, infrastructure and joint policing. When tribes enter into such contracts with local municipalities, both parties can negotiate in a manner similar to treaty-making unrestrained by state and federal regulations. While it is very unlikely that Congress will resume treaty-making with Indian tribes, IGRA places tribes in a position to negotiate gaming agreements with local municipalities and with states which is a new paradigm.

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101. Richard A. Guest, *Tribal Supreme Court Project*, Native American Rights Fund, accessed August 21, 2012, http://www.NARF.org.

The five pivotal periods summarized are indicative of the types of political assaults on tribal sovereignty for the past 239 years. Even when it was restored but limited exclusively to internal tribal control and authority, this authority was compromised again by Public Law 280 for tribes in some states as well as by urban relocation and education of Indian youth which dismantled and separated Indian families. Tribes could not anticipate when the next assault would occur or how long it would last. Despite these numerous assaults, sovereignty was the fabric that sustained many Indian tribes as cohesive cultural groups in this country.

Prior to casino gaming, there was a lack of sustained economic development on most reservations which maintained their poverty levels and bleak outlooks. It often rendered them obscure as they posed no threat to the American way of life. However, they are a reminder of the country's history of exploitation and Congressional discussions regarding absolving the trust relationship seems absurd. The proactive role of Indian advocacy agencies such as NCAI is much needed to counter such discussions and advance a national agenda for Indian tribes. Regional differences exist perhaps because regional politics were different. The Red Power movement was largely initiated by young Indians in the west, northwest and mid-western parts of the country that were not directly impacted by the politics of southern racism or Indian removal.

Tribal sovereignty will likely continue to be redefined through litigation strongly influenced by the national political economy. Many gaming tribes now have the capacity to not only voice their concerns and opposition but they also have increased membership, advocacy groups, pride, confidence and revenue to fight their legal battles.

As a theoretical framework for this study, tribal sovereignty required immense research and cross referencing as it relates to the intersecting cross disciplines of law and politics. It is a paradigm studied by few contemporary scholars and was more often examined within the Indian community. It is likely that the average lay person does not fully understand its parameters. It is the hope of this researcher that this study not only exposes the inconsistencies in this theoretical principle but will further the discussion on tribal affairs in general and identify areas where greater research is needed.

CHAPTER III

LITERATURE REVIEW PART TWO

Political History of the Poarch Band of Creek Indians

The chapter begins with a narrative on the political history of the Poarch Band Creek Indians in Alabama culminating with a discussion on their socioeconomic gains after obtaining federal recognition, a prerequisite for acquiring sovereign status and thus, tribal gaming rights. It continues with a discussion on Indian gaming from a national perspective and concludes with an overview of non-Indian commercial gaming

Federal recognition for small tribes like the Poarch Band Creeks was made possible through the 1970 Federal Acknowledgement Program (FAP) administered by the Bureau of Indian Affairs. The FAP outlined seven mandatory criteria that tribes must meet to gain federal recognition and thus, sovereign status. However, meeting the criteria can be cumbersome and is a challenging process. It took the Poarch Band Creeks ten years to finally meet the criteria and only after several resubmissions, trips to Washington and intervention on behalf of the tribe by the National Congress of American Indians. Without federal recognition, the Poarch Band could not be recognized as a sovereign Indian Nation in Alabama. Additionally, federal recognition is required for the tribe to be eligible for federal tribal benefits. Federal recognition and then gaming radically changed the Poarch Creek way of life.

Most southeastern Indians that remained west of the Mississippi after the Indian removal policies of the 1830s, did not maintain written documentation of their existence. There were no formal political policies or processes in place and cultural history was passed down verbally. By integrating with whites, a small group of Poarch Band Creeks avoided Indian removal and remained in Alabama but they were obscure and impoverished. Much of their cultural identity was lost. Few, if any Poarch Creek members today are full-blood Indians.

Some aspects of the mandatory criteria for federal recognition are also subjective. When the Poarch Creek applied, the seven criteria were as follows: (a**)** identity as an Indian on a substantial and continuous basis since 1900; (b) a predominant portion of the applicant group must comprise a distinct community and must have existed as a community from historical times until the present; (c**)** the petitioner has maintained political influence or authority over its members as an autonomous entity; (d**)** a copy of the current governing documents must be provided; (e**)** members must be descendents from a historical Indian tribe or tribes that combined and functioned as a single autonomous political entity; (f**)** members must be composed primarily of persons who are not members of another tribe; and (g**)** the petitioner cannot be the subject of congressional legislation that terminated or forbade the federal relationship.[1] The most challenging criterion that small tribes found difficult to prove was tribal continuity and cohesiveness as an Indian group especially after the period of Indian removal. Larger Indian tribes that left their southern homelands through forced removal or voluntary

1. *Federal Register*, Code of Federal Regulations at 25 CFA 83.7 (a) – (g).

migration to Oklahoma in the 1830s were already documented as tribes by the federal government and thus met the criteria much easier.

Primarily through the help of Episcopal missionaries and their church records, the Poarch Band Creeks finally received federal recognition and sovereign status in 1984 which granted them sovereignty right including self-determination, self-governing rights and a government-to-government relationship with the federal government. Specific rights conferred to tribes as a result of recognition include: the right to establish their own legal requirements for membership, to form their own government, enforce laws (both civil and criminal) on their reserve land (reservation) and, the right to license, zone, tax, and regulate activities on their reserve lands. Indian Tribes also have the right to exclude people from their tribal territories. Limitations of tribal authority are the same as limitations for state authority. For example, neither tribes nor states have the power to wage war, coin money or engage in foreign relations.

The federal recognition process was amended in 2014 under President Barack Obama to make the process easier for tribes. This change is significant as it could allow other Alabama tribes such as the MOWA Band of Choctaw Indians in Mount Vernon, Alabama to be federally recognized. The MOWA were previously denied federal recognition in 1995.[2] If they receive federal recognition, they will be granted the same sovereign status, protections and exemptions as the Poarch Band and thus could become new gaming competitors. The tensions between the Poarch Band and the MOWA Band are discussed later in the research findings. While there are other tribes recognized by the

2. "Proposed Finding Against the Federal Acknowledgment of the MOWA Band of Choctaw," *The Federal Register*, Indian Affairs Bureau, January 5, 1995.

state of Alabama, the Poarch Band Creeks were the only federally recognized tribe at the time this research study was conducted.

Not long after the Poarch gained federal recognition, on November 21, 1984, 231.554 acres of land in southern Alabama and northern Florida were taken into federal trust for the tribe. On April 12, 1985, 229.54 acres of that land were declared a reservation. The Poarch Band Creeks currently have 480 acres of trust land more than twice their original acreage, according to Robert McGhee, Tribal Council Vice Chairman.[3] The Poarch Band Creeks are descendents of the original Creek Nation which once covered almost all of Alabama and Georgia. Primarily through forced migration, most Creeks and other southern tribes including the Cherokees, Seminoles, Choctaws and Chickasaws were relocated to Oklahoma during the 1830s. The Creeks were not a nomadic tribe and thus, many were reluctant to leave their homelands. Those that remained were subject to Alabama laws and were viewed as friendly and non-threatening toward whites. Many intermarried with whites. The Federal Census of 1840 was the first documentation of Creeks (the Poarch settlement) still living near each other in Alabama after Indian removal. They resided in a rural area that was then named Red Hill and later Jack Springs. By 1868, they had moved further inland near Poarch, Alabama which is close to Atmore and where most of their reservation land is located. By the early 1900's they continued to remain isolated, poor and largely unnoticed. Although they had managed to maintain small amounts of land through homestead applications and land

3. Poarch Tribal Treasurer Robert McGhee of Atmore, interview by author, November 29, 2013.

grants, they were extremely poor throughout the 19th century and into the 20th century.[4] On the 1870 Federal Census, there were 78 Creek surnames on the census returns for the Jack Springs Community.[5] By 1930, the Poarch Creeks had lost their Creek Muscogee language and much of their identity through intermarriage primarily with whites. Some were identifying themselves as "white" on the 1910 and 1930 Federal Census. Additionally, some Creeks simply refused to be counted in the census. The federal government became more aware of the Poarch presence in Alabama during the 1920s when they had to intervene to prevent and punish trespassers for cutting timber on their land between the years 1920-1925. The Episcopal missionaries began helping the Poarch and provided basic medical care in 1929 under the leadership of Dr. Robert C. Macy and his wife Anna Macy. They assisted in the construction of two churches in the area, St. Ana's Episcopal Church and St. Johns in the Wilderness Church. Only St. Ana's is still standing.[6] These community churches later became schools for Indian children. In 1934, there were 130 students enrolled in the segregated Indian Schools in Poarch, Alabama.[7] In 1949, Escambia County built a segregated consolidated Indian school in Poarch, the Poarch Consolidated School.

Through intermarriage the Poarch Creek population increased significantly over the next years and had reached over 1,000 by the time of federal recognition in 1984.

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4. Lou Vickery and Steve Travis, *The Rise of the Poarch Band of Creek Indians* (Charleston: Upword Press, 2009), 144.

5. Ibid., 143.

6. "History of the Poarch Band of Creek Indians," 43rd Annual Thanksgiving Powwow Program, November 2013, 16.

7. Vickery and Travis, *The Rise of the Poarch Band of Creek Indians*, 172.

While Creeks were allowed to intermarry with whites in Alabama, prior to 1949, they could not attend school with whites. Segregation applied to them very much as it did for blacks but not to the same degree. For example, they could sit on juries but they were not welcome at all white churches. Their social status was described as distinct and somewhere between that of blacks and whites.[8] Educational opportunities began to improve for Indians nationally in the 1970s around the same time that they improved for blacks through Civil Rights legislation and school desegregation. While Poarch historians Vickery and Travis reference intermarriage between Indians and whites, they do not mention Indian-black relationships. Another historian, J. Leitch Wright Jr., explained why political ties and intermarriage between Indians and blacks was not popular at that time. Wright argued that the long term effect of Indian removal policies and the threat of removal, served to promote and encourage Creeks to quickly adopt white racial attitudes toward blacks.[9] According to Wright, if an Indian man married a Negro slave and later died, the slave was more often treated like property rather than as a widow. He also noted that on some occasions, she may be treated like the head of the household.[10] It seems that political ties were stronger between full-blood Indians and blacks in the south such as those between blacks and the Seminoles as early as 1869, according to Angie Debo.[11]

8. Ibid., 174.

9. J. Leitch Wright Jr., *Creeks and Seminoles* (Lincoln: University of Nebraska, 1986), 290.

10. Ibid., 287-290.

11. Angie Debo, *The Road to Disappearance, A History of the Creek Indians* (Norman: University of Oklahoma Press, 1941), 192.

References to the Poarch Band could not be found in Debo's work. Her work primarily focused on the Creeks in Oklahoma after Indian removal.

Wright describes the Poarch Band as the "largest and most cohesive group" that remained in the southeast after 1836.[12] He also notes close cultural and political ties between Creeks and Seminoles given their proximity to each other in Alabama, Georgia and Florida. He postured that many, if not most, Seminoles were relocated Creeks that escaped to the Florida swamps to avoid white hostilities. The Florida border is only five miles from Atmore, Alabama where the Poarch government is located. In addition to having trust land in Alabama, the Poarch have a small amount of trust land in northern Florida. Socioeconomic and political alliances between the Poarch Creeks and Seminoles as it relates to gaming are discussed later in this chapter.

Through church records, the Poarch were able to provide official documentation of their cohesive existence.[13] Recorded interviews with elders from an oral history project conducted by Dr. Tony Paredes, an anthropologist, also helped document their lineage and cohesive existence. The importance of Paredes' role in the Poarch acquiring federal recognition was given special acknowledgement by the former Poarch Tribal Chairman, Buford Rolin during the opening ceremony at the November 2013 Annual Powwow. Immediately following the acknowledgement, a male descendent of Mr. Paredes was given a traditional basket by the Cultural Director, Robert Thrower as a way of showing appreciation and continued recognition of the important role he played which resulted in their current way of life.

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12. Wright Jr., *Creeks and Seminoles,* 318.

13. Poarch Cultural Director Robert Thrower, interview by author, February 1, 2010.

According to Vickery and Travis, the Poarch Creeks had some recognized leaders within the tribe but they did not have formally appointed leaders as early as 1880. A more formal system of government with one tribal chief emerged after the 1940s. Prior to the 1940s, the informal leaders, many of whom were religious leaders, exercised influence in church and school activities. They also helped to maintain social control and organized community activities.[14] The first formal single leader of the Poarch with a clearly defined leadership role was Calvin McGhee who was chosen by tribal members in 1950. He subsequently initiated a movement among Eastern Creek descendants for wider land claims.[15] The tribal chief not only played a primary role in promoting educational and social opportunities but also assumed political leadership in documenting the tribe's lineage and history which was very important in obtaining federal recognition.

In 1974, the Poarch asserted their distinction as a tribe separate from other Creek Indians by identifying themselves as the "Poarch Band of Creek Indians." This name was chosen due to their presence in and around the town of Poarch. In 1975, Tribal Council Chairman, Eddie Tullis submitted an application for federal recognition. At that time, the tribal council consisted of 18 members. Poarch descendents of the Rolin and McGhee families were very active in early tribal leadership and they continue to play key leadership roles. The former Chairman, Buford L. Rolin is a descendant of an earlier tribal leader with the same surname. The same is true for Robert R. McGhee who was Treasurer when the research was underway. In 2016 he was voted in as Vice-Chairman of the Tribal Council.

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14. Vickery and Travis, *The Rise of the Poarch Band of Creek Indians*, 172.

15. "History of the Poarch Band of Creek Indians," 15-16.

In addition to sovereignty rights, federal recognition renders tribes eligible for federal benefits including grants and services though the Bureau of Indian Affairs (BIA). The scope of services provided are similar to those offered by states such as health, education, social service, law enforcement, agricultural management services and resource protection. Programs and services for federally recognized tribes are available through other federal agencies including the Departments of Housing and Urban Development, Justice, Education, Agriculture, Labor, Commerce, Health and Human Services and Energy. Additionally, tribal members are eligible to receive services from state programs such as SSI (Supplemental Security Income), Food Stamps, Temporary Assistance for Needy Families (TANF), and Low Income Heating and Energy Assistance Program (LIHEAP). The Indian Self-Determination and Education Assistance Act of 1975 transferred authority for administering federal programs for Indians to their tribal governments. Thus, when the Poarch received federal recognition in 1984, they immediately began administering their federal programs. In 1985, one year after federal recognition, the Poarch Band Tribal Council wrote and approved their tribal Constitution. At that time, there were about 1,800 Poarch Band Creek members. The 1985 Poarch Creek Constitution reduced the tribal council from 18 members to 9 members and required one-fourth blood quantum for tribal membership. By 2006, tribal membership had increased to about 2,340, according to Robert Thrower, the Poarch Cultural Director. Thrower also reported that the tribe owned over 9,000 acres of land in 2010. At the April 1, 2010 Tribal Council Meeting attended by this researcher, membership was reported as 2,996, two thirds of whom receive health care provided by the tribe. In November 2014,

there were over 3,000 Poarch Band Creek members of which over 1,000 live in the vicinity of Poarch, Alabama (8 miles north of Atmore, Alabama) where the tribal government offices are also located.[16] During an interview with Robert McGhee in November 2013, he reported that the tribe owned 480 acres of trust land and over 12,000 acres of non-trust land at that time. Only trust land can be used for tribal gaming purposes. A tribe can request to have additional land placed in trust after the recognition process but it can be a lengthy process. McGhee reported that more applications for land into trust were approved under the Obama Administration than in previous years by other administrations.

Indian Gaming – A Growing National Phenomenon

Casino gaming by Indian tribes became a growing source of tribal economic development after the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. Prior to that time Indian nations were largely dependent upon the federal government for grants and subsidies. Despite federal assistance, most tribal members lived in poverty. According to research conducted by Klaus Franz for reservation Indians (those living in homes on reserved lands), the poverty rate for Indians has been at 40.5 percent.[17] However, it may be even higher since Pommersheim reported the poverty rate for Indians living on reservations at more than 50 percent.[18]

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16. "History of the Poarch Band of Creek Indians," 16.

17. Frantz Klaus, "The Socioeconomic Status of American Indians," *Indian Reservations in the United States* (Chicago: University of Chicago Press, 1999), 105-106

18. Frank Pommersheim, "Economic Development in Indian Country: What are the Questions? *American Indian Law Review* xii, no. 2 (June 1984): 195.

Despite their economic status, the principle of shared wealth has been a traditional cultural norm among most Indians while competitive economics was not. Gaming and other competitive tribal enterprises may change this cultural norm. According to Frantz, as long as tribal enterprises are managed by the tribe itself, sociocultural values and considerations such as a preference for tribal employees rather than maximum financial profit has been their primary concern. Frantz also noted another rather distinctive characteristic of reservation Indians that he describes as a "fear of success" based on the notion that the success of tribal economies could lead to reductions in federal subsidies.[19] While these values may be evident in traditional Indian economies, gaming may be gradually eroding them given the competitive challenges and quick growth rate. Gaming is subject to trends and other market variables such as supply and demand as well as political influences. In less than ten years after the passage of IGRA, Indian gaming had become the new buffalo for several Indian tribes. In 19 states where there were more than 170 high stakes Bingo halls and casinos located, there was an estimated combined gross earnings of about $6 billion a year. This amount was between 4-5 percent of the national gaming industry profits for Indian gaming and non-Indian gaming combined.[20] According to the National Indian Gaming Commission, only 13 percent or 39 tribes of the 290 gaming tribes generated annual revenues of $200 million and more in 2001 compared to 28% or 81 tribes that generated annual revenues of less than $3 million.[21]

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19. Klaus, "The Socioeconomic status of American Indians," 172–173.

20. Anthony Laying, "Indian Gaming: An Overview," in "Indian Casinos: Past Precedents and Future Prospects," *USA Today Magazine* 124, no. 7074 (March 1996), accessed August 19, 2013, http://www.usatodaymag.com.

21. National Indian Gaming Commission, Annual FOIA Report, 2002, accessed August 20, 2013, http://www.nigc.gov.

Casino gaming has benefitted tribes in several ways. According to Laying, this new windfall increased pride and confidence among gaming tribes and is evidenced by the popular use of the term, "Indian Country," and a new spirit of optimism.

These sentiments are evidenced in a political journal, *Indian Country* published in Florida, that began publication in 1981. In addition to increased, pride, confidence and optimism among gaming tribes, gaming created new jobs and expanded housing and health programs. It has significantly contributed to cultural restoration including new museums, education programs and the re-establishment of tribal languages. The Poarch Band of Creek Indians opened a museum in Atmore, Alabama in 2010. Gaming has also helped to create other types of economic development through investments and reduced tribal dependency on federal subsidies particularly for education and health programs. Tribal governments are making decisions about how to spend their own revenues rather than simply deciding how to spend federal resources. Revenues from tribal gaming have helped to pay expensive legal costs when tribal sovereignty is threatened. It also allows tribes to engage lobbyists to promote their interests at the local, state and national levels.

Swift and substantial economic gains were made by only a few tribes such as the Mashantucket Pequot in Connecticut. However, such rapid and substantial economic growth does not appear to be true for most Indian gaming operations. While Indian gaming is on the rise, according to Darian-Smith, only 2-3 percent of the gaming tribes with casinos may be highly successful.[22] The rural geographic remoteness of reservation land is often problematic for most tribes.

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22. Eve Darian-Smith, *New Capitalists, Law, Politics & Identity Surrounding Casino Gaming on Native American Land* (Belmont, CA: Wadsworth, 2003), 63.

The National Indian Gaming Commission's website reported that in 1999 ten years after the passage of IGRA, there were 150 gaming Indian tribes in 24 states. The website indicates that this number grew to over 250 gaming tribes in 28 states by 2009. While there have been great benefits for gaming tribes, Indian gaming also poses internal challenges including controversies among Indian leadership and particularly between leaders that have contemporary views and those that maintain traditional values. Some traditional Indians feel that gaming may destroy native culture and promote compulsive gambling.[23] Class III gaming requires that tribes negotiate a compact with the state which creates a new political paradigm of power sharing between tribes and states. Although gaming has become a new economic resource, it also poses new political challenges. Gaming is increasing the political savvy of some tribal leaders but others are being manipulated and controlled by management groups, lobbyists and other special interest groups. With regard to high stakes bingo and casino gaming, three different studies in Midwestern states found significantly higher rates of pathological gambling that reported 14.5 percent by the Indian population compared to 3.5 percent for the non-Indian population.[24] Non-Indian gaming competitors like Donald Trump argued that IGRA does not impose the type of restrictive regulatory and reporting standards that non-Indian gaming must adhere to.[25] Trump further argued that Indian gaming is not unionized and

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23. Don Cozzetto and Brent W. LaRocque, "Indian Gaming May Promote Compulsive Gambling Among Native Americans" in *Native American Rights, Current Controversies,* ed. Leone, Bruno (San Diego, CA: Greenhaven Press, Inc., 1998), 97-106.

24. Ibid., 100-101.

25. Donald Trump, "Indian Gaming Will Hurt the Economy," in *Native American Rights, Current Controversies,* ed. Leone, Bruno (San Diego, CA: Greenhaven Press, Inc., 1998), 114-117.

thus, employees are not protected. Former U.S. Senator Robert Torricelli from New Jersey called for tighter regulations and reported in 1998 that tribal casinos had already become targets for organized crime in at least ten states.[26] It seems that this type of criminal involvement occurs more frequently when outside management firms are used to oversee tribal gaming. Given these early gaming problems, more tribes are now managing and promoting their own gaming. More tribes are taking full responsibility for their management and have a well organized hiring system as stipulated by IGRA that includes employee background checks.

The passage of IGRA in 1988 and the quick growth of high stakes gaming by Indians can largely be attributed to the persistent legal actions of the Cabazon Band of Mission Indians in their dispute with the state of California. The 1987 Supreme Court decision in *California v Cabazon Band of Mission Indians* was the catalyst that led to the passage of IGRA. The court upheld that the tribe had the right to conduct gambling in a state where gambling was already allowed.[27] The struggle of the Cabazon and their eventual legal success and the subsequent passage of IGRA created a new era for tribes across the country to expand their bingo operations in a fast and technologically growing industry. Gaming is fondly referred to by Indians as the new buffalo since it provides new sustenance, survival, hope and revitalization for many tribes. Twenty years after the Cabazon filed and won their challenge, the Florida Seminoles advanced sovereignty

26. Robert G. Torricelli, "Organized Crime May Infiltrate Indian Casinos," in *Native American Rights, Current Controversies*, ed. Leone, Bruno (San Diego, CA: Greenhaven Press, Inc., 1998), 110-113.

27. Cozzetto and LaRocque, "Indian Gaming May Promote Compulsive Gambling Among Native Americans," 100.

rights and protections for tribal gaming when they filed a suit against the state of Florida after the state refused to negotiate a compact with them to operate Class III high stakes bingo. However, the decision ruled in favor of the state of Florida. In essence it found that the tribe could not sue the state. Finally in 2011, the Seminole were granted a Class III Compact by the outgoing governor and they now operate high stakes gambling.

Based on IGRA regulations, there are three levels of tribal gaming allowed: **Class I gaming** which, according to IGRA (Section 2703), is described as traditional forms of Indian bingo or social games with minimum prizes. Traditional bingo is bingo played by using bingo cards such as the games that are often played in churches. It is regulated solely by the tribe. **Class II gaming**, according to IGRA, is described as bingo and other similar games such as lotto, pull tabs, instant bingo and tip jars and which are explicitly authorized by the state or are not explicitly prohibited by the state. IGRA further stipulates that Class II games are played in conformity with those laws and regulations regarding hours of operation and limitations on wagers or pot sizes. Class II games include certain non-house banked games like poker but do not include banking card games such as blackjack or electronic games of chance or slot machines. Class II games are subject to certain conditions set forth in IGRA. While it is regulated by the tribes, it also requires some oversight by the National Indian Gaming Commission (NGIC). **Class III gaming**, according to IGRA, includes everything else that is not considered Class I or Class II such as banking card games including blackjack, slot machines and table games such as roulette, electronic games of chance, pari-mutuel wagering, craps and house-banked card games. Class III games are considered high

stakes games such as those offered in Las Vegas. Class III is regulated by the tribes as well as by NIGC and governed by tribal-state compacts. Tribes must negotiate compacts with states in order to operate Class III gaming. Electronic bingo was not initially described in IGRA but recently clarified by NIGC as a form of bingo that utilizes electronic equipment and machines that resemble slot machines. It can be Class II or Class III depending upon how the game operates. The term "games of chance" is unclear and there has been a great deal of controversy between states and gaming tribes surrounding Class II electronic bingo in terms of whether it is a game of chance or a game of competition and thus whether it is Class II or Class III. This clarification was only recently made clear by IGRA when it further clarified that electronic bingo machines that only require the player to press one button, could still be considered Class II. Reportedly, when playing electronic bingo, patrons are playing against other patrons.

In states where Class III gaming is operating, a new relationship or partnership between tribal governments and state governments exists which has created a new paradigm for power-sharing between these two sovereigns. The compact is not similar to the treaty relationship between parties which was often a coercive relationship as noted by the late Vine Deloria Jr. Deloria described what he calls the "consent principle" in former treaty-making process which should be a balance of power between sovereigns. Instead it was often a coercive agreement during treaty-making that primarily benefitted states at tribes' expense.[28] Light and Rand argue that gaming is forcing legal compromises between tribes and states when the process should be a "mutual give and

28. Deloria Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review* 31 (1989): 204.

take between equals rather than merely masking continued coercion."[29] They emphasize that tribes must recognize that negotiating is not equivalent to "selling out."[30] Sovereign status may be sometimes used by tribes as a strategy for refusing to engage in public political discourse with state officials and other gaming stakeholders and also as a basis for not sharing information with outsiders. A former Alabama public official that wished to remain anonymous told this researcher that when an invitation was extended in 2010 to the Poarch Band Creek Chairman, Buford Rollins, to meet with stakeholders of Victoryland, a non-Indian casino that previously operated in Alabama, there was no response from the Poarch Band Chairman. This request was made after former Governor, Bob Riley launched a campaign to close all casinos in Alabama.

Electronic bingo games that fall under the classification of Class II have become a very lucrative enterprise for gaming tribes and especially for the Poarch Band Creeks DBA PCI Gaming in Alabama. PCI makes generous annual donations to local schools and other community programs. One could argue that there is no way to determine if a tribe is getting "rich" from Class II gaming since Class II gaming only requires some oversight by NIGC but not to the extent of Class III gaming and data collected by NIGA on Class II gaming remains confidential.

Allegations of fraud and mismanagement of tribal casinos surfaced within five years after IGRA was passed. It appears that tribes that hired outside management companies for their casinos placed themselves at greatest risk of fraud, mismanagement

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29. Steven Light, Andrew Rand, and Kathryn Rand, *Indian Gaming and Tribal Sovereignty, the Casino Compromise* (Lawrence, KS: University Press of Kansas, 2005), 159.

30. Ibid., 159-160.

and syndicate ties. Inexperience of tribal leaders may have played a role in casino mismanagement, illegal lobbying activity and embezzlement. In his testimony before the House of Representatives' Subcommittee on Native American Affairs on October 5, 1993, former US Senator Robert G. Torricelli from New Jersey alleged that loose Class II gaming regulations for Indian casinos and their exemption from the Bank Secrecy Act, makes tribal casinos attractive targets for money laundering. He gave several examples of the impact of loose regulations. Toricelli also alleged that the mob was involved in killing a tribal official of the Cabazon Tribe in California that accused a manager of skimming money. He further alleged that the casino owned by the Cabazon tribe was run by a local crime syndicate member. During his testimony, Torricelli gave other examples of money laundering and/or ties between Indian casinos and organized crime including in California as well as with the Seminole Indian Tribe's bingo operation in Florida.[31]

Reportedly, PCI Gaming is self-managed by the Poarch Band and not by an outside management firm. Since gaining a monopoly in 2010, it can be estimated that PCI gaming's earnings soared over the next five years. In 2012, PCI gaming announced a million-dollar jackpot at its Windcreek Casino in Atmore and also announced plans to expand their two smaller casinos in Montgomery and Wetumpka. Due to the lack of reporting requirements in the regulations for Class II gaming, it is not known how much PCI Gaming has earned or how their earnings have been used. However, they continue to make sizable annual donations (2 million) to the local school systems as well as to some community based programs. Additionally, there are some new economic development initiatives underway by PCI in Alabama as well as in Florida which is described later.

