NOTES

THE INDIAN GAMING REGULATORY ACT AND THE ELEVENTH AMENDMENT: STATES ASSERT SOVEREIGN IMMUNITY DEFENSE TO SLOW THE GROWTH OF INDIAN GAMING

> I firmly believe that we now stand at a crossroads, at a point where we may seize the opportunity to acknowledge the Indians' unequivocal right to self-determination and invite the Indian tribes into the American mainstream. . . . [T]he possibility [exists] that the tribes can fully participate in our economic prosperity while they retain . . . their rights to decide to what extent and in what manner they choose to participate.[1]

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA)[2] to promote "tribal economic development, self-sufficiency, and strong tribal governments."[3] Initially, the Act was successful, and its goals were being met.[4] However, states have opposed tribal efforts to

---

1. 134 CONG. REC. 24,027 (1988) (statement of Sen. Evans) (explaining why the Indian Gaming Regulatory Act should be enacted).

2. 25 U.S.C. § 2701 (1988).

3. *Id.* § 2702 (1988) (declaring Congress' policy). Section 2702 provides:

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

4. For example, annual revenues from gambling on reservations have reached $5 billion since 1988. David Holmstrom, *Indian Gaming Booms Nationwide*, CHRISTIAN SCI. MONITOR, Nov. 10, 1992, at 6. The tribes use the revenues to fund health-care centers, schools, day-care centers, and other community and economic projects. *Id. See also* Ken Miller, *Gambling Has Made Tribes a Major Economic Force*, GANNET NEWS SERVICE, Sept. 30, 1992, *available in* LEXIS, Nexis Library, Currnt File (stating that while nationwide federal aid has decreased, tribes are using gaming as the chief means of becoming self-sufficient); George Oake, *Natives Set Sights on Casinos as U.S. Bands Rake in the Cash*, TORONTO STAR, Aug. 4, 1992, at A15 (noting that gambling has become the most successful economic venture for Indians across the United States); Susan Stanich, *Indians Say States Stack Deck Against Reservation Gambling Operations*, WASH. POST, Aug. 2, 1992, at A16 (reporting that Charles Keechi, President of the Delaware Tribe of Western Oklahoma and Chair-

expand gambling operations,[5] and recently, some states have successfully prevented tribes from establishing more sophisticated gambling enterprises.[6]

The most controversial aspect of IGRA has been the "compacting" process between the tribes and the states.[7] A tribe cannot conduct high-stakes, or "class III," gambling activities[8] without a compact, which is an agreement negotiated between the tribe and the state.[9] Through IGRA's jurisdictional provision, section 2710(d)(7), a tribe has a cause of action in federal district court[10] when a state stalls or refuses to negotiate a compact. Several district courts, however, have ruled that states may raise an Eleventh Amendment sovereign immunity defense to these claims. These courts have granted the states' motions to dismiss.[11]

This Note examines whether section 2710(d)(7) is constitutional under

---

man of the National Indian Gaming Association, and other tribal leaders assert that gaming operations have brought hope and economic self-sufficiency to the tribes).

5. *See, e.g.*, S. REP. No. 446, 100th Cong., 2d Sess. 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103 (additional views of Sen. McCain) (noting that states oppose Indian gaming because states want to protect their own gaming operations from competition). *See also infra* notes 22-64 and accompanying text.

6. *See, e.g.*, Pueblo of Sandia v. New Mexico, No. 92-0613 JC (D.N.M. Nov. 13, 1992); Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T (W.D. Okla. Sept. 8, 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Mississippi Band of Choctaw Indians v. Mississippi, No. CIV.A.J90-0386(B), 1991 WL 255614 (S.D. Miss. Apr. 9, 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991). In these cases, tribes sued to compel the states to negotiate agreements for high-stakes gambling operations, but the courts dismissed the suits.

7. The tribal-state "compact" is the instrument Congress devised to enable tribes and states to negotiate agreements to allow sophisticated gambling operations, such as casinos, on reservations. 25 U.S.C. § 2710(d)(3) (1988). IGRA classifies such sophisticated gambling as "class III" gaming. 25 U.S.C. § 2703(8) (1988). IGRA mandates that United States district courts shall have jurisdiction over suits brought by the tribes "arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A) (1988). For the full text of this section, see *infra* note 83.

This last provision has been very controversial and is the focus of this Note. In six out of eight cases, courts have determined that § 2710(d)(7)(A) is unconstitutional and that Congress does not have the authority to subject states to federal jurisdiction for the purpose of concluding a tribal-state compact. *See infra* note 13.

8. IGRA designates the most sophisticated forms of gambling as "class III" activities. *See supra* note 7. Jai-alai, casino gambling, parimutuel betting, and dog racing are examples of class III gaming. 134 CONG. REC. 8,154 (1988) (statement of Rep. Vucanovich).

9. 25 U.S.C. § 2710(d)(1)(C) (1988).

10. See *infra* note 83.

11. *See supra* note 6.

the Eleventh Amendment. Only two[12] of the eight federal district courts[13] to address the issue have held that section 2710(d)(7) is constitutional and that Congress has the right to abrogate the states' Eleventh Amendment immunity when legislating pursuant to the Indian Commerce Clause.[14] This Note argues that the states should not be able to contravene IGRA's goals by asserting an Eleventh Amendment sovereign immunity defense. Moreover, this Note advocates that courts facing the sovereign immunity issue in Indian gaming cases should pattern their decisions after *Seminole Tribe of Florida v. Florida*[15] and *Cheyenne River Sioux Tribe v. South Dakota*[16] and refuse to grant motions to dismiss based on an Eleventh Amendment defense.

This Note offers two judicial solutions to the Eleventh Amendment controversy in class III Indian gaming cases. Part I reviews the historical background of Indian gaming, examines important pre-IGRA gaming cases, and discusses the legislative history and key provisions of IGRA. Part II notes the tribes' early successes in establishing class III gambling operations under IGRA. Part III analyzes the history of the Eleventh Amendment and the state sovereign immunity doctrine. Part IV discusses the eight Eleventh Amendment-Indian gaming cases[17] that have been decided to date. Part V demonstrates that no court has addressed the issue adequately and proposes two judicial solutions[18] which

12. *See* Cheyenne River Sioux Tribe v. South Dakota, No. 92-3009 (D.S.D. Jan. 8, 1993); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992).

13. For purposes of this Note, the phrases "all eight courts" or "the eight cases" refer to the following decisions: Pueblo of Sandia v. New Mexico, No. 92-0613 JC (D.N.M. Nov. 13, 1992); Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T (2 W.D. Okla. Sept. 8, 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Mississippi Band of Choctaw Indians v. Mississippi, No. CIV.A.J90-0386(B), 1991 WL 255614 (S.D. Miss. Apr. 9, 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991). *Contra* Cheyenne River Sioux Tribe v. South Dakota, No. 92-3009 (D.S.D. Jan. 8, 1993) (holding that states may not assert sovereign immunity defense to IGRA); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992) (same).

14. Both the "Interstate Commerce Clause" and "Indian Commerce Clause" are included in Article One, Section Eight, Clause Three of the Constitution. Clause Three provides that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

15. 801 F. Supp. 655 (S.D. Fla. 1992).

16. No. 92-3009 (D.S.D. Jan. 8, 1993).

17. The term "Eleventh Amendment-Indian gaming cases" will be used in this Note to identify the class III Indian gaming cases in which states have asserted an Eleventh Amendment defense. *See supra* note 13.

18. The scope of this Note is limited to judicial proposals for remedying the current tribal-state

recognize that IGRA legitimately requires the states to submit to federal jurisdiction on class III gaming issues.

I. HISTORICAL BACKGROUND

A. The Rise of Indian Gaming Before IGRA

Games of chance have been a traditional part of Indian culture.[19] In recent years, tribes have been faced with severe economic problems,[20]

---

conflicts in class III gaming. Legislative solutions are also possible. In the 102nd Congress, Representative Esteban Torres sponsored a bill that would have removed the compacting privilege from states refusing to negotiate with tribes. The bill, which was not passed, would have eliminated the Eleventh Amendment problem—if a state refused to negotiate, the state's authority to conclude a tribal-state compact would be removed and transferred to the National Indian Gaming Commission. The Commission was established under 25 U.S.C. § 2704 as a subdivision of the Department of the Interior to monitor class II and class III gaming. The bill provided, in pertinent part, as follows:

> [Create a new section, 25 U.S.C. 2710(d)(8) to read:]
> (a) An Indian Tribe may conduct Class III Gaming pursuant to a Class III Gaming Certificate issued by the Commission under § 2710(d)(10).
> (b) A tribe may apply for a Class III Gaming Certificate under § 2710(d)(10) only if:
> (i) a state fails to consent to the jurisdiction of the federal court pursuant to § 2710(d)(7)(A)(i) within 180 days of the delivery to the state of a request by a tribe for compact negotiations as provided for by § 2710(d)(3)(A), whichever is longer,
> (ii) in an action brought against a state by a tribe, a state raises any defense to the jurisdiction of the federal court on any grounds which are not curable by the tribal plaintiff, or
> (iii) the federal court finds it lacks jurisdiction for any reason not curable by the tribe.

H.R. REP. No. 6158, 102nd Cong., 2d Sess. (1992).

Senator Daniel Inouye has also been frustrated with the states' refusal to cooperate in the compacting process. At a National Tribal Leaders Forum meeting, he commented:

> Federal law has clearly authorized the operation of gaming activities on Indian land. I will not stand by and allow states to put padlocks on the doors of Indian gaming establishments. That is not fair. . . . This tribal-state compact idea was not your idea, it was not my idea, it was a concept that was proposed and supported by the several states of this Union. . . . It appears to me that some states are telling Congress: We don't want to have anything to do with Indian gaming. We won't even enter compacts. We won't let you bring us into court and tell us whether we should negotiate or not. This a law they wanted, and now they say forget it.
>
> So, I say, very simply: If the states don't want a role to play, that's OK with me. . . . If the federal government enters into a compact with a tribal government, there will be no state regulation or enforcement. . . .

Chet Lunner, *Inouye Threatens to Remove State Control of Indian Gaming*, GANNETT NEWS SERVICE, May 13, 1992, *available in* LEXIS, Nexis Library, Currnt File.

Legislative proposals that remove all state authority in the compacting process are theoretically possible, but are not politically feasible because of the states' opposition to any form of Indian gaming. *See infra* note 79 and accompanying text.

19. *See, e.g.*, WILLIAM BRANDON, INDIANS 42, 136 (1987); DOLAN H. EAGLE, JR., THE EARTH IS OUR MOTHER: A GUIDE TO THE INDIANS OF CALIFORNIA, THEIR LOCALES AND HISTORIC SITES 38, 38-39, 90 (1986); RALPH ANDREWS, INDIAN PRIMITIVE 59-61 (1960).

20. Tribes typically have unemployment rates that range from 50 to 90 percent. 134 CONG. REC. 8,156 (1988) (statement of Rep. Sikorski). *See also* 134 CONG. REC. 24,027-28 (1988) (statements of Sens. Evans and Domenici).

and as a result, many tribes have turned to gaming as their primary source of income.[21]

The roots of the controversy over Indian gaming can be traced to the Fifth Circuit's decision in *Seminole Tribe v. Butterworth*.[22] In 1979 the Seminole Tribe was the first tribe to begin a major bingo operation on a reservation.[23] In *Butterworth*, the Fifth Circuit upheld a federal district court ruling that the Seminole Tribe of Florida could continue its bingo operations despite the State of Florida's opposition.[24] The court of appeals decided that the tribe could conduct gaming without state interference because the federal government had never transferred jurisdiction to the State of Florida to impose its civil regulatory laws on Indian lands.[25]

Indeed, states generally do not have jurisdiction over Indian lands unless Congress specifically grants such jurisdiction.[26] Accordingly, the State in *Butterworth* asserted that Congress had granted such jurisdiction over the Tribe's bingo operation through Public Law 83-280.[27] Public

21. In some cases, gaming has become the only option for tribal economic development. *See* 134 CONG. REC. 24,026 (1988) (statement of Sen. McCain). However, neither Indian tribes nor Congress intend gaming to become a permanent foundation for tribal economies. Rather, Indian leaders and members of Congress see gaming as a necessary first step toward long-term economic development. *See, e.g.*, Diane Brooks, *Tulalip Casino is a Gamble that Paid Off—Tribe Discovers Surprise Windfall in Profit Margins and Self-Esteem*, SEATTLE TIMES, December 11, 1992, at C4 (relating that Charles Keechi, Chairman of the National Indian Gaming Association stated, " 'I don't think gambling is going to be the end result of economic development, but (rather) a stepping stone to something else.' "); 134 CONG. REC. 24,028 (1988) (statement of Sen. Domenici) ("I hope in 10 years we could look back and say we had to do this because our Indian people had such difficulty in getting economic opportunity to their people that they had to look to gambling. I hope we will be able to look back in 10 years and say this was just part of a whole series of economic opportunities for our Indian people.").

