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Sidney M. Wolf

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# KILLING THE NEW BUFFALO: STATE ELEVENTH AMENDMENT DEFENSE TO ENFORCEMENT OF IGRA INDIAN GAMING COMPACTS

*SIDNEY M. WOLF\**

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## I. INTRODUCTION

In 1987, the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*<sup>1</sup> ruled that Indian tribes have exclusive authority to control gaming on their reservations.<sup>2</sup> The *Cabazon* decision ensured tribes freedom from state interference with gaming enterprises run on Indian lands.<sup>3</sup> The following year, Congress responded to *Cabazon* by enacting the Indian Gaming Regulatory Act (IGRA).<sup>4</sup> States and Nevada gaming interests were the principle proponents.<sup>5</sup> IGRA not only imposed federal limitations on the ability of tribes to regulate reservation-based

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\* Assistant Professor, Law and Public Policy, Department of Landscape Architecture and Regional Planning, University of Massachusetts at Amherst. B.G.S., 1972, M.A., Urban and Regional Planning, 1974, J.D. 1975, University of Iowa, Ph.D., Public Policy Analysis, 1972, University of Illinois.

1. 480 U.S. 202 (1987).

2. In the *Cabazon* decision the Court found that when state laws permitted but *civilly* regulated gaming activities on non-Indian lands, tribes could permit those same activities and regulate them under tribal law. Only if a state *criminally* prohibited such gaming would that prohibition extend to the reservation. Because the distinction between civil regulation and criminal prohibition was not always clear, the Court noted that "the shorthand test is whether the conduct at issue violates the State's public policy." *Id.* 480 U.S. at 209-10. See *infra* part IV.C for a discussion of the *Cabazon* case.

3. S. REP. 446, 100th Cong., 2d Sess., 2-3, reprinted in 1988 U.S.C.C.A.N. 3071, 3072-73 [hereinafter S. Rep. No. 446].

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

5. S. Rep. No. 446, *supra* note 3, at 33 (statement of Sen. McCain).

gambling, but also gave states substantial influence over the most coveted type of gaming, high-stakes and casino-style gambling on Indian lands.<sup>6</sup> Tribes opposed this statute which cripples the "new buffalo."<sup>7</sup>

IGRA divides gaming into Class I, Class II, and Class III categories.<sup>8</sup> Class I consists of traditional Indian games and is subject solely to tribal regulation.<sup>9</sup> Class II consists of mostly bingo-type games, and while there are minimal federal conditions on such gaming, it too is not subject to state regulation.<sup>10</sup> Class III gaming consists of sophisticated and high-stakes gaming such as slot machines, blackjack, lotteries, parimutuel wagering, roulette and other casino-type games.<sup>11</sup> Class III gaming is the only category subject to state influence.

IGRA requires the states and tribes to enter into "compacts" before Class III gaming can be conducted on Indian lands.<sup>12</sup> A compact is the result of negotiations between the states and tribes as to the proper operation and regulation of Class III gaming.<sup>13</sup> States must negotiate compacts at the request of a tribe.<sup>14</sup> If a state fails to negotiate properly, the tribe can sue the state in federal courts.<sup>15</sup>

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6. See *infra* part III.B (detailing states' power to regulate some types of gaming through the compact requirement).

7. Robert Dvorchak, *Without Wampum, Indians Bank on Blackjack*, L.A. TIMES, Jan. 3, 1993, at A10. Indian gaming can be likened to the buffalo because of its ability to sustain the tribes. See *infra* notes 37-39 and accompanying text.

8. 25 U.S.C. §§ 2703(6),(7),(8) (1988 & Supp. V. 1993).

9. See *infra* notes 54-55 and accompanying text for a discussion of Class I gaming.

10. See *infra* notes 56-59 and accompanying text for a discussion of Class II gaming.

11. See *infra* notes 60-62 and accompanying text for a discussion of Class III gaming.

12. 25 U.S.C. § 2710(d)(1)(C). The compact must also be approved by the Secretary of Interior. 25 U.S.C. § 2710(d)(3)(B). See generally *infra* part III.B (describing compacting).

IGRA was not the first attempt at federal legislation to use tribal-state compacts to resolve conflicts between states and tribes. In 1978, the Senate passed the Tribal-State Compact Act, to encourage Indian tribes and states to shift from litigation to negotiation to solve their disputes. S. 2502, 95th Cong., 2d Sess. (1978). The bill never became law.

13. 25 U.S.C. § 2710(d)(3)(A). Congress noted that a compact might require extension of state controls to gaming activities on Indian lands. See *supra* note 12 (explaining previous attempts to legislate in this area).

14. 25 U.S.C. § 2710(d)(3)(A).

15. 25 U.S.C. § 2710(D)(7)(A). IGRA grants jurisdiction to federal district courts to hear suits by Indian tribes arising from the failure of a state to enter into compact negotiations or conduct the negotiations in good faith. § 2710(d)(7)(A)(i). Federal district courts are also granted jurisdiction over any other cause of action initiated by a state or Indian tribe to enjoin Class III gaming. § 2710(d)(7)(A)(ii).

As economic entities competing with the tribes, states have adopted a two-phase strategy to stymie Indian gaming operations. Initially, states delay or refuse to negotiate compacts with the Indians,<sup>16</sup> Without this state-tribal compact, it appears that IGRA prohibits the tribes from operating casino gaming.<sup>17</sup> When tribes sue to compel states to negotiate, states assert that the constitutional defense of sovereign immunity, under the Eleventh Amendment, bars such suits.<sup>18</sup> The United States Courts of Appeal have split on whether state immunity bars suits to compel IGRA compacting, with the majority ruling in favor of the tribes.<sup>19</sup>

IGRA and states' tactics put tribes in a Catch-22. Tribes cannot operate casinos on Indian land without a state-tribal compact. States, however, refuse to negotiate,<sup>20</sup> and the federal courts have split on whether the Eleventh Amendment bars suits to compel state negotiation.<sup>21</sup> IGRA leaves the Indians without a remedy and thereby kills casino gaming — the new buffalo.

One of the prime movers behind IGRA, then House Interior Committee Chairman Morris Udall, described the compact provision as a "delicately balanced compromise."<sup>22</sup> The legislative

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16. Mark A. Jarboe, *Regulating Indian Gaming: Fairness or Finagling?*, THE BENCH AND BAR OF MINN., May-June 1993, at 26.

17. S. Rep. No. 446, *supra* note 3, at 6 (IGRA "does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a tribal-state compact.").

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

The states have also challenged the constitutionality of the compacting process under the Tenth Amendment. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

The states allege that IGRA coerces them to compact and as such infringes upon the powers of state sovereignty protected under the Tenth Amendment. Courts reject this claim because IGRA only requires states to negotiate in good faith. *See Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1432-36 (10th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993).

19. *Ponca Tribe*, 37 F.3d 1422 (finding states not immune from suits to enforce IGRA); *Spokane Tribe of Indians v. Washington*, 28 F.3d 991 (9th Cir. 1994) (same); *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) (holding states immune from suits by tribes); *Cheyenne River Sioux*, 3 F.3d 273 (holding that IGRA abrogates state sovereign immunity). *See also infra* part VII (discussing IGRA litigation).

20. Jarboe, *supra* note 16, at 26.

21. *See supra* note 19 and accompanying text.

22. 134 CONG. REC. 2,377 (1988) (statement of Rep. Udall).

history of IGRA reflects congressional concern for both tribes and states as sovereign entities and their “significant governmental interests” in gaming on Indian lands.<sup>23</sup> The committee report for IGRA concluded that the compacts between tribes<sup>24</sup> and states<sup>25</sup> were the best mechanism to address the interests of both sovereigns with respect to regulation of casino gaming and other high-stakes gaming enterprises.<sup>26</sup>

In adopting the compacting provision, Congress proceeded on the stated assumption that states and tribes should share the mutual benefits of class III gaming.<sup>27</sup> The committee believed equity required that the tribes and states negotiate these benefits.<sup>28</sup> The committee report warned that the compact requirement for Class III gaming should not be used by a state to exclude Indian tribes from gaming or to protect state-licensed gaming enterprises from competition with Indian tribes.<sup>29</sup>

This admonition proved prophetic. States have leveraged the compact requirement for the very purpose its opponents decried. Some states have successfully excluded Indians from the benefits of Class III gaming.

IGRA was a compromise Indian tribes did not savor, but was one they accepted as part of a deal.<sup>30</sup> The states then broke the deal, using the Eleventh Amendment to kill the compact arrangement. A lawyer representing the Indian tribes noted the “*deja-vu*.”<sup>31</sup> He recalled previous “Indian-giving” such as the Black Hills which were given to the Dakota Indians and then taken away after gold was discovered.<sup>32</sup>

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23. S. Rep. No. 446, *supra* note 3, at 13.

24. *Id.* The Committee report on IGRA mentioned that the state governmental interests with respect to class III gaming on Indian lands consisted of the interplay of this type of gaming with state public policy, safety, law and other interests, including economic interests, in raising revenues for state citizens. *Id.* The chief public safety concern raised by the states in advocating a federal framework like IGRA, and one which is explicitly recognized in the statute’s statement of purpose, was to shield the Indian gaming from infiltration from organized crime. 25 U.S.C. § 2702(2).

25. S. Rep. No. 446, *supra* note 3, at 13. The Committee report on IGRA declared that tribal government interests included raising revenue to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, achieving the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons on tribal lands. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Jarboe, *supra* note 16, at 26.

31. *Id.* at 27.

32. *Id.* The Black Hills were originally left to the Dakota Indians in the

This Article examines and proposes a solution to the strategies states employ to harness the Indian tribes' new buffalo — casino gaming. Part II uncovers states' hidden agenda in the fierce competition for casino gaming proceeds. Part III details IGRA's provisions, with particular attention to the compact process. Part IV analyzes the pre-IGRA law governing gaming on Indian lands. Part V describes the legislative development of IGRA with special emphasis on the compact requirement. Part VI focuses on state sovereign immunity under the Eleventh Amendment. Part VII analyzes federal case law on IGRA abrogation. Part VIII concludes that while the states have no constitutional authority to resist compacting, the impasse created by differing judicial interpretations will likely continue until Congress or the courts act to resolve it.

## II. COMPETITIVE REALITY OF GAMING: STATES V. INDIANS

The states and Indians are direct competitors, not mutual beneficiaries, for gaming revenues. As economic competitors, the states' motivation is to betray the compromise they agreed to in IGRA's compact requirement.

Indian gaming revenues rose from \$225 million in 1987,<sup>33</sup> the year *Cabazon* was decided, to \$6 billion by 1993,<sup>34</sup> indicating the rapid development of Indian gaming since the enactment of IGRA. Over 200 tribes engage in some form of gaming business<sup>35</sup> and at least 74 tribes in 18 states have entered into compacts with states to engage in casino gaming.<sup>36</sup> In sum, Indian gaming activity exploded following IGRA.

Good reasons cause Indian tribes to engage in gaming. Gaming operations offer tribes a better life which Congress summed up

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19th century as a reservation because they were a wasteland considered of little value to white settlers. When gold was discovered there, the federal government reneged on the treaty and took back the Black Hills from the Dakotas. *Id.*

33. Paul Lieberman, *Lady Luck Turns on Indians*, L.A. TIMES, Oct. 6, 1991, at A1.

34. *Report Urges Controls on Indian Gaming Industry*, N.Y. TIMES, Dec. 19, 1993, at 37.

35. *Id.*

36. Barry Meier, *Casinos Putting Tribes at Odds*, N.Y. TIMES, Jan. 13, 1994, at D1, D7. The highest concentration of Indian casinos is in the upper Midwest. As of 1994, 25 casinos have been opened by Indian tribes in Minnesota, North and South Dakota. Donald J. Berg, 'Hit Me Again:' *A Geography of Indian Casino Gambling in the Upper Midwest*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 26. At least 15 of these casinos are in Minnesota, which is the highest number of any state in the nation. Jerry D. Gerlach, *A View of Minnesota Indian Casinos*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 120.

as "tribal economic development, self-sufficiency, and strong tribal governments."<sup>37</sup> One tribal leader called Indian-run gambling operations the "new buffalo" because they have been a highly successful means for Indian tribes to feed, clothe, and shelter members and to improve the quality of life on reservations.<sup>38</sup> An Indian journalist has described gaming as "the first thing to come along in 100 years that gives tribes a real chance to be economically independent."<sup>39</sup>

Economic development is not an option for American Indians, it is a necessity. Gaming ventures are an answer to this critical need. Indians have traditionally been the poorest racial group in the United States, experiencing dire poverty. In 1990, nearly half of the nation's 1.8 million native Americans<sup>40</sup> lived in poverty and over one-third were unemployed.<sup>41</sup> Indian tribes have high expectations for gaming,<sup>42</sup> particularly those whose

37. 25 U.S.C. § 2701 (1988).

38. Robert Dvorchak, *Without Wampum, Indians Bank on Blackjack*, L.A. TIMES, Jan. 3, 1993, at A10. See Kristin E. Brink, *Indian Gaming*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 39 (reporting that as a result of Indian gaming, economic conditions are improving on many Indian reservations); Roger E. Dendinger, *Indian Gaming and Reservation Housing in Flandreau, South Dakota*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 81 (declaring that in two years, the Royal River Casino on the Flandreau Santee Sioux Tribe Reservation in South Dakota created 200 new jobs and brought a measure of prosperity to the reservation); Jerry D. Gerlach, *A View of Minnesota Indian Casinos*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 120 (noting that tribal casinos in Minnesota have had a positive impact for the Indians).

39. Edward Walsh, *Rise of Casino Gambling on Indian Land Sparks Controversy*, WASH. POST, June 16, 1992, at A3 (quoting Tim Giago, editor of the Lakota Times, an independent weekly Indian newspaper in South Dakota).

40. Joan Greendeer-Lee and Edna Paisano, *1990 Census Reporting on American Tribes*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 130. There are over 540 tribes in the nation. *Id.*

41. George Miller, *Progress for Indians is a Film Fantasy*, L.A. TIMES, Mar. 26, 1991, at B7. Indian alcoholism is 663% higher than the national rate, suicide rate is 95% higher, and unemployment is more than 100% higher. Dvorchak, *supra* note 38, at A10. See also *American Indians; The Landless Landed*, THE ECONOMIST, June 8, 1991, at 31 (describing conditions on reservations as close to that of the third world); William L. Chaze, *Alcohol, Poverty — The Killing Fields of Rosebud*, U.S. NEWS & WORLD REP., Sept. 2, 1985, at 52 (describing, as a paradox, Indian poverty amidst vast resources); Will Lissner, *Poverty on the Land*, AM. J. ECON. AND SOC., July 1987, 354; Dominique van de Walle, *Population Growth and Poverty: Another Look at the Indian Time Series Data*, J. DEV. STUD., Apr. 1985, 429.

42. James Dao, *Once Destitute, Oneida Tribe Braces for a Flood of*

members are poor.<sup>43</sup> A few tribes already appear to have found gaming to be a bonanza.<sup>44</sup>

Gaming is the most successful economic development opportunity for Indians in the United States.<sup>45</sup> Gaming revenues have benefited Indians as Congress hoped. Gaming provides for the tribes' general welfare, a variety of economic development and social service activities, and new jobs.<sup>46</sup> In many instances, Indian gaming is truly a "new buffalo."

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*Gambling Profits*, N.Y. TIMES, July 18, 1993, at 27 (noting expectation of large revenues by Oneida Indians as they prepare to open Turning Stone Casino in New York state). See also W. John Moore, *A Winning Hand?*, NAT'L L.J., July 17, 1993, at 1796; David Holmstrom, *Indian Gaming Booms Nationwide*, CHRISTIAN SCI. MONITOR, Nov. 10, 1992, at 6 (commenting on competition for gambling profits); David Holmstrom, *Bingo! Indian Tribes Find Way to Make Money*, CHRISTIAN SCI. MONITOR, Sept. 4, 1991, at 8 (describing tribes' gambling activities after IGRA's enactment); Pauline Yoshihashi, *Indian Tribes Put Their Bets on Casinos*, WALL ST. J., Aug. 5, 1991, at B1.