31. Torricelli, "Organized Crime May Infiltrate Indian Casinos," 112.

As mentioned earlier, the Mashantucket Pequot Indians in Connecticut were often cited as the most successful example of tribal gaming by a small tribe with their Foxwoods Casino that opened in 1992. It was described as the world's largest casino based on space and gambling equipment. This enterprise may have spurred the use of the term "rich Indian". It seems that as the Pequot's prosperity became widely noticed, so did the attacks on their cultural identity as well as their success with gaining tribal recognition through an alternative tribal recognition process. The Pequot only had 13 members living on reserve lands when they were counted in the 1910 Census. After they expanded their bingo operation to casino gaming, membership increased when tribal members returned to the reservation area. Unlike most tribes, the Pequot received federal recognition from Congress in 1983 rather than from the Bureau of Indian Affairs (BIA). Two other Connecticut tribes were also granted federal recognition: the Eastern Pequot Tribal Nation of North Stonington in 2001 and the Schaghticoke Tribal Nation in 2004. However, federal recognition for both tribes was revoked in 2005 by the BIA. Foxwoods was doing so well that in 2008 at the height of the national recession, the tribe made a very costly expansion to their casino enterprise. However due to a drastic decline in earnings in 2010, payments to individual tribal members ended after they were each previously receiving up to $100,000 annually. This decline was largely due to the poor economy and increased competition from other casinos in the region including the Mohegan Sun. Foxwoods had a two billion dollar debt that it could not pay. Tribal members went from prosperous to poor very quickly which left a devastating effect.[32]

32. Michael Melia, "Tribe $2 Billion in Debt After Casino Bonanza," accessed March 28, 2012, http://www.nbcnews.com.

One would need to understand their basis for expansion during a dwindling economy and if their advisors provided a true economic forecast or simply were out to make money. The influence of outside interests including political maneuverings of their competitors may have also played a part in their demise. Not all tribes give annuities to their members. Of the more than 500 American Indian tribes across the country, 124 have notified the Department of the Interior that they intend to share gambling revenues with members through direct payments.[33]

Lobbyists such as Michael Scanlon and Jack Abramoff the latter of whom was often referred to as a "super lobbyist," took early advantage of some gaming tribes. They promised to protect tribal gaming interests through political connections and political savvy. However, Abramoff and Scanlon stole more than $82 million dollars from six tribes between 2001 and 2003, according to the Gimme Five investigative report issued by the Senate Committee on Indian Affairs.[34] The Louisiana Coushatta, North American Chippewa (Saginaw) and the Mississippi Choctaw Indians reportedly, fell prey to the unorthodox and sometimes illegal schemes of Scanlon and Abramoff. The Mississippi Choctaw located on the Mississippi coastline are perhaps the Poach Creeks greatest Indian gaming competitor. Peter Stone alleged that through political contributions in the amount of $500,000 to the Republican Governors Association, the Mississippi Choctaws tried to influence the 2002 gubernatorial race in Alabama in favor of Bob Riley, a GOP member with an anti-gambling platform. Reportedly, only $150,000 actually went to the

33. Ibid., 2.

34. Gale Courey Toensing, "Appeal Denied," *Indian Country Today 3*, no. 6 (February 20, 2013): 12.

Alabama GOP while the remaining $350,000 went to Riley's campaign along with another $250,000 from Scanlon a few days later.[35] During a Senate hearing in 2002, it was discovered that there was another contribution of $1,000,000.00 made by the Mississippi Choctaw and arranged by Jack Abramoff to the National Center for Public Policy Research, headed up by Amy Ridenour. According to Ridenour's testimony at the Senate hearing, the center funneled the money back to Scanlon for projects that they were "trying to conceal."[36] Riley's gubernatorial opponent, former Alabama governor, Don Siegelmann, a Democrat, supported legalizing some gambling in the state. Riley won the election and later launched at anti-gambling campaign against Indian and non-Indian gambling in Alabama which is discussed in greater detail later.

Indian gaming and particularly gaming by California tribes and southwestern tribes was the subject of early interest by some university scholars in their dissertation research. In 1998, while completing her graduate work at the University of Kansas, Annette Kuhlmann completed her dissertation on Wisconsin gaming tribes.[37] Kuhlmann was able to involve the participation of 27 tribal members in her anthropological research through telephone interviews. Although her research had a sociological focus rather than a political one and involved Midwestern tribes, it appears to be the only dissertation research that was successful in getting several tribal members

35. Peter Stone, *Heist, Superlobbyist Jack Abramoff, His Republican Allies and the Buying of Washington* (New York: Farrar, Straus and Giroux, 2006), 126-127.

36. Ibid., 145-147.

37. Annette Kulman, "Bingo, Blackjack and the One-Armed Bandits in the Northwoods: A sociology of American Indian Gaming in the United States" (PhD diss., University of Kansas, 1998), accessed October 12, 2011, http://www.ProQuest.

to participate. Her study was both quantitative and qualitative and utilized information obtained directly from tribal members regarding the benefits of gaming. This type of close and long-term communal research facilities communication and information sharing as it allows for trust to develop between the researcher and the interviewees.

The work of another scholar, James H. Precht was found to be relevant particularly since he completed his research on the Coushatta's in Louisiana who were originally members of the powerful Alabama Creek Confederacy in the 18th century. At the height of the Confederacy, there were about 15,000 people in 73 towns. According to Precht, white encroachment resulted in them moving westward toward Texas and Louisiana. A group of about 300 settled near Bayou Blue in southwestern Louisiana in 1898 and later became known as the Coushatta of Louisiana. The tribe's status was terminated by the federal government in 1953 but they later regained state and federal recognition in 1973 after forming the Coushatta Indians of Allen Parish, Inc.[38] Louisiana was noted for riverboat gambling as early as the civil war period. Coushatta bingo halls opened in January 1984. After much controversy and negotiations over almost a twenty year period, the Coushatta were finally able to acquire a Class III Gaming Compact in 2001. According to Precht, prior to the state of Louisiana granting the compact, the Coushatta experienced political challenges similar to those of the Poarch Band of Creek Indians in Alabama. The Coushatta Bingo Hall was raided by order of the district attorney in 1985 prior to the passage of IGRA and the Coushatta also later faced legal

38. James H. Precht, "The Lost Tribe Wanders No More. Indian Gaming and the Emergence of Coushatta Self-Determination" (PhD diss., Arizona State University, May 2007), accessed May 14, 2012, http://www.ProQuest.

challenges by the state which filed suit against the National Indian Gaming Commission and the Department of the Interior. Precht summarizes how the tribe responded to these early challenges and later negotiated and lobbied to expand their casino as well as prevent competition from other gaming tribes in the area. Like Alabama, Louisiana is also a state that does not fall under state jurisdiction for criminal offenses on reservation lands based on Public Law 83-280 which was described in the previous chapter. The Coushatta were involved with Abramoff much earlier than the Mississippi Choctaw and it appears that their lobbying efforts were successful. The success of their casino, according to Precht, was largely due to its "great location" in Kinder, Louisiana. It was located in a small safe rural area near Houston, Texas where there were no casinos at the time.[39] Precht reports that in 1991, the Coushatta tribal council announced that they were loaned $18 million by a Minneapolis based company, Grand Casino Inc. to build and operate their casino. In 2000, they spent $100 million of their own money to expand their casino enterprise. It was deemed the third largest casino in the country. According to Precht, by 2002, the Coushatta had upgraded their casino operation, the Grand Casino Coushatta, which initially opened in January 1995, to a level that allowed them to give annual payments to their members in the amount of $30,000 - $40,000. In 2002, they had also taken over the management of their casino.[40] It is interesting to note that the Coushatta were doing so well with their casino enterprise that they bid on a prison complex contract, offering a $16.39 million dollar investment. Precht noted that some members of the Joint

39. Ibid., 102.

40. Ibid., 157-158.

Legislative Committee on the Budget criticized the project and particularly, the role of the Coushatta when asking "Why are we contracting with Indians."[41] As state government officials realized the extent of Coushatta success, they made plans to increase their share of the revenues. During the following years, Coushatta negotiations with the state became very difficult in terms of agreeing on a percentage of their net gambling revenues to pay the state as part of their Class III high stakes gaming Compact. At one point, Governor Mike Foster suggested that they pay as high as 11 percent of their casino revenue which was deemed outrageous by the Coushatta who were willing to pay $7 million a year over the next seven years. According to Precht, the Coushatta's paid Abramoff $1.76 million to block the casino operations of the Mississippi Choctaw. In 2001, the Coushatta's spent more than $18 million in lobbyists and lawyers which they took from important tribal areas such as health, education and social services. Between 2001 and 2003, they spent between $24 million - $32 million on lobbying and attorney fees.[42] These disclosures led to a split among tribal leadership as reportedly, council members had taken an oath not to disclose internal financial records.[43] The disclosures led to investigations by the Attorney General's office into the tribe's dealings with Abramoff,' who was the Coushatta's key lobbyist at the time. It also led to Senate hearings held by the Indian Affairs Committee led by Senator John McCain. The Poarch Band may learn from the Coushatta's early experience negotiating with the state of

41. Ibid., 160.

42. Ibid., 186.

43. Ibid., 187.

Louisiana if they later plan to obtain a Class III Compact. They should also take note of the Coushatta's political dealings with Abramoff regarding what not to do in terms of lobbying.

Another relevant dissertation on gaming was completed in 2004 and targeted the Florida Seminoles by Jessica R. Cattelino at New York University. [44] It is very relevant to the research on gaming particularly since there have been two legal cases decided in favor of Seminole gaming that opened the floodgates for other tribes to offer high stakes gaming. Cattelino's study is very lengthy (350 + pages) and is largely an anthropological ethnographic study. However, the study was very interesting to read and enlightening. Like this researcher, she too experienced difficulty when attempting to gain permission from the tribe to conduct her research. A northeastern gaming tribe had flat out refused her previously. An anthropologist, Katherine Spilde, who was the research director for the National Indian Gaming Association (NIGA), an advocacy group in Washington DC facilitated the process for Cattelino to gain access to the Seminoles. Spilde sent a letter to an attorney who forwarded it to a Seminole lobbyist on Capitol Hill. Despite moving from New York to Florida and living on reservation land for a year to volunteer and complete her fieldwork, Cattelino still experienced a great deal of mistrust and suspicion by reservation Indians.

Like the Pequot in Connecticut and the Poarch Creeks in Alabama, the Seminoles in Florida experienced a quick and drastic single-generation economic change from gaming revenues. Cattelino acknowledges the contradictions in the term "rich Indian."

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44. Jessica R. Cattelino, "High Stakes: Seminole Sovereignty in the Casino Era" (PhD diss., New York University, May 2004), accessed October 12, 2011, http://auctr.illiad.ocle. org/illiad/logon.html.

She describes the prosperity gained by Indian tribes from gaming as "flying in the face of dominant American images of Indians as poor, anti-materialist and therefore "traditional". [45] She further describes the Seminoles as experiencing a rapid shift from extreme poverty to economic security. Florida and Alabama are adjacent to each other. The Alabama Poarch Creeks recently established new gambling interests in Florida including a horse track. The Poarch Band's largest casino, Wind Creek in Escambia County is less than 10 miles from the northern Florida border.

One of the goals of Cattelino's study was to demonstrate that gaming has reinforced Seminole commitments to their tribal sovereignty and cultural distinctiveness. Another goal was to reframe theories that money and market integration have an intrinsically de-culturing effect. Cattelino does an excellent job when examining gaming from a sociocultural and economic perspective and explores the relationship between tribal gaming and tribal efforts to maintain cultural and political distinctiveness. Cattelino describes the growing concept of the "rich Indian" both as a joke and as a threat as reflected in the television series, The Sopranos, The Simpsons and South Park as well as in political commentary including 60 Minutes and *Time Magazine*.[46] She also acknowledges the perceptions of anthropologist, Katherine Spilde who argued that "the mobilization of an emerging rich Indian image has undermined American Indian tribes' gaming rights claims and tribal sovereignty by conjuring an image of surplus in which prosperous indigenous peoples do not need.[47] Cattelino postures that due to the growing

45. Ibid., 10.

46. Ibid., 1-2.

47. Ibid., 10.

perception of the "rich Indian" several members of the U.S. Congress have advocated for a "means testing" bill. If passed, such a bill could be used as a basis to adjust federal appropriations to tribes according to their assets and income.[48]

Gaming is created a new sense of political belonging and political power for gaming tribes and is also reshaping political relations between Indian tribes and multiple layers of government including at the local, state and federal levels.[49] Legal uncertainties continue to exist when tribes must rely on the opinions of the Supreme Court justices based on federal Indian law that is grounded in racist ideology as noted in the previous chapter. The misconceptions or misinterpretations of the term "rich Indian" and the discussions among congressional members about creating a means test for federal appropriations warrant legal assurances for the protection of tribal sovereignty. Robert Williams Jr. postures that unlike other minorities, Indians desire a degree of "measured separatism" to govern their homelands despite whether their laws, customs and traditions conflict with that of the dominant society.[50] Williams goes on further to acknowledge that the rights they refer to are exclusive to Indian tribes only and he notes that the Supreme Court must first begin a process of decolonizing the writing and interpretation of the laws by eliminating the racist language of inferiority perpetuated, sanctioned and repeated by the justices. Williams also argues that the same racial stereotypes used to describe Indians in the 19th century were still being endorsed and accepted as true by 20th century

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48. Ibid., 120.

49. Ibid., 12.

50. Robert Williams, Jr., *Like a Loaded Weapon, The Rehnquist Court, Indian Rights and the Legal History of Racism in America*, Indigenous Americas Series (Minneapolis: University of Minnesota Press, 2005), xxv.

justices. These contemporary justices continue to use biased historical perspectives such as those of Chief Justice John Marshall and his doctrine of discovery as well as notions of white racial superiority and Indian inferiority. Williams stated that for almost 200 years, the "justices have relied on racist precedents perpetuated by the Marshall model, to uphold the court's continuing support of the doctrine of discovery and its legal privileging of white interests over Indian interests." He cites as examples, the opinion of Justice Rehnquist in *Oliphant v Suquamish Indian Tribe* (1980) and the opinion of Justice Rehnquist in Tee-Hit-Tin.[51] He also describes the opinions rendered in *Nevada V. Hicks (2001)* and *U.S. v Lara* (2004) as reflecting racism and describes Justice Clarence Thomas's as acknowledging that the legal approach was "schizophrenic" relative to Indian rights in *U.S. v Lara*.[52] This latter case involved a jurisdictional issue and resulted in a situation of double jeopardy given that an Indian was tried in both the Indian Tribal Court as well as in federal court for striking a federal officer on Indian reservation land. Thomas argued that this case was decided viewing the tribe as both a separate sovereign as well as not a separate sovereign and thus contradictory and schizophrenic. Even as late as 2005, in the *Sherrill v Oneida Indian Nation* case, the racial precedents of Marshall's interpretations were still used. With regard to federal Indian law, Justice Marshall is most often cited. Williams uses the term "aversive racism" to describe what he called a subtle form of racism used by whites where bias is unintentional and those using it believe they

51. Ibid., 128-136.

52. Ibid., 149.

are not prejudice.[53] Thus, they may continue to believe that the premises, precedents and perceived logic used to decide tribal cases are valid. Lastly, Williams argued that contemporary international law rather than traditional federal law should be used as an "interpretative backdrop" and would be more appropriate when deciding legal cases that involve indigenous people including American Indians. International law respects the human rights of indigenous peoples and reflects the principles of racial equality and equal justice.[54] Despite the racial underpinnings of traditional federal Indian law, some tribes like the Seminole view it as an effective vehicle for asserting and protecting their sovereignty. According to Jerry Straus, an outside attorney for the Seminoles, from the Washington, DC Indian law firm, Hobbs, Straus, Dean and Walker, Seminole leaders do not view the existing legal system and United States law as impenetrable in terms of its rules and limitations nor as a colonist construct.[55] Seminole success with litigating their appeal in *Seminole Tribe v Butterworth* (1981) opened the gates for other tribes to pursue Class II gaming rather than simply having paper bingo. Their recent victory in *Seminole Tribe v Florida* that had been pending for years was also a game changer as it opened the doors for other tribes to challenge states that refuse to negotiate Class III compacts to offer high stakes gaming.

In 2004, the Seminole Nation in the southeast had a growing membership of 3,000 persons half of whom were under the age of 18. While the size of the Seminole

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53. Ibid., 131-136.

54. Ibid., 192-195.

55. Jessica R Cattelino, "High Stakes: Seminole Sovereignty in the Casino Era," accessed May 14, 2012, http://www.ProQuest.

Nation cannot be compared to the Pequot in the northeast which had less than 100 members when it opened its large casino, both of these Indian Nations as well as the Cabazon Band of Mission Indians in California played pivotal roles in advancing economic independence for gaming tribes.

As noted earlier, some traditional tribal members view gaming as compromising Indian sovereignty since tribes must negotiate with states for Class III compacts when tribes were not previously required to negotiate with states on any matters. According to Cattelino, most Indian rights advocates view this new negotiated power as "the beginning of a slippery slope" that could lead to increased state involvement. However, she also notes that some legal historians view IGRA as reaffirming Indian sovereignty because this Act makes it clear that only Congress with its plenary power is able to establish requirements for negotiating or placing limits on tribal sovereignty.[56] It is fair to say that there are simultaneous advantages and disadvantages of IGRA. After IGRA, Class III Indian gaming led to states and tribes having some level of interdependence with each, given these new government-to-government relationships. States are gaining from the economic resources of Indian casinos and tribes are learning how state government operates. Tribes are also learning how lobbying can be utilized to promote their specific interests. According to W. Dale Mason, the Seminole cases led to a redefinition of the federal-state balance of power. Mason argues that IGRA was passed largely due to the pressure placed on Congress after numerous lawsuits that were filed when tribes tried to

56. Ibid., 236.

expand gaming operations and states tried to prevent or regulate them.[57] Thus, the outcome of litigation filed on behalf of and against gaming tribes is shaping federal Indian law in this country. When the economic status of Indian nations prior to and after the passage of IGRA is closely examined, the impact of gaming is notably clear. After IGRA was passed in 1988, higher stakes gaming replaced bingo operations that were conducted in converted warehouses on reservation land. According to the Bureau of Indian Affairs, it was estimated that in 1987 at least 113 separate tribes were involved in the bingo industry with an estimated gross revenue of $225 million dollars. The Seminoles Indians in Florida began using bingo as a revenue generating strategy as early as 1979. They opened the nation's first big stakes bingo hall in Hollywood, Florida backed by a group of non-Indian investors.[58] Their four bingo facilities generated an estimated $45 million in one year which significantly reduced their dependency on federal funds.[59] Due to their sovereign rights tribal bingo always had a comparative advantage over non-tribal bingo given that states could not place monetary limitations on their jackpots. However, investments in tribal gaming by non-Indian investors can be risky given that Indian tribes are immune from suit and thus investors may not be able to recoup their investments if the casino is not successful. Tribes with outside management groups are also at a disadvantage, as most management agreements only give Indians 51

57. W. Dale Mason, *Indian Gaming, Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000), 240-241.

58. Eduardo Cordeiro, Report on "The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations" (Cambridge, MA: Malcolm Wiener Center for Social Policy, Harvard University Press, 1989), 14.

59. Pommersheim, "Economic Development in Indian Country: What are the Questions?" 195.

percent of the profits.[60] Cordeiro argued that the risk of Mafia involvement is greater when outside management groups are utilized. He cited reports of Mafia involvement in at least 12 high stakes Indian bingo operations in 1989 where money was being skimmed off the profits.[61]

Like non-Indian bingo, general market factors such as supply and demand also impact Indian gaming including population density and location. Thus, it stands to reason that bingo operations and casinos located in highly populated areas will generate more revenue that those located in rural areas. The size of the bingo halls or casinos, schedule of operation and type of management (Indian or non-Indian) and the stability of the tribal government are key factors in terms of how well the enterprise will do. Additionally, Indian nations can sell tax free cigarettes and smoking is allowed in their bingo halls and casinos. When this researcher visited the three casinos in Alabama owned by the Poarch Band Creek Indians (PCI gaming) in 2012, the facilities were filled with people and smoke. The two casinos located within ten miles of downtown Montgomery appeared to be converted warehouses and were very crowded. Wind Creek Casino located in rural Atmore was their newest and larger operation at the time. It was not overcrowded and had better ventilation. PCI casino gaming is discussed further in the next chapter.

Indian gaming benefits Indian and non-Indian communities. IGRA stipulates that revenues from tribal gaming (Class II and Class III gaming) must be used only for certain purposes. Gaming revenues must be used to help fund tribal government operations and programs; provide for the general welfare of tribal citizens; support charitable

60. Cordeiro, "The Economics of Bingo," 16-17.

61. Ibid., 17.

organizations; promote economic development and fund operations for local non-tribal government agencies.

Taylor, Krepps, and Wang conducted a statistical analysis in 2000 of 100 communities across the country, 24 of which had experienced the introduction of a nearby non-Indian casino and 16 of which had experienced the introduction of an Indian casino. They found that the Indian casinos had a "measurably greater" positive economic and social impact on surrounding communities than non-Indian casinos.[62] Their study describes gains to the Indian community as improvements in basic infrastructure, improved fire, police and emergency services, budgets for social programs, health, housing and education including indigenous language and natural resource management. Gaming has not only supported land base re-acquisition and income for individual tribal members but it has also resulted in the migration of Indians back to reservation land. While total income was not statistically changed by the introduction of Indian casinos, reductions in welfare and unemployment support the notion that casinos are useful strategies for reducing poverty among Indians. Their analysis indicates that by 1995, the gaming tribes in their study reported 12 percent lower unemployment rates than their non-gaming counterparts.[63] While there is little national data on tribal employment and spending patterns or about their effects, non-Indian communities have benefited from increased employment and donations made by tribes to charitable and civic organizations. Based on the research completed by Taylor, Krepps, and Wang, there was a net positive

62. Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, "The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities," Abstract (Cambridge, MA: Malcolm Wiener Center for Social Policy, Harvard University Press, 2000), 1.

63. Ibid., 16.

impact in the surrounding communities of the casinos that were generally rural areas where poorer patrons participate in gaming. For these areas, they cite a rise in gross incomes and a decrease in certain crime rates. However, they do not indicate which crimes they reference. These researchers note that their evidence is incomplete. The bulk of the evidence they were able to obtain was derived from the policy conflicts that occurred between gaming proponents and opponents in any given location. Just as this researcher experienced difficulty obtaining information from PCI Gaming in Alabama, these researchers state that the tribes in their study were "unwilling to share what they view as proprietary information about their commercial operations."[64] Census data are limited and available every ten years. Information on Indian tribes collected by and available from the Bureau of Indian Affairs has declined over the years due to their shrinking budget and changing role from federal overseer to one of technical assistance. More importantly, IGRA is not required to make their records public.

According to economist Alan Meister, Indian gaming experienced a decline and slowdown in growth beginning in 2005 which continued for four years consistent with the recession in the overall U.S. economy.[65] There was decreased spending at existing gaming facilities and restricted lending and financing were more costly. There were also fewer new casino developments, renovations and expansions during those years. However, by the latter part of 2009 Indian gaming had begun to grow again slowly. By 2010, 44 percent of all U.S. casino gaming revenue was generated by Indian gaming. PCI gaming expanded their Atmore gaming facility in Alabama during this period in January

64. Ibid., 4.

65. Alan Meister, *Indian Gaming Industry Report* (Newton, MA: Casino City Press, 2012), 2.

2009. Meister reports Indian gaming in Alabama as having the fastest growth rate in the country with a +61 percent revenue growth rate in 2010 compared to a -7 percent revenue growth rate in North Carolina.[66] Alabama growth was largely due to the advantage gained by the Poarch Band Creek Indians (PCI) when the state of Alabama closed all non-Indian gaming facilities in 2010. PCI had also increased their number of gaming machines by 9 percent by the end of 2010.[67]

Indian gaming facilities are making significant contributions to the U.S. economy. In calendar year 2010, they generated 306,000 jobs and $12.6 billion dollars in wages nationally.[68] Meister views the short term future of Indian gaming as very promising and says it "is poised to overtake the commercial casino segment in the near future."[69] He views the long term outlook as uncertain as it will be largely affected by market factors and non market factors. Market factors include increasing competition, size of and proximity to the customer base, patron demographics, local/regional economic conditions and the maturation of gaming markets. The most important market factor is the location of the casino.[70] Non-market factors include legal challenges, legislation and restrictive regulations that could limit expansions. Meister further acknowledges that the success of Indian gaming varies widely across the country. While the small state of Alabama had the strongest growth rate in 2010, other larger Indian gaming states had moderate to strong

66. Ibid., 3.

67. Ibid., 29.

68. Ibid., 3-5.

69. Ibid.

70. Ibid., 59.

growth rates (i.e., Oklahoma, New York, Michigan, and Washington). States that had a noticeable decline in growth were California and Connecticut.[71] Ironically, Indian tribes in these two states were the first to have early gaming success. Prior to the recession in 2007, Indian gaming had experienced strong growth for the previous two decades following the passage of IGRA in 1988. It can be said that although the recession had a strong impact, after gaming reached its peak, the market for gaming became saturated and thus it began to decline. State and federal policies as well as judicial decisions also played a key role in the slow growth of Indian gaming. Some states refused to negotiate Class III gaming compacts with tribes and there was reluctance or a slow response by the federal government to enact and clarify secretarial procedures for tribes to follow when a state refuses to negotiate. The 2009 *Carcieri v Salazar* ruling placed limits on whether some tribes can have additional land placed in trust (including for casino development). Limitations were also established in some states on how many casinos and where casinos can be developed. These latter two issues occurred in the states of California, New Mexico, New York, Washington, Arizona, Montana, South Dakota, and Wisconsin. There were also some restrictions placed on the type of Class III games that Indian casinos can offer such as not allowing craps and roulette in Arizona and California and not allowing live table games in Idaho or North Carolina. California is the state with the highest revenue for Indian gaming. It appears that all Indian gaming states in the southern region of the country (Alabama, Mississippi, Louisiana, Texas, Florida, and Oklahoma had growth in Indian gaming. North Carolina (Eastern Band of Cherokees) was the only

71. Ibid., 57.

southern state that continued to have a decline.[72] As noted earlier, location of the Indian casino in terms of proximity to patrons and competitors is a key factor. Meister's data and predictions are very helpful in understanding the political economy of Indian gaming. His data sources include public information acquired directly from tribes, gaming associations, state and local governments, regulatory agencies and some published studies and financial reports. He was also able to obtain some private data voluntarily shared in confidence from tribes and casinos. Some of his estimates are based on public and private data and proprietary gaming market models as well as from reports published by Eve & Company, an accounting firm that works with many tribes across the country.[73]

The pending public policy issue regarding land-into-trust is the most pressing legal issue for Indian gaming at this time. Federally recognized gaming tribes are seeking to place addition land into trust that may not have been included in their original reserved lands. The additional land could then be used by the tribe for its own purposes including gaming. In January 2008 the Department of the Interior issued a memo that included a requirement that any land to be taken into trust must be within a commutable distance of the tribes original trust land. In June 2011, Larry Echo Hawk, who was then the Assistant Secretary for Indian Affairs, rescinded the 2008 memo and the commutable distance requirement. However, two years prior to him rescinding the memo, the 2009 Supreme Court decision involving the case *Carcieri v. Salazar* ruled that 31 acres of land could not be held into trust for the Narragansett Tribe because it was not federally recognized until 1934. The Indian Reorganization Act of 1934 placed tribal land into

72. Ibid., 62-63.

73. Ibid., 9.

trust. The Narragansett Tribe planned to use the land for elderly housing. Some states including Alabama are referencing the Carcieri decision to challenge the right of Indian tribes to have additional land placed into trust as a strategy to prevent gaming tribes from establishing new gaming facilities. Another ruling in June 2012 was the *Salazar v. Patchak* case involving the Gun Lake Tribe and a non-Indian citizen that lived near the tribe's casino. This case opened the flood gates by lowering the bar for litigants to sue the federal government in cases involving trust land.[74] The Patchak decision allows a litigant to sue for up to six years after land has been taken into trust. Indian leaders and gaming tribes view the Carcieri and Patchak decisions as major setbacks for tribal sovereignty. These two Supreme Court decisions are key issues for Jacqueline Pata, Executive Director of the National Congress of American Indians (NCAI) and Brian Patterson, President of the United Southeastern Tribes (USET) both of whom have voiced strong opposition.[75] Other Indian leaders have also made their opposition known including Ernie Stevens Jr., Chairman of the National Indian Gaming Association (NIGA), a tribal advocacy organization. Stevens describes the Carcieri decision as a direct attack on tribal sovereignty and also views it as an attack on the ability of tribes to restore their homelands which is a core aspect of tribal sovereignty. He further describes the decision as deterring investment in Indian country. While he acknowledges that the Obama

74. Toensing and Capriccioso, "From Carcieri to Worse," *Indian Country Today* 2, no. 26 (July 2012): 22-25.

75. Ibid., 23-24.

administration (including the BIA and Secretary of the Interior, Ken Salazar) supports a fix to the Carcieri decision, they lack congressional support.[76]

In December 2010, the Department of the Interior approved an application for the Cowlitz Tribe to place land into trust which was not federally recognized until 2000. Initially, the approval seemed to be an administrative fix to the Carcieri decision. However, subsequent Supreme Court rulings continue to reinforce the 2009 Carcieri decision and some legislators are using it to promote even tighter restrictions. U.S. Senators, Dianne Feinstein (California) and John Kyl (Arizona) introduced legislation aimed at restricting tribes from establishing new gaming facilities. In 2011, U.S. Senators John McCain (Arizona) and John Kyl (Arizona) introduced legislation entitled, "The Off-Reservation Land Acquisition Guidance Act." If passed this act would require the Department of Interior to consider the distance of the land from the original reserve land just as it was initially stipulated in the 2008 memo that was rescinded in 2011. It is interesting that the legislation was introduced by representatives of states with close proximity to non-Indian commercial gaming in Las Vegas. Several gaming tribes submitted land-into-trust applications that have been pending before the Bureau of Indian Affairs. As of December 31, 2011, there were twenty pending applications, eight of which date back to 2006. PCI gaming is not listed on Meister's tables as a gaming tribe that submitted an application. It is not known whether they may have submitted an application after December 31, 2011 to have additional land placed in trust.

