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Will It Take a Move by the New York Yankees for the Seneca Nation to Obtain a Class III Gaming Licence?

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WILL IT TAKE A MOVE BY THE NEW YORK YANKEES FOR THE SENECA NATION TO OBTAIN A CLASS III GAMING LICENSE?

The recent surge in tribal reservation gaming has escalated the rivalry between New York and New Jersey over legalized gambling.[1] An unintended consequence of this rivalry was New York's threat to legalize high-stakes gambling[2] state-wide should New Jersey successfully lure New York's professional baseball team across the river.[3] This threat is

1. *See* Jerry Zremski, *Trump Says Mob Targets Indian Gambling*, BUFFALO NEWS, Oct. 6, 1993, at A10 (describing Donald Trump's testimony to Congress protesting the growth of Indian gaming). Trump, owner of three casinos in Atlantic City, New Jersey, appeared before Congress on October 5, 1993, as part of the debate on controlling Indian gambling. *Id.* Just prior to the congressional hearings, New York approved its first Indian casino—Turning Stone Casino on Oneida Indian land in Verona, near Syracuse. *Id.* At the time, other tribes, including the Seneca Nation, had discussed opening additional casinos on their reservations. *Id.*; *see also* Mitchell Zuckoff & Doug Bailey, *Indians Pursue a Golden Chance*, BOSTON GLOBE, Sept. 29, 1993, at A1 (discussing the unfair match between Atlantic City's millionaire developer Donald Trump who opposes Indian gambling and Mystic Lake, Minnesota's Tracy Stade, a Shakopee Mdewakanton Sioux with a high school diploma). Trump filed a federal lawsuit in 1993 alleging that he was disadvantaged by Stade and other Indians in his casino gambling activities. *Id.* Trump, using his influence to contain Indian gambling, argued that Indian gaming is infiltrated by organized crime. *What Trump Said on Indian Gaming*, USA TODAY, Dec. 6, 1993, at 11A (printing excerpts of Trump's testimony before a House panel on Indian gambling). It is more likely, however, that he is concerned over the effect of this new source of competition on his gambling empire in Atlantic City, New Jersey. *See* Leonard Prescott, *Stop Picking on Indian Gambling*, USA TODAY, Dec. 6, 1993, at 11A (explaining that Indian gaming benefits both tribes and states and emphasizing the Indian commitment to prevent the loss of this valuable resource from both criminal and governmental involvement).

2. *See* Robert Fachet, *Baseball*, WASH. POST, Oct. 8, 1993, at C2. Governor Cuomo's intention reflected the political controversy resulting from the meteoric rise of Indian gambling in the New York area, including the opening of the Foxwoods Casino in Ledyard, Connecticut, the Turning Stone Casino in Verona, New York, and current discussions regarding the Seneca Nation's plans to open a casino on their lands in western New York. *See* Zremski, *supra* note 1, at A10 (reporting on Donald Trump's testimony before Congress protesting the controversial growth of Indian gambling, the opening of the Oneida Tribe's Turning Stone Casino, and the Seneca Nation's discussion on opening a casino of their own).

3. Fachet, *supra* note 2, at C2 (recounting Governor Cuomo's intent to make clear to New Jersey, Donald Trump, and George Steinbrenner all possible ramifications of a move by the Yankees out of New York); *see also* Carolyn White, *Elsewhere*, USA TODAY, Oct. 8, 1993, at 13C.

but one example of the problems resulting from state jealousy[4] over non-taxable revenues generated by tribes from high-stakes, casino-style gambling[5] permitted under the Indian Gaming Regulatory Act of 1988 (IGRA).[6] Consequently, states are reluctant to facilitate Indian casino operations and continue to lobby heavily for their own state legislatures to pass laws permitting casino-style gambling.[7]

Under IGRA, an Indian tribe must obtain the state's cooperation to operate Class III, or casino-style, gaming on reservations within state borders.[8] The tribe and the state in which their reservation is located must negotiate an agreement, or compact (Tribal-State compact),[9] to regulate the gambling.[10] The compact is then approved by the United States Sec-

4. *See* Victor Dricks, *Pressure on to Ban Tribal Gaming Halls*, PHOENIX GAZETTE, Feb. 17, 1993, at A1 (identifying the opposition to Indian gambling in the States of California, New Mexico, Oklahoma, Arizona, and Wisconsin).

5. *See* 25 C.F.R. § 502.4 (1993) (listing the types of gaming considered as high-stakes, Las Vegas-style gaming). High-stakes, casino-type gambling is termed Class III gambling. *Id.* It includes all forms of gambling not included in Class I or Class II gaming and may include: (1) card games where one bets against the house such as blackjack, baccarat, chemin de fer, and pai gow; (2) casino games such as roulette, craps, and keno; (3) slot machine games and electronic facsimiles of any game of chance; (4) sports betting and parimutuel wagering; and (5) lotteries. *Id.*

6. Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (1988 & Supp. V 1993)).

7. *See* Peter Hellman, *Casino Craze*, TRAVEL-HOLIDAY, Mar. 1994, at 80, 82-83, 132 (discussing the proliferation of gambling throughout the United States and noting Louisiana's governor's prediction that United States cities with populations of at least one million will soon have casinos of their own); *see also* Ellen Hale, *Other Cities Hope Gaming Will Help Put Them on a Roll*, USA TODAY, Oct. 25, 1993, at 9A (describing current activities in state legislatures to pass riverboat gambling operations).

8. 25 U.S.C. § 2710(d)(1)(b) (1988 & Supp. V 1993).

9. *Id.* § 2710(d)(3) (requiring tribes to enter into agreements with states, called Tribal-State compacts, governing any Class III gaming a tribe conducts on its land).

10. *Id.* § 2710(d)(3)(C) (identifying permissive provisions included in Tribal-State compacts); *see* Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 276-77 (8th Cir. 1993) (summarizing the ultimately successful conclusion of a Tribal-State compact between the Flandreau Santee Sioux Tribe and South Dakota in 1990); *see also* Harold A. Monteau, *Tribal-State Gambling Compacts Under the Provisions of Class III Gaming in the Federal Indian Gaming Act*, *in* SPEAKING THE TRUTH ABOUT INDIAN GAMING doc. 3, at 2-3 (National Indian Gaming Ass'n ed., 1993) (on file with the *Catholic University Law Review*) [hereinafter SPEAKING THE TRUTH] (explaining the statutory negotiation process for concluding Tribal-State compacts). Tribal-State compacts may include provisions that identify: (1) which government's law and regulations apply; (2) who issues the license; (3) which government has criminal and civil enforcement jurisdiction; (4) any amounts paid to the state for enforcement or regulatory activities; and (5) remedies for the breach of a compact or violation of other Class III gaming activity. *Id.* Other provisions may include specifications regarding tribal taxation of Indian gaming activities at comparable state rates, specifications for licensing and operations, agreements allowing concurrent state jurisdiction, and types of gaming operations, including mechanical gaming devices. *Id.*

retary of the Interior.[11] Understanding that states enjoy a pronounced bargaining advantage over tribes,[12] Congress provided tribes with access to federal district courts to compel states to negotiate.[13] Until recently, states argued successfully that the Eleventh Amendment's prohibition of suits against a state[14] effectively shielded them from federal jurisdiction[15] in suits initiated by tribes.[16] It is questionable, however, whether the Eleventh Amendment will be removed from the states' arsenal of obstructive tactics used to combat Indian gaming. Nevertheless, recent decisions from the United States Courts of Appeals for the Ninth and Tenth Circuits hopefully will encourage tribal-state negotiations and forestall protracted litigation, a process which places undue burdens upon tribes as they contend with the interminable delay associated with the appeals process,[17] the possible loss of an impartial judicial forum to hear the dis-

11. 25 U.S.C. § 2710(d)(3)(B), (d)(8).

12. *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, 146 (1993) (explaining that states enjoy a pronounced bargaining advantage over tribes because a tribe typically must consent to state jurisdiction over gaming activities to conclude a Tribal-State compact).

13. 25 U.S.C. § 2710(d)(7)(A); *see also* Scott Crowell & Jerry Straus, *States Wrongly Assert that the Indian Gaming Regulatory Act Violates the Tenth and Eleventh Amendments to Avoid Fair Dealing With Tribes*, *in* SPEAKING THE TRUTH, *supra* note 10, at doc. 5, at 1 (noting that federal court litigation, brought by tribes against states directly contributed to tribal successes in Connecticut, Minnesota, and Wisconsin).

14. The Eleventh Amendment to the United States Constitution provides that: "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." U.S. CONST. amend. XI. Some states also have argued that the Tenth Amendment effectively bars federal jurisdiction under IGRA. This argument, however, has met with little success. *See Cheyenne River Sioux Tribe*, 3 F.3d at 281; *see also* William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 HASTINGS CONST. L.Q. 71, 92 (1993) (analyzing the Tenth Amendment's application to IGRA).

15. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 45 (4th ed. 1991). While the Eleventh Amendment generally acts as a jurisdictional bar to lawsuits against state governments in federal court, it does not bar a plaintiff from bringing suit against the state in state court in certain circumstances. *Id.*

16. *See* Crowell & Straus, *supra* note 13, at 2 n.1 (listing six pending United States Court of Appeals cases in which the district courts agreed with state arguments that Congress lacked constitutional authority to abrogate Eleventh Amendment immunity); Amber J. Ahola, Comment, *"Call It the Revenge of the Pequots," or How American Indian Tribes Can Sue States Under the Indian Gaming Regulatory Act Without Violating the Eleventh Amendment*, 27 U.S.F. L. REV. 907, 916-27 (1993) (discussing exceptions to the states' Eleventh Amendment argument to prevent tribes from suing in federal district court pursuant to IGRA).

17. *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1020 (11th Cir.) (providing an example of the type of protracted litigation surrounding Class III gaming), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12). The Seminole Tribe initiated suit in federal district court on September 19, 1991, and obtained a favorable ruling. *Id.* The

pute,[18] and the loss of potential gaming revenue necessary for their economic survival.[19]

This Comment deplores the lack of options available to tribes when states refuse to negotiate in good faith to conclude a Tribal-State compact for Class III gaming. This Comment begins by examining the economic situation of tribes before and after passage of IGRA. Next, this Comment focuses on judicial interpretation of the federal jurisdiction afforded tribes by IGRA when states refuse to negotiate. This Comment asserts that, based on statutory language, legislative history, and the public policy goals of IGRA, Congress had the intent and the power to abrogate the states' Eleventh Amendment immunity to encourage state participation in regulating gaming activity. This Comment further argues that the Supreme Court must resolve the differences in the judicial approaches to state sovereign immunity from suit and must expressly acknowledge Congress' power to abrogate this immunity pursuant to the Indian Commerce Clause. This Comment concludes that Congress must amend IGRA to clarify its intent to subject states to federal jurisdiction, to make Tribal-State compact negotiations voluntary, and to provide immediate federal-tribal regulation of Class III gaming upon failure of the compact negotiation process.

State appealed and the Eleventh Circuit reversed the district court decision on January 18, 1994. *Id.*

18. NOWAK & ROTUNDA, *supra* note 15, at 46. When states invoke Eleventh Amendment sovereign immunity from federal jurisdiction, this does not bar suit in state court in certain circumstances. *Id.*; *see also* Nevada v. Hall, 440 U.S. 410, 425-26 (1979) (holding that California residents injured in an auto accident in California by a Nevada state employee could bring suit in California state court against the State of Nevada because principles of federalism or state comity were not violated). Even though a suit is not barred, the tribe may face anti-Indian prejudice because Indian gaming disputes involve states and state judiciaries may be influenced by state political sentiments. Ahola, *supra* note 16, at 912 n.33.

19. Paul Lieberman, *Indians See Battle Ahead Over Future of Gambling*, L.A. TIMES, Oct. 10, 1991, at A1, A22 (explaining that according to the Chairman of the National Indian Gaming Commission (NIGC), gambling is currently the only way for Indians to develop economically on the reservation); *see also* Patricia A. Marks, *Three Studies of the Positive Economic Impact of Indian Tribal Gaming Industries in*, SPEAKING THE TRUTH, *supra* note 10, at doc. 9 (reviewing the results of studies conducted in Minnesota, Wisconsin, and Michigan on the significant beneficial economic impact Indian gaming confers on the Indian and local non-Indian communities); *infra* part I.B (discussing the beneficial impact of Indian gaming).

I. ECONOMIC IMPACT OF INDIAN GAMING

A. *Tribal Economic Conditions Before IGRA*

Most Indians living on the United States' 350 tribal reservations are impoverished, suffering from an alcoholism rate 663% higher than the general population, a suicide rate 95% higher, and an unemployment rate 200% higher than the national average.[20] These deplorable conditions exist despite the limited federal and state economic assistance provided to Indians.[21] In states with Indian populations, Indians represent a disproportionate amount of individuals receiving public assistance.[22]

Although some reservations have timber industries, electronics plants, or telephone stations,[23] Indian reservations more frequently are located in remote rural areas unattractive to industry.[24] Manufacturing thrives on only a few reservations.[25] To generate economic revenue, one state government encourages tribes to undertake projects such as goat farming.[26] Consequently, tribes naturally seek other, more lucrative means to generate the revenue necessary for providing vital social services. One California tribe resorted to permitting a 600-acre landfill on its land;[27] another in Arizona agreed to accept a hazardous waste incinerator;[28] still another in New Mexico permitted the United States Department of Energy to study the feasibility of creating a site to store radioactive fuel.[29] Not all tribes are in a position to seek alternatives. Thus, out of necessity, many tribes seek to capitalize on the popular pastime of gambling in bingo halls and casinos.[30]

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20. Joan Oleck, *Tribal Warfare: Indians Want to Clear the Way for More Casinos, But the States are Fighting Them Hard*, RESTAURANT BUS., June 10, 1993, at 56, 58; *California Indians; Buffalo Stakes*, THE ECONOMIST, July 24, 1993, at 25, 25 (reporting statistics from 1988, the year IGRA was passed).

