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Indian Gaming - The First Circuit Interprets the Indian Gaming Regulatory Act: Rhode Island v. Narragansett Indian Tribe

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INDIAN GAMING—The First Circuit Interprets the Indian Gaming Regulatory Act: *Rhode Island v. Narragansett Indian Tribe*

I. INTRODUCTION

Gambling in the United States is big business. In the past decade, annual gross revenues from the gambling industry have grown from less than $14 billion to more than $30 billion.[1] Indian gaming is fast becoming a large part of this industry, accounting for $6 billion a year.[2] Accompanying the growth of Indian gaming is conflict over its future. In fact, the fight over Indian gaming has escalated into an all-out war.[3] One reason for the conflict is that tribal casinos are seen as a potential enemy of the conventional gambling industry.[4] Another reason is that state politicians, many of whom oppose gambling of all types in their states, certainly do not want gambling that would not produce any state tax revenue.[5] However, despite strong opposition, Indian gaming has spread across the United States at a remarkable rate. Twenty-four states currently have some form of tribal gaming.[6]

The federal Indian Gaming Regulatory Act (IGRA) governs gambling on Indian reservations.[7] Since its enactment in 1988, the IGRA has

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1. Rick Wartzman & Pauline Yoshihashi, *Gambling Industry Says Tax Means Snake Eyes, But from Washington It Looks Like a Natural*, WALL ST. J., Mar. 31, 1994, at A16. The industry is expected to keep growing at a healthy rate. *Id.*

2. Pauline Yoshihashi, *Gambling: As Indian Casinos Spread, Politicians and Rivals Maneuver to Fight the Trend*, WALL ST. J., May 4, 1993, at B1. Indian gaming has become the most geographically widespread form of legal gaming. *Id.*

3. *See id.* ("Regional fights over Indian casinos, one of the fastest-growing sectors of legal gambling, have escalated into all-out political war."). Both politicians and conventional casino operators are trying to halt the spread of tribal gaming. *Id.* Recently, well-known casino entrepreneur Donald Trump sued Interior Secretary Bruce Babbitt and the chairman of the National Indian Gaming Commission, charging them with providing Indians with preferential treatment in the issuance of casino licenses and alleging that the federal Indian Gaming Regulatory Act is unconstitutional. *Id.*

4. *See id.* (noting that Indian casinos have the most potential to hurt the conventional gambling industry).

5. *See id.* ("[T]o many politicians, the only thing worse than a casino in their state is one that doesn't produce any dollars for the public coffers.").

6. As of May 1993, states with Indian gaming and the number of operations in each are: Oklahoma (23); California (15); Wisconsin (13); Minnesota (12); Washington (9); Michigan (8); Arizona (7); South Dakota (6); New Mexico (5); New York (5); Florida (4); Kansas (3); North Dakota (2); Oregon (2); Alabama (1); Colorado (1); Connecticut (1); Iowa (1); Idaho (1); Louisiana (1); Missouri (1); Mississippi (1); Montana (1); and Nebraska (1). *Id.*

7. The IGRA is codified at 25 U.S.C. §§ 2701-2721 (1988). "The purpose of this chapter is . . . (3) to declare . . . the establishment of independent federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands . . . ." *Id.* § 2702.

spawned a substantial amount of litigation. *Rhode Island v. Narragansett Indian Tribe*[8] (*"Narragansett"*), which interprets the requirements of the IGRA and its effect on previous agreements between the states and Indian tribes, is a landmark case in the evolution of the IGRA and provides strong precedent for future IGRA litigation.

This Note presents *Narragansett* as an example of how the courts will interpret the IGRA, the most comprehensive piece of legislation dealing with the issue of Indian gaming to date. In Part II, this Note presents the historical background of the IGRA and the Rhode Island Indian Claims Settlement Act ("Settlement Act"), a pre-IGRA agreement between the state of Rhode Island and the Narragansett Indian Tribe ("the Tribe"). Part III examines *Narragansett* and its interpretation of the IGRA. Part IV presents a critical analysis of the First Circuit's decision in *Narragansett* and discusses the constitutional issues relating to the IGRA. Finally, Part V looks at the impact of *Narragansett* on the future of the IGRA.

II. BACKGROUND

A. The Rhode Island Indian Claims Settlement Act

The dispute over Indian gaming in Rhode Island began in 1978 when the Narragansett Tribe filed two lawsuits in federal court seeking approximately 3,200 acres of public and private land in Charlestown, Rhode Island.[9] The suits named the Director of the Rhode Island Department of Environmental Management and "myriad private landowners" as defendants in the suit.[10] The Tribe claimed that it owned and occupied these lands "as part of its aboriginal territory and reservation."[11] Because these pending lawsuits threatened ill economic effects for the residents of Charlestown,[12] rigorous negotiations were conducted by the parties.[13] As a result, the parties reached an agreement in which the Tribe agreed to abandon its land claims in return for a lump sum payment and approximately 1800 acres of land.[14] As part of this agreement, the Rhode Island legislature passed the Narragansett Indian Land Management Corporation Act.[15] This Act created a corporation charged with managing and holding title to the real property that the Tribe acquired.[16] Finally,

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8. 19 F.3d 685, *cert. denied*, 115 S. Ct. 298 (1994).

9. Town of Charlestown v. United States, 696 F. Supp. 800, 801-02 (D.R.I. 1988), *aff'd*, 873 F.2d 1433 (1st Cir. 1989). The two lawsuits were later consolidated. *Id.* at 802.

10. *Id.* at 801.

11. *Id.* at 802.

12. "[T]he pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits." 25 U.S.C. § 1701(b) (1988).

13. *Charlestown*, 696 F. Supp. at 802.

14. *Narragansett*, 19 F.3d at 689.

15. R.I. GEN. LAWS §§ 37-18-1 to 37-18-15 (1990).

16. *Id.* § 37-18-4. The statute provided that the corporation would expire once the Tribe received recognition. *Id.* § 37-18-12.

because Congress possesses plenary power over Indian affairs,[17] the parties sought and obtained the approval of Congress, which blessed the Narragansett Indian Land Management Corporation Act by passing the Settlement Act.[18]

Generally, the Settlement Act reflects the original agreement between the state and the Tribe.[19] Specifically, it authorizes the money used to purchase 900 acres of private land for the Tribe.[20] Additionally, the Settlement Act grants a general exemption from federal, state, and local taxation to the settlement lands,[21] but states that the exemption does not apply to any income-producing activities occurring on the land.[22] The enactment of the Settlement Act was seen as a first of its kind[23] and a milestone in Indian relations.[24]

Beginning in 1983, the Settlement Act went through a number of changes. In 1983, the Secretary of the Interior recognized the Tribe as an Indian Tribe.[25] As a result, the Narragansett Indian Land Management Corporation Act was amended to allow the corporation to transfer settlement lands to the Tribe.[26] Subsequently, the Tribe deeded the settlement lands to the federal Bureau of Indian Affairs as trustee.[27]

B. The Federal Indian Gaming Regulatory Act

During the five years prior to the enactment of the IGRA, numerous bills were introduced in Congress to address the issue of gaming on Indian lands.[28] In 1986, *California v. Cabazon Band of Mission Indians*[29]

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17. U.S. CONST. art. I, § 8, cl. 3 (providing Congress with power to "regulate Commerce . . . with the Indian Tribes"); *see also* Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (noting the "plenary power of Congress to deal with the special problems of Indians").

18. The Settlement Act is codified at 25 U.S.C. §§ 1701-1716 (1988).

19. "[T]he parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress . . . ." *Id.* § 1701(d).