22. 658 F.2d 310 (5th Cir. Unit B 1981). Robert Butterworth was the Sheriff of Broward County, Florida who informed the Tribe that it was violating state law. *Id.* at 311.

23. S. REP. No. 446, 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072 [hereinafter SENATE REPORT No. 446].

24. *Butterworth*, 658 F.2d at 312.

25. *Id.* at 312-15.

26. *Id.* at 312. Because tribes are sovereign entities, states have historically had few rights to impose regulations on Indian tribes. The Supreme Court recognized this fact in one of its earliest Indian law cases, Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Chief Justice Marshall explained:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of congress.

31 U.S. (6 Pet.) at 561. See *infra* note 74 for a discussion of the unique relationship between the federal government and Indian tribes.

27. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590 (codified as 18 U.S.C. § 1162 (1984) and 28

Law 83-280 gave states the power to transfer criminal jurisdiction over Indians and Indian lands from the federal government to the state.[28] Additionally, Florida argued that it could prohibit the Tribe from operating bingo halls by virtue of the state's statute on bingo operations.[29]

The court first noted that the Supreme Court had decided that Public Law 83-280 does not grant the states general civil regulatory authority over Indian tribes.[30] The court reasoned that in order to prevail, Florida needed to show that bingo was prohibited by criminal sanctions rather than merely regulated by civil ordinances.[31] The court ultimately concluded that Florida's policy toward bingo was more civil-regulatory than criminal-prohibitory[32] because Florida did not prohibit all bingo activities.[33] Therefore, the state could not assert its jurisdiction over the Tribe's bingo operation through Public Law 83-280.[34]

U.S.C. § 1360 (1976)), *repealed by* Act of April 11, 1968, Pub. L. No. 90-284, § 403(b), 82 Stat. 79 (1984).

28. S. REP. NO. 446 succinctly summarizes the intent of Public Law 83-280:

> Public Law 83-280, codified in 18 U.S.C. 1162 and 28 U.S.C. 1360, authorized the transfer of criminal jurisdiction over Indians and Indian lands from the Federal Government to those state governments that chose to assert such jurisdiction. Tribes were free to continue to exercise civil jurisdiction over their members and their lands. The law was subsequently amended in 1968 to require tribal consent before jurisdiction could be transferred to a State. Since then, no tribes have done so and no new states are permitted to come under the Public Law 280 statute.

S. REP. NO. 446, at 3072 n.1.

Florida was a "280 state." 658 F.2d at 311. Florida assumed criminal jurisdiction over Indian reservations under Public Law 83-280 before 1968, when the law was amended to require the tribes' consent.

29. *Butterworth*, 658 F.2d at 311-12.

30. *Id.* at 313. The court referred to the Supreme Court's decision in Bryan v. Itasca County, 426 U.S. 373 (1976). In *Bryan*, the Court held that Public Law 83-280 granted civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and private citizens. *Bryan*, 426 U.S. at 383. The *Bryan* Court stated: "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation over reservation Indians, it would have expressly said so." *Id.* at 390. The court in *Butterworth* concluded "[I]t is clear that these same limitations on civil jurisdiction would apply to a state that assumed jurisdiction pursuant to . . . Public Law 280. Thus the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes." 658 F.2d at 313.

31. *Butterworth*, 658 F.2d at 313.

32. *Id.* at 315-16. In dictum, the court stated that Florida's bingo statute could arguably be construed as criminal-prohibitory. However, citing the rule in *Bryan* the court noted that in cases of doubtful statutory construction, a statute should be construed in favor of the Indians. *Butterworth*, 658 F.2d at 316. For a more complete discussion of this liberal construction rule, see *infra* notes 218-22 and accompanying text.

33. *Id.* at 314. The court noted that Florida's bingo statute allowed charitable organizations to conduct bingo games.

34. *Id.* at 315-16.

After *Butterworth*, Indian bingo operations proliferated,[35] as did the states' opposition to them.[36] In the case that was the landmark for Indian gaming, *California v. Cabazon Band of Mission Indians*,[37] the Supreme Court recognized the right of Indian tribes to conduct gaming without state interference.[38]

California, like Florida, was a "280 state," meaning that it had unilaterally elected to assume criminal jurisdiction over Indian reservations under Public Law 83-280 before the law was amended to require the tribes' consent.[39] California therefore threatened to apply criminal sanctions against the Cabazon and Morongo Bands of Mission Indians when they opened a bingo hall and card hall at which casino-type card games were played.[40] The tribes sought a declaratory judgment that California had no power to apply its statutes on the reservation, and the district court granted the tribes' motion for summary judgment.[41] The Court of Appeals for the Ninth Circuit affirmed the decision[42] as did the Supreme Court.[43]

Although consistent with *Butterworth*,[44] the *Cabazon* decision is even more important because the Supreme Court allowed tribes to conduct casino-style gaming as well as bingo.[45] The Court rejected California's argument that its bingo statute was a criminal law.[46] Instead, the Court found that California not only permitted a substantial amount of gambling, but also that the state had actually promoted gambling on one

35. Over 100 tribal bingo games opened between the date of the *Butterworth* decision and 1988. S. REP. NO. 446, at 3072.

36. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 166-67 (1990); Thomas L. Wilson, *Indian Gaming and Economic Development on the Reservation*, 68 MICH. BAR J. 380, 381-82 (1989); Nancy McKay, Comment, *The Meaning of Good Faith in the Indian Gaming Regulatory Act*, 27 GONZ. L. REV. 471 (1991-92).

37. 480 U.S. 202 (1987).

38. *Id.* at 211.

39. *Id.* at 207. See *supra* note 28 for an explanation of the jurisdictional effects of Public Law 83-280.

40. *Id.* at 204-05.

41. *Id.* at 206. The district court held that the state did not have any authority to enforce its gambling laws within the reservations. *Id.*

42. *Id.*

43. *Id.* at 222.

44. In *Cabazon*, the Court affirmed the application of the civil-regulatory versus criminal-prohibitory test used in *Butterworth*. *Id.* at 209-11.

45. *Id.* at 210-14.

46. *Id.* at 207-12.

occasion.[47] Therefore, the majority decided that California regulated, rather than prohibited, gambling,[48] and prevented the state from asserting its jurisdiction over the tribes' gaming activities.[49]

Perhaps the most important aspect of *Cabazon* is the Court's discussion of the numerous and conflicting interests involved in Indian gaming.[50] This discussion provided the focus for Congress' attempt to enact legislation that would balance the interests of the three major players in Indian gaming: the federal government, the tribes, and the states.[51]

The Supreme Court's decision in *Cabazon* essentially rested on balancing state interests against federal and tribal interests.[52] Although the tribes argued in favor of a per se rule that would forbid state jurisdiction over tribes in the absence of expressed congressional consent,[53] the Court ruled that in certain circumstances, state laws may be applied to tribal members on reservations, even if not expressly authorized by Congress.[54]

---

47. *Id.* at 210. California permitted parimutuel horse-race betting. CAL. BUS. & PROF. CODE §§ 19400-19667 (West 1964 and Supp. 1987). Bingo was also allowed. *Cabazon*, 480 U.S. at 211. California promoted its state-run lottery through advertising. *Cabazon*, at 210-11. CAL. GOVT. CODE ANN § 880 (West Supp. 1987).

48. *Cabazon*, 480 U.S. at 211. One author has suggested that the Court's method in deciding that California's approach to gambling was civil-regulatory rather than criminal-prohibitory is quite significant. "*Cabazon* seemed to indicate that if a state allowed some types of gaming activities, the state's approach to 'gambling in general' would be interpreted to be civil-regulatory. Under this construction, the limit to Indian gaming operations was difficult to determine." Eric J. Swanson, Note, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 474 (1992).

49. *Cabazon*, 480 U.S. at 211-214.

50. *Id.* at 214-22. *See also infra* notes 52-64 and accompanying text.

51. Congress discussed the importance of the *Cabazon* decision during the floor debate on IGRA. 134 CONG. REC. 24,027 (statement of Sen. Evans) ("This law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision."). *See also* S. REP. NO. 446, at 3072.

52. *Cabazon*, 480 U.S. 214-22.

53. *Id.* at 214. Referring to a statement in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973), the Tribes argued that the Supreme Court should simply affirm the decisions of the lower courts with nothing more, because the state laws at issue were imposed directly on the Tribes without the expressed consent of Congress. *Cabazon*, 480 U.S. at 214.

54. *Cabazon*, 480 U.S. at 214-16. The majority noted that, except for the area of state taxation of tribes, the Supreme Court had not previously adopted "an inflexible *per se* rule precluding state jurisdiction . . . in the absence of express congressional consent." *Id.* at 214-15 (footnote omitted). The Court cited to the general rule in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983), that states may assert jurisdiction over tribal members on reservations under exceptional circumstances. Next, the Court provided two illustrative cases on this rule, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976), and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980). In both decisions, the Supreme Court held that the state had a significant interest in requiring tribal smokeshops to collect state sales tax from non-Indian

The Court then applied a balancing test to determine whether California's laws could be applied to the on-reservation gaming activities of the tribal members.[55] The Court analyzed the federal and tribal interests.[56] The federal government's interests in fulfilling its trust obligations[57] to Indian tribes were extremely strong in the area of Indian gaming.[58] In fact, several federal agencies financed, developed, approved, and reviewed tribal gaming organizations.[59] This federal assistance to tribal gaming enterprises furthered the federal policy of encouraging tribal self-government and economic development.[60] The Tribes, too, were interested in self-government and economic development. The majority in *Cabazon* believed that the Tribes' interest was especially strong because gaming represented the sole source of revenue for tribal governments and the provision of tribal services.[61]

In comparison, the Court found that the State's asserted interest in preventing the infiltration of organized crime into tribal gaming operations was considerably weaker.[62] The Court considered the State's asserted interest in prohibiting all tribal games irrelevant because the State permitted considerable off-reservation gaming.[63] The Court then con-

---

customers. *Cabazon*, 480 U.S. at 216. The tribes' burden in collecting the tax was minimal while the states' interests in collecting sales tax from non-Indians was significant. *Cabazon*, 480 U.S. at 215-16. Finally, the Court determined that this was an appropriate case to apply the state versus federal/tribal interests test because "the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations." *Cabazon*, 480 U.S. at 216.

55. *See supra* note 48.

56. *Cabazon*, 480 U.S. at 217-22.

57. See *infra* note 74 for a concise explanation of Congress' trust obligation to Indian tribes. For a more complete history of the relationship between the federal government and Indian tribes, see generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1986 ed.).

58. *Cabazon*, 480 U.S. at 217. The Court noted that the court of appeals had relied on official declarations by the Assistant Secretary of the Interior and the Director of Indian Services, Bureau of Indian Affairs. 783 F.2d at 904-905. Both the Assistant Secretary of the Interior and the Director of Indian Services strongly supported tribal gaming and opposed legislation that would limit this potential revenue source. *Cabazon*, 480 U.S. at 217-18 n.21.