21. *See* W. John Moore, *A Winning Hand?*, 25 NAT'L J. 1796, 1799 (July 17, 1993) (commenting that the amount of federal funds provided to tribes by the Bureau of Indian Affairs (BIA) for economic assistance dropped by two-thirds between 1977 and 1992).

22. *See id.* at 1799. Although Indians comprise 7.3% of Montana's population, they represent 54.2% of the population receiving federal welfare. *Id.* Unfortunately, reservation economies generally rely more on welfare than employment for their income. *Id.*

23. Lieberman, *supra* note 19, at A22.

24. *Id.*

25. Moore, *supra* note 21, at 1799.

26. Lieberman, *supra* note 19, at A22.

27. Moore, *supra* note 21, at 1799.

28. *Id.*

29. *Id.*

30. *See* Bill Duryea, *Indians Want a Hand in High Stakes Poker*, ST. PETERSBURG TIMES, Aug. 22, 1993, at 1B (contrasting the full parking lot of the Seminole Bingo Hall in Tampa with the empty parking lots of the other Tampa Seminole Indian tourist attractions and gift shop).

During the Reagan administration, tribes started to expand their small gambling operations in an effort to generate revenue[31] to compensate for shortfalls caused by declining federal assistance from the United States Department of the Interior.[32] Several court cases reaffirmed the fact that states were unable to employ Public Law 83-280 (Public Law 280) to exercise jurisdiction over tribal gaming activities conducted on reservations.[33] Consequently, by July 1993, Indian tribes operated 152 bingo halls and 23 casinos in the United States and generated tax-free revenues of approximately $6 billion.[34]

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31. *See* Moore, *supra* note 21, at 1796.

32. Oleck, *supra* note 20, at 58. During the Reagan administration, Interior Secretary James Watt reportedly told one Indian group to start their own " 'damn business' " and to stop "depending on the Great White Father." *Id.*

33. *E.g.*, Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1187-88 (9th Cir. 1982) (precluding enforcement of state and county laws pertaining to the operation of bingo games against the tribe), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe v. Butterworth, 658 F.2d 310, 312 (5th Cir. 1981) (precluding enforcement of a state statute against a tribe that restricts bingo gaming to specified organizations), *cert. denied*, 455 U.S. 1020 (1982). The United States Courts of Appeals for the Fifth and Ninth Circuits also based their decisions on the civil/regulatory criminal/prohibitory dichotomy established in Bryan v. Itasca County, 426 U.S. 373, 378-81 (1976). This analysis developed from judicial application of sections 2 and 4 of Public Law 280, Act of August 15, 1953, ch. 505, §§ 2, 4, 67 Stat. 588, 588-89 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, respectively). *Bryan*, 426 U.S. at 378-81. As Public Law 280 states, California has criminal jurisdiction and limited civil jurisdiction over Indian tribes. *Id.* Florida later opted to be subject to Public Law 280. 25 U.S.C. § 1747(b) (1988); *see infra* notes 91, 92. Courts, however, include in this jurisdiction criminal activities that are prohibited by the state and exclude from jurisdiction civil activities that merely are regulated by the state and are not contrary to public policy. *Bryan*, 426 U.S. at 378-81. Because states permitted and regulated bingo games, the Fifth and Ninth Circuit courts held that Indian operation of bingo games on tribal lands in violation of state statutes was a civil/regulatory activity not contrary to states' public policy and, therefore, not subject to state jurisdiction. Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900, 903 (9th Cir. 1986), *aff'd*, 480 U.S. 202 (1987); Seminole Tribe v. Butterworth, 658 F.2d 310, 315 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

Subsequently, the United States Supreme Court, in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), held that the State and county could not enforce gambling regulations on reservations because Indian gambling was not contrary to public policy, was civil and regulatory in nature, and thus, state regulations were unenforceable under Public Law 280. *Id.* at 209-12; *see* Connie K. Haslam, Note, *Indian Sovereignty: Confusion Prevails*—California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987), 63 WASH. L. REV. 169, 181 (1988).

34. Moore, *supra* note 21, at 1798.

B. Economic Impact of IGRA on Tribes and States

1. IGRA's Impact on Indian Tribes

Tribal gaming revenue, although minuscule in comparison to total United States gambling revenues,[35] is the lifeblood of many tribes. For example, the Wisconsin Winnebago Tribe uses eighty-five percent of its gaming revenue to fund schools, a government complex, middle-income housing, and non-gaming ventures.[36] With these monies, the Winnebagos built three smoke shops, a meat-processing plant, and an interstate travel plaza that houses five Winnebago-owned businesses.[37]

In Connecticut, despite strong state opposition, the Mashantucket Pequot Tribe opened Foxwoods Casino in February 1992.[38] As a result, the Pequots enjoy an unprecedented economic boon and are purchasing much of the original 2000 acres of their tribal lands.[39] All 250 members of the tribe share in the revenues netted by Foxwoods[40] and, as a result of the casino's success, cradle-to-grave social services[41] now exist.[42] Apartments, houses, and health clinics are under construction, and, in its first year of operation, the casino gave each tribal member a profit participation check in an amount between $5,000 and $50,000.[43]

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35. Gary Enos, *Tribes Hit on Gaming; Congress' Help Sought to Curb Proliferation of Indian Casinos*, CRAIN'S CITY & STATE, Apr. 12-25, 1993, at 1, 22. In 1991, with $720 million in national gross gambling revenues, revenues from Indian gaming comprised a mere two percent of the gaming industry. *Id.*; *see also* Hellman, *supra* note 7, at 80 (discussing recent developments in Indian gaming and noting that Indian gaming revenues grew to $1.5 billion in 1992).

36. Daniel Roth, *Winnebago Indian Tribe Bringing Legal Work Inside Casino Gambling is a Growth Industry*, CORPORATE LEGAL TIMES, Oct. 1993, at 1.

37. *Id.*

38. Kim I. Eisler, *Revenge of the Indians*, WASHINGTONIAN, Aug. 1993, at 65, 141. In 1667, those Pequots who survived massacres, avoided assimilation into the Narragansett and Mohican tribes, and were not sold into slavery by the British, were given 2000 acres of Connecticut land. *Id.* at 67. By the 1970s, however, only 178 acres and one resident elderly Pequot woman remained. *Id.* Connecticut planned to repossess the land upon her death and to create a state park. *Id.* Fortunately for the Pequots, the woman persuaded her grandson to return to the reservation. *Id.* He investigated economic opportunities, saw the bingo hall operations run by the Seminoles in Florida, and under the aegis of IGRA, created Foxwoods. *Id.*

39. *Id.* at 67, 141.

40. *Id.* at 141. In its first year of operation, Foxwoods netted $100 million on $1 billion of revenue. *Id.* at 141.

41. *Id.* at 66. Cradle-to-grave social services typically include medical, housing, education, and recreational services for tribal members beginning at birth and continuing until death. *Id.*

42. *Id.*

43. *Id.* IGRA permits per capita payments to tribe members pursuant to a plan, approved by the Secretary "to allocate revenues to uses authorized by paragraph (2)(B)." 25 U.S.C. § 2710(b)(3)(A); *see* 25 U.S.C. § 2710(d)(2)(A). Paragraph (2)(B) restricts the use of gaming revenues "(i) to fund tribal government operations or programs; (ii) to provide

2. *IGRA's Impact on States*

a. *Wisconsin*

In Wisconsin, Class III gaming revenues created 11,483 jobs primarily as a consequence of casino employment and secondarily as a result of retail and construction spending.[44] Consequently, 1400 people were taken off unemployment and 820 off welfare; the Indian casino put them on payroll.[45] Other benefits accrue to the State because many of Wisconsin's tribal reservations do not contain large grocery or clothing stores, gas stations, auto dealerships, or insurance companies.[46] Thus, the $68 million Indian gaming payroll is spent outside the reservation, but within Wisconsin.[47] Tourists who patronize casinos and purchase goods and services from Wisconsin merchants create an additional 5603 jobs.[48]

The local economy is not the only beneficiary of tribal gaming revenues. The State of Wisconsin received nearly $385,000 in tax revenues from tribal casino employees and the federal government received $2.1 million.[49] The State also derives additional savings because casino employees no longer are dependent on state welfare, unemployment compensation, or other state-funded services.[50] Wisconsin alone realized a $27.5 million annual savings in its public assistance programs.[51]

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for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B). These per capita payments are subject to federal income taxation. *Id.* § 2710(b)(3)(D).

44. *See* Marks, *supra* note 19, at 2-4.

45. *Id.* at 2. A 1992 study performed by Dr. James Murray of the University of Wisconsin confirms these figures. *Id.* His report identified other benefits conferred on Wisconsin resulting from tribal casino expenditures of $62 million per year for purchases and $30 million for gaming-related construction. *Id.* at 2-3.

46. *Id.* at 3.

47. *Id.*

48. *Id.* Day visitors to Wisconsin's 15 tribal casinos spend, on average, $35 per day on food and drink. *Id.* Overnight visitors spend, on average, $125 per person for the same items plus lodging. *Id.* In addition, 17% of these visitors originate from outside Wisconsin and 53% from outside the local area. *Id.*

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 2. Of the total 4500 employees of tribal casinos, 2000 of whom are not Indian, 3000 rely 100% on the income derived from gaming employment. *Id.* In the event that Class III gaming is outlawed, these 3000 people would lose their jobs and be forced to rely on state economic assistance in the amount of $27,465,000 per year (average unemployment compensation in Wisconsin is $176 per week, $9,152 per year). *Id.*

b. Minnesota

Similarly, Minnesota experienced a dramatic drop in the number of welfare recipients as a result of permitting Indian Class III gaming.[52] The State's thirteen tribal casinos employ nearly 10,000 individuals, twenty-five percent of whom are Indians,[53] making Indian gaming Minnesota's seventh largest employer.[54] The $116 million payroll for these employees is dispensed outside the reservation in local clothing and grocery stores, auto dealerships, insurance companies, and utility companies.[55] Furthermore, Minnesota's casino-related construction expenditures are estimated at $95.9 million.[56] Minnesota also benefits from the $3 million annually spent by tribes in their efforts to attract tourists[57] who, in turn, boost the local economy by spending money on lodging, food, entertainment, and shopping. By law, tribal gaming revenues must be used to provide for economic development, social services, welfare, and government purposes.[58] Thus, Minnesota also gains because the tribes' members are less dependent on state social welfare programs.[59]

c. Michigan

Eight tribal gaming operations in Michigan employ approximately 2000 people[60] with a total payroll of $13.5 million per year.[61] Just over sixty percent of those employed are Indians.[62] These Indian employees provide financial support for an additional 3,100 tribal members.[63] Prior to

52. *See* Moore, *supra* note 21 (explaining that the unemployment rate among the Mille Lacs Band of Ojibwe in Minnesota declined from 60% to almost 0%).

53. *See* Marks, *supra* note 19, at 4.

54. *Id.*

55. *Id.*

56. *Id.* The tribes already spent $68.8 million on casino construction with plans to spend an additional $27.1 million within the next few years. *Id.*

57. *Id.* at 5. This $3 million tourist attraction expenditure figure is more than twice the amount spent by the Minnesota Office of Tourism during fiscal year 1992. *Id.*

58. 25 U.S.C. § 2710(b)(2)(B), (b)(3) (1988); *see also* Marks, *supra* note 19, at 5 (discussing these revenue-related provisions).

59. *See* Moore, *supra* note 21, at 1796-97 (explaining that the tribal government is constructing homes, roads, schools, and a health clinic with the Mille Lacs' gaming revenues). Furthermore, the tribe views the pecuniary benefit of reservation gambling as a way to increase tribal self-development and tribal self-sufficiency. *Id.* at 1797. Moore states that "gambling represents more than a measure of financial freedom. In the eyes of tribal leaders, it could be the key to giving Indians control over their own destiny." *Id.*

60. Marks, *supra* note 19, at 5.

61. *Id.*; *see also* Thomas L. Wilson, *Indian Gaming and Economic Development on the Reservation*, 68 MICH. B.J. 380, 383 (1989) (observing that since the Saginaw Chippewa Tribe of Michigan began conducting gaming in 1980, unemployment levels have significantly dropped from their 1980 high of 50%).

62. Marks, *supra* note 19, at 5.

63. *Id.*

the establishment of tribal casinos, nearly forty percent of these casino employees received some form of state or federal welfare assistance, while an additional thirty percent received unemployment compensation.[64] As a direct result of gaming operations, Michigan casinos contributed nearly $654,000 to federal and state unemployment tax revenue.[65]

Expenditures by Michigan tribal gaming operations on food, supplies, utilities, insurance, and other necessities total $41 million.[66] Nearly all of these dollars are spent within Michigan's borders.[67] Gaming operations also attract foreign dollars from Canada and other countries.[68] Currently, thirty-six percent of Michigan tribal casinos' patrons reside outside the United States.[69] Furthermore, these visitors spend money at local Michigan businesses as well as at the casinos.[70] Thus, local areas also enjoy the benefits of tribal gaming revenues.[71]

d. Connecticut

Since the opening of the Foxwoods casino on the Mashantucket Pequot reservation near Mystic, Connecticut, residents in the surrounding region have benefitted from the spillover effect of tribal gaming revenue.[72] Connecticut residents have access to the reservation's free health clinic and ambulance service, local banks have solicited a greater volume of deposits, and the tourist town of Mystic has recovered from its economic slump.[73] Furthermore, the Mashantucket Pequots are discussing plans for construction of a $350 million theme park.[74]

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64. *Id.*

65. *Id.*

66. *Id.*

67. *See* Wilson, *supra* note 61, at 384 (commenting that local communities in Michigan have profited from the gaming operations of the tribes because "dollars are often turned over as many as 2 1/2 times").