> [B]y virtue of the approval of a transfer of land . . . all claims against the United States, any State or subdivision thereof . . . by the Indian Corporation . . . arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources . . . shall be regarded as extinguished as of the date of the transfer.

Id. § 1705(a)(3).

20. *Id.* § 1710 ("There is hereby authorized to be appropriated $3,5000,000 to carry out the purposes of this subchapter.").

21. *Id.* § 1715(a).

22. *Id.* § 1715(b).

23. "[The Settlement Act] represents the first legislation submitted to Congress which would resolve the land claims of an Indian tribe . . . ." H.R. REP. No. 1453, 95th Cong., 2d Sess. 7, (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1951.

24. "[The Settlement Act] will serve as a landmark for the resolution of other land claims . . . ." *Id.*

25. 48 Fed. Reg. 6177-78 (1983).

26. R.I. GEN. LAWS § 37-18-14 (1990).

27. *Narragansett*, 19 F.3d at 689.

28. *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387, 395 (1993). For a complete treatment of the legislation introduced at this time, *see id.*; *see also* S. REP. No. 446, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073 [hereinafter *Senate Report*] ("[The IGRA] is the outgrowth of several years of discussions and negotiations . . . .").

29. 480 U.S. 202 (1987).

reached the Supreme Court's docket and drastically changed the direction of gaming legislation.[30] In *Cabazon*, a tribe sued a county for attempting to regulate bingo and card games on Indian lands.[31] The tribe eventually emerged victorious when the Court held that the state could not regulate tribal bingo.[32] However, the mere pendency of this case in front of the Supreme Court had a dramatic effect. Indian tribes, concerned that the Court might rule that regulation of Indian lands was proper, began to demonstrate a willingness to compromise with lawmakers in achieving federal legislation on Indian gaming.[33] In contrast, the states, confident that the Court would rule in favor of state regulation, became more steadfast in their opposition of Indian gaming.[34] The majority of opposition to Indian gaming came not from anti-gambling factions but from states where gambling was already legal,[35] demonstrating that opposition to the legislation was based primarily on economic rather than moral/social reasons.[36] Various Indian leaders also opposed the IGRA.[37] Despite this opposition, the IGRA moved toward approval.

Congress finally approved the IGRA in 1988 with the explicit primary goals of economic and political development for Indian tribes[38] and the protection of Indian gaming from criminal influences.[39] The IGRA also can be viewed as an attempt by Congress to fulfill what it sees as an obligation to Indian tribes to provide economic support without the consequences of government spending.[40] In enacting the IGRA, Congress

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30. *Senate Report*, *supra* note 28, at 3073 ("On April 29, 1986, the Supreme Court docketed the *Cabazon* case, significantly altering the course of the legislation as it was referred to the Senate.").

31. *Cabazon*, 480 U.S. at 204-06.

32. *Id.* at 221-22. The Court concluded that the state's interest in preventing the infiltration of organized crime did not justify state regulation in light of the tribe's interest in self-government. *Id.*

33. *Senate Report*, *supra* note 28, at 3073-74.

34. *Id.* at 3074.

35. Eric J. Swanson, *The Reservation Gaming Craze: Casino Gambling under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 475 (1992).

36. *See* 134 CONG. REC. 24,028 (1988) (statement of Sen. Evans) ("We should be candid about the interests surrounding this particular piece of legislation. The issue has never really been one of crime control, morality, or economic fairness.").

37. *See* 134 CONG. REC. 24,026 (1988) (statement of Sen. McCain) ("[A] few days ago a number of Indian leaders held a press conference here in Washington to express their strong opposition to the [IGRA] . . . .").

38. 25 U.S.C. § 2702(1) (1988) ("[One purpose is] 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."); *see also id.* § 2701(4) ("[Congress finds that] a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.").

39. *Id.* § 2702(2) (One purpose is to "shield [the Indians] from organized crime and other corrupting influences."); *see also Senate Report*, *supra* note 28, at 3071 (recognizing "fear that Indian Bingo and other gambling enterprises may become targets for infiltration by criminal elements").

40. *See* William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 HASTINGS CONST. L.Q. 71, 73 (1993) ("Indian gaming still had strong support in Congress from legislators who believed the federal government had a moral duty to provide financial support to Indian Tribes . . . . Moreover, gaming offered the added advantage of requiring little federal assistance at a time of deep concern over the growing budget deficit.").

attempted to balance the states' interests in regulating gambling with the tribes' interest of self-government.[41] Judicial insight into the purposes of the IGRA appears in several cases. In *Red Lake Band of Chippewa Indians v. Swimmer*,[42] Indian tribes challenged the validity of the IGRA.[43] The district court held that the IGRA was valid and that the legislation was related to Congress' trust responsibility to Indians and its desire to protect Indians from organized crime.[44]

Through the IGRA, Congress constructed a regulatory scheme for gambling on Indian reservations. The IGRA defines a species of gambling, called "gaming," and separates it into three distinct "classes."[45] Class I gaming consists of traditional forms of Indian ritual games.[46] This class of gaming is not affected by the IGRA and cannot be regulated by the states.[47] Class II gaming covers such games as bingo, card games allowed by the state, pull-tabs, lotto, and other games similar to bingo.[48] Class II gaming can be conducted if the state does not generally proscribe this type of gaming.[49] Class III gaming includes all other types of gaming.[50] It encompasses the most important part of the IGRA because it includes "high stakes" casino-type games which can be a source of substantial revenue for the Indian tribes and a significant rival for the traditional private sector casinos.[51] It is this class of gaming which is the subject of litigation in *Narragansett*.[52]

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41. *See* 134 CONG. REC. 24,022 (1988) (statement of Sen. Inouye) ("[T]he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands.").

42. 740 F. Supp. 9 (D.D.C. 1990).

43. *Id.* at 10. The plaintiffs, the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe, sued the Department of the Interior to prevent the implementation of the IGRA. *Id.* at 10. The tribes argued against implementation of the IGRA on four grounds: (1) the IGRA violated their right to self-determination; (2) "Congress violated its federal trust responsibility to the Indians" by enacting the IGRA; (3) the IGRA unconstitutionally restricted the power of the federal courts; and (4) the IGRA violated their Fifth Amendment right to self-government. *Id.* at 10-11.

44. *Id.* at 13-14. In upholding the IGRA, the court first asserted that Congress holds "virtually unlimited power over the Indian tribes." *Id.* at 11. The court then noted the IGRA's legislative history and concluded that the IGRA was enacted for the benefit of Indians. *Id.* at 13. The court also found that the IGRA did not deny the tribes due process. *Id.* at 14. Finally, the court noted that judicial relief was limited to "ordering the parties to conclude a compact." *Id.*

45. 25 U.S.C. § 2703 (1988) (setting forth three classes of gaming).

46. *Id.* § 2703(6) (1988) ("The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming . . . .").

47. *Id.* § 2710(a)(1) ("Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.").

48. *Id.* § 2703(7) ("The term 'class II gaming' means . . . bingo . . . other games similar to bingo . . . and card games [allowed by the state] . . . .").

49. *Id.* § 2710(b)(1)-(A) ("An Indian tribe may engage in . . . class II gaming . . . if . . . such Indian gaming is located within a State that permits such gaming . . . .").

50. *Id.* § 2703(8) ("The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming.").

51. *See supra* notes 2, 4 and accompanying text.

52. *Narragansett*, 19 F.3d at 688 (The Narragansett Tribe requested that Rhode Island enter into negotiations for a tribal-state compact as to Class III gaming under the IGRA.).