43. Dao, *supra* note 42, at D7. See also Meier, *supra* note 36, at D7 (discussing casino ventures under consideration by the Gila River Community of Arizona, which had an unemployment rate of 38%). Indian gaming only generates 5% of the gaming industry's total profit in the United States, \$900 million annually, but that money is significant to many poor tribes. *Id.*

44. In its first year of operation, the Mashantucket Pequot Tribe's casino in Connecticut grossed more than \$750 million. Agnes Palazzetti, *Oneida Indian Leader Staking Claim to the State's First Gambling Casino*, BUFFALO NEWS, Apr. 11, 1992, at D7. Slot machine business was so brisk at Indian reservations in Minnesota, Wisconsin, and South Dakota that it severely depleted the supply of quarters at the regional Federal Reserve Bank in Minneapolis. Amy Feldman, *Brother, Can You Spare a Few Million Quarters?*, FORBES, Jan. 18, 1993, at 19. In Minnesota, reservations have become one of the state's top 20 employers. MINN. INDIAN GAMING ASS'N, ECONOMIC BENEFITS OF TRIBAL GAMING IN MINNESOTA 16 (1992) (cited in Eric J. Swanson, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 Hamline L. Rev. 471 n.177 (1992)). During 1991 the gaming operations of six Indian nations in Minnesota generated \$143 million in revenues and profits of \$54 million. Lance W. Burr, *Broken Promises Revisited: A Story of the Kickapoo Nation — Kansas Gaming Compact*, 32 WASHBURN L.J. 16, 26 (1992). See also Kirk Johnson, *Indians' Casino Pumps Up the Volume*, N.Y. TIMES, Sept. 1, 1993, at A12 (describing plans to double the size of the Mashantucket Pequot casino); Shannon Henry, *Multiplying Indian Casinos Draw Critics' Fire*, CHRISTIAN SCI. MONITOR, Aug. 2, 1993, at 12 (commenting on efforts by states and gambling interests to impose limits on Indian gambling); Moore, *supra* note 42, at 1796.

45. George Oake, *Natives Set Sights on Casinos as U.S. Bands Rake in the Cash*, TORONTO STAR, Aug. 4, 1992, at A15.

46. An Indian gaming facility located in Milwaukee, Wisconsin, and consisting of high-stakes bingo and video gaming machines, provided the small Forest County Potawatomi Community with income of approximately \$400,000 per month. *Forest County Potawatomi Community of Wis. v. Doyle*, 828 F. Supp. 1401, 1407 (W.D.Wis. 1993). The community used the proceeds to operate an Indian school and perform badly needed renovations on the school's



The states are killing, or at least crippling, the "new buffalo" by breaking their deal to negotiate Class III gaming compacts with Indian tribes. State opposition to and obstruction of Indian gaming is rampant.<sup>47</sup> Congress adopted the IGRA compact requirement based on the false assumption that the states and tribes were mutual beneficiaries in Indian gaming.<sup>48</sup> Rather, states and Indian tribes are direct competitors for gaming proceeds. Legalized gambling is one of the fastest growing economic activities in the nation<sup>49</sup> and states must compete with tribes for gaming proceeds.<sup>50</sup> The tribes also compete for gaming revenues

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buildings. *Id.* The Shakopee Mdewakanton Sioux Tribe in Minnesota use the revenues from their casino to pay for new housing, sewers, and roads and distribute to their members monthly dividends, college scholarships, and trust funds. Dvorchak, *supra* note 38, at A10. In Michigan, seven Indian gaming ventures employed 1,931 people, 62% of them Indians. Burr, *supra* note 44, at 27. This decreased unemployment rates at the reservations by 64%. *Id.*

47. See Virginia Ellis, *Indians Say Wilson is Blocking Gaming*, L.A. TIMES, Sept. 2, 1993, at A3; Steve Wiegand, *The Canvas Casino*, CAL. J., Aug. 1, 1993, at 25; Iver Peterson, *Our Towns: On Horizon, Specter of a Casino*, N.Y. TIMES, July 27, 1993, at B6; William Claiborne, *Rhode Island Stakes a Bet Against the Narragansetts; Indian Casino Movement Stops Here*, Governor Says, WASH. POST, May 16, 1993, at A3; Pauline Yoshihashi, *As Indian Casinos Spread, Politicians and Rivals Maneuver to Fight the Trend*, WALL ST. J., May 4, 1993, at B1; *Arizona Bars Casino Games*, N.Y. TIMES, March 7, 1993, at 15; Dirk Johnson, *Raid on Indian Casino Inflames Issue of Self-Rule*, N.Y. TIMES, May 17, 1992, at 18; Kirk Johnson, *Pequot Casino Faces Challenges of Success*, N.Y. TIMES, May 3, 1992, at 46; Paul Lieberman and Lisa Castiglione, *Authorities Raid Gaming Halls Run by 3 Indian Tribes*, L.A. TIMES, Oct. 31, 1991, at A3; Holmstrom, *Indian Gaming Booms Nationwide*, *supra* note 42, at 6.

48. S. Rep. No. 446, *supra* note 3, at 13.

49. John F. Lounsbury, *The Development of a Major Gaming Center in Southeastern Nevada*, ABSTRACTS, ASS'N OF AM. GEOGRAPHERS, 90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 225. This growth has proceeded over the last ten years. *Id.* As of early 1994, all but two states have sanctioned some form of gambling. *Id.* Casino gaming now not only exists in Nevada and Atlantic City, but also on riverboats and Indian Reservations in at least 23 states. *Id.* Riverboat casinos are the most current rage in gambling around the nation. At least 34 of these operate in Mississippi River states, 19 in Mississippi alone, with Illinois ranking next with 10. Curtis Wilkie, *Casinos Raise Money, Doubts in Mississippi*, BOSTON GLOBE, Jan. 30, 1994, at 1, 14.

50. A Florida state senator, urging approval of a referendum by Florida voters to allow casino gambling in the state, estimated casinos will provide 80,000 jobs, reduce the state's unemployment by a full percentage point, pump \$3 to \$4 billion in Florida's economy, and create \$500 million a year in new tax revenues. *To Some, Florida's Approval of Casinos is a Foregone Conclusion*, BOSTON GLOBE, March 27, 1994, at 18.

Mississippi has opened itself up to extensive development of casino gambling along the Mississippi River and the Gulf Coast. Wilkie, *supra* note 49, at 1, 14. See also Klaus J. Meyer-Arendt, *From River to the Sea — Dockside*

with local governments,<sup>51</sup> major gaming companies (in Las Vegas and Atlantic City),<sup>52</sup> and even each other.<sup>53</sup> In the competition for gambling dollars, states have aimed the crosshairs of the Eleventh Amendment at the “new buffalo” — Indian gaming.

### III. IGRA'S PROVISIONS

#### A. *Classes of Gaming*

IGRA creates a relatively simple framework for regulating Indian gaming. IGRA divides gaming into three classes, each of which is subject to a different level of state and federal intrusion. Class I gaming consists of social gaming for “prizes of minimal value” or traditional Indian games,<sup>54</sup> and is only subject to tribal regulation.<sup>55</sup> Class II gaming includes bingo, games similar

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90TH ANN. MEETING, MAR. 29, 1994 - APR. 2, 1994, at 254. In five counties alone, between August 1992 and September 1993, 11 dockside casinos opened, and licenses were approved or were pending approval for 40 more. Meyer-Arendt, at 254. Casino gambling has generated substantial state revenues since 1993, the first full year of their operation in the state. In that year, casinos reported \$790 million in revenues and paid taxes of \$65 million. Wilke, *supra* note 49, at 14. The state treasury is enjoying a surplus. *Id.* A state economic planning agency estimates the gaming industry will create 37,000 new jobs and \$130 million in state taxes by the end of fiscal 1994. *Id.*

Gaming has been proposed as a source for raising funds for the federal government, particularly to support President Clinton's proposed health care reform.

51. See Holstrom, *Indian Gaming Booms Nationwide*, *supra* note 43, at 6; Yoshihashi, *As Indian Casinos Spread, Politicians and Rivals Maneuver to Fight the Trend*, *supra* note 47, at B1.

52. For example, casino owner and real-estate magnate Donald Trump is an outspoken foe of competition from Indian casinos. Trump's views are representative of a long-standing opposition by the gambling industry to reservation-based gambling. See Coleman McCarthy, *Trumped-up Assault On Indian Gambling*, WASH. POST, Oct. 26, 1993, at D18; see also Nick Ravo, *How a Tribe in Connecticut is Taking on Atlantic City*, N.Y. TIMES, Apr. 14, 1991 at D6. Recently, however, major Las Vegas and Atlantic City based casino companies have joined Indian tribes in casino business ventures. This trend has irritated state and local officials. See, e.g., *Cesars World to Invest in Indian Casino*, N.Y. TIMES, July 22, 1993, at D4 (discussing plans for a \$25 million casino in Palm Springs, California); Christopher Palmeri, *Smoke Signals ?*, FORBES, Aug. 3, 1992, at 19 (discussing plans by Mirage Resorts to operate tribal casinos); Pauline Yoshihashi, *Mirage Joins with Indians in Casino Plan*, WALL ST. J., Feb. 14, 1992, at B1.

53. Pauline Yoshihashi, *Arizona, Two Tribes Tentatively Agree to Settle Fight Over Indians' Gambling*, WALL ST. J., May 10, 1993, at B10. Giant gaming companies with operations in Atlantic City and Las Vegas, which once opposed Indian gaming, are now allied with Indian tribes. See also Meier, *supra* note 36, at D7. These Indian and gaming company projects are now in competition with those of other tribes. *Id.* Furthermore, within many Indian tribes there is disagreement over whether to enter the gambling businesses. See, e.g., James Dao, *Casino Issue Divides Mohawk Reservation in New York*, N.Y. TIMES, Mar. 21, 1993, at 33.

54. 25 U.S.C. § 2703(6) (1988). Class I gaming is defined as follows: “(6)

to bingo like pull-tabs, punch boards and tip jars, and certain “nonbank” card games.<sup>56</sup> Tribes may engage in Class II gaming without interference from state regulation, so long as the state in which a tribe is located allows similar gaming.<sup>57</sup> Class II gaming is subject to several IGRA requirements and formalities,<sup>58</sup> including oversight by the National Indian Gaming Commission.<sup>59</sup>

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The term ‘class I gaming’ means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations.” *Id.*

55. 25 U.S.C. §2710(a)(1) (1988).

56. 25 U.S.C. § 2703(7). Regarding Class II gaming, the statute provides:

(A) The term “class II” gaming means —

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) —

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull tabs, lotto, punch boards, tips jars, instant bingo, and other games similar to bingo, and

(ii) card games that —

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term “class II gaming” does not include —

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

*Id.*

57. 25 U.S.C. § 2710(b)(1)(A). This provision of IGRA incorporated the *Cabazon* test, in which the Supreme Court allowed Indian gaming by any person, organization, or entity without state interference provided that the state in which the tribe was located allowed such gaming. *See infra* part IV.C. To obtain authority to self-regulate Class II gaming, the Indian tribe must conform to certain requirements. 25 U.S.C. § 2710(c)(3). The most important requirement is that the tribe must have conducted Class II gaming for at least three years in an honest manner and with a good reputation. 25 U.S.C. § 2710(c)(3)-(4)(A).

58. Class II card games are allowed only if the tribe conducts them in conformity with state laws and regulations, if any, regarding hours of operation

Class III gaming encompasses all other forms of gaming, including more sophisticated, high-stakes gambling, such as casino gaming.<sup>60</sup> Class III gaming can be conducted only if such gaming is permitted within the state by any person for any purpose.<sup>61</sup> This category of gaming is subject to the greatest degree of federal and state involvement. To satisfy the federal requirements, the tribe must adopt a gaming ordinance which has been approved by the Chairman of the National Indian Gaming Commission.<sup>62</sup>

### B. *Tribal-State Compacts*

The compact requirement provides an opportunity for state influence in Class III gaming. In order to conduct Class III gaming, a tribe must negotiate a compact with the state setting forth which games can be played and governing their conduct.<sup>63</sup> The compact mechanism gives the state an opening to either influence or directly regulate Class III gaming on Indian lands. The compact can even extend state civil and criminal jurisdiction onto Indian lands.<sup>64</sup>

IGRA provides a "framework" for negotiation and enforcement of tribal-state gaming compacts.<sup>65</sup> The tribe must request

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or limitations on wagers or pot sizes. 25 U.S.C. § 2703(7)(A)(ii). The net revenues of Class II gaming can only be used by the tribal government for the general welfare of tribal members, tribal economic development, or donations to charitable organizations or local government agencies. 25 U.S.C. § 2710(b)(2)(B).

59. To conduct Class II gaming, a tribe's governing body must adopt an ordinance or resolution authorizing the gaming activities and prescribing operating regulations. 25 U.S.C. § 2710(b)(1)(B). The ordinance or resolution is subject to the approval of the Chairman of the National Indian Gaming Commission. *Id.*

60. 25 U.S.C. § 2703(8).

61. 25 U.S.C. § 2710(d)(1)(B). Again, this is the *Cabazon* test. *See infra* part IV.C.

62. 25 U.S.C. § 2710(d)(1)(A).

63. 25 U.S.C. § 2710(d)(3)(A).

64. 25 U.S.C. § 2703(d)(3)(C)(i)-(vii). Tribal-state compacts can include provisions regarding the application of criminal and civil laws and regulations, allocation of criminal and civil jurisdiction between tribe and state, taxation by the tribe, remedies for breach of contract, standards for the operation and maintenance of gaming facilities including licensing, and any other subjects directly related to the operation of gaming activities. *Id.* The compact takes effect only after approval by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). IGRA prevents states from using the compact to intrude into Indian affairs. The legislative history indicates that states cannot use the compact process to exclude Indian tribes from Class III gaming or to protect other state licensed enterprises from free market competition with the tribes.

S. Rep. No. 446, *supra* note 3, at 3. The statute expressly forbids use of the

that a state negotiate a compact.<sup>66</sup> The state must then negotiate in “good faith.”<sup>67</sup> IGRA’s jurisdictional provision, section 2710(d)(7), allows the tribes to enforce the compact process in federal courts.<sup>68</sup> Section 2710(d)(7) grants jurisdiction to the federal courts over any cause of action brought by an Indian tribe arising from a state’s failure to enter compact negotiations or to conduct negotiations in good faith.<sup>69</sup> A federal court may order a tribe or state to reach a compact if the state fails to meet its burden of showing that it negotiated in good faith.<sup>70</sup> If the state and the tribe cannot reach an agreement, IGRA empowers the court to appoint a mediator to develop one.<sup>71</sup>

Most IGRA litigation focuses on federal jurisdiction.<sup>72</sup> Beginning in 1991, states began to challenge federal court jurisdiction to hear Indian suits to enforce the compacting process by

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compact as precedent for imposing any revenue-raising taxes or assessments on any activities on Indian lands if there is no other basis for imposing such tax or assessment. 25 U.S.C. § 2710(d)(4).

65. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 275 (8th Cir. 1993).

66. 25 U.S.C. § 2710(d)(3)(A).

67. *Id.*

68. 25 U.S.C. § 2710(d)(7)(A).

69. The provision also grants jurisdiction to the federal courts over any other cause of action initiated by a state or Indian tribe to enjoin Class III gaming. 25 U.S.C. § 2710(d)(7)(A)(ii).

70. 25 U.S.C. § 2710(d)(7)(B)(iii). Upon introduction of evidence by the tribe that negotiations began more than 180 days before, no tribal-state compact was concluded, and the state did not respond to requests for negotiations or did not respond in good faith, the burden of proof shifts to the state to prove that it negotiated in good faith. § 2710(d)(7)(B)(ii). In determining whether the state negotiated in good faith, the court may consider “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.” § 2710(d)(7)(B)(iii)(I). Upon finding the state has not acted in good faith, the court may order the parties to reach a compact within 60 days. § 2710(d)(7)(B)(iii).