68. Marks, *supra* note 19, at 6.

69. *Id.*

70. *Id.*

71. *Id.*; *see also* Wilson, *supra* note 61, at 381 (noting that Michigan tribal gaming actually attracts tourist dollars, not funds otherwise spent on state-sanctioned lotteries).

72. Eisler, *supra* note 38, at 142.

73. *Id.*

74. *Id.*

Despite Connecticut's resistance to permitting tribal gaming,[75] the State appears to enjoy its new source of revenue.[76] With a 1992 payroll of $86 million covering 4,370 staffers, the Mashantucket Pequot Indian Tribe claims to be Connecticut's largest corporate taxpayer.[77] Connecticut also has negotiated an agreement with the Tribe to permit slot machines at the casino in exchange for $100 million, or twenty-five percent of the anticipated slot machine revenue, whichever is greater.[78]

II. INDIAN GAMING REGULATORY ACT

IGRA is the result of several years of legislative efforts to create a regulatory scheme for Indian gaming.[79] Between 1983 and 1987, Con-

75. *Id.* at 141; *see also* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1032 (2d Cir. 1990) (requiring Connecticut to conclude a Tribal-State compact pursuant to IGRA after determining that the State had acted in bad faith by refusing to negotiate with the tribe), *cert. denied*, 449 U.S. 975 (1991). Ultimately, the State refused to agree to a compact and the United States Secretary of the Interior eventually prescribed Class III gaming procedures. *See* 56 Fed. Reg. 15,746 (1991); 56 Fed. Reg. 24,996 (1991); *see also* 25 U.S.C. § 2710(d)(7)(B)(iii) (1988 & Supp. V 1993).

76. *See* Moore, *supra* note 21, at 1797.

77. *Id.* at 1799.

78. *See* Hellman, *supra* note 7, at 80 (discussing the recent growth in United States gambling activity). In 1993, Foxwoods boasted an attendance of 15,000-20,000 on weekdays and 20,000-30,000 on weekends. *Id.* Tribal gaming revenues, net of the state's share, are expected to reach $113 million in fiscal 1994. *Id.*

79. Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 182 (1990). Congressional interest in regulating Indian gaming began in the first session of the Ninety-Eighth Congress via H.R. 4566. *Id.* at 155. This bill, introduced after the decision in Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), was modeled after the Nevada Gaming Commission and provided for a federal licensing scheme for Indian gaming supervised by a Department of the Interior commission. Sokolow, *supra*, at 155. The bill was supported by one group of tribes on the basis that it clarified existing law and was opposed by other groups because it impinged on tribal sovereignty. *Id.* at 156. Ultimately it died in committee. *Id.*

The Ninety-Ninth Congress introduced three of the most important bills related to Indian gaming: S. 902, H.R. 1920, and S. 2557. *Id.* Of these, S. 902 was least comprehensive. *Id.* This bill instituted specific federal standards for Indian gambling, required approval by the Secretary of the Interior for tribal ordinances and management contracts, and established a gaming commission without defining its power or organization. *Id.*

H.R. 1920 created a more comprehensive framework than that provided in S. 902. *Id.* This bill established a National Gaming Commission that had the authority to approve tribal ordinances and management contracts for the Secretary of the Interior. *Id.* The bill also mandated that revenues be used to fund tribal functions. *Id.* The unusual feature of the House bill was that it established three classes of gaming, Class I, II, and III, which were jurisdictionally identical to those ultimately enacted in IGRA. *Id.* at 156, 159, 180. H.R. 1920 also covered tribes that were not federally recognized. *Id.* at 157.

S. 2557 was the Reagan administration's response to H.R. 1920. *Id.* S. 2557 sought to correct the perceived inadequacies of H.R. 1920 by providing for more rigorous regulation of licensing, accounting, and auditing procedures. *Id.* at 158. S. 2557 focused, however, almost exclusively on the regulation of bingo. *Id.* It also provided a gaming context for

gress introduced numerous bills on the subject of Indian gaming.[80] The final bill, Senate Bill 555[81] (S. 555), as enacted, was a compromise that sought to balance the competing interests of tribes, states, and the gaming industry.[82]

Concurrent with Congress' drafting of IGRA, the United States Supreme Court decided *California v. Cabazon Band of Mission Indians*.[83] In *Cabazon*, the Court expressly approved the " 'civil/regulatory' " " 'criminal/prohibitory' " dichotomy[84] employed by the United States Courts of Appeals[85] in deciding whether the activity in question came under the jurisdiction of Public Law 280, and thus subject to state regula-

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application of Public Law 280 and provided for criminal sanctions under Title 18 of the United States Code. *Id.* The bill also established a distinct category of crimes subject to concurrent federal and state jurisdiction. *Id.* These three bills, however, died. *Id.*

The bill eventually enacted into law as IGRA, S. 555, sought to clarify the legal status of Indian gambling and to protect tribes from coming under the influence of organized crime. *Id.* at 159. Congress amended this bill and eventually President Ronald Reagan signed it into law on October 17, 1988. *Id.* at 182; *see also* S. REP. NO. 446, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 3071. Senators Daniel Inouye (D-Haw.), Chairman of the Senate Select Committee on Indian Affairs, Daniel Evans (R-Wash.), and Thomas Daschle (D-S.D.) introduced the final gaming bill, S. 555, in the 100th Congress. *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387, 401 (1993) (tracking the various pieces of legislation leading to IGRA).

80. *See supra* note 79 (discussing legislative developments culminating in IGRA); *see also* 1988 U.S.C.C.A.N. 3071, 3092-3106 (outlining the views of Senators Inouye and McCain in response to the various precursors to IGRA).

81. S. REP. NO. 446, *supra* note 79, at 1, *reprinted in* 1988 U.S.C.C.A.N. at 3071. It should be noted that the bill as reported to the Senate Indian Affairs Committee was amended on the Senate floor. *Id.*

82. *Id.* The Senate Report explained that

> S. 555 is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress . . . to formulate a system for regulating gaming on Indian lands . . . [while at the same time preserving] the right of tribes to self-government . . . [and protecting] both the tribes and the gaming public from unscrupulous persons.

Id. at 1-2, *reprinted in* 1988 U.S.C.C.A.N. at 3071.

83. 480 U.S. 202 (1987).

84. *Id.* at 209; *see supra* note 33 (addressing the civil/regulatory criminal/prohibitory dichotomy and applying it to the regulation of Indian gaming). The Court explained that "[t]he shorthand test is whether the conduct at issue violates the State's public policy." *Cabazon*, 480 U.S. at 209. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211 (footnote omitted).

85. *Cabazon*, 480 U.S. at 209 (explaining that the Ninth Circuit applied the same persuasive analysis used by the United States Court of Appeals for the Fifth Circuit in Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982)).

tion.[86] Because Public Law 280[87] confers state jurisdiction over criminal activities within state borders, the courts were required to evaluate reservation gambling in light of existing state gambling laws and public policy to determine if it was a criminal activity.[88] The existence of state statutes permitting and regulating gambling compelled the courts to conclude that gambling was not a prohibited criminal activity, but was a state-regulated, civil activity.[89] Thus, states could not invoke jurisdiction via Public Law 280 to regulate tribal gambling.[90]

The civil/regulatory criminal/prohibitory dichotomy adopted by the Supreme Court is significant because it provides certain states[91] with a

86. *Id.* The Court agreed with the Ninth Circuit's application of the civil/regulatory criminal/prohibitory dichotomy in deciding "that neither the State nor the county had any authority to enforce its gambling laws within the reservations." *Id.* at 206.

87. *See supra* note 33.

88. *Cabazon*, 480 U.S. at 207.

89. *Id.*

90. *Id.*

91. Public Law 280 was enacted to prevent lawlessness on Indian reservations. *Id.* at 208. It initially provided six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—with criminal and limited civil jurisdiction over Indian tribes. Haslam, *supra* note 33, at 176 n.68. Public Law 280 also allowed any other state to assume jurisdiction via statute or state constitutional amendment. *Id.* at 176. Currently, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington have assumed partial or total jurisdiction under this provision. *Id.* at 176 n.69; *see also supra* note 33 (discussing in greater detail Public Law 280); *infra* note 92 (setting forth the current codified version of Public Law 280).

mechanism[92] for obtaining jurisdiction,[93] subject to Indian consent, over certain activities on Indian country.[94] Similarly, Congress recognized the value of this analysis in determining the extent of federal regulation over the types of games permitted under IGRA.[95] The Senate Select Committee on Indian Affairs, however, stressed that the application of the civil/regulatory criminal/prohibitory dichotomy to S. 555 was "markedly different"[96] than that under Public Law 280. The analysis under S. 555 should assist the judiciary in distinguishing "between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities."[97] Courts cur-

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92. The mechanism for state exercise of criminal jurisdiction is codified at 18 U.S.C. § 1162(a) (1988) and provides for state jurisdiction over

> offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State.

18 U.S.C. § 1162(a) (1988); *see also supra* note 33 (discussing Public Law 280).

The mechanism for state civil jurisdiction is codified at 28 U.S.C. § 1360(a) (1988) and provides for state jurisdiction over

> civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a) (1988); *see also supra* note 33 (discussing Public Law 280). Under 25 U.S.C. § 1326, however, the Indians affected by such state jurisdiction must consent in an election "by a majority vote of the adult Indians voting at a special election." *Id.* None have done so since the provision's enactment.

93. *Cabazon*, 480 U.S. at 208 (citing Bryan v. Itasca County, 426 U.S. 373 (1976), which states that the civil jurisdictional grant of Public Law 280 section 4 is conferred to the states when the state law enforced is criminal in nature).

94. *Id.* at 207. " 'Indian country,' " as defined at 18 U.S.C. § 1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 115(a) (1988). This definition applies to questions of both criminal and civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Thus, the Cabazon and Morongo Reservations are Indian country. It should be noted that IGRA adopted a slightly different term, Indian lands, and definition. *See* 25 U.S.C. § 2703(4) (1988 & Supp. V 1993). "Indian lands" is defined as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

Id.

95. S. REP. No. 446, *supra* note 79, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3076.

96. *Id.*

97. *Id.*

rently apply the *Cabazon* analysis conjunctively with IGRA to evaluate what Class III games should be included in compact negotiations.[98] Thus, the *Cabazon* decision has become an essential element of IGRA in that it provides a framework for determining the scope of both state and federal regulation over Indian gaming.

A. California v. Cabazon Band of Mission Indians

In *California v. Cabazon Band of Mission Indians*,[99] two federally recognized Indian tribes, the Cabazon and Morongo Bands of Mission Indians, operated bingo games on their reservations in Riverside County, California, pursuant to federally approved tribal ordinances.[100] The Cabazon Band also operated card parlor games for profit that were played primarily by the non-Indian public.[101] These activities were a major source of employment and the sole source of income for the Tribes.[102] Fearing organized crime involvement in tribal gaming activities, the State of California and Riverside County sought to regulate the gambling activities on Indian country by enforcing California Penal Code Ann. § 326.5[103] via Public Law 280,[104] the Organized Crime Control Act of

98. *See, e.g.*, Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1032 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 368 (8th Cir. 1990); Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812GEB, 1993 U.S. Dist. LEXIS 9877, at *21 (E.D. Cal. July 16, 1993) (explaining the mechanics of the conjunctive application of *Cabazon* to IGRA). The district court applied a two-step analysis to determine if the proposed Class III games are the proper subject of a Tribal-State compact. *Rumsey Indian*, 1993 U.S. Dist. LEXIS 9877, at *21. First, the court must decide whether a state permits the proposed activity to be played " 'for any purpose by any person.' " *Id.* (quoting 25 U.S.C. § 2710(d)(1)(B) (1988)). If the proposed game is permitted, the analysis stops and the game is deemed a proper subject of a Tribal-State compact. *Id.* If the proposed game is not permitted by the state, the court will employ the *Cabazon* analysis to determine if the game violates state public policy. *Id.* Thus, the court examines a state's entire statutory scheme to determine if the activity is regulated or prohibited. *Id.*

99. 480 U.S. 202 (1987).

100. *Id.* at 204. The Cabazon and Morongo Bands of Indians operated bingo games pursuant to ordinances approved by the United States Secretary of the Interior. *Id.* at 205.

101. *Id.*

102. *Id.*

103. *Id.* Section 326.5 of the California Penal Code does not completely prohibit bingo. *Id.* It permits bingo as long as the operators are members of designated charitable organizations and are not compensated for their services. *Id.*

104. *Cabazon*, 480 U.S. at 205; *see* 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1988 & Supp. V 1993) (granting California and five other states jurisdiction over criminal offenses committed by or against Indians on Indian lands within the states' borders); *see supra* note 33 (discussing the application of Public Law 280 to regulating activities on reservations).

1970[105] (OCCA), and two county gaming ordinances.[106] Although California permitted certain charities to operate bingo parlors, prizes were capped at $250 per game.[107] Tribal jackpots, however, exceeded this limit.[108] Because this gaming would have been illegal if not conducted on the reservation,[109] California claimed that its regulations prohibited this activity and employed Public Law 280[110] and OCCA[111] to obtain jurisdiction.

The tribes sued Riverside County in federal district court seeking a declaratory judgment that the county lacked authority to enforce its gambling laws on the reservation.[112] The State of California intervened.[113] The district court agreed with the tribes and granted their motion for summary judgment.[114]

The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment and permanent injunction restraining Riverside County and the State of California from applying their gambling laws on the reservations.[115] The United States Supreme Court upheld the decision.[116] Writing for the Court, Justice White recognized the supremacy of the federal interest in promoting tribal self-sufficiency and economic development.[117] Justice White found that, absent express congressional consent, states may not apply their laws to tribal Indians on their reservations.[118] The Court then rejected California's contention that Public Law

105. *Cabazon*, 480 U.S. at 205; *see* 18 U.S.C. § 1955 (1988 & Supp. V 1993).