C. *The Regulation of Class III Gaming Under the IGRA*

In regulating class III gaming, the IGRA requires that: 1) an ordinance allowing such gaming is adopted by the governing body of the tribe; 2) the state allows this type of gaming for any purpose by any person; and 3) the gaming is conducted in compliance with a tribal-state compact entered into by the Indian tribe and the state.[53] The regulation of class III gaming has been the most controversial part of the IGRA[54] and the subject of considerable litigation between various Indian tribes and the states.[55]

The starting point for an analysis of class III gaming under the IGRA requires a determination of whether the state permits such gaming.[56] Examination of this issue requires a two-step analysis.[57] First, courts must determine if the game can legally be played in the state.[58] If it can, the game is to be included in the compact.[59] If not, step two requires the court to determine if the particular game violates the state's public policy.[60] If it does not, then the game is to be included in the compact.[61] Therefore, only games prohibited by the state *and* against public policy are removed from the compacting process.[62]

After determining whether or not the state permits the type of gaming, courts look for compliance with the IGRA's class III compacting process. A considerable amount of litigation has produced a number of guidelines concerning the compacting process for class III gaming. First, courts unanimously agree that the only way for a state to regulate class III

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53. 24 U.S.C. § 2710(d).

54. *See* T. Barton French, Jr., Note, *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow Growth of Indian Gaming*, 71 WASH. U. L.Q. 735, 736 (1993) ("The most controversial aspect of IGRA has been the 'compacting' process between the tribes and the states.").

55. *See infra* notes 63-72 and accompanying text.

56. 25 U.S.C. § 2710(d)(1)-(B) (1988) (stating that class III gaming shall be lawful only if "located in a State that permits such gaming").

57. Ysleta Del Sur Pueblo v. Texas, 852 F. Supp. 587, 593 (W.D. Tex. 1993) ("[A] two-step analysis must be employed to determine which Class III games are the proper subject of a Tribal-State Compact."); *see also* Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812, 1993 WL 360652 at *7 (E.D. Cal. July 20, 1993) ("The effect of IGRA is simply to provide a shortened application of the *Cabazon* rule where a game is found to be played within a state. In such instance, no further analysis is necessary to find the game is proper . . . . In every other case, however, *Cabazon* retains its full vitality and a game will only be prohibited . . . if it violates the state's public policy.").

58. *Ysleta*, 852 F. Supp. at 593.

59. *Id.*

60. *Id.*

61. *Id.*

62. In addressing the situation where a state public policy opposes a particular game, it has been held that a broad public policy against gaming may not remove a state's obligation to enter into negotiations on class III gaming. *See id.* at 592-93 (holding that Texas can no longer assert a broad public policy against gambling when it allowed horse and dog racing, bingo, and a state-run lottery). *But see* Coeur D'Alene Tribe v. State, 842 F. Supp. 1268 (D. Idaho 1994) (holding that state was not required to negotiate with tribe because state constitution declared gambling contrary to public policy and was strictly prohibited except for three limited exceptions).

gaming is through the compacting process.[63] Additionally, the only prerequisite to a state's obligation to enter into negotiations on a compact is that the Indian tribe request the negotiations.[64] One recognized limit on the Indians' compacting power is that a state is not required to reenter negotiations on class III gaming after a compact has been signed.[65] Also, one court has gone so far as to say that while a state is required to enter into negotiations, it is not required to enter into a compact.[66] Thus, it is widely accepted that the compacting process is a power bestowed upon the Indian tribes and is a mere courtesy towards the states.[67]

In determining whether or not there has been compliance with the compacting process for class III gaming, courts determine whether the IGRA mandate that a state enter into "good faith" negotiations with an Indian tribe has been met.[68] But what does "good faith" mean in the context of the IGRA? On this issue, there is little direction. One option is that the requirement of good faith be applied under an objective test.[69] An argument for an objective test is that an objective test is appropriate when there is unequal bargaining power among the parties.[70] Regardless, no court has set out a definite standard for the good faith test. It has been held, however, that the determination of whether a state has negotiated in good faith should be based on the transcripts of the negotiations themselves and not with reference to positions taken outside

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63. *See Narragansett*, 19 F.3d at 690 ("[T]he tribal-state compact is the exclusive method of regulating class III gaming."); *see also* Keetoowah Indians v. Oklahoma, 927 F.2d 1170, 1177 (10th Cir. 1991) ("[The IGRA] permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming.") (emphasis added); Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498, 1504 (S.D. Cal. 1992) (stating that jurisdiction is limited to tribal-state compact); *Senate Report*, *supra* note 28, at 3075-76 ("The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact.").

64. *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2d Cir. 1990) ("[T]he IGRA plainly requires a state to enter into negotiations with a tribe upon request.").

65. *See* Wisconsin Winnebago Nation v. Thompson, 22 F.3d 719, 723-24 (7th Cir. 1994) (holding that state was not required to negotiate when compact was previously signed six months prior to request for re-negotiations).

66. *See* Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) ("IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation[s] . . . .").

67. *See* Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, 526 (D.S.D. 1993) (stating that "Congress wished to give states a certain amount of input into gambling on Indian reservations."); *see also Senate Report*, *supra* note 28, at 3074 (stating Congress' intent to allow states to participate in regulation of Indian gaming); 134 CONG. REC. S12,643-01 (daily ed. Sept. 15, 1988) (statement of Senator Inouye) ("The compacts are not intended to impose de facto State regulation.").

68. 25 U.S.C. § 2710(d)(7)(A)(1) (1988) ("The United States district courts shall have jurisdiction over . . . any cause of action . . . arising from the failure of a State . . . to conduct such negotiations in good faith . . . ."); *see also Cheyenne*, 830 F. Supp. at 527 (discussing whether state negotiated in good faith).

69. *See* Nancy McKay, Comment, *The Meaning of Good Faith in the Indian Gaming Regulatory Act*, 27 GONZ. L. REV. 471, 486 (1992) ("[T]he court could help effectuate Congress' intent in the [IGRA] and provide guidance to other courts by examining the meaning of good faith and adopting the objective test for its determination."). For a complete survey of the various "good faith" tests, see *id.*

70. *Id.* at 485.

the negotiation process.[71] Furthermore, one court has refused to examine whether a state acted in good faith after signing a compact, stating that a tribe's challenge to a state's good faith should come during the negotiation process.[72]

D. The Special Rules of Interpretation for Indian Legislation

In analyzing *Narragansett*, it is vital to recognize the unique "decisional framework" in which the court is operating.[73] The court clearly states that it is viewing the issues in *Narragansett* from a "distinctive perspective."[74] This perspective is a result of long-established special rules of interpretation for Indian legislation.[75]

The general rule of interpretation for Indian legislation is that any doubts or ambiguities in the statute are to be resolved in favor of the Indians.[76] The expressed justification for this rule is that Indians are in need of special protection by the federal government and the court system.[77] Thus, the rule provides Indian tribes with "special treatment."[78] It has been cautioned, however, that this special rule is only operative where doubt or ambiguity exists in the legislation.[79] It is particularly important in analyzing *Narragansett* to note that this special rule of interpretation has been previously applied to the issue of Indian sovereignty[80] because it aids the *Narragansett* court in reaching a number of rulings. It is certainly arguable that the application of this rule has been an important factor in a series of court decisions that run in favor of tribal gaming.[81]

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71. *Cheyenne*, 830 F. Supp. at 527 (noting that determination of good faith should be derived from negotiation sessions).

72. Wisconsin Winnebago Nation v. Thompson, 22 F.3d 719, 723-24 (7th Cir. 1994) (holding that tribe cannot claim bad faith after completed compact was signed).

73. *Narragansett*, 19 F.3d at 691 (setting forth court's "decisional framework").