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76. Gale Courey Toensing, "The Fix Isn't In – Yet," *Indian Country Today 2*, no. 37 (October 3, 2012): 34-35.

According to Meister, throughout the history of Indian gaming, the BIA has not approved many applications.[77] However, since the election of President Obama, the BIA has been somewhat quicker in its review of applications and more applications have been approved than previously.[78] In 2012, President Obama nominated Kevin Washburn, a member of the Chickasaw Nation, to serve as the new Assistant Secretary for Indian Affairs in the Department of the Interior to replace Larry Echo Hawk. Washburn is a law professor and served as general counsel for the National Indian Gaming Commission (NIGC) from 2000 until 2002. He was also an assistant United States attorney in New Mexico and a trial attorney in the U.S. Department of Justice. He appears to very knowledgeable and sensitive to Indian legal issues. Washburn proposed a partial fix to the Patchak decision by recommending a 30-day appeal period rather than a six-year period during which litigants can sue but only in cases that do not involve casinos. Litigants would also be required to state the basis of their appeal when it is filed. Washburn's proposal had a 60-day comment period for the public, tribes were to be consulted and Congress will have an opportunity for input. Washburn reported that 1,200 land-into-trust applications have been approved since the beginning of the Obama administration.[79] He also recently proposed changes to the process for acknowledging Indian groups as federally recognized

77. Meister, *Indian Gaming Industry Report*, 64.

78. Ibid., 72.

79. Rob Capriccioso, "A Partial Patchak Patch," *Indian Country Today 3*, no. 23 (June 19, 2013): 22-23.

tribes that according to him will "provide additional certainty and timeliness in the process."[80]

In addition to the land-into-trust policy issues and perhaps due to the Carcieri and Patchak rulings, members of Congress may introduce other legislation that could threaten tribal sovereignty as it relates to gaming. In 2012, former U.S. Representative John Sullivan (Oklahoma), introduced an act entitled, the Giving Local Communities a Voice in Tribal Gaming Act. If approved, this act would require gaming tribes to obtain approval from their local governments before Class III gaming could be operated despite whether it has been approved by the federal government and negotiated with the state.[81] Thus far, some gaming tribes including the Poarch Creeks informally negotiate with local governments but not because they were required to do so.

Internet gaming is another important economic issue for Indian tribes. An opinion written by the Department of Justice in 2011 opened the arena for discussions on Internet gaming with the exception of sports betting, to states and Indian tribes. Since that time Delaware and Nevada enacted legislation legalizing forms of Internet gaming in those states anticipating federal approval. Nevada already began accepting applications for online operator gaming licenses in 2013. Other states are also considering legislation. A bill legalizing online poker passed unanimously in the New Jersey Senate and in 2012 was scheduled for a vote in the House.[82]

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80. Gale Courey Toensing, "Comment Period Federal Recognition Regulations Extended," *Indian Country Today 1*, no. 6 (August 21, 2013): 3.

81. Meister, *Indian Gaming Industry Report*, 72.

82. Gale Courey Toensing, "Internet Hot Spot. Tribal Leaders Gather in DC to Define Their Hopes and Needs for Federal Control of Internet gaming," *Indian County Today 2*, no. 32 (August 29, 2012), 30.

The Pascua Yaqui Tribe's Casino Del Sol in Tucson, Arizona has become one of the first land-based Indian casinos to offer free online gaming through its website. If federal legislation is passed, they are poised to convert to online gaming with a cost to players. Tribes are pushing for federal regulations on Internet gaming that would be in accordance with those of IGRA for their land based casinos rather than allowing individual states to establish guidelines for how their Internet games should be operated. Tribes want equal footing rather than a patchwork approach by different states. They also want to be involved in the process. IGRA was drafted by congressional members with input from tribal leaders. Two Indian advocacy groups, the National Congress of American Indians and the National Indian Gaming Commission (NIGC), are jointly developing a unified position on Internet gaming that respects tribal sovereignty. Tribal leaders are hopeful that NIGC, the federal regulatory agency, which currently regulates land based Indian gaming will also take on the responsibility for Internet gaming. There have been congressional hearings on the subject but legislation has not yet been passed. Gaming tribes that are doing well are in a position to lobby at the local, state and national levels to elect officials that will support their economic interests.

While this chapter aimed to separate the discussion on Indian gaming from commercial gaming. However, there were some discussions that overlap. The next two sections in this chapter primarily discuss commercial gaming nationally and commercial gaming in Alabama with some overlap in the final discussion on Internet gaming. Appendix A is a table on Casino Gaming by State that indicates which states have Indian gaming and/or commercial gaming based on 2013 data from the American Gaming

Association. The term "commercial gaming" includes land-based casinos as well as riverboats and racetrack casinos. Only two states in the southeastern region have both types of gaming: Florida and Mississippi. North Carolina has Indian gaming only while Kentucky has commercial gaming only. South Carolina, Tennessee and Georgia did not have either form of gaming. Alabama had commercial and Indian gaming prior to 2013. However, in 2010 all Alabama commercial gaming facilities were closed.

Non-Indian Commercial Gaming

Private-owned casinos in the U.S. have a much longer political history than that of Indian casinos. Nevada was the first state to legalize casino gaming in 1931. At that time casinos were largely operated or manipulated by organized crime syndicates such as the Flamingo Casino in Nevada that was owned and operated by noted mobster Bugsy Siegel.[83] In response to concerns regarding the association between casinos and organized crime, the U.S. Senate established a Special Committee to Investigate Organized Crime in Interstate Commerce (also known as the Kefauver Committee) which began to hold hearings on the subject in 1950. This action led to Nevada establishing a Gaming Control Division and later a State Gaming Commission to oversee gaming including the issuing and revoking of gaming licenses. During the 1960s, Nevada passed laws that removed prohibitions on corporate involvement in casinos and in 1973 one of their casinos, Harrah's Entertainment became the first casino to be traded on the New York Stock Exchange.[84]

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83. Andrew Walter, "Casino Industry," Survey of American Industry & Careers (Armenia: Salem Press at Greyhouse Publishing, 2013), 271-275.

84. Ibid.

Nevada was the pace setter and remained the only state with legalized gambling for forty-five years. In 1976 New Jersey became the second state to legalize casino gambling followed by South Dakota and Iowa in 1989. Racetrack casinos or "racinos" became legal in Rhode Island, Delaware, Iowa, West Virginia, and Louisiana. By the 1990's luxury casinos had been developed and became tourist attractions. Luxury casinos included entertainment, hotels and restaurants.[85] By 2009, in addition to Nevada and New Jersey, ten other states had opened casinos and by 2012, thirty states operated privately owned commercial casinos.[86] By 2014, almost every state with the exception of Hawaii and Utah had some form of legalized gambling such as charitable gaming, lotteries, casinos and/or pari-mutuel wagering.

Gambling is not prohibited by the federal government. Each state has the right to allow, prohibit or regulate gambling and each state sets its own regulations and methods of taxation. Gaming entities must follow the same tax requirements as any other taxable entity. For example, if the casino is established as an S corporation, then it follows the requirements for S corporations with regard to taxes. Casinos are required to pay income taxes and property taxes. Many states also impose other taxes such as annual gaming and machine licensing taxes. Nevada imposes an annual tax of $250/per slot machine as well as another annual tax that varies depending on the number of table games.[87] State tax

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85. Steve Durham and Kathryn Hashimoto, *The History of Gambling in America* (Upper Saddle River, NJ: Prentice Hall, 2007), 42-45.

86. Richard K. Miller and Kelli Washington, "Chapter 3: Key Players," *Casinos, Gaming and Wagering* (Washington, DC: American Gaming Association, 2012), 50.

87. Christopher R. Jones, Spencer C. Usrey, and Thomas Z. Webb, "Taxation of Gambling in the United States: Comparing the Current System with Two Alternatives," *ATA Journal of Legal Tax Research 12*, no. 2, American Accounting Association (December 2014): 37-40.

laws for gamblers regarding winnings and losses vary considerable. Mississippi requires casinos to withhold a 3 percent non-refundable income tax at the time a winner is paid and it is included on the W-2g or 1099. However, Mississippi does not require residents or non-residents to include gambling winnings as income. Louisiana includes gambling winnings as income and also requires non-residents to file a Louisiana state income tax return.[88]

Based on the 2011 casino revenues, seven of the largest casinos and gaming corporations are: Ameristar Casino (1.2 billion), International Game Technology (1.96 billion), Boyd Gaming Corporation (2.37 billion), Penn National Gaming (2.74 billion), Wynn Resorts (5.27 billion), Caesars Entertainment (8.83 billion), and Las Vegas Sands (9.41 billion).[89] Revenue for 2011 was not reported for Avenue Capital Group, a hedge fund managed by Marc Lasry that took over the operations of Trump Entertainment Resorts on an interim basis in 2010. Trump Entertainment Resorts in 2010 included Trump Plaza Hotel and Casino and Trump Taj Mahal Casino Resort both of which are located in Atlantic City, New Jersey. These two casinos had been operating in Chapter 11 bankruptcy with 2009 revenue reported as $994 million. However, operating income had a deficit of < $578 million > in 2009. The corporation filed Chapter 11 bankruptcy in February 2009 for the third time and Donald Trump resigned from the board of directors.[90] Due to nearby competition from the saturated mid-Atlantic casino market including Indian casinos, several casinos in Atlantic City closed in recent years. The

88. Ibid., 42.

89. Miller and Washington, “Chapter 3: Key Players,” 26-37.

90. Ibid., 34.

remaining casinos in Atlantic City have declining incomes. There are 12 casinos in nearby Philadelphia and 3 casinos in Delaware. Atlantic City casinos earned $2.86 billion in 2013 compared to $5.3 billion in 2006.[91] Overall, the commercial casino industry is the fastest growing U.S. industry and in 2008, employed more than 375,000 people.[92]

According to the University of Nevada at Las Vegas, Americans spent almost $39 billion in casinos in 2013.[93] Although gambling is a worldwide activity, reportedly, relatively few individuals become problem gamblers and those that do become addicted, recover without professional assistance.[94] Research by the American Psychiatric Association seems to suggest that for most people, there is a pattern of moderate gambling including Internet gambling. However, research studies on gambling behavior are primarily based on individual self-reports and self-regulation and thus validity problems exist. Greater research is needed in this area.[95]

Internet casino-style gambling is a growing trend and had already been occurring via websites located outside of the U.S. since 1995. At the beginning of the 21st century, there were approximately 1,400 websites with some form of e-gambling wager. It was estimated that there are approximately 2,100 Internet gambling websites located in

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91. Bill Saporito, "Trump Isn't the Only Loser in Atlantic City," *Time Magazine,* August 14, 2014, 1.

92. Andrew Walter, "Casino Industry," *Survey of American Industry & Careers* (Armenia: Salem Press at Greyhouse Publishing, 2013), 10.

93. Ibid.

94. Susan Moore, Anna C. Thomas, Michael Kyrios, and Glen Bates, "The Self Regulation of Gambling," *Journal of Gambling Studies 28,* no. 3 (September 2012): 405-407.

95. Ibid., 406; Howard J. Shaffer, Allyson J. Peller, Debi A. Laplante, Sarah E. Nelson, and Richard A Labrie, "Toward a Paradigm Shift in Internet Gambling Research: From Opinion and Self-Report to Actual Behavior," *Addiction Research and Theory 18,* no. 3 (June 2010): 270-283.

approximately 80 different countries. However, Internet gaming in the U.S. that involves wagering has been discouraged from operating by the Department of Justice (DOJ) which ruled it illegal. While none of the profits are going to U.S. based operations, Americans compose approximately 50–70 percent of those that are betting online.[96]

In June 2001, Nevada took legislative steps to prepare for online gambling despite the position of DOJ by passing Assembly Bill 466 which the governor signed into law. The bill gave the Nevada Gaming Commission authority to adopt regulations governing the licensing and operation of "interactive gaming" which by definition includes interstate Internet casino-style gaming. This legislation is contingent upon interactive gaming becoming legal and compliant with all applicable laws. The federal statutes that already support the DOJ's position against Internet gaming include the Interstate Wire Act of 1961, the Travel Act of 1952 and the Illegal Gambling Business Act of 1970, the latter of which is part of the Organized Crime Control Act. For several years, Congress focused on passing legislation that would further ban Internet gaming versus regulating and taxing it. It was estimated that in 2006, the U.S. lost more than $7.2 billion dollars of American money that was spent gambling through Internet sites based in other countries.[97] It was projected that market revenues would reach over $24 billion by 2010.[98] According to another source, online gambling spending by Americans was

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96. Marc G. Warren, "Internet Casino-Style Gambling: Is it Legal in Nevada?" *University of Nevada, Las Vegas Gaming Research and Review Journal 10,* no. 1 (February 1, 2006): 21.

97. Ibid.

98. Jonathan Conon, "Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in 'Dead Man's Land' in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legalization," *Journal of Criminal Law and Criminology 99,* no. 4 (September 1, 2009): 1161.

estimated in 2011 to range from $4 billion to $16 billion annually. The growth in online gambling is attributed in large part to the rapid increase in online poker. [99]

If the federal government ever changes its position with regard to legalizing Internet gambling, Nevada is already positioned to be in the forefront. In March 2005, the Nevada Legislature passed A.B. 471 which the governor signed into law that allows the use of mobile gaming devices inside Nevada Casinos. A.B. 471 expressly prohibits the use of the Internet for this new form of gaming.[100] The Nevada Gaming Commission with the assistance of the Nevada State Gaming Control Board adopted regulations for mobile gaming. It allows casino patrons to use wireless handheld communications devices that are linked to a central computer to play casino games. The regulations restrict mobile gaming to casinos where there are 100 or more slot machines and at least one table game.

The rush for casino-style Internet gambling is being led by the richest people in the country in anticipation that the federal government and/or state governments will establish regulations. The U.S. online gambling market is reported as the largest and it has operated in the shadows of the law. The U.S. commercial casino industry is strongly pushing to get Internet gambling legislation passed through Congress and especially lawmakers in Nevada and New Jersey. The push to legalize Internet gaming was likely a motivating factor for Republican Donald Trump in his decision to enter the presidential race in 2015. Allegedly, Trump has a joint venture planned with billionaire Marc Lasry (a Democrat that supported Obama) and with his daughter, Ivanka Trump if online gambling regulations are put in place. Trump is reported as saying, “This has to happen

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99. Ibid.

100. Warren, “Internet Casino-Style Gambling: Is it Legal in Nevada?” 24.

because many other countries are doing it and like usual the US is just missing out".[101] When Trump was quoted earlier by the same source, he reportedly included New Jersey is his comments when saying, "The U.S. is missing out and New Jersey is missing out and everyone else is getting it."[102] Trump is preparing for the possibility of federal Internet gaming regulation becoming law and is also hopeful that New Jersey will do something at the state level. Not only is the casino industry keeping a watchful eye on online gambling developments and continuing to lobby for it but big Wall Street investors are also paying close attention.

One year after mobile gaming legislation was passed in Nevada, Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006 which was signed into law by former President George Bush on October 13, 2006. It was the first federal regulation specifically aimed at online gaming. Perhaps as a strategy to promote passage, the act was attached at the last minute to an unrelated act, the Security and Accountability for the Safe Port Act of 2006. Prior to UIGEA, the 1961 Wire Act already prohibited gambling businesses from using interstate or international telecommunications wires to transmit or receive bets. There has been a lot of criticism of UIGEA and primarily that it does not go far enough to curb online gambling.

Many journal articles on the subject of online gambling are notably coming from Las Vegas. Conon and Rose offered some similar but also different perspectives in their analyses of UIGEA. Both agree that UIGEA is too vague and does not go far enough in

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101. Nathan Vardi, "The Billionaires Betting on Internet Gambling," *Forbes Magazine*, October 31, 2011, accessed March 3, 2014, http://www.forbes.com.

102. Nathan Vardi, "Donald Trump: Internet Gambling Mogul," *Forbes Magazine,* October 20, 2011, accessed March 3, 2014, http://www.forbes.com.

defining what is "illegal" Internet gaming. They acknowledged that it lacks international support and cooperation and also lacks enforcement mechanisms. Rose does not accept the assertion made by UIGEA that Internet gaming is a growing problem for banks and credit card companies.[103] According to a 2002 Government Accountability Office (GAO) Report, due to pressure by U.S. lawmakers, many large U.S. credit card issuers already block Internet gambling transactions. Betters must resort to using debit cards (check cards) which only allow access to their existing funds in these accounts.[104] Conon argued that the main reason for UIGEA passing, stemmed from a concern that debts from Internet gambling would be uncollectable as well as concerns regarding money laundering and pathological and underage gambling. Conan supports his argument by citing a concern stemming from findings that states that allowed casino gambling saw an increase in the number of personal bankruptcy filings.[105] Conan criticizes UIGEA for its failure to prohibit or penalize individual gamblers, as it "leaves the supply of online players virtually unaffected."[106] Conan acknowledges that measuring the size of the online gambling market is difficult and thus, he offered a range for estimated revenues as mentioned earlier. Lastly, Conan argues that the complexities of the Internet create major problems with regards to collections and thus the "massive tax potential of the industry"

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103. I. Nelson Rose, "Gambling and the Law: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed," *Gaming Research and Review Journal 11,* no. 1 (2006): 53-56.

104. U.S. General Accounting Office, "Internet Gambling, An Overview of the Issues," (Washington, DC: Report to the Congressional Requesters, 2002), 6.

105. Conon, "Aces and Eights," 1158.

106. Ibid., 1159.

cited by Internet gambling proponents "need to be more seriously scrutinized."[107] Conan's position is that online gambling at most, has a minimal benefit to society.

States do not want to jump the gun if federal legislation is not imminent. In 2012, it was rumored that Senators Harry Reid and Jon Kyl had co-drafted federal legislation, called the Reid/Kyl Proposal to legalize Internet Poker. Their proposal planned to establish a federal Office of Online Poker Oversight under the Department of Commerce. It also planned to limit potential licensees to those who already had land-based facilities and included a state system whereby states could choose whether or not they want to participate. The proposed bill included a distribution plan for fees and taxes and would allow Indian tribes to also engage in Internet Poker if the state they are located in, has opted in. IGRA (Indian Gaming Regulatory Act) stipulates that tribes can offer certain types of games but they must be located on Indian lands. Given the nature of Internet gambling, an Internet gambling patron may not necessarily be physically present on Indian land and thus Internet gaming for Indian tribes may not be allowable under IGRA. Miller notes, "If the correct interpretation of IGRA is to require the gamblers' physical presence, Indian tribes stand to gain very little from Internet Gambling."[108] Thus, IGRA would require an amendment for tribes to engage in Internet gambling. Moreover, if the IGRA statute is open for amendment, other unrelated and less desirable changes could occur.

In April 2013 in Oklahoma, the Cheyenne and Arapaho Indian Tribes entered into a Class III Gaming Compact to share revenues from international gaming while

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107. Ibid., 1191.

108. Miller, "The Internet Gambling Genie and the Challenges States Face," 28.

banning in-state Internet gambling.[109] This may be the first Class III (high stakes gambling) Compact between a state and tribe related to international Internet gambling. This compact will give Oklahoma and the tribes an early advantage on state-foreign compacts that could follow if/when Internet gambling becomes legal in the U.S. The American Gaming Association which lobbies for the commercial gaming industry supports a federal approach to Internet gambling. It makes sense to have a national approach since it is an international industry. Miller argued in 2013 that the current political climate in terms of the "dysfunctional relationship between Congress and the President makes any sort of agreement on legislation permitting electronic gambling seem fanciful."[110] Barack Obama was president at that time.

Donald Trump's position at that time was that the Indian Gaming Regulatory Act did not impose the type of restrictive regulatory and reporting standards that privately owned commercial gaming must adhere to.[111] Trump also argued that Indian gaming is not unionized and thus, employees are not protected. It seems that Trump had interests in both commercial casinos and Indian casinos. It was reported that he made allegations against his long time friend and consultant Richard Fields when accusing Fields of stealing his plan to build two casinos on Seminole land in Florida. The casinos would be owned by the Seminoles. Trump and Fields had collaboratively sought to establish Class III gaming in Florida in 1998 on Seminole land but the governor and legislators would not support it at that time. Allegedly, Fields was given the go ahead by Trump to seek a

109. Ibid., 296.

110. Ibid., 20-21.

111. Trump, "Indian Gaming Will Hurt the Economy," 114-117.

deal on his own. Fields later helped negotiate a contract in 2000 for the Seminole to offer Class II gaming (electronic variations of bingo and card games). The casinos opened in 2004 and were very successful with revenues of $1 billion a year. After the casinos opened, Trump sued Fields alleging that Fields betrayed him by using his plan to build two casinos on land owned by the Seminoles in Florida. Trump further alleged that Fields misled the Seminoles into thinking that he was still consulting with Trump when he arranged the deal. Trump said he taught Fields the business and all that he knows and alleged that Fields "took advantage of the situation unfairly."[112] Fields alleged that Trump was only interested in negotiating Class III gaming such as slot machines, craps and roulette and not Class II gaming that primarily involve only electronic bingo machines. Fields further alleged that Trump withdrew interest when Class III could not happen but encouraged him to try negotiating with the tribe on his own.

As indicted earlier, former Senator Robert Torricelli from New Jersey raised early concerns in 1998 that tribal casinos had become targets for organized crime in at least ten states.[113] However, it seems that criminal involvement may occur more frequently when outside management firms are used to oversee tribal gaming. Organized crime may be a larger problem for commercial casinos given their early involvement in New Jersey and Las Vegas casinos. Internet gaming will create new opportunities for gaming tribes and the commercial gaming industry but will also create new challenges in terms of how to monitor compliance and limit external influences and criminal involvement.

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112. Ibid., 82.

113. Torricelli, "Organized Crime May Infiltrate Indian Casinos," 110-113.

Non-Indian Commercial Gaming in Alabama

It seems that electronic bingo was first introduced in Alabama by non-Indian gaming advocates. According to former Tuskegee Mayor and former State Legislator Johnny Ford, electronic bingo was introduced in Alabama through a bill he sponsored (House Bill 660) that was enacted on June 11, 2003. It passed by only one vote and authorized electronic bingo in Macon County, Alabama by nonprofit organizations for charitable and educational purposes via constitutional amendment.[114] Electronic bingo quickly became a new option for Macon County Greyhound Inc. DBA Victoryland/ Quincy Triple Seven located in Shorter, Alabama (Macon County). The greyhound track had been open since 1983. Electronic bingo machines were later installed after Ford's bill was passed in 2003. Prior to its closure in 2010, Victoryland was the largest and most popular non-Indian commercial casino in Alabama. Ford believes his bingo bill "changed the gaming industry forever in Alabama." With the introduction of electronic bingo, patrons feel like they are engaging in high stakes gambling rather than playing bingo. According to Ford, Victoryland grossed $80 million and had 300 employees in 2003. After his bill passed and electronic bingo was introduced, Victoryland grossed $300 million annually and was employing over 1,300 people by 2010. Ford indicated that Victoryland was the largest employer in Macon County.[115]

Almost a year after the Poarch Creek Indians (PCI) upgraded their bingo hall in Atmore with the Wind Creek Casino and Hotel in January 2009, Victoryland also

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114. Johnny Ford, interview by author, Tuskegee, Alabama May 5, 2010; Johnny Ford, *Let Me Speak to the Mayor, Autobiography of Johnny Ford* (Atlanta, GA: Publishing Associates, Inc., 2007), 94-95.

115. Johnny Ford, Interview by author, Tuskegee, Alabama, May 5, 2010.

upgraded in November 2009 and expanded from a dog track and one-level casino to a 16-story hotel, Oasis with expanded casino offerings including 6,000 electronic bingo machines.[116] Through the passage of similar constitutional amendments in other counties, additional commercial casinos with electronic bingo began to open in Alabama but they were not equivalent to Victoryland nor did they include hotels. The largest of these other commercial casinos were Country Crossing in Houston County, White Hall in Lowndes County and Greenetrack in Greene County near Birmingham. Greenetrack reportedly employed more than 400 people and housed more than 900 electronic bingo machines. Greenetrack also allows employees to own shares in the business and according to John Bolton, an Alabama gaming attorney, Greenetrack and Victoryland have the same owner, Milton McGregor.[117] Country Crossing was developed with an investment of $87 million and opened in 2009 with 1,700 electronic bingo machines.[118] Smaller charitable organizations also began to install electronic bingo machines in counties where referendums were passed.

As electronic bingo grew in popularity, it drew negative attention from anti-gaming advocates including groups such as Citizens for a Better Alabama and from members of the Christian Coalition. Conservative religious groups oppose gaming because of the stereotypical issues that allegedly surround casinos like gambling

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116. Phillip Rawls, "Rolling the Dice: Alabama Casinos Go Luxurious to Compete With Mississippi for Gamblers," *Business News* (December 21, 2009). Accessed January 27 2010, http;//www.reuters.com.

117. Gaming Attorney John Bolton, interview by author, Montgomery, Alabama October 20, 2010.

118. Phillip Rawls, "Casino Owner Wants District Judge to OK Jail Release," *Montgomery Advertiser,* February 21, 2011.

addiction, organized crime and corruption. Former Alabama Governor, Bob Riley was also strongly opposed to gaming in Alabama. He was very vocal and adamant that electronic bingo was not a game of chance like bingo (Class II) but actually slot machines (Class III) which are not allowable in Alabama. Shortly after Victoryland expanded to include a hotel and additional bingo machines, Governor Riley established a Task Force against Gambling headed by the Attorney General, Troy King. The goal of the Governor's Task Force was to close all electronic bingo operations in the state, including the Indian casinos. Governor Riley's Task Force was successful in raiding and closing Victoryland by February 2010 as well as the other smaller commercial casinos soon thereafter.[119] However, he could not close Indian casinos, as the National Indian Gaming Commission reiterated that the state had no jurisdiction over the affairs of the Poarch Creek Indians and reaffirmed that their gaming operations met the requirements of IGRA as Class II gaming.[120]

After the forced closing of all commercial casinos in Alabama, state legislators came under political pressure to indicate their support for or against gambling. Senate Bill SB380 sponsored by Senator Bedford in April 2010 passed in the Alabama Senate but did not pass in the House. If it had passed it would have allowed the citizens to decide whether some commercial casinos closed by the Governor's Task Force could reopen. It could have also resulted in further commercial casino expansion and would have created

119. Bob Johnson, "Update: Gambling Task Force Wins Court Victory," Associated Press, February 4, 2010.

120. "Alabama Indian Casinos Thrive as Others Close," *Reznet News*, February 11, 2010.

greater competition for the Poarch Creek Indians. [121] The bill was withdrawn on the date scheduled for House vote as Bedford stated that he did not have enough votes in the House for the bill to pass.[122]

Alabama legislators and other public officials that represent the three districts where Poarch Creek Indian (PCI) casinos are located were invited in May 2010 to participate in an interview with the researcher regarding their positions on Indian gaming. All of the legislators and most public officials declined to participate including Atmore Mayor, Howard Shell. Shell send the author an email declining to be interviewed saying that he was "too close to this controversial issue." Shell represented citizens that he said were both pro and against gaming. He felt that it was not appropriate to respond to gaming questions at that time.[123] Republican Representative Harry Shriver, who represented Montgomery where Creek Casino Montgomery is located, called the researcher to say that he too was in the middle. Representative Shriver's district has 45,000 people. He indicated that most of his supporters are in agreement with his position to allow the citizens to vote on whether or not to allow gaming. Wetumpka Mayor Jerry Willis and former mayor and legislator Johnny Ford were the only public officials that agreed to be interviewed in 2010. Ford is a pro-gaming advocate for Victoryland, a non-

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121. " Eleven Indicted in FBI Bingo Probe," *Selma Times,* October 4, 2010; Charles Dean, "Lobbyist Robert Geddie Arrested in FBI Probe of Lobbying in Alabama Legislature," *The Birmingham News,* October 4, 2010; Sebastian Kitchen, "65-page Indictment Details Conversations in Bingo Vote-Buying Case," *Montgomery Advertiser,* October 6, 2010.