106. *Cabazon*, 480 U.S. at 206. The county gaming ordinances included local Ordinance No. 558, which regulated bingo, and Ordinance No. 331, which prohibited draw poker and other card games. *Id.*

107. *Id.* at 205.

108. *Id.*

109. *Id.* at 202.

110. *Id.* at 203.

111. *Id.*

112. *Id.* at 202.

113. *Id.* at 206.

114. *Id.* at 202.

115. Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900, 906 (9th Cir. 1986), *aff'd*, 480 U.S. 202 (1987).

116. *Cabazon*, 480 U.S. at 206.

117. *Id.* at 216. Justice White identified the overriding federal goal of promoting tribal economic development and self-sufficiency. *Id.* Justice White wrote:

> [The] [d]ecision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."

Id. (alteration in original) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

118. *Id.* at 207.

280 and OCCA constituted congressional consent to regulate tribal gaming activity.[119]

B. Overview of IGRA's General Provisions

In response to the rapid increase of high-stakes bingo activities on tribal reservations during the late 1970s and early 1980s, Congress enacted IGRA on October 17, 1988.[120] Arriving on the heels of the Supreme Court's decision in *Cabazon*,[121] IGRA codified the federal government's Indian policy goal of promoting strong tribal economic development, tribal self-sufficiency, and strong tribal government.[122] IGRA established a statutory basis for regulating and protecting tribal gaming operations[123]

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119. *Id.*

120. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (1988 & Supp. V 1993).

121. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). It is interesting to note that S. 555, the basis for IGRA, was introduced by Senator Daniel Inouye (D-Haw. and Chairman on the Senate Select Committee on Indian Affairs), Senator Daniel Evans (R-Wash.), and Senator Thomas Daschle (D-S.D. and a member of the Senate Select Committee on Indian Affairs) six days prior to the *Cabazon* decision. S. REP. No. 446, *supra* note 79, at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3074. At the time *Cabazon* was decided, tribes feared that an adverse ruling by the United States Supreme Court would affect negatively their position on the proposed bill and became more willing to compromise. *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3073. Tribes originally were opposed to any legislation over gambling that unilaterally conferred jurisdiction to states and expressed a "preference for an outright ban of class III games to any direct grant of jurisdiction to States." *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3074. H.R. 1920 reflected this and sought to ban Class III gaming altogether. *Id.*; *see also* note 79 (discussing H.R. 1920). S. 555 took into account the tribes' position but also gave them the option to come under state jurisdiction in the event they wanted to conduct Class III gaming. *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3074. The mechanism to accomplish this is the Tribal-State compact. *Id.* at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3075-76; *see infra* notes 134-44 and accompanying text (discussing Tribal-State compacts).

122. *See* 25 U.S.C. § 2701(4) (1988); *see also* Haslam, *supra* note 33, at 178 n.98 (identifying the 1960s as the period when the federal policy goal of encouraging tribal economic independence and self-government emerged).

123. 25 U.S.C. § 2702 (1988). The Act's declaration of policy sets forth the purposes of the Act:

> (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

and created the National Indian Gaming Commission[124] (NIGC) to oversee Indian gaming.[125] IGRA also provides a jurisdictional scheme over Indian gaming based on the type of game involved.[126] This scheme provides for exclusive tribal jurisdiction over Class I gaming,[127] characterized as social[128] or traditional;[129] and shared control with NIGC over Class II gaming,[130] involving certain card and bingo-type games of chance.[131] To conduct Class II gaming, the tribal government must adopt a gaming ordinance and obtain approval from the NIGC Chairman.[132]

Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Id.

124. 25 U.S.C. § 2704 (1988). The NIGC is established within the Department of the Interior. *Id.* § 2704(a). The composition of NIGC is as follows:

> (1) The Commission shall be composed of three full-time members who shall be appointed as follows:
>
> (A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and
>
> (B) two associate members who shall be appointed by the Secretary of the Interior.
>
> (2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.
>
> (B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.
>
> (3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

Id. § 2704(b)(1) to (3).

125. 25 U.S.C. § 2706 (1988). Powers of the NIGC include: the assessment and collection of civil fines for IGRA violations; the monitoring, inspection, and examination of tribal premises and Class II gaming activity; the investigation of the backgrounds of gaming personnel; the promulgation of guidelines and regulations, as appropriate; and the submission of biannual reports to Congress. *Id.*

126. 25 U.S.C. § 2710 (1988).

127. *Id.* § 2710(a)(1) (providing absolute tribal control over Class I gaming).

128. 25 U.S.C. § 2703(6) (1988 & Supp. V 1993) (identifying social games as games with prize awards of minimal value).

129. *Id.* (identifying gaming as games connected with tribal ceremonies or celebrations).

130. 25 U.S.C. § 2710(b) (providing for tribal regulation of Class II gaming subject to NIGC approval and statutory compliance).

131. 25 U.S.C. § 2703(7) (including bingo, assisted by electronic, computer, or other technological means, and card games played in conformity with state law).

132. 25 U.S.C. § 2710(b)(1)(B). IGRA requires that for an ordinance for Class II gaming to be approved by the NIGC Chairman, the tribe must have sole proprietary responsibility for the gaming conducted. *Id.* § 2710(b)(2)(A). Further, net gaming revenues must be used: "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local

IGRA's most controversial aspect is allowing tribes to conduct Class III, or high-stakes, gaming.[133] Lawful Class III gaming activity is conducted pursuant to an approved tribal gaming ordinance, located in a state that permits this type of gambling, and executed in conformance with a Tribal-State compact entered into between a tribe and the state.[134]

1. Tribal-State Compact

Although S. 555 recognized primary tribal jurisdiction over card parlor operations and bingo, it vested oversight powers in the newly created NIGC.[135] S. 555 also authorized tribal and state governments to enter into Tribal-State compacts to address the regulatory and jurisdictional issues of Class III casino, parimutuel, and slot machine gaming.[136] The legislature's purpose in requiring a Tribal-State compact for the operation of

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government agencies." *Id.* § 2710(b)(2)(B). Additional statutory requirements include annual external audits, construction of the facility in conformance with environmental and public health and safety concerns, and the implementation of a system to adequately perform background investigations on primary management officials and key employees. *Id.* § 2710(b)(2)(C) to (F). Congress included this last requirement in response to serious concerns regarding Mafia involvement in Indian gaming activity. *See* Eric J. Swanson, Comment, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 482 (1992) (emphasizing Congress' fear of organized crime involvement in Indian gaming activity as a significant reason for IGRA's passage).

133. 25 U.S.C. § 2710(d). In the first major case interpreting IGRA, the United States Court of Appeals for the Second Circuit included as Class III gaming high-stakes casino style gambling such as blackjack, poker, dice, money-wheels, roulette, baccarat, chick-a-luck, pan game, over and under, and bouncing ball. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1027 n.5 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). From the Indian perspective, the most controversial aspect of IGRA was the imposition of federal and state restrictions on tribal governmental powers. *See* Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9, 11 (D.D.C. 1990).

134. 25 U.S.C. § 2710(d). Section 2710(d) states that Class III gaming may lawfully be conducted on Indian lands if such activities are—

> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and
>
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.

Id. § 2710(d)(1).

135. S. REP. No. 446, *supra* note 79, at 16, *reprinted in* 1988 U.S.C.C.A.N. at 3073. In S. 555 the NIGC was to be composed of five members, but was later reduced to three. 25 U.S.C. § 2704.

136. *See* S. REP. No. 446, *supra* note 79, at 16, *reprinted in* 1988 U.S.C.C.A.N. at 3073; Monteau, *supra* note 10, at 1.

Class III gaming was to create a mechanism to balance the competing interests of the tribes and the states.[137] Prior to IGRA's enactment, state laws and regulations pertaining to Class III gambling generally did not apply on the reservations.[138] States have a strong interest, however, in maintaining their restrictions on Class III activities on tribal lands.[139] The Senate Select Committee on Indian Affairs (Committee) balanced this state interest with the competing tribal interest against imposition of state jurisdiction over activities on tribal land.[140] The Committee also identified other significant tribal and state governmental interests regarding the conduct of Class III gaming.[141] Thus, the effect of the Tribal-State compact provision is to allow the state an opportunity to participate in the regulation of Class III gaming on Indian land within its borders.[142]

Another goal of the compact was to put the Indian tribes and the states on equal footing by facilitating negotiations between two equal sovereigns.[143] The Committee recognized, however, the difficulty of creating incentives for states to enter into negotiations with tribes to conclude compacts for Class III gaming.[144] The Committee's solution was to en-

137. S. REP. No. 446, *supra* note 79, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083. The Senate Select Committee on Indian Affairs sought "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 land." *Id.* at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075. The Committee determined that the Tribal-State compact was the best mechanism available to the tribes and the states "to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth." *Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083. *But see* Jones, *supra* note 12, at 134-35 (noting that the mandatory compact requirement "in reality aggravated conflicting notions of sovereignty in the context of historic adversity").

138. S. REP. No. 446, *supra* note 79, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083.

139. *Id.*

140. *Id.* The tribes' opposition to any encroachment on their sovereignty was so great that some advocated "an outright ban of class III games." *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3074.

141. *Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083. Tribe governmental interests include: (1) raising revenues to provide governmental services to benefit the tribe; (2) promoting public safety and lawfulness on tribal land; (3) attaining tribal economic self-sufficiency; (4) attaining Indian self-determination; and (5) regulating people within tribal borders. *Id.* State governmental interests relating to Class III gaming conducted on Indian lands within state borders include interaction of Class III gaming with the states' own public policy, safety, law, and economic interests. *Id.*

142. *See id.*

143. *Id.*

144. *Id.* The Committee stated, "The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place." *Id.*

able tribes to sue states in federal district court for refusing to engage in good faith negotiations.[145]

2. Statutory Process for Compact Conclusion

Pursuant to section 2710(d)(7)(A)(i) of IGRA, an Indian tribe may file suit in federal district court against a state for failing to enter into negotiations to conclude a compact or for failing to conduct such negotiations in good faith.[146] Such an action may be initiated after the passage of a 180-day period commencing on the date the tribes sought state participation in negotiations.[147] To establish its prima facie case, the tribe must introduce evidence that a Tribal-State compact has not been concluded and that the state ignored the request or did not respond in good faith.[148] The burden of proof then shifts to the state to demonstrate that it negotiated in good faith to conclude a compact.[149] If the state fails to meet this burden, the court will order a compact to be concluded within 60 days.[150]

In the event that the 60-day period expires without the tribe and state concluding a compact, the tribe and state each must submit their best compact offer to a court-appointed mediator who decides which compact is to be adopted.[151] If the state consents to the compact proposed by the mediator within 60 days of its submission to the state, the agreement proposed by the mediator is to be treated as a Tribal-State compact.[152] If the state does not consent to the mediated compact, the state is removed from the process and the Secretary of the Interior works with the tribe to prescribe the appropriate procedures for engaging in Class III gaming.[153]

C. Judicial Interpretation of IGRA

The Supreme Court's decision in *California v. Cabazon Band of Mission Indians*[154] and the subsequent passage of IGRA spawned an unprec-

145. *Id.* at 14, *reprinted in* 1988 U.S.C.C.A.N. at 3084. The Committee recognized that in agreeing to conclude a compact for Class III gaming with a state, a tribe relinquishes any existing legal right to conduct Class III gaming if they chose not to engage in gaming rather than accede to state jurisdiction, or if they chose to negotiate a compact and it was never concluded. *Id.*

146. 25 U.S.C. § 2710(d)(7)(A)(i) (1988 & Supp. V 1993).

147. *Id.* § 2710(d)(7)(B)(i).

148. *Id.* § 2710(d)(7)(B)(ii).

149. *Id.*

150. *Id.* § 2710(d)(7)(B)(iii).

151. *Id.* § 2710(d)(7)(B)(iv).

152. *Id.* § 2710(d)(7)(B)(v), (vi).

153. *Id.* § 2710(d)(7)(B)(vii).

154. 480 U.S. 202 (1987); *see also* Bisset, *supra* note 14, at 74 (explaining that by requiring express congressional consent for application of state and local law to Indian gaming, the Supreme Court in *Cabazon* provided judicial support for this activity). The *Cabazon*

edented growth in gambling activities on tribal lands.[155] In the absence of an established regulatory framework for determining the finer points of the new law, however, tribes and states were forced to turn to the judiciary for interpretation.[156] Tribes actively sought judicial assistance to conclude Tribal-State compacts,[157] while states sought to avoid judicial intervention in the compact negotiation process by asserting the soverign immunity defense afforded by the Eleventh Amendment.[158]

1. Tribal Victories

Mashantucket Pequot Tribe v. Connecticut provided the most significant judicial interpretation of IGRA's good faith requirement that states conclude a compact.[159] The Pequots invoked IGRA's statutory remedy by bringing suit against Connecticut for refusing to negotiate a compact.[160] The State could not satisfy its burden of proof regarding good faith negotiation because it had completely refused to negotiate.[161] Instead, Connecticut argued that IGRA required tribes to adopt ordinances allowing

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decision ultimately eliminated state control of Indian gambling without imposing federal restraints. *Id.* Although IGRA repealed the application of the Johnson Act (15 U.S.C. § 1175, prohibiting the use or possession of any gambling device) to Class III gambling devices subject to an effective Tribal-State compact, the Johnson Act remains applicable to Class II gaming on Indian lands. *See* Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633, 635 n.3 (D.C. Cir.), *cert. denied*, 114 S. Ct. 2709 (1994) (making it unlawful for video facsimiles of games to be regulated as Class II gaming devices).