74. *Id.*

75. Antoine v. Washington, 420 U.S. 194, 199 (1975) (noting that special rules for interpretation of Indian legislation have been established for over one and one-half centuries).

76. *See* South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) (noting "canon of construction regarding the resolution of ambiguities in favor of Indians"); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) (holding that doubtful expressions are to be resolved in favor of Indians); DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) (holding that ambiguities are to be resolved in favor of Indians); *Antoine*, 420 U.S. at 199-200 (stating that doubts are to be resolved in favor of Indians).

77. *See Rosebud*, 430 U.S. at 586 (characterizing Indians as "weak and defenseless people" who are "wards of the nation" and in need of the government's "protection and good faith") (quoting McClanahan v. Ariz. State Tax Comm., 411 U.S. 164, 174 (1973)).

78. Morton v. Mancari, 417 U.S. 535, 554 (1974) (noting that Court has held out Indians for "particular and special treatment").

79. *See Catawba*, 476 U.S. at 506 ("The canon of construction . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."); *DeCoteau* 420 U.S. at 447 ("We give this [Indian legislation interpretation] rule the broadest possible scope, but it remains at base a canon . . . . A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.").

80. *See* Edmond F. Leedham, III, Note, *The Indian Gaming Controversy in Connecticut: Forging a Balance Between Tribal Sovereignty and State Interests*, 13 BRIDGEPORT L. REV. 649, 662 (1993) (noting that legislation affecting tribal sovereignty is construed in favor of Indians).

81. *See* Swanson, *supra* note 35, at 478 (noting series of decisions in favor of Indians).

III. *RHODE ISLAND V. NARRAGANSETT INDIAN TRIBE*

A. Facts and Procedural History

On January 15, 1992, the Tribe requested that the state of Rhode Island enter into negotiations on a tribal-state compact for class III gaming in accordance with the IGRA.[82] The state refused to negotiate, instead filing suit in federal district court seeking declaratory and injunctive relief.[83] In this action, the state asked the court to rule that the IGRA did not apply to the settlement lands in question and to issue an injunction against the development of gambling facilities on these lands.[84] The Tribe, in turn, sought an injunction commanding the state to negotiate in good faith.[85] After a number of rulings,[86] the district court ordered the state to enter into good faith negotiations on the tribal-state compact.[87] After the state appealed the district court's decision, the district court stayed its order.[88]

In *Narragansett*, the U.S. Court of Appeals for the First Circuit, sets forth a comprehensive treatment of the IGRA and, in particular, its application to the Narragansett Indian settlement lands. The court first summarized the history of the Settlement Act.[89] The court then discussed the IGRA and its classification scheme.[90] After reviewing the district court's decision,[91] the court stated its decisional framework, that being one of deference to the Tribe.[92] The court, overruling the lower court, held that the issue of jurisdiction was ripe for trial.[93] At this point, the court addressed the major substantive issues of the case.

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82. *Narragansett*, 19 F.3d at 690.

83. Rhode Island v. Narragansett Tribe of Indians, 816 F. Supp. 796 (D.R.I. 1993).

84. *Id.* at 798. The state requested that the court declare that "(1) the [IGRA] does not apply to the settlement lands; and (2) that those lands are subject to the criminal, civil, and civil regulatory laws of Rhode Island and the Town of Charlestown, including criminal and civil laws regulating gambling." *Id.* The state asked the court to enjoin the Tribe from "taking any action to develop or use the settlement lands not in compliance with State and local laws." *Id.* Moreover, the state asked the court to enjoin "the State and the Tribe from negotiating a Tribal-State compact under the [IGRA]." *Id.*

85. *Id.*

86. The district court first ruled that the issue of jurisdiction over the land lacked ripeness. *Id.* at 799-800. The court then held that any grant of jurisdiction to the state under the Settlement Act was "preempted" by the IGRA. *Id.* This holding was based on the court's findings that precedent directed that the IGRA preempted earlier federal statutes, that Rhode Island was not exempt from the IGRA, and that the Tribe met the requirements of the two-pronged test of the IGRA. *Id.* at 801-806. For an explanation of the two-prong test of the IGRA, see *infra* notes 102-23 and accompanying text.

87. *Id.* at 806.

88. *Narragansett*, 19 F.3d at 691.

89. *See id.* at 698; *supra* notes 9-27 and accompanying text.

90. *See Narragansett*, 19 F.3d at 689-90; *supra* notes 28-72 and accompanying text.

91. *Narragansett*, 19 F.3d at 690-91.

92. *Id.* at 691-92; *see supra* notes 73-81 and accompanying text.

93. *See Narragansett*, 19 F.3d at 692-94 ("Accordingly, we rule that the basic issue of state and local jurisdiction . . . is ripe for declaratory judgment purposes.").

B. *The Grant of Jurisdiction in the Settlement Act*

The first major issue discussed by the First Circuit in *Narragansett*, one with important ramifications,[94] is whether the Settlement Act confers civil regulatory jurisdiction to Rhode Island. The Tribe argued that it did not,[95] based on the Settlement Act's plain language.[96] The Tribe argued that because an early version of the bill transferred "the complete civil and criminal jurisdiction" and the final bill transferred "the civil and criminal laws and jurisdiction," the absence of "complete" in the final version evidenced Congress' intent to limit the jurisdiction to the state.[97] The court rejected this argument,[98] specifically noting that "complete" in this context means "exclusive" and that the removal of the word "complete" in the final draft was done to avoid conferring exclusive jurisdiction on the state.[99] The court then emphasized that the Settlement Act was a mere "implementation" of the previous agreement.[100] Therefore, the court concluded that the Settlement Act conferred civil regulatory jurisdiction on the State.[101]

C. *The Two-Pronged Test of the IGRA*

The second issue discussed by the First Circuit in *Narragansett* was whether the IGRA applies to the Tribe's settlement lands.[102] In analyzing this issue, the court focused on the dual requirements of "jurisdiction" and "governmental power" necessary to invoke the IGRA.[103]

1. The Requirement of Jurisdiction

The state argued, and the court agreed, that in order to invoke the IGRA an Indian tribe must exercise jurisdiction over the settlement

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94. *See infra* notes 104-16 and accompanying text.

95. *Narragansett*, 19 F.3d at 695.

96. "Except as otherwise provided in this subchapter, the Settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708 (1988).

97. *Narragansett*, 19 F.3d at 696. *See* Bryan v. Itasca County, 426 U.S. 373, 383 (1976) (holding that civil jurisdiction was only adjudicatory jurisdiction meant to solve private legal disputes).

98. *Narragansett*, 19 F.3d at 696. The court held that the present case did not have an analogous legislative history to *Bryan*. *Id. See also* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 599 (1977) (holding that there is "implied continuity in purpose" from one version of act to next).

99. *Narragansett*, 19 F.3d at 695. *See also* United States v. Cook, 922 F.2d 1026, 1032 (2d Cir. 1991), *cert. denied*, 500 U.S. 941 (1991) (holding that removal of word "complete" in final draft of Indian legislation meant that grant of jurisdiction was not exclusive).

100. *Narragansett*, 19 F.3d at 696; *Rosebud*, 430 U.S. at 600 ("Congress . . . thought that it was acting pursuant to the earlier version."); *see also* 25 U.S.C. § 1701(d).

101. *Narragansett*, 19 F.3d at 696 ("[W]e conclude that the Settlement Act granted civil regulatory jurisdiction, as well as civil adjudicatory jurisdiction, to the state."). *But see* Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94, 99 (D.R.I. 1992) (holding that Settlement Act, in conferring state jurisdiction over settlement lands, does not abrogate tribe's civil regulatory power and that Settlement Act subjects settlement lands to state civil and criminal laws, but not all laws).