59. These agencies included the Interior Department, the Department of Housing and Urban Development, and the Department of Health and Human Services. *Cabazon*, 480 U.S. at 217-18.

60. *Id.* at 218-19.

61. *Id.*

62. *Id.* at 220-22. The Court also rejected California's attempt to diminish the importance of the Tribal interests. Whereas the State contended that the Tribes were "merely marketing an exemption from state gambling laws," the Court asserted that the Tribes were "generating value on the reservations through activities in which they have a substantial interest." *Id.* at 219-20.

63. *Id.* at 220-21. The Court partially accepted the State's argument that the high stakes offered at the Tribal games would be more attractive to organized crime than the regulated gaming

cluded that because the federal and tribal interests outweighed the State's interests, California could not regulate the Tribes' bingo and casino-style card gaming operations.[64]

B. IGRA: Legislative History and Key Provisions

Although IGRA was not enacted until 1988,[65] the Act is the product of years of congressional efforts to devise a comprehensive scheme for regulating gaming activities on Indian lands.[66] The Act attempts to balance the competing interests of the tribes, federal government, and states, just as the Supreme Court had tried to do in *Cabazon*.[67]

Tribes have several obvious interests in gaming operations. Gaming operations can be opened quickly with minimal capital expenditures.[68] Additionally, gambling enterprises often serve as the main source of tribal revenue, other than funding from the federal government.[69] In turn, these revenues enable the tribes to gain greater economic and political self-sufficiency.[70] The tribes' primary concerns regarding gaming relate to attempts by the states to interfere with tribal sovereignty.[71]

---

authorized under California law. However, the Court maintained that this legitimate concern did not preempt the weightier federal and tribal interests. *Id.* at 221.

64. *Id.* at 221-22.

65. *See supra* note 2.

66. *See generally* Sokolow, *supra* note 36 (comprehensive discussion of proposed legislation during the 98th, 99th, and 100th Congresses, before the passage of IGRA).

67. S. REP. NO. 446. *See also supra* notes 52-64 and accompanying text.

68. The explosion of Indian gaming is evidence of the benefits of the low capital expenditures required to start an operation. *See supra* note 4. The Tulalip Tribe's Casino provides a specific example. Although the Casino opened in the middle of 1992, revenues escalated so much that the Tribes could repay the $2.5 million construction loan by the end of the Casino's first year. Brooks, *supra* note 21, at C4.

69. *See supra* note 21 and accompanying text.

70. For an example of economic self-sufficiency, see Brooks, *supra* note 21, at C4. Brooks suggests:

> For the Tulalips, casino income already has helped build a new dental clinic and hire a dentist to staff it. Early next year, the tribes hope to break ground for a new community center for tribal elders. In addition, matching funds are needed for a federal Housing and Urban Development grant to build a recovery home for tribal members fighting drug or alcohol problems.

See also supra note 4.

For an example of political self-sufficiency, see *Cabazon*, 480 U.S. at 218-19 (stating that gaming revenues were the sole source of income for the operation of the tribal government). *See also* Stanich, *supra* note 4, at A16 (gaming revenues support the infrastructure of tribal government).

71. Many tribes were opposed to IGRA because it gave the state a considerable role in more sophisticated gambling activities. *See, e.g.*, Ken Miller, *Suits, Seizures Possible With Indian Gambling Rules*, GANNETT NEWS SERVICE, May 6, 1992, *available in* LEXIS, Nexis, Currnt File (reporting that Senator Daniel Inouye said that when IGRA was enacted in 1988, tribes opposed it

In most respects, the federal interests in gaming parallel those of the tribes.[72] Both the executive and the legislative branches also view gaming as a means to promote strong tribal governments and economic self-sufficiency.[73] Thus, the federal government is able to fulfill its trust obligation to the tribes[74] by defending their rights to operate gambling enter-

---

while states supported it). *See also* 134 CONG. REC. 24,024 (1988) (statement of Sen. Evans) (acknowledging that many tribes opposed IGRA because of the potential for extending state jurisdiction over Indian lands for certain gaming activities); Wilson, *supra* note 36, at 384 (citing Red Lake Band of Chippewa Indians and Mescalero Apache Tribe v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990), in which two tribes asserted that IGRA interferes with tribal sovereignty and self-government).

72. *See, e.g., Cabazon,* 480 U.S. at 202 (deciding that the interests in tribal self-determination and economic development are common to the federal government and to the tribes).

73. Both the President and various officials of the executive branch have promoted Indian gaming. *See, e.g., Cabazon,* 480 U.S. at 217-18 (The President of the United States, Secretary of the Interior, Department of Housing and Urban Development, and the Department of Health and Human Services favor Indian gaming).

Congress also sees gaming as a means of promoting strong tribal governments and economic self-sufficiency. *See, e.g., supra* note 3 and accompanying text.

74. In early decisions, the Supreme Court noted the unique relationship between the federal government and the Indian tribes. Essentially, Congress has a dual, if somewhat contradictory, role with respect to the Indian tribes. On one hand, Congress has almost unlimited "plenary" power over the tribes. One scholar has succinctly described this authority: "[w]hat Congress wants, Congress gets." Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 285 (1984). In United States v. Kagama, 118 U.S. 375 (1886), the Supreme Court explicitly recognized the plenary power doctrine:

> It seems to us that this [authority to enact a federal criminal statute regarding certain acts of tribal Indians within a reservation] is within the competency of Congress. These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84.

There is some ambiguity as to the origin of Congress' plenary power over Indian tribes. Felix Cohen suggested the origins were constitutional sources, such as the Indian Commerce Clause and Congress' appropriating and treaty-making powers. *See* COHEN, *supra* note 57, at 89-91. Cohen noted, however, that the plenary power doctrine actually extends beyond constitutional sources:

> While the decisions of the courts may be explained on the basis of express constitutional powers, the language used in some cases seems to indicate that decisions were influenced by a consideration of the peculiar relationship between the Indians and the Federal Government [citing Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); and Brader v. James, 246 U.S. 88 (1918), among other sources].
>
> Thus in *United States v. Kagama*, the Supreme Court found that the protection of the Indians constituted a national problem and referred to *the practical necessity* of protecting the Indians and the nonexistence of such a power in the states.

COHEN, *supra* note 57, at 90 (emphasis added).

Notice that in the above quotation from *Kagama*, the Court not only recognized the legitimacy of Congress' plenary power, but also stated, "[T]here arises the duty of protection . . . ." *Kagama*, 118

prises and simultaneously protect the government's economic interest by decreasing the degree to which Indian tribes depend on the federal government for funding.[75] Federal and tribal interests may clash, however, in the area of regulation. While the tribes seek to regulate their gaming establishments with little outside interference,[76] the federal government desires federal and state regulation, in addition to tribal regulation, to prevent organized crime from infiltrating tribal gambling.[77]

U.S. at 384. This duty of protection owed by the federal government to the Indian tribes is often referred to as Congress' "trust obligation." Chief Justice Marshall was the first to describe this trust relationship between the United States and Indian tribes in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831):

> They [the Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id. at 17.

See also Morton v. Mancari, 417 U.S. 535 (1974) (acknowledging that because of the government's trust obligation, Congress can enact legislation that singles out Indians for preferential treatment); Morton v. Ruiz, 415 U.S. 199 (1974) (highlighting the federal government's responsibility to deal fairly with all Indians, regardless of whether tribal members reside on a reservation or outside the reservation); Seminole Nation v. United States, 316 U.S. 286 (1942) (holding that the federal government has a trust obligation to make amends for violations of an 1856 treaty).

In sum, "[a] relationship of dependence and trust not only gives the federal government broad, plenary powers over Indian affairs, but also imposes a trustee's duties of protection and fair dealings upon the government." DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW, CASES AND MATERIALS 37 (2d ed. 1986). Cases such as *Cabazon* and the Eleventh Amendment-Indian gaming cases demonstrate that both doctrines—Congress' plenary power and trust obligation—maintain their vitality today in the context of Indian affairs.

75. The President's 1983 Statement on Indian Policy reads: "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. Pres. Doc. 99 (1983)(cited in *Cabazon*, 480 U.S. at 217 n.20).

76. *See, e.g.*, Wilson, *supra* note 36, at 383:

> Indian tribes have long resented references to their gaming enterprises as 'unregulated gambling.' . . . Tribal games are usually referred to as unregulated gambling because they are not being regulated by the non-Indian world. This is seen as an implied denial of the right of Indian governments to be self-governing and to continue such activity. Early on, Indians were concerned that unregulated gaming might lead to undesirable conduct, and thus enacted tribal laws to control and regulate tribal games.

77. *See* S. Rep. No. 446. *See also* S. REP. NO. 446, at 3092 (relating letter from the U.S. Department of Justice giving the Administration's view that federal control over high-stakes gambling is too weak in the proposed legislation).

At least two authors believe that organized crime has already infiltrated some Indian gambling enterprises. *See* Swanson, *supra* note 48, at 491-93; Jonathon Littman, *And the Dealer Stays: Indian*

State interests are more directly opposed to tribal interests. The states, like the federal government, insist that they must regulate sophisticated gambling to guard against organized crime.[78] The dominant state interest, however, is an economic one. The states fear that Indian gaming will compete with other gaming institutions within the states.[79] Unlike other gambling enterprises, states cannot operate gambling projects on the reservations or collect taxes from the revenues generated by tribal gambling operations.[80]

The most controversial provisions of IGRA are those that attempt to balance the competing tribal, federal, and state interests. Controversy

---

Gaming is a 1990s Gold Rush with Lawyers Leading the Charge, CAL. LAWYER, Jan. 1993, at 45 (illustrating that there is strong evidence of organized crime, including an execution-style murder, on the Reservation of the Cabazon Band of Mission Indians).

78. *See, e.g., Cabazon*, 480 U.S. at 220.

79. *See, e.g.*, S. REP. NO. 446. Senator John McCain noted:

> As the debate unfolded, it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition. . . . Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribes have is negotiable.

S. REP. NO. 446, at 3071, 3103.

Similarly, Senator Daniel Evans stated:

> We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. . . . Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes.

S. REP. NO. 446, at 3071, 3105.

80. The Supreme Court has consistently held that the states have no authority to tax Indian tribes. In *Cabazon*, the Court summarized its decisions in this area:

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule [to preclude state taxation of Indian tribes]. In Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. . . . We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged "*in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."

Cabazon, 480 U.S. at 215-16 n.17 (alterations in original).

surrounds the classification system,[81] the compacting process,[82] and the jurisdictional provision.[83]

Under IGRA, there are three classes of Indian gaming. Class I activities,[84] traditional Indian games, present few problems. There is no tribal-state conflict over these activities because tribes exercise exclusive jurisdiction over class I gaming on Indian lands.[85]

More sophisticated class II activities[86] are allowed on Indian lands only if the lands are in a state that permits such gaming by any person or organization.[87] Tribes regulate class II activities with oversight by the National Indian Gaming Commission.[88]

Although there has been considerable litigation involving class II activities,[89] high-stakes class III activities[90] have generated the most con-

---

81. IGRA divides Indian gaming activities into three categories: class I, class II, and class III. 25 U.S.C. § 2710 (1988). *See also supra* note 8 (defining class III gaming).

82. *See supra* note 7 and *infra* note 92.

83. Section 25 U.S.C. § 2710(d)(7) provides:

> (7)(A) the United States district courts shall have jurisdiction over—
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary [of the Interior] to enforce the procedures prescribed under subparagraph (B)(vii).

25 U.S.C. § 2710(d)(7)(A) (1988).

84. "The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) (1988).

85. *Id.* § 2710(a).

86. Class II gaming is defined as "the games of chance commonly known as bingo . . . including . . . pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and card games. . . ." *Id.* § 2703(7)(A)(i)&(ii).

87. *Id.* § 2710(b)(1).

88. *Id.* § 2706(b)(1). The National Indian Gaming Commission, a subdivision of the Department of the Interior, was established under IGRA to regulate and oversee Indian gaming operations. *Id.* § 2704.

