

Ralph A. Rossum

# The Supreme Court and Tribal Gaming



*California v. Cabazon Band  
of Mission Indians*

RALPH A. ROSSUM

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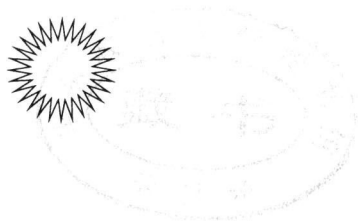
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UNIVERSITY PRESS OF KANSAS



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Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University

Library of Congress Cataloging-in-Publication Data

Rossum, Ralph A., 1946–  
The Supreme Court and tribal gaming : California v. Cabazon Band of  
Mission Indians / Ralph A. Rossum.  
p. cm.

Includes bibliographical references and index.

ISBN 978-0-7006-1777-7 (cloth : alk. paper)

ISBN 978-0-7006-1778-4 (pbk. : alk. paper)

1. Gambling on Indian reservations—Law and legislation—United States.
2. Indians of North America—Government relations. 3. United States.  
Indian Gaming Regulatory Act. 4. California—Trials, litigation, etc.
5. Cabazon Band of Mission Indian—Trials, litigation, etc. I. Title.

KF8210.G35R67 2011

344.73'099--dc22

2011002772

British Library Cataloguing-in-Publication Data is available.

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

The paper used in this publication is recycled and contains 30 percent postconsumer waste. It is acid free and meets the minimum requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1992.

# The Supreme Court and Tribal Gaming

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*For G. David Huntoon,  
my Rose Institute colleague at Claremont McKenna College,  
who made this book possible*

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## EDITORS' PREFACE

One of the saddest and most ironic stories in American history is the near destruction of California's thriving and diverse native population by successive waves of European immigrants. The Spanish missionaries inadvertently brought diseases to which the Indians had no natural immunities. The Anglo settlers hunted the Indians the same way they hunted wolves and bears. But the Indians did not disappear and the legal triumph of the small Cabazon band of mission Indians chronicled in Ralph Rossum's superbly researched, deeply moving, and thoroughly persuasive account of the Cabazon band's fight to run their own casino is testimony to that fact.

American law and American politics were never kind to the first Americans. Rossum, an expert on Indian law, tracks the troubled course of this law through an almost impassable terrain of broken promises, abrogated treaties, unenforced Supreme Court decisions, confused congressional statutes, and harsh administrative rulings. Casino ownership came to be one way that Native peoples could reclaim their sovereignty and self-respect in the law, though the irony remained that the Casino was about as far from traditional Native ways as one could image. To achieve these victories, Native Americans had to overcome county and state opponents, gain the ear of the High Court, and in *California v. Cabazon Band of Mission Indians* (1987) regain "Indian country." The case would open the door to Indian casinos throughout the country and enable Indian bands to lift themselves from generations of impoverishment. But that was not the end of the story. Congress would once again intervene to broker state-Indian relations in the Indian Gaming Regulatory Act (IGRA) of 1988. Only this time, the result was not the forced migration of Indian peoples to lands far from their homes.

From the vantage point of *Cabazon*, Rossum surveys the entire landscape of Indian law. He takes us back to the first contact, carries the story through Chief Justice John Marshall's famous trilogy of Indian cases, and continues with the federal government's claim as trustee and administrator of Indian policy. Indians were to become assimilated, a stance that gave little credit to the diversity and richness of Indian belief systems and ways and would have crushed Indian

identity. Rossum's is the first and will surely stand as the authoritative account of California's attempts to suppress Indian casinos, an attempt that began locally and ended in the Marble Palace. California's position was supported by twenty other states, the kind of odds that had throughout American history cost Indian lands and lives. But not this time. Even after the High Court, in *Seminole Tribe v. Florida* (1996) limited Indian rights to sue states, as permitted in the IGRA, tribes were able to use the revenue their casinos generated to gain concessions from otherwise recalcitrant state governments.