102. *Narragansett*, 19 F.3d at 701.

103. *Id.* at 702.

lands.[104] This requirement is derived from the language of the statute.[105] Therefore, the court examined whether the Tribe had jurisdiction over the settlement lands.[106]

Stating that it was operating from a "backdrop" of Indian sovereignty,[107] the court emphasized the well-accepted rule that Indian tribes are a distinct people with a long-standing history of sovereignty and self-government.[108] This sovereignty has been held to include the power of regulation over Indian settlement lands.[109] Thus, the court invoked a presumption of sovereignty for determining whether the Tribe had jurisdiction over the settlement lands.[110]

In addition the court found that, pursuant to the Settlement Act, the Tribe retained concurrent jurisdiction.[111] Moreover, the court concluded that *concurrent* jurisdiction by an Indian tribe was sufficient to meet the jurisdictional requirement of the IGRA,[112] thus satisfying the first prong of the IGRA.

In ruling that concurrent jurisdiction is sufficient to meet the jurisdictional requirement of the IGRA, the court examined whether or not the Settlement Act granted exclusive jurisdiction to the state. If it did, the Tribe would fail to meet the jurisdictional requirement and the IGRA would be inapplicable. The language of the Settlement Act provides no help in determining whether the grant of jurisdiction was exclusive.[113] The court pointed to another section of the act which uses the modifier

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104. *Id.*

105. *See* 25 U.S.C. § 2710(d)(3)(A) (1988) ("Any Indian tribe *having jurisdiction* over the Indian lands . . . shall request the State . . . to enter into negotiations . . . .") (emphasis added); *id.* § 2710(b)(1) ("An Indian tribe may engage in . . . class III gaming on Indian lands *within such tribe's jurisdiction* . . . .") (emphasis added).

106. *Narragansett*, 19 F.3d at 701-02.

107. *Id.* at 701; *see also* McClanahan v. Ariz. State Tax Comm., 411 U.S. 164, 172 (1973) (stating that "Indian sovereignty . . . provides [the] backdrop").

108. *See Narragansett*, 19 F.3d at 701 (noting history of tribal sovereignty); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989) (recognizing "history of tribal sovereignty"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (stating that Indian tribes are "distinct, independent, political communities"); *McClanahan*, 411 U.S. at 172 (noting inherent Indian sovereignty); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (stating that Indians are "people distinct from others"). *But see* United States v. Wheeler, 435 U.S. 313, 323 (1978) (stating that Indian tribes are no longer "possessed of the full attributes of sovereignty"). This assumption of sovereignty is seen as a departure from the previous policy of Indian assimilation. *See* Robert B. Porter, Note, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. ON LEGIS. 497, 506 (1990) (recognizing change in policy from assimilation to sovereignty).

109. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (holding that sovereignty includes power to regulate).

110. *Narragansett*, 19 F.3d at 701-02. *But see* Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 191 (1994) ("The Court has refocused the inquiry [of jurisdiction] by moving away from a discussion of the existence of tribal jurisdiction based on Indian sovereignty . . . .").

111. *See infra* notes 113-16 and accompanying text.

112. *Narragansett*, 19 F.3d at 701 ("[W]e rule . . . that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the [IGRA].").

113. 25 U.S.C. § 1708 (1988) ("[T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.").

"exclusive" in a jurisdictional setting,[114] thus making the deduction that if an exclusive grant of jurisdiction to the state was meant, the Settlement Act would include the term "exclusive jurisdiction."[115] In addition, the court cited an interpretation of another Indian statute which held that a grant of jurisdiction to a state over Indian lands is non-exclusive.[116]

2. The Requirement of Governmental Power

The court next found that the Tribe met the second prong of the IGRA test in that the Tribe exercised governmental power over the settlement lands. This requirement is derived from the IGRA's definition of "Indian lands."[117] It is, however, less controversial than the requirement of jurisdiction.[118] There is neither a direct nor indirect reference to the "governmental power" requirement in the act's legislative history.[119] The court noted that an exercise of governmental power does not depend on "theoretical authority" but must be shown through "concrete manifestations" of that power.[120] The court then listed a number of examples of how the Tribe had exercised "governmental power"[121] and concluded that this requirement of the IGRA had been met by the Tribe.[122]

Therefore, in finding that the Tribe met the requirements of both the "jurisdictional" and "governmental power" prongs of the enabling test, the court held that the Tribe was entitled to the rights granted in the IGRA.[123]

D. The IGRA's Effect on the Settlement Act

Once the *Narragansett* court determined that the IGRA applied to the Tribe's settlement lands, it proceeded to resolve the conflicts between the IGRA and the Settlement Act. The court ruled that the IGRA operated as an implied repeal of the Settlement Act.[124]

The court first discussed the doctrine of implied repeal.[125] The court held that the lower court had incorrectly applied the doctrine of pre-

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114. *Id.* § 1711 ("*Exclusive* jurisdiction over any such action . . .") (emphasis added).

115. *Narragansett*, 19 F.3d at 702; *see also* Rodriquez v. United States, 480 U.S. 522, 525 (1987) (stating rule of statutory construction that if language is included in one part of statute and omitted in another, omission was intentional and substantive).

116. *Narragansett*, 19 F.3d at 702; *see* United States v. Cook, 922 F.2d 1026, 1032 (2d Cir. 1991) ("Significantly absent is any allusion to a complete surrender of jurisdiction.").

117. 25 U.S.C. § 2703(4) (1988) ("The term Indian lands means . . . any lands . . . over which an Indian tribe exercises governmental power."); *see Narragansett*, 19 F.3d at 701 (stating that "one element of the definition of 'Indian lands' requires that an Indian tribe 'exercise[ ] governmental power' over them.").

118. *See supra* notes 104-16 and accompanying text.

119. *See Senate Report*, *supra* note 28.

120. *Narragansett*, 19 F.3d at 703.

121. *Id.* at 703 (citing Tribe's housing authority, recognition by Environmental Protection Agency as a "governing body," its participation in Indian Self-Determination and Education Assistance Act, and various other programs as evidence of Tribe's "governmental power.").

122. *Id.* ("These activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.").

123. *Id.*

124. *Id.* at 705.

125. *Id.*

emption, stating that the correct mode of analysis when two federal statutes collide is that of implied repeal.[126] In order for one statute to impliedly repeal another, one statute must be repugnant, at least in part, to the other. In other words, the goal is to give both effect if at all possible.[127]

The state argued that the Settlement Act survived the enactment of the IGRA. In doing so, the state relied heavily on the legislative history of the IGRA. Specifically, the state pointed to a discussion of the IGRA on the Senate floor in which the two senators from Rhode Island, Senator Pell and Senator Chafee, were assured by the IGRA's sponsor, Senator Inouye, that the Settlement Act and its protections would remain in effect after the enactment of the IGRA.[128] The court characterized the legislative history argument as a "flanking maneuver,"[129] stating that it should look to the legislative history of the statute only when the language of the statute is ambiguous.[130]

The state next argued that Rhode Island is exempted from the IGRA based on the IGRA's "consensual transfer" provision.[131] This provision mandates jurisdiction for criminal prosecutions of gambling violations

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126. *Id.*; *see also* United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870) (applying doctrine of implied repeal); United States v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991) ("The issue in the case is not whether the [federal statutes] preempted [the federal statute], but whether the former two implicitly repealed the latter.").