89. The most common issue in class II cases has been whether an activity should be characterized as class II or class III. The tribes seek to have the disputed activity characterized as class II so that the state cannot play a regulatory role. The states, however, want contested activities to be classified as class III. Because class III activities require a tribal-state compact, *see supra* note 7, states can exercise much more control over gaming on Indian lands. *See, e.g.*, Oneida Tribe of Indians of Wisconsin v. Wisconsin, 951 F.2d 757 (7th Cir. 1991); Spokane Tribe of Indians v. United States, 782 F. Supp. 520 (E.D. Wash. 1991) (demonstrating how tribes contend that proposed activities are class II while states insist that these activities are class III).

90. Class III activities include the most sophisticated forms of gambling such as casino games

flict between tribes and states. According to IGRA, class III activities are permissible on Indian lands only if: (1) the lands are located within a state that permits gambling for any purpose by any person or organization; (2) the tribe adopts a gaming ordinance that has been approved by the Chairman of the National Indian Gaming Commission; and (3) the activities are conducted in conformity with a tribal-state compact.[91] Under section 2710(d)(3) of the Act, the compact governs the manner in which class III activities will be organized within a particular Indian reservation.[92]

IGRA's jurisdictional provision, section 2710(d)(7), is related to the classification system and the compacting process. Under this section, the federal district courts have jurisdiction over class III controversies that arise between tribes and states.[93] Section 2710(d)(7) is the root of most tribal-state disputes over high-stakes gambling. Until recently, there were few class III cases, and all of them had been decided in favor of the tribes and against the states.[94] However, in 1991, states began adopting a new strategy—asserting an Eleventh Amendment sovereign immunity

---

and jai-alai. *See supra* note 8. Class III encompasses all types of gaming that are not included in class I or class II. 25 U.S.C. § 2703(8) (1988).

91. *Id.* § 2710(d)(1).

92. The provisions state:

> (3)(A) Any Indian tribe having jurisdiction over Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact. . . .
>
> (C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—
>
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(A) & (C) (1988).

93. For the text of § 2710(d)(7), see *supra* note 83.

94. Until recently, the main issue in most conflicts over class III activities had been whether a state was negotiating in good faith with an Indian tribe to adopt a tribal-state compact. *See, e.g.*, Mashantucket Pequot Indians v. Connecticut, 913 F.2d 1024 (2d. Cir. 1990), *cert. denied*, 111 S.Ct.

defense to the jurisdictional provision of IGRA. To date, this strategy has been quite successful.[95]

II. EARLY SUCCESSES FOR THE TRIBES

The Second Circuit Court of Appeals' decision in *Mashantucket Pequot Tribe v. Connecticut*[96] provides a good example of the Indian tribes' early success in establishing high-stakes gambling operations. In *Mashantucket*, the Second Circuit affirmed a district court decision that required the state to conclude a tribal-state compact for class III gaming within sixty days, as provided in IGRA.[97] The state advanced three arguments: (1) as a precondition to entering negotiations under IGRA, the tribe must first adopt a tribal ordinance authorizing casino-type gambling on the reservation;[98] (2) the type of class III gaming the Tribe sought to establish was not the type of gaming permitted in Connecticut;[99] and (3) under IGRA, the district court is required to order the State and Tribe to conclude a compact only when the court finds that the state failed to negotiate in good faith, and because the State did not negotiate at all, the court cannot order the State to conclude a compact with the Tribe.[100]

The Second Circuit rejected all three arguments. In response to the State's first assertion, the court held that IGRA only required that a tribe

668 (1991); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), *aff'd*, 957 F.2d 515 (7th Cir. 1992).

95. See *supra* note 13 for several cases in which states successfully raised Eleventh Amendment sovereign immunity defenses.

96. 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 668 (1991).

97. *Id.* at 1025. The relevant IGRA section provides:

> (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations. . . .
>
> (ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—
>
> (I) a Tribal-State compact has not been entered into . . .
>
> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.
>
> (iii) If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, *the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.*

25 U.S.C. § 2710(d)(7)(B) (1988) (emphasis added).

98. *Mashantucket*, 913 F.2d at 1028.

99. *Id.* at 1029.

100. *Id.* at 1032.

request to negotiate with a state as a prerequisite to negotiating a tribal-state compact.[101] The court found that a tribe must adopt an appropriate tribal ordinance before engaging in class III gaming, but said that nothing suggests that the tribal ordinance must be enacted before a state must negotiate.[102]

The court responded to the State's second argument by referring to the statutory language of section 2701(5), which declares that Indian tribes may regulate gaming on Indian lands if the gaming is "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[103] The Second Circuit noted that Connecticut only regulated gaming and did not prohibit it outright.[104] Therefore, even if the State did not permit the specific casino-style gaming that the Tribe planned to conduct,[105] the Tribe should be able to operate its gambling activity because the State merely regulated other gambling activities.[106]

Finally, in response to the State's third argument, the court held that the trial court had made no express finding as to the State's lack of good faith because the State did not raise the issue.[107] Nevertheless, the court had the authority under IGRA to order the State to conclude a compact with the Tribe.[108] The court determined that section 2710(d)(7)(B)(ii) of IGRA vests jurisdiction in district courts if a state does not negotiate in

---

101. *Id.* at 1028.

102. *Mashantucket*, 913 F.2d at 1028. The court explained:

> Section 2710(d)(1) on its face lists several conditions that must be satisfied before a tribe can lawfully engage in class III gaming. Although the adoption of an appropriate tribal ordinance is the first requirement set forth in section 2710(d)(1), nothing in that provision requires sequential satisfaction of its requirements, nor does its legislative history suggest that a tribal ordinance must be in place before a state's obligation to negotiate arises.

Id.

103. *Id.* at 1029. The court noted that § 2701(5) is consistent with the Supreme Court's holding in *Cabazon*. "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.* (quoting *Cabazon*, 480 U.S. at 209).

104. *Id.* at 1031.

105. Under Connecticut law, the state sanctioned "Las Vegas nights," which were games of chance conducted by non-profit organizations. *Id.* at 1029. The court agreed with the district court that existing Connecticut law permitted gambling, although in a regulated form. *Id.* at 1031.

106. The court first analyzed the relevant IGRA provision, which states that class III gaming activities are lawful only if they are conducted in a state which permits such gaming for any purpose by any person or organization. 25 U.S.C. § 2710(d)(1)(B) (1988). Next, the court determined that the Connecticut law regulated rather than prohibited class III gaming. Therefore, the state had an obligation to negotiate with the Tribe concerning casino-style gambling. 913 F.2d at 1031-32.

107. 913 F.2d at 1032.

108. *Id.* at 1032-33.

good faith or does not respond to the tribe's request to negotiate a compact.[109] In *Mashantucket*, the state had not responded to a tribe's request, and thus, could not negotiate in good faith.[110] Because the state refused to negotiate, the court ordered a compact to be concluded.[111]

After *Mashantucket*, one other court held that tribes have the right to engage in class III gaming enterprises.[112] Since 1991, however, in six out of eight cases in which the issue was raised,[113] the states have successfully raised an Eleventh Amendment sovereign immunity defense. When the tribes sued the states for failing to negotiate a compact, the courts granted the states' motions to dismiss based on the belief that Congress did not have the authority to abrogate the states' immunity through IGRA. To facilitate an informed discussion of the cases, it is first necessary to outline certain general Eleventh Amendment principles.

III. THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[114]

By its plain language, the Eleventh Amendment denies federal jurisdiction only in diversity suits, suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

109. *Id.* For the text of this provision, see *supra* note 97.

110. *Id.* at 1032. The court cited NLRB v. Katz, 369 U.S. 736, 743 (1962) for the rule that if a party refuses to negotiate, there is no reason to consider the issue of good faith. *Id.*

111. 913 F.2d at 1032-33.

112. In Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), *aff'd*, 957 F.2d 515 (7th Cir. 1992), the court held that the state was obligated to negotiate with the Tribe regarding certain class III activities. Like the State of Connecticut in *Mashantucket*, Wisconsin wanted the court to declare that § 2701(5) of IGRA limited the Tribe to the specific type of gaming activity actually in operation in the state. Because the state only allowed a lottery and parimutuel betting, Wisconsin asserted that the Tribe was limited to those types of class III gambling activities and could not negotiate for casino games, such as video gaming machines, roulette, slot machines, poker, or craps. The court rejected this narrow interpretation of § 2701(5). Instead, the court focused on whether Wisconsin's general policy toward sophisticated gaming was prohibitory or regulatory. The court determined that Wisconsin's public policy was regulatory because amendments to the Wisconsin Constitution allowed a state-run lottery and parimutuel on-track betting.

113. *See supra* note 13.

114. U.S. CONST. amend. XI.

State."[115] Few commentators, however, interpret the Eleventh Amendment so strictly.[116] In *Hans v. Louisiana*,[117] the Supreme Court expanded the scope of the Eleventh Amendment.[118] In *Hans*, the Court held that the Eleventh Amendment prohibited a citizen of a state from suing that state in federal court based on federal question jurisdiction.[119] The plaintiff, a Louisiana citizen, attempted to sue the state to collect on Civil War bonds.[120] The state contended that the Eleventh Amendment prevented its own citizens from suing it, even though this type of protection was beyond the literal scope of the Amendment. The Court agreed and held that the state was immune from this suit, stating that it would be "absurd" to restrict the application of the Amendment to its literal language.[121] The court reasoned that the state's immunity was "inherent in the nature of sovereignty."[122]

Later Supreme Court decisions have limited the *Hans* doctrine of state sovereign immunity based on the Eleventh Amendment.[123] Under cer-

115. *Id.*

116. Apparently, only one commentator has argued that the Eleventh Amendment should be interpreted this strictly. *See* Merritt R. Blakeslee, Case Comment, *The Eleventh Amendment and States' Sovereign Immunity from Suit by a Private Citizen:* Hans v. Louisiana *and its Progeny after* Pennsylvania v. Union Gas Company, 24 GA. L. REV. 113, 129-30 (1989) (citing Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1349 (1989)).

117. 134 U.S. 1 (1890).

118. *Id.* at 15-18. Since *Hans*, the Supreme Court has recognized that a variety of suits are not precluded by the Eleventh Amendment. *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (reasoning that the Eleventh Amendment does not prevent suits by United States against a state); Sterling v. Constantin, 287 U.S. 378, 393 (1932) (holding that the Eleventh Amendment does not prevent parties from suing state officials to enjoin them from enforcing state laws that violate federal law); *Ex parte* Young, 209 U.S. 123, 155-56 (1908) (noting that suits may be initiated in federal courts against state officials sued in their individual capacities for illegal actions); South Dakota v. North Carolina, 192 U.S. 286, 315-16 (1904) (determining that the Eleventh Amendment does not prevent one state from suing another).

119. *Hans*, 134 U.S. at 14-15.

120. *Id.* at 1-3.

121. The Court asked:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for the citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Id. at 15.

122. *Id.* at 13 (quoting THE FEDERALIST No. 81, at 508 (Alexander Hamilton) (H. Lodge ed., 1895)).

123. *See infra* notes 125-32 and accompanying text.

tain circumstances, Congress now may abrogate states' sovereign immunity. In Fourteenth Amendment[124] cases, the Court has recognized federal jurisdiction if clear statutory language conveys congressional intent to override state immunity.[125] The Court has held that Section Five of the Fourteenth Amendment[126] grants Congress the power to abrogate a state's sovereign immunity.[127] The test for abrogation under the Fourteenth Amendment, however, is stringent: when legislating pursuant to the Fourteenth Amendment, Congress can abrogate a state's sovereign immunity only if the statutory language is "unmistakably clear."[128]

Congress may also override a state's sovereign immunity when it exercises one of its broad legislative powers, such as the commerce power.[129]

---

124. The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

125. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick*, the Court stated that § 5 of the Fourteenth Amendment, *see infra* notes 127-28 and accompanying text, limits the scope of the Eleventh Amendment and the principle of state sovereign immunity. 427 U.S. at 453. The Court held that the Eleventh Amendment did not prevent a federal court from granting a retroactive award of wrongfully withheld retirement benefits through the 1972 Amendments to Title VII of the Civil Rights Act of 1964. *Id.* at 451-56. The 1972 Amendments, passed pursuant to the Fourteenth Amendment, authorized federal courts to award money damages to private individuals whenever a court found that a state government had subjected such an individual to employment discrimination. *Id.* at 447-48.

126. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

127. *See, e.g., supra* note 126. As one author notes, there are two arguments for the proposition that Section Five of the Fourteenth Amendment allows Congress to lift sovereign immunity.

> The first is the "later in time" argument. Because the Fourteenth Amendment was ratified subsequent to the Eleventh Amendment, section five of the Fourteenth Amendment carved out an area of federal power from existing state power. This includes those powers previously granted to the states, including those immunities granted in the Eleventh Amendment.
>
> The second argument is that the Fourteenth Amendment is a unique limitation on state power. Section five of the Fourteenth Amendment allocates to Congress the power to enforce the various sections of the Amendment, including the Due Process provisions. The Supreme Court is required to balance the state's interest represented by the Eleventh Amendment with the federal interest in the supremacy of federal law. Thus, the Fourteenth Amendment trumps existing state power found in the Constitution and Common Law.

Christopher L. Lafuse, Note, *Beyond* Blatchford v. Native Village of Noatak: *Permitting the Indian Tribes to Sue the States Without Regard to the Eleventh Amendment Bar*, 26 VAL. U. L. REV. 639, 656-57 (1992) (footnotes omitted).

128. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

129. *See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184 (1964).

Until 1989, the Court's standard for Commerce Clause cases was difficult to fulfill. The Court recognized federal court jurisdiction only if Congress legislated pursuant to the Commerce Clause and the state implicitly waived its sovereign immunity and consented to suit in federal court.[130] The Court loosened this standard somewhat in *Pennsylvania v. Union Gas Co.*[131] In *Union Gas*, the Court concluded that when the states ratified the Constitution, they gave Congress the authority to regulate commerce, thus relinquishing their sovereign immunity in that area.[132] The holding in *Union Gas* is clear—Congress abrogates the states' Eleventh Amendment immunity when it legislates pursuant to the Commerce Clause. However, it is not clear what the holding in *Union Gas* rests upon, and courts are without guidance as to how to apply the *Union Gas* rule in other contexts.[133]

In *Union Gas*, the Court was presented with a two-part question: (1) does the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) clearly express Congress' intent to permit a suit against a state in federal court; and (2) if so, does Congress have the authority to abrogate a state's immunity when legislating pursuant to the Commerce Clause?[134]

The Court searched the language in CERCLA and found that Congress clearly intended states to be subjected to the federal courts' jurisdiction.[135] The Court then turned to the broader constitutional question of whether Congress had the authority to override the state's sovereign immunity in this instance. The plurality held that Congress did, indeed, have this authority when exercising its plenary power to regulate interstate commerce.[136] The plurality compared the Commerce Clause to the Fourteenth Amendment and decided that Congress may abrogate a state's immunity when legislating pursuant to the Commerce Clause.[137]

---

130. *See, e.g.*, Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973); *Parden*, 374 U.S. 184 (1964).

131. 491 U.S. 1 (1989).

132. *Id.* at 14. *See also infra* note 141.

133. The courts that have faced the Eleventh Amendment-Indian gaming issue have disagreed on what theory is behind the holding of *Union Gas*. *See infra* notes 142-43, 171-92 and accompanying text.

134. *Union Gas*, 491 U.S. at 5.

135. *Id.* at 13.

136. *Id.* at 16.

137. *Id.* at 15-17. The Court pointed to *Fitzpatrick* in which it held that Congress can abrogate a state's immunity under § 5 of the Fourteenth Amendment:

> Such enforcement [of the prohibitions of the Fourteenth Amendment] is no invasion of

The Commerce Clause, like the Fourteenth Amendment, confers plenary power to Congress that expands federal power at the expense of the states.[138] The states surrendered part of their sovereignty by approving the Constitution.[139] By adopting the Commerce Clause, states gave up their sovereignty in the area of interstate commerce and consented to the federal government's jurisdiction.[140] This argument, that states surrendered some of their sovereignty when they ratified the Constitution, is known as the "plan of convention" theory.[141]

Since *Union Gas*, courts have continued to wrestle with the unsettled doctrine of the states' sovereign immunity under the Eleventh Amendment. Nowhere is this struggle more apparent than in recent Eleventh Amendment-Indian gaming cases. Courts faced with Indian gaming issues have interpreted the holding of *Union Gas* quite differently. Courts holding that states may raise a sovereign immunity defense to IGRA believe that *Union Gas* rests on the "plan of convention" theory.[142] In con-

---

> State sovereignty. No law can be, which the people of the United states, have . . . empowered Congress to enact. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Ex parte Virginia, 100 U.S. 339, 346 (1880), *quoted in Fitzpatrick*, 427 U.S. at 454-55. *See also supra* note 126.

The dissent in *Union Gas* insisted that the plurality was wrong to compare the Commerce Clause to the Fourteenth Amendment stating:

> An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable. The Fourteenth Amendment, on the other hand, was avowedly directed against the power of the States, and permits abrogation of their sovereign immunity only for a limited purpose.

491 U.S. at 42.

138. *Id.* at 16. "Plenary power" means "[a]uthority and power as broad as is required in a given case." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990). For an explanation of plenary power in the context of Indian affairs, see *supra* note 74.

139. *Union Gas*, 491 U.S. at 14.

140. *Id.* at 16-20.

141. *See id.* "We have recognized that the States enjoy no immunity where there has been 'a surrender of this immunity in the plan of the convention.'" *Id.* (citing Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (quoting THE FEDERALIST No. 81, at 657 (Alexander Hamilton) (H. Dawson ed., 1876)).

142. *See, e.g.*, Pueblo of Sandia v. New Mexico, No. 92-0613 JC (D.N.M. Nov. 13, 1992); Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T (W.D. Okla. Sept. 8, 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); Spokane Tribe of Indians v. Washington, 790 F.

trast, courts concluding that states cannot raise an Eleventh Amendment defense view *Union Gas* as premised on Congress' plenary power, not on the "plan of convention" theory.[143]

Thus, the way in which courts interpret *Union Gas* is critical to the success or failure of class III Indian gaming. A later decision, *Blatchford v. Native Village of Noatak*,[144] although not an Indian gaming case, highlighted the Eleventh Amendment controversy in the context of Indian affairs. In *Blatchford*, the Supreme Court addressed the question whether federal courts have jurisdiction over an Indian tribe's suit against a state for a violation of a state statute.[145] The Court decided that the Eleventh Amendment protected the state from such suits.[146] In doing so, the Court reversed the Ninth Circuit's holding that through their acceptance of the Commerce Clause, states consented to suits from the Indian tribes. The Ninth Circuit concluded that allowing federal courts to have jurisdiction over suits brought by tribes was part of the inherent plan of the Constitution.[147]

The Supreme Court disagreed. The Court held that in adopting the Constitution, states made mutual concessions to allow themselves to sue one another; however, no state surrendered immunity with respect to Indian tribes.[148] The Court reasoned that the states could not have made such a mutual concession with the Indians because the tribes were not parties to the Constitutional Convention.[149]

Blatchford is important because it held that states did not waive their

---

Supp. 1057 (E.D. Wash. 1991); Mississippi Band of Choctaw Indians v. Mississippi, No. CIV.A.J90-0386(B), 1991 WL 255614 (S.D. Miss. Apr. 9, 1991).

For an explanation of the "plan of convention" theory, see *supra* note 141 and accompanying text.

143. *See* Cheyenne River Sioux Tribe v. South Dakota, No. 92-3009 (D.S.D. Jan. 8, 1993); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992). See *supra* note 138 for a definition of plenary power.

144. 111 S. Ct. 2578 (1991).

145. *Id.* at 2580-81. Alaska enacted a revenue-sharing statute in 1980 which provided for payments to Eskimo villages. *Id.* The Commissioner of Alaska's Department of Community and Regional Affairs, however, on the advice of the state's Attorney General, enlarged the program to include non-Native communities as well. *Id.* By including other communities, the Commissioner effectively reduced the amount of money Eskimo communities received. The Native Village of Noatak brought suit against the Commissioner, alleging that the state had failed to provide the funds authorized by the state legislature. *Id.*

146. *Id.* at 2580-86.

147. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1164 (9th Cir. 1989).

148. *Id.* at 2582.

149. *Id.* The court stated: "But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes."

immunity against suits by Indian tribes in the "plan of convention,"[150] and made clear courts' interpretations of *Union Gas* often determine the outcomes of Eleventh Amendment-Indian gaming cases. In *Blatchford*, one of the bases of the Court's decision in *Union Gas*—that states waived their sovereign immunity when they ratified the Constitution—was rejected for Indian law issues. Therefore, courts that believe *Union Gas* rests primarily on a "plan of convention" theory also believe that *Union Gas* does not apply to Eleventh Amendment-Indian gaming cases.[151]

IV. THE ELEVENTH AMENDMENT-INDIAN GAMING CASES

The courts that have faced the Eleventh Amendment question in the context of Indian gaming have framed their legal analysis according to *Pennsylvania v. Union Gas Co.*[152] These courts asked first, whether IGRA expresses clear congressional intent to abrogate the states' sovereign immunity, and next, whether Congress has such authority.[153] The first question of congressional intent has not been seriously contested. Even the courts that have ultimately decided that states may assert an Eleventh Amendment sovereign immunity defense presume that under section 2710(d)(7)(A) of IGRA[154] "Congress clearly intended to subject the States to suit in federal court."[155]

---

150. *Id.* at 2580-82.

151. *See infra* notes 170-92 and accompanying text.

152. 491 U.S. 1 (1989). See *supra* notes 131-141 and accompanying text for a discussion of the Supreme Court's analysis in *Union Gas*.

153. *See infra* notes 154-92 and accompanying text.

154. *See supra* note 83.

155. Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T, slip op. at 6 (W.D. Okla. 1992). *See also* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992) ("It is beyond peradventure that, in expressly providing for federal jurisdiction over claims brought by Indian tribes against States to compel good faith negotiations under IGRA (or to remedy the lack of such negotiations), Congress made its intention to abrogate the States' immunity in this context 'unmistakably clear in the language of the statute.' ") (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992) (finding that the Act "is a clear statement of waiver of sovereign immunity[ ]"); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557 (S.D. Ala. 1991) ("[T]his Court has little doubt but that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation.").

In Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991), however, the court thought it did not need to decide the issue. 790 F. Supp. at 1061. "Having determined that Congress did not have the authority to abrogate the States' sovereign immunity in the Indian Gaming Regulatory Act, it is not necessary to address whether Congress used 'unmistakably clear' language in an attempt to abrogate States' immunity." Two courts also reviewed whether 28 U.S.C. § 1362, which had previously established federal court jurisdiction by abrogating the states' Eleventh

The second part of the courts' analysis—whether Congress has the authority to abrogate the states' sovereign immunity under IGRA—has been considerably more controversial and complex.

In several cases, the tribes contended that Congress did not need to abrogate the states' Eleventh Amendment immunity because the states had waived their immunity, either expressly or implicitly. In *Poarch Band of Creek Indians v. Alabama*,[156] for example, the Tribe argued that the state of Alabama had consented to suit in federal court because the state had entered into compact negotiations with the Tribe.[157] The court quickly disposed of this argument by concluding that courts can only recognize a state's consent if it is expressed in a legislative enactment.[158] No express consent occurred in *Poarch Band* because the Alabama legislature did not consent to suit.[159] No other tribe has made an express consent argument.[160]

Several tribes, however, have argued that states implicitly consented to suit in federal courts and waived their sovereign immunity when IGRA was enacted. A common variation of the implied consent argument is the "plan of convention" argument.[161] In *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*,[162] the Tribe argued that when the states entered the Union, they gave up certain attributes of sovereignty.[163] The Tribe asserted that the states surrendered their sovereignty in the area of

---

Amendment immunity when a suit was brought by an Indian tribe, provided an alternative basis for federal jurisdiction. Section § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The courts ruled that § 1362 did not apply. *See Spokane Tribe*, 790 F. Supp. at 1059-60 (noting that in Blatchford v. Native Village of Noatak, 111 S.Ct. 2578 (1991), the Supreme Court determined that § 1362 does not establish federal jurisdiction "in and of itself"). *Accord Sault Ste. Marie Tribe*, 800 F. Supp. at 1487.