155. *See* Bisset, *supra* note 14, at 74 (discussing the rapid growth of Indian gaming); Swanson, *supra* note 132, at 471 (noting the subsequent nationwide increase of casino-style gambling on reservations); *see also supra* part I.B (discussing IGRA's impact on tribal and state economies).

156. Numerous tribes filed lawsuits in federal district court to compel states' good faith negotiations. *See infra* parts II.C.1, II.C.2 (discussing the cases in which tribes sued states pursuant to IGRA).

157. *See infra* part II.C.1.

158. *See* discussion *infra* parts II.C.2, III. States also sought clarification on what specific kinds of gaming are permissible as Class II or Class III gaming. *See, e.g.*, Oneida Tribe v. Wisconsin, 951 F.2d 757, 760 (7th Cir. 1991) (defining " 'lotto' " as a Class II game which may be prohibited but cannot be regulated by the state).

159. 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

160. *Id.* at 1025.

161. *Id.*; *see* Nancy McKay, Comment, *The Meaning of Good Faith in the Indian Gaming Regulatory Act*, 27 GONZ. L. REV. 471, 477 (1992) (discussing the Second Circuit's interpretation that IGRA mandates good faith negotiations between states and tribes). Because little case law regarding the good faith standard exists under IGRA, McKay proposes four possible meanings of good faith. *Id.* at 477-78. The first standard is the reasonable subjective standard within the context of the Uniform Commercial Code (UCC). *Id.* at 478. The second is the National Labor Relations Act (NLRA) standard of good faith, which combines a totality of the circumstances approach with a per se violation standard. *Id.* at 478-79. The third is the totality of the circumstances test employed by the Washington State Supreme Court for determining good faith bargaining in the public sector. *Id.*

Class III gaming prior to negotiation with a state.[162] The United States District Court for the District of Connecticut agreed with the Pequot Tribe that IGRA does not require sequential adherence to the conditions outlined in 25 U.S.C. § 2710(d)(1) and, thus, adoption of a tribal ordinance is not a prerequisite for tribal-state negotiations.[163] The United States Court of Appeals for the Second Circuit affirmed,[164] emphasizing that a state's duty to enter into good faith negotiations is triggered when a tribe submits its request to enter into negotiations to conclude a tribal-state gaming compact.[165]

The Second Circuit also affirmed the district court's application of the *Cabazon* analysis.[166] Because Connecticut permitted casino-style gambling conducted by charities, Class III gaming could not be considered prohibited.[167] The Second Circuit concluded that because the activity was regulated by the State, it was not violative of public policy.[168] Thus, Connecticut was required to negotiate a compact with the Mashantucket Pequot Tribe.[169]

In *Cheyenne River Sioux Tribe v. South Dakota*,[170] the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision denying the Sioux Tribe's request to compel South Dakota to conclude a compact.[171] South Dakota had engaged in five formal negotiations with the Cheyenne River Sioux between February and August 1991.[172] The negotiations broke down over the Cheyenne River Sioux's interest in: (1) obtaining higher bet limits than those permitted by the State; (2) conducting Keno and other casino games prohibited under other Tribal-State compacts; and (3) obtaining compacts for two off-reser-

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The fourth is the objective standard employed by the insurance industry when negotiating contracts. *Id.* at 481-82.

162. *Mashantucket Pequot*, 913 F.2d at 1027.

163. Mashantucket Pequot Tribe v. Connecticut, 737 F. Supp. 169, 171 (D. Conn.) (granting tribe's motion for summary judgment), *aff'd*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

164. *Mashantucket Pequot*, 913 F.2d at 1024.

165. *Id.* at 1028 (stating that "the only condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter into negotiations").

166. *Id.* at 1030.

167. *Id.* at 1031.

168. *Id.* at 1029 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1990)). The Court held that Connecticut permitted Class III gaming " 'for any purpose by any person, organization, or entity' within the meaning of section 2710(d)(1)(B)" of IGRA. *Id.* (quoting 25 U.S.C. § 2710(d)(1)(B) (1988)).

169. *Id.* at 1032.

170. 3 F.3d 273 (8th Cir. 1993).

171. *Id.* at 281.

172. *Id.* at 276.

vation locations.[173] The United States District Court for the District of South Dakota acknowledged South Dakota's duty to engage in good faith negotiations with the Sioux, but found insufficient evidence that South Dakota had not bargained in good faith.[174]

The district court also held that the Tenth and Eleventh Amendments[175] did not bar the court from exercising jurisdiction over the dispute.[176] The court noted the different treatment by circuit courts as to whether the Eleventh Amendment barred suits brought under IGRA.[177] It held that because the tribes sought neither monetary nor injunctive relief against the State, South Dakota could not assert its Eleventh Amendment immunity.[178] Regarding the Tenth Amendment, the district court noted that "IGRA does not force states to negotiate compacts,"[179] but rather provides a series of alternatives under section 2710(d)(7).[180]

The Eighth Circuit also found that the Eleventh Amendment did not preclude federal jurisdiction.[181] The court of appeals followed the reasoning of the United States District Court for the Southern District of Florida in *Seminole Tribe v. Florida*.[182] In *Seminole Tribe*, the district court held that the Eleventh Amendment did not preclude IGRA actions against the state.[183] Similarly, the Eighth Circuit in *Cheyenne River Sioux*

173. Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, 527 (D.S.D), *aff'd*, 3 F.3d 273 (8th Cir. 1993).

174. *Id.* at 527; *see also* Monteau, *supra* note 10, at 6 (stating that by the time of this decision, South Dakota had concluded seven Tribal-State compacts with other tribes covering blackjack, poker, slot machine, and video lottery games).

175. *See supra* notes 14-19 and accompanying text (discussing whether the Eleventh Amendment bars suits brought by tribes against states).

176. *Cheyenne River Sioux*, 830 F. Supp. at 525-26.

177. *Id.*

178. *Id.* at 526; *see supra* notes 14-18 and accompanying text (discussing whether the Eleventh Amendment bars suits brought by tribes against states).

179. *Cheyenne River Sioux*, 830 F. Supp. at 526.

180. *Id.*; *see* U.S. CONST. amend. X ("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."); *supra* notes 12-18 and accompanying text (discussing states' use of the Eleventh Amendment as a bar to suits brought by tribes); *see also* Timothy Joranko et al., *"Good Faith" Under the Indian Gaming Regulatory Act*, *in* SPEAKING THE TRUTH, *supra* note 10, at doc. 7, at 1 (explaining the states' options at each juncture under 25 U.S.C. § 2710(d)(7) and the tribes' access to federal procedures available under the statute). States may avail themselves of several alternatives in negotiating over Class III gaming. *Id.* States may refuse to negotiate at all and risk federal district court suit by the tribe. *Id.* States may decide to default at which time they have an additional 60 days to conclude a compact. *Id.* States may continue to refuse to negotiate or conclude a compact and be subject to a mediator's decision. *Id.*

181. Cheyenne River Sioux v. South Dakota, 3 F.3d. 273, 280 (8th Cir. 1993).

182. *Id.* at 280-81; *see* Seminole Tribe v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994).

183. *Seminole Tribe*, 801 F. Supp. at 658.

recognized that Congress abrogated state Eleventh Amendment immunity by enacting IGRA pursuant to its constitutional power under the Indian Commerce Clause.[184] Additionally, the Eighth Circuit noted the important state interest in active negotiation of tribal compacts to supervise Indian gaming within state borders.[185]

In *Spokane Tribe of Indians v. Washington*,[186] the United States Court of Appeals for the Ninth Circuit followed the Eighth Circuit and held that the Eleventh Amendment does not bar federal courts from exercising jurisdiction over states pursuant to IGRA.[187] The Ninth Circuit reversed the district court's dismissal of the suit on Eleventh Amendment grounds.[188] The *Spokane* court explained that Congress not only intended to abrogate state sovereign immunity by enacting IGRA, but also possessed the constitutional power to do so under the Indian Commerce Clause.[189]

The Ninth Circuit emphasized that those federal courts that addressed the issue[190] concede that IGRA's language evidences a clear intent by Congress to abrogate state sovereign immunity by authorizing suit in federal court for injunctive relief.[191] The Ninth Circuit also explained that Congress' constitutional power to abrogate state immunity from suits derives from the Indian Commerce Clause.[192] Following the United States Supreme Court's analysis in *Pennsylvania v. Union Gas Co.*,[193] the *Spokane* court held that Congress' plenary power to abrogate state sovereign immunity pursuant to the Commerce Clause applied equally to the Indian Commerce Clause.[194]

184. *Cheyenne River Sioux*, 3 F.3d at 280.

185. *Id.* at 281.

186. 28 F.3d 991 (9th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357).

187. *Id.* at 996.

188. *Id.* at 998.

189. *Id.* at 995-98

190. *Id.* at 994-95 (citing Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993) and Seminole Tribe v. Florida, 11 F.3d 1016, 1024 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12)).

191. *Id.* at 995 (discussing section 2710(d) of IGRA).

192. *Id.*

193. 491 U.S. 1 (1989); *see infra* notes 277-82 and accompanying text (discussing the *Union Gas* decision).

194. *Spokane*, 28 F.3d at 994-95.

2. *Tribal Defeat*: Seminole Tribe v. Florida *and* Poarch Band of Creek Indians v. Alabama

The United States Court of Appeals for the Eleventh Circuit consolidated two cases, *Seminole Tribe v. Florida*[195] and *Poarch Band of Creek Indians v. Alabama*,[196] and decided that the Indian Commerce Clause did not give Congress the power to abrogate states' Eleventh Amendment immunity.[197] This decision allowed Alabama and Florida to refuse to negotiate with tribes over Class III gaming.[198]

The Seminole and Poarch Tribes initiated separate suits in federal district courts pursuant to section 2710(d)(7)(A)(i), alleging that the States had refused to enter into good faith negotiations to conclude compacts regarding Class III gaming.[199] In *Poarch*, the United States District Court for the Southern District of Alabama granted Alabama's motion to dismiss based on Eleventh Amendment sovereign immunity.[200] Conversely, in *Seminole Tribe*, the United States District Court for the Southern District of Florida denied the State's motion to dismiss on Eleventh Amendment grounds.[201] Thus, the Eleventh Circuit affirmed *Poarch* and reversed *Seminole Tribe*.[202]

By holding that states lawfully may not be subject to federal district court jurisdiction, the Eleventh Circuit denied the tribes access to the most powerful remedy available under IGRA. Specifically, the Eleventh Circuit recognized that tribes may not avail themselves of the remedial

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195. 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994).

196. 776 F. Supp. 550 (S.D. Ala. 1991), *dismissed*, 784 F. Supp. 1549 (S.D. Ala. 1992), *aff'd*, 11 F.3d 1016 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12).

197. Seminole Tribe v. Florida, 11 F.3d 1016, 1019 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12).

198. *Id.* at 1029.

199. *Id.* at 1020-21.

200. *Id.* at 1021. The Poarch Band of Creek Indians initially brought suit against the State of Alabama and the Governor of Alabama. *Id.* The district court dismissed the suit against the State, *Poarch*, 776 F. Supp. at 550 (*Poarch I*), and also against the Governor, 784 F. Supp. 1549 (S.D. Ala. 1992) (*Poarch II*), on Eleventh Amendment grounds. *Seminole Tribe*, 11 F.3d at 1021.

201. *Seminole Tribe*, 11 F.3d at 1020. The Seminole Tribe sued the State of Florida and the Governor of Florida. Seminole Tribe v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994). In this case, however, the United States District Court for the Southern District of Florida denied the State's motion to dismiss on Eleventh Amendment grounds. *Seminole Tribe*, 11 F.3d at 1020. Consequently, the State of Florida filed an interlocutory appeal. *Id.*

202. *Seminole Tribe*, 11 F.3d at 1029.

procedures outlined in sections 2710(d)(7)(A)(i)[203] and (B)(i)-(vi),[204] unless states' waive their Eleventh Amendment immunity.[205] Furthermore, the court explicitly identified section 2710(d)(7)(B)(vii) as the appropriate remedy for tribes when states refuse to negotiate and to consent to federal district court jurisdiction.[206] This remedy effectively places governance of Class III gaming in the hands of the Secretary of the Interior after the expiration of 180 days triggered by dismissal of the lawsuit in federal district court.[207]

3. *Attempts to Establish a Good Faith Standard*

Until recently, many states successfully argued that the Tenth and Eleventh Amendments bar federal district courts from exercising jurisdiction over them. Consequently, there is little case law interpreting IGRA's good faith standard.[208] District court decisions that address states' duties to negotiate in good faith with tribes include *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*[209] and *Yavapai-Prescott Indian Tribe v. Arizona*.[210] While neither decision fully addressed an appropriate good faith standard,[211] the United States District Court for the

203. *See supra* notes 146-53 and accompanying text (explaining IGRA's remedial scheme).

204. *See supra* notes 146-53 and accompanying text (explaining IGRA's remedial scheme).

205. *Seminole Tribe*, 11 F.3d at 1029. The Eleventh Circuit, however, recognized that when a state consents to suit, the provisions of section 2710 remain in effect. *Id.* at 1029 n.15 (citing Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812GEB, 1993 U.S. Dist. LEXIS 9877, at *9 n.5 (E.D. Cal. July 16, 1993) as a case in which defendants waived Eleventh Amendment immunity).