127. *Narragansett*, 19 F.3d at 703; *see also Tynen*, 78 U.S. (11 Wall.) at 92 ("When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant . . . the latter act . . . operates to the extent of the repugnancy as a repeal of the first . . . ."); *Cook*, 922 F.2d at 1034 ("For a repeal by implication, the provisions of one must be repugnant to the other.").

128. That discussion between the senators went as follows:

> Mr. PELL. Mr. President, I would like to thank the managers of S. 555, the Indian Gaming Regulatory Act . . . for their hard work and patience in achieving a consensus on this important measure.
>
> In the interests of clarity, I have asked that the language specifically citing the protections of the Rhode Island Indian Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.
>
> Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that the protections of the Rhode Island Indian Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe will clearly remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.
>
> Mr. CHAFEE. Mr. President, I too would like to thank the chairman . . . . The chairman's statement makes it clear that any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State.

134 CONG. REC. 24,023 (1988).

129. *Narragansett*, 19 F.3d at 697.

130. *Narragansett*, 19 F.3d at 697 ("[C]ourts must look primarily to statutory language, not to legislative history . . . ."); *see also* Yates v. United States, 354 U.S. 298, 305 (1957) (finding that judicial construction is unnecessary where there is no ambiguity in language of statute); Browder v. United States, 312 U.S. 335, 338 (1941) (stating that plain language should be source of interpretation); United States v. Meyer, 808 F.2d 912, 915 (1st Cir. 1987) ("Where . . . the language of a statute seems clear and unambiguous, courts should be extremely hesitant to search for ways to interpose their own notion's of Congress's intent.").

131. *Narragansett*, 19 F.3d at 697 ("This [consensual transfer] proviso, Rhode Island asseverates, presages an exemption applicable to the settlement lands.").

on Indian land.[132] The state argued that the Settlement Act, as federal law, invoked this provision, thus exempting Rhode Island from the IGRA.[133] The court rejected this argument on two grounds.[134] First, the court emphasized that the consensual transfer provision deals only with criminal prosecutions and has no effect on civil or regulatory jurisdiction.[135] Second, the court stated that the provision applies only to "gambling," which does not include gaming as defined in the IGRA.[136]

The court's refusal to exempt Rhode Island from the IGRA, combined with its rejection of the IGRA's legislative history,[137] led the court to hold that the IGRA applies "with full force" to the Narragansett's settlement lands.[138]

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132. The consensual transfer provision reads:

> The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the [IGRA], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. § 1166(d) (1988).

133. *Narragansett*, 19 F.3d at 697.

134. *Id.*

135. *Id.*

136. *Id.*; *see* 18 U.S.C. § 1166(d) (1988) (stating that § 1166 applies to "[s]tate *gambling* laws") (emphasis added); § 1166(c) ("For purposes of this section, the term 'gambling' does not include—(1) class I gaming or class II gaming regulated by the [IGRA], or class III gaming conducted under a Tribal-State compact . . . .").

137. *See supra* notes 128-30 and accompanying text.

138. *Narragansett*, 19 F.3d at 705. Since *Narragansett*, Rhode Island has complied with the order to enter into negotiations with the Tribe on class III gaming. On August 29, 1994, then Rhode Island Governor Bruce Sundlun signed a compact with the Tribe allowing them to build a casino in either West Greenwich, Rhode Island or on the Tribe's reservation in Charlestown, Rhode Island. *See* Thomas Frank, *Sundlun, Tribe Agree on Casino*, PROVIDENCE J., Aug. 30, 1994, at A1 ("Moments after smoking a peace pipe in the governor's office, leaders of the Narragansett Indian tribe signed a compact with Governor Sundlun yesterday allowing them to build a casino either in West Greenwich or on their reservation in Charlestown."). Under the compact, the state is to receive 16.5 percent of the casino's gross revenue, which is projected to be approximately $325 million a year. *See id.* at A1, A6 ("The compact . . . requires the tribe to pay the state 16.5 percent of the casino's gross revenue . . . . With anticipated revenues of $325 million a year, the casino would funnel $53.6 million to the state."). In order to be built in West Greenwich, a site preferred over the settlement lands due to its access to Interstate 95, the town must vote its approval in a town referendum. *See id.* at A1 ("But voters in West Greenwich . . . must approve a referendum in November allowing the tribe and Capital Gaming International Inc. of Atlantic City to build the 120,000-square-foot casino with 3,000 slot machines. Capital Gaming would manage the casino.").

On October 3, 1994, the state's petition for a writ of certiorari was denied by the Court. 115 S. Ct. 298 (1994).

On January 19, 1995, newly-elected Rhode Island Governor Lincoln Almond filed suit in U.S. District Court asking that gambling at the Tribe's future casino be limited to the forms of gambling currently allowed in Rhode Island. This would bar table games and coin slot machines, severely limiting the casino's drawing power. *See* Scott MacKay, *Almond Seeks Lid on Gaming*, PROVIDENCE J., Jan. 20, 1995, at A1.

On January 20, 1995, a federal judge ruled that a suit brought by Rhode Island Attorney General Jeffrey Pine, seeking a ruling that former Governor Bruce Sundlun violated the state Constitution when he signed the tribal-state compact, should be decided by the Rhode Island Supreme Court. *See* John Hill, *Casino Ruling Goes to R.I. Justices*, PROVIDENCE J., Jan. 21, 1995, at A1. Pine is claiming that the compact amended or repealed state laws without the General Assembly's approval, thus violating the state Constitution. *Id.* The federal judge, in his ruling, emphasized that while the IGRA required the governor to negotiate, it did not specify who had to approve the agreement for the state. *Id.* at A5.

IV. ANALYSIS

A. *A Critical Analysis of the Court's Major Holdings in Narragansett*

1. The Narragansett Tribe Met the Two-Pronged Test of the IGRA

The court's choice of a concurrent jurisdiction requirement is a clear application of the special rules of statutory interpretation favoring Indian tribes.[139] This application, however, questionably ignores the IGRA's legislative history. There is no direct reference to the jurisdictional requirement of the IGRA in the legislative history[140] and the First Circuit, in discussing the requirement, did not attempt to ascertain any legislative intent. One could, however, draw inferences from the legislative history.

First, the legislative history says that it is the "responsibility of the Congress . . . to adjust, where appropriate, the jurisdictional framework" of Indian lands.[141] This statement would seem to discount some, if not all, of the weight given to the historical background of Indian sovereignty upon which the court so heavily relied.[142] Second, review of 25 U.S.C. § 2170(d)(3)(A) reveals that the legislative history does not contain the phrase "having jurisdiction over the Indian lands."[143] This could be interpreted in two different ways. The state would argue that the inclusion of the phrase in the final draft indicates that the phrase (and thus the jurisdictional requirement) is substantively significant. The Tribe would argue that the absence of the phrase in the legislative history would indicate a lack of Congress' intent to impose any jurisdictional requirement at all. The court, in holding that the IGRA required only concurrent jurisdiction, could have alternatively ruled that the requirement of jurisdiction under the IGRA was one of *exclusive* jurisdiction, thereby disqualifying the Tribe of rights under the IGRA.