122. Sebastian Kitchen, "Alabama Senate OKs Revised Bingo Bill," *Montgomery Advertiser,* March 31, 2010. The researcher was present at the State House Chambers when the bill was discussed by Representative Bedford.

123. Atmore Mayor Howard Shell, email message to author, May 7, 2010.

Indian casino in Shorter, Alabama. As indicated earlier, his legislation that was passed in 2003 was the catalyst for electronic bingo in Alabama. By the summer of 2010 none of the state legislators or Indian officials would respond to the researcher regarding gaming issues in Alabama. It was announced later that summer that an FBI investigation was underway stemming from allegations that some state legislators were paid off and/or coerced to vote in favor of Bedford's bingo bill to reopen and expand non-Indian commercial gaming. In October 2010, eleven people were arrested following the FBI investigation into alleged vote influencing and payoffs by lobbyists to promote the passage of the Senate Bill 380.[124] Those arrested included Milton McGregor, owner of Victoryland/Quincy 777 and Ronald Gilley, owner of Country Crossing. Some lobbyists and four Alabama Senators: Quinton Ross, James Pruiett, Larry Means and Harri Anne Smith were also arrested.[125] Senator Pruiett's district included PCI's Creek Casino in Montgomery. Earlier that year in July 2010, it had been reported that representatives of three large Alabama casinos made significant political contributions to Political Action Committees (PAC's). Victoryland contributed $1.9 million to more than 50 PAC's, PCI Gaming contributed $1.4 million to 56 PAC's and Greenetrack contributed more than $487,000.[126]

After the closing of the commercial casinos in 2010, legal challenges were launched against the Governor's Task Force alleging that citizens voting rights had been

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124. "11 Indicated n FBI Bingo Probe," *Selma Times Journal*, October 4, 2010; Kitchen, "65-Page Indictment Details Conversations in Bingo Vote-Buying Case, *Montgomery Advertiser*, October 6, 2010.

125. Guy Rhodes, "Bingo Lawsuit Counts Narrowed," *The Tuskegee News*, July 22, 2010.

126. Eric Velasco, "Gambling Interests Give $4 M to Political Campaigns," *The Birmingham News – The Associated Press*, July 4, 2010.

violated. Attorney Fred Gray filed a lawsuit on behalf of Victoryland where Gray is reportedly a stockholder. Some of the laid off employees and community leaders held protests outside the State Capital. Many were supporters of Victoryland which had employed more than 1,400 workers.[127] The layoffs increased unemployment in an already bleak Alabama economy.

The researcher visited Alabama during the weekend of Jubilee, March 5-7, 2010 for the annual Bridge Crossing in Selma, Alabama. Those attending the event included Reverend Jessie Jackson as well as local Alabama leaders and protesters. Many carried signs protesting the closing of electronic bingo establishments. The Jubilee celebration included a bingo rally on March 6 that culminated at the steps of the Alabama State House. The rally was held to protest the denial of the voting rights of Alabama citizens since they had voted on county referendums previously that allowed electronic bingo. After Bedford's bill was withdrawn from a vote in the legislature, the future of commercial casinos seemed bleak.

A federal lawsuit was filed in September 2010 on behalf of Victoryland against Governor Bob Riley and his Task Force Commander, John Tyson.[128] It alleged that the Voting Rights Act was violated when Governor Riley closed and confiscated electronic bingo machines in Greene and Macon Counties when voters had approved county referendums to allow electronic bingo in those two counties. As of May 2014, there had been no ruling to overturn Governor Riley's actions. In March 2012, Southern Star

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127. Phillip Rawls, "Gambling Advocates Protest near State Supreme Court," *Montgomery Advertiser*, July 17, 2010.

128. "Lawsuit Filed by Electronic Bingo Supporters Against Governor Riley: The World Around You," *The Demopolis Times*, September 14, 2010.

Casino in White Hall Alabama reopened its electronic bingo operation. However, on November 2, 2012, under the direction of Attorney General Luther Strange, Southern Star Casino was raided and more than 350 gambling machines and cash were seized by law enforcement officials.[129] In March 2013 Victoryland was allowed to reopen the pari-mutuel racing facilities only. Given the FBI probe into legislative voting and subsequent arrests, it is highly unlikely that the state legislature will reconsider voting on a bingo bill in the near future.

After the closing of non-Indian commercial casinos in Alabama in 2010, the Poarch Band of Creek Indians (PCI Gaming) had a gaming monopoly. At that time the tribe had two casinos in the state that offer Class II gaming with electronic bingo machines. In 2013, PCI expanded their small casino near Montgomery and also rebuilt a larger casino (Wind Creek Wetumpka) in Wetumpka that includes a 20-story hotel with 238 rooms. Television advertisement about the new Wetumpka casino was frequently aired on local Georgia channels. The new Wind Creek Wetumpka is likely creating some competition for the Cherokee Casino, Harrah's in North Carolina. Both are 2½ to 3 hours from Atlanta. PCI's casinos in Alabama can only offer Class II games while the Cherokee's Harrah's Casino has Class III gaming including table card games and other more advanced gaming similar to those offered in Las Vegas. The Cherokee Nation in North Carolina has a compact with the state and has been operating class III gaming for several years. However, their casino is managed by Harrah's rather than by the tribe. Indian gaming is allowable in nearby South Carolina but there are no casinos there.

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129. Erin Edgemon, "Luther Strange: 350 Illegal Gambling Machines Seized in Southern Star Casino Raid," *Alabama Local News*, November 2, 2012.

The profitability of commercial casino gaming was negatively impacted by casino gaming by Indian tribes not only in Alabama but in other states as well. Internet gaming, if allowed could become a new commodity for commercial gaming interests. Based on IGRA's current regulations, Indian tribes cannot offer Internet gaming. If this restriction remains, it will likely make Internet gaming more attractive for the commercial industry as there would be no competition for them with Indian tribes. However, some Indian tribes expressed interest in Internet gaming and a Tribal Internet Gaming Alliance (TIGA) was formed and spearheaded by the Inter-tribal Gaming Association founded by gaming tribes in California, Michigan and Oklahoma. The alliance was formed in response to a discussion draft issued by IGRA in 2014 on Internet gaming.[130] The alliance is positioned to help shape federal policy on Internet gaming if it becomes a reality.

The National Congress of American Indians (NCAI) also responded to the IGRA draft on Internet gaming with a resolution in 2015. Their resolution encourages Congress to support Internet gaming that has a minimal impact on tribal casinos and that would permit tribes to conduct Internet gaming similar to Internet gaming that would be made available to other entities off reservations. NCAI also advocated in their resolution that similar to Indian casinos, Internet gaming for Indian casinos not be subject to taxation.

In a position paper written by Racheal White Hawk at Arizona State University, she recommended that Internet gaming if allowed by IGRA, should follow the revenue sharing agreements that already exist for Class III gaming compacts between tribes and

130. Rob Capriccioso, "Internet Tribal Gaming Group Tests the Waters," *Indian Country Today Media Network,* April 2, 2014, accessed June 6, 2016, http://www.indiancountrymedianetwork.com.

states. She suggested that a new gaming category (Class IV gaming) be added to IGRA for Internet gaming. Based on her position, it seems that only tribes with Class III gaming would be eligible to engage in Internet gaming by IGRA. She acknowledged the need for federal legislation to address organized crime. White Hawk views Internet gaming for Indian tribes as simply an opportunity for them to take advantage of any gaming opportunities that become available given the active use of technology including computers, tablets and cell phones. She reported that Indian gaming represents 40 percent of the gaming industry overall and generates more than $27 billion annually.[131] While IGRA issued a draft for public comment, they had not issued new regulations for Internet gaming by Indian tribes nor had Congress passed any relevant legislation.

131. Rachael White Hawk, "A New Formula for Tribal Internet Gaming," accessed June 6, 2016, https://www.web.law.asu.edu.

CHAPTER IV

RESEARCH FINDINGS

Poarch Creek Indian (PCI) Gaming

In April 1985, one year after gaining federal recognition, the Poarch Creek Indians opened their first small gaming business, the Creek Bingo Palace, in the rural outskirts of Atmore, a town in southern Alabama (Escambia County) near the Florida border. Since the 1901 Alabama State Constitution allows bingo in the state, tribes can also offer it. Tribal bingo is considered by the National Indian Gaming Commission to be on par with paper bingo games held at churches and other non-profit organizations.

Ten years after federal recognition, the Poarch Creeks opened two larger bingo halls within a 20 minute drive from each other: Riverside Entertainment Center in Wetumpka (Elmore County) and the Tallapoosa Entertainment Center in Montgomery (Montgomery County). These two halls are located in central Alabama and are about 2-hours from Atmore. All three casinos were initially housed in large one-story trailers or warehouses. The Riverside Entertainment Center in Wetumpka was 39,000 square feet and housed 900 electronic gaming machines while Creek Casino Montgomery was substantially smaller with 21,000 square feet and housed 500 electronic gaming machines. Since that time all three casinos were upgraded and expanded.

In 2006, the Bingo Palace in Atmore was expanded to 20,000 square feet, 500 additional electronic bingo machines were added and the name was changed to the Creek Entertainment Center. The expansion created approximately 100 new jobs for local residents. Prior to the expansion, tribal officials and Atmore city officials travelled together during the planning process to observe other Indian casino operations in the south. It is important to note that the Poarch Creek Indians had strong local support in Atmore and especially with Mayor, Howard Shell for their gaming expansion plan.[1] A liquor license had been approved for the Creek Entertainment Center a few months earlier.[2]

Thereafter, tribal gaming progressed quickly for the Poarch Creeks Indians and their gaming enterprises are DBA Poarch Creek Indian (PCI) Gaming. Traditional paper bingo ended and was replaced with electronic bingo machines at the Creek Entertainment Center in April 2007. Six months later in October 2007, a formal three-year revenue sharing agreement was negotiated by PCI Gaming with the Escambia County Commission in Atmore. The County initially requested more than 4 million dollars over an 8-year period. However, final negotiations resulted in an agreement for PCI to pay the county $300,000 over a 36-month period equivalent to $100,000 per year. The revenue was to defray the costs and reduce the impact the casino would have on the county in terms of infrastructure including roads and law enforcement.[3] It is important to note that

1. Arthur McClean, "Indian Tribe Sees Casino, More in Poarch Future," *The Brewton Standard*, August 18, 2004.

2. Adam Prestridge, "CEC Begins Serving Alcohol," *The Brewton Standard*, September 6, 2006.

3. Lisa Tindell, "PCI, County Agree," *The Brewton Standard*, October 10, 2007.

the Indian Gaming Regulatory Act does not require tribes to negotiate with local municipalities for any type of gaming operations. However, by doing so the Poarch were able to garner local support for their gaming and it may have strengthened tribal-local relations. It may have also been a political strategy by the Poarch to acquire local support when state support from the governor was lacking for more advanced forms of gaming such as Class III. The Poarch Band had initially sought to negotiate a Class III Compact with the state in 1991 to offer high stakes gambling but the state had flat out refused to negotiate. PCI filed a lawsuit that year in the District Court in an attempt to force negotiations with the state but the case was dismissed.[4] Since they were not able to offer Class III gaming without a Compact, PCI upgraded and expanded their Class II gaming by capitalizing on the use of electronic bingo machines which operate similar to slot machines.

By 2008, PCI Gaming employed 1,600 people at their three gaming facilities and paid more than $10.3 million in payroll inventory and other taxes.[5] Their gaming facilities are solely managed by the tribe rather than outside management companies. Ninety percent of their employees are non-Indian. Thereafter, gaming expansions and new economic developments would occur at an even quicker pace and with much larger tribal investments. In January 2009, PCI Gaming replaced the Creek Entertainment Center in Atmore with a 17-story hotel and casino: Wind Creek Casino and Hotel. The facility includes 236 hotel rooms, an entertainment lounge, cooking studio and spa and it

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4. *Poarch Band of Creek Indians v State of Alabama and Guy Hunt, Governor of Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991).

5. Adam Prestridge, "PCI Adds Dog Tracks," *The Brewton Standard*, August 26, 2009.

houses three restaurants. There were more than 1,600 electronic bingo machines in 80,000 square feet of space on the ground floor. Wind Creek Casino and Hotel was described as a $245 million investment. During the first week of opening, more than 10,000 patrons visited the new Wind Creek Casino and Hotel. The celebration of their one year anniversary in 2010 was a proud moment in Poarch history.[6] These economic developments by the Poarch would not go unnoticed by state officials who would eventually challenge the type of gaming offered by PCI Gaming and argue that it was Class III gaming (slot machines) which requires a tribal-state compact.

In August 2009, PCI Gaming also purchased controlling interest (65 percent) in two dog tracks: the Mobile Greyhound Track in Mobile, Alabama and the Pensacola Greyhound Track in Pensacola, Florida. These investments were described as a $16 million investment by the Poarch Creek. These pari-mutuel investments represent the tribe's first joint gaming ventures that are not totally owned by the Tribe. The tracks are not located on trust land and ownership is shared with non-Indians.[7] They may also represent PCI's first investment outside the state of Alabama. On January 13, 2012, a press release from Innisfree Hotels announced a ground breaking ceremony being held that day for a $24 million project to build a 127-room Hyatt Place Hotel adjacent to the airport in Pensacola, Florida in partnership with the Poarch Creek Indians. On October 31, 2013, PCI had a ribbon cutting ceremony to announce the addition of an Entertainment Center at the Wind Creek Casino and Hotel in Atmore. The addition

6. Mary Claire Foster, "Casino Opens to Praise from Patrons," *The Brewton Standard*, January 12, 2009; Adam Prestridge, "Wind Creek Celebrates One Year," *The Brewton Standard*, February 3, 2010.

7. Adam Prestridge, "PCI Adds Dog Tracks," *The Brewton Standard*, August 26, 2009.

included a 16-lane bowling alley, 8-screen cinema, a sports bar and grill and a self-serve frozen yogurt and coffee bar.[8] On December 17, 2013, PCI Gaming held the official opening for a second large hotel and casino, Wind Creek Wetumpka, described as another $245 million investment that included a 20-story luxury hotel with 238 rooms. It replaced Creek Casino Wetumpka near Montgomery. Wind Creek Wetumpka is 85,000 square feet and larger than their first casino, Wind Creek in Atmore. The indoor atmosphere at the new Wetumpka casino is similar to that of a nightclub. There is a center stage with live entertainment, a 16,000 gallon shark tank at the center bar and five restaurants.[9] The researcher observed many enticing television ads for the Wind Creek casinos on local Atlanta television news channels and especially on Fox 5. The new Wind Creek Wetumpka is likely creating some competition for the Cherokee Casino, Harrah's in North Carolina. Both are 2½ - 3 hours from Atlanta. However, PCI's Wind Creek's casinos can only offer Class II games while the Cherokee's Harrah's Casino has Class III gaming similar to that offered in Las Vegas. The Cherokee Nation in North Carolina has a compact with the state of North Carolina to offer class III gaming but they are managed by Harrah's rather than by the Tribe. Wind Creek Atmore which is further away from Atlanta (about 6-7 hours) was also regularly advertised on Atlanta television stations prior to the opening of Wind Creek Wetumpka Creek Casino Montgomery. At least twenty-one television advertisements for Poarch Creek casinos were observed by this researcher during a one month period in 2013. Since January 2014, Atlanta television ads

8. Dale Liesch, "Entertainment Center Opens," *The Atmore Advance*, October 31, 2013.

9. "Wetumpka Casino and Hotel Grand Opening," *The Brewton Standard*, December 17, 2013.

seem to focus more on Wind Creek Wetumpka describing it as "the closest casino to Atlanta." In 2006, when the new Wetumpka casino and hotel were being planned, it was to be managed by Harrah's, which manages many Indian casinos. However, this management arrangement did not occur and an explanation when an inquiry was made by the researcher.

There was a six-year delay in building the new Wind Creek Wetumpka which was initially scheduled to open in 2007 but it did not open until December 2013. Wetumpka Mayor Willis is a strong supporter of PCI Gaming. When interviewed, he described having a good working relationship with the tribe. He was amenable to expanding the town's informal agreement with PCI Gaming and was not opposed to expanding the casino in Wetumpka.[10] However, when plans were announced for construction to begin, opposition was raised by the Muscogee Creeks in Oklahoma whose ancestors were buried near the casino development site. This controversy may have played a role in the six-year delay in construction. Tensions that erupted between the Muscogee Creeks and Poarch Creeks over the building of this casino are discussed later in this chapter. The Poarch own an apartment complex, River Oaks that is located along the Coosa River in Wetumpka not far from the new casino. It has seventy-eight apartment units, including one, two and tree bedroom units.

In addition to the aforementioned tribal business investments, the Poarch have other tribal enterprises most of which are located in the Atmore area including: a fire station, the Muskogee Inn, Riverside Smoke Shop, Creek Smoke Shop and Creek Travel

10. Mayor Jerry Willis of Wetumpka, interview by author, May 5, 2010, Wetumpka, AL; Mayor Johnny Ford of Tuskegee, interview by author May 5, 2010, Tuskegee, AL.

Plaza. The smoke shops sell discounted cigarettes at a cost of about twenty cents less than non-Indian businesses. The tribe also own Perdido River Farms (a cow/calf operation on 2,200 acres of agricultural land) and Muskogee Technology which provides aerospace manufacturing services including construction, metal fabrication and engineering. Muskogee Technology contracts with the U.S. Department of Defense as well as other government and commercial customers. The Poarch Creek also manage and protect the Magnolia Branch Wildlife Reserve, a camping and outdoor reserve that encompasses 6,000 acres of pristine timberland and twelve miles of waterfront acreage directly on the Big Escambia Creek. These non-gaming enterprises are managed by the Creek Indian Enterprises Development Authority (CIEDA). The three casinos are managed by PCI Gaming's Tribal Gaming Commission (TGC) which is discussed later in the chapter relative to tribal government structure.

In 2014, CIEDA was involved in building a Marriott Hotel in Huntsville, Alabama. Some newer projects outside of Alabama that were also under development as indicated by Robert McGhee, the former Tribal Treasurer include a Hyatt Regency in Pensacola and condominiums at Fort Walton Beach, Florida.

Due to the FBI investigation in May 2010 into legislative voting on a bingo bill in Alabama, interview efforts by the researcher came to a halt. By the summer of 2010, the researcher could not get a response from any Poarch Creek representatives or from local and state leaders. Robert Thrower, Cultural Director, with whom the researcher had initially met, did not respond to telephone messages and the researcher's emails to him were returned. It is assumed that Poarch tribal authorities forbade Robert Thrower from

having further communication with the researcher. Mr. Thrower never provided an explanation for ending communications. However, it was likely due to the federal probe that was underway as it was announced later that summer that the FBI investigation stemmed from allegations that some state legislators were paid off and/or coerced to vote in favor of Bedford's bingo bill. If passed, the bill would have expanded non-Indian commercial gaming.

Contact with the Tribe did not resume until 2013. A letter was sent on behalf of the researcher to the Poarch Band Creeks in October 2013 by the Research Committee Advisor, Dr. William Boone verifying the nature and validity of the doctoral research. The letter was sent to Sharon Delmar, the Public Relations Tribal Liaison who shared it with the Tribal Council. The researcher asked to meet with a legal representative of the tribe. Ms. Delmar subsequently arranged a meeting for the researcher with Robert McGhee, who was the Tribal Treasurer at that time. The meeting took place during the Thanksgiving holiday on November 28, 2013. Mr. McGhee provided responses to most of the researcher's questions. However, he would not share the amount of annual profits that the tribe receives from the casinos nor would he discuss the conflict between the Poarch Band Creeks and the Muscogee Creeks over Hickory Ground. The researcher remained in Alabama the following day to attend the annual Poarch Creek Powwow and visited the casinos again.

Poarch Creek Tribal Government

Similar to the U.S. federal and state government structures, the Poarch Creek Tribal Government has three branches: *The Legislative Branch, the Executive Branch and*

the Judicial Branch. Tribal government offices are located in Atmore, one exit from the Wind Creek Hotel and Casino and about a block away from the Poarch Cultural Museum. *The Legislative Branch* consists of an 8-member Tribal Council headed by a Chairperson for a total of nine positions. Buford L. Rolin served as Chair since 2006. However, it was announced in the May 2014 Poarch Creek Newsletter that he would not be seeking re-election. The Chair is also the Chief Executive Officer for the Tribe. As of May 2014, the Tribal Council Members were: Stephanie Bryan, Vice-Chair, Robert R. McGhee, Treasurer, David W. Gehman, Secretary and at-large members: Sandy Hollinger, Keith Martin, Arthur Mothershed, Kevin McGhee, Garvis Sells. Council members are elected by the general membership while the chair is elected by the council. Elections are held to replace one third/three council members each year including the chairman position. There is no limit on how long a member or the chair can serve.

Chairman Buford L. Rolin was described as active in tribal government for the past fifty years. He previously served as Secretary and Vice-Chairman of the Tribal Council. Chief Rolin worked with the previous two Chairmen, Calvin McGhee and Eddie Tullis in the tribe's efforts to gain federal recognition. Former Chairman, Eddie Tullis held the position for more than thirty years. As a result of the June 2014 tribal elections, Stephanie Bryan became the new Chairperson and Robert McGhee became the Vice Chair. The Tribal Council meets twice monthly on the first and third Thursdays to manage tribal affairs including voting on amendments and approving budgets.

As an observer, the researcher attended a Tribal Council Meeting held on April 1, 2010 in Atmore, Alabama. The Chairman and all Council members were present and

about 35 tribal members attended. The meeting opened with prayer and lasted for about 1½ hours. After the minutes from the previous meeting were approved, a public comment period was allowed and then general business was discussed. Topics on the agenda that were discussed included grant resolutions for museum services, fire assistance, housing authority budgets, a family violence grant and a new Boys and Girls Club for children ages 6 to 17. It was reported that six new homes were being built by the Tribe for tribal members. There was a concern raised by one member that every year there are less new homes being built. Another member stated that he should be hired to work for the casino despite having a criminal background. There was some brief discussion around other tribal businesses that the member might be eligible to apply for rather than employment at the casino. There was a motion approved for PCI Gaming to purchase a racetrack on behalf of the tribe. The most relevant topic of discussion at the April 1st council meeting was the Wetumpka Cooperative Law Agreement that was up for renewal. PCI Gaming has an agreement with the town of Wetumpka where one of their casinos is located to share the costs and responsibility for law enforcement officers. A motion was passed for the Wetumpka police to be paid while waiting for the new agreement to be put in place.[11]

Membership enrollment was reported as 3,012 at the April 2010 meeting. In 1985 when the Poarch Constitution was established, it recognized 1,800 tribal members at that time. Later in 1985 the rolls were reduced by 350 members, as some did not meet the one quarter (¼) blood quantum requirement for membership that was outlined in the Poarch

11. Poarch Creek Indian Tribal Council Meeting Agenda, April 1, 2010.

Creek constitution.[12] Based on the membership reported at the April 2010 council meeting, it seems that Poarch tribal enrollment has almost doubled since gaining federal recognition and especially after gaming improving their economic status. As of September 2012, membership was reported as over 3,000 of which about 1,000 live in the vicinity of Poarch, Alabama.[13] However, only 155 tribal members actually live on the reserve lands or other Indian land in Alabama.[14] Thus, most do not live in the reservation area. Vickery and Travis indicate that as the tribe's economic status improved, several white residents of Alabama applied for membership self-identifying as Indian. Some applicants met the blood quantum requirement and some did not.[15] Membership requirements are solely a tribal decision. Some tribes use blood quantum while others use a direct lineal descent connection. Indians that belong to a federally-recognized Indian Tribe hold dual citizenship: They are citizens of their Indian Nation and also citizens of the United States.[16]

The Executive Branch of the Poarch tribal government is responsible for the overall management of the tribe's daily activities. As the Poarch Creek expand their investment portfolio, it creates more work for all branches of the tribal government. The Executive Branch consists of several administrative departments. Their management responsibilities include accounting, human services, education, family services, health

12. Vickery and Travis, *The Rise of the Poarch Band of Creek Indians*, 188.

13. "History of the Poarch Band of Creek Indians," 16.

14. *Poarch Creek News 30*, no. 6 (June 2012): 31.

15. Vickery and Travis, *The Rise of the Poarch Band of Creek Indians*, 204.

16. Ibid.

services, public safety, public works, utilities, economic development, legal matters and resource development. Some of these services are described in greater detail later in this chapter regarding tribal member benefits.

The Judicial Branch has a full-time law enforcement staff including a Tribal Court System and law enforcement officers, some of whom are cross-deputized in Atmore, Montgomery and Wetumpka. They are sometimes trained together and primarily serve as back up for each other. The tribe's public safety department operates under the Special Law Enforcement Department of the Bureau of Indian Affairs (BIA). The Poarch reported having law enforcement agreements with the Sherriff Departments in Escambia County and Montgomery County as well as with the Wetumpka City Police Department. Tribal police also participate in local county drug task forces. Greater details on tribal law enforcement and the terms of these agreements were not made available.

The Tribal Court system includes a Supreme Court and a lower court of general jurisdiction. The courts are responsible for deciding matters relative to civil and criminal issues on tribal lands. The state of Alabama has no criminal or civil jurisdiction on tribal land. However, the U.S. Federal Court has judicial authority over major criminal offenses that occur on reserve lands. The power and authority of tribal courts is considered a very important aspect of Poarch sovereignty.[17]

The **mission** of the Poarch Creek tribal government is stated in their literature is, "Seeking Prosperity and Self-Determination." Their goals are as follows:

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17. Poarch Creek Tribal Council Treasurer, Robert McGhee, interview by author, November 27, 2013, Atmore.

1. Continue forever, with the help of God our creator, our unique identity as members of the Poarch Band of Creek Indians and to protect that identity from forces that threaten to diminish it;

2. Protect our inherent rights as members of a sovereign American Indian tribe;

3. Promote our cultural and religious beliefs, to pass them in our own way to our children, grandchildren and grandchildren's children forever;

4. Help our members achieve their highest potential in education, physical and mental health, and economic development;

5. Maintain good relations with other Indian tribes, the United States, the state of Alabama and local governments;

6. Support the government of the United States and encourage our members to be loyal citizens;

7. Acquire, develop and conserve resources to achieve economic and social self-sufficiency for our tribe; and

8. Ensure that our people shall live in peace and harmony among ourselves and with all other people.

As of 2014, the legislative arm of tribal government had enacted twenty-seven tribal codes or laws.[18] The codes cover the following areas: Tribal sovereignty, Legislative, Judicial, Jurisdiction, Limitations of Actions, Juries and Trials, Attorneys, Criminal Code, Domestic Violence, Criminal Procedure, Juvenile, Child/Family Protection, Civil Actions, Full Faith and Credit, Tribal Rules of Civil Procedure, Traffic Offense, Proceedings to Recover Possession of Premises, Tribal Rules of Appellate Procedure, Domestic, Estates, Game and Fish, Personnel and Ethics, Poarch Creek Indian Housing Authority, Gaming, Tribal Election Procedures, Repealer and Severability, Coroner, Environmental Protection and Tribal Uniform Prudent Investor Act. One of the

18. National Indian Law Library (NILL), "Poarch Band of Creek Indians Tribal Code," accessed September 23, 2013, www.narf.org/nill/Codes/poarchcode.

codes, Tribal Code #24 is simply noted as “reserved.” When asked about this code, Robert McGhee did not provide an explanation about the substance of Tribal Code #24. Tribal code #20 (Gaming) outlines six areas of responsibility: General Provisions, Tribal Gaming Commission (TGC), gaming licenses, background investigations, financial management and accounting procedures and, miscellaneous provisions. Tribal code #20 includes an explanation of the responsibilities of the TGC including organization, personal powers and duties. Tribal code #22 describes tribal election procedures and includes twenty articles: definitions, election board, annual election, uncontested elections, election notices, candidates for tribal council, popular participation in government, recall petition, constitutional amendments and advisory recommendations to the tribal council. Tribal Code #22 also describes the preparation of the ballots, absentee ballots, manner of voting, votes, counting of ballots, posting of election results, challenges, certification of election results, appeal of challenge tribal council officer election and vacancies.