206. *Seminole Tribe*, 11 F.3d at 1029. The Eleventh Circuit interpreted IGRA to require tribes to wait 180 days before bringing suit in federal district court against states, to wait for dismissal based on the states' Eleventh Amendment sovereign immunity defense, to notify the Secretary of the Interior of the states' failure to conclude a compact, and to rely on the Secretary of the Interior to prescribe regulations governing Class III gaming on the tribes' reservations. *Id.*

207. *Id.*

208. *See* Crowell & Straus, *supra* note 13, at 2-3 (identifying states that invoked Tenth and Eleventh Amendment defenses to the obligation to negotiate in good faith with tribes); Ahola, *supra* note 16, at 911-12. Fortunately, some cases were decided in favor of the tribes on appeal, and thus, some guidance as to the standard of good faith required in negotiations under IGRA may be forthcoming. *See* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1432 (10th Cir.) (agreeing with the Eighth and Ninth Circuit and holding that "the Indian Commerce Clause empowers Congress to abrogate the states' Eleventh Amendment immunity and that IGRA constitutes an unequivocal expression of Congress' intent to do so"), *petition for cert. filed*, 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994) (No. 94-1029).

209. 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir.), *cert. denied*, 113 S. Ct. 91 (1992).

210. 796 F. Supp. 1292 (D. Ariz. 1992).

211. *See* McKay, *supra* note 161, at 474.

Western District of Wisconsin in *Wisconsin Winnebago Nation v. Thompson*[212] recently attempted to define the standards of good faith.[213]

The facts of *Lac du Flambeau* did not require the United States District Court for the Western District of Wisconsin to articulate a standard of good faith.[214] The State of Wisconsin acknowledged its refusal to negotiate certain Class III gaming activities.[215] Wisconsin stipulated that if the court found that IGRA mandated negotiation of these activities, then the State would admit its failure to negotiate in good faith.[216] Wisconsin's qualification removed many issues from the case, narrowing the scope of the opinion.[217]

The court ordered Wisconsin to conclude a compact with the tribe.[218] *Lac du Flambeau* thus informed states that if they generally allow lotteries with "elements of prize, chance and consideration,"[219] tribes are free to negotiate any type of Class III gambling activity regulated by the state.[220]

In *Yavapai-Prescott*,[221] the Yavapai-Prescott Indian Tribe brought suit against the State of Arizona after negotiations to conclude a compact stalled.[222] The dispute centered on the scope of Class III gaming activity permitted within Arizona and Arizona's duty to include various forms of Class III gaming activity in a Tribal-State compact.[223] Arizona wanted to exclude casino and video gaming from the Tribal-State compact, while the Yavapai-Prescott wanted to include these games.[224]

The Yavapai-Prescott wanted the court to apply the *Cabazon* civil/regulatory criminal/prohibitory dichotomy[225] to Class III gaming as *Mashantucket Pequot*[226] and *Lac du Flambeau* had done.[227] The United States District Court for the District of Arizona declined to apply the *Cabazon*

212. 824 F. Supp. 167 (W.D. Wis. 1993), *aff'd*, 22 F.3d 719 (7th Cir. 1994).
213. *Id.* at 172.
214. *Lac du Flambeau*, 770 F. Supp. at 484; *see supra* note 161.
215. *Lac du Flambeau*, 770 F. Supp. at 481.
216. *Id.* at 484.
217. *Id.*
218. *Id.* at 488.
219. *Id.* at 487.
220. *Id.*
221. Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292 (D. Ariz. 1992).
222. *Id.* at 1294.
223. *Id.*
224. *Id.*
225. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209-11 (1987); *see supra* notes 83-98 and accompanying text (discussing the civil/regulatory criminal/prohibitory dichotomy).
226. 913 F.2d 1024, 1029-32 (2d Cir. 1990).
227. *Yavapai-Prescott*, 796 F. Supp. at 1294.

test.[228] Writing for the court, Judge Rosenblatt concluded that *Lac du Flambeau* inappropriately applied the civil/regulatory criminal/prohibitory dichotomy to Wisconsin law as a basis for good faith negotiations.[229] Instead, the court followed *Mashantucket Pequot*, holding that once Class III gaming is found to be civil/regulatory in the federal scheme, the type of games discussed should be open and negotiations unlimited in accordance with federal law.[230] Furthermore, Judge Rosenblatt held that *Lac du Flambeau* went too far in ordering Wisconsin, which had negotiated in good faith with the Lac du Flambeau tribe, to conclude a compact.[231] He stated that the court could order conclusion of a compact only if it found that the State had failed in its duty to negotiate in good faith.[232]

In *Wisconsin Winnebago Nation v. Thompson*,[233] the Winnebago Tribe sued the Governor of Wisconsin for failing to negotiate a compact for a new site.[234] The Tribe and the State already had concluded a compact for Class III gaming on the Tribe's existing gaming sites in June 1992.[235] During the negotiation process for the 1992 compact, the Tribe requested that a new site be included.[236] Although the State of Wisconsin refused to include the new site, the compact was concluded.[237]

The Tribe argued that it was entitled to decide unilaterally where it could engage in gaming on its lands and that site selection was not open to negotiation.[238] The United States District Court for the Western District of Wisconsin disagreed, ruling that, absent any evidence to the contrary, the lack of a provision for gaming at the new site was a legitimate concession made by the Tribe for concluding the compact.[239] The district court also stated that because the new site was the subject of negotiation for the June 1992 compact and was not included in the final agreement, the Tribe was precluded from reopening negotiations on that issue without the State's consent.[240]

The district court did not address whether a tribe may sue a state to compel good faith negotiations once a compact is concluded.[241] It did

228. *Id.* at 1295-96.
229. *Id.* at 1296.
230. *Id.*
231. *Id.*
232. *Id.*
233. 824 F. Supp. 167 (W.D. Wis. 1993), *aff'd*, 22 F.3d 719 (7th Cir. 1994).
234. *Id.* at 169.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 172.
240. *Id.*
241. *Id.* at 173.

advise, however, that should a tribe wish to reserve negotiations over gaming at another site for a future day, it should insist on such a provision in the compact.[242]

III. IGRA JURISPRUDENCE: THE QUAGMIRE OF STATE SOVEREIGN IMMUNITY

The Second, Eighth, Ninth, Tenth, and Eleventh Circuit decisions on whether the Eleventh Amendment bars suits against the states to compel compact negotiations have a significant impact on the interpretation of IGRA.[243] The Second Circuit did not address the Eleventh Amendment issue, but established that a state's refusal to negotiate was prima facie evidence of a failure to negotiate in good faith.[244] Conversely, the Eighth Circuit faced the Eleventh Amendment issue and decided that Congress satisfied the two-prong test for abrogation when it enacted IGRA: Congress expressly abrogated state sovereign immunity, and Congress had the power to do so under the Indian Commerce Clause.[245] The Eighth Circuit, however, did not find sufficient evidence that the State failed to bargain in good faith.[246] Similarly, the Ninth Circuit concentrated on the Eleventh Amendment issue, following the Eighth Circuit's rationale, and found that Congress satisfied the two-prong test for abrogation.[247] The Tenth Circuit agreed with both the Eighth and Ninth Circuits that the two-prong test was satisfied.[248] Finally, the Eleventh Circuit held that

242. *Id.*

243. *See* Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357); Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

244. *Mashantucket Pequot*, 913 F.2d at 1024; *see supra* notes 75, 159-69 and accompanying text (discussing the *Mashantucket Pequot* case).

245. *Cheyenne River Sioux*, 3 F.3d at 280-81; *see supra* notes 170-85 and accompanying text (discussing the *Cheyenne River Sioux* case).

246. *Cheyenne River Sioux*, 3 F.3d at 280-81.

247. *Spokane*, 28 F.3d at 994-95; *see supra* notes 186-94 (discussing the *Spokane* case). Unlike the Eleventh Circuit's holding that IGRA satisfied only the first prong of the two-prong test for abrogation of state sovereign immunity, the Ninth Circuit held that the second prong is also satisfied by virtue of Congress' power under the Indian Commerce Clause. *Spokane*, 28 F.3d at 995-96. The Ninth Circuit recognized that IGRA's language requiring that states be subject to suit in federal court for failing to negotiate with tribes satisfied the first prong—intent to abrogate. *Id.* at 994-95. The Ninth Circuit further explained that Congress satisfied the second prong—power to abrogate—by the enactment of IGRA pursuant to its constitutionally granted plenary power to legislate in the field of Indian affairs. *Id.* at 996-97.

248. Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1424 (10th Cir.) (consolidating four cases in which tribes sought injunctions to compel Oklahoma, New Mexico, and Kansas to nego-

although Congress clearly intended to abrogate state sovereign immunity, it had not been granted power to do so under the Indian Commerce Clause.[249] Thus, the Eleventh Circuit dismissed the tribes' suit and never reached the good faith negotiation issue.[250]

Clearly, without a resolution of the constitutional question, courts are not able to determine the good faith standard required under IGRA.[251] A Supreme Court decision expressly recognizing Congress' power to abrogate sovereign immunity under the Indian Commerce Clause would resolve the constitutional question, free the courts to determine a good faith standard for tribal-state negotiations, and enable the courts to fashion remedies for tribes when these negotiations fail. The Ninth and Tenth Circuits' conflict with the Eleventh Circuit's decision on the issue provide the United States Supreme Court with the opportunity to resolve the question of whether Congress has to power the abrogate state sovereign immunity under the Indian Commerce Clause.

A. The Eleventh Amendment Bar

Currently, a conflict exists among the circuits as to whether the Eleventh Amendment immunizes states from being subject to suit in federal court.[252] The United States Court of Appeals for the Eleventh Circuit, in

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tiate compacts pursuant to IGRA), *petition for cert. filed*, 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994) (No. 94-1029). The *Ponca* court thoroughly examined the states' Tenth and Eleventh Amendment claims as well as the applicability of the *Ex parte Young* Doctrine. *Id.* 1427-36. The court concluded that neither the Tenth nor the Eleventh Amendments barred tribes from bringing suit against states under IGRA and that the *Ex parte Young* Doctrine was inapplicable. *Id.*; *see also infra* note 256 and accompanying text (explaining the *Ex parte Young* Doctrine).

249. Seminole Tribe v. Florida, 11 F.3d 1016, 1027 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12); *see supra* notes 195-207 (discussing the *Seminole* case in depth).

250. *Seminole Tribe*, 11 F.3d at 1022.

251. In *Mashantucket Pequot*, the Second Circuit determined that a refusal to negotiate constituted bad faith. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1032 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). The court noted, however, that there is little guidance, except that contained in section 2710(d)(7)(B)(iii) for evaluating the elements of good faith negotiation. *Id.* Some commentators advocate application of the good faith standard used in the labor relations area. *See* McKay, *supra* note 161, at 477-82.

252. The appellate court decision validating states' use of the Eleventh Amendment defense includes the combined decision in *Seminole Tribe*, 11 F.3d at 1016; *see supra* notes 195-207 (discussing the *Seminole Tribe* decision in depth).

Appellate court decisions refusing to permit the states to hide behind the shield of Eleventh Amendment immunity include: Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357), Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994) (No. 94-1029).

Seminole Tribe v. Florida, held that the Eleventh Amendment bars states from being subject to suit in federal court.[253] In *Seminole Tribe*, the Eleventh Circuit held that unless one of three exceptions—consent,[254] abrogation,[255] or application of the *Ex parte Young* doctrine[256]—apply, the Eleventh Amendment prevents federal courts from exercising jurisdiction over states being sued by tribes pursuant to section § 2710(d)(7).[257] In the context of IGRA, the abrogation exception is the one that applies in most cases.[258] The Eleventh Circuit applied the Supreme Court's two-prong test to determine whether the criteria for abrogation is satisfied.[259]

253. *Seminole Tribe*, 11 F.3d at 1019.

254. *Id.* The court discussed state power to waive Eleventh Amendment immunity by expressly consenting to suit via legislative enactment, or by " 'plan of the convention' " consent pursuant to the United States Constitution and state participation in a congressional program. *Id.* at 1022. This type of consent must be "explicitly authorized by the state 'in its Constitution, statutes and decisions.' " *Id.* (quoting Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986)). The Eleventh Circuit noted, however, that "plan of the convention" consent applied to states' surrender of sovereign immunity from suit by other states on the basis of " 'mutuality of the concession.' " *Id.* (quoting Blatchford v. Native Village, 501 U.S. 775, 782 (1991)). Because there is no mutuality of the concession with foreign sovereigns or Indian tribes, " '[i]f 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.' " *Id.* (quoting *Blatchford*, 501 U.S. at 782).

The tribes contended that because states intend to reap the benefits of IGRA, they also should suffer the detriment of being subject to suit in federal district court, and thus states implicitly consent to federal jurisdiction. *Id.* The Eleventh Circuit disagreed and explained that if it adopted the tribes' argument, the states would be subject to suit under IGRA both when the states refuse to negotiate and when the states consent to negotiate. *Id.* at 1023.

255. *Id.* For Congress to abrogate state sovereign immunity, two conditions must be satisfied. *Id.* at 1024. First, it must clearly state its intent to subject states to federal district court jurisdiction. *Id.* Second, it must have the power to abrogate. *Id.* The Eleventh Circuit applied this test and determined that Congress' intent was clear, but that it did not have the power to abrogate under the Indian Commerce Clause. *Id.*

The Eleventh Circuit acknowledged Congress' power to abrogate state Eleventh Amendment immunity pursuant to Article 5 of the Fourteenth Amendment and Article I section 8, but refused to recognize congressional power to abrogate state sovereign immunity pursuant to any other constitutional provision without Supreme Court precedent. *Id.* at 1023-24. Thus, it disagreed with the tribes' argument that Congress abrogated state sovereign immunity when it enacted section 2710(d) pursuant to the Indian Commerce Clause. *Id.* at 1024.

256. *Id.* at 1028. The *Ex parte Young* doctrine permits a party to obtain a federal injunction against a state officer to comply with federal law. *Id.* Tribes have used this doctrine to sue state governors to force negotiations under the IGRA with mixed results. *Id.*

257. *Id.* at 1029.