2. The IGRA Impliedly Repealed the Settlement Act

The First Circuit's analysis of the interface between the IGRA and the Settlement Act is flawed because it improperly applied the doctrine of implied repeal, questionably ignored strong legislative history, and misinterpreted the "consensual transfer" provision of the IGRA. The court did not discuss the rule of statutory construction that, for one statute to be considered a substitute for another, and not merely a continuation, the latter statute must clearly be intended as a substitute.[144] Moreover, in examining the implied repeal of the Settlement Act, the court disre-

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139. *See supra* notes 74-81 and accompanying text.
140. *See Senate Report*, *supra* note 28, at 3071-106.
141. *Id.* at 3073.
142. *See supra* notes 107-10 and accompanying text.
143. *Senate Report*, *supra* note 28, at 3088.
144. *See* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) ("[A]s a general thing . . . the latter act is to be construed as a continuation of, and not a substitute for, the first act . . .").

garded specific precedent which instructs a court to look at whether Congress intended an implied repeal.[145] As previously discussed, the court generally disregarded the legislative history of the IGRA.[146] In the context of the implied repeal issue, this decision led the court to rule that the IGRA acts as an implied repeal of the Settlement Act, whereas an examination of the legislative history would likely have led the court to the opposite conclusion.[147]

In ruling that it should not look at the IGRA's legislative history, the court ignored precedent instructing a court to look beyond the statutory language, especially in cases where there is clear congressional intent that contradicts the express language of the statute.[148] Curiously, the court did not consider the conversation on the Senate floor as "clear and convincing" legislative intent that the Settlement would survive the enactment of the IGRA.[149] The court held that the remarks of legislators should not be given controlling effect.[150] However, there is precedent to the contrary, especially when the statements are precisely directed to a specific issue and are unambiguous,[151] as was the case with the Rhode Island senators' statements.[152] The court further stated that the remarks of the IGRA's sponsor (Senator Inouye) are not determinative of congressional intent,[153] where other courts have held that the sponsor's

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145. *See* Watt v. Alaska, 451 U.S. 259, 266 (1981) ("[W]e decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress."); United States v. Borden Co., 308 U.S. 188, 198 (1939) ("The intention of the legislature to repeal 'must be clear and manifest.'"); *Posadas*, 296 U.S. at 503 ("[T]he intention of the legislature to repeal must be clear and manifest . . . ."); Palmore v. Superior Court of District of Columbia, 515 F.2d 1294, 1307-08 (D.C. Cir. 1975) (noting importance of Congressional intent on issue of implied repeal); *see also* 1A Norman J. Singer, *Sutherland on Stat. Const.* § 23.09 (5th ed. 1993) (noting significance of Congressional intent to impliedly repeal).

146. *See supra* notes 128-30 and accompanying text.

147. *See id.*

148. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) ("[W]e look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language . . . ."); Watt v. Alaska, 451 U.S. 259, 266 (1981) ("[A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry . . . . [T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"); United States v. Turkette, 452 U.S. 576, 580 (1981) ("*[I]n the absence of a 'clearly expressed legislative intent to the contrary*, that language must ordinarily be regarded as conclusive.'") (emphasis added).

149. *Narragansett*, 19 F.3d at 697.

150. *Id.* at 699 ("Although we give full faith and credit to the earnestness senators involved in this exchange, we are unable to accept the colloquy at face value."); *see also* Brock v. Pierce County, 476 U.S. 253, 263 (1986) ("Such statements by individual legislators should not be given controlling effect . . . .").

151. *See* Regan v. Wald, 468 U.S. 222, 237 (1984) ("Oral testimony of . . . individual Congressmen, *unless very precisely directed to the intended meaning of particular words in a statute*, can seldom be expected to be as precise as the enacted language itself.") (emphasis added); Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("[O]ne isolated remark by a single Senator, *ambiguous in meaning when examined in context*, is insufficient to establish . . . congressional expression . . . .") (emphasis added).

152. *See supra* note 128.

153. *Narragansett*, 19 F.3d at 699; *see also* Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor . . . are certainly not controlling . . . ."); Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 118 (1980) (discounting sponsors' statements).

statements are to be considered.[154] Ultimately, the court refused to give any controlling weight to the direct statements of the senators, evidencing once again its deference to the interests of the Tribe.[155]

The court held that the "consensual transfer" provision of the IGRA was only applicable to criminal, and not regulatory, prosecutions. Gambling, however, while being an entity that the state wants to regulate, is also a crime in Rhode Island.[156] The court did not consider this fact. The court also held that this provision did not apply to gaming as defined in the IGRA. But it seems contradictory that the consensual transfer provision itself explicitly mentions the compacting process of the IGRA.[157] Indeed, a federal district court had previously interpreted this provision as being specifically intended to exempt Rhode Island from the IGRA.[158]

B. Can an Indian Tribe Sue a State Under the IGRA?: Tenth and Eleventh Amendment Issues Not Addressed in Narragansett

One way states have tried to avoid forced negotiations on a tribal-state compact is to refuse to negotiate and then assert a Tenth[159] or Eleventh[160] Amendment defense in an action by the Indian tribes to force the states to negotiate. Courts have been split on both arguments. Interestingly, the court in *Narragansett* did not address this issue, most likely because the court action was brought by the State (seeking an injunction) and not by the Tribe.[161] But a complete treatment of the IGRA would be lacking without a discussion of these constitutional issues.

The argument for upholding a Tenth Amendment defense is that Congress cannot compel a state to "regulate."[162] Thus, it has been held

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154. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982) ("[The remarks] of the sponsor . . . are an authoritative guide to the statute's construction."); Federal Energy Admin. v. Algonquin SNG, 426 U.S. 548, 564 (1976) (stating that sponsor's remarks should be given substantial weight); United States v. Massachusetts Maritime Academy, 762 F.2d 142, 149 (1st Cir. 1985) (noting that Court has treated bill's sponsors' views as authoritative on congressional intent behind legislation).

155. *See supra* notes 73-81 and accompanying text.

156. *See* R.I. GEN. LAWS §§ 11-19-1 to 11-19-31 (1994).

157. 18 U.S.C. § 1166(d) (1988 & Supp. 1994) (stating significance of whether Indian tribe has transferred jurisdiction "pursuant to a Tribal-State compact . . . .").

158. *See* Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 653-54 (W.D. Wis. 1990) ("The legislative history leaves no doubt that the consensual transfer provisions in § 1166(d) did not refer to Pub.L. 280 transfer of jurisdiction by fiat, but to a recent Indian land claims settlement in Rhode Island . . . ."). The court in *Narragansett* ruled that the *Lac Du Flambeau* court erred in its interpretation of the consensual transfer provision due to its erroneous reliance on the Senate report of the IGRA. *Narragansett*, 19 F.3d at 697 n.12; *see Senate Report*, *supra* note 28, at 3090 ("Sect. 23. — Makes clear that gaming on Indian lands in the State of Rhode Island must be conducted in accordance with State law.").

159. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

160. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

161. *See Narragansett*, 19 F.3d at 690.

162. *See* Ponca Tribe v. Oklahoma, 834 F. Supp. 1341, 1346 (W.D. Okl. 1992) ("Although Congress can urge a State . . . to adopt a legislative program . . . it cannot compel the state to regulate.").

that the IGRA exceeded the power of Congress by requiring states to negotiate tribal-state gaming compacts.[163] At the same time, it has been held that the IGRA does not violate the Tenth Amendment[164] because the state is not "forced" to negotiate and is only being given an opportunity to provide input on regulation of class III gaming.[165] One commentator has stated that the Supreme Court would not find Tenth Amendment difficulties with the IGRA.[166]

The Eleventh Amendment issue has been dealt with more frequently. Some courts have held that the Eleventh Amendment bars an action by an Indian tribe against a state under the IGRA.[167] The rationale behind this position is that in regulating the states, Congress is acting beyond its Indian Commerce Clause[168] power.[169] Other courts, holding that the Eleventh Amendment does not bar an action under the IGRA, argue that it was the intent of Congress in enacting the IGRA to abrogate state immunity,[170] and that the IGRA does in fact abrogate such immunity.[171] The argument behind this position is the intent of the statute and the fact that states are not penalized for not negotiating but may only lose their right to have input on class III gaming regulation.[172] The Court recently invited the Solicitor General to file briefs on an appeal by the Seminole Tribe of Florida of an Eleventh Circuit decision upholding a state's immunity under the Eleventh Amendment in the context of the IGRA.[173]

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163. *See id.* at 1347 ("[T]he [IGRA] exceeds the powers of Congress . . . .").