71. 25 U.S.C. § 2710(d)(7)(iv)-(vii). If the tribe and state fail to reach a compact within 60 days, the court may appoint a mediator who considers the “last best offer” from each side and selects one of the proposals to be the final compact. 25 U.S.C. § 2710(d)(7)(B)(iv). The proposed compact becomes the governing compact if the state consents within sixty days. 25 U.S.C. § 2710(d)(7)(B)(vi). If the state fails to consent within 60 days, the Secretary of Interior, in consultation with the tribe, determines how gaming should be conducted and controlled on Indian land, prescribing procedures consistent with the proposed compact selected by the mediator, IGRA’s provisions, and relevant state law. 25 U.S.C. § 2710(d)(7)(B)(vii).

72. The initial lawsuits brought in federal courts by the tribes against the states concerning Class III activities under IGRA were over whether the states were negotiating in good faith. See *infra* part VII (discussing the IGRA litigation).

asserting an Eleventh Amendment sovereign immunity defense.<sup>73</sup> The United States Courts of Appeal have split on this question.<sup>74</sup>

#### IV. PRE-IGRA CASE LAW

##### A. *Supreme Court Recognition of Indian Sovereignty, Limitation of State Jurisdiction, and Plenary Power of Congress*

To determine if states can validly claim sovereign immunity from suits to enforce IGRA's compact provision, it is necessary to examine not only Eleventh Amendment law, but also pre-IGRA federal Indian law and the congressional intent behind IGRA. Although subject to the overriding power of the federal constitution, Indian tribes are self-governing entities with the power to establish their own laws governing their people and lands.<sup>75</sup> Like the states, Indian tribes have authority to devise laws governing conduct within their own borders.

The Supreme Court has characterized Indian tribes as "domestic dependant nations" that possess all the powers of government that the United States has not expressly removed or held to be inconsistent with the tribes' status as domestic dependant nations.<sup>76</sup> As a result of the tribe's status, Congress has

73. See *supra* note 19.

74. See *infra* part VII (discussing these cases).

75. It is ironic that in the beginning of the Indian gaming controversy tribes claimed sovereign protection against the intrusion of state authority. States now assert that their sovereignty protects them against federal court enforcement of IGRA's compact requirement.

76. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In *Cherokee Nation*, Chief Justice Marshall denied the Cherokee Tribe's request for an injunction to prevent the execution of a series of laws passed by the Georgia legislature that divided all Cherokee lands into existing Georgia counties, extended Georgia laws and authority over all Cherokee lands, and annulled all Cherokee laws and ordinances. *Id.* at 7. Chief Justice Marshall rejected the Cherokee Tribe's claim that it was a "foreign nation" within the meaning of Article III, sec. 2, cl. 2, of the United States Constitution which confers original jurisdiction to the Supreme Court over suits between foreign nations and the states or citizens. *Id.* at 17. Marshall wrote that the tribes are "domestic dependant nations" because they tacitly gave up their pre-existing sovereign right to deal with any other nation but the United States. *Id.* at 17, 18. He further noted:

They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

*Id.*; See also FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 231 (1982). ("The recognition of tribal self-government embodied in federal legislation and treaties preempts competing assertions of state authority.")

plenary power to legislate with respect to Indians and Indian tribes.<sup>77</sup> The scope of federal power over Indian tribes is almost limitless while that of the states is severely limited.<sup>78</sup>

The concept of Indian sovereignty has its roots in opinions by Chief Justice Marshall over 160 years ago in *Cherokee Nation v. Georgia*<sup>79</sup> and *Worcester v. Georgia*.<sup>80</sup> In these opinions, the Court first pronounced the federal government's unassailable authority over Indian tribes and delineated the respective sovereign statuses of the tribes, states, and federal government. In *Cherokee Nation*, Marshall first characterized Indian tribes as domestic dependant nations in relation to the United States.<sup>81</sup> In *Worcester*, Marshall made it clear that even though Indian tribes are "dependant" nations they are still sovereign entities<sup>82</sup> with inherent rights to self-government.<sup>83</sup> Moreover, because tribes are sovereign entities, states have few rights to impose regulations on them. Marshall observed that because Indian

77. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903).

78. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 550. See generally COHEN, *supra* note 76, at 259-79 (describing the scope of state powers).

79. 30 U.S. (5 Pet.) 1 (1831).

80. 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, a missionary appealed his conviction and incarceration under a Georgia statute that made it illegal for a non-Indian to enter the Cherokee lands without permission from the governor of Georgia. *Id.* at 536. Chief Justice Marshall wrote for the Court and held that Georgia lacked authority to regulate activities within Cherokee lands, ruling that the federal government possessed sole and exclusive authority to regulate Indian affairs as a matter of constitutional law. *Id.* at 561-62.

81. 30 U.S. (5 Pet.) at 17. "[The Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations." *Id.*

82. 31 U.S. at 559-60.

The very term "nation," so generally applied to [Indian tribes], means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.

*Id.*

83. *Id.* at 559. Marshall stated:

The Indian Nations had always been considered independent, political communities . . . [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and

nations are dependant on the United States they are subject only to limitations imposed by the federal government and not to state laws.<sup>84</sup>

There are two important facets to the federal relationship with tribal governments. The first is the federal "trust obligation" toward the tribes and the second is Congress' plenary power over Indian relations in the United States. As will be discussed later in this article, congressional plenary power is pivotal in federal court decisions over whether or not to enforce the compact requirement in the face of the Eleventh Amendment defense.

The trust obligation is a duty of protection the federal government owes to the tribes. Chief Justice Marshall, in *Cherokee Nation*, appears to be the first to describe this guardianship relationship. Marshall observed that in their status as domestic dependant nations the tribes' "relation to the United States resembles that of a ward to his guardian."<sup>85</sup> The trust obligation creates not only a duty upon the federal government to deal fairly with Indian nations<sup>86</sup> but also serves as a source of extensive power to legislate on matters concerning Indian affairs.<sup>87</sup>

In *Worcester*, Marshall described the plenary power<sup>88</sup> of the federal government over Indian affairs. He concluded that the

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84. *Id.* at 561. There are three exceptions: consent, treaties with the national government, or acts of Congress.

The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

*Id.*

85. 30 U.S. (5 Pet.) at 17. Marshall further observed: "[Indian tribes] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." *Id.*

86. *See, e.g.,* *Morton v. Ruiz*, 415 U.S. 199 (1974) (recognizing the federal government's responsibility to deal fairly with Indians, whether tribal members living on or off the reservation); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (ruling that the federal government owes a trust obligation to rectify violations of a 19th century treaty); *United States v. Sandoval*, 231 U.S. 28, 45-48 (1913) (stressing that Congress has the power and duty to regulate commerce with Indian tribes, as well as the duty to care for and protect all dependant Indian communities).

87. *See* *Morton v. Mancari*, 417 U.S. 535 (1974) (noting that the trust obligation allows Congress to enact legislation that singles out Indians for preferential treatment).

88. Plenary power has been defined as: "Authority and power as broad as is required in a given case." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).



Indian Commerce Clause,<sup>89</sup> along with the Treaty Clause,<sup>90</sup> permitted Congress to do all that is required for complete control over Indian matters. By including Indian tribes in the Commerce Clause the framers tried to protect them from state interference.<sup>91</sup> Congressional plenary power over Indian affairs became particularly important after 1871, when Congress ended the era of treaty-making with Indian tribes, which was exclusively under the authority of the President and Senate, and shifted control of Indian affairs to direct congressional legislation.<sup>92</sup> With this shift, the Indian Commerce Clause became the basis for the plenary authority of congressional legislation, and the Supreme Court has come to regard the scope of this congressional power as almost limitless.<sup>93</sup>

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89. U.S. CONST., art I, § 8, cl. 3 "The Congress shall have the power . . . to regulate commerce . . . with the Indian tribes."

90. U.S. CONST., art. II, § 2, cl. 2 "[T]he President shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . ."; U.S. CONST., art. VI, cl. 2 "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land".

91. Rachel San Kronowitz et. al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. REV. 507, (1987).

92. Appropriations Act of Mar 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871). In 1871 Congress passed a law prohibiting the federal government from making additional treaties with the Indian tribes (codified at 25 U.S.C. § 71 (1988)). This law was the result of the political jealousy of the House of Representatives against the Senate and the abuses of treaties by the executive branch. The House of Representatives was shut out of Indian treaty formulation, which was the constitutional duty of the President and the Senate, although the House did act on its own Constitutional appropriation duty to fund these treaties. Raymond Cross, *De-Federalizing American Indian Commerce: Toward A New Political Economy for Indian County*, 16 HARV. J.L. & PUB. POL'Y 445, 456, n.32 (1993). The President, represented by treaty commissioners around the nation, conducted Indian policy in the executive branch. *Id.* Resenting the Senate's power to ratify treaties and the lack of having any role in treaty formulation, the House demanded the end of treaty-making and a shift to legislating Indian affairs which involved a larger role for itself in overseeing Indian policy. *Id.* Moreover, the abuses in making and complying with treaties with Indians had degenerated into a "cruel farce" by time of the legislative prohibition on treaty-making. *Id.* at 457 n.34. *See also* Kronowitz et. al., *supra* note 9, at 507 (1987).

93. *See e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (holding Congress has authority to divest tribal authority to tax non-Indians on Indian lands); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980) (acknowledging paramount authority of Congress over Indian property); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (recognizing Congressional authority to limit, change or eliminate tribal governmental powers); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209-12 (1978) (recognizing Congressional authority to define criminal, civil or regulatory jurisdiction of Indian tribes); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (holding Congress has plenary authority to legislate for Indian tribes on all matters, including

The domestic dependent status of Indian nations explained in *Worcester* and *Cherokee Nation* provides the conceptual foundation for federal supremacy over Indian affairs and correspondingly provides the basis for excluding state authority over Indian tribes.<sup>94</sup> Likening Indian tribes to foreign nations justifies subjecting them to federal treaty-making.<sup>95</sup> Likening them to wards rationalizes the federal government's exclusive guardianship role over the Indian tribes.<sup>96</sup> When Congress enacted IGRA, it did so recognizing no state power over Indian affairs but relying on plenary federal authority.<sup>97</sup>

### B. *Bryan v. Itasca County: Civil-Regulatory — Criminal-Prohibitory Test and Indian Gaming*

The semisovereign status of Indian tribes is at the heart of the Indian gaming controversy. This sovereign authority gives Indian tribes the power to establish laws governing their people and lands, subject only to the overriding power of federal law.<sup>98</sup> In most instances, the tribes' special status also bars any state regulation of Indian tribes.<sup>99</sup> Thus, states had no control over gaming on Indian territory for non-Indians until Congress granted

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their form of government); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85-86 (1977) (recognizing authority of Congress to control tribal assets); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-88, 594 (1977) (recognizing Congressional authority to reduce tribal reservation boundaries without tribal consent or compensation and abrogate treaties); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (recognizing Congressional plenary power to legislate on behalf of Indian tribes). See generally Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

94. See Cross, *supra* note 92, at 447 n.10.

95. See *id.*

96. See *id.*

97. S. REP. NO. 446, *supra* note 3, at 5.

It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

*Id.*

98. *Cabazon*, 480 U.S. at 207. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States." *Id.* (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)).

99. See *infra* notes 104-11 and accompanying text (discussing the scope of state jurisdiction).

them that authority in Public Law 83-280 (Public Law 280).<sup>100</sup>

Enacted in 1953, Public Law 280 expanded state authority over Indian affairs in five states.<sup>101</sup> The principal purpose of Public Law 280 was to extend those states' criminal jurisdiction "over offenses committed by or against Indians . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the State."<sup>102</sup> Public Law 280 also allowed the five states to apply their civil jurisdiction, provided it was "to the same extent such State has jurisdiction over other civil causes of action" in non-Indian areas.<sup>103</sup>

In 1977, the Supreme Court in *Bryan v. Itasca County*<sup>104</sup> held that the civil jurisdiction Congress granted the states in Public Law 280 was substantially narrower than the criminal jurisdiction.<sup>105</sup> The Court noted that Public Law 280 granted civil jurisdiction only for civil court proceedings involving Indians and private citizens.<sup>106</sup> The Court concluded that Public Law 280 did not allow the states to enforce all state civil laws on Indian lands, particularly civil-regulatory laws.<sup>107</sup>

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100. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988) and 28 U.S.C. § 1360 (1988)).

101. 67 Stat. 588 §§ 2, 4. Until 1968, the law also provided an option for the extension of authority to other states. It transferred to California, Minnesota, Nebraska, Oregon, and Wisconsin criminal and civil jurisdiction over designated Indian lands. *Id.* These states were specified because they wished to assume this jurisdiction and most of the affected Indian tribes had supported the transfer of jurisdiction because they were not sufficiently organized to exercise this authority themselves. S. Rep. No. 699, 83 Cong., 1st Sess. 848 (1953), reprinted in 1953 U.S.C.C.A.N. 2409, 2412. Until 1968 other states were permitted to acquire such jurisdiction if they chose to do so. Pub. L. No. 83-280 § 7, 67 Stat. 590. Florida, Idaho, Iowa, Montana, and Washington exercised this authority. This provision was repealed in 1968. Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, 82 Stat. 73. After 1968, states seeking to assume jurisdiction on Indian lands required the consent of the affected tribe. Since then no tribes have consented and no new states have been permitted to acquire jurisdiction under Public Law 280. S. Rep. No. 446, *supra* note 3, at 2 n.1.

102. Pub. L. No. 83-280 § 2, 67 Stat. 588 (codified at 18 U.S.C. § 1162).

103. Pub. L. No. 83-280 § 4, 67 Stat. 588 (codified at 28 U.S.C. § 1360).

104. 426 U.S. 373 (1976). In *Bryan* the Court held that a statute allowing counties to tax personal property did not apply to property on Indian land. *Id.* at 375. The court affirmed a previous holding in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), which held a state could not extend taxation to Indian lands without Congressional authorization. *Id.* at 376-77. The Court ruled that Public Law 280 did not provide the necessary authorization. *Id.* at 378-79.

105. *Id.* at 387-90.

106. *Id.* at 383. The Court held that Congress intended the civil jurisdiction provision to be limited to the resolution of civil legal disputes. *Id.* at 385, 391.

107. *Id.* at 390. State taxation like the Minnesota personal property tax was

*Bryan* formed the foundation for the “civil-regulatory versus criminal-prohibitory” test.<sup>108</sup> Under this test, states can only enforce statutes that are criminal-prohibitory in nature, not civil-regulatory, on Indian lands.<sup>109</sup> Consequently, state authority on Indian lands extends only to those activities that are prohibited under state law and not those merely subject to regulation.<sup>110</sup> The net result of *Bryan* was that the corpus of state regulatory laws are not generally enforceable on Indian lands.<sup>111</sup>

In the late 1970s, Indian tribes began to run significant gaming operations. The most notable of these were the high-stakes bingo games of the Seminole Tribe in Florida and the Oneida Tribe in Wisconsin. Both Wisconsin<sup>112</sup> and Florida<sup>113</sup> had laws which imposed limits upon the frequency of bingo games and the size of prizes. Wisconsin and Florida were also “280 states.”<sup>114</sup> The Fifth Circuit in *Seminole Tribe v. Butterworth*<sup>115</sup> and a Wisconsin federal district court in *Oneida Tribe of Indians v. Wisconsin*<sup>116</sup> ruled, however, that under the *Bryan* test, Florida and Wisconsin lacked jurisdiction under Public Law 280 to regulate gaming occurring on Indian lands. The courts in *Butterworth*<sup>117</sup> and *Oneida*<sup>118</sup> held that these statutes governing bingo were more

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regarded by the Court to be a general regulatory power. *Id.* In reviewing Congressional intent the Court noted the “absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.” *Id.* at 384.

108. The Minnesota Supreme Court had held that § 4(a) of Public Law 280 created a general grant of the power to tax. 426 U.S. at 378. The Supreme Court rejected this argument, concluding that “the primary intent of § 4 was to grant jurisdiction over *private civil litigation* involving reservation Indians in state court.” 426 U.S. at 385 (emphasis added).