Rossum's account is detailed in the best way, explaining in terms we all can understand the intricacies of the law, the aims of the parties, the role of the various government agencies, and the path of the case through the courts. His closing comparison of the "straightforward and relatively uncomplicated" deployment of Foxwoods (Pequot) and Mohegan Sun in Connecticut with California's "protracted" struggle and the Seminole Tribe of Florida's caustic, politically-divisive twenty-five-year battle to fulfill the promise of the IGRA. The comparison is an apt and succinct lesson in how law can conciliate and facilitate win-win solutions or fall in the face of partisan and cultural animus. Such lessons go far beyond *Cabazon*, of course, making this story's moral one for every American to learn.

## ACKNOWLEDGMENTS

This book had its origins with my appointment as director of the Rose Institute of State and Local Government at Claremont McKenna College in the summer of 2000. By the time of my appointment, the Rose Institute had already conducted several projects in Indian country, but over the course of the next decade under my direction, it has conducted forty more. These projects include over a dozen studies measuring the economic impact of tribal casinos on Southern California, a study of “best practices” for improving the relations between tribes and local governments, a history of the passage of the Indian Gaming Regulatory Act, a study of the financial supporters and opponents of ballot measures in California that gave the tribes a monopoly to engage in Las Vegas–style gaming in the state, and a series of Towns and Tribes conferences hosted by the Rose Institute that focused on public policy issues (e.g., education, economic development, and tourism) pertinent to both tribal and local governments.

These projects brought me into personal contact with tribal leaders across Southern California who introduced me to the fascinating issues of tribal sovereignty and federal Indian law. They stirred my curiosity and prompted me to explore a subject that few political scientists have researched. The result of that research is not only this book, but also a chapter in the first volume of *American Constitutional Law*, 8th Edition, entitled “The Constitution and Native American Tribes,” that I coedited with G. Alan Tarr. It is the only casebook in the political science or law school market with such a chapter.

I wish to acknowledge my appreciation to Pamela Brooks Gann, president of Claremont McKenna College, for giving me the opportunity to serve as Rose Institute Director, and to Alan Heslop, founding director of the Rose Institute, who recommended me as the person to succeed him. Without their support, I would never have had the opportunity to gain the insights and make the connections necessary to write this book or to enhance so significantly the Rossum and Tarr casebook.

The sole reason that the Rose Institute has been able to do so many projects in Indian country is G. David Huntoon, a fellow at the Rose Institute. His personal connections with the tribal leaders of South-

ern California have been critical to what the Rose Institute has been able to accomplish and to the writing of this book. David introduced me to all the major players in the *Cabazon Band* case — the tribal leaders and their attorney, Glenn M. Feldman. The trust David had built up with tribal leaders over the years was indispensable in allowing me to obtain data and secure interviews. I am very much in his debt, and I have dedicated the book to him.

I also want to acknowledge my gratitude to Glenn M. Feldman, attorney to the Cabazon Band since 1979. He not only agreed to two interviews with me but also opened his extensive files on the *Cabazon Band* litigation to me — approximately 15,000 pages of court pleadings and motions. He was a joy to meet, and I very much appreciate his interest and assistance.

I wish to thank Ann Harvey, a Scripps College alumna, an undergraduate research assistant at the Rose Institute, current editor-in-chief of the *San Diego Law Review*, and soon-to-be associate with Jones Day (the second largest law firm in the country, and the same firm that hired Justice Scalia upon his graduation from Harvard Law School — *Antonin Scalia's Jurisprudence: Text and Tradition* [2006] was my first book with the University Press of Kansas), for her extensive assistance in researching the impact of the *Cabazon* decision on subsequent court decisions and in the law reviews. It was first-class research for which I am very grateful.

Professors Peter Charles Hoffer and N. E. H. Hull agreed to include this book in their series Landmark Law Cases and American Society, for which I am very much appreciative. Martha Whitt did a splendid job of copyediting the manuscript — her close attention to detail was remarkable; she has spared me many embarrassments. Finally, I would be remiss indeed if I did not thank Larisa Martin, production editor, and the Press's leadership team, Susan Schott, Michael Briggs, and Fred M. Woodward, for their superb efforts. They are the reason scholars want their works published by the University Press of Kansas.