The tribal government is responsible for providing essential services to its members including health clinics, elder care, housing, education, police, fire, and emergency services. Most tribal programs and services are based in the vicinity of the tribal government offices including the health clinic, elder services and housing units. The reservation is located eight miles northwest of Atmore in rural Escambia County and 57 miles northeast of Mobile. It encompasses land in five counties: Escambia, Baldwin, Mobile, Monroe and Elmore. It also includes land in Escambia County, Florida which is adjacent to Escambia County, Alabama. Through their housing authority, the tribe

manages 95 family rental units and 44 senior citizen rental units. Tribally assisted home ownership (TAHO) is also offered but the number of homes being built has been reduced in recent years, according to the concern raised by a tribal member at the April 1, 2010 Tribal Council Meeting.

New tribal members must wait one year to be eligible for tribal benefits. Tribal membership entitles members to hiring preferences for employment with tribal businesses. They are also eligible for a burial expense payment of $5,000 and health insurance is provided for uninsured adults, ages 18 to 64. After casino gaming was underway, members began receiving annual per capita birthday checks, the amount of which is determined each year by the tribal council and administered through tribal discretionary funds. In 2010, it was reported to be about $3,000 but by 2013, it had increased to $18,000.[19] Tribal members are considered profit sharers in tribal enterprises.

Addiction counseling services are available to tribal members by a full-time addictions counselor. Anger management and domestic violence counseling are also available. The tribe's domestic violence program was described as one of the few in the southeast for Indian tribes. A domestic violence shelter is available in a safe out of the way place for short term situations that require immediate options for relief from abuse. Tribal members are also eligible to receive a lifetime education benefit of up to $30,000. During a natural emergency or personal crisis, there is a tribal emergency fund for members that have limited financial resources. Elders receive a $200/month Elder

19. Dave Palermo, "Good Neighbors," *Global Gaming Business Magazine 13*, no. 3 (March 2014), accessed June 2, 2014, http://www.ggbmagazine.com/article/good-neighbors/.

Benefit. Homemaker services are also available for elders and disabled adults including in-home services on a temporary, short-term or long-term basis.

While tribal membership entitles any Indian applicant, not just Poarch members for hiring preference with tribal businesses, ninety percent of casino employees are non-Indians.[20] Based on observations by the researcher there appeared to be a large number of white and black floor employees and most visible management staff behind the service counters appeared to be white. However, given that most Poarch Band members are mixed-blood, some individuals that appear to be white may in fact be of Indian descent. Poarch tribal members are allowed to gamble at the casinos. Patrons at the casinos were diverse in terms of race, gender and age.

On the weekend of April 2, 2010, the researcher observed almost an equal number of black and white patrons at the two largest casinos in Atmore and Wetumpka. There were also about an equal number of young and older patrons. However, by Monday morning, there were primarily older patrons, possibly retired seniors. A few were in wheelchairs or used walking canes. Since it was the beginning of the month, they may have been gambling with some of their retirement income, a popular activity for seniors according to the American Association of Retired Professionals (AARP). AARP described older Americans as easily addicted and the fastest growing population of gambling addicts. Trips to casinos are organized by churches, assisted living centers and other adult community programs. Reportedly, the gambling industry aggressively targets older patrons. About 40 percent of the people seen by the Problem Gambling Center in

20. Poarch Creek Tribal Council Treasurer, interview by author, November 27, 2013, Atmore.

Las Vegas are over age 50.[21] Those most at risk are people who gamble for the wrong reasons such as depression, loneliness or chronic pain. Many of the casino patrons smoke cigarettes which are sold on the reservation at a discount of about twenty cents. Given the number of patrons smoking, the air quality and ventilation was poor in the casinos during visits made by this researcher, including on 12/17/13 from 12 noon – 2:30 p.m., opening day for the new Wind Creek Casino and Hotel in Wetumpka. According to the press release, the new Wetumpka casino has a state of the art air filtration and ventilation system. However, it did not seem to be working that day, as the researcher could not stay long due to developing a headache from the smoke. The third smaller Creek Casino Montgomery appeared to have a greater number of black patrons than white patrons when visited by this researcher, perhaps due to his location. When asked where their patrons come from, Robert McGhee indicated that they not only come from the surrounding communities but they also travel from Atlanta, Birmingham, Mobile, Pensacola and Destin, Florida. When asked which casino was their greatest competitor, Robert McGhee indicated that casinos in the Biloxi, Mississippi area which is only two hours away, are PCI's greatest competitors. McGhee did not view compulsive gambling as problematic for tribal members and he would not discuss whether or not gaming has resulted in factionalism within the tribe. However, during an earlier interview on February 1, 2010 with Robert Thrower, Cultural Director, Thrower stated that some elders in the tribe were not pleased with gaming due to moral reasons. Thrower also indicated that about 70 percent of tribal members were Judeo-Christians.

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21. "A Desperate Gamble," *AARP Bulletin/Real Possibilities* (January–February 2014): 24-26.

Robert McGhee would not or could not share information regarding the tribe's lobbying expenditures but simply responded by saying they have average spending for lobbying which primarily is spent to protect their sovereignty. According to the Lobbying Spending Database published by Opensecrets.org, the Poarch Spent $20,000 on lobbying in 2007, based on their self-filed Year End Reports. It is fair to assume that as gaming revenue increased, so has the role of tribal government and particularly in terms of size and responsibility. It is not known whether tribal accountability has also increased, as Robert Thrower informed the researcher that he too would like to know the answer to many of the researcher's questions that were shared with him.

Regarding tribal accountability, Tribal Code #27, the Tribal Uniform Prudent Investor Act, adopted on December 15, 2003, reads as follows:

> The Tribal Uniform Prudent Investor Act provides a standard of caution and discretion to be used by the Poach Band of Creek Indians and their vehicles of investments. Investments shall be made with judgment and care under circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation, but for the investment, considering the probable safety of their capital as well as the probable income to be derived.

The Prudent Investor Act further calls for diversification of the investment unless it has been reasonably determined that because of special circumstances, the purposes of the trust are better served without diversification. It also specifies the delegation of management and investment functions, compliance review and severability. It is not known who manages this role and if there are outside advisors. The Act also describes the prudent investor rule regarding its duty to the beneficiaries (tribal members), portfolio strategies and objectives for returns including: (a) general economic conditions, (b) the

possible effect of inflation or deflation, (c) the expected tax consequences of investment decisions or strategies, (d) the role that each investment or course of action plays within the overall trust portfolio, (e) the expected total return from income and the appreciation of capital, (f) other resources of the beneficiaries, (g) needs for liquidity, regularity of income, and preservation or appreciation of capital, and (h) an asset's special relationship or special value, if any to the purposes of the trust or to one or more of the beneficiaries.

The Poarch Creek Tribal Government sponsors an annual State of the Tribe Forum for tribal members only to update them on new developments and the tribe's financial status. In February 2009, the Poarch General Council Voice (GCV) was founded and incorporated as a civic, social and cultural non-profit organization to provide a collective voice or coalition for tribal member concerns. The GCF's primary role is to provide advisory recommendations to the tribal council. The role is specified within the tribe's 1985 Constitution (Article IV, Section 2 (E)) under Branches of Government and Powers of the General Council. However, it appears that the GCV was not founded until 2009. The tribal government also sponsors an annual two-day Powwow held during the Thanksgiving holiday weekend in Atmore. This event is open to the public and viewed as a homecoming event for Poarch Creek tribal members. This researcher attended the first day of the Poarch 43rd Annual Thanksgiving Powwow on November 28, 2013 that advertised over $75,000 in prizes for dance and drum competitions. Representatives of other Indian tribes attended and participated in the competitions. Robert Thrower spoke with the researcher briefly at the powwow but he never offered an explanation about why he had previously discontinued contact in 2010.

The tribal agency responsible for oversight of the tribe's three casinos is the five-member Tribal Gaming Commission (TGC). It is accountable to the tribal government. The duties of the TGC are outlined in Tribal Code #20 – Gaming. The code explains the roles and duties of the TGC as well as operating procedures and other provisions for gaming. The Tribal Gaming Commission is the regulatory body established by the Poarch Creek tribal government to enforce all tribal ordinances related to their gaming activities and to protect the integrity and assets of the tribe. It is also responsible for maintaining the regulations as outlined in the Indian Gaming Regulatory Act (IGRA). In 2013, the Tribal Gaming Commission members were as follows: Stephanie Bryan (TGC Chairwoman), Vicky Burns, Savilla McGhee, Sharon Smiley, and Candace Fayard. All of the commissioners are females. Stephanie Bryan was also the Vice-President of the Tribal Council, as required by Tribal Code 20 which states that the Vice Chair of the Council shall also serve as the Chairperson of the TGC. Robert McGhee was subsequently elected as the new Vice Chair and thus, he is also now the Chairman of the Tribal Gaming Commission. Stephanie Bryan is the new Tribal Chairperson. The other four members of the TGC are appointed by the Tribal Chairman from within the tribal membership with names submitted by Tribal Council members. TGC members can serve for up to four years. No more than two can be reappointed in any one year. Tribal Gaming Commissioners meet bi-monthly. They only receive pay for attending meetings and for any reasonable expenses that they may incur from their duties. The TGC has six departments: Administration, Compliance, Audit, Investigations, Information Technology and Finance. In 2013, the TGC was staffed by 49 positions and had a total of 55 approved

positions. Six positions were unfilled. Fifty-one percent of TGC employees met the Indian preference clause (from any Indian tribe) with 35 percent of them being enrolled Poarch tribal members.[22]

The Poarch Creeks have taken special care to prevent outsiders from accessing their private information. There is a confidentiality clause in Tribal Code 20 for the Commission members to discourage the disclosure of information. The clause indicates that a penalty (misdemeanor) will be incurred for any commissioner that divulges any fact or information that is not publicly known. As indicated earlier, initially it was very difficult for this researcher to obtain gaming information from the tribe and to arrange meetings with tribal officials. The researcher had initially requested in 2009 to meet with the Tribal Chair, Buford Rolin, but such a meeting was never arranged. Eventually, the researcher was referred to the tribe's Cultural Director, Robert Thrower who had very limited information about the tribe's gaming. Subsequently, through the assistance of Public Relations Liaison, Sharon Delmar, in November 2013, meeting was arranged for the researcher with Robert McGhee, who was the Tribal Treasurer at that time.

The Tribal Gaming Commission's primary objective is to enforce the regulations outlined in the Minimum Internal Control Standards in IGRA regulated by the National Indian Gaming Commission (NIGC), the regulatory agency of IGRA. These requirements minimize possibilities for corruption and theft. The TGC is also responsible for any complaints as well as allegations of theft. All employees and vendors for the casinos must apply for licensure through the Commission. Employment requirements include drug

22. "Poarch Tribal Gaming Commission," *Poarch Creek News,* October 2013.

screens and criminal background checks. Final approval for hire and licensure of a prospective employee is made by the National Indian Gaming Commission which has 30 days to review and approve the employee application submitted by the tribe.

There is an option in IGRA for Indian Gaming to be self-regulated by a tribe. This self-regulatory process limits some the responsibilities of the National Indian Gaming Commission. Robert McGhee indicated that PCI Gaming is not self-regulated and also stated that the tribe does not plan to submit an application for self-regulation. The self-regulatory process is less time consuming and involves less paperwork that must be sent to NIGC. By not being self-regulated, the Poarch have greater contact with NIGC representatives than a tribe that is self-regulated. Given the challenges to their sovereignty rights relative to gaming posed by the state of Alabama, perhaps it is in their best interest to not be self-regulated.

Philanthropy, Revenue Sharing, and Taxation

Concurrent with expanding their gaming operations, the Poarch Creek made substantial contributions in the surrounding communities and especially for programs that benefit youth. For example, after donating almost $2 million in aid to the Montgomery County and Elmore County Schools in 2012, they announced plans that same year to donate an additional $1.9 million to fund a variety of community services and projects. The contributions are part of their Planned Giving Campaign. Projects for 2012 included: $350,000 to the Children's First Foundation, $100,000 to the Alabama Department of Archives and History, $150,000 to the YMCA, $100,000 to the Volunteers of America Southeast and $150,000 to the West Escambia County Humane Society. The campaign

also donated $100,000 each to the Escambia County Drug Task Force and the Elmore County Drug Task Force that year. By 2012, PCI had donated more than $10 million as part of its campaign. In 2013, the Poarch donated over $2 million again to area schools. Their greatest philanthropy has been in the area of public education.

In 2013, $500,000 was donated to the University of Alabama to implement a Native American Studies Program. Also in October 2013, the Montgomery Museum of Fine Arts received $100,000 from the Poarch Creek. Other local projects have been the recipients of PCI philanthropy such as a community wide Summer Feeding Program held at the Poarch Creek Indians Boys & Girls Club from May until August where children from the surrounding communities are fed breakfast and lunch. PCI also made donations to the Atmore Community Hospital and other area organizations.

According to a pamphlet that summarized tribal spending provided by Robert McGhee, PCI will have paid more than $280 million in taxes including payroll taxes, excise taxes and sales taxes from the years 2008–2011. By 2012, payroll for employees had doubled and was averaging $42 million per year by the end of 2011. With regard to capital spending, PCI reinvested its revenues in the state with more than $375 million in capital spending by 2012. Job creation from their casinos was reported as reducing federal unemployment benefits and welfare benefits. Employee benefits are similar to those paid by any large employer including: PTO (paid time off), a Bonus Program, Blue Cross Health and Dental Insurance, Life Insurance, a 401(k) and there is a monetary bonus for "Employee of the Quarter."[23] When asked about employee rights, Robert

23. "About Us," accessed October 22, 2013, www.pcigaming.com.

McGhee indicated that PCI has an employee grievance policy that involves a peer review board. As of November 2013, there were over 2,500 employees of CIEDA (Creek Indian Enterprises Development Authority) and PCI Gaming.[24] As stated earlier, ninety percent of their employees are non-Indian. However, management staff has a higher percentage of Indian employees including the Tribal Gaming Commission.

Only tribal members that live on the reservation and work at tribal businesses located on the reservation are exempt from paying state income taxes and they must still pay federal taxes. Robert McGhee stated that "Everyone pays state and federal taxes". Thus, it can be deduced that tribal members employed at the casinos that do not live on reserve land pay both taxes. Those living on the reservation are exempt from excise taxes and personal property tax including on automobiles and mobile homes. Non-Indians working on reservation land are subject to both federal and state income taxes. For example, the Creek Travel Plaza was not built on Poarch reservation or trust land and thus, CIEDA (Creek Indian Enterprises Development Authority) must pay state property taxes for the Plaza. Taxes must be paid on goods and services purchased by the tribe from outside sources. Both tribes and states may tax non-tribal members doing business in Indian country.

As a sovereign nation, the Poarch Band Creeks have the right to levy tribal taxes on its members.[25] However, like other tribes the Poarch have not exercised this right. The limits on their right to tax are concurrent with state jurisdiction limits over non-Indians.

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24. Interview with Robert McGhee, Poarch Creek Indian Treasurer, November 28, 2013.

25. Stephen L. Pevar, "The Rights of Indians and Tribes," *The American Civil Liberties Union Handbook* (Carbondale: Southern Illinois University Press, 1992), 170-188.

Taxing tribal members is often not a viable option and taxing non-Indians could discourage investments in tribal enterprises, and for non-Indian owned businesses on tribal land, as non-Indian investors could be subject to both state and tribal taxes.[26] While employed tribal members are subject to federal taxation, the Tribe as an entity is not. An Indian tribe may operate unincorporated business in an area outside of Indian country. The income derived is not subject to federal income tax. If the tribe decides to incorporate the business, it could become subject to federal taxation, based on how the corporation is formed. If a tribe forms a corporation under state law, it is automatically subject to federal taxes on income earned on or after October 1, 1994, regardless of where it is located.[27]

Per capita payments that the Poarch make annually to its members are also subject to federal taxes. As indicated earlier, annual per capita payments have significantly increased in recent years and were last reported to be $18,000 per member in 2013. IGRA specifies four conditions that must be met in order for a tribe to make per capital payments from gaming revenues to its members. The four conditions are:

1. The tribe must prepare a distribution plan or Revenue Allocation Plan (RAP) to allocate revenues only for the following uses as a means to fund tribal government operations or programs; (a) provide for the general welfare of the Indian tribe and its members; (b) promote tribal economic development; (c) donate to charitable organizations; or (d) fund local government and agency operations;

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26. Eric Facer, "State Taxing Authority in Indian Country, Intertribal Trade and Intergovernmental Agreements," Presentation at the National Intertribal Tax Alliance, September 9, 2015, accessed October 1, 2015, http://www.intertribaltaxalliance.org.

27. Internal Revenue Service, "Gaming Tax Law and Bank Secrecy Act Issues for Indian Tribal Governments," Section III, Distributions from Gaming Revenue, Publication 3908 (Rev 10-2013), p. 3.

2. The Secretary of the Interior must approve the revenue's use, particularly when it is to promote tribal economic development or fund tribal government operations or programs;

3. The tribe must protect and preserve minors' and other legally incompetent persons' interests who are entitled to receive any of the per capita payments. These payments must be dispersed to their parents or legal guardian for their health, education or welfare, under a plan approved by the Secretary and the Tribes governing body; and

4. Per capital payments are subject to federal taxation and the Tribe must inform its members of their tax liability at the time that the per capita payments are made.[28]

The Internal Revenue Service has established a new tax office for Indian Tribal Governments and there are five regional IRS field groups that work directly with tribes to help simplify the tax administration process.

United South and Eastern Tribes (USET), a regional tribal advocacy organization established in 1969, has been very active in advocating for federal reform and articulating regional tribal concerns including those of gaming tribes. In July 2013, USET passed a resolution calling for some major tribal tax reforms at the federal level. The reforms also called for the establishment of a Tribal Advisory Committee within the United States Treasury to advise the Secretary on matters of Indian taxation. The tax reforms proposed by USET are clearly described and justified and highlight seven changes needed in the existing tax laws. The proposed reforms call for the elimination of states' ability to tax tribe-to-tribe commerce, tax credits for federal income tax paid, parity in the treatment of tribal government pensions and exemption of tribal government distributions from the Kiddie Tax. The reforms also call for the establishment of Indian Country Empowerment

28. Ibid., 9.

Zones similar to the Empowerment Zones that exist in states.[29] The Poarch Band Creeks are members of USET which has two offices: one in Washington, DC and one in Nashville, Tennessee. The current Poarch Tribal Council Vice-Chair, Robert McGhee was formerly the USET Secretary. A former Poarch Tribal Chairman, Eddie Tullis also served as USET Secretary previously.

Challenges to Poarch Creek Sovereignty

As indicated earlier, former Alabama Governor Bob Riley was successful in closing all non-Indian commercial gaming in 2010 which created a gaming monopoly for PCI. While the Poarch Band Creek and the communities where their casinos are located continue to reap substantial economic benefits, the continuity and protection of tribal gaming was not maintained without a legal fight. Legal challenges had been ongoing between PCI and the state of Alabama beginning in 1990. At that time PCI requested that the state negotiate a Class III Gaming Compact that would have allowed them to operate higher stakes gaming but the governor refused. Since 1980, voters in eighteen Alabama counties have approved local referendums that allowed charitable bingo including the use of electronic or video gaming devices in non-Indian establishments. Gaming facilities such as Quincy 777 Casino/Victoryland Racetrack in Macon County had electronic gaming machines since 2003.[30] When the state continued to refuse to allow PCI to offer the same type of games, PCI sued the State of Alabama in *Poarch Band of Creek Indians*

29. United South and Eastern Tribes, Inc., "USET Proposals for Tribal Tax Reform," July 16, 2013, accessed March 14, 2015, https://www.finance.senate.gov/download/united-south-and-eastern-tribes-inc.

30. Letter from the U.S. Department of the Interior, Office of the Secretary, to the Alabama Attorney General, dated March 4, 2008, p. 7.

v. Alabama (1991). There was only one other state (Florida) at that time that had refused to negotiate a compact with an Indian Tribe, the Seminoles. Thus, the court decided to consolidate both cases and ruled on them simultaneously in the opinion rendered in *Seminole Tribe v. Florida* (1996) that in essence ruled in favor of the states. The ruling stated that tribes could not sue states, as it infringed on the states' Eleventh Amendment rights as states cannot be sued without their consent.[31] See the Addendum for a summary of legal cases referenced in this study.

On March 3, 2006, the Poarch Creeks submitted a proposal to operate Class III Gaming to the Department of the Interior pursuant to the Secretarial Procedures outlined in IGRA that can be utilized when a state refuses to negotiate a compact in good faith. This procedure allows the Secretary of the Interior to decide whether or not the state has acted in good faith and the Secretary attempts to resolve the issues. However, at that time, Secretarial Procedures had not yet been fully tested. On April 13, 2006, the Department of the Interior, Office of the Secretary invited the Alabama Governor and Attorney General to comment on whether they were in agreement with the tribe's proposal for gaming and whether the proposal was consistent with state laws. The Secretary's office also invited the state to submit an alternative proposal. On July 28, 2006, the state responded by disagreeing with the gaming proposal submitted by the Poarch and argued that it was not consistent with the provisions of the state's laws. While they

31. *State of Alabama, Plaintiff v United States of America*, et al., Defendants, Civil Action Case 1:08-cv-00182-WS-C, Document 37, Filed 11/24/2008, p. 1-17.

acknowledged that there was some form of gaming already existing in Alabama, they did not submit an alternative proposal.[32]

In a press release issued on August 11, 2006, by Poarch Band Public Relations Liaison, Sharon Delmar, it was reported that the Alabama Attorney General also sent a letter to the Department of the Interior asking that they deny Poarch Band's request to expand gaming. On October 19, 2006, the U.S. Secretary invited representatives of the Poarch Creek and Alabama state officials to participate in an informal conference on gaming. The conference took place on November 18, 2006 in Washington, DC.

It was the position of the Poarch Creeks that the gaming occurring in Macon and Greene Counties in Alabama was consistent with Class III gaming (high stakes gaming) and therefore, they should be allowed to offer the same Class III games and namely electronic bingo on their reservation land. At that time, the Poarch did not already have electronic bingo machines. During the conference discussion which was summarized in the final ruling, the state of Alabama, represented by Mr. Miller of the Attorney General's office, had no other choice but to concede that electronic bingo was being offered in the state and there was nothing in state law that prohibited it. Thus, it was eventually decided by the U.S. Secretary that the Poarch Band Creeks could offer the same type of games (electronic bingo).The final decision which came almost two years later on March 4, 2008 authorized the Poarch to operate electronic bingo and actually referred to electronic bingo as Class III and not Class II. The Secretary's decision also allowed the Poarch to offer pari-mutuel gaming (dog and horse racing) including

32. Letter from the U.S. Department of the Interior, Office of the Secretary, to the Alabama Attorney General, Bill H Pryor Jr., March 4, 2008, p. 1.

simulcast. However, it specifically stated that card games such as those offered under Class III could not be offered.[33] In essence, the ruling seemed to be encouraging the State of Alabama to enter into a gaming compact with the Poarch Band. However, it was not specifically stated. It also noted that the tribe did not need a compact to offer Class II gaming. Shortly thereafter, Alabama filed a suit to appeal the decision in the U.S. District Court and the Poarch filed a motion to dismiss their appeal. The motion to dismiss was granted on November 28, 2008 and in less than a year after receiving the Secretary's opinion, the Poarch Band opened their first large scale casino and hotel, Wind Creek in Atmore, Alabama in January 2009. PCI's electronic bingo machines were subsequently clarified by NIGC as Class II and not Class III gaming. Not long thereafter, the state's largest non-Indian casino, Quincy 777 DBA Victoryland expanded its casino operations in November 2009 to include a multi-story hotel, called Oasis adjacent to their gaming facility. Two months later in January 2010, Governor Riley announced that he had established a Task Force against Gaming and would be closing all facilities offering electronic bingo in the state including the Indian casinos. The opening of the two aforementioned casinos no doubt fueled Governor Riley's actions to end casino gaming in Alabama.

As noted earlier in the chapter on commercial gaming, there were allegations several years ago that Governor Riley's anti-gambling stance in Alabama and particularly toward the Poarch was politically motivated by his involvement with a key competitor, the Mississippi Choctaw Indians who operate Class III gaming in their casinos. It was

33. Ibid., 9-13.

alleged that the Choctaw contributed money to the campaigns of Alabama officials to prevent negotiations for a Class III compact with the Poarch as well as to fund Riley's Task Force against Gaming.[34] These allegations may have strained relations between the Choctaw and the Poarch. Both tribes are members of USET and were described as previously having a collaborative mentoring relationship.

Despite the federal decision, Governor Riley tried on more than one occasion to close the three casinos owned, managed and operated by PCI Gaming. When he could not obtain relief in state courts, he sought federal opinions. Each time, his efforts were thwarted by a ruling that was favorable toward PCI by the National Indian Gaming Commission (NIGC). NIGC issued an opinion that summarily stated that the electronic bingo machines in PCI Gaming's casinos were a legal form of bingo based on IGRA regulations and accountable only to the federal government through NIGC.

In January 2011, a new Republican governor, Robert Bentley took office. During his campaign, Bentley stated that he supported allowing the citizens to vote on whether gambling (electronic bingo) should be allowed in the state. However, a vote did not subsequently occur. A new Republican Attorney General, Luther Strange also took office in 2011. Luther Strange continued the anti-gaming position of the former attorney general. Strange wrote to the National Indian Gaming Commission (NIGC) on February 11, 2011 to comment on the Commission's review at that time of regulations pertaining to the Indian Gaming Regulatory ACT (IGRA). In the letter, Strange argued that electronic bingo as it is currently being played in Alabama at the Indian casinos did

34. Debbie Ingram, "Gov. Candidate Bill Johnson Believes Riley Influenced by Miss. Casino Owners," *Dothan Eagle*, November 5, 2009.

not meet the definition of "bingo" as it was intended in the state constitution nor did it meet the definition of "charity bingo" as it was described in local referendums. Strange laid out six distinguishing factors that categorize traditional paper bingo. He argued that electronic bingo machines are slot machines and thus illegal in Alabama. He referenced the ruling by the Alabama Supreme Court in *Barber v Jefferson County Racing Authority* where the court deemed the machines as illegal. Strange further argued that electronic bingo is "more likely to cause addition, severe economic loss and the other societal harms traditionally associated with gambling."[35]

A year later, Strange wrote to the NIGC again to submit comments on the proposed revisions to the Minimum Internal Control Standard for Class II Games and Gaming Equipment used in Class II Games. This time, he emphasized his earlier request in his 2011 letter for NIGC to "make clear that Native American Indian Tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama Law." He also criticized the minor changes that NIGC made when clarifying the distinction between Class II and Class III electronic bingo. Strange deduced that the electronic bingo operated by the Poarch Creeks in Alabama is Class III gaming and similar to that offered in Las Vegas and thus cannot operate without a tribal-state compact. Strange referenced the 2009 *Carcieri v. Salazar* case conceding that "neither the Poarch Band of Creek Indians is a properly recognized tribe nor the Department of

35. Letter from Attorney General Luther Strange to the National Indian Gaming Commission, February 11, 2011.

the Interior had authority to take land into trust for the Tribe."[36] By the time of Strange's second letter, the non-Indian casinos and all other facilities that had operated electronic bingo, had been closed for two years and PCI had been operating a gaming monopoly in Alabama. Strange's 2012 letter to NIGC must have raised monetary concerns by members of the Escambia County Commission who thought that based on the Carcieri decision, the possibility existed for them to tax the Poarch Creek casino in Atmore. It caused them to question PCI's sovereignty status and the status of their trust land based on the date that they gained federal recognition. The Escambia County Commission in Atmore subsequently wrote to the Department of Interior, Indian Affairs to validate whether or not the Poarch's reservation in Escambia County where Wind Creek Casino and Hotel in Atmore is located, is in fact legal trust land. A letter of response was sent to the County Commission from Donald Laverdure, the Acting Assistant Secretary of Indian Affairs, on June 4, 2012. The letter confirmed that the trust land referenced in their letter owned by the Poarch Band was acquired in trust by the U.S. in 1984 and proclaimed as a reservation in 1985.[37]

In response to the county's challenge, the Poarch Creek issued a press release on June 6, 2012 reiterating what the Secretary's letter had confirmed. The press release also exposed that Attorney Brian Taylor from Elmore County (where Wind Creek Wetumpka is located), who had formerly worked for Governor Riley, had been hired by the

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36. Letter from Attorney General Luther Strange to the National Indian Gaming Commission April 25, 2012.