156. 776 F. Supp. 550 (S.D. Ala. 1991).

157. *Id.* at 554.

158. *Id.* The court noted that in Carr v. City of Florence, Ala., 916 F.2d 1521, 1524 (11th Cir. 1990), the Eleventh Circuit ruled that express consent must be through legislative enactment.

159. *Poarch Band*, 776 F. Supp. at 554.

160. In *Spokane Tribe*, however, the court devoted a small section of its opinion to this issue. 790 F. Supp. at 1060. The court noted that express consent was not argued and that there was no basis for finding expressed consent. The court cited to the Supreme Court holding in Clark v. Barnard, 108 U.S. 436, 447 (1883), for the rule that the only way a state may lose its immunity is to expressly consent to suit in federal court. 790 F. Supp. at 1060.

161. *See supra* note 141.

162. 800 F. Supp. 1484 (W.D. Mich. 1992).

163. *Id.* at 1488.

interstate commerce and that Supreme Court decisions hold that state sovereignty cannot be used to prohibit Congress from regulating interstate commerce.[164] The Tribe further argued that states had also relinquished their sovereignty under the Indian Commerce Clause when they ratified the Constitution.[165] The Indian Commerce Clause allows Congress "[t]o regulate commerce . . . with the Indian tribes[.]"[166]

The court in *Sault Ste. Marie Tribe* disagreed with the Tribe. Instead, it relied on *Blatchford* in which the Court held that states had not waived their immunity against Indian tribes when the states adopted the Constitution.[167] The *Sault Ste. Marie Tribe* court noted that there were differences between this case and *Blatchford*,[168] but it decided that states did not implicitly surrender their sovereignty under IGRA.[169]

In *Poarch Band*, the court also rejected the Tribe's "plan of convention" argument. The Tribe argued that because the state of Alabama had accepted the benefits of IGRA, the State must have realized that participation in this federal program was conditioned on a waiver of sovereign immunity.[170] The Poarch Tribe relied heavily on the Supreme Court's decision in *Parden v. Terminal Railway*.[171] In *Parden*, the Supreme Court held that when a state chooses to engage in business that is regulated by the federal government pursuant to the Commerce Clause, that state implicitly consents to the federal courts' jurisdiction.[172]

The court found two reasons to reject the Poarch Tribe's arguments. First, the court declared that *Parden* had been limited by later Supreme Court decisions.[173] Second, according to the court, even if *Parden* was

164. *Id.* The Tribe cited Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989) and Parden v. Terminal Ry., 377 U.S. 184 (1964).

165. *Sault Ste. Marie Tribe*, 800 F. Supp. at 1488.

166. U.S. CONST. art.I, § 8, cl. 3. *See also supra* note 14.

167. *Sault Ste. Marie Tribe*, the court cited *Blatchford*, 111 S.Ct. at 2582.

168. Specifically, the court noted that in *Blatchford* "the Court did not consider whether the states had agreed to the surrender of sovereign immunity when Congress legislated pursuant to the Indian Commerce Clause." 800 F. Supp. at 1488. The Court in *Blatchford* only determined whether the states had surrendered their sovereign immunity vis-à-vis Indian tribes when the Constitution was adopted. *Id.*

169. *Id.*

170. 776 F. Supp. at 556.

171. 377 U.S. 184 (1964).

172. 776 F. Supp. at 556 (citing *Parden*, 377 U.S. at 192).

173. *Id.* at 556-57. The court referred to several decisions that limited *Parden*: Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 273 (1985); Edelman v. Jordan, 415 U.S. 651 (1974); Employees of Dep't of Pub. Health & Welfare v. Missouri, 411 U.S. 279 (1973). The court stated:

controlling, the decision did not apply. Alabama did not engage in gambling or receive any federal funds for negotiating a compact with the Tribe.[174] In fact, the court indicated that because IGRA demands that states negotiate with tribes, the Act attempts to abrogate the states' immunity. The states do not truly consent under IGRA. Therefore, under the *Parden* doctrine, the state of Alabama did not consent to federal jurisdiction.[175] Other Eleventh Amendment-Indian gaming decisions have also rejected the "plan of convention" consent argument.[176]

Although no court has accepted the argument that states implicitly consented to federal jurisdiction under IGRA, courts have divided on whether Congress may abrogate the states' sovereign immunity under IGRA. Two courts decided that Congress abrogated the states' sovereign immunity under the Act, legislating pursuant to the Indian Commerce Clause.[177] Five other courts ruled that Congress cannot abrogate the states' immunity when legislating pursuant to the Indian Commerce

---

> Later cases have not read the *Parden* exception expansively. No Supreme Court decision except *Parden* itself, which was a five-four decision, has found consent under the *Parden* theory, and the requirement that Congress' intention to condition a state's participation in federally regulated activities on a forfeiture of sovereign immunity be clearly expressed has been strengthened so that already part of *Parden* stands overruled.

Poarch Band, 776 F. Supp. at 556.

174. 776 F. Supp. at 557.

175. *Id.*

176. In Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T (W.D. Okla. Sept. 8, 1992), the court found *Parden* inapplicable:

> *Parden* is inapplicable, as it was premised on the theory that by becoming a common carrier in interstate commerce, the State of Alabama had entered a field of economic activity that was federally regulated and had implicitly consented to be bound by that regulation and be subject to suit in federal court. . . . Here the state has not voluntarily '[left] the sphere that is exclusively its own and enter[ed] into activities subject to congressional regulation.'

Ponca Tribe, No. 92-988-T, slip op. at 5 (quoting *Parden*, 377 U.S. at 196).

Interestingly, even in one of the decisions in which a court held that the state was not immune, the court decided not to base its decision on an implied consent theory. Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992). The court explained:

> We thus rest today's decision primarily on Congress' plenary power over Indian affairs, rather than on a "mutuality in the plan of convention" theory, for a number of reasons. First, an explication of plenary congressional power is, in our view, the central thrust of *Union Gas*, and is a proper basis on which to find congressional power to abrogate. In addition, the latter theory seemingly begs the question by presuming that the states have already ceded their sovereignty. Finally, we think, "plan of convention" cession is more properly a "waiver" argument than an "abrogation" argument, and in the Indian affairs context, was rejected in *Blatchford*[.]

Id. at 655, 661 n.6.

177. *See, e.g.*, Cheyenne River Sioux Tribe v. South Dakota, No. 92-3009 (D.S.D. Jan. 8, 1993); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992).

Clause.[178]

In *Poarch Band*, the court rejected the Tribe's arguments that legislation enacted pursuant to the Indian Commerce Clause abrogates states' Eleventh Amendment immunity.[179] The Tribe relied on *Union Gas* for the proposition that because Congress has the authority to abrogate the states' immunity when legislating pursuant to the Interstate Commerce Clause,[180] it can also override the states' immunity under the equally broad Indian Commerce Clause.[181] The court disagreed, reasoning that the holding in *Union Gas* was too "unstable" to extend to the Indian Commerce Clause.[182] Additionally, the court saw differences between the two commerce clauses. Although Congress may abrogate the states' immunity pursuant to the Interstate Commerce Clause, it may not do so pursuant to the Indian Commerce Clause.[183] Four other courts employed similar reasoning to conclude that Congress cannot abrogate the states' sovereign immunity through IGRA, enacted pursuant to the In-

178. *See* Pueblo of Sandia v. New Mexico, No. 92-0613 JC (D.N.M. Nov. 13, 1992); Ponca Tribe of Oklahoma v. Oklahoma, No. 92-988-T (W.D. Okla. Sept. 8, 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991).

179. 776 F. Supp. at 558-59.

180. *Id.* at 558.

181. *Id.*

182. *Id.* at 558-59. The court found several reasons not to rely on *Union Gas* as controlling precedent. First, the court described the decision in *Union Gas* as resting on a "four-and-a-half"-vote majority. *Id.* In his concurring opinion, Justice White said only: "I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* at 558 (quoting *Union Gas*, 491 U.S. at 57). Also, the court noted that because *Union Gas* is not directly on point, it should not be given an expansive reading. Moreover, Justices Brennan and Marshall, who joined the plurality opinion, are no longer on the Court. Three of the current members joined Justice Scalia's dissent, and he noted that the holding in *Union Gas* was not likely to endure. 776 F. Supp. at 559.

183. *Id.* at 559. The court noted that even the Supreme Court acknowledged that the Indian Commerce Clause and the Interstate Commerce Clause are different. *Id.* The *Poarch Band* court acknowledged that in Cotton Petroleum Corp. v. New Mexico, 490 U.S.163, 192 (1989), the Supreme Court stated: "The extensive case law that has developed under the Interstate Commerce Clause[ ] is premised on a structural understanding of the unique role of the states in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." 776 F. Supp. at 559 (alteration in original). Therefore, the court in *Poarch Band* was wary of extending the *Union Gas* holding to mean that Congress may abrogate a state's immunity when legislating pursuant to the Indian Commerce Clause. 776 F. Supp. at 559. Finally, the court reasoned that the Indian Commerce Clause of Article I, which was adopted before the Eleventh Amendment, could not restrict the operation of the latter Amendment. 776 F. Supp. at 559.

dian Commerce Clause.[184]

In *Seminole Tribe*, however, the court ruled that Congress properly abrogated the states' Eleventh Amendment immunity through IGRA.[185] The court first observed that Congress has the authority to regulate Indian affairs through the Indian Commerce Clause, second, that Indian issues are "uniquely federal," and additionally, that congressional authority over Indian affairs is plenary.[186] Next, the court noted that Congress may abrogate the states' immunity when it acts pursuant to its plenary power embodied in the Constitution.[187] The court reasoned that when Congress legislates pursuant to its plenary power in relation to Indian tribes, there is a strong basis to find congressional authority to abrogate states' immunity.[188]

The court then compared *Seminole Tribe* to *Union Gas*.[189] In the court's opinion, the holding in *Union Gas* rested on two grounds. Most importantly, stated the court, Congress has the authority to abrogate the states' immunity when legislating pursuant to the Interstate Commerce

184. In *Spokane Tribe*, the court held that Congress may not properly abrogate states' sovereign immunity when acting pursuant to the Indian Commerce Clause. 790 F. Supp. at 1060-61. As in *Poarch Band*, the court in *Spokane Tribe* decided that the applications of the two commerce clauses were distinguishable. The court cited *Blatchford,* in which the Supreme Court noted that the states had surrendered immunity to each other, creating a "mutuality of concessions." *Id.* at 1061. However, because the tribes have retained their immunity to suits by the states, no mutuality exists. *Id.* (citing *Blatchford*, 111 S.Ct. at 2583). Therefore, the fact that Congress may abrogate the states' authority pursuant to the Interstate Commerce Clause does not mean that Congress may do so pursuant to the Indian Commerce Clause. *Id. Accord Sault Ste. Marie Tribe*, 800 F. Supp. at 1489; *Ponca Tribe*, No. 92-988-T, slip op. at 6-8.

185. 801 F. Supp. at 658-63.

186. *Id.* at 658-60. The Court found support for these propositions in several earlier Supreme Court decisions, including: Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (holding that the Indian Commerce Clause provides Congress with plenary power over Indian affairs); Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234-35 (1985) (reasoning that once the Constitution was adopted, the federal government had exclusive control over Indian affairs); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (noting that Congress has broad authority to regulate Indian affairs under the Indian Commerce Clause); Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("Resolution of the instant issue . . . turns on the unique federal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status. . . . The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832) (declaring that in the Constitution, Congress was granted the power to regulate commerce with the Indian tribes, removing the restraints of the Articles of Confederation).