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## Introduction

Today, Southern Californians take for granted the presence of palatial tribal casinos along a 90-mile stretch of Interstate 10 (from 60 miles east of Los Angeles to 30 miles east Palm Springs). They have all been built in the past ten years and rival the finest hotel-casinos of Las Vegas or Atlantic City. Few Southern Californians know, however, that they exist because of the Supreme Court's critical decision in *California v. Cabazon Band of Mission Indians*.

Located adjacent to Interstate 10 in Indio, California, and 30 miles east of Palm Springs is Fantasy Springs Resort Casino. Owned and operated by the Cabazon Band of Mission Indians on its reservation, it has a 100,000-square-foot casino floor with 2,000 slot machines and 40 table games including Blackjack, California Craps, Pai Gow, and more. It has an off-track betting facility and a bingo palace with 600 seats. Its 12-story hotel has 250 luxury rooms and suites, a 3,500 seat Special Events Center that brings in first-class entertainment, top-notch restaurants, conference facilities, and a 24-lane bowling alley. It also has Eagle Falls Golf Course — an 18-hole, 6,715-yard, par 72 championship course designed by Clive Clark and voted one of the “Best Courses You Can Play” by *Golfweek* magazine.

The Cabazon Band of Mission Indians is a small tribe of only twenty-five members. Nonetheless, its tribal leaders are civically involved and have hosted repeated Towns and Tribes conferences to foster better understanding and cooperation between local and tribal governments on topics ranging from education to the environment. They have taken the lead in both Sacramento and Washington, D.C., to advocate for legislation on such matters as certifying tribal police and fire departments by state and federal authorities and securing the full authority of tribal governments to participate in the political process. Their efforts, and the efforts of other tribes, have resulted in

their invitation, and the invitation of other tribes, to join as full members the Coachella Valley Council of Governments.

Also located adjacent to Interstate 10 in Cabazon, California, but this time 20 miles west of Palms Springs (and 90 miles east of Los Angeles) is Morongo Casino Resort & Spa. Owned by the 1,000 members of the Morongo Band of Mission Indians and located on its reservation, it is also a world-class facility. Its 27-story futuristic hotel rises from the desert floor with 310 luxury rooms and suites and 8 restaurants. Its 150,000-square-foot casino floor accommodates 2,400 slot machines and 100 table games along with a private 22-table poker room and a high-stakes room featuring high-limit blackjack and \$100 slot machines. It has a bingo palace with 600 seats. Its Special Events Center attracts entertainers such as Michael Bolton, Bill Maher, Melissa Etheridge, and Engelbert Humperdinck. It has a 12,000-square-foot grand ballroom as well as smaller conference facilities and a 24-lane bowling alley.

Nearby in Southern California are even larger and equally lavish tribal casinos. The 400 members of the Agua Caliente Band of Cahuilla Indians have two casinos on their tribal lands. One is located 12 miles east of Palms Springs and adjacent to Interstate 10 in Rancho Mirage, California. Agua Caliente Casino, Resort, Spa has a luxury 16-story hotel with 338 rooms and suites; a 45,000-square-foot casino with 1,800 slot machines and 42 table games; a poker room with 11 tables, and a high-limits room with blackjack and Mini-Baccarat games to \$5,000 and \$100 slots. It has 6 restaurants, 13,000 square feet of conference space, and a 2,000-seat concert theater that books headliners like the Beach Boys, Sheryl Crow, Billy Idol, and Ted Nugent. The other casino is located in downtown Palm Springs; Spa Resort Casino has a 30,000-square-foot casino floor with 1,000 slots and 40 table games; an 11-table poker room; a high-stakes room; and 6 restaurants. Its hotel has 228 rooms and suites along with 7,000 square feet of conference space.