109. *Id.* at 390. For a case applying the *Bryan* test, see *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982). See also, *Cabazon*, 480 U.S. at 215-16, n.17.

110. 426 U.S. at 390.

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

112. WIS. STAT. ANN. § 163.51 (West 1989).

113. FLA. STAT. ANN. § 849.0931 (West 1994).

114. Wisconsin was one of the original five states to which Public Law 280 transferred civil and criminal jurisdiction when the statute was enacted in 1953. See *supra* note 101. Florida assumed criminal jurisdiction over Indian tribes prior to 1968, when the law repealed the provision allowing states to extend jurisdiction to Indian lands without tribal consent. *Butterworth*, 658 F.2d. at 312-13.

115. 658 F.2d 310 (5th Cir. Unit B, Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982).

116. 518 F. Supp. 712 (W.D. Wis. 1981).

117. 658 F.2d at 314 (“Bingo appears to fall into a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses.”).

118. 518 F. Supp. at 719 (“[B]ecause it appears that Wisconsin’s bingo laws are not designed to prohibit the general populace from playing bingo, it seems that those laws are regulatory rather than prohibitory . . .”).

civil-regulatory than criminal-prohibitory in nature because rather than prohibiting all bingo operations, the states imposed regulatory limitations.

### C. *California v. Cabazon Band of Mission Indians: Freeing Indian Gaming from State Regulation*

After the *Oneida* and *Butterworth* decisions, tribal bingo operations exploded around the country.<sup>119</sup> Other tribal victories in federal courts followed as states increasingly opposed Indian bingo.<sup>120</sup> The Supreme Court resolved the question of state authority over Indian gaming in 1987 in *California v. Cabazon Band of Mission Indians*.<sup>121</sup>

*Cabazon* made clear that state laws are inapplicable on Indian reservations unless Congress directs otherwise. In *Cabazon*, the Court affirmed and refined the criminal-prohibitory, civil-regulatory test in determining whether states could claim Public Law 280 jurisdiction over Indian gaming.<sup>122</sup> The decision was a striking victory for Indian tribes. The Court ruled that Indian tribes have exclusive authority to regulate gaming on their lands, subject only to federal law, and to state laws to the extent they make any type of gaming completely illegal.<sup>123</sup> The *Cabazon* decision was particularly significant because it went beyond bingo and opened the door for tribes to conduct casino-style gambling.<sup>124</sup>

The *Cabazon* case concerned the Cabazon and Morongo Bands of Mission Indians. The Bands, which had previously operated a bingo hall, opened a card club at which mostly non-Indians

119. By 1986, 108 tribes had gaming facilities, 104 of them involved bingo. Gross receipts for gambling on Indian reservations exceeded \$100 million a year by this time. S. REP. NO. 493, 99th Cong., 2d Sess. 2 (1986). Virtually all the Indian bingo activities started after the Fifth Circuit's decision in *Butterworth* in 1981. S. REP. NO. 446, *supra* note 3, at 2.

120. *E.g.*, *Barona Group of Mission Indians v. Duffy*, 694 F. 2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986).

121. 480 U.S. 202 (1987). This case spurred Congress to wrap up enactment of IGRA which partially codified *Cabazon*. See S. REP. NO. 446, *supra* note 3, at 4.

The significance of *Cabazon* was raised during the floor debate on IGRA, with Senator Dan Evans stating, for example, that "[t]his law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision." 134 CONG. REC. 24,027 (1988).

122. 480 U.S. at 209-11.

123. *Id.* at 214-22.

124. *Id.* at 210-14.

played casino-type card games.<sup>125</sup> California was one the original five states to which Public Law 280 transferred criminal jurisdiction in 1953.<sup>126</sup> California law permitted bingo and card games, but limited them to designated charitable organizations, restricted prizes to \$250, and confined the use of profits to charitable purposes.<sup>127</sup> The Cabazon Band sought declaratory relief in federal court when California threatened to use the criminal sanctions in the bingo statute against them.<sup>128</sup>

Seeking to apply *Bryan*, California claimed that they could enforce their bingo law against the Indians because it was criminal-prohibitory in nature rather than civil-regulatory.<sup>129</sup> California claimed that the criminal aspect of its law was achieved by subjecting violators to criminal penalties.<sup>130</sup> Noting that under *Bryan* a state can prohibit activities on Indian lands that are otherwise prohibited elsewhere in a state, California claimed that it did not regulate bingo but rather prohibited high stakes unregulated bingo.<sup>131</sup>

The Supreme Court found that the California bingo statute was not a criminal law.<sup>132</sup> Acknowledging there was no bright line to determine whether a state law is criminal-prohibitory or civil-regulatory,<sup>133</sup> the Court developed a two-prong test to determine the classification of a state law.<sup>134</sup>

The first prong is a public policy test. If the act to which the law is directed is considered contrary to the public policy of the state, then the statute is a criminal prohibition.<sup>135</sup> The Court concluded that the bingo law was not prohibitory under the public policy test because California not only allowed but even promoted numerous forms of gambling.<sup>136</sup> *Cabazon* made clear

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125. *Id.* at 204-05. Only the Cabazon Indians opened a card club casino. *Id.*

126. *See supra* note 101 (describing Public Law 280).

127. 480 U.S. at 205 (citing CAL. PENAL CODE ANN. § 326.5 (West Supp. 1987)).

128. 480 U.S. 205-06. The district court granted the Band's motion for summary judgement, holding that California lacked authority to enforce its gambling laws on the reservation. *Id.* at 206. The Ninth Circuit affirmed. *Id.*

129. *Id.* at 207-12.

130. *Id.* at 209.

131. *Id.* at 211.

132. *Id.* ("[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert into a criminal law within the meaning of Public Law 280.").

133. 480 U.S. at 210.

134. *Id.* at 209-10, 216.

135. *Id.* at 209 ("[T]he shorthand test is whether the conduct at issue violates the State's public policy.").

136. *Id.* at 210-11. The Court stated:

California does not prohibit all forms of gambling. California

that gambling will not be found to be against a state's public policy if a state permits even minor gaming, such as charitable bingo.<sup>137</sup>

The second prong of the *Cabazon* test balances state interests against federal and tribal interests.<sup>138</sup> California claimed a need to exercise police power over gaming in the state, particularly to protect against the infiltration of organized crime into Indian gaming.<sup>139</sup> The Court determined that California's fear of organized crime was not supported by sufficient evidence.<sup>140</sup> The Court rejected the State's asserted general interest in prohibiting tribal gaming because California permitted numerous kinds of off-reservation gambling.<sup>141</sup>

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itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Although certain enumerated gambling games are prohibited [under California law], games not enumerated, including the card games played in the *Cabazon* card club, are permissible. 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 prohibits gambling in general and bingo in particular.

*Id.* (citations and footnote omitted).

137. *Id.* at 211 n.141. Congress later codified this public policy test in IGRA. IGRA allows Class II and Class III gaming on Indian lands unless not "permitted for any purpose by any person" on non-Indian lands. 25 U.S.C. § 2703(7)-(8) (1988).

*See, e.g.,* *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 486 (W.D. Wis. 1991), *appeal dismissed* 957 F.2d 515 (7th Cir. 1992) (applying the *Cabazon* test to determine "whether Wisconsin's public policy toward Class III gaming is prohibitory or regulatory."); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990), *cert. denied* 499 U.S. 975 (1991) ("Connecticut permits games of chance, albeit in highly regulated form. Thus such gaming is not totally repugnant to the State's public policy."); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366, 368 (8th Cir. 1990) (noting that "Congress adopted a modified version of the *Cabazon* test . . . Thus, as a court our task is to assess whether South Dakota's gaming law is prohibitory or regulatory.").

138. 480 U.S. at 216. "Decision 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.* (citation omitted).

139. *Id.* at 220-22. California had claimed that the difference in pots between the statutorily restricted games on non-Indian lands and the high stakes gaming on Indian reservations would attract organized crime to infiltrate Indian gaming. *Id.* at 221.

140. *Id.* at 221.

141. *Id.* at 220-21.

The Court found that the federal and tribal interests in gaming, however, strongly outweighed state interests.<sup>142</sup> The Court concluded that California had only a minimal interest in preventing organized crime compared to both federal and tribal interests in Indian self-sufficiency and economic development.<sup>143</sup> The Court emphasized that its “inquiry [proceeded] in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.”<sup>144</sup> The Court acknowledged substantial efforts by the federal government to assist Indian gaming, which it saw as part of a federal policy of promoting tribal self-rule and internal development.<sup>145</sup> The Court found the economic interests of the Cabazon Band and other Indians in gaming particularly strong.<sup>146</sup> Gaming often represented the sole source of revenue for the tribal governments and the major source of tribal employment.<sup>147</sup> The Court emphasized that “[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.”<sup>148</sup> The court further noted: “The[se] Tribes’ interests obviously parallel the federal interests.”<sup>149</sup>

*Cabazon* provided a basis for IGRA. The congressional findings incorporated the public policy test.<sup>150</sup> Additionally, IGRA specifically requires that if a state permits any person to conduct a type Class II or Class III gaming for any purpose, then the tribes are entitled to conduct such gaming on their lands in

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142. *Id.*

143. 480 U.S. at 220-22.

144. *Id.* at 216.

145. *Id.* at 217-19. At this time, the Department of Interior had strongly supported Indian gaming and opposed legislation which would limit gaming as a source of revenues for tribes. *Id.* at 217-18 n.21 (quoting a policy directive that the Assistant Secretary of the Interior issued on March 2, 1983). Several federal agencies had provided technical and financial assistance to Indian gaming projects. *Id.* at 217-18.

146. *Id.* at 219. California had argued that the tribes were merely marketing an exemption from state gambling laws, and thus, “merely importing a product onto the reservations for immediate resale to non-Indians.” *Id.* This argument, if valid, would diminish the tribes’ interests in gaming activities. *Id.*

147. *Id.* at 205.

148. 480 U.S. at 219.

149. *Id.*

150. 25 U.S.C. § 2701(5) states:

Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and *public policy*, prohibit such gaming activity.

25 U.S.C. § 2701(5) (emphasis added).



accordance with negotiated compacts for Class III gaming activities.<sup>151</sup> The balancing of state, tribal, and Indian interests was clearly a concern in congressional enactment of IGRA.<sup>152</sup> Moreover, Congress stated that it, not the Supreme Court, is responsible for weighing these interests. IGRA shows that it is Congress' role to resolve the conflict between the three key participants in Indian gaming, namely the tribes, federal government, and state governments.<sup>153</sup>

## V. LEGISLATIVE HISTORY OF IGRA AND THE COMPACT REQUIREMENT

### A. *Sowing the Seeds for Failure of the Compact Provision*

IGRA's legislative history reveals the conflict and tension between state and tribal interests in gaming. Congress hoped that compacting would resolve or diminish the clash of state and tribal interests over the major forms of gambling covered by IGRA's Class III category. Compacts failed to resolve the state-tribal dispute. This failure can be attributed to three causes: Congress failed to carefully consider the compact provision; Congress attempted to dodge the state-tribal conflict; and Congress attempted to strike a compromise between irreconcilable positions.

First, Congress did not sufficiently examine the compact measure. Although Congress debated Indian gaming legislation for several years, it waffled on the issue of state jurisdiction over casinos and other sophisticated gaming.<sup>154</sup> Only at the last minute did Congress adopt state-tribal compacts as a legislative solution.<sup>155</sup>

Second, the compact provision represents Congressional hand-washing of the conflict between states and tribes. The states' and tribes' inability to solve their gaming conflicts was a major reason for federal regulation of gaming on Indian lands in the

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151. 25 U.S.C. § 2710(b)(1)(A) (Class II); 25 U.S.C. § 2710 (d)(1)(B) [Class III].

152. See *infra* note 160 and accompanying text.

153. S. REP. No. 446, *supra* note 3, at 3.

154. A considerable portion of the discussion of the legislative history of IGRA is drawn from Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where are We Going?*, 26 CREIGHTON L. REV. 387, 395-403 (1993).

155. *Id.* at 403. The legislative journey which began in November 1983 with the introduction of HR 4566 ended five years later with the passage of IGRA on October 17, 1988. *Id.* at 395-96. The final version of IGRA containing the compact concept was developed in the final weeks before passage. *Id.* at 403.

first place.<sup>156</sup> But, unlike the provisions for Class I and Class II gaming, in which Congress dictated how such types of gaming could occur on tribal lands,<sup>157</sup> Congress left the question of how to solve Class III gambling problems to the states and tribes.<sup>158</sup> Expecting these two entities to resolve differences that Congress could not resolve was unrealistically optimistic.

Third, Congress attempted to compromise irreconcilable differences between the states and tribes with the compact provision. The favorable judicial decisions prior to IGRA had removed nearly all obstruction by the states to Indian gaming activities and had given the tribes a superior position. In the Class III gaming provisions, Congress legislated away the tribes' judicial victories and, with the compact provision, unwittingly provided the states with another tool to delay and impede Indian gaming.

Examining the legislative development of IGRA during the 1980s illuminates the varying interests, tensions, and options facing Congress and ultimate scheme it chose to regulate gambling on Indian lands. The committee report characterizes IGRA as "the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress . . . ."<sup>159</sup> In enacting IGRA, Congress announced that it hoped to "balance [these] competing policy interests . . . ."<sup>160</sup>

For Indian peoples, Congress hoped IGRA would allow "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments . . . ."<sup>161</sup> IGRA purported to address state and federal concerns that criminal elements, including organized crime, would infiltrate Indian gaming activities.<sup>162</sup> While the

156. *See id.* at 424.

157. *See id.* at 405-06.

158. *See id.* at 406-07.

159. S. Rep. No. 446, *supra* note 3, at 1.

160. *Id.* at 3.

161. 25 U.S.C. § 2702(1) (1988).

162. S. Rep. No. 446, *supra* note 3, at 2. IGRA's declaration of congressional policy in § 2702 states one of the statute's purposes:

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 . . . .

25 U.S.C. § 2702(2).

The existence and extent of the influence of organized crime in tribal gaming was a matter of dispute during the legislative development of IGRA and after its enactment. In its objections to IGRA, the Justice Department expressed

states attempted to characterize their concern as high-minded and altruistic by claiming that state jurisdiction over Indian gambling was necessary to protect against crime, they really wanted to protect their own economic interests.<sup>163</sup> This distinction was important for the states because while the states can collect taxes from gaming on non-Indian lands, they cannot collect from tribal gaming operations. Congress also stated that enactment of IGRA recognized the economic competition between the tribes and the states over gambling enterprises and that the legislation sought to achieve a "fair balancing" of this competition.<sup>164</sup> If compacting is not allowed to occur, it is difficult to imagine how this "fair balancing" can be achieved.

### B. *Early Bills*

The first serious legislative attempt to regulate Indian gaming was the introduction of H.R. 4566 during the 98th Congress in 1983 by Representative Morris Udall, a Democrat from Ari-

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the Reagan Administration's view that IGRA was too weak to control criminal intrusion into Indian gambling. S. REP. NO. 446, *supra* note 3, at 28 (reprinting a letter from John R. Bolton, Assistant Attorney General). In 1993 the Justice Department concluded there was no evidence that organized crime had infiltrated tribal casinos but a report by the Interior Department's Office of Inspector General alleged criminal activity and exploitation on tribal lands. *Report Urges Controls on Indian Gaming Industry*, N.Y. TIMES, Dec. 19, 1993, at 37. See also James Popkin, *Gambling with the Mob?*, U.S. NEWS & WORLD REPORT, Aug. 23, 1993, at 30 (describing testimony of an alleged mob informant before Congress); Barry M. Horstman & Paul Lieberman, *Mafia Tied to Indian Gaming Takeover Bid*, L.A. TIMES, Jan. 11, 1992, at A1 (describing indictment of organized crime figures for infiltrating an Indian casino); Paul Lieberman, *How the Mafia Targeted Tribe's Gambling Business*, L.A. TIMES, Oct. 7, 1991, at A1.