164. *See* Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, 527 (D. S.D. 1993) (holding that IGRA does not violate Tenth Amendment).

165. *See id.* at 526 ("The IGRA does not 'force' states to compact with Indian Tribes . . . .").

166. *See* Bisset, *supra* note 40, at 90 ("It seems likely that the Supreme Court would hold that IGRA does not run afoul of the Tenth Amendment, either because it requires no action by states at all or because it does not impermissibly 'coerce' state regulation . . . .").

167. *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1019 (11th Cir. 1994) (holding that action under IGRA violates Eleventh Amendment); Ponca Tribe v. Oklahoma, 834 F. Supp. 1341, 1345 (W.D. Okl. 1992) ("[T]he court concludes the plaintiff's action against the State . . . is barred by the Eleventh Amendment."); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1490 (W.D. Mich. 1992) (holding that suits under IGRA are barred by Eleventh Amendment).

168. The Indian Commerce Clause provides: "[The Congress shall have power] . . . [t]o regulate Commerce . . . with the Indian Tribes . . . ." U.S. CONST. art. 1, § 8, cl. 3.

169. *See Ponca*, 834 F. Supp. at 1345-46 (holding that Indian Commerce Clause did not authorize Congress to abrogate state immunity via the IGRA).

170. *See* Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423, 1427 (D. Kan. 1993) ("Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them . . . . [A] clearer statement of the intent to abrogate is difficult to envision."); *see also* French, *supra* note 54, at 737 ("[S]tates should not be able to contravene IGRA's goals by asserting an Eleventh Amendment sovereign immunity defense.").

171. *See Kickapoo*, 818 F. Supp. at 1427 (holding that IGRA abrogates state's immunity); *see also* Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, 526 (D. S.D. 1993) (stating that IGRA abrogates state immunity); Joseph J. Weissman, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court under the Indian Gaming Regulatory Act*, 62 GEO. WASH. L. REV. 123 (1993) (arguing that Congress abrogated Eleventh Amendment bar in enacting IGRA).

172. *See* Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. at 526 ("Under the IGRA, no penalties can be assessed against a state for failing to negotiate. What the state would lose by such a stance would be possible input into a Tribal-State gaming compact.").

173. Seminole Tribe v. Florida, 63 U.S.L.W. 3064 (U.S. Oct. 3, 1994).

Thus, in examining *Narragansett*, one must not disregard these constitutional issues as they might govern future IGRA cases. The inconsistency[174] in the judicial decisions to date makes it difficult to predict how the next court might rule.[175] It does seem likely, however, that the constitutional questions pertaining to the IGRA will eventually be answered by the Supreme Court.[176]

V. IMPACT

The First Circuit's decision in *Narragansett* provides insight into how federal courts might interpret Indian legislation in general and the IGRA specifically. As a starting point, it is clear that courts will construe legislation that affects Indians in favor of the Indians. The first prong of the IGRA enabling test, jurisdiction, will be met in most cases if the court examining the requirement uses the concepts of Indian sovereignty and self-government as a backdrop. Beyond that, the court in *Narragansett* went so far as to rule that concurrent jurisdiction was enough to meet the requirement and that the Settlement Act did not give the state exclusive jurisdiction. It seems that this methodology could be applied to any state's pre-IGRA settlement agreement.

The court in *Narragansett* did look for concrete examples of governmental power in examining the second prong requirement. One must wonder, however, if this thorough examination was a result of the court's *a priori* knowledge that the Tribe would fulfill the requirement and whether a tribe with less concrete examples of governmental power would be held to a less rigorous test in order to come to the same result.

The court's treatment of the IGRA's legislative history has the most disturbing effect. It is clear from the legislative history, especially the conversations between Senators Inouye, Pell, and Chafee, that the Senate intended that the Settlement Act remain in full force after the enactment of the IGRA. But the court, through citations to rebuttable rules of interpretation, discounted this compelling legislative history.

Narragansett should be taken as a warning to states that wish to prevent class III gaming on Indian settlement land within their borders. Future courts now have *Narragansett* as precedent, making decisions in favor of Indian tribes even easier to accomplish in future IGRA cases. A state should not take comfort in the IGRA's two-pronged test, as a court can easily find both prongs satisfied. In addition, a state should not rely on

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174. *See* Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 161 (1993) (noting the difficulties these inconsistencies on IGRA's Eleventh Amendment issues pose to future rulings).

175. *See* Santoni, *supra* note 28, at 425 ("The complexity of the existing Eleventh Amendment jurisprudence makes it difficult to predict . . . the last word on the Eleventh Amendment issue.").

176. *See* Linda Greenhouse, *The Supreme Court: The Overview; U.S. Justices Open Their New Session By Refusing Cases*, N.Y. TIMES, Oct. 4, 1994 ("[D]isagreement [on the Eleventh Amendment issue], as well as the growing importance of the multibillion-dollar tribal casino business, makes eventual Supreme Court review highly likely.").

the use of the IGRA's legislative history, unless expressly supported in the IGRA's final language. Thus, a state's best "defense" is a constitutional Tenth or Eleventh Amendment argument, which has had some success in previous cases.[177]

The court in *Narragansett* completely discounted the pre-IGRA Settlement Act. Several other states have similar Indian claims settlement acts.[178] Of these states, only Maine and Massachusetts could possibly use their pre-IGRA acts to attack a tribe's jurisdiction under the IGRA by referring to exclusive jurisdiction language within their settlement acts.[179]

It is apparent that future courts, employing similar reasoning to that of the First Circuit in *Narragansett*, will find in favor of Indian tribes. To have any chance of success, any attack by states to prevent Indian gaming should be launched from their Tenth and Eleventh Amendment constitutional arsenal.

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177. *See supra* notes 159-76 and accompanying text.

178. *See* 25 U.S.C. §§ 1721-1735 (1988) (Maine Indian Claims Settlement Act); *id.* §§ 1741-1749 (Florida Indian (Miccosukee) Land Claims Settlement Act); *id.* §§ 1751-1760 (Connecticut Indian Land Claims Settlement Act); *id.* § 1771 (Massachusetts Indian Land Claims Settlement Act); *id.* § 1772 (Florida Indian (Seminole) Land Claims Settlement Act); *id.* § 1773 (Washington Indian (Puyallup) Land Claims Settlement Act); *id.* § 1774 (Seneca Nation (New York) Land Claims Settlement Act).

179. *See Narragansett*, 19 F.3d at 702 ("[B]oth [the Maine and Massachusetts] acts . . . contain corresponding limits on Indian jurisdiction, conspicuously absent from the Settlement Act."); 25 U.S.C. § 1725(f) (1988) (Maine Act states that tribes may only exercise jurisdiction to extent granted in Act and any subsequent amendments thereto); 25 U.S.C. § 1771e(a) (Massachusetts Act setting forth specific limits on Indian jurisdiction). Interestingly, Governor Weld of Massachusetts has already signed an agreement with the Wampanoag Indian Tribe to build a casino in New Bedford, Massachusetts. Meg Vaillancourt & Mitchell Zuckoff, *Ante Upped on Casino Deal*, BOSTON GLOBE, Aug. 24, 1994, at 1 ("Gov. Weld yesterday hailed a proposed $175 million casino and theme park for [the] struggling city [of New Bedford, Massachusetts] . . . .").