187. *Seminole Tribe*, 801 F. Supp. at 660. The first case the court cited for support was *Union Gas*, 490 U.S. at 15.

188. *Seminole Tribe*, 801 F. Supp. at 660.

189. *Id.* at 660-61.

Clause because Congress' authority over interstate commerce is plenary.[190] Congress also has this authority under the "plan of convention" because the states surrendered their immunity in the area of interstate commerce when they adopted the Constitution.[191] The court concluded that Congress has the power to abrogate the states' immunity pursuant to the Indian Commerce Clause because Congress has plenary power over Indian affairs that is "at least as broad as Congress' interstate power."[192]

The court in *Seminole Tribe* concluded by commenting on the defendant's arguments.[193] The defendant based its arguments on the *Sault Ste. Marie Tribe, Spokane Tribe,* and *Poarch Band* decisions.[194] First, the defendant noted that the earlier Indian gaming decisions doubted the applicability and "continuing vitality of *Union Gas*."[195] The court maintained, however, that *Union Gas* was binding.[196] Moreover, the court decided that because the Indian Commerce Clause is in the same clause of the Constitution as the Interstate Commerce Clause,[197] and because Congress' power in both areas is plenary, the holding and reasoning of *Union Gas* apply to Eleventh Amendment-Indian gaming cases.[198]

The *Seminole Tribe* court rejected all of the defendant's attempts to distinguish the Interstate and Indian Commerce Clauses.[199] The court noted that in oral argument, the defendant had admitted that Congress' power to abrogate the states' immunity in Indian commerce was just as great with respect to interstate commerce.[200] The defendant then cited

190. *Id.* See *supra* notes 131-41 and accompanying text for a more complete explanation of the *Union Gas* decision.

191. 801 F. Supp. at 660-61. However, in a footnote, the court explained why it did not rest its opinion on a "plan of convention" theory. *See id.* at 660-61 n.7. *See also supra* note 176.

192. 801 F. Supp. at 661. In a footnote, the court referred to several cases and law review articles that concluded that the Indian Commerce Clause should be read at least as broadly as the Interstate Commerce Clause. *Id.* at 662-63 n.8.

193. *Id.* at 661-63.

194. *Id.*

195. *Id.* at 661. In particular, the court in *Seminole Tribe* noted that in *Poarch Band*, the court thought that *Union Gas* rested on shaky ground because of its plurality opinion. *Id.* (citing *Poarch Band*, 776 F. Supp. at 558).

196. *Seminole Tribe,* 801 F. Supp. at 661.

197. U.S. CONST. art. I, § 8, cl. 3. *See also supra* note 14.

198. 801 F. Supp. at 661.

199. *Id.* at 662. The court commented: "[C]ongressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian commerce." *Id.*

200. *Id.* at 662. The opinion provided a portion of the oral argument:

THE COURT: [I]s congressional authority under Article I, Section 8, dealing with the

language from a Supreme Court decision which suggested that the two clauses had different applications.[201] However, the court interpreted that language to mean that Congress' power to legislate under the Indian Commerce Clause was just as great as its legislative authority under the Interstate Commerce Clause.[202]

Finally, the defendant relied on *Blatchford* to argue that the Indian Commerce Clause does not give Congress the authority to abrogate a state's sovereign immunity.[203] The court, however, disagreed. In the court's view, *Blatchford* merely held that when the states adopted the Constitution, they did not waive their immunity to all suits by Indian tribes.[204] The decision would therefore not support the defendant's abrogation argument because it did not address Congress' authority to abrogate a state's immunity.[205]

To date, the key issue in Eleventh Amendment-Indian gaming cases has been whether Congress has the authority to abrogate the states' immunity under IGRA. Although other arguments have been advanced by

---

power to regulate commerce with the Indian tribes any less sweeping than the power to regulate commerce with foreign nations and among the several States?
MR. GLOGAU: No, it is not.

201. The defendant quoted Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989), in which the Court noted that "[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." 801 F. Supp. at 662.

202. The court in *Seminole Tribe* quoted from a later section of the *Cotton Petroleum* opinion:

> In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, *the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs*.

801 F. Supp. at 663 (emphasis in original) (quoting *Cotton Petroleum*, 490 U.S. at 192).

203. 801 F. Supp. at 663.

204. *Id.*

205. *Id.* The court explained:

> [The defendant's] reliance is misplaced, we think, since *Blatchford* is primarily a "waiver" case, and its concerns over a lack of "mutuality of . . . concession"[between the tribes and the states], . . . are properly limited to that context. But even if, as Defendants assert, the "waiver" principles enunciated in *Blatchford* can be said to speak to Congress' power to abrogate—and we think they do not—the lack of State-Indian mutuality is a matter of relatively minor importance. First, Congress' plenary power over the uniquely federal area of Indian affairs is the primary basis on which we rest today's decision. Second, we are not persuaded that a lack of mutuality between the States and the Indian nations is a compelling deficiency, since there did in fact exist a mutuality between the federal government—in which plenary power to regulate Indian affairs was vested—and the States. And although the lack of State-Indian mutuality may undercut the argument that the States *waived* their immunity to any and all suits by Indian tribes, the importance of that want of mutuality is diminished when a suit is brought pursuant to explicit congressional authorization, since the linchpin of abrogation must be the nature of the power pursuant to which Congress raised the Eleventh Amendment barrier.

Id.

both tribes and states,[206] the resolution of the Eleventh Amendment issue has determined the success or demise of high-stakes Indian gambling.

206. Several additional arguments are worthy of note. First, in several cases, tribes have argued that by the *Ex parte Young* doctrine, the tribe may sue individual state officials, such as the governor, even if the Eleventh Amendment bars the tribes from suing the states directly. In *Ex parte* Young, 209 U.S. 123 (1908), the Supreme Court established that the Eleventh Amendment does not prevent a suit in federal court to enjoin state officials from acting in violation of the Constitution or federal laws. In *Spokane Tribe*, for example, the court concluded that IGRA established federal court jurisdiction against the individual defendants, Governor Gardner and Deputy Director Miller. 790 F. Supp. at 1063. Therefore, even though the court in *Spokane Tribe* granted the defendant-state's motion to dismiss based on the Eleventh Amendment, it denied the defendant's motion to dismiss the suit against the named individuals. *Id.*

In *Poarch Band*, too, the Tribe urged that according to the *Ex parte Young* doctrine, the federal district court had jurisdiction under IGRA to hear the suit against the Governor in his official capacity. In the first *Poarch Band* case, 776 F. Supp. 550 (S.D.Ala. 1991), the court did not decide the *Ex parte Young* issue. However, in a subsequent case in which the *Ex parte Young* doctrine was the sole issue, Poarch Band of Creek Indians v. Alabama, No. 91-0757-AH-M (S.D.Ala. 1992), the court decided that the suit against the Governor was actually a suit against the State of Alabama. Therefore, the court granted the Governor's motion to dismiss. *Accord Ponca Tribe*, No. 92-988-T, slip op. at 8-9; *Pueblo of Sandia*, No. 92-0613JC, slip op. at 1.

Second, in *Sault Ste. Marie Tribe*, the Tribe employed a novel strategy. The Tribe asserted that IGRA was adopted pursuant to the Interstate Commerce Clause as well as the Indian Commerce Clause and that *Union Gas* should be directly controlling. Accordingly, the Tribe asserted that the court should find that Congress has the authority to abrogate the states' immunity under IGRA. 800 F. Supp. at 1490. The court agreed with the Tribe that one of the purposes of the Act was to protect against the infiltration of organized crime. *Id.* However, in the court's opinion, the Indian Commerce Clause, not the Interstate Commerce Clause, provided Congress with the authority to regulate in this manner. *Id.*

Third, the court in *Cheyenne River Sioux Tribe* found additional reasons why the Eleventh Amendment does not prevent a suit under IGRA's jurisdictional provision, § 2710 (d)(7)(A). One reason was that no monetary or injunctive relief could be sought against the state. *Cheyenne River Sioux Tribe*, No. 92-3009, slip op. at 6. Additionally, South Dakota, the defendant, could not shield itself behind the Amendment because in the past, the state had "actively engaged in negotiating State-Tribal gaming compacts. It ha[d] reaped benefits from these negotiations by being able to provide input into how Indian gaming will be conducted within the state." *Id.*

Finally, in *Ponca Tribe* and in *Pueblo of Sandia,* the courts imposed an additional jurisdictional barrier to federal court access in class III cases. The courts found that the Tenth Amendment, as well as the Eleventh, precluded the tribes' from suing the states. *Ponca Tribe*, No. 92-988-T, slip op. at 9-12; *Pueblo of Sandia*, No. 92-0613-JC, slip op. at 3. In *Ponca Tribe*, the State pointed to the recent Tenth Amendment case, New York v. United States, 112 S. Ct. 2408 (1992). In *New York*, the Supreme Court considered whether Congress improperly directed the states to regulate waste disposal in the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Court held that although Congress can urge a state to adopt a legislative program that conforms to federal interests, it cannot compel the state to regulate. 112 S. Ct. at 2434-35. The court in *Ponca Tribe* applied the rule from *New York* and decided that "a critical alternative is missing in IGRA—a State may not simply decline to regulate Class III gaming; it does not have the option of refusing to act." *Ponca Tribe,* No. 92-988-T slip op. at 11. *Accord Pueblo of Sandia*, No. 92-0613-JC, slip op. at 3. *Contra Cheyenne River Sioux Tribe*, No. 92-3009, slip op. at 6-9. Therefore, the court in *Ponca Tribe* concluded that IGRA violated the Tenth Amendment, and the court granted the State's motion to

V. TWO JUDICIAL SOLUTIONS TO THE ELEVENTH AMENDMENT DILEMMA

Upon learning that in six out of eight decisions, federal district courts have held that states may successfully raise an Eleventh Amendment defense to tribal suits for class III gaming negotiations,[207] many observers are likely to assume that the states have won the war in Eleventh Amendment-Indian gaming cases. However, closer inspection reveals that only two courts—the District Court for the Southern District of Florida in *Seminole Tribe* and the District Court for the District of South Dakota in *Cheyenne River Sioux Tribe*—have reached the proper result on this issue.

Of the eight decisions, only *Seminole Tribe* and *Cheyenne River Sioux Tribe* are correct because they allow the purposes of IGRA to be implemented.[208] Both tribes now have the opportunity to generate revenue through class III, casino-style activities precisely because the courts rejected the states' Eleventh Amendment defenses.[209] The tribes in the other six cases, cannot even begin to develop sophisticated gambling operations because the federal courts have refused to hear the merits of their cases.[210]

In *Seminole Tribe*, the court correctly concluded that the scope of Congress' power under the Indian Commerce Clause is the same as it is under the Interstate Commerce Clause.[211] In reality, the "two clauses" are not distinct, but exist in the same clause of the Constitution,[212] and Congress has broad power when legislating under both clauses.[213]

---

dismiss based on both the Eleventh and Tenth Amendments. *Ponca Tribe*, No. 92-988-T, slip op. at 12.

The *Ponca Tribe* and *Pueblo of Sandia* decisions could have broad implications for future Indian gaming cases. These decisions are two of the most recent Eleventh Amendment-Indian gaming cases and are the first to consider and accept Tenth Amendment as well as Eleventh Amendment challenges to the jurisdictional provision of IGRA. *See supra* note 83. Unless future courts adopt a different judicial framework that is similar to the proposal in Part V of this Note, the tribes will have a difficult task overcoming two, previously-accepted, constitutional arguments against § 2710(d)(7).

207. *See supra* note 13.

208. See *supra* note 3 for the expressed statutory purpose of IGRA.

209. *See Seminole Tribe*, 801 F. Supp. at 655; *Cheyenne River Sioux Tribe*, No. 92-3009, slip op. at 6.

210. The courts did not consider the substance of the cases because they granted the states' motions to dismiss. *See supra* note 13.

211. 801 F. Supp. at 660-63.