163. Two United States Senators stated that the states' primary concern regarding Indian gambling was economic. Senator John McCain observed:

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

S. Rep. No. 446, *supra* note 3, at 33 (additional views of Sen. McCain).

Senator John Evans stated: "We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. . . . Indian tribes may have a competitive economic advantage [which the states seek to be protected from]." *Id.* at 36 (additional views of Sen. Evans).

zona.<sup>165</sup> This bill was favorable to tribal interests because it imposed only modest federal regulation and codified the existing federal case law that minimized state jurisdiction over Indian gambling.

H.R. 4566 was a response to the Fifth Circuit's 1981 decision in *Seminole Tribe of Florida v. Butterworth*,<sup>166</sup> a case which applied the criminal-prohibitory, civil-regulatory distinction to curtail state regulation of bingo on Indian lands. Under Udall's bill, unless gaming activity was not specifically banned on Indian lands by federal law or by a state through criminal law, then it could be regulated only by the Secretary of the Interior.<sup>167</sup> The bill required tribal gaming regulations and dictated that they be at least as restrictive as state laws controlling gaming.<sup>168</sup> Under Udall's plan, the Secretary would have routinely approved tribal ordinances which met the conditions of the proposed legislation.<sup>169</sup>

H.R. 4566 had few supporters. It generated discontent from the Reagan Administration, the states, and the tribes. The bill died in committee as a consequence. Indian groups were divided over the bill. One portion of the Indian community supported it as a clarification of the present status of Indian law, because the *Butterworth* decision sharply limited state regulation of Indian gaming.<sup>170</sup> Other Indian groups opposed the legislative proposal as an unnecessary infringement of tribal sovereignty,<sup>171</sup> particularly because the tribes already possessed the powers specified in the bill.<sup>172</sup> The Justice Department complained that the Department of the Interior lacked sufficient power to prevent organized crime from infiltrating gaming and that tribes lacked the ability to be effective regulators.<sup>173</sup> Finally, the Department of the Interior urged that Indian gaming legislation be delayed

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165. H.R. 4566, 98th Cong., 1st Sess. (1983).

166. 658 F.2d 310 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982). The Seminole Tribe was the first tribe in the nation to establish a major bingo operation on a reservation. S. Rep. No. 446, *supra* note 18, at 3072, at 2. See *supra* notes 101-19 and accompanying text (discussing state jurisdiction under Public Law 280); see also Santoni, *supra* note 154 at 346 (discussing H.R. 4566).

167. H.R. 4566 at § 6(a).

168. *Id.* § 6(c).

169. *Id.* § 6(b).

170. *Indian Gambling Control Act: Hearings on H.R. 4566 Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 2d. Sess. 96-97 (1984) (statement of Newton Larar, President, National Tribal Chairman's Association).

171. *Id.* at 96.

172. *Id.* at 97-98.

173. *Id.* at 16-17 (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Dept. of Justice).

until the various interested parties developed a common regulatory approach.<sup>174</sup>

In 1985, during the 99th Congress, several legislators introduced bills on Indian gaming. H.R. 1920, introduced by Representative Udall, ultimately became the major vehicle for the 99th Congress' consideration of Indian gaming.<sup>175</sup> In its original form, H.R. 1920 was little different than H.R. 4566, which Udall had introduced during the previous Congress.<sup>176</sup> H.R. 1920 was reported out of committee and became the principal foundation for IGRA.<sup>177</sup> Other legislators introduced bills on Indian gambling during the 99th Congress. Although they were not reported out of committee, they contained concepts that influenced later debate.

H.R. 2404<sup>178</sup> was the other noteworthy bill on Indian gaming introduced in the House of Representatives during the 99th Congress.<sup>179</sup> H.R. 2404 and H.R. 1920 were similar, but the latter provided slightly more detailed and defined federal regulation while the former limited Indian gambling by requiring it to comply with state public policy.<sup>180</sup> The key similarity between the bills was that they both prevented the extension of direct

174. *Id.* at 15 (statement of John W. Fritz, Deputy Assistant Secretary, United States Department of Interior, Indian Affairs).

175. H.R. 1920, 99th Cong., 1st Sess. (1985). *See generally Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. (1985) (presenting various views on H.R. 2040) [hereinafter H.R. 1920 & H.R. 2404 Hearings].

176. H.R. 1920 provided for: "[F]ederal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes." *Id.*

177. H.R. REP. NO. 488, 99th Cong., 2d Sess. at 1 (1986) [hereinafter H.R. REP. NO. 488].

178. H.R. 2404, 99th Cong., 1st Sess. (1985). Representative Norman D. Shumway, a California republican, introduced H.R. 2404. The bill was designed "[t]o prohibit gambling activities within Indian country unless such activities do not violate state law . . ." or are conducted under federal supervision and are not contrary to state public policy. *See* H.R. 2404 § 3(e). H.R. 2404 never made it out of committee.

179. The Reagan Administration introduced S. 2557, which was more limited in scope than the other proposals, concentrating overwhelmingly on Indian operated bingo activities. *See* RICHARD JONES, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, GAMBLING ON INDIAN RESERVATIONS - UPDATE FEBRUARY 17 (1987).

180. Under both bills the Secretary of Interior regulated gaming activity on Indian lands by approving or disapproving tribal gaming ordinances. H.R. 2404 differed by conditioning approval by the Secretary upon finding that the particular form of gambling and the manner and extent of the gambling did not violate the public policy of the state. H.R. 2404, § 4(b)(1). Moreover, H.R. 2404 would have required the Secretary to consult with the Governor of the state and to obtain comments on the state's public policy on gambling.

state regulatory jurisdiction over tribal lands and instead relied on tribal and federal regulation.<sup>181</sup>

The major Senate bill during the 99th Congress was S. 902.<sup>182</sup> S. 902 established certain federal standards for Indian gaming and required the Secretary of Interior to approve tribal gaming ordinances.<sup>183</sup> The bill required tribal gaming ordinances to be at least as restrictive as prevailing state law.<sup>184</sup> S. 902 also permitted regional commissions in each Bureau of Indian Affairs (BIA) district to regulate and monitor tribal gaming activities.<sup>185</sup> These regional commissions could be organized and established by the tribes within each BIA district.<sup>186</sup>

Tribal groups opposed S. 902 because the bill required tribal regulations to be at least as restrictive as state laws. In other words, under S. 902, the states would call the shots. The tribes called this an unprecedented intrusion of state authority on their sovereignty.<sup>187</sup> Some tribes also opposed the regional commission approach, primarily because they felt that tribes with gaming operations would control the commissions and prevent the creation of additional gaming opportunities by other tribes.<sup>188</sup>

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181. H.R. 1920 and H.R. 2404 represented extremes of acceptance of and hostility towards Indian gaming. H.R. 2404's sponsor stated: "My intent is that whatever state officials have deemed appropriate for gambling within the state . . . [should] be applicable to Indian tribes as well." H.R. 1920 & H.R. 2404 Hearings, *supra* note 175, at 25 (statement of Rep. Shumway). H.R. 1920 recognized, however, "that the establishment of federal standards for gaming activities within Indian reservations and on Indian lands is necessary to meet the concerns which have been raised about such activities and to protect such activities as a means of generating needed tribal revenues." H.R. 1920 § 3.

182. S. 902, 99th Cong., 1st Sess. (1985). Senator Dennis DeConcini, an Arizona Democrat, introduced S. 902. *See generally Gambling on Indian Reservations and Lands: Hearings on S. 902 Before the Senate Select Comm. on Indian Affairs*, 99th Cong., 1st Sess. (1985) (presenting various views on S. 902) [hereinafter S. 902 Hearings].

183. S. 902, § 6(d).

184. *Id.* § 6(c).

185. *Id.* § 11.

186. *Id.* Each commission would have had the "same authority and responsibility that the Secretary has in the respective area to approve or disapprove all tribal gaming ordinances, resolutions, and management contracts, and otherwise regulate all Indian gaming activities in [the region]." *Id.* § 11(c).

187. *See, e.g.,* S. 902 Hearings, *supra* note 182, at 280-81 (statement of Douglas L. Bell, Counsel, Tulalip Tribe).

188. *Id.* at 280 (statement of Douglas L. Bell). The tribes that opposed S. 902's commission approach felt that the commissions could invade dissenting tribes' sovereignty. These tribes wanted to preserve the "government-to-government relationship that has served as the centerpiece of federal-Indian relations. . . ." *Id.* at 283 (prepared statement of the Tulalip Tribes of Washington, submitted by Stanley G. Jones, Sr., Member Tulalip Board of Directors).

The three major legislative proposals of 1985, for one reason or another, failed to satisfy tribes, states, and gaming companies. The key point of disagreement was whether and to what extent the states would play a regulatory role. The states argued that they should have primary responsibility for gaming for three reasons.<sup>189</sup> The states asserted that gaming has a strong effect on local communities, is susceptible to organized crime, and is most efficiently regulated by regional authorities, not federal or tribal authorities.<sup>190</sup> Tribal authorities staunchly rejected any state interference, citing the traditional principle that state authority ends at tribal borders.<sup>191</sup> The only outside regulation tribes would accept was federal.<sup>192</sup> Gaming interests were concerned about the rapid spread of uncontrolled gaming on Indian land.<sup>193</sup> The gaming industry expressed concern over the pending federal legislative proposals, which they considered weak.<sup>194</sup>

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189. S. 902 Hearings, *supra* note 182 at 107 (statement of Robert Corbin, Attorney General State of Arizona). Attorney General Corbin argued: [Congress] should be guided by traditional notions of State responsibility in areas of State concern rather than short-sighted and erroneously motivated objectives of permitting Indian country gambling completely immune from State regulation. Tribal sovereignty and self-government with regard to purely internal, tribal matters do not have the same force or applicability when large numbers of non-tribal members are involved. The lure of gambling free of State control, with all of the attendant evils, is a matter of clear and urgent concern to the States because of the historical dangers inherent in such activities.

*Id.* at 115.

190. *Id.* at 107-15.

191. See S. 902 Hearings, *supra* note 182 at 183 (statement of Donald R. Antone, Sr., Governor of the Gila River Indian Community, Sacaton, Arizona). Mr. Antone remarked that "[t]o refer to state law as a standard against which tribal law will be measured, turns the current status of the law on its head." *Id.* at 185.

192. *Id.* at 182. The tribes accepted and preferred federal regulation over state control because the Reagan administration favored tribal self-sufficiency. *Id.* at 181.

193. H.R. 1920 & H.R. 2404 Hearings, *supra* note 175 at 140 (statement of Michael D. Rumbolz, member, State Gaming Congrol Board of Nevada). Mr. Rumbolz expressed concern that if federal court precedents regarding Indian gaming were applied to Nevada, tribes could run large casinos without state control. *Id.*

194. *Id.* at 144-48. In particular, Mr. Rumbolz argued that Congress had underestimated the complexity of needed gaming regulations. *Id.* at 144. He also believed that the proposed legislation would codify the civil-regulatory versus criminal-prohibitory distinction, thus ignoring state prohibitions of unregulated gambling. *Id.* at 146. See *supra* part III.B (explaining this jurisdictional issue). Mr. Rumbolz also echoed states' concern that gambling on reservations would create "new havens for organized crime to operate in disregard of state laws." H.R. 1920 & H.R. 2404 Hearings, *supra* note 175,

With little support from any side none of the legislative proposals of H.R. 1920, H.R. 2404, or S. 902 made it out of committee in 1985. H.R. 1920 survived the legislative shuffle, probably because of the influence of its sponsor, Representative Udall, and substantial changes. In 1986, H.R. 1920 was amended and reported to the Committee of the Whole House.<sup>195</sup> The amended bill retitled the legislation from the "Indian Gambling Control Act" to the "Indian Gaming Regulatory Act" and contained many of the key elements which were enacted in the bill's final form in 1988.<sup>196</sup>

H.R. 1920<sup>197</sup> established a National Indian Gaming Commission to approve of tribal ordinances. For the first time, three classes of gaming were introduced.<sup>198</sup> The bill gave the tribes exclusive jurisdiction over Class I gaming.<sup>199</sup> The bill conferred approval authority upon the Commission for tribal ordinances regulating Class II gaming,<sup>200</sup> which had the effect of giving the tribes and the federal government concurrent jurisdiction over this kind of gaming. Tribal gaming ordinances for Class III gaming were subject to approval by the Commission and these ordinances had to be identical to the laws used by a state for the same or similar kinds of gaming activity.<sup>201</sup> For both Class II and Class III gaming, the Indian tribes could not engage in a gambling activity which the state prohibited as a matter of public policy or criminal law.<sup>202</sup> Additionally, Class II and Class III gaming on Indian lands were altogether prohibited in Nevada.<sup>203</sup>

The fiercest debate among the interest groups was over whether to permit direct state regulation of Class III Indian gaming. Udall made it clear that he considered the amended H.R. 1920 a compromise, and he was against extending any more jurisdiction or power to the states, other than providing that Commission regulations would be consistent with the gaming laws the states themselves used.<sup>204</sup>

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at 148. See also *S. 902 Hearings*, *supra* note 182, at 592-95 (statement of Richard Rolapp, President, American Horse Council) (arguing that states are better equipped to regulate Indian gaming than the federal government).

195. H.R. Rep. No. 488, *supra* note 177, at 1.

196. *Id.* at 1-9.

197. H.R. 1920, 99th Cong., 2d Sess (1986).

198. *Id.* § 19(5)(A)-(C).

199. *Id.* § 5.

200. *Id.* § 11(a)(1).

201. *Id.* § 11(b)(a)(2).

202. H.R. 1920 § 11(a)(2)(B)(ii).

203. *Id.*

204. H.R. Rep. No. 488, *supra* note 177, at 28-29 (supplemented views of Rep. Udall).



Gaming interests continued to object to giving authority to regulate Indian gaming to a national tribal commission on the grounds that it would be biased toward Indians and would fail to protect industry interests.<sup>205</sup> As a result, when the bill was referred to the Senate Select Committee on Indian Affairs,<sup>206</sup> it contained an industry-backed provision for a four-year moratorium on any Class III gaming on Indian lands.<sup>207</sup> In the interim, the bill required the Comptroller General to prepare and submit a report to Congress that studied Class III gaming and determined whether tribal, state, or federal regulation was most appropriate.<sup>208</sup>

The gaming industry continued to apply its influence to the Senate Select Committee on Indian Affairs and succeeded in having its favored provisions on Class III Indian gaming included in the version of H.R. 1920 which was reported out by the Committee.<sup>209</sup> This bill, however, dropped the moratorium in favor of giving states a significant role in determining the fate of Class III gaming on Indian lands.<sup>210</sup> Under the reported version of H.R. 1920, Class III gaming would be prohibited on Indian lands unless both the state and the Department of the Interior approved a transfer of jurisdiction to a tribe which sought to conduct this kind of gaming.<sup>211</sup> The tribes opposed any legislation that would unilaterally confer state regulatory authority over gaming activities and preferred an outright ban on Class III gaming to any direct regulatory jurisdiction given to the states.<sup>212</sup> Thus, the parties to the Indian gaming controversy remained at odds as they had through the legislative process.

### C. *Fear of a Judicial Last Word Spurs Congressional Action*

It seemed that significant pressure would be needed to reach a compromise. That pressure to compromise came from the federal courts. A concern that federal courts would arbitrate the future of Indian gaming provoked Congress to begin the process of developing legislation. Decisions like *Butterworth* encouraged a rapid expansion of bingo and other gambling

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205. See Santoni, *supra* note 154, at 400 (detailing efforts of the gaming industry).

206. H.R. 1920 (Senate version dated April 22, 1986).

207. *Id.* § 3(c)(1).

208. *Id.* § 21(a)(1).

209. See S. REP. NO. 493, 99th Cong., 2d Sess. 6-7 (1986) [hereinafter S. Rep. No. 493] (summarizing amendments).

210. *Id.* at 6.