37. Letter from Acting Assistant Secretary of Indian Affairs, Donald Laverdure to David Stokes, Chairman, Escambia County Commission, June 4, 2012.

Escambia Commission after convincing several commission members that the Poarch lands were not legally taken into trust and thus were subject to county property taxes. The June 2012 Poarch Newsletter that is sent to Poarch tribal members summarized Escambia County's challenge to the tribe's sovereignty. It seems that four of the five Escambia County Commissioners wanted clarification about the tribe's trust land. The Poarch Creeks were perhaps surprised about the county's inquiry given the relationship that had existed with Escambia County and the level of philanthropy they have contributed annually to the county. The June 2012 newsletter indicated that since 2008, the Tribe had donated over $400,000 directly to the County Commission, based on their local-tribal agreement. Additionally, they had made other contributions including $360,000 to the Escambia County Drug Task Force and another $1.3 million to the Escambia County Schools. The Poarch Creek's response concluded by encouraging its members to register to vote so that they could support candidates that support the Tribe.[38] Thus, the Poarch Tribal government may take a more active role in encouraging members to vote for particular candidates in future local elections that support their sovereign status. Given the county's questioning of their sovereign status and trust lands and their interest in taxing tribal businesses, it would not be surprising if the Escambia County Commission requests more than 100,000 annually in future contract negotiations with PCI and especially when the Poarch Creek were able to donate millions of dollars to local schools. The one abstaining member on the County Commission, Brandon Smith who did not question Poarch legitimacy, reiterated his long term support for the tribe and

38. "Escambia County Commission Challenges Tribal Sovereignty," *Poarch Creek Indian Newsletter 30,* no. 6 (June 2012): 6.

acknowledged the benefits that tribal gaming brought to the county.[39] One can deduce that despite the extensive Poarch contributions and their financial agreement with the county, most Commissioners would prefer to have the power to tax PCI enterprises and especially the casino rather than receive an annual payment.

On February 19, 2013, Attorney General Luther Strange launched another challenge to Poarch sovereignty. This time he filed a complaint in the Circuit Court of Elmore County, Alabama. The complaint alleged that the defendants were "operating, advancing and profiting from unlawful gambling activity at the Creek Casino in Wetumpka, the Wind Creek Casino in Atmore and the Creek Casino in Montgomery". It also sought injunctive relief to abate a public nuisance.[40] The complaint was filed against the PCI Gaming Authority, all of the Tribal Council Members and PCI Gaming Commission Board members. PCI successfully had the case moved to federal court a year later on March 21, 2013 and filed a motion to dismiss the complaint on March 28, 2013. The State amended its complaint to include both a state and federal nuisance claim. The Tribe filed a motion to dismiss the amended complaint on May 9, 2013. The United States filed an amicus brief in support of the Tribe's motion to dismiss on June 6, 3013. The State of Michigan filed an amicus brief in support of Alabama's position on July 3, 2013. Michigan's interest in Alabama's legal matter concerning tribal gaming was interesting as it seemed to represent a collaborative effort by Michigan to support

39. Ibid., 7.

40. *State of Alabama v PCI Gaming Authority*, electronically filed 2/19/2013 in Elmore County, Alabama, accessed June 1, 2015, http://www.media.al.com/wire/other/pci-complaint.pdf.

Alabama with its suit against an Indian tribe. Judge W. Keith Watkins granted PCI's motion to dismiss the lawsuit on April 10, 2014.[41] Based on the amicus brief, it appears that the state of Alabama had begun to solicit support from other states such as Michigan in their anti-gambling efforts against the Poarch Band Creek Indians. These persistent and relentless political challenges by the state of Alabama undoubtedly kept Poarch Creek attorneys as well as Alabama state attorneys very busy.

Anti-Indian gaming sentiment was also expressed by Gary Palmer in some of his Viewpoint Articles, a publication of the Alabama Policy Institute where Palmer serves as President. The Institute is described as a non-partisan, non-profit research and education organization dedicated to the preservation of free markets, limited government and strong families which are indispensable to a prosperous society. Although it proclaims to be non-partisan, the views seem to reflect a Republican agenda. Palmer's Viewpoint articles reflect an anti-gaming position in general. It appears that he does not want gambling to become legal in Alabama. In 2007, after the Poarch had announced plans to build their first casino, Palmer implied that the Poarch would lobby new incoming legislators. He explicitly stated in one article, "The Poarchs have no right to build a full-fledged casino" and "They are subject to Alabama laws like everyone else."[42] Palmer also criticized gaming by the Mississippi Choctaw Indians and alleged increased incidences of

41. Justin Schuver, "Federal Judge Dismisses Strange's Lawsuit Against PCI," *Atmore Advance*, April 11, 2014; Poarch Legal Department, "*State of Alabama v PCI Gaming Authority* et al. (Federal Court)," *Poarch Creek Newsletter,* August 2013, 38.

42. Gary Palmer, "Gambling Money May Influence New Legislature," Birmingham: Alabama Policy Institute, March 26, 2009, accessed June 2, 2014, http://alabamapolicy.org.

corruption as supporting his anti-gaming position.[43] In another article, Palmer suggested that PCI gaming should be taxed and cited the Carcieri decision regarding land taken into trust after 1934.[44]

Palmer's articles supported Governor Riley's anti-gambling campaign against the Poarch Creek and may have influenced Escambia County's subsequent challenge to the Poarch Creek land in trust. Palmer challenged Governor Riley to end gaming by the Poarch Creek which likely further fueled Riley's anti-gaming actions.

A publication by another anti-gaming group, Citizens for a Better Alabama focused on casinos in general but primarily commercial gaming enterprises in Alabama.[45] Within the leadership of the Alabama Christian Coalition in 2006-2007, there were dissenting factions representing both pro and anti-gambling sentiments which led to a lawsuit filed by Dr. Randy Brinson, Chairman against the former Coalition President, John Giles. The lawsuit accused Giles of misrepresenting the Coalition and using the Coalition to further his own political agenda and alleged that Giles had ties to gambling interests including Indian gaming interests.[46]

On three occasions, this researcher spoke to officials at the National Indian Gaming Commission regarding the controversy surrounding Indian gaming in Alabama

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43. Gary Palmer, "Gambling Ads are a 'Sweet Hoax' on Alabama," Birmingham: Alabama Policy Institute, March 26, 2009, accessed June 2, 2014, http://alabamapolicy.org.

44. Gary Palmer, "U.S. Supreme Court Decision Could Impact Poarch Creek Casinos," Birmingham: Alabama Policy Institute, May 8, 2009, accessed June 2, 2014, http://alabamapolicy.org.

45. "The Battle over Gambling," Special Report, Citizens for a Better Alabama, accessed June 2, 2014, http://www.citizensforabetterAL.com.

46. *The Christian Coalition of Alabama: Dr. Randy Brinson v. John Giles*, Civil Action No. 2007-778, Filed in the Circuit Court of Montgomery County, May 11, 2007.

and specifically to discuss the tribal-state relationship in Alabama. Telephone interviews were conducted on November 29, 2010, December 7, 2010 and again on April 29, 2013. On November 29, 2010, the researcher spoke with Tom Hardaman and later that same day with Elaine Tremble Saiz, at the Department of the Interior, Office of Indian Gaming Management. Hardaman explained the consultation process for his office with Indian tribes and cited Florida as the only state where progress had been made to pressure the state to negotiate a Class III compact with a tribe. Hardaman further indicated that full application of the secretarial procedure had not yet occurred. He indicated that Indian tribes in Texas were experiencing similar problems but they had not submitted an application for Secretarial procedure. Ms. Saiz briefly discussed the Seminole Tribe's difficulty trying to gain a compact with the state of Florida. Neither she nor Mr. Hardaman was familiar with the situation in Alabama at that time. (Since that time, the Seminole negotiated a compact with their governor in Florida). Ms. Saiz advised the researcher to speak with Michael Hoenig, one of the gaming attorneys at NIGC. On December 7, 2010, Attorney Hoenig was contacted. He was very helpful and later sent the assessor copies of some official documents that were referenced earlier including the Secretary's letter to the Alabama Attorney General. Hoenig reported that the state of Alabama could not close Indian casinos that utilize electronic aids such as electronic bingo as long as paper bingo was still allowed. He shared some of the proposed changes to the IGRA regulations relative to electronic bingo and the need for clarification between Class II and Class III. He could not cite any precedents where a state had allowed gaming and then disallowed it. He noted that a few other tribes were

experiencing similar problems with states refusing to negotiate compacts. A few tribes had applied for Secretarial procedures but decisions had been pending for a few years at that time. Attorney Hoenig was contacted again three years later on April 29, 2013. At that time, land into trust was the major issue that his office was addressing. When asked how NIGC was funded, he indicated that NIGC did not receive any federal funding but that the tribes pay a fee for NIGC to regulate them. He did not state the amount of the fee or provide any financial information about tribes such as how much they earn from Class II or Class III gaming.

NIGC is a separate agency under the Secretary of the Interior's office. Their primary role is to regulate Class III gaming. However, they also regular compliance with IGRA overall including for Class II gaming. They periodically visit Class II Indian gaming operations and especially if problems arise such as those that were occurring in Alabama. Although the primary role of NIGC is to regulate tribal compliance with IGRA, given that they are funded by gaming tribes' fees, they may also view their role as one of advocacy and technical assistance to protect tribal sovereignty.

If Alabama had been successful in closing Indian casinos, a precedent would have been established. It would have set Indian tribes back economically and politically and been a direct affront to sovereignty. Moreover, other states could have followed suit and negatively impacted the upward trend in tribal gaming. Given Alabama's economic status and the futility of the state's attempts to end Indian gaming, it would not be surprising if the state legislature eventually passes an amendment that allows the voters to decide on the gaming issue to reopen commercial gaming. Governor Bentley expressed support for

such a vote when he was running for office. If commercial casinos remain closed, state lawmakers may consider voting to implement a state lottery.[47] The neighboring states of Georgia, Mississippi, Tennessee and Florida have lotteries. Reportedly, House Minority Leader Craig Ford, Democrat from Gadsden, Alabama plans to introduce a lottery bill soon.[48]

Inter-Tribal Political Conflict

In addition to state and county political challenges to Poarch sovereignty, their gaming advancements spurred inter-tribal conflict with the Muscogee (also spelled "Muskogee) Creeks in Okmulgee, Oklahoma and the MOWA Band of Choctaw Indians in Mount Vernon, Alabama. The original Poarch bingo hall and casino in Wetumpka was simply a doublewide trailer. However, in order to expand the site to develop a full scale casino and hotel, the adjacent land which is part of Hickory Ground, was accessed for development. Hickory Ground was once a large Indian town and the site of the last capital of the Creek Nation prior to the removal of most Creeks from Alabama. Some Muscogee Creek ancestors including elders and former chiefs are buried at Hickory Ground which was also used as a ceremonial ground for prayer. Hickory Ground is listed on the National Register of Historic Places. According to the Poarch Band, they asked the Muscogee Creek to join them several years ago in applying for a grant to buy the land when it came up for sale but the Muskogee's did not respond. The Poarch Band acquired

47. Editorial Board, *Anniston Star*, "Gambling on the Lottery – State Lawmaker Next in Line for the Alabama Lottery," January, 3, 2014, accessed January 6, 2014, http://wwwannistonstar.com.

48. Ibid.

Hickory Ground as trust land in 1980, four years prior to receiving federal recognition. Poarch Creek leaders allege that they were unaware initially that their Wetumpka property encompassed the Ceremonial Grounds. The entire town of Wetumpka is built on what was once the Indian town of Hickory Ground.[49] Upon relocating to Oklahoma, a second Hickory Ground town was established there by the Muscogee and they continued ceremonial practices. The Muscogee Creeks argued that for two decades, they have remained adamant about not wanting the Poarch to develop the Hickory Ground site in Alabama. After the Poarch Creeks began construction of the site in November 2012, the Muscogee Creek Nation in Oklahoma filed a federal lawsuit, *Muscogee Nation v Poarch Creek Indians* in December 2012 to stop the construction and expansion of Wind Creek Wetumpka.[50] This case not only raised the issue of Creek sovereignty rights in terms of how the Poarch Creek use tribal land but also raises about which authority can resolve inter-tribal disputes over land use. According to George Tiger, Principal Chief of the Muscogee Creeks, the Poarch Creeks violated the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990.[51] Chief Tiger's position is that tribal respect for cultural traditions should supersede gaming purposes. He alleged that the Muscogee Creeks never consented to the excavation and more importantly, that 57 sets of human remains and associated funerary objects were excavated and relocated to expand the

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49. Sharon Delmar, "Grand Jury Does not Indict on Terroristic Charges," *Poarch Creek Newsletter*, June 2013, accessed August 1, 2013, http://www.pci-nsn.gov/westminster/newsletters.

50. George Tiger, "Letter to Tribal Leaders From Muscogee (Creek) Nation," *Indian Country Today*, October 16, 2013; Statement from the Muscogee (Creek) Nation Executive Office dated December 12, 2012, accessed January 10, 2014, http://www.SaveHickoryGround.org.

51. Ibid.

casino on sacred land. The lawsuit sought preservation not monetary damages. It also called for construction to be halted and for the human remains to be returned to their original burial site.

The Poarch Creeks allowed state archeologists to study the site but allegedly, they once promised that they would leave it undisturbed. Richard Pombo, a former Congressman from 1993-2007 and former Chairman of the House Resources Committee from 2003-2007, where he was known as the top expert on federal Indian policy, alleged that the Poarch did make such a promise but had shamefully broken it. According to Pombo, the Poarch acquired Hickory Ground in 1980 with a historic preservation grant through state and federal taxpayer money. He concurred with the Muscogee that at that time, the Poarch Creek had promised to preserve Hickory Ground forever on behalf of the Creek Indians in both Alabama and Oklahoma.[52] Pombo alleged that some of the funerary objects disappeared during excavation. He surmised that the situation would lead to a decline not only in public support for tribal gaming but also for Congressional support for tribal gaming as well as reduce federal priority on taking lands into federal trust status. Pombo wanted federal agencies to force all gaming activity at the Wetumpka site to stop. He also made note of the fact that the Poach have another casino, Creek Casino, Montgomery that is only fifteen miles from Wetumpka that they could have developed instead. While the Poarch have a close political alliance with the mayor in Wetumpka, they did not report having such an alliance in Montgomery. Senator Pruiett who represented Montgomery and that was arrested during the 2010 FBI investigation,

52. Richard Pombo, "Opening of Casino on Hickory Ground a Day of Shame," *Indian Country Today*, December 24, 2013.

had supported a bill to expand non-Indian commercial gaming. Political support for Indian gaming expansion in Montgomery may have been lacking.

The Poarch Creek argued that the Ceremonial Grounds are still protected and the remains had been memorialized and preserved. They further argued stated that any human remains found within the Ceremonial grounds area were never removed and that they will never be removed. However, they also acknowledge that remains found outside the Ceremonial Grounds were interred adjacent to the Ceremonial Grounds by them with prayer and ceremony which they said was according to Creek Indian tradition.[53]

On February 14, 2013, some Muscogee Creek protestors tried to access the site to pray while casino construction was underway. Reportedly, they had informed the Poarch of their intent to be present at the site that day for a prayer meeting and had asked them to temporarily halt construction but they received no response back from the Poarch.[54] Four protestors were arrested for trespassing as they approached the entrance of the casino. One of the trespassers, Wayland Gray, reportedly, threatened to burn the casino down and was charged with making a terroristic threat. When the case was finally heard, the grand jury did not indict Wayland Gray and the charges were dismissed. The Poarch Creek leadership was not pleased with this outcome and especially since their tribal police were not allowed to present evidence including a video tape of the incident. Given that the incident occurred on Poarch Creek land, it seems that the Alabama court did not acknowledge Poarch sovereignty rights in terms of jurisdiction and authority over crimes

53. Delmar, "Grand Jury Does not Indict on Terroristic Charges," June 2013.

54. David D. Goodwin, "Traditional Creek Group to go ahead with plans despite Poarch denial," *Wetumpka Herald,* February 13, 2013.

that occur on their land and especially involving other Indians. Thus, Poarch judicial authority was not recognized in this case.

The Alabama Poarch Band Creeks and the Oklahoma Muskogee Creeks are two politically separate and distinct Indian Nations. Both Tribes are federally recognized and both are descendents of the original Creek Nation that once resided in Alabama and Georgia. The Muscogee have the largest Creek membership with about 70,000 members. The Poarch view the lawsuit by the Muscogee Creek as divisive and an attempt by another sovereign to control the use of their lands. The Poarch Creek argued that they invited the Muscogee Creeks in 2006 to participate in a reburial ceremony of ancestral remains but reportedly, the only response they received was sarcasm. This matter may have caused a delay in construction of the new casino. The Poarch had initially planned to build the new casino in Wetumpka in 2006 but final construction did not begin until six years later. The Poarch would have been required to indicate their development plans for this site in their annual Revenue Allocation Plan that is approved by NIGC so it is fair to assume that the development plan had federal approval.

The lawsuit filed by the Muscogee Creek Nation not only names the Poarch Band Creeks as defendants but also includes their construction contractors, Auburn University and the U.S. Department of Interior. The federal complaint notes that the American Indian Religious Freedom Act requires consultation with traditional religious leaders in order for such excavation to occur. While the Muskogee Creeks felt that they should have been the Tribe consulted since it involves their ancestors too, it is likely that this condition was met via consultation with the Poarch Creeks since it is their trust land. This

controversy has led to other Indian nations taking sides in the matter. Reportedly, more Indian Tribes are siding with the Muscogee Creeks than with the Poarch including members of the Chickasaw, Choctaw, Cherokee and Seminole.[55] On December 17, 2013, opening day for the new Wind Creek Wetumpka, the Muscogee Creeks asked other Indian Nations to join with them in a day of mourning as a means of expressing their opposition to what they view as a desecration of sacred burial and ceremonial grounds.[56]

The political tensions and divisions between the Poarch Creeks that remained in Alabama and the Muscogee Creeks that were primarily forced to relocate to Oklahoma, has been an ongoing issue between these two sovereigns. It dates back to their early beliefs about each other during the period of Indian Removal. The Hickory Ground issue has further fueled past divisions. The Muscogee argued that the Poarch descendents were traitors and were rewarded with a land grant in Tensaw, Alabama for assisting the US government in removing most of the Creek Nation from Alabama. Some called the Poarch Creek collaborators and questioned their Indianess. The strategy of divide and conquer was often used by the US military and other government leaders to create factionalism within Indian Tribes in order to acquire their land.

The Poarch Creek argued that they have ancestors who were on both sides of the Creek Civil War in 1813–1814 and on both sides of the removal issue and also that not all of their descendents were friendly toward whites. The Poarch Creeks further argued

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55. Dashanne Stokes, "Rights Vs Identity: Divisions Run Deep Over Hickory Ground," *Indian Country Today*, March 26, 2013.

56. George Tiger, "Tiger Thankful For Hickory Ground Ancestors Day of Mourning Support," *Indian Country Today*, December 19, 2013.

that while they remained in Alabama, they were extremely poor and often discriminated against. The Muscogee Creeks in Oklahoma were not reported as being instrumental in helping the Poarch Creek meet the residency requirements to obtain federal recognition.

The MOWA Band of Choctaw Indians in Mount Vernon, Alabama was also at odds with the Poarch Creeks. Chief Framon Weaver of the MOWA Band of Choctaw Indians accused the Poarch Band Creeks of working behind the scenes in an effort to prevent them from gaining federal recognition.[57] The MOWA Band has more than 4,000 members and about 300 acres of land in Mobile and Washington Counties located in the southwestern area of Alabama. They tried to gain federal recognition but were denied in 1995.[58] Chief Weaver alleges that while they supported the Poarch in their application for federal recognition, the Poarch have opposed them in their efforts to gain federal recognition. He alleged that racism by the Poarch Creeks plays a role in their opposition to the MOWA being federally recognized because they question the MOWA Band's heritage. Weaver postures that the Poarch hold the same racist views as many white southerners and especially since many MOWA intermarried with blacks rather than with whites. The MOWA resent any reference by the Poarch to themselves as being poor. Weaver initially expressed no interest in establishing gaming and stated that the majority of the MOWA Band would be against building a casino if federal recognition is obtained. However in early November 2013, despite some opposition by tribal members, the

57. George Altman, "Member of MOWA Tribe Blasts Poarch Creek Officials," *Montgomery Bureau*, accessed July 11, 2012, http://www.AL.Com.

58. Summary, A Notice by the Indian Affairs Bureau, Proposed Finding Against Federal Acknowledgement of the MOWA Band of Choctaw, Pursuant to 25 CFR 83.10(e), *The Federal Register*, January 5, 1995.

MOWA Band had 50 electronic bingo machines installed at their Choctaw Entertainment Center in Mount Vernon, Alabama where there is reportedly, a high substance abuse problem.[59] MOWA gaming was a short lived venture. A few days after their machines were installed, the Mobile County Sheriff's department seized their gaming machines and any cash that was on hand.[60] Without federal recognition, they cannot engage in this type of gaming. If the MOWA Band becomes federally recognized, they could become a key gaming competitor for the Poarch Band in southern Alabama. Diminished inter-tribal support for the Poarch due to the Hickory Ground issue could result in greater inter-tribal support for gaming by the MOWA Band.

Another Indian Tribe located not far from the Poarch Band that has also been unsuccessful in obtaining federal recognition for fifty years is the Muscogee Nation of Florida, a tribe of Eastern Creek Indians located in North Walton County, Florida. It was alleged that there was a hidden investor supporting their application given that 1.1 million was spent lobbying for them since 2005.[61] They too may continue to seek federal recognition now that the criteria will be easier to meet and they too could become gaming competitors for the Poarch Creek. These intertribal political tensions with the MOWA Band Choctaw and Muscogee Creek seem to contradict the Poarch Creek goal for "maintaining good relations with other tribes." However, they may be congruent with the

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59. Michael Finch II, "MOWA Choctaw Indians Roll Out Bingo and Slot Machines, But Is It Legal?," accessed November 6, 2013, http://www.AL.com.

60. Michael Finch II, "Mobile Sheriff's Office Seizes Electronic Gaming Machines on MOWA Choctaw Reservation," accessed November 7, 2013, http://www.AL.com.

61. "Florida Muscogees Seek U.S. Recognition," accessed October 18, 2009, http://www.Reznetnews.org.

Poarch Creek mission of "Seeking Prosperity and Self-Determination," especially given their decision to build a second casino in Wetumpka on what was considered sacred land.

The June 2014 elections for the Poarch Tribal Council resulted in the election of the tribe's first female Chairperson/CEO, Stephanie Bryan. A total of 1,394 tribal members voted in the election. Stephanie Bryan had been a life-long tribal member and resides in Atmore. She has a long history of leadership in the tribe including with gaming, healthcare, education and utilities. She was the Vice-Chair of the Tribal Council since 2006 and worked with many organizations including USET, NIGC, NIGA and PCI's gaming commission. Bryan witnessed the "metamorphosis" of the tribe from poverty to prosperity.[62]

The 2016 tribal election resulted in the election of Robert McGhee, the former Poarch Creek Tribal Treasurer, as the Vice-Chair of the Tribal Council. McGhee also has a long leadership history with the tribe and particularly with government-to-government relations at the local, state and national levels on issues of economic development, sovereign immunity, health care, youth and education. He previously worked at the Bureau of Indian Affairs at the Department of the Interior for the United States Senate and he worked at an Indian law practice. McGhee is a member of the United States Secretary's Health and Human Services Tribal Advisory Committee and he has served on several White House initiatives and boards.[63] He also resides in Atmore. McGhee was the key tribal contact for this research. Although he could not or would not answer all of the

62. Bio on Stephanie Bryan, accessed June 1, 2015, http://www.pci-nsn.gov.

63. Bio on Robert McGhee, accessed June 1, 2015, http://www.pci-nsn.gov.

researcher's questions, he shared some pertinent information relative to gaming and Poarch Creek sovereignty. New leadership in the top two tribal council positions creates opportunities for new directions, new perspectives and strategies as well as a reorganization of tribal priorities for the future. The tribal council is not only charged with managing the influx of new revenue from gaming but it must also respond to the needs and concerns of its tribal members. At a 2010 tribal council meeting one member asked regarding why more local housing was not being developed.

The tribal council has a regional role as a member of USET (United Southern and Eastern Tribes) and is also represented by the National Indian Gaming Association, a tribal gaming advocacy organization. It is likely that the concerns raised by the Muscogee Creeks regarding what they perceived as the desecration of Hickory Ground will not simply go away. Indian cultural traditions and cultural maintenance could be lost in the exercise of Poarch Creek tribal sovereignty through gaming. Although they have a goal for maintain good relations with other tribes, their mission is "seeking prosperity and self-determination." The latter appears to have taken priority over the former.

CHAPTER V

CONCLUSIONS

This research study makes a significant contribution to the discussion regarding sovereignty and tribal gaming and particularly with regard to the advantages of Class II gaming. Chief Justice Marshall's early interpretation of the political status of Indian tribes as that of "domestic dependent nations" may no longer be the political framework for defining successful gaming tribes. It can be argued that prospering gaming tribes are becoming more self-reliant and less dependent on external resources including federal loans and subsidies. This study found that casino gaming by the Poarch Band Creek Indians (PCI) in Alabama has been a vehicle for exercising and testing the strength of their tribal sovereignty.

When exercised exclusively within tribal jurisdictions and impacting only tribal members, sovereignty was not previously viewed as a political threat to state power. The changing economic status of gaming tribes and their autonomy from state authority may continue to create tensions between states and tribes. These tensions are evidenced by the large volume of legal cases involving tribal state disputes that have reached the Supreme Court, many of which have yet to be resolved. As noted by Mason previously, the tribal-state compacts required by the Indian Gaming Regulatory Act (IGRA) for Class III gaming often do not reflect equal power sharing terms. A compact with the state is not required for Class II gaming such as that offered by the Poarch Creeks. Based on the

events that occurred in Alabama, there was an assumption that if the state could legally force the closure of all non-Indian gaming, the Indian casinos could also be closed. If this had occurred, it would have set a national precedent relative to Indian gaming and greatly diminished sovereignty rights. Closure of the Indian casinos did not happen. Instead, a gaming monopoly resulted for Poarch Creek. Their Class II casino gaming with electronic bingo machines is a gaming category that does not require tribal-state negotiations or public disclosure of their earnings. Gaming is not only altering tribal economic status but is likely creating class tensions within the tribe. PCI Gaming soared quickly and unexpectedly with their five-year gaming monopoly in Alabama. The quick influx of new and substantial resources has undoubtedly impacted and will continue to impact internal tribal power relationships as well as external relations as indicated in the conflict surrounding Hickory Ground. One wonders which would be more advantageous; slow but steady sustainable economic growth that the tribe can predict and prepare for or; quick and tremendous growth without solid preparation and planning. It can be argued that the Poarch were the benefactors of the latter effect and thus their decision-making was largely influenced by a quick abundance of revenue.