258. *See* Jones, *supra* note 12, at 149 (explaining that although some Eleventh Amendment disputes arise over the exceptions of consent and the *Ex parte Young* doctrine, the majority involve the abrogation doctrine).

259. *Seminole Tribe*, 11 F.3d at 1024. The Eleventh Circuit explained:

> When determining whether Congress has abrogated the states' Eleventh Amendment immunity, we must conduct a two-part inquiry. We first must deter-

The Eleventh Circuit held that because Congress intended to abrogate states' immunity and expressed the intent explicitly in IGRA, the first prong of the test is satisfied.[260] The court did not, however, find that Congress possessed constitutional authority to abrogate states' immunity because the Indian Commerce Clause does not confer this authority to Congress.[261]

Conversely, the Ninth and Tenth Circuits held that the Eleventh Amendment does not immunize states from being subject to suit in federal court because the two prongs were satisfied.[262] Both circuits found that IGRA's language indicates Congress' clear intent to abrogate state sovereign immunity and that Congress has the power to abrogate state sovereign immunity via the Indian Commerce Clause.[263]

B. Congressional Intent to Abrogate States' Immunity

Most courts faced with the Eleventh Amendment issue have acknowledged that the first prong, congressional intent to abrogate, is satisfied.[264] Courts rely on the legislative history as well as the text of IGRA for guidance on Congress' intent. IGRA's legislative history strongly supports the conclusion that Congress enacted IGRA to establish a federal scheme for the governance of Indian gaming activities.[265] The Committee was concerned that some states would attempt to escape from negotiating with tribes by invoking the Eleventh Amendment.[266] Senators Inouye and McCain alerted the National Governors Association to these concerns and indicated that if the states were exhibiting their refusal to play a role in regulating Class III Indian gaming, Congress' only alternative

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> mine that the "evidence of congressional intent [to abrogate the states' immunity is] both unequivocal and textual." We also must find that Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity.

Id. (quoting Dellmuth v. Muth, 491 U.S. 223, 230 (1989)) (citations omitted); *see also supra* note 255 (discussing the abrogation of sovereign immunity).

260. *Seminole Tribe*, 11 F.3d at 1024.

261. *Id.*

262. *See* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1428 (10th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994) (No. 94-1029); Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir.) (holding that Congress constitutionally abrogated state sovereign immunity by enacting IGRA pursuant to its power under the Indian Commerce Clause), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357).

263. *Ponca*, 37 F.3d at 1428; *Spokane*, 28 F.3d at 997.

264. *See, e.g.*, *Ponca*, 37 F.3d at 1427 (aggregating six district court decisions); *Seminole Tribe*, 11 F.3d at 1024.

265. S. REP. No. 446, *supra* note 79, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3076. The Committee explained that Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Id.*

266. *See* Santoni, *supra* note 79, at 425-26.

would be to establish comprehensive federal regulation of Indian gaming.[267]

Without this explicit preemption, it would be disingenuous for IGRA to allow tribes recourse to federal district courts to enforce section 2710(d)(7). Congress foresaw the difficulties tribes would face when dealing with states.[268] Thus, Congress ensured that tribes retained exclusive control over their existing ceremonial gambling and sought to protect tribes from state intervention over Class II gaming by giving the NIGC concurrent jurisdiction.[269] Furthermore, Congress sought to dispel the fears of organized crime involvement in Class III gaming by establishing a mechanism for state regulatory and economic participation in these activities via the Tribal-State compact.[270]

C. Congressional Power to Abrogate

Congress' power to abrogate state sovereignty is more problematic.[271] The prevailing view is that Congress does not have abrogation powers unless legislating pursuant to section 5 of the Fourteenth Amendment[272] or the Interstate Commerce Clause.[273] While the Fourteenth Amend-

267. *Id.* at 426. Commenting on S. 555, Senator Daniel Evans emphasized that "this bill should be construed as an explicit preemption of the field of gaming in Indian country." S. REP. NO. 446, *supra* note 79, at 36, *reprinted in* 1988 U.S.C.C.A.N. at 3105.

268. *See* S. REP. NO. 446, *supra* note 79, at 6, 33, *reprinted in* 1988 U.S.C.C.A.N. at 3076, 3104.

269. *Id.*

270. *Id.*

271. *See supra* note 255 (discussing the problematic interpretation of the abrogation exception).

272. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (subjecting states to suits for damages in federal court). The Supreme Court held "that the Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456 (citation omitted). The Court's rationale acknowledged an express shift in the relationship between states and the federal government because the Fourteenth Amendment limits state authority and at the same time grants Congress the power to enforce that limit. *Id.* at 452-56; *see also* Jones, *supra* note 12, at 149-51 (discussing federal cases relying on *Fitzpatrick*). Federal courts, however, also acknowledge Congress' power to abrogate state sovereign immunity when acting under its plenary powers pursuant to other constitutional provisions such as: the Bankruptcy Clause, *In re* McVey Trucking, Inc., 812 F.2d 311, 323 (7th Cir.) (citing U.S. CONST. art. I, § 8, cl. 4), *cert. denied*, 484 U.S. 895 (1987); Article I war powers, Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1080 (5th Cir. 1979) (citing U.S. CONST. art. I, § 8, cl. 11); the extradition powers, County of Monroe v. Florida, 678 F.2d 1124, 1127 (2d Cir. 1982) (citing U.S. CONST. art. IV, § 2, cl. 2), *cert. denied*, 459 U.S. 1104 (1983); the Copyright Clause, Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (citing U.S. CONST. art. I, § 8, cl. 8).

273. *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1025 (11th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3064 (U.S. July 1, 1994) (No. 94-12); *see also* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1429 (10th Cir.), *petition for cert. filed* 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994)

ment protects liberty and property interests derived from " 'a legitimate claim of entitlement,' "[274] it does not protect interests derived from "the discretionary nature of the compacting process envisioned by IGRA."[275] Thus, the Eleventh Circuit in *Seminole Tribe* concluded that because IGRA creates no liberty or property interests, Congress did not abrogate state sovereignty pursuant to the Fourteenth Amendment.[276]

The Eleventh Circuit was hesitant to rely on *Pennsylvania v. Union Gas Co.*[277] for the proposition that Congress has blanket authority to abrogate state sovereign immunity under the Interstate Commerce Clause.[278] Instead, the Eleventh Circuit restricted the *Union Gas* holding to specific laws passed under the Interstate Commerce Clause.[279] Courts following the Eleventh Circuit's view contend that *Union Gas*' authority is weak[280] because the make-up of the United States Supreme Court has changed since the controversial plurality decision was handed down,[281] and because it is likely that the majority of the current Court would disagree with the decision.[282]

The Eleventh Circuit and its adherents also distinguish the Interstate Commerce Clause from the Indian Commerce Clause.[283] In *Cotton Pe-*

(No. 94-1029). Both courts recognize that in Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989), a plurality of the United States Supreme Court acknowledged that the Interstate Commerce Clause provides an additional constitutional source of authority for congressional abrogation of state sovereign immunity. *Ponca*, 37 F.3d at 1428.

274. *Seminole Tribe*, 11 F.3d at 1025 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

275. *Id.* The Eleventh Circuit noted that IGRA does not create an entitlement to gambling operations, but merely establishes standards by which Indian gaming may be conducted. *Id.*

276. *Id.*

277. 491 U.S. 1 (1989) (explaining Congress' power to abrogate state sovereign immunity when enacting CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA)). The plurality opinion extended Congress' abrogation power to congressional acts under the Commerce Clause. *Id.* at 19. The Court also adopted an implied consent theory under which states, by ratifying the Constitution, consent to suit enforcing regulations Congress enacted under its constitutional authority. *Id.* at 19-20.

278. *Id. Union Gas* is cited in opinions dealing with Eleventh Amendment state sovereign immunity claims under IGRA because courts rely on *Union Gas* to extend Congress' abrogation authority to the Indian Commerce Clause as well as the Interstate Commerce Clause. *See Seminole Tribe*, 11 F.3d at 1027.

279. *Seminole Tribe*, 11 F.3d at 1027 (noting specific statutes under the Commerce Clause such as CERCLA and SARA).

280. *See id.* (noting that *Union Gas* was a plurality opinion authored by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, and concurred with by Justice White).

281. *Id.* at 1027.

282. *Id.* Very little additional explanation has been provided to support this contention.

283. *See id.* at 1026-27.

troleum Corp. v. New Mexico,[284] the United States Supreme Court held that the Indian Commerce Clause grants Congress the "plenary power to legislate in the field of Indian affairs."[285] The Ninth and Tenth Circuits have conjunctively applied *Union Gas* and *Cotton Petroleum* to conclude that Congress possesses plenary power under the Indian Commerce Clause to abrogate state sovereign immunity pursuant to IGRA.[286] The Eleventh Circuit and its adherents, however, are reluctant to apply the interstate commerce doctrine to intercourse with Indian Tribes.[287] Furthermore, these courts insist that Congress' power to abrogate state sovereign immunity is restricted to legislation arising under the Interstate Commerce Clause and the Fourteenth Amendment.[288]

By applying *Union Gas* narrowly,[289] or not at all,[290] the Eleventh Circuit focused on the subject matter of Congress' power rather than the type or extent of that power.[291] Congress' plenary power to abrogate state sovereign immunity is contained in Article I of the United States Constitution.[292] This provision empowers Congress to regulate interstate commerce and to shift the federal-state balance of power in favor of the federal government when legislating in this area.[293] This same provision empowered Congress to regulate commerce with Indian tribes and foreign nations.[294] By consenting to Congress' regulation of interstate commerce, states surrendered some sovereign immunity.[295] Thus, they also

284. 490 U.S. 163 (1989) (holding that although the Interstate Commerce Clause and the Indian Commerce Clause derive from the same constitutional grant of plenary power to Congress in Article I, they have different applications and different legal interpretations).

285. *Id.* at 192.

286. *See* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1430-32 (10th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2176 (U.S. Dec. 9, 1994) (No. 94-1029); Spokane Tribe of Indians v. Washington, 28 F.3d 991, 995-97 (9th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357).

287. *See Seminole Tribe*, 11 F.3d at 1025-28.

288. *See id.*

289. *Id.* at 1027 (explaining that the *Union Gas* holding should be limited to cases involving the exercise of Congress' power to legislate under the Interstate Commerce Clause).

290. *Id.* (explaining that *Union Gas* is not controlling in IGRA cases because of the different purposes of the Interstate Commerce and Indian Commerce Clauses). See *supra* part III.C for a discussion of Congress' plenary power under these clauses.

291. *Id.*

292. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.")

293. *See* Seminole Tribe v. Florida, 801 F. Supp. 655, 661 (S.D. Fla. 1992) (citing Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)), *rev'd*, 11 F.3d 1026 (11th Cir. 1994).

294. *Id.*

295. *Id.* at 660.

must surrender this same degree of sovereign immunity when affected by congressional regulation over Indian gaming.

Congress' power to abrogate state sovereign immunity under the Commerce Clause should be interpreted broadly. As the *Spokane* court noted, the Supreme Court in *Union Gas* did not intend to limit Congress' power to abrogate state sovereign immunity to the interstate commerce section of the Commerce Clause, but intended to include other clauses as well.[296] Congressional power to regulate commerce among the states equals its power to regulate commerce relating to foreign nations and Indian tribes.[297] Thus, this equality of power should be understood to imply that Congress may abrogate state sovereign immunity when enacting laws affecting both Indians and interstate commerce.[298] This is evidenced by the Court's general reference to the Commerce Clause.[299] For subsequent courts to comfortably apply the *Union Gas* test to the Indian Commerce Clause, the Supreme Court must expand its holding.[300]

IV. Conclusion of Tribal-State Compacts: An Impossibility When States Assert the Shield of Sovereign Immunity

A. *The Hurdle of Sovereign Immunity*

Despite Congress' intent, states remain unwilling to relinquish control over gambling within territorial borders.[301] States continue to refuse to enter into compact negotiations with tribes, invoking the Eleventh Amendment to bar federal jurisdiction.[302] This effectively precludes tribes from obtaining relief.[303] Likewise, tribes are prevented from engaging in lucrative, legal gaming activities for an indeterminate period of time.[304]

To determine tribes' options when states refuse to negotiate compacts in good faith, tribes must overcome the hurdle of state sovereign immu-

296. *See* Spokane Tribe of Indians v. Washington, 28 F.3d 991, 994-95 (9th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3207 (U.S. Aug. 29, 1994) (No. 94-357).

297. Nowak & Rotunda, *supra* note 15, at 130.

298. *See Spokane*, 28 F.3d at 996.

299. *Id.*

300. *Id.* (noting that despite the fact that it was a plurality decision of the Supreme Court, *Union Gas* is still a binding decision).

301. *See supra* notes 14-19 and accompanying text (discussing cases in which states have effectively blocked tribes from negotiating Class III gaming operations by invoking the Eleventh Amendment).

302. *See* Ahola, *supra* note 16, at 933.

303. *Id.*

304. *See supra* notes 146-53 and accompanying text (discussing the statutory time frame for conclusion of Tribal-State compacts).

nity. Unfortunately, this hurdle has been cleared in only four circuits: the Second, Eighth, Ninth, and Tenth.[305] To fulfill the aims of IGRA, Indian gaming must be permitted, states must be required to negotiate in good faith with tribes, constitutional objections to IGRA must be overcome, and the policy goals of promoting tribal self-sufficiency and economic independence must be actively pursued.

The state sovereign immunity hurdle may be overcome by legislative fiat or judicial decree. Congress already has taken steps to reduce states' sovereign immunity in the IGRA Amendments Act of 1994 (1994 Amendments).[306] Although Congress recently conducted hearings on the 1994 Amendments, it did not take action on the Amendments by the close of the 103d Congress.[307]

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305. *See supra* notes 271-300 and accompanying text (discussing the Eighth, Ninth, Tenth, and Eleventh Circuits' resolution of the Eleventh Amendment issue).