211. H.R. 1920 § 11(c)(1)-(2)(A) (Senate version dated Sept. 26, 1986).

212. S. Rep. No. 446, *supra* note 3, at 4.

activities on reservations.<sup>213</sup> State officials feared that Indian gaming jeopardized revenues from competing state gambling activities and called for federal or state regulation of Indian gaming rather than tribal self-regulation.<sup>214</sup> Both gaming interests and the states objected to the federal courts' criminal-prohibitory, civil-regulatory distinction because it liberated tribal gaming from state regulation.<sup>215</sup> In the end, a similar concern for what the federal courts might do to Indian gaming jelled into the compromise that became IGRA.

While the Senate was drafting its version of H.R. 1920 in the spring of 1986,<sup>216</sup> the Supreme Court accepted review of the Ninth Circuit's decision in *California v. Cabazon Band of Mission Indians*.<sup>217</sup> The decision of the Supreme Court to accept review in *Cabazon* prompted the various groups concerned about federal gaming legislation to reassess their positions.<sup>218</sup> Tribal groups, fearing that the Court would reverse the Ninth Circuit's protribal decision, became more willing to compromise.<sup>219</sup> States and gaming interests adopted an even tougher position in favor of transferring jurisdiction over Indian gaming to the states.<sup>220</sup> Despite the tribes' willingness to give ground, the Senate failed to consider passage of H.R. 1920 before the adjournment of the Ninety-ninth Congress,<sup>221</sup> no doubt because the Senate version of H.R. 1920 was too slanted against the Indian tribes.

The *Cabazon* litigation intensified and congealed the congressional development of IGRA in the 100th Congress. As the Committee report noted, Congress clearly believed it and not the federal judiciary should resolve the question of Indian gaming.<sup>222</sup> A little more than a month after the opening of the

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213. Over 100 bingo games opened on tribal lands between 1981 when *Butterworth* was decided by the Fifth Circuit and 1988 when IGRA was enacted. S. REP. No. 446, *supra* note 3, at 2.

214. Burr, *supra* note 44, at 20.

215. The H.R. 1920 reported out of the Senate Select Committee on Indian Affairs was shaped by state and gaming interests, interjected state regulation into tribal gaming, and clearly noted that it "[did] not rest on the criminal-prohibitory, civil-regulatory decision in the law as developed in court decisions . . ." S. Rep. No. 493, *supra* note 208, at 2.

216. S. Rep. No. 446, *supra* note 3, at 4.

217. The Ninth Circuit, like *Butterworth* before, adopted the civil-regulatory, criminal-prohibitory test and concluded that Public law 280 states like California lacked jurisdiction to regulate bingo games operated by the Cabazon Indians. 783 F.2d 900 (9th Cir. 1986).

218. S. REP. No. 446, *supra* note 3, at 4.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Congress observed that in deciding the *Cabazon* case the Supreme Court sought to weigh the interests of states, tribes and the federal government.

100th Congress and six days before the Supreme Court's decision in *Cabazon*, on February 19, 1987, S. 555, which was to become IGRA, was introduced.<sup>223</sup> S. 555's principal sponsors were Senators Thomas Daschle, a South Dakota Democrat, Daniel Evans, a Washington Republican, and Daniel Inouye, a Hawaii Democrat.<sup>224</sup> Daschle and Inouye were particularly powerful because they both served on the Select Committee on Indian Affairs and because Inouye was its chairman and an influential congressional figure on Indian matters. Their original version of S. 555 was in large part the Senate version of H.R. 1920 that was pending at the end of the Ninety-ninth Congress.<sup>225</sup>

The Supreme Court's *Cabazon* decision sparked a flurry of legislative activity, resulting in a major revision of S. 555 and the introduction of other bills. In late May 1987, Udall introduced H.R. 2057 on the House side.<sup>226</sup> A month later, Republican Senators John McCain, from Arizona, and Daniel Evans, from Washington, introduced S. 1303,<sup>227</sup> which was identical to H.R. 2057.<sup>228</sup> Although other bills were also introduced,<sup>229</sup> the real competition for enactment was between S. 555 and the House and Senate companion bills of H.R. 2057 and S. 1303. The main difference between the two sets of legislative proposals boiled down to the treatment of Class III gaming.

H.R. 2057 and S. 1303 explicitly stated that Class III gaming was within the jurisdiction of the Indians tribes, provided the state allowed similar gaming for any other party.<sup>230</sup> These legislative proposals did not require the tribes to consent to state

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*Id.* at 2. Congress was insistent in stating that, "[h]owever, in the final analysis, it is the responsibility of the Congress. . .to balance [these interests] and adjust . . . the jurisdictional framework for regulation of gaming on Indian lands." *Id.* at 3.

223. S. REP. 446, *supra* note 3, at 4.

224. *Id.*

225. *Id.*

226. H.R. 2057, 100th Cong., 1st Sess. (1987). The bill was jointly introduced with Representatives Young, Campbell, Smith, and Bereuter. S. Rep. No. 446, *supra* note 3, at 4.

227. S. 1303, 100th Cong., 1st Sess. (1987).

228. See *supra* note 163 and accompanying text (recounting concerns expressed about the eventually enacted IGRA by Evans and McCain).

229. In early February 1987, several days prior to the *Cabazon* decision Representatives Udall and Bereuter introduced H.R. 1079 and Representatives Coelho, Lujan and Pepper introduced H.R. 964. S. Rep. No. 446, *supra* note 3, at 4. In November 1987, identical bills were introduced in the Senate and House, respectively S. 1841 introduced by Senators Hecht and Reid, and H.R. 3605, introduced by Representatives Vacanovich and Bilbray. *Id.* at 4-5.

230. H.R. 2057, 100th Cong., 1st Sess. § 10(b). Class II gaming was subject to similar treatment. *Id.*

jurisdiction.<sup>231</sup> Udall intended his bill to limit state regulatory and enforcement authority over Class III gaming by the tribes, but conceded that the federal regulatory rules for Indian gaming would have to be consistent with state regulations.<sup>232</sup>

S. 555 permitted significantly more state intrusion into tribal gaming authority. S. 555 prohibited Class III gaming on Indian land unless a tribe consented to state jurisdiction over gaming activity, which included being subject to state licensing requirements and state civil and criminal provisions.<sup>233</sup> S. 555 effectively transferred jurisdiction from the tribes to the states. Essentially, S. 555 was an "all or nothing" method for allowing gaming on Indian land with transfer of jurisdiction to the states as a condition of allowing Class III gambling.

The tribes clearly favored S. 1303 and H.R. 2507 because they preferred tribal and federal regulation of gaming to state regulation and enforcement.<sup>234</sup> The states' position was represented in a weakly supported bill introduced by Senators Hecht and Reid which sought to subordinate Indian regulation to state regulation.<sup>235</sup> Hecht falsely claimed that S. 1303 gave the Indians nearly exclusive regulatory control.<sup>236</sup> Reid more candidly advocated placing all the authority for regulating Indian gaming in the hands of the states.<sup>237</sup>

#### D. *Sudden Appearance of the Compact Provision*

In August 1988, the Senate Select Committee on Indian Affairs reached a compromise between S. 555, the pro-state bill,

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231. Tribal ordinances regarding Class II and Class III gaming were subject to approval by the Chairman of the National Indian Gaming Commission. H.R. 2057, 100th Cong., 1st Sess. §§ 11(a), 12(a).

232. The regulatory scheme under this version was to flow from the federal government, not the states, with the federal government acting through the National Gaming Commission, which would devise rules the tribes would follow. S. 1303, 100th Cong. 1st Sess. § 12(e)(1)(1987).

233. S. 555, 100th Cong., 1st Sess. § 11(d). A tribe wishing to engage in Class III gaming was required to seek transfer of civil and criminal jurisdiction from itself to the state. The tribe had to obtain approval from the Secretary of Interior for this transfer. The Secretary acted as the agent for this approval by seeking and obtaining from a state their consent and then giving Department of Interior approval.

234. *Gambling Activities on Indian Reservations and Lands: Hearings on S. 555 and S. 1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 1 (1987) [hereinafter S. 555 & S. 1303 hearings] (statement of Sen. Daniel Inouye, Chairman, Senate Select Comm. on Indian Affairs).

235. Hecht and Reid sponsored S. 1841. S. Rep. No. 446, *supra* note 3, at 4.

236. S. 555 & S. 1303 hearings, *supra* note 234, at 82 (statement of Sen. Hecht).

237. *Id.* (statement of Sen. Reid).

and S. 1303, the protribal bill, and reported out a new version of S. 555. This new version was enacted as the Indian Gaming Regulatory Act on October 17, 1988.<sup>238</sup> After nearly five years of Congressional haggling over the Indian gaming issue, the tribal-state compact<sup>239</sup> appeared for the first time in the amended S. 555 as a way to resolve the problem of Class III gaming jurisdiction. The compact allowed the states and tribes to work out any division of civil, criminal, and regulatory responsibility for this type of Indian gaming.<sup>240</sup> Compacting was not intended to relinquish Indian jurisdiction to the states but was intended to be a precondition of engaging in tribal gaming.<sup>241</sup> The compact requirement, however, presented an opportunity for state jurisdiction, albeit with the consent of tribal governments. In sum, Congress "punted" the issue of deciding state versus tribal jurisdiction to the states and tribes to negotiate amongst themselves on a case-by-case basis.

The Senate Indian Affairs Committee considered the tribal-state compact to be a selective extension of state jurisdiction onto tribal lands. The Committee admitted, however, that the compact provision created an "unusual relationship in which a tribe might affirmatively seek the extension of state jurisdiction and the application of state laws to activities conducted on Indian land . . ."<sup>242</sup> although "the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests."<sup>243</sup> The Committee noted that it is well established that state laws do not extend to Indian lands, that only Congress can permit such extension, and that even when it does "allow a limited application of State law on Indian lands, Congress has required the consent of tribal governments. . . ."<sup>244</sup>

The Committee report explained that the compact arrangement was consistent with the principle of Indian sovereignty because Congress left final regulation to negotiation, rather than unilateral federal decision making.<sup>245</sup> In the instance of high-stakes gaming, the Committee contended that the compact was the "best mechanism" in which the different concerns and objectives of the states and tribes could be addressed, balanced, and satisfied.<sup>246</sup> Unfortunately, Congress did not contemplate the

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238. Pub. L. No. 100-497, 102 Stat. 2467 (1988).

239. 25 U.S.C. § 2710(d) (1988).

240. 25 U.S.C. § 2710(d)(3).

241. S. REP. No. 446, *supra* note 3, at 5-6.

242. *Id.* at 6.

243. *Id.* at 6.

244. *Id.* at 5.

245. *Id.* at 5-6.

246. S. REP. No. 446, *supra* note 3, at 13.

problem that the compact mechanism could neither be the best, nor a viable, means for any purpose if it was unenforceable.

## VI. ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

### A. *Exceptions to Eleventh Amendment Sovereign Immunity*

The Eleventh Amendment, as interpreted by the Supreme Court, bars suits against a state government by citizens of another state or citizens of a foreign country,<sup>247</sup> and the Court has included Indian tribes among the foreign governments to whom this bar applies.<sup>248</sup> The Supreme Court explained that States entered the federal system with their sovereignty intact and that the judicial authority in Article III is limited by this sovereignty.<sup>249</sup>

There are three exceptions to sovereign immunity: suits against state officials, consent, and abrogation. First, under the Supreme Court's decision in *Ex Parte Young*,<sup>250</sup> suits are permitted against state officials acting in their official capacities when they act unconstitutionally and the suit seeks equitable relief.<sup>251</sup> States have raised the *Ex Parte Young* doctrine in several compact suits in which they invoked the sovereign immunity defense.<sup>252</sup> This Article will not examine the *Young* exception because it

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247. *Fitts v. McGhee*, 172 U.S. 516 (1899) (holding suits against a state by its own citizens are also barred); *Hans v. Louisiana*, 134 U.S. 1 (1890).

248. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

249. *Id.* at 782.

250. 209 U.S. 123 (1908).

251. *Id.* at 155, 159. In *Ex parte Young*, the Court held that a suit challenging the constitutionality of a state official's actions was not against the state, and therefore the Eleventh Amendment did not bar the federal courts from issuing injunctive relief against state officials. *Id.* at 159.

252. *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1436-37 (10th Cir. 1994) (rejecting application of *Ex Parte Young* doctrine and barring suit against Governor in his official capacity on the grounds that any order to negotiate a compact would operate against the state itself); *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, (9th Cir. 1994) (noting that the District Court allowed the tribe to sue the Governor for failure to compact); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994) (concluding that the *Ex Parte Young* doctrine does not apply to IGRA suits); *Sault Ste. Marie Tribe v. Michigan*, 5 F.3d 147, 149 (6th Cir. 1993) (noting that after finding IGRA suit was barred by the Eleventh Amendment the district court granted a motion to name the Governor as a defendant under the *Ex Parte Young* doctrine). See also *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 803 F. Supp. 401, 409 (S.D. Fla. 1992) ("A well-established Eleventh Amendment fiction requires a party to bring federal suits against a state official rather than the state itself.")

has not been a major factor in litigation to enforce IGRA's compact provision.

Second, a state may consent to suit and in doing so waive its Eleventh Amendment immunity. There are two types of consent-waiver exceptions. The first is express or explicit consent and is usually manifested through legislative enactment.<sup>253</sup> A state does not waive its sovereign immunity by merely failing to raise the defense in the trial court.<sup>254</sup> None of the courts considering the question of whether the Eleventh Amendment bars suits to enforce IGRA's compact provision have found express consent.

The second type of consent is called constructive consent. This doctrine holds that the states surrendered elements of their sovereignty when they joined the Union and adopted the Constitution. Constructive consent is also called consent or waiver from the "plan of convention." The Supreme Court explained, "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of convention.'"<sup>255</sup> The "plan of convention" theory fits into a larger concept more aptly called "surrender theory."<sup>256</sup>

The leading case for consent inherent in the plan of convention, and one which figures prominently in the compact cases, is the Supreme Court decision in *Parden v. Terminal Railway*.<sup>257</sup> *Parden* held that a state implicitly waives its sovereignty if it enters a field of economic activity that is federally regulated.<sup>258</sup>

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253. *Poarch Band of Creek Indians v. Alabama*, 776 F.Supp. 550, 554 (S.D. Ala. 1991), *aff'd* 11 F.3d 1016 (11th Cir. 1994) (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)); *see also* *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Carr v. City of Florence, Ala.*, 916 F.2d 1521 (11th Cir.) (holding sheriffs immune from suit in a civil rights action because state law so provided).

254. *Poarch Band of Creek Indians*, 776 F. Supp. at 554 (citing *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974)).

255. *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting THE FEDERALIST No. 81 at 657 (Alexander Hamilton) (H. Dawson ed. 1876)). This implied waiver of state sovereignty from the plan of convention is found to exist in two situations. The first is the waiver of immunity against suits by the United States. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 641-46 (1892). The second type is a waiver of immunity in suits by other states. *See, e.g.*, *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

256. *See* Letita A. Sears, Comment, *Pennsylvania v. Union Gas: Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living with Hans*, 58 FORDHAM L. REV. 513, 517 (1989) (discussing the history and theory of the Eleventh Amendment).

257. 377 U.S. 184 (1964).

258. *Id.* at 192. In *Parden*, the Court held that as the owner and operator of a railroad Alabama may not plead sovereign immunity when it is sued under the Federal Employers' Liability Act (FELA). *Id.* at 192. *See infra* part VI.B.3 (discussing *Parden*).