There were only two published studies that examined tribal gaming and sovereignty simultaneously: W. Dale Mason (2000) and Steven Andrew Light and Kathryn Rand (2005). The researchers emphasized political tensions for sovereign tribes operating high stakes Class III gaming. While Class III gaming references were not relevant to this study, some of their generalizations regarding tribal sovereignty and tribal-state relationships were applicable. For example, Mason argued that tribal sovereignty is “vulnerable” in practice particularly when it involves a political “zeitgeist”

such as tribal gaming.[1] Mason's argument is exemplified by the forceful efforts made by the Alabama Task Force against Gaming to close all casino gaming including Indian gaming in the state. Mason also argued that gaming is a new source of tribal-state conflict that will continue well into the 21st century and that federal court decisions are setting the national legislative agenda as it relates to Indian gaming.[2] He also suggested that the political controversies created by Indian gaming are forcing states to reconsider their gaming policies as Indian tribes could wind up with a monopoly.[3] This is exactly what occurred in Alabama. Tribes located in states where tribal-state negotiations for Class III gaming are unlikely, should consider advanced forms of Class II gaming such as that operated by PCI Gaming.

Indian tribes as new political interest groups are another important aspect of tribal gaming that was emphasized by Mason and which this research supports. As an interest group, PCI Gaming has influenced local government officials, including the mayor in Wetumpka and county government officials in Escambia County, to forge partnerships that support their gaming initiatives and in some cases cross-deputizing of their police has occurred. Mason noted that unlike states, tribes have a trust relationship with the federal government and thus they have a base from which to approach Congress and the federal government that states do not have. However, one could argue with Mason on this latter point as states have Congressional representation that tribes do not have. The

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1. Dale W. Mason, *Tribal Sovereignty and American Politics, Indian Gaming* (Norman: University Press of Oklahoma, 2000), 231.

2. Ibid., 232.

3. Ibid., 241.

negotiation process required by IGRA forces tribes to negotiate compacts with states (for Class III gaming) when they never were required to negotiate with states previously. The end results of these compacts are not always favorable for tribes. This research study supports Mason's final argument in his epilogue that "the historical political conflict between tribal and state sovereignty continues as vigorous as ever because tribes have greater resources than at any time since they were a military power courted by European nations..." and that "gaming has provided the economic opportunity to fight these battles but the battles are being led and fought by Indians."[4] When Light and Rand examined tribal sovereignty within the context of Indian gaming in North Dakota, they too highlighted the tensions and the ultimate compromise that Class III gaming tribes have made. They described IGRA as subversive to tribal sovereignty given that it requires a tribal-state relationship that did not previously exist. They posture that the escalating politic pressure that states are placing on Congress to amend IGRA to give them more local control, will ultimately lead to a decline in tribal gaming.[5] If this prediction is true, in order to sustain and continue to promote tribal economic development, tribes will need to diversify their portfolios.

The decision made by the Poarch Creek leadership regarding the use of Hickory Ground to build a second large casino and multi-story hotel led to other Indian tribes and particularly the Muscogee Creeks in Oklahoma to question their cultural identity and respect for cultural tradition. Disturbing and/or moving ancestral graves to build a

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4. Ibid., 259.

5. Steven Andrew Light and Kathryn R. L. Rand, *Indian Gaming and Tribal Sovereignty, The Casino Compromise* (Lawrence, KS: University Press of Kansas, 2005), 148-149.

parking garage for the Wetumpka casino, is likely not a decision that will be forgotten by their tribal peers. They appear to have compromised tribal cultural and religious integrity solely for economic gain. While Light and Rand included a lengthy discussion on indigenous perspectives of tribal sovereignty and they acknowledge that non-Indian political actors lack an understanding of indigenous perspectives, neither they nor Mason mention the politics of racism and classism within the context of Indian sovereignty or gaming. Tribal sovereignty and gaming developments for the Poarch Creek should be followed over the next five years to assess the sustainability of their casinos and other new economies as well as any internal class issues that may develop. Census data for 2020 may indicate a change in poverty levels. Indian gaming has created a paradigm shift from the notion of poor dependent Indian tribes to quickly growing tribal economies and greater independence. Thus, gaming tribes will be will faced with economic challenges relative to the subtleties of race and class as well as regional differences. Their location in the Bible belt and in a state with a long and intense history of racism may pose additional challenges for the Poarch Band. Their early history was that of a small obscure tribe in rural Alabama that sought to be unnoticed and blended through intermarriage with whites. However, they are no longer unnoticed.

Federal recognition for the Poarch Band marked a pivotal turning point in their socioeconomic and political status. Through electronic bingo, they were able to establish themselves as a viable employer and financial contributor within the Alabama community. The success of their gaming monopoly has moved the tribe toward greater independence and self-sufficiency especially in areas of health, education, elder care and housing. They are no longer a poor obscure tribe but proud and contributing “good

neighbors," as expressed by the former Tribal Chairman, Buford Rolin. As their gaming revenue quickly increased, the Poarch Creek began to diversify and expand their economies including dog tracks and hotels in Florida. They have also initiated discussions with the Seminole Indians in Florida to determine whether it is feasible to develop a Class III gaming operation in northern Florida since the Seminole already have a tribal-state compact in Florida. In light of the controversy surrounding the new Wetumpka Casino and Hotel, it is not surprising that the Poarch Tribal Chief, Buford Rolin, decided that he would not seek re-election in June 2014. Greater internal accountability by tribal leaders should be expected. Gaming has resulted in new and expanding tribal government departments as well as the creation of a new department within the Internal Revenue Service to help Tribes with their expanded tax liabilities and other tax related issues.

Lack of public disclosure regarding the amount of gaming revenue generated from Class II tribal gaming benefits the Poarch Creek and gives them leverage in local negotiations. It seems that they only disclose a limited amount of information to their membership. When the Poarch Cultural Director Robert Thrower, who is very active in tribal affairs, was given a list of the questions that the researcher needed to ask, he could not answer them and responded saying he would like to know the answers to some of the questions as well. The tribe's level of philanthropy and their rapid acquisition of other business ventures seem to suggest that they are becoming prosperous quickly. Based on an article that appeared in the Alabama Anniston Star, PCI's 2012 net earnings were

estimated to be in excess of $322 million.[6] Their monopoly continued for three more years through 2015. Since the Poarch Creek manage their casinos themselves as compared to the Cherokee casino in North Carolina that is managed by Harrah's, there is an enormous responsibility for a sound corporate management structure and management savvy by Poarch Creek tribal administrators. It would stand to reason that employment issues for three casinos and two hotels that operate 24 hours a day is an immense responsibility for a small tribal government that previously only focused on internal tribal affairs. Although gaming tribes can attempt to remain obscure to some extent, they must learn to effectively navigate corporate politics and/or hire experts that respect and understand sovereignty. The quick development of three multi-million dollar casinos within five years (2009–2014) made PCI Gaming one of the top employers in Alabama. Their prosperity grew at a very rapid pace and thus the long-term socioeconomic and political impacts of their gaming have not been fully assessed.

Nationally, tribal gaming has created controversy regarding new tribal membership enrollment. A greater number of people may have claimed Indian heritage to reap tribal benefits including those with and without Indian blood. More than 52 million Americans claimed Indian ancestry in the 2010 Census which represents a 27 percent increase from 2000.[7] The 2010 Census was the first census that allowed citizens to claim more than one race. According to Patrick Murphy, a former executive for the Mystic Lake Casino in Minnesota, where there are twenty-two Class III Compacts with Indian Tribes, tribal gaming is the first real economic development program to work on the

6. Eddie Burkhalter, "Lawyer: Seized Games are Legal," *Anniston Star*, December 4, 2014.

7. "Streamlining Dubious Claims," *The Post and Courier*, September 17, 2013.

reservations. Murphy postured that tribal gaming nationally has resulted in more success than what was expected.[8] The political economy has changed for gaming tribes especially within the last decade resulting in a major paradigm shift from one of poverty to one of prosperity. There has never been an entire race of people to experience such an increase in wealth in such a short period. Gaming tribes can now afford to lobby for their sovereign interests individually and collectively.

The Poarch Creek were unsuccessful when they attempted to enter into discussions regarding Class III gaming with state officials several years ago. However, in December 2014, State Representative Craig Ford, a Democrat from Gadsden, Alabama expressed interest in promoting bills that would establish a state lottery as well as a compact with the Poarch Creek. The State Senate President, Del Marsh, a Republican from Anniston, Alabama acknowledged that the state needs revenue and must look at ways to bolster the state budget including bills that promote gambling.[9] In 2014 former Governor Robert Bentley was considering a Class III compact with the Poarch Creek as a possible solution to solving the general fund budget problems but wide support was lacking.[10]

Conflict between tribes and states over gaming issues is inevitable. Since the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, states continue to lobby for amendments to the Act to give them greater leverage with tribes. Federal

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8. "Tribal Governments in 2010 – Tribal Gaming," West St. Paul, MN, American Indian Policy Center, accessed December 1, 2013, http://www.aipc@cpinternet.com.

9. Ibid.

10. Leada Gore, "How Alabama Lawsuit Against the Poarch Creek Indians Could Make it Easier for the Tribe to Sell Marijuana," accessed December 16, 2014, http://www.AL.com.

jurisprudence will continue to address these legal challenges and shape federal Indian law and policy. Recent changes in the federal recognition process in 2014 that reduced the criteria formerly required for tribes to prove they existed as organized communities since their first contact with non-Indians (1789), is also a significant development. Tribes now only need to prove tribal continuity since 1934 when the Indian Reorganization Act was passed. This change will likely increase the number of federally recognized tribes and thus increase the number of gaming tribes as well.[11] Even a poor tribe can find investors for a casino. The changes in the federal recognition process will open the door for smaller and poor tribes, not previously recognized, to become gaming competitors such as the MOWA Band in Alabama. Increased competition could result in a diminished gaming market leaving tribes in debt and/or financially dependent on other investments and economies. While there were pros and cons regarding the Indian Reorganization Act (IRA) of 1934, it was the first piece of legislation that promoted business development on reservations and established a revolving credit fund to help tribes achieve this goal.

In 2006 the Poarch Creek expressed early interest in negotiating a tribal-state compact to operate high stakes Class III gaming. However, Alabama was not receptive at that time. If a compact is negotiated in the future, the terms must be fair to the tribe and to the state and will require diplomacy given their history of tension. These compacts require new government-to-government relationships. If Class III gaming is a realistic goal for the Poarch Creek, it would behoove them to begin establishing some form of communication with state agencies such as the State Board of Education. Although the

11. Gale Courey Toensing, "Federal Recognition Reform Moves Forward," *Indian Country Today*, May 22, 2014.

Poarch Band Creek expressed interest in Class III gaming, they seem to be fairing well with Class II gaming which allows them greater autonomy and unrestricted short-term agreements with the local municipalities. Some Class III tribal-state compacts are negotiated for a very long period. The Seminole compact for Florida has negotiated terms for a twenty-year period. Based on the outcome of the Seminole's first lawsuit with Florida in *Seminole Tribe of Florida v Florida* (1996), the Poarch cannot pressure Alabama to negotiate a Class III compact as a good faith effort. Rand and Light are on point when they surmise that the Seminole decision caused a shift in the balance of power between tribes and states. In essence, the decision relieved states of IGRA's earlier requirement for them to make a good faith effort to negotiate with tribes that desire Class III compacts. The Seminole ruling also restricts tribes from suing states that refuse to negotiate compacts. This court decision had been pending for several years and is viewed as a major gain for states and a major setback for gaming tribes. Under new leadership by Governor Charlie Crist in Florida eventually entered into a gaming compact with the Seminole Tribal Chairman Mitchell Cypress in August 2009 but it has not been without controversy and conflict within the tribal leadership and within the state. Rand and Light summarize the root of controversy between tribes and states in the following statement:

> The states have historically failed to perceive any value in the continuation of tribal sovereignty and independence from state jurisdiction, while tribes have been forced to recognize that expanded state jurisdiction often threatens to extinguish the separate cultural and political status that tribes seek to preserve. Indian gaming encapsulates this long-standing political battle.[12]

12. Light, Rand, and Rand, *Indian Gaming and Tribal Sovereignty, The Casino Compromise* (Lawrence, KS: University Press of Kansas, 2005), 151.

Electronic bingo machines that resemble slot machines could become a growing trend for Indian tribes in states that refuse to negotiate compacts. States still benefit in the long run because cities and towns benefit. However, states with Class III tribal gaming benefit more, as larger annual revenues are earned with a percentage to states. If the passage of IGRA in 1988 is used as a pivotal starting point for tribal gaming expansion, tribal wealth is a fairly new phenomenon. As a national phenomenon it has developed in less than twenty years and within five years for the Poarch Creek. There may continue to be discussions in Congress regarding a re-assessment of federal funds and programs for Indians in general. However, these discussions must consider unpredictable factors that may impact gaming success. Current earnings should not be viewed as perpetual. Like any type of business, gaming is subject to ebbs and flows depending upon market variables such as increased competition.

While criminal justice systems and public safety on Indian land is funded by the federal government, funding for tribal law enforcement was reported as inadequate by the National Congress of American Indians (NCAI). On tribal lands, there are 1.3 officers for every 1,000 citizens compared to 2.9 officers per 1,000 citizens in non-Indian communities.[13] Criminal and civil jurisdictional issues on tribal land involving legal disputes between Indians and non-Indians also test the limits of tribal authority including the legitimacy of tribal courts. In nearby Mississippi where the Choctaw Nation has operated Class III casinos for several years and where other types of non-Indian businesses are also located on Indian lands, the Supreme Court was scheduled to soon

13. National Congress of American Indians, "Introduction to Indian Nations in the United States," Washington, DC, accessed April 1, 2015, http://www.ncai.org.

hear a matter involving Dollar General. The March 2014 case, *Dollar General v Mississippi Band of Choctaw* involves allegations of sexual assault reported by a 13-year old Indian male apprentice working in one of the stores, against a non-Indian male store manager. The Dollar General Store had been operated on the land since 2000. When they obtained a business license from the Choctaw they entered into binding leases that recognized tribal law. Initially, the child's parents were barred from bringing criminal charges through tribal court (given that it involved a non-Indian) but the US Attorney's office never filed any criminal charges either. The family later sought civil damages and compensation through the tribal court system which the tribal court and the lower federal courts deemed appropriate. In a comparable situation, a ruling in 1981 by the Supreme Court held in *Montana v United States* that tribal sovereignty includes the power to exercise some forms of civil jurisdiction over non-Indians on reservation land. Despite the Montana ruling, Dollar General challenged the Choctaw tribal court's authority and appealed to the Supreme Court for a decision.[14] Depending upon the outcome, it could diminish the legality of contracts and leases between Indians and non-Indians in business agreements or confirm the authority of tribal courts. It these agreements are rendered non-binding such an outcome would also mean that the tribe is unable to protect its citizens from non-Indians and that the tribal court's authority is exclusively for internal tribal matters. A favorable decision for the tribal court is needed to protect sovereignty. A decision on this matter may not be decided until after the current Supreme Court vacancy is filled to replace former Justice Antonin Scalia who died in February 2016. Justice

14. Ned Blackhawk, "The Struggle for Justice on Tribal Lands," Opinion Pages, *New York Times*, November 25, 2015.

Scalia did not have a reputation for being a strong advocate of Indian rights. As tribal gaming expands as well as economic development by non-Indians on tribal land, it can be expected that criminal jurisdiction issues involving tribal land and non-Indians will continue to challenge tribal court authority. The Poarch Band Creeks reported handling jurisdictional matters through cross-deputizing tribal police and local police. However, they would not provide specific details regarding how this arrangement works. It seemed to be more informal than formal. The more popular and lucrative Indian casinos become, the more attractive it becomes for other types of businesses to operate nearby. The casino economy promotes growth in area wide economies. Understanding the nuances of corporate politics and the legalities of binding contracts will be a learning experience for small gaming tribes like the Poarch Band. Perhaps these agreements should require more specific language with regard to arbitration. Also needed are clear policies for all employee-management relations particularly as it relates to child labor, sex discrimination and sexual harassment. Regional and national gaming advocacy organizations should develop policies in these areas for tribes to consider.

Tribal sovereignty confers a status of dual citizenship for tribal members since they are members of the tribe and also citizens of the U.S. As noted previously, gaming has led to in-migration or return of tribal members back to rural reservation land. It has also led to increased pride in tribal government and culture and rejuvenated tribal traditions. As indicated by Rand and Light, there are many representative social benefits of tribal gaming including economic development, increased tribal membership, job creation and reacquisition of tribal land. However, specific data relative to these

indicators is not available.[15] Rand and Light also identified some probable social costs associated with Indian gaming as increased gambling, increased crime and increased substance abuse. However, in the footnote reference for their Tables on Social Benefits and Social Cost, they acknowledge that "each of these benefits and costs in theory could accrue to all, or none, of the jurisdictions at any given time. In these tables we identify what we believe are the most probable general outcomes in combination with the strongest likely effect."[16] Thus, these tables reflect generalizations that can be misleading. While there is a lack of studies on the social effects of gaming including gambling addition, most would agree that the expansion of legalized gambling has created at the very least a greater number of low-risk gamblers. As Rand and Light found, the data is either underreported or understudied. The data are difficult to obtain because tribes are not required to share this public information. However, given the social issues that plague some tribes such as alcoholism and poverty, monitoring the impact of tribal casinos on tribal members is a venture worth tribes investing in. In order to take full benefit of casino gaming, patrons receive membership cards on which they can save their winnings. The cards also offer other benefits for players such as free plays and raffles. Winnings are transferred from the cards for later payouts. Some demographic information about the player is collected when the card is first issued. Gaming tribes could require disclosures and releases from members when the card is first issued. Anonymous player behavior studies could be conducted using this club card information but may require some disclosure in advance to patrons. The demographic data on these cards could also be used

15. Ibid., 93.

16. Ibid., 200.

for political purposes such as mailings, phone calls and/or emails to patrons to encourage support for political candidates that support tribal sovereignty and gaming. Greater public awareness regarding tribal sovereignty is needed. Even within the Poarch Creek Constitution there was very little information regarding the meaning of sovereignty. Alabama state officials may have not fully understood the meaning of tribal sovereignty.

While the Poarch Band continue to make significant contributions to education within and outside of Escambia County, more could be done to meet their goal of helping members achieve their highest potential in education and economic development. A state of the art regional technical school would be a great asset for high school youth, school dropouts as well as unemployed and underemployed adults. The school could offer beginning and advanced skills training in the construction trades, hotel and hospitality, animal husbandry, agriculture, science and technology, electronics (casino game development) and other relevant areas. Programs and admissions policies could be designed similar to those offered in some Massachusetts regional technical schools where students are actively learning vocational skills that lead directly to employment. There are innovative programs including charter schools not only in the northeast but throughout the country that are exemplary and could easily be replicated. Massachusetts was a leader in introducing the integration of academic and vocational technical curricula in vocational technical high schools. This researcher played a key role in that process and provided technical assistance to vocational-technical schools and community colleges in Massachusetts. When integrated with the technical courses, math and science courses become more relevant and interesting for students. Course offerings could also include electives such as tribal sovereignty, gaming law, criminal justice, Indian history and

Creek language. Given PCI's level of annual philanthropy for public education, a more substantial contribution could be made to the region. Given the economic partnerships that the Poarch Creek already have in Florida, a regional technical school located near the Alabama/Florida state borders might be a worthy investment in more ways than one. Additionally, an Indian law library and reading room would be great additions for regional school or the Kerretv Cuko Cultural Museum in Atmore. The museum is built in an area where a Poarch Creek school previously existed.

Political tension between state authority and tribal authority will likely continue to be the greatest challenge to tribal sovereignty. Fortunately, tribes have a protective arm through their trust relationship with the federal government. The trust relationship is the cornerstone of tribal sovereignty and was derived from early treaties and legal jurisprudence. The federal government is obligated to protect treaty rights, tribal land, resources and assets as part of its trust responsibility. It is also responsible for carrying out the directives from court cases and federal statutes including the maintenance of tribal self-governance. The trust relationship is viewed as one of the most important doctrines of federal Indian law. It was defined by the Supreme Court in *Seminole Nation v United States* (1942) as a "moral obligation of the highest responsibility and trust." The trust responsibility was also acknowledged in the Snyder Act of 1921 which required the Bureau of Indian Affairs (BIA) under the supervision of the Secretary of the Interior to "direct, supervise and expend such moneys as Congress may from time to time appropriate, for the benefit, care and assistance of Indians throughout the United

States."[17] Many early treaties had promised to provide health care and education in perpetuity for Indians in exchange for large portions of their land. Indian tribes currently hold more than 50 million acres of land which is approximately 2 percent of the United States. They previously held more than 90 million acres.[18] Much of the tribal land in this country is unused due to its remoteness. On October 28, 2014, a policy statement issued by the U.S. Department of Justice will allow tribes to grow and sell Marijuana on reservations even in states where the drug remains illegal.[19] This policy follows a 2013 Justice Department decision to stop federal Marijuana prosecution in states that have legalized sale or possession of the drug. Although there will be regulations for Marijuana business on tribal land, as gaming growth stabilizes, Marijuana cultivation could become the new buffalo for some Indian tribes. Land into trust issues could become very pertinent for this possible Indian economy and thus could also create other types of state-tribal challenges. Title to Indian trust lands is held by the federal government for current and future Indian generations. In addition to existing trust land, tribes can purchase additional land and have it placed in trust in order to conserve and develop Indian lands and resources and to rehabilitate Indian economic life. The Secretary of the Interior or the United States Congress must approve applications for land into trust. In doing so there is a requirement that consideration must be given to the effect it may have on state and local governments given that the land will be removed from the tax rolls. States and local

17. "Trust Relationship," Introduction to Indian Nations in the Unites States. Accessed August 20, 2012. http://www.ncai.org.

18. Ibid., 13.

19. Memorandum, U.S. Department of Justice, Executive Office for United States Attorneys, October 28, 2014; Leada Gore, "Feds to Allow Marijuana Sales on Native American Lands," accessed December 11, 2014, http://www.Al.com.

governments can appeal a secretarial decision with the Department of Interior and within the federal court system. The majority of new land taken into trust is within the boundaries of reservations but sometimes land outside of the reservation boundary is acquired and particularly for tribes with small reservations, tribes that lost their original land due to allotment and termination period and tribes that are in remote areas far from the mainstream of economic life.[20]

Prosperity by the Poarch Band Creeks can largely be attributed to their sovereignty status exercised through the tribal-federal trust relationship. However, ambiguous and inconsistent legal decisions prove that Supreme Court jurisprudence is unpredictable. The late Vine Deloria Jr. who was viewed by his peers as the leading indigenous intellectual in the field of Indian law and politics, described federal Indian law as the following:

> Badly written, vaguely phrased and ill-considered federal statutes; hundreds of self-serving Solicitor's Opinions and regulations; and state, federal, and Supreme Court decisions which bear little relationship to rational thought and contain a fictional view of American history that would shame some of our country's best novelists.[21]

A return to tribal-federal treaty-making is very unlikely. The negotiation process for tribal-state compacts and tribal-local agreements in essence is a form of treaty-making. Since tribal-local agreements are voluntary and not regulated, greater flexibility exists. Contract law is an area in which tribal council members need to be savvy. All formal

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20. National Congress of American Indians, "Trust Lands: Introduction to Indian Nations in the Unites States," Washington, DC., accessed January 20, 2015, http://www.ncai.org.

21. Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review 31*, no. 2 (Spring 1989): 203.

tribal agreements should require mutual prerequisites of fairness, knowledge, diplomacy, respect and integrity.

Postscript

A few relevant political developments that occurred after the research study had concluded are summarized here. On June 16, 2016 a decision was reached by the Supreme Court in *Dollar General v Mississippi*. It was decided in favor of the tribal court and acknowledged the tribal court's jurisdiction over civil matters that affect the health, safety and welfare of its tribal members including when they involve non-Indians.[22] Tribal jurisdiction over non-Indians on Indian land has been a complex issue with various legal outcomes. The opposite decision was reached in *Oliphant v Suquamish Indian Tribe* (1978) which denied tribal jurisdiction over a non-Indian and thus restrained tribal authority. Matters that involve tribal jurisdiction over non-Indians will likely continue to be decided on a case by case basis.

Victoryland, the largest commercial casino in Shorter, Alabama that was closed in 2010 and the key competitor for the Indian casinos, reopened in September 2016 which officially ending PCI Gaming's monopoly. Former Alabama Governor Bentley that replaced Governor Bob Riley did not oppose the Macon County sheriff's decision to allow Victoryland to open. However, not long thereafter, a sex scandal involving Bentley and a female colleague was made public as well as allegations of him misusing public

22. Suzette Brewer, "Breaking: Victory for Tribes as SCOTUS Ties in Dollar General," *Indian Country Today Media Network*, accessed July 1, 2016, http://indiancountrymedianetwork.com.

funds. The scandal led to Governor Bentley stepping down from his position and Lieutenant Governor Kay Ivey replacing him.[23]

In November 2016 Poarch Creek Vice President Robert McGhee met with Alabama officials to promote ideas on establishing a Class III gaming compact in the state with legislative approval. While meeting with Alabama state officials, McGhee disclosed that he had recently met with members of the Georgia Hope Scholarship committee in Atlanta where he presented some preliminary ideas for operating casinos in Georgia.[24]

Donald Trump was elected President of the United States and took office in January 2017. As a former commercial casino owner and strong advocate for Internet gambling, President Trump may seek Congressional approval for Internet gambling or issue another Executive Order. He appointed former Alabama Attorney General Jeff Sessions as the new United States Attorney General. Jurisdictional issues are key concerns for Indian Tribes and especially those with casinos. Sessions will be responsible for influencing federal policy regarding criminal jurisdictional issues. He was criticized for not supporting civil rights in Alabama and allegedly has ties to the Klu Klux Klan. However, Sessions described himself as having "good relations" with the Poarch Creek in Alabama.[25] The new Poarch Creek Tribal Chair/CEO Stephanie Bryan expressed optimism regarding Sessions. She was quoted as saying, "We look forward to a continued

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23. Alan, Blinder, "Robert Bentley, Alabama Governor, Resign Amid Scandal," *New York Times*, accessed April 10, 2017, www.nytimes.com.

24. Josh Moon, "Poarch Creek Indians to push casino plans in Alabama and Georgia," *Alabama Political Reporter*, November 2016.

25. Tanya H. Lee, "Native and Civil Rights Hang in the Balance*," Indian Country Media Network News*, January 17, 2017.

working relationship with Senator Jeff Sessions and hope that if he is confirmed as our next U.S. Attorney General, he will be a strong advocate upholding the constitutional rights of our sovereign governments."[26] Justice Neil Gorsuch, age 49, a Republican from Colorado was also selected by President Trump to replace former Justice Antonin Scalia. Gorsuch was confirmed a day after the new Senate rules change with a simple majority rather than 60 votes and sworn in on April 10, 2017. He was described as having strong conservative views and favoring the interests of big business over the interests of individuals.[27] The future narrative for tribal sovereignty and tribal gaming will largely be influenced by the changing political economy and the extent to which tribes are vigilant and effective in lobbying for their interests and protecting their sovereignty rights. High school level courses and college level courses on American government will be remiss if they fail to include the important and unique narrative of Native American tribal sovereignty.

26. Ibid.

27. Richard Wolf and Erin Kelly, "Gorsuch Confirmation to Have Major Impact on All Three Branches of Government," *USA Today News*, accessed July 1, 2017, http://www.usatoday.com.