212. *See supra* note 14.

213. *See, e.g., Seminole Tribe*, 801 F. Supp at 661 ("Since Congress clearly possesses complete and plenary authority in the area of Indian affairs, which is at least as broad as Congress' interstate

Therefore, just as *Union Gas* decided that Congress may abrogate the states' immunity when legislating pursuant to the Interstate Commerce Clause,[214] *Seminole Tribe* properly held that Congress may also abrogate the states' immunity pursuant to the Indian Commerce Clause.[215]

Nevertheless, even the court in *Seminole Tribe* did not fully address this issue in its proper legal framework. As shown earlier, in all eight decisions the courts' interpretations of *Union Gas*[216] have determined whether Congress may properly subject the states to suit in federal court through section 2710(d)(7) of IGRA.[217] However, the future of class III gaming does not need to rest on such an unsatisfactory and unstable foundation.

All eight courts have failed to consider a long-standing canon of Indian law. Language in federal statutes that deal with Indian tribes must be liberally construed or interpreted in favor of the tribes.[218] This liberal construction rule is derived from the historical relationship between Con-

---

commerce power . . . we hold that Congress has the power to abrogate the States' immunity pursuant to the Indian Commerce Clause.") (footnote omitted).

214. *Union Gas*, 491 U.S. at 15-17. *See also supra* notes 132-41 and accompanying text.

215. *See Seminole Tribe*, 801 F. Supp. at 658-63. *See also supra* notes 185-92 and accompanying text.

216. The six courts that allowed the Eleventh Amendment defense believed that *Union Gas* rested on a "plan of convention" theory. *See supra* notes 141-43 and accompanying text.

In contrast, the courts in *Seminole Tribe* and *Cheyenne River Sioux Tribe* decided that *Union Gas* was premised on the theory that Congress' power over interstate commerce is plenary. Because Congress' power over Indian affairs is also plenary, Congress may abrogate the states' immunity by enacting legislation, such as IGRA, under the Indian Commerce Clause.

See also supra notes 179-94 and accompanying text.

217. *See supra* note 83.

218. One IGRA case employed the liberal construction rule on an unrelated issue. *See* Oneida Tribe of Indians of Wisconsin v. Wisconsin, 951 F.2d 757 (7th Cir. 1991) (holding that the liberal construction rule should be applied to determine whether a proposed gambling activity should be classified as class II or class III). The rule has been applied in many other Indian cases. *See generally* Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (noting that language in various treaties between the Cherokees and United States "should never be construed to [the Indians'] prejudice"); Winters v. United States, 207 U.S. 564, 576-77 (1908) (stating that where there are two possible interpretations, the liberal construction rule should be applied to support the purpose of an agreement); Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2589-90 (1991) (Blackmun, J., dissenting) (holding that 25 U.S.C. § 1362, which provides that federal district courts have jurisdiction of all civil actions brought by Indian tribes, should include tribal litigation that the federal government could have brought as the tribes' guardian); Antoine v. Washington, 420 U.S. 194, 212 (1975) (Douglas, J., concurring) ("The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak, and defenseless people, who are wards of the nation." (quoting from Choate v. Trapp, 224 U.S. 665, 675 (1912)).

gress and the Indian tribes.[219] Early Supreme Court cases recognized that Congress is a guardian of the tribes.[220] Moreover, historically, the agreements made between the tribes and the United States have frequently been disadvantageous to the Indians.[221] Therefore, when Congress enacts legislation that affects Indian tribes, courts should presume that Congress intended that the law would benefit the tribes.[222]

Certainly, the liberal construction canon should apply to IGRA. The legislative history, expressed statutory purpose, and comments of individual members of Congress clearly indicate that IGRA was passed for the benefit of Indian tribes.[223] In all eight Eleventh Amendment-Indian gaming cases, the courts arrived at legally supportable conclusions, finding section 2710(d)(7) either valid or invalid.[224] Because both interpretations are legally supportable, however, the canon of liberal construction should break the tie, and favor the tribes' position. Results in IGRA cases will be much more consistent if federal courts apply this liberal

---

219. *See* COHEN, *supra* note 57, at 172-73. Cohen describes the reasons for the rule:

> Doubtful clauses in treaties or agreements between the United States and the Indian tribes have often been resolved by the courts in a nontechnical way, as the Indians would have understood the language and in their favor. The Supreme Court of the United States stated, *per* Justice Matthews, in the case of *Choctaw Nation v. United States*, [119 U.S. 1 (1886)]:
>
> > The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.
> >
> > [Id.] at 28.
>
> The principle of construction in favor of the Indians is also applicable to congressional statutes. . . . The theory also helps to explain the rule of statutory construction, *often recited but not always followed*, that general acts of Congress do not apply to Indians, if their application would affect the Indians adversely, unless congressional intent to include them is clear.

COHEN, *supra* note 57, at 172-73 (footnotes omitted) (emphasis added).

220. *See supra* note 74. Cohen noted that, "the practical significance of the wardship concept . . . is to justify certain types of legislation that would otherwise be held unconstitutional." COHEN, *supra* note 57, at 171.

221. *See, e.g.*, Wilcomb Washburn, *The Historical Context of American Indian Legal Problems*, *in* AMERICAN INDIANS AND THE LAW 12 (L. Rosen ed., 1976); P. GATES, THE RAPE OF INDIAN LANDS (1979); Winifred T. Gross, Note, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes*, 9 AM. INDIAN L. REV. 309, 317 (1981) (citing United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979)).

222. *See supra* note 218.

223. *See supra* notes 1-3, 56-59, 72-77 and accompanying text.

224. *See* part IV and accompanying footnotes.

construction canon in the future. Courts will then recognize that plausible arguments exist to find section 2710(d)(7) constitutional or unconstitutional,[225] but that as a matter of law, the section is valid in the context of Indian affairs. States, therefore, may not assert an Eleventh Amendment defense to IGRA because section 2710(d)(7) vests jurisdiction in the federal courts to resolve tribal-state conflicts regarding class III gaming.

Courts might also reach this same result by adopting a second, more novel approach. As mentioned, the liberal construction canon is derived from Congress' historical role as a guardian of Indian tribes.[226] Although the Supreme Court has been given no such formal role, the Court, too, has assumed a special responsibility toward the Indian tribes. The foundation of Indian law began with the judicial branch, not with the executive or legislative branches.[227] Language in both old and modern decisions reflects the Court's concern with the tribes' well-being. In many opinions, the Court has said that the "Federal Government" or "the Court" (as opposed to simply "Congress") has a duty to protect the Indian tribes.[228] Therefore, it seems reasonable and within the spirit of

225. *See supra* note 224.

226. *See supra* notes 218-19.

227. In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)—the so-called "Marshall Trilogy"—the Supreme Court handed down the opinions that formed the foundation of federal Indian law.

At the time of the Marshall Trilogy, neither Congress nor the President was either willing or able to establish a consistent set of rules for dealing with Indian tribes. President Jackson was clearly antagonistic toward Indian interests. In referring to *Worchester*, in which the court struck down state laws and released a defendant-missionary who was convicted of preaching to the Indians, Jackson purportedly declared: "John Marshall has made his law; now let him enforce it." Anton Chroust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Non-enforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960).

Congress was also institutionally unprepared to deal systematically with Indian tribes. Congress mostly dealt with tribes through individual treaties. *See also supra* note 74. In the Marshall Trilogy, Chief Justice Marshall was the first to recognize the federal government's trust obligation to the Indian tribes.

228. *See, e.g., Blatchford*, 111 S.Ct. at 2589 (1991) (Blackmun, J., dissenting) ("Fundamentally, the vindication of Native American rights has been the *institutional responsibility of the Federal Government* since the Republic's founding."); United States v. Antelope, 430 U.S. 641, 645 (1977) ("[c]lassifications singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by *the ensuing history of the Federal Government's relations with the Indians*.") (emphasis supplied); Morton v. Ruiz, 415 U.S. 199, 236 (1974) ("*The overriding duty of our Federal Government to deal fairly with Indians* wherever located . . .") (emphasis supplied); Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized *the distinctive obligation of trust incumbent upon the Government* in its dealings with these dependent and

the liberal construction canon to expand the canon's application to Supreme Court precedent. Accordingly, if a Supreme Court decision can be interpreted to have more than one meaning, some meanings with detrimental effects and some meanings with favorable effects on the tribes, the favorable interpretation must be adopted in the context of Indian affairs.

Applying this proposed rule to the Eleventh Amendment-Indian gaming cases, states would be unable to raise an Eleventh Amendment defense to section 2710(d)(7) and would be subjected to the jurisdiction of the federal courts. The *Seminole Tribe* interpretation of *Union Gas*[229]—the interpretation most favorable to the tribes—would dictate that Congress has the right to abrogate the states' sovereign immunity when legislating pursuant to the Indian Commerce Clause, just as Congress has this authority when legislating pursuant to the Interstate Commerce Clause. IGRA, enacted pursuant to the Indian Commerce Clause, therefore, would defeat any attempt by the states to raise a jurisdictional defense, including an Eleventh Amendment defense.

Both of these proposed judicial solutions to the Eleventh Amendment dilemma in Indian gaming cases are modest. For over 150 years, courts have applied the canon of liberal statutory construction.[230] There is no reason why this rule should not be applied to IGRA, which was specifically enacted for the tribes' benefit.[231] Additionally, the canon only applies in Indian cases. With respect to IGRA, the canon suggests only that IGRA should be construed liberally in favor of the Indian tribes. Moreover, the liberal construction canon can only be expanded to Supreme Court precedent in Indian cases. For example, although *Union Gas* should be interpreted in the tribes' favor for Eleventh Amendment-Indian gaming cases, in non-Indian contexts, alternative interpretations might be permissible. Finally, this liberal precedent rule would apply only to Supreme Court decisions. The proposed rule stems from the

---

sometimes exploited people.") (emphasis supplied); United States v. Kagama, 118 U.S. 375, 384 (1886) ("This [duty of protection by the federal government] has always been recognized by the Executive and by Congress, *and by this court* . . .") (emphasis supplied).

Additionally, Congress recognizes that it shares its plenary power with the other governmental branches. Senator Daniel Evans declared, "The entire Federal Government owes a trust obligation to the tribes. . . ." S. REP. NO. 446, at 3105.

229. *See supra* notes 185-92 and accompanying text.

230. *See supra* notes 218-19 and accompanying text.

231. It is quite possible that the courts simply overlooked this rule of statutory construction. Felix Cohen has noted that courts often fail to apply this canon. *See supra* note 219.

Court's unique role, as a branch of the federal government, in relation to Indian tribes. The rule would not apply to state court decisions and would arguably not even apply to decisions of lower federal courts, which have not had such a unique relationship with the tribes.[232]

VI. CONCLUSION

The future of class III Indian gaming depends on whether states continue to refuse to negotiate tribal-state compacts and the manner in which the federal courts respond to the states' jurisdictional challenges to IGRA. The states now have the upper hand in their disputes with Indian tribes because no court has analyzed the issue correctly.[233] However, as this Note suggests, the Indian tribes actually have the more persuasive, historical arguments working to their advantage. By applying the statutory construction canon to IGRA, courts in the future will realize that through section 2710(d)(7), Congress may override the states' Eleventh Amendment defense and subject the states to the jurisdiction of the federal courts. Perhaps this same result can be achieved by expanding the liberal construction rule to Supreme Court precedent. By adopting one or both of these approaches, courts will fulfill the purposes of IGRA by enabling tribes to earn much-needed revenue through class III gambling activities.

T. Barton French, Jr.

---

232. Unlike the Supreme Court, neither state nor lower federal courts have assumed the role of guardian of Indian tribes. *See supra* note 74. The states' role has traditionally been inimical to the Indian tribes, and the Supreme Court alone, through the Marshall Trilogy, developed the trust-guardian doctrine.

233. Currently, the *Sault Ste. Marie Tribe, Spokane Tribe, Ponca Tribe*, and *Seminole Tribe* decisions are on appeal in the Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal, respectively.