*Parden*, however, is without bite because the Supreme Court has never cited this theory in any subsequent decision.<sup>259</sup> None of the compact enforcement cases have found the constructive or implied consent exception to state immunity applicable.<sup>260</sup>

Virtually all debate in the compact enforcement cases concerns the third exception to the Eleventh Amendment — the “abrogation” of state sovereignty. In certain circumstances Congress has the power to abrogate a state’s Eleventh Amendment immunity. The Supreme Court has recognized congressional power to abrogate when enacting legislation under two constitutional provisions, the Commerce Clause in *Pennsylvania v. Union Gas*<sup>261</sup> and Section Five of the Fourteenth Amendment in *Fitzpatrick v. Bitzer*.<sup>262</sup>

### B. *Supreme Court Cases Relevant to IGRA Abrogation—* Hans v. Louisiana, Union Gas, Fitzpatrick, Blatchford, and Cotton Petroleum

The central dispute between the tribes and states is whether Congress, in enacting IGRA, in fact abrogated state sovereign

259. The limited effect of *Parden* is commented upon in one of the IGRA compact enforcement decisions. See *Seminole Tribe*, 11 F.3d at 1023. Courts have not read the *Parden* exception expansively. No Supreme Court decision except *Parden* itself has found consent under the *Parden* theory. The requirement that Congress clearly express its intention to condition a state’s participation in federally regulated activities on a forfeiture of sovereign immunity has been strengthened so that part of *Parden* already stands overruled. *Id.*

*Seminole Tribe* cites as examples of the Court’s movement away from *Parden*: *Welch v. Texas Dept. of Highways & Public Transportation*, 483 U.S. 468 (1987) (finding *Parden* inapplicable in a seaman’s suit against a state); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (declining to apply *Parden* to all federally funded programs); *Edelman v. Jordan*, 415 U.S. 651 (1974) (finding *Parden* inapplicable to a federally funded program); *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973) (declining to apply *Parden* to public hospitals). The court in *Poarch* contended that *Welch* partially overruled *Parden* by requiring that Congressional intent to subject states to suits must be “unmistakably clear” in the language of the statute. 776 F. Supp. at 557 (citing *Welch*, 483 U.S. at 478). See *infra* notes 364-67 and accompanying text (discussing this “clear expression” test).

260. See, e.g., *Seminole Tribe* 11 F.3d at 1022-23 (rejecting the tribe’s argument that Florida implicitly waived its immunity inherently in the plan of convention or constructively by acceptance of the benefits of IGRA).

261. 491 U.S. 1 (1989) (abrogating states’ immunity from money damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)). See *infra* part VI.B.5.

262. 427 U.S. 445 (abrogating states’ immunity from money damages under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972). See *infra* part VI.B.4.



immunity under the Eleventh Amendment. The tribes assert that the Indian Commerce Clause, under which IGRA was enacted, provides Congress the power to abrogate state immunity.<sup>263</sup> The Supreme Court has never held that the Indian Commerce Clause provides a basis for congressional abrogation. Thus, the lower courts have been left to determine whether congressional power to abrogate under the Indian Commerce Clause is equal to the power to abrogate under the Interstate Commerce Clause and Section Five of the Fourteenth Amendment.<sup>264</sup> In their search for an answer to this question, courts have consulted several Supreme Court decisions.

### 1. Centrality of *Union Gas* and Relevance of Surrender Theory

Because the Supreme Court has held that the states did not consent to suits by Indian tribes in the plan of the convention,<sup>265</sup> courts must determine whether Congress nevertheless has the power to abrogate state immunity. *Union Gas* has confused courts as to the role of the "surrender theory" in determining whether states have lost their sovereign immunity under IGRA. Regardless of whether surrender theory has been used to determine the application of constructive consent or abrogation exceptions, those courts that hold states immune from an IGRA suit believe *Union Gas* rests on surrender theory.<sup>266</sup> The courts that hold the Eleventh Amendment defense unavailable to the states regard *Union Gas* as resting not on surrender theory, but on Congress' plenary power to enact legislation pursuant to the commerce clause.<sup>267</sup>

### 2. *Hans v. Louisiana* — The Genesis of Surrender Theory

The Supreme Court has largely abandoned constructive consent as a basis for the Eleventh Amendment defense.<sup>268</sup> Thus,

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263. See, e.g., *Ponca Tribe*, 37 F.3d at 1429; *Spokane Tribe*, 28 F.3d at 995; *Seminole Tribe* 11 F.3d at 1025; *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992), *aff'd on other grounds* *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147; *Mississippi Band of Choctaw Indians v. Mississippi*, No. CIV.A.J.90-0386(B), 1991 WL 255614 (S.D. Miss. Apr. 9, 1991).

264. See *infra* part VII (discussing federal courts' attempts to resolve this issue).

265. *Blatchford*, 501 U.S. at 782. See also *infra* part VI.B.6.

266. See *Seminole Tribe*, 11 F.3d at 1027-28.

267. See *Ponca Tribe*, 37 F.3d at 1430; *Spokane Tribe*, 28 F.3d at 996; *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 280 (8th Cir. 1993).

268. See *supra* notes 257-60 and accompanying text.

any confusion over whether surrender theory in the form of the "plan of convention" doctrine is the basis for constructive consent or for congressional abrogation is not justified. The confusion over whether surrender theory or plenary power theory is the basis for *Union Gas*, however, is appropriate. Furthermore, *Union Gas* and other Supreme Court decisions are not clear on whether the congressional abrogation authority, which *Union Gas* determined existed under the Interstate Commerce Clause, can be extended to apply to the Indian Commerce Clause, under which IGRA was enacted.

The surrender theory arose from *Hans v. Louisiana*,<sup>269</sup> the Supreme Court's landmark 1890 Eleventh Amendment decision. The Court found Louisiana immune from suit in federal court by one of its citizens seeking to collect on Civil War bonds,<sup>270</sup> even though the text of the Eleventh Amendment prohibits only suits by noncitizens.<sup>271</sup> The Court determined that state immunity was not restricted by the terms of the Eleventh Amendment but was "inherent in the nature of [state] sovereignty" that existed at the time the Constitution was ratified.<sup>272</sup> As the Court later noted, state immunity comes not from the words of the Constitution, but is inherent in the constitutional plan.<sup>273</sup>

*Hans* went beyond the literal meaning and interpreted the Eleventh Amendment in a manner which the Court regarded as consistent with the constitutional plan.<sup>274</sup> The decision that state immunity rests upon the constitutional plan is the basis for judicial acceptance of surrender theory and gave substance to a variant theory which was later mentioned in *Union Gas* as the "plan of convention" theory. Under this theory, states are deemed to have surrendered some of their sovereignty when they ratified the Constitution. Surrender theory is a form of consent in which the states relinquished their sovereignty when accepting the Constitution.<sup>275</sup> This harks back to the understanding of

269. 134 U.S. 1 (1890).

270. *Id.* at 10.

271. *Id.* at 21. The Eleventh Amendment, by its own terms, only prohibits suits in federal courts by "Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

272. *Hans*, 377 U.S. at 13.

273. *Monaco v. Mississippi*, 292 U.S. at 322-23.

274. *Hans*, 134 U.S. at 15.

275. *Monaco* 292 U.S. at 313, 329. The Court determined the jurisdiction of the federal courts over the states was inherent in the Constitutional plan. *Id.* *Monaco* declared that the states agreed to federal court jurisdiction for the purpose of preserving "the permanence of the Union." *Id.* at 320 (citing *United States v. Texas*, 143 U.S. 621, 644 (1892)). The Court has held that states agreed to jurisdiction in federal tribunals in suits against each other in order to preserve the peace of the Union. *South Dakota v. North Carolina*,

state sovereignty Alexander Hamilton expressed in *The Federalist*. *Union Gas* quotes Hamilton in stating, "we have recognized that the States enjoy no immunity where there has been 'a surrender of this immunity in the plan of convention.'"<sup>276</sup> The Supreme Court relied on this principle to allow the states to be sued in federal court by the United States and by other states.<sup>277</sup> Relying on the same reasoning, the Court determined that foreign nations cannot sue states in federal court because foreign nations were not included in the political framework of the Constitution.<sup>278</sup>

### 3. The Rise and Fall of *Parden*

During the 1960s, the Supreme Court used the doctrine of constructive consent to permit federal court review of federal question cases against the states.<sup>279</sup> The apex in Supreme Court development of the constructive consent doctrine was the 1964 decision of *Parden v. Terminal Railway*.<sup>280</sup>

The majority opinion in *Parden*, written by Justice Brennan, the author of the plurality opinion in *Union Gas*, held that an employee of a state owned and operated railroad could sue Alabama in federal court to recover for personal injuries under the Federal Employers Liability Act (FELA) even though such state-owned railroads were not expressly mentioned in the statute.<sup>281</sup> The Court stated that FELA was enacted pursuant to Congress' power to regulate commerce under the Interstate Commerce Clause.<sup>282</sup> The Court determined that Alabama had consented to suit under FELA by operating a railroad in interstate commerce, thus surrendering its immunity to suit by engaging in a properly regulated activity.<sup>283</sup> Brennan's surrender theory proposed that in ratifying the Constitution, the states submitted to federal regulation pursuant to enumerated Congressional powers.<sup>284</sup>

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276. *Union Gas*, 491 U.S. at 19 (citing *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting THE FEDERALIST No. 81, at 657 (Alexander Hamilton) (H. Dawson ed. 1876))).

277. *Id.* at 20.

278. *Monaco*, 292 U.S. at 231-32.

279. Donald L. Boren, *Congressional Power to Grant Federal Courts Jurisdiction Over States: The Impact of Pennsylvania v. Union Gas*, 24 AKRON L. REV. 9, 15 (1990).

280. 377 U.S. 184 (1964).

281. *Id.* at 186.

282. *Id.* at 190-91.

283. *Id.* at 191 ("The States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.").

284. *Id.* at 192 ("The States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.").

*Parden's* holding could be read to mean that Congress abrogates state immunity when it legislates pursuant to the commerce clause. Instead, however, *Parden* is commonly understood to represent the implied waiver theory of consent.<sup>285</sup> The *Parden* doctrine of constructive waiver appears to have been either overruled<sup>286</sup> or discarded.<sup>287</sup> No other Supreme Court decision holds that state participation in a federal program enacted pursuant to the Commerce Clause implies a waiver of state Eleventh Amendment Immunity. A series of Supreme Court decisions beginning in 1973 seemed to reject constructive consent by not accepting mere participation in a federally regulated activity as the only condition to constructive consent.<sup>288</sup> Those opinions insisted that the legislation also adhere to the clear statement rule to such a stringent degree that constructive consent was nearly impossible to achieve.<sup>289</sup>

#### 4. *Fitzpatrick v. Bitzer* — Abrogation under the Fourteenth Amendment

In 1975, the Court, in *Fitzpatrick v. Bitzer*,<sup>290</sup> recognized a constitutional provision as the basis for congressional abrogation

285. See Catherine Goldberg, Comment, *Abrogation of State Sovereign Immunity Under CERCLA*, 16 WM. MITCHELL L. REV. 1075, 1089 (stating that *Parden* turned on waiver) (citing *Employees of the Dept. of Pub. Health and Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 282 (1973)).

286. Boren, *supra* note 279 at 15 & n.39 (asserting that *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468 (1987), overruled *Parden*).

287. *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484, 1487 (W.D. Mich. 1992) (quoting *Edelman v. Jordan* 415 U.S. 651, 653 (“Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights and we see no place for it here.”)).

288. See *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 478 (1987) (“[T]o the extent that *Parden* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.”); see also *Poarch*, 776 F. Supp. at 556 (“The requirement that Congress’ intention to condition a state’s participation in federally regulated activities on a forfeiture of sovereign immunity be clearly expressed has been strengthened so that already part of *Parden* stands overruled.”).

In *Welch* the Court held that Texas could raise the defense of sovereign immunity to a tort suit for personal injuries suffered by an employee of the Texas Highway Department. The employee sued Texas in federal court under the Jones Act, 46 U.S.C. § 688 (1988), which extends FELA to seamen who suffer injury in the course of employment and provides for federal court jurisdiction. *Welch*, 483 U.S. at 471. See also *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Public Health Department*, 411 U.S. 279, 285 (1973).

289. See *Welch*, 483 U.S. at 478 (“In subsequent cases the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity.”).

290. 427 U.S. 445 (1976).

for the first time.<sup>291</sup> *Fitzpatrick* can be understood in two ways. On the one hand, the holding relied on the surrender theory to the extent that it held states subject to suit in federal courts in instances provided for in the Constitution, such as the enforcement provision of the Fourteenth Amendment.<sup>292</sup> On the other hand, in *Fitzpatrick*, Eleventh Amendment sovereign immunity might also be seen as bowing to Congress' plenary power to legislate to enforce the Fourteenth Amendment's substantive guarantees.<sup>293</sup>

In *Fitzpatrick* the Court embraced the Fourteenth Amendment as a unique limitation on state power, which circumscribes state authority and empowers Congress to do all that is necessary and proper to implement its provisions.<sup>294</sup> The Court held that the grant of power in the Fourteenth Amendment limits other parts of the Constitution in order to achieve the Amendment's purposes.<sup>295</sup>

In *Fitzpatrick*, the Court distinguished abrogation from waiver.<sup>296</sup> Abrogation is based on Congressional power and not consent. Surrender of state power, which is so crucial to constructive consent,<sup>297</sup> was not the justification the Court used in *Fitzpatrick*. The Court instead adopted a plenary power theory by describing the Fourteenth Amendment as a significant limitation upon state power.<sup>298</sup> Under this theory, state power must

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291. It also presaged the Court's eventually permitting abrogation under the Commerce Clause. In his concurring opinion in *Fitzpatrick*, Justice Stevens declared he believed Congress had the power to abrogate under the Commerce Clause. *Id.* at 458 (Stevens, J., concurring). He believed the Court should have considered the issue of whether Congress had power to abrogate Eleventh Amendment immunity of the states by enacting Title VII of the Civil Rights Act of 1964 under the Commerce Clause and not the Fourteenth Amendment. *Id.* See also *Welch* 483 U.S. at 475 ("We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting states to suit in federal court is not confined to § 5 of the Fourteenth Amendment.").

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

293. Goldberg, *supra*, note 285, at 1092.

294. 427 U.S. at 456. The Court explained that § 5 provides Congress the power to legislate in order to enforce limitations on state power contained elsewhere in the Fourteenth Amendment. *Id.*

295. *Id.* at 456.

296. *Id.* at 451-52.

297. See *Parden*, 377 U.S. at 191-93 (describing the theory of constructive consent, whereby states are deemed to have surrendered Eleventh Amendment immunity by engaging in certain specified activities).

298. 427 U.S. at 456 ("[T]he Eleventh Amendment and the principle of state sovereign immunity . . . are necessarily limited by the enforcement provisions of section five of the Fourteenth Amendment.") (citation omitted).

give way to superseding federal power. The Court held that the grant of authority to Congress in the Fourteenth Amendment limits other parts of the Constitution in order to fulfill the Amendment's purposes. The Court in *Fitzpatrick* balanced state interests represented by the Eleventh Amendment with the federal interest in the supremacy of federal law.<sup>299</sup>

The plan of convention theory has less relevance for abrogation under the Fourteenth Amendment since this amendment can be justified by the "later in time" argument.<sup>300</sup> Unlike the Commerce Clause, the Fourteenth Amendment was ratified after the Eleventh Amendment. The Court's treatment of the Fourteenth Amendment in *Fitzpatrick* benefited from the general rule of construction that if two legal instruments of equal authority conflict, the one more recently enacted prevails.<sup>301</sup> Because the Fourteenth Amendment came later in time than the Eleventh Amendment it is easier to characterize the former as a grant of power to the federal government which is carved out at the expense of any previously existing state power.<sup>302</sup>

##### 5. *Union Gas* — A Messy Decision

In *Pennsylvania v. Union Gas*<sup>303</sup> the Supreme Court held that the Comprehensive Environmental Response, Compensation, and

299. *Id.* at 454-55. The Court stated:

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

*Id.* (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)).

This role can be likened to a supremacy clause argument. *Id.* The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land . . . ." U.S. CONST., art. VI, cl. 2.

300. Jesse M. Feder, Note, *Congressional Abrogation of State Sovereign Immunity*, 86 COLUM. L. REV. 1436, 1442 (1986).

301. This legal argument is based on the premise that whoever enacted the latter legislation was aware of the earlier law and intended the later one to supplant the earlier one. *Id.*

302. See, e.g., *Ex Parte Virginia*, 100 U.S. 339 (1880) (describing the scope of the Fourteenth Amendment in relation to the sovereignty of states within the context of federalism).

303. 491 U.S. 6 (1989).