Located 60 miles east of Los Angeles and 60 miles west of Palm Springs adjacent to the 210 Freeway in Highland is the San Manuel Indian Bingo and Casino, owned and operated by the 175 members of the San Manuel Band of Serrano Mission Indians. Its casino floor of 120,000 square feet accommodates 3,000 slot machines and 130 table games. It draws to its Yuhaviatam Room entertainers such as Gloria

Estefan, Rod Stewart, and Bill Cosby. And it has a 2,500-seat bingo hall.

Just outside of Temecula on Interstate 15 and 80 miles from Palm Springs, 60 miles from San Diego, and 90 miles from Los Angeles is the Pechanga Resort Casino, owned and operated by the 1,300 members of the Pechanga Band of Luiseño Indians. Larger than any other tribal casino west of the Mississippi and even larger than any Las Vegas casino, it has a 188,000-square-foot casino floor with 4,900 slot machines, 212 table games, a poker room of 54 tables, a high-rise hotel with 517 rooms and suites, a 53,000-square-foot conference center, 10 restaurants, a 1,200-seat theater attracting top entertainers, and a 7,200-foot, par 72 golf course designed by Arthur Hills. The tribe was invited and now is a member of the very influential Los Angeles Leadership Council, a business-led-and-sponsored public policy partnership for the Southern California region providing proactive leadership for a strong economy, a vital business environment, and a better quality of life for everyone living in California's Southland.

Thirty years ago, all of these tribes were utterly destitute; they occupied arid desert land with no natural resources and no prospects that their grim financial circumstances would ever change. Their members lived in abject poverty and faced a dismal future. But, one brave tribe challenged that future, and one Supreme Court case made today's reality for these tribes possible. The Web site of the Cabazon Band's casino captures it perfectly: "The Cabazon Band was the first Native America tribe in the United States to have gaming on its reservation. The Supreme Court 1987 *Cabazon* decision paved the way for other tribes to operate gaming centers."

Clearly not all tribes have benefitted from the *Cabazon* decision. The tribes mentioned above have been very fortunate to have decisive, courageous, and politically skilled leaders; but they have also benefitted enormously because their reservations all have in common the three most important attributes of real estate property: location, location, location. Their arid lands may be unsuited for agriculture and devoid of natural resources, but they are all conveniently located near one of the major metropolitan centers of the country – the one that includes Los Angeles, Orange, San Diego, Riverside, and San Bernardino Counties in Southern California. Their casinos are within easy driving range of tens of millions of customers, but, and this is

equally important, they are not too close; their casinos, golf courses, and hotels make them attractive resort destinations, and they are so viewed by the public. However, they are not so close that those living in Southern California find the games they offer threatening to local community values or competing for entertainment dollars that would otherwise be spent locally. The Southern California public considers the tribes' casino resorts to be like Las Vegas – fun destinations to visit that are full of vitality, allure, excitement, and glamour – but they enjoy one distinct advantage over Las Vegas: they can easily be reached by car in an hour to an hour and a half, as opposed to the five hours it takes to drive from Los Angeles to Las Vegas. Their spectacular success has given encouragement – sometimes realistically, sometimes not – to other tribes in more remote and less densely populated areas of the country to attempt to follow their lead, often with mixed results.

This book explores how it is that Native American tribes across the country, and especially those near major metropolitan areas in Southern California, Florida, the Midwest, and the Northeast, have come to profit enormously from tribal gaming and, in the process, to reclaim their sovereign powers as tribal governments. It discusses in detail the Supreme Court's decision in *California v. Cabazon Band of Mission Indians* (1987) as well as Congress's actions following the *Cabazon* decision that resulted in the passage of the Indian Gaming Regulatory Act (IGRA).

On February 25, 1987, the Supreme Court held in *California v. Cabazon Band of Mission Indians* that states are barred from interfering with tribal gaming – i.e., tribally sponsored, high-stakes commercial gaming enterprises catering primarily to non-Indian participants and operating in Indian country. (“Indian country” is defined in 18 *United States Code* § 1151 as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government.”)