APPENDIX A

Casino Gaming by State

State	Commercial Casinos*	Indian Casinos
Alabama	No	Yes
Alaska	No	Yes
Arizona	No	Yes
Arkansas	Yes	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	No	Yes
Delaware	Yes	No
Florida	Yes	Yes
Georgia	No	No
Hawaii	No	No
Idaho	No	Yes
Illinois	Yes	No
Indiana	Yes	No
Iowa	Yes	Yes
Kansas	No	Yes
Kentucky	Yes	No
Louisiana	Yes	Yes
Maine	Yes	No
Maryland	Yes	No
Massachusetts	Yes	Yes
Michigan	Yes	Yes
Minnesota	Yes	Yes
Mississippi	Yes	Yes
Missouri	Yes	Yes
Montana	No	Yes
Nebraska	No	Yes
Nevada	Yes	Yes
New Hampshire	No	No
New Jersey	Yes	No
New Mexico	Yes	Yes
New York	Yes	Yes
North Carolina	No	Yes

State	Commercial Casinos*	Indian Casinos
North Dakota	No	Yes
Ohio	Yes	No
Oklahoma	Yes	Yes
Oregon	No	Yes
Pennsylvania	Yes	No
Rhode Island	Yes	No
South Carolina	No	No
South Dakota	Yes	Yes
Tennessee	No	No
Texas	No	Yes
Utah	No	No
Vermont	No	No
Virginia	No	No
Washington	Yes	Yes
West Virginia	Yes	No
Wisconsin	No	Yes
Wyoming	Yes	Yes

*Includes land-based, riverboat, and racetrack casinos

Source: American Gaming Association, 2013
Available at: http://www.americangaming.org/sites/default/files/uploads/docs/aga_sos2013_fnl

APPENDIX B

Court Case Summaries Relevant to Tribal Sovereignty

1. *Alabama v Poarch Band Creek Indians Gaming Authority* 14-12004 (11th cir. 2015) This case involved a case brought against PCI by the state of Alabama by the former Attorney General Luther Strange which challenged the right of PCI to operate casinos on land taken in trust based on the 2009 Carcieri decision given that the Poarch Band did not have federal recognition in 1934. The state also charged that PCI operated illegal slot machines rather than bingo and that it created a public nuisance. Lastly, they argued that PCI gaming did not have immunity from suit as the Tribe because it was a commercial enterprise. The lower court had dismissed the case and the federal appeals court upheld the lower's court's ruling based on the tribe's immunity from suit and the state's lack of jurisdiction over PCI gaming facilities. Moreover, it clarified that although tribal gaming is a business entity, it acts as an arm of the tribe and thus also shares the tribe's immunity from suit. Alabama could only have some type of regulatory authority through a Tribal-State Compact (for Class III gaming) which Alabama does not have with the tribe. PCI Gaming sought to obtain such a compact beginning in 1991. They have only operated what was deemed Class II Gaming (electronic bingo) by the Department of Interior.

2. *Atkinson Trading Company v Shirley* 532 U.S. 645 (2001). Atkinson Trading owned and operated several retail businesses including a restaurant and hotel within the Navajo reservation but on non-Indian fee land or land not held in trust by the federal government. The tribe provided fire, police and ambulance services including for the hotel and charged an 8 percent hotel occupancy tax on hotel rooms. Atkinson sought to have the tax declared invalid based on a Supreme Court decision rendered 20 years earlier in Montana *v* United States. The Montana case involved taxing hunting and fishing rights on reservation land. (See Montana *v* U.S.). In Atkinson, the Supreme Court ruled that the Navajo Nation could not impose a hotel occupancy tax upon non-members operating on non-Indian fee land within its reservation. The Tribe now requires a consent to tax clause in all contracts with non-Indian retail businesses on non-Indian fee land.

3. *Bryan v Itasca County* 426 U.S. 373 (1976). The Supreme Court ruled unanimously that without Congressional authority the state of Minnesota did not have the right to assess a tax on the property of a Native American Indian living on tribal land in a mobile home. Minnesota is one of the states that have full criminal jurisdiction and limited civil jurisdiction on Indian Territory through Public Law 280. Minnesota had attempted to use Public Law 280 as a basis for applying the tax as a civil

jurisdictional issue. Bryan's mobile home was deemed a fixed house or real property and thus exempt from state tax.

4. *California v Cabazon Band of Mission Indians* 480 U.S. 202 (1987). A year prior to the ruling California state officials attempted to close high stakes bingo and poker games operated by the Cabazon and Morongo Band Indians. Although California is a state that falls under Public Law 280 which gives certain states criminal jurisdiction in Indian Territory, gaming falls under civil not criminal statutes and thus California had not authority. This landmark case laid the groundwork for Indian tribes to engage in gaming without state intervention. The ruling overturned the previous restrictive laws relative to Indian gaming/gambling on U.S. Indian reservations. It ruled that Indian reservations could engage in a form of gaming when that form is legal in the state. Conversely, they cannot engage in any form of gaming that is not legal in the state.

5. *Carcieri v Salazar* 555 U.S. 379 (2009). The major finding in this case was to clarify the meaning of the term "now under Federal jurisdiction." The Supreme Court determined that this term only refers to tribes that were federally recognized when the Indian Reorganization Act was passed 1934 at which time the federal government could no longer take land into trust from tribes that were not recognized at that time. This ruling has raised questions regarding the legality of tribes that received recognition after that date and land that was placed in trust thereafter. This case initiated in Rhode Island by Governor Carcieri, the plaintiff against Salazar, Secretary of the Interior after the Narragansett's, a small tribe in Rhode Island requested to have 30 acres of land placed in trust. Rhode Island appealed the decision and the U.S. Circuit Court upheld the ruling of the District Court to allow the land to be placed in trust. Carcieri then appealed to the Supreme Court. By clarifying the meaning of the term "now under Federal jurisdiction," the Supreme Court ruled that he Narragansett Tribe was not federally recognized until 1983 and not by 1934 and was thus ineligible to have land taken into trust by the BIA.

   The ruling had serious implications regarding tribal sovereignty and especially for gaming tribes that received federal recognition after 1934 including the Poarch Band of Creek Indians. It raised the question as to whether or not any land placed in trust after that time, is legally bound as trust land and thus exempt from state taxes and state regulation. Litigation with states as plaintiffs has followed this ruling to test the implications. The Native American and legal community want Congress to pass legislation to fix to the Supreme Court's decision in this case by amending the Indian Reorganization Act to allow the BIA to continue to take land into trust. (See *Salazar v Patchak* and *Poarch Band Creeks v James Hildreth Jr*. regarding other trust land issues.)

6. *Cherokee Nation v Georgia* 30 U.S. 1 (1831). The Cherokee Nation in Georgia was the plaintiff in this case. They sought an injunction when the state tried to force them to leave their Georgia homelands during the period of Indian removal in the 1830's. Supreme Court Justice John Marshall was not in favor of the state forcing their

removal but only ruled that the court could not decide the matter because it did not have jurisdiction. His decision categorized Indian tribes as "domestic dependent nations" with a relationship to the U.S. like wards to a guardian. This term and case continue to be referenced in legal opinions as the fundamental political status of Indian tribes in the U.S. but with greater emphasis on the "domestic dependent" than on "nations."

7. *City of Sherrill v Oneida Indian Nation of New York* 544 U.S. 197 (2005). The primary finding in this case was that the repurchase of traditional tribal land did not restore tribal sovereignty status to that land. The state of New York had continued to purchase tribal land and remove tribes to western lands even after Congress had passed the Indian Trade and Intercourse Act in 1780 which prohibited states from doing so. The result left members of one Oneida Tribe in New York with only 32 acres. The Tribe purchased land on the open market in 1997 and 1998 that had been part of their original reservation. When the city of Sherrill tried to impose property taxes, the Oneida maintained that the land was tribal land and thus the property was tax exempt. The Supreme Court ruled in favor of the city of Sherrill. The decision was largely based on the fact that too much time had passed (200 years) since the tribe ceded the land and they had not previously sought to regain title. Additionally, non-Indians resided on the land and to rule otherwise could pose problems for those citizens. The Supreme Court recommended that the Oneida Nation place the land in trust in an effort to reassert its tribal immunity over the re-acquired lands and deferred to the Bureau of Indian Affairs to address what was termed a "checkerboard" jurisdiction and any other relevant issues.

8. Dollar General Stores *v* Mississippi Band of Choctaw Indians 579 U.S. (2016) Dollar General appealed a decision that had been decided by the 5th Circuit of Appeals in favor of the tribe. The matter involved whether tribal court as jurisdiction to adjudicate civil tort claims against non-members including whether it can regulate the conduct of non-members who enter into consensual relationships with a tribe or its members. A civil tort claim had been filed on behalf of a youth that was a tribal member and worked in a tribal sponsored job training program at a Dollar General Store that was located on trust land. The youth alleged that while working at the store he was sexually molested by the sexual advances and sexual harassment by a Dollar General employee who was not a member of the tribe. His family brought the matter to the tribal court but Dollar General filed to dismiss the case on the grounds that the tribal court did not have the authority to try it. Supreme Court found that Dollar General had consented to tribal court jurisdiction and thus the tribal court has the authority to decide the matter. The Supreme Court upheld the ruling of the Fifth Circuit Court of Appeals.

9. *Duro v Reina* 495 U.S. 676 (1990). The case involved a jurisdictional issue in Arizona regarding whether or not a tribe had authority over other Indians that were not members of that tribe. The previous decisions in Oliphant and Wheeler may have influenced the decision in this case, as those cases found that a tribe has no criminal

authority over non-Indians. This same rationale was applied for non-member Indians. The court ruled that tribes did not have the authority to prosecute members of other Indian tribes. Duro, a member of a California tribe that was living and working on the Arizona reservation had been charged with murder. The state of Arizona had expressly disclaimed prosecutorial authority over Indians on Arizona reservations. After the Supreme Court decision was rendered, he was released.

Until this ruling, there had been a jurisdictional void regarding the matter of Indian authority over non-member Indians and thus, the court seems to have simply applied the same reasoning regarding the lack of tribal authority over non-Indians. However, a year after this Supreme Court decision and largely due t pressure from Indian leaders to fix the problem created by the Duro decision, Congress amended the Indian Civil Rights Act to authorize tribes to prosecute all Indians including non-member Indians that commit crimes on their territory based on the tribe's inherent sovereignty. This amendment became known as the "Duro fix."

10. *Employment Division v Smith* 494 U.S. 872 (1990). Two Native American employees working as counselors for the Department of Human Resources in Oregon were fired after it was learned that they had smoked Peyote while working. They claimed it was a religious practice and applied for unemployment benefits. The Supreme Court upheld the Employment Division's decision to deny them unemployment benefits and ruled that the state could deny unemployment benefits to a person fired for violating a state prohibition even though the use peyote is part of a religious ritual.

11. *Johnson v McIntosh* 21 U.S. 543 (1823). This case involved the issue of Indian title and property rights. It challenged the authority of a western tribe to sell land to a private party. The plaintiffs were land speculators for an Illinois-based company. The court concluded that Indian tribes did not have the right to convey or sell land to private parties without the consent of the federal government and private citizens could not purchase lands from Indian. It is noted as a landmark decision because Chief Justice John Marshall upheld the doctrines of discovery and conquest when he defined tribal sovereignty as diminished after their conquest by Europeans.

12. *Lone Wolf v Hitchcock* 187 U.S. 553 (1903). The plaintiff Lone Wolf was the Principal Chief of the Kiowa Indian Tribe in the northern Great Plains who alleged that Indian tribes that were a party to the Medicine Lodge Treaty of 1867 had been defrauded of land by congressional actions taken to allot the land in violation of the treaty. Although the tribe had been relocated, Lone Wolf resisted assimilation and sought to prevent white intrusion on Indian land. The Medicine Lodge Treaty stipulated that whites were not allowed to unlawfully enter the reservation. Lone Wolf had an alliance with the Comanche and Apache to not cede any more land.

    The Supreme Court reflected a paternalistic view in its ruling. It found that the Indians were only occupants of the land and that an act by Congress prevailed over

prior treaty terms. It ruled that through its plenary power Congress has the right to void treaty obligations between the United States and Native American Tribes.

13. *Lying v Northwest Indian Cemetery Protection Association* 485 U.S. 439 (1988). This case examined the environmental impact of building a road and harvesting timber in an area that was considered sacred to the California Indians. A 1982 Impact Study commissioned by the US Forest Service concluded that it would be severe and irreparable and thus advised against building the road. However, the US Forest Service rejected the study and moved forward with building plans. American Indian groups sought an injunction. The plaintiff, Lying was the U.S. Secretary of Agriculture at the time.

    The Supreme Court allowed the road to be built by the government noting that the building of the road created no substantial burden on Indian religious beliefs. However, dissenting opinions argued that building the road threatened Indian religious practices. After the case was decided, Congress intervened and declared the area a "wilderness" area under the Wilderness Act and the road was not built.

14. *McClanahan v Arizona State Tax Commission* 411 U.S. 164 (1973). McClanahan, a Navajo, protested the collection of state taxes and requested a refund of all of her taxes withheld by the state but the state denied her claim. Through appeals, the case eventually reached the Supreme Court. Justice Thurgood Marshall ruled in this case that federal law did not allow Arizona to collect a state income tax or impose taxes on the income of Navajo Indians residing on their reservation when their income is totally derived from reservation economies.

15. *Merrion v Jicarillo Apache Tribe* 455 U.S. 130 (1982). In 1976 the BIA approved a tribal ordinance that provided for a severance tax to be paid to tribes by oil and gas companies. Oil companies that had entered into lease agreements with the New Mexico Tribe in 1950 through the Bureau of Indian Affairs. The oil companies were paying a severance tax to the state and had promised to pay royalties to the Tribe but never did so. When the tribe requested their taxes years later, the oil companies refused to pay both tribal and state taxes and argued that it was double taxation. The oil companies finally appealed to the U.S. Supreme Court. The ruling on this case followed an earlier ruling in the 1981 case, *Montana v U.S.* It concurred with the Montana ruling and further clarified that an Indian Tribe has the authority to impose taxes on non-Indians conducting business on Indian land as an inherent power of their tribal sovereignty.

16. *Mississippi Band of Choctaw Indians v Holyfield* 490 U.S. 30 (1989).This case tested the jurisdiction of the tribal court versus the state court. The Supreme Court ruled in favor of the Choctaw Indians and held that the Indian Child Welfare Act governed adoptions of Indian children and that a tribal court had jurisdiction over the state court regardless of where the child was born as long as the natural parents resided on reservation land.

17. *Montana v U.S.* 450 U.S. 544 (1981). The court's decision in Montana was influenced by an earlier ruling in Oliphant v Suquamish Indian Tribe three years prior. The Montana case involved the Crow Indian Nation's ability to regulate hunting and fishing on their land by non-Indians. Treaty rights and sovereign governing authority of the Crow Nation were considered as well as whether or not the Crow can exercise criminal, civil and regulatory jurisdiction over non-Indians. Unlike Montana, Oliphant solely dealt with criminal jurisdiction.

    The Supreme Court ruling in Montana held that the Crow Nation could regulate hunting and fishing on tribal lands by non-Indians as they had jurisdiction over "conduct which threatens or has some direct effect" upon the tribe's "political integrity, economic security, and health or welfare. However, they could not tax hunters or fisherman because there was no consensual relationship such as a contract or lease between them and the Tribe. The ruling in this case created confusion regarding jurisdictional issues which would be brought to the court's attention again in subsequent litigation. The overlying interpretation has been that tribal inherent powers relative to jurisdiction do not extend beyond what is necessary to protect their tribal self-government or control internal relations.

    The value of the Montana decision which is often referenced in litigation as a precedent is that it gives Tribes authority to regulate consensual activity and enter into contracts with non-Indian businesses including Bingo operations owned by private entities operating on Indian land.

18. *Morton v Mancari* 417 U.S.535 (1974). A group of non-Indian employees at the Bureau of Indian Affairs (BIA) in Washington, DC brought this action to the attention of the Supreme Court through the appeals process. They challenged the hiring preferences granted to Indians by the Indian Reorganization Act passed by Congress in 1934 to work at the Bureau of Indian Affairs. The plaintiffs argued that this hiring preference denied them due process granted by the 5th amendment and also that it contradicted the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 which prohibited racial discrimination in federal agencies. The court found that the hiring preference for Indians was not grounded in racial discrimination but motivated by a desire to give "Indians a greater participation in their own self-government." It emphasized the need to make the BIA more responsive to Indians and found that promoting self-government outweighed any disadvantages for non-Indians.

19. *Muscogee Creek Nation et al v Poarch Creek Indians* 2:12-cv-01079-MHT-CSC (MD Ala. 2013) Members of the Muscogee Creek Nation in Oklahoma filed suit in 2012 in Alabama against the Poarch Creek and their officials as well as against the construction company, Auburn University and the U.S. Department of Interior. They sought an injunction stop PCI from desecrating Hickory Ground, a sacred burial site in Wetumpka where PCI planned to build a new casino, hotel and parking garage. The Muscogee Creeks alleged that the Poarch had excavated about 57 sets of human remains and reburied them in a different location. The case was dismissed. The

lawsuit not only called for construction to halt but also for the human remains to be returned to their original burial site. The case was dismissed on the grounds of tribal immunity from suit.

20. *Nevada v Hicks* 533 U.S. 353 (2000). State of Nevada Game Wardens executed a search warrant against an Indian tribal member who had allegedly killed two California Bighorn sheep on non-reservation land and maintained the sheep heads. Hicks, the defendant filed suit in tribal court against the game wardens alleging that they trespassed, abused the legal process and violated his constitutional rights. The tribal court ruled that the tribe and not the state had jurisdiction but the state of Nevada disagreed. Through a unanimous decision, the Supreme Court decided that the tribal courts did not have authority over the warden's allegedly tortuous acts. The Court further found that the tribal court did not have authority to regulate state officers in their official capacities regarding off reservation violations and that tribal authority did not extend to non-members.

21. *Oliphant v Suquamish Indian Tribe* 435 U.S. 191 (1978). This case involved the issue of criminal jurisdiction of tribal courts over non-Indians. Oliphant was a non-Indian living as a permanent resident on reservation land of the Suquamish Tribe in northwest Washington. He was arrested by tribal police and charged with resisting arrest and assaulting a tribal officer. Oliphant appealed the decision of the tribal court.

    The Supreme Court ruled that Indian tribal courts did not have inherent criminal jurisdiction to hold trials or punish non-Indians and cannot assume such jurisdiction unless they are authorized to do so by Congress. The opinion was written by Justice William Rehnquist whose rulings that same year in another case, United States *v* Wheeler further diminished the authority of tribal courts.

22. *Poarch Band of Creek Indians v James Hildreth Jr.* 15-13400 (11th cir. appeals 2016) The Poarch Band filed suit against the Escambia County Assessor, Hildreth in response to the county's unlawful attempt to levy property taxes on their Wind Creek Casino in Atmore, Alabama. Hildreth's attorneys cited the Carcieri decision as grounds for challenging PCI and they sought five years of back taxes which amounted to $23 million as well as an annual tax of $3.5 million. In July 2015, the U.S. District Court issued an injunction against Hildreth to prevent him from assessing property taxes on PCI in Escambia County. Hildreth appealed to the U.S. Circuit Court of Appeals.

    The appeals' court reaffirmed the district court's decision that the state via the county could levy taxes on the Tribe. The ruling noted that a state tax assessment would result in an irreparable violation of tribal sovereignty. It also emphasized that state was aware of prior rulings regarding the Tribe's sovereign status as it relates to gaming and land taken into trust in 1985, 1993 and 1995 as well as the date the Tribe obtained federal recognition and the state failed to submit a claim within the six year statute of limitations. Thus, the state's claim against PCI was deemed untimely and

the court ruled in favor of PCI. In response to the ruling, PCI requested Congress to pass H.R. 5486, the Poarch Band of Creek Indians Land Reaffirmation Act to clear up any pending doubts regarding the status of their trust land. Congress has not discussed the matter yet.

23. *Salazar v Patchak* 132 S. Ct. 1878 (2012) .The defendant David Patchak's had filed suit against Salazar, the Secretary of Interior to prevent the holding land (147 acres) known as the Bradley tract in trust for the Match-E-Be-Nash-She-Wish band also known as the Gun Lake Band, an Indian tribe in Michigan. The Tribe owned the land and wanted to establish a casino but the land needed to have trust status in order for them to do so. Patchak is a resident that lives near the land that the Tribe wants to develop. He argued that a casino would destroy the peace and quiet of the area, increase crime and cause air and water pollution. On 1/20/2009, Secretary Salazar placed the Bradley tract into trust.

    However, three weeks later on 2/24/09, the Supreme Court issued their ruling in *Carcieri v Salazar*. This subsequent ruling was in favor of Patchak which was seen as a setback by tribes. On 6/12/2012, the Supreme Court did not rule on the merits of the case but simply ruled that Patchak had the right to sue the Secretary of the Interior and that the lower court would need to determine whether the U.S. was authorized to take land into trust for the tribe. One new factor referenced in the decision was that a person may challenge the Department of Interior's decision to take land into trust for a tribe for up to six years and such a challenge could result in land being removed from trust status. (This six year limitation was referenced in the recent 2016 decision regarding *Poarch Band Creek Indians v James Hildreth Jr*.).

24. *Santa Clara Pueblo v Martinez* 436 U.S. 49 (1978). Martinez and her daughter both of whom are members of the Santa Clara Pueblo Tribe in New Mexico tribe brought suit against the tribe and against the tribe's governor. They sought relief against the enforcement of a tribal ordinance that denied membership in the tribe to children of female members that marry outside of the tribe. Her claim highlighted a sex bias within the tribal codes regarding tribal membership as the children of men who married outside of their race were not denied membership. The Supreme Court ruled that suits against the tribe under the Indian Civil Rights Act of 1968 which prohibits Tribes from denying equal protection for its members, are barred by the Tribe's sovereign immunity from suit. The decision noted that the Indian Civil Rights Act does not subject tribes to federal courts in civil actions for injunctive relief. It minimized the protections that were granted in the Indian Civil Rights Act of 1968.

25. *Seminole Tribe v Butterworth* 658 F2d 310 (1981). Butterworth, the anti-gambling sheriff of Broward County, Florida threatened the tribe with arrests if they violated state law by operating a bingo hall. Florida is one of the states that fall under Public Law 280 which grants certain states criminal and some civil jurisdiction on tribal land. This case questioned the parameters of state authority under Public Law 280 relative to gaming. The court ruled that tribes have the right to create gambling enterprises on their land even if facilities such as casinos are not allowed in the state

when bingo is allowed elsewhere in the state such as in churches. The ruling gave reservation Indians greater authority, the ability to levy taxes, own assets and create judiciaries. The decision opened the gates for the expansion of tribal gaming but also led to other states challenging the legitimacy of tribal gaming including in Alabama which joined a suit with Florida to halt gaming expansion. The ruling identified the need for some form of federal regulation. Seven years later, the 1988 Indian Gaming Regulatory Act (IGRA) was passed.

26. *Seminole Tribe of Florida v Florida* 517 U.S. 44 (1996). When the Seminoles later wanted to expand their bingo operations to high stakes gambling (Class III), Florida refused to negotiate a compact with them as stipulated in IGRA. In response to the state's refusal to negotiate Class III gaming, the Seminoles sued the state. After several years, the court finally ruled that both tribes and states were sovereigns and thus the tribe could not sue the state.

27. *Talton v Mayes* 163 U.S. 376 (1896). Talton was a Cherokee Indian convicted of murdering a fellow Cherokee. He was sentenced to hang. Talton challenged the tribal court's decision and demanded that he be afforded due process in accordance to his citizenship rights under the U.S. Constitution. However, the Supreme Court upheld the authority of the tribal court. The ruling in this case held that the individual rights and protections which limit federal and state governments do not apply to tribal governments. It reaffirmed Cherokee Nation v Georgia that Tribes were domestic dependent nations independent of federal government. Most Native Americans were not considered citizens of the United States until Congress passed the Indian Citizenship Act of 1924 which occurred 28 years after this decision.

28. *Tee-Hit Ton v U.S.* 348 U.S. 272 (1955). The Tee-Hit Ton, an Indian subgroup of the Tlingit Tribe in Alaska sought compensation through Congress for lumber taken from the land they occupied. The Supreme Court ruled against the Tribe's claim to 350,000 acres of land and the resources including lumber on the land despite the fact that they had always occupied this land. The court applied the same rationale as was applied in its 1823 ruling in Johnson *v* McIntosh regarding Indian title. It reiterated that the tribe's use of the land was solely at the government's will and not protected by any legal obligation.

29. *United States v Kagama* 118 U.S. 375(1886). This was a test case to see if the Major Crimes Act of 1885 which had just been passed would be upheld. The Act gave federal courts jurisdiction in certain cases involving Indian-on-Indian crime even if the crime was committed on a reservation. It claimed exclusive jurisdiction of the federal government to prosecute Indians anywhere in the country if they committed one or more of seven particular crimes (i.e. murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny). Kagama was a Yurok Indian accused of murder. The ruling determined that the Major Crimes Act of 1885 was constitutional and within the jurisdiction of the federal courts. Thus, the decision made by the San Francisco court to indict would stand. The significance of this case was that it reaffirmed Congressional authority over Indian affairs. It was criticized by legal

scholars as utilizing powers that are not granted to Congress by the Constitution. However, the ruling still stands.

30. *United States v Lara* 541 U.S. 193 (2004). This case raised issues of double jeopardy when two jurisdictions, tribal and federal are involved. Lara, the defendant in this case was charged for criminal offenses under both the tribal authority of the Spirit Lake Sioux Tribe as well as under the authority of the federal authority. After learning that he was being banished from entering the reservation in North Dakota where he had resided with his wife and children. Lara was accused of striking an officer that was both a tribal and federal law enforcement officer. Lara pled guilty to tribal charges but claimed double jeopardy with regard to federal charges. The decision rendered in this case emphasized that both the United States and a Native American tribe could prosecute an Indian for the same crimes in both jurisdictions and that since the US and tribes are separate sovereigns, double jeopardy with tribal and federal prosecution does not exist.

31. *United States v Sioux Nation* 448 U.S. 371 (1980). This case involved a lengthy Indian land dispute that originated in 1920 when the Sioux Nation requested compensation for the Black Hills, a large tract of land in South Dakota that was reclaimed by Congress in 1877 at which time the land was discovered to be rich in minerals and timber and prospectors were involved in illegal mining. The battle over this land led to General Custer's land stand and was won by the Sioux. However, thereafter the tribe was cut off from appropriations and left to starve which prompted them to renegotiate and cede the land. The land had originally been pledged to the Sioux in an 1868 Treaty. The U.S. Court of Claims had ruled against the Sioux Nation in 1942 but after the Indian Claims Commission was established in 1946, the Black Hills issue was resurrected. The 1980 Supreme Court decision ruled that the Sioux were entitled to pursue their claim again despite it being previously adjudicated and that they were due just compensation including interest for the land and its resources.

    However, despite the ruling the Sioux prefer to have the Black Hills returned to them and refuse to accept the financial payment as acceptance would legally terminate their demand for the return of the land. In 1877 the land was valued at $17 million. The value of the gold which had been illegally taken by prospectors was valued to be worth $450,000 at that time and 100 years of interest at 5% per year would be an additional $88 million. Including interest the value had accrued to more than 1 billion dollars in 2011. The money remains in an account with the Bureau of Indian Affairs and continues to accrue interest.

    The Sioux have a history of resistance and political activism, including during the American Indian Movement (AIM) of the 1960s. A well-known Sioux political activist and member of AIM, Leonard Peltier has been incarcerated since 1977 for allegedly killing two FBI agents during a 1975 shootout on the Pine Ridge Reservation in South Dakota. Peltier argues that he is innocent and was framed. He

has a large list of supporters including Amnesty International in his appeal for clemency.

32. *United States v Wheeler* 435 U.S. 313 (1978). Wheeler, a Navajo Indian was initially charged with disorderly conduct and contributing to a minor. The tribal court gave him a minimal fine of $30 and 15 days in jail for the 1st charge and 60 days in jail and $120 fine for the 2nd charge. However, when a federal grand jury later indicted Wheeler for statutory rape based on the same incident, Wheeler sought to end the matter by claiming double jeopardy. The Supreme Court decision emphasized that the double jeopardy clause does not bar the federal prosecution of a Native American (Indian) who has already been prosecuted by the tribe.

33. *Winters v U.S.* 207 U.S. 564 (1908). This case involved Indian water rights. The decision prevented companies from using river rights intended for Indian reservations. It protected Indian water rights and set the standards for the US government to acknowledge the vitality of Indian water rights and how those rights relate to the continuing survival and self-sufficiency of Indian people.

34. *Worcester v Georgia* 31 U.S. 515 (1832). The jurisprudence and legal thought involved in this case set a precedent that established the premise of the doctrine of tribal sovereignty for the 20th century. It raised the issues not only of tribal versus state rights but also tested federal judicial authority versus state authority. The plaintiffs in this case were two white missionaries that lived and worked on the Cherokee reservation in Georgia. They were influential in the Cherokees resistance to removal. Georgia had been steady and relentless in passing laws to force the Cherokees to leave and relocate to Oklahoma territory. When the state passed a law requiring all white men to obtain special state permits in order to live on the reservation, these missionaries refused to do so. They were imprisoned and sentenced to serve four years in jail. The Cherokees appealed the state's decision on behalf of the missionaries to the Supreme Court. The court ruled in favor of the missionaries by upholding the position that the state could not impose laws on reservation land. Despite the ruling, Georgia did not release the missionaries until a year later and only after they agreed to give up their fight.

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