306. On June 23, 1994, the Senate introduced S. 2230, the Indian Gaming Regulatory Act Amendments Act of 1994. *See* 140 CONG. REC. S7561 (daily ed. June 23, 1994) (statement of Sen. Inouye). The 1994 Amendments were a direct response to concerns voiced by state governors and by tribes in certain regions of the country that felt thwarted in their efforts to secure a Class III gaming compact. *Id.* The 1994 Amendments responded primarily to the successful Tenth and Eleventh Amendment defenses used successfully by states to defeat federal court jurisdiction. *Id.*

The 1994 Amendments proposed to establish clear federal standards for the conduct of Class II and Class III gaming on Indian lands and to expand the federal presence in the regulation of Class III gaming. *Id.* The federal presence would have been expanded via a process permitting a state to choose whether it would enter into a Tribal-State compact for the conduct of Class III gaming or whether it prefers to opt out entirely from the compact process. *Id.* When a state chose the latter option, the Secretary of the Interior would replace the state as the compacting party to the Indian tribe. *Id.* at S7561-62.

Other revisions included: a comprehensive licensing system to regulate the privilege of doing business in Indian country, similar to systems in operation in Las Vegas and Atlantic City; a procedure for assuring the consideration of all parties' interest when land is taken into trust for gaming purposes; and a mechanism for federal regulation cost assessment. *Id.* at S7652.

307. *See Indian Gaming Regulatory Act Amendments Act of 1994: Hearings on S. 2230 Before the Senate Comm. on Indian Affairs*, 103d Cong., 2d Sess. (July 25, 1994) (testimony of the Honorable James E. Doyle, Attorney General of the State of Wisconsin and Chair, National Association of Attorneys General Task Force). The 1994 Amendments were the result of a negotiation process sponsored by Senators Inouye and McCain. *Id.* at 2. This process sought to obtain concessions by states from using their Tenth and Eleventh Amendment defenses in exchange for the establishment of a state law based definition of the scope of gaming subject to negotiation. *Id.* Nevertheless, states' opposition to the 1994 Amendments was very strong. *Id.* States seek a more active role in the regulatory and licensing process, the exclusion of slot machines from Class II games, and other limiting provisions. *Id.* at 3-15.

Tribes also opposed the 1994 Amendments. *See id.* (statement of JoAnn Jones, Chairperson, Wisconsin Winnebago Business Committee). Tribes fear that an expansion of state law over reservation gaming activity is an encroachment on Indian sovereignty and may threaten tribes opportunity for economic development. *Id.* at 1. Tribes are unsure whether the inclusion of a provision that state participation in the compact process for

The best way to overcome the hurdle of state sovereign immunity and affirm Congress' power to legislate pursuant to the Indian Commerce Clause is by a Supreme Court decision expressly recognizing Congress' power to abrogate sovereign immunity under the Indian Commerce Clause. The Supreme Court should resolve the current circuit conflict resulting from the Eleventh Circuit's decision in *Seminole Tribe* and the Ninth Circuit's decision in *Spokane* by granting certiorari to the Seminole and Poarch tribes on this issue.

B. The Need for Clearing the Hurdle

In response to the Fifth Circuit's decision in *Seminole Indian Tribe v. Butterworth*,[308] Indians began to expand gaming operations rapidly.[309] States then began to challenge Indian gaming activities and litigation ensued.[310] When courts applied the civil/regulatory criminal/prohibitory dichotomy of Public Law 280 established in *Butterworth*[311] and affirmed by the Supreme Court in *Cabazon*, Indian gaming operators were favored heavily.[312] To the chagrin of the states, the *Cabazon* Court balanced the competing interests of tribes and states and decided that encouraging tribal self-sufficiency and economic development was of paramount importance.[313] The Supreme Court recognized that, in most cases, these tribal gaming operations were the primary source of revenue for tribal governments and the primary source of employment for tribal members.[314]

At the time *Cabazon* was being decided, Congress was drafting S. 555.[315] Because the Supreme Court's decision in *Cabazon* favored tribes, state support for IGRA increased.[316] States, consistent with their desire

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Class III gaming "is 'deemed to constitute a voluntary waiver of the sovereign immunity of the State for the purposes of this Act.' " *Id.* at 7 (quoting S. 2230, 103d Cong., 2d Sess. § 10(a)(3)(B)(iv) (1994)). They are concerned that the "deemed to constitute a voluntary waiver" language of the Act does not satisfy the test of an express waiver. *Id.* Finally, they note that the constitutional question of whether Congress has the power to abrogate state sovereign immunity at all will not be resolved until the Supreme Court decides the question. *Id.*

308. 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

309. *See* Wilson, *supra* note 60, at 380 (acknowledging that Indians have been conducting bingo operations regularly since 1974).

310. *Id.* at 381.

311. *Butterworth*, 658 F.2d at 311; *see supra* note 33 and accompanying text (discussing the civil/regulatory criminal/prohibitory dichotomy in *Cabazon*).

312. *See* Swanson, *supra* note 132, at 473 (noting that the civil/regulatory criminal/prohibitory dichotomy favored Indian gambling activities and posed serious problems for state imposition of limits on types of gaming).

313. *See Cabazon*, 480 U.S. at 219.

314. *Id.* at 218-19.

315. S. REP. No. 446, *supra* note 79, at 2, *reprinted in* 1988 U.S.C.C.A.N at 3071-72.

316. *Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083.

to control all activities within their borders, became envious of the tax-free revenues generated by tribes through gaming operations and were concerned with the loss of revenue from their own gaming operations.[317] They viewed the burgeoning Indian gambling market as competition for state lotteries, race tracks, and other gaming operations.[318]

Although IGRA responded to state concerns, it also sought to provide a framework to protect tribal sovereignty.[319] The basis for this framework is the Tribal-State compact and the requirement that states negotiate in good faith.[320] The only means available to tribes to enforce section 2710's requirement of negotiating a Tribal-State compact to a conclusion is access to the federal district courts.[321] Tribes, however, are denied this mechanism because states invoke the Eleventh Amendment to preclude federal jurisdiction.[322] Thus, unless tribes can sue states in federal district court for failure to negotiate in good faith, it is impossible for the courts to fashion an appropriate good faith standard.[323]

It is ironic that the states, the primary force behind enactment of IGRA, now have decided that they are not subject to its provisions. Many states are in the process of enacting legislation permitting gambling and are buying time to ensure that tribal casinos will never become competitors.[324] By refusing to negotiate with tribes and refusing to submit to federal jurisdiction, states extend the length of time tribes are denied a major source of income. Furthermore, new judicial and legislative developments threaten the closing of this potential source of tribal revenue.[325] Thus, the Supreme Court should eliminate state use of the Eleventh Amendment to contravene the purposes and policies behind IGRA by recognizing Congress' power to abrogate state sovereign immunity under the Indian Commerce Clause.

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317. *See* Swanson, *supra* note 132, at 473.

318. *Id.*

319. *Id.*

320. 25 U.S.C. § 2710 (1988); *see supra* notes 8-13 and accompanying text (discussing IGRA's provisions mandating tribal-state negotiations for compact conclusion).

321. *See* 25 U.S.C. § 2710.

322. *See supra* notes 14-19, 245-50 and accompanying text (discussing recent cases in which states have successfully used the Eleventh Amendment to bar suits brought by tribes).

323. *See supra* notes 208-42 and accompanying text (discussing the courts' inability to interpret the good faith requirement when IGRA cases are dismissed on Eleventh Amendment grounds).

324. Hellman, *supra* note 7, at 83 (identifying Hawaii and Utah as the only states imposing a total ban on a commercial gambling).

325. *See supra* notes 16, 199-202 and accompanying text (discussing concerns and trends that pose hazards for Indian gaming).

C. Policy Considerations

Many states, including Connecticut, Wisconsin, Michigan, and more recently, New York, acknowledged the Department of the Interior's endorsement of Tribal-State compacts for Class III gaming and successfully negotiated agreements.[326] A number of states are skilled in concluding compacts on very favorable terms.[327] While some, like Minnesota, are cognizant of the economic benefits that flow from gaming operations,[328] others oppose gambling altogether.[329] Even in states where Tribal-State compacts regarding Class III gaming have been concluded, however, tribes may be denied the opportunity to modify compact provisions.[330] Given the questionable legitimacy of forces gathering against Indian gaming and, conversely, the current lack of evidence that Indian gaming has spawned an upsurge in crime,[331] public policy dictates that Indian gaming

326. *See* Santoni, *supra* note 79, at 438-44 (listing 55 compacts concluded as of August 10, 1992).

327. *See* Robert D. McFadden, *Cuomo Accepts Mohawk Plan for a Casino*, N.Y. TIMES, Oct. 16, 1993, at A25. Governor Cuomo signed a compact with the Mohawk tribe to permit the building of a $10 million Las Vegas style casino near the Canadian border. *Id.* The compact provided for stiff state regulation, permitted dice, roulette, and card games, but banned alcohol and the operation of slot machines. *Id.*

328. *See* Santoni, *supra* note 79, at 438-44. Minnesota concluded 22 Tribal-State compacts between April 1990 and October 1991. *Id.*

329. *See* Susan Stanich, *Indians Say States Stack Deck Against Reservation Gambling Operations*, WASH. POST, Aug. 2, 1992, at A16 (identifying Wisconsin, Florida, Mississippi, Washington, and Michigan as uncooperative in negotiating with tribes to establish gambling operations); *see also* Mary Jo Pitzl, *Governor Vows to Sign Indian Gaming Pacts Even if Lawmakers Don't Kill Ban*, ARIZONA REPUBLIC, June 10, 1993, at B1. Governor Fife Symington requested the state legislature to repeal its recent ban on casino gambling and to adopt a negotiating approach that bases the size of the casino on the size and economic needs of the tribe. *Id.*

Governor Symington, however, is not a proponent of Indian gambling as indicated by his statements that federal and tribal authorization of Indian gambling encroaches on state sovereignty. Paul Bender, *Legal Ins, Outs on Indian Gambling; Confusion and Misinformation Surround Issue*, ARIZONA REPUBLIC, Mar. 21, 1993, at C1. Furthermore, Governor Symington criticized the federally appointed mediator for authorizing extensive casino gambling when he selected the tribes' proposal after compact negotiations broke down over Arizona's policy to permit only 250 gambling devices per tribe, regardless of tribe size or economic needs. *Id.*

330. *See* Wisconsin Winnebago Nation v. Thompson, 824 F. Supp. 167, 170 (W.D. Wis. 1993), *aff'd*, 22 F.3d 719 (7th Cir. 1994). The district court held that upon conclusion of a Tribal-State compact, Class III gaming activity is " 'subject to the terms and conditions of the Tribal-State compact . . . that is in effect.' " *Id.* at 172-73 (quoting 25 U.S.C. § 2710(d)(2)(C) (1988)). The district court acknowledged the existence of circumstances in which a tribe may sue a state to compel good faith negotiations over Class III gaming even when a compact has been concluded. *Id.* at 173.

331. *See* Mitchell Zuckoff, *Fears, Footprints of Organized Crime*, BOSTON GLOBE, Sept. 29, 1993, at 25 (discussing congressional testimony by the FBI and United States Department of Justice officials regarding the lack of documented evidence of organized crime

be permitted.[332] Because of tribes' successes in improving their economic conditions via gaming operations, tribes view gambling as today's metaphorical equivalent to the buffalo, that hallowed beast[333] associated with spiritual and economic well-being.[334]

V. CONCLUSION

Indian high-stakes gaming is a major means for tribes to achieve economic and social development. In states where it is permitted, tribal casinos are a boon to both reservations and local economies. Gaming also is responsible for changes in the outlook of the Indians themselves.

IGRA seeks to protect and preserve the Indian tribes' sovereign status while providing a comprehensive legal and regulatory framework to facilitate the exploitation of the economic opportunities afforded by gambling. Unfortunately, while this intent was clearly documented in the legislative history, the statute itself contains gaps that have enabled states to undermine the purpose of the law completely.

To achieve IGRA's established goals, the Supreme Court must act to prevent states from use of judicial delaying tactics to circumvent the authority of IGRA, a law the states framed. At the same time, swift and thorough legislative action also is required to prevent states from denying tribes their only remedy available at law.

Marianne T. Caulfield

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links to Indian gaming). A high-ranking FBI organized crime investigator admitted, however, that although there has not been any systematic attempt by the mafia to infiltrate Indian gaming, it may be a legitimate concern in certain locales. *Id.* Thus, tribes are taking measures to protect themselves. *Id.*

332. *See supra* notes 328-29 and accompanying text; *see also Tribes Losing Millions in Casino Revenue*, WASH. POST, Dec. 19, 1993, at A4 (noting that the Department of Justice has found no evidence that organized crime has infiltrated Indian gaming).

333. *California Indians Buffalo Stakes*, ECONOMIST, July 25, 1993, at 25, 25 (commenting that gambling is nearly as beneficial to the welfare of the tribes as the buffalo was to Indians).

334. Ellen O'Brien, *A 'Miracle' beast*, PHILA. INQUIRER, Oct. 2, 1994, at G1 (discussing the spiritual significance of the August 20, 1994 birth of Miracle, the rare white buffalo, in Wisconsin). For centuries, the buffalo has been a source of life to tribes that inhabited the North American Great Plains. *Id.* at G4. The buffalo was the tribes' source of meat for food, hide for clothes and tepees, and manure chips for fuel. *Id.* It also was "an earthly connection to religious experience and grace" for the tribes. *Id.* It remains, however, to be seen if Indian gaming meets the same fate as the buffalo, nearly a century ago—extinction.