When the Cabazon Band and the neighboring Morongo Band of Mission Indians, agricultural tribes barely eking out a subsistence existence on the harsh desert lands of the remote Coachella Valley, opened high-stakes bingo facilities on their reservations to provide employment opportunities for their members and to raise revenues for tribal governmental services, their operations were raided and closed down by the State of California and the County of Riverside on the grounds that they violated California's gambling laws. The Tribes sought relief

in federal court and secured a permanent injunction restraining the State and County from applying their gambling laws on the reservations. After the Ninth Circuit affirmed, California appealed to the Supreme Court, only to be told that states have no authority to enforce their gambling laws on the reservation of a federally recognized tribe.

The Supreme Court had held in earlier cases that state laws may be enforced on Indian reservations if Congress has expressly consented. In this case, however, it found that Congress had not consented to this assertion of state power either through Public Law 83-280 (1953), commonly and hereafter referred to as Public Law 280, which had delegated criminal/prohibitory but not civil/regulatory jurisdiction over Indian tribes to California and five other specified states, or the Organized Crime Control Act of 1970 (OCCA), which made specific violations of state and local gambling laws to be violations of federal law. It also found that under a federal common law balancing test, the states' interest in preventing the infiltration of tribal gaming by organized crime was insufficient to escape the preemptive force of federal and tribal interests.

Justice Byron White wrote for a six-member majority; his Opinion for the Court recognized the unique position Indian tribes occupy in the United States. While tribes are sovereign nations with inherent powers of self-government, their sovereignty is dependent on, and subordinate to, the federal government. In Chief Justice John Marshall's famous words from *Cherokee Nation v. Georgia* (1831), tribes are "domestic, dependent nations" whose "relation to the United States resembles that of a ward to his guardian."

White's reasoning reflected the principles of long-established federal Indian law: he accepted the traditional understanding of tribal sovereignty (i.e., the only government that can assert sovereign authority over the tribes is the federal government and not the states), and, in accordance with the standard canons of construction of federal Indian law flowing from that traditional understanding, he construed ambiguous language in Public Law 280 and OCCA in favor of the tribes. By contrast, Justice Stevens rejected these canons and embraced the opposite presumption; his dissent argued that a state's gambling laws apply on Indian reservations unless there is an express congressional statement to the contrary.

*Cabazon* is important for a number of reasons. To begin with, as a

result of that Court decision, tribal gaming has swept the nation; in 2009, over \$27 billion were wagered in 425 tribal casinos operated by 238 tribes in 29 states from Connecticut to California. Tribal gaming has become Indian country's most effective economic-development tool, and the slot machine has become for many gaming tribes their "new buffalo" — a single source capable of fulfilling all of their needs, including jobs, schools, social services, and infrastructure.

*Cabazon* is also important for having brought together in one case a debate over the meaning of tribal sovereignty, the relationship of tribes to the federal government and the states, and the appropriateness of having distinctive canons of construction for federal Indian law. It constitutes a fascinating introduction to the consideration of such questions as: what is tribal sovereignty? How has tribal sovereignty been understood over time, by both the Court and the popular branches? What is the source of Congress's power over the tribes? What powers, if any, do states have to enforce their laws in Indian country? And why are the canons of construction of federal Indian law different from those in other fields of law?

*Cabazon* is also important politically: it figured prominently in Congress's enactment one year later of the Indian Gaming Regulatory Act of 1988 (IGRA) and its requirement that tribes must enter into compacts with state governments before they engage in Class III gaming (i.e., Las Vegas-type gaming — slot machines, banked table games such as blackjack, craps, roulette, etc.). Tribal-state compacts vary widely from state to state — both in terms of the kinds of gaming a tribe is allowed to offer and the level of gaming revenues the tribe is obliged to share with the state. The need for the tribes to negotiate with state governments initial (and revised) compacts favorable to them has brought the tribes off their reservations and into the political process where they have often wielded the political clout their considerable gaming revenues provide them to their advantage. But these actions potentially threaten the continued willingness of the political branches to regard tribes as wards in need of the particular solicitude of the federal government and of the judiciary to construe federal Indian law based on its own unique canons of construction.

The chapters that follow develop these themes. Chapter One is an overview of the *Cabazon* case and the many interesting constitutional questions it raises.