Liability Act of 1980 (CERCLA)<sup>304</sup> permits a private party to sue a state for damages in federal court.<sup>305</sup> The Court held that the Commerce Clause granted Congress the power to enact CERCLA and create a cause of action in federal court that would supersede a state's Eleventh Amendment immunity.<sup>306</sup>

Justice Brennan's plurality opinion in *Union Gas*<sup>307</sup> held that Congress has the power to abrogate Eleventh Amendment immunity when legislating pursuant to the Commerce Clause.<sup>308</sup> The opinion is a model of internal inconsistency and contradiction, using consent, surrender theory, plan of convention theory, and plenary power theory to reach its conclusion.<sup>309</sup>

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304. 42 U.S.C. §§ 9601-75 (1988 & Supp. IV 1992).

305. See generally Goldberg, *supra* note 285 (describing in detail the *Union Gas* decision).

306. 491 U.S. at 20. The case involved a suit by the Environmental Protection Agency (EPA) against Union Gas for reimbursement of environmental clean up costs. *Id.* at 5. Union Gas' predecessor operated a coal gasification plant, which had been dismantled in 1950. *Id.* Coal tar at the site began to seep into a creek in 1980, shortly after the State of Pennsylvania struck a large deposit of coal tar while excavating the creek. *Id.* EPA declared that the coal tar was a hazardous substance, cleaned up the site, and sued Union Gas to recoup its costs under CERCLA. *Id.* at 6. Union Gas filed a third party complaint against the State of Pennsylvania, asserting it was liable as an "owner and operator" of the site under CERCLA. *Id.* A section of CERCLA, 42 U.S.C. § 9607(d)(2) (1988) excludes a state government from general liability but allowed liability for gross negligence or intentional misconduct. The district court dismissed the third-party complaint, holding the state could not be sued as a result of Eleventh Amendment sovereign immunity. *United States v. Union Gas Co.*, 575 F. Supp. 949 (E.D. Pa. 1983). After remand in light of the 1986 amendments to CERCLA, the Third Circuit found that Congress clearly intended to hold states liable for money damages and that Congress had power to do so under the Commerce Clause. *United States v. Union Gas Co.*, 832 F.2d 1343 (3d. Cir. 1986).

307. On the question of whether Congress can abrogate state immunity when legislating pursuant to the Commerce Clause, Justice Brennan delivered an opinion, joined by Justices Marshall, Blackmun, and Stevens. 491 U.S. at 5. While the various opinions in *Union Gas* appear to reach no concrete conclusions, five justices agreed that Congress had the authority to abrogate states' immunity under the Commerce Clause. Four votes came from those joining Justice Brennan's opinion, and a fifth from Justice White, who grudgingly joined the relevant part of the plurality opinion: "I agree with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the states, but I do not agree with much of [Brennan's] reasoning." 491 U.S. at 57 (White, J., concurring in part in the judgement).

308. 491 U.S. at 23. Brennan reasoned that congressional authority to abrogate stemmed from "the special nature of the power conferred by [the Commerce Clause]." *Id.* at 19.

309. The use of so many varied theories led Justice Scalia, who wrote the dissent, to criticize the majority for creating confusion, rather than "cleaning up the allegedly muddled Eleventh Amendment jurisprudence." *Union Gas*,

The plurality maintained that Congress' power to regulate interstate commerce gave Congress the power to abrogate state Eleventh Amendment Immunity.<sup>310</sup> The plurality maintained that the Commerce Clause alters the balance of state and federal power established by the Constitution and determining the scope Eleventh Amendment immunity.<sup>311</sup> The plurality also regarded the Commerce Clause as conferring special plenary power on Congress that expands federal power at the expense of state power.<sup>312</sup> By giving Congress the authority to regulate commerce, the plurality concluded, the states surrendered a portion of their sovereignty.<sup>313</sup>

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491 U.S. at 44 (Scalia, J., dissenting).

In addition to being inconsistent, *Union Gas* is also a sharply divided decision. Apart from the plurality opinion, Justice Stevens filed a concurrence which emphasized the Court's responsibility to uphold congressional decisions to subject states to liability under federal law. 491 U.S. at 28-29 (Stevens, J., concurring). Justice White also filed a concurring opinion. However, he disagreed with Brennan's reasoning, espousing the position that Congress must use "unmistakable language" in order to abrogate immunity. *Id.* at 50 (White, J., concurring in part). Justice Scalia dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy. *Id.* at 29 (Scalia, J., dissenting). Justice O'Connor also joined Part I of Justice White's concurrence. *Id.* at 57.

310. The plurality held the authority of Congress to regulate commerce under the Interstate Commerce Clause includes the authority to abrogate state immunity from suit. 491 U.S. at 14. Through an analogy to the Fourteenth Amendment, the plurality reasoned that the congressional Commerce Clause power includes the ability to limit the Eleventh Amendment. *Id.* at 16-17. Specifically, because the Commerce Clause and the Fourteenth Amendment both simultaneously give power to the federal government while taking power from the states, the Commerce Clause limits the principles of federalism established by the Constitution under which the Eleventh Amendment is interpreted. Hence, the Commerce Clause confers special plenary power on Congress that expands federal power at the expense of state power. *Id.* at 14-17.

311. 491 U.S. at 16-19. Justice Scalia argued that Fitzpatrick's rationale did not apply to the Commerce Clause because the Fourteenth Amendment was a subsequent limit on state power. *Id.* at 41-42 (Scalia, J., concurring in part and dissenting in part). The plurality responded that Justice Scalia's opinion failed to recognize that the Eleventh Amendment was an embodiment of principles that already existed in the Constitution. *Id.* at 17-19.

312. *Id.* at 16. The plurality emphasized the effect of the commerce power to displace state authority. This effect, the plurality noted, is where congressional power really lies. *Id.* at 20.

313. Justice Scalia wrote a four-vote dissent which disagreed with the plurality's analogy to the Fourteenth Amendment and argued that Congress only has authority to override state immunity when legislating pursuant to Section Five of the Fourteenth Amendment. 491 U.S. at 29 (Scalia, J., concurring in part and dissenting in part). The dissent argued that the Eleventh Amendment is a constitutional limitation upon the power of the federal courts, not a statement limiting state sovereign immunity. *Id.* at 31. The dissent also



Brennan relied upon dicta from the majority opinion he authored in *Parden* to infer state consent in Pennsylvania's ratification of the Constitution.<sup>314</sup> Consent, as borrowed from *Parden*, was phrased in terms of surrender theory.<sup>315</sup> The plurality in turn associated surrender of immunity with plan of convention.<sup>316</sup> Thus, one of the seeming sources for the holding was that the states waived their immunity under the "plan of convention."

Using the consent theory from *Parden*, the *Union Gas* plurality blurred the separate theories of abrogation and consent. *Union Gas* made consent, at least under the plan of convention, the basis for subjecting a state to a congressional abrogation of immunity. In *Union Gas*, the Court held that congressional action could abrogate a state's Eleventh Amendment immunity from suit where congressional intent was clear and where the abrogation occurred through the exercise of Congress' constitutional authority to regulate commerce which the states purportedly had impliedly consented to "in the plan of the [constitutional] convention."<sup>317</sup> Thus, *Union Gas* might stand for the proposition that state sovereignty cannot be used to prohibit Congress from regulating interstate commerce because the states consented to this power by adopting the Constitution.<sup>318</sup>

A number of baffling anomalies result from the *Union Gas* reliance on *Parden*. First, the Court had seemingly abandoned

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used a slippery slope argument, claiming that if other Article I powers could be used to abrogate the limited grant of judicial jurisdiction then Article III powers would be expanded. That, the dissent claimed, "is not the regime the Constitution establishes." *Id.* at 40.

314. 491 U.S. at 14.

[W]e concluded that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," and that "[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. . . ." Although it is true that we have referred to *Parden* as a case involving a waiver of immunity, the statements quoted above lay a firm foundation for the argument that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit.

*Id.* (citations omitted).

315. *Id.* (quoting *Parden*, 377 U.S. at 192).

316. "We have recognized that the States enjoy no immunity where there has been 'a surrender of this immunity in the plan of convention.'" *Union Gas*, 491 U.S. at 19 (citing *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)).

317. *Id.*

318. *Id.* at 19-20.

constructive consent after *Parden*. Second, abrogation and waiver are incomparable and independent bases for removing Eleventh Amendment immunity, because *Fitzpatrick* appears to reflect the view that the former is based on congressional power and not consent of the states to be subject to lawsuits. Finally, the bases for consent Brennan found in *Parden* and in *Union Gas* were entirely different. *Parden* was based on a waiver of Eleventh Amendment immunity and not on congressional power under the Commerce Clause. In *Parden*, the Brennan majority opinion premised state consent on participation in a federally regulated activity which occurred after the enactment of federal legislation. In *Union Gas* the Brennan plurality opinion inferred state consent in its ratification, via plan of convention, of the Constitution two hundred years earlier.

The plurality opinion in *Union Gas* also applied to the Commerce Clause the same plenary power reasoning the Court had used to support abrogation under the Fourteenth Amendment in *Fitzpatrick*.<sup>319</sup> Brennan found that the Commerce Clause, like the Fourteenth Amendment, is a plenary power which "both expands federal power and contracts state power."<sup>320</sup> The plurality opinion noted that, like the Fourteenth Amendment, the Commerce Clause gives power to Congress while it takes power away from the states.<sup>321</sup>

Justice Scalia's dissent exclaimed that the Commerce Clause is not a limitation on state power in the same way as the Fourteenth Amendment.<sup>322</sup> Scalia's dissent argued that abrogation in the Fourteenth Amendment context was different than abrogation under Article I because the Fourteenth Amendment, unlike the original Constitution, postdates the Eleventh Amendment.<sup>323</sup>

Brennan sought to trump Scalia's later in time argument by adopting Scalia's chronological approach to make an argument for preratification existence of sovereign immunity. Brennan

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319. Brennan analogized the two provisions and found sufficient similarities to justify treating the two powers the same for Eleventh Amendment abrogation purposes. *Union Gas*, 491 U.S. 16.

320. *Id.* at 17.

321. *Id.* at 16.

322. 491 U.S. at 42 (Scalia J., dissenting). Scalia stated:

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

*Id.*

noted that since the doctrine of state sovereign immunity predated the Constitution, all Article I powers, just like the Fourteenth Amendment, postdate, and therefore limit, sovereign immunity.<sup>324</sup>

Brennan presented a “surrender theory” which operated on the principle that states agreed to be subject to regulation adopted by Congress pursuant to its *enumerated* constitutional powers.<sup>325</sup> Brennan ignored the later in time argument because both the Commerce Clause and the Fourteenth Amendment are enumerated congressional powers carved out of a surrender of state sovereignty.<sup>326</sup>

## 6. Complicating *Union Gas* — *Blatchford v. Native Village of Noatak*

Complicating the debate over whether IGRA abrogates state immunity from suit is the Supreme Court decision two years after *Union Gas* in *Blatchford v. Native Village of Noatak*.<sup>327</sup> In *Blatchford*, the Supreme Court held that the Eleventh Amendment protects states from suits by Indian tribes in federal court for breaches of state statutes.<sup>328</sup> The Court reversed a Ninth Circuit decision holding that the Commerce Clause furnished jurisdiction to the federal courts over all Indian matters.<sup>329</sup> *Blatchford* makes clear that consent-waiver and abrogation are two separate and distinct lines of inquiry, even though both

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324. 491 U.S. at 17 (“It is not the Commerce Clause that came first, but the principle embodied in the Eleventh Amendment’ that did so.”).

325. *Id.* at 19-20 (“To the extent that the States gave Congress authority to regulate commerce, they also relinquished their immunity where Congress found it necessary . . . to render them liable.”). *Id.* at 20.

326. Brennan expressed this type of thinking in his concurring opinion in *Fitzpatrick*: “Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3 and in § 5 of the Fourteenth Amendment, *two of the enumerated powers granted Congress in the Constitution.*” 427 U.S. at 458 (Brennan, J. concurring) (emphasis added).

327. 501 U.S. 775 (1991).

328. *Blatchford*, 501 U.S. at 788. The Native Village of Noatak sued the Commissioner of Alaska’s Department of Community and Regional Affairs for including non-native communities in a revenue-sharing program which the legislature authorized for Eskimo communities. *Id.* at 778. By expanding the class of communities eligible to receive the state aid, the Commissioner’s action reduced the aid available to Eskimo communities. *Id.* The Village sued the Commissioner in federal court, claiming that the state failed to provide the funds authorized by the state legislature. *Id.*

329. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1164 (9th Cir. 1990).

might be based upon plan of convention or surrender theory.<sup>330</sup> The Court also left open the question of whether Congress has the power to abrogate state immunity under the Indian Commerce Clause.

The Ninth Circuit determined that the states, in accepting the Commerce Clause, surrendered their sovereign immunity to suits regarding all relations with nonforeign governments, including Indian tribes.<sup>331</sup> The court held that abrogation was unnecessary because states' consent to suit by the tribes was inherent in the plan of the constitution.<sup>332</sup> Because the tribes were present in the United States prior to ratification of the Constitution, the Ninth Circuit stated the new union had to allocate government power in relations with the Indians.<sup>333</sup> The Ninth Circuit stated that after adoption of the Constitution, Indian relations became the exclusive province of the federal government.<sup>334</sup> In ratifying the Constitution, the states not only surrendered control to federal government, but also surrendered immunity from suit.<sup>335</sup> The Ninth Circuit concluded that, within this framework, the federal statute granting federal court jurisdiction over Indian affairs was sufficient to grant federal court jurisdiction over suits against states.<sup>336</sup>

The Supreme Court, relying upon the plan of convention theory which served as one of the rationales for *Union Gas*, determined the Eleventh Amendment prevents tribes from suing the states for damages pursuant to state law.<sup>337</sup> However, while *Union Gas* was about congressional power to abrogate, *Blatchford* was about waiver of immunity. The *Blatchford* Court did not specifically address whether its decision would be the same if Congress was enacting legislation pursuant to the Indian

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330. *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1431 (10th Cir. 1994) ("The *Blatchford* Court's historical analysis about waiver in no way undermines *Union Gas*, which only considered Congress' abrogation powers . . . [*Blatchford*] demonstrates that the historical analysis of waiver does not undermine the conclusion that Congress may abrogate . . . pursuant to its Article I plenary powers.").

331. *Hoffman*, 896 F.2d at 1164.

332. *Id.* at 1164 (reasoning that states retain no immunity from suit by tribes because any such immunity was rendered non-existent by the states' consent to the Constitution).

333. *Id.* at 1162.

334. *Id.* at 1163.

335. *Id.* at 1162.

336. *Hoffman*, 896 F.2d at 1160.

337. 501 U.S. at 782. The Supreme Court has affirmed the right of Indian tribes to sue for injunctive and prospective relief to enforce treaty rights in federal court. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S.

Commerce Clause. In *Blatchford*, the Court considered both abrogation and constructive consent and clarified that consent-waiver and abrogation are distinctly different bases for removing the Eleventh Amendment immunity bar.<sup>338</sup>

On the question of the waiver of sovereign immunity, the tribes argued that sovereign immunity under the Eleventh Amendment limits suits by individuals against sovereigns rather than suits by sovereigns against sovereigns.<sup>339</sup> Relying upon its 1934 decision in *Monaco v. Mississippi*,<sup>340</sup> the Supreme Court held that a state's sovereign immunity extended to both individuals and sovereigns and that a state's surrender of immunity is determined by the plan of convention.<sup>341</sup> The Court found nothing to suggest that a surrender of immunity among states and tribes was inherent in the plan of convention.<sup>342</sup>

The Supreme Court found it inconsistent that the states would surrender their immunity to the Indians without a mutual concession from the Indian tribes.<sup>343</sup> The Court differentiated the application of the plan of convention for the states from its application to the tribes.<sup>344</sup> The states ceded some aspects of their sovereign immunity to the federal government, but they did not give up their sovereign immunity against entities other than the United States and sister states.<sup>345</sup> In ratifying the Constitution the states made a mutual concession to be sued by other states.<sup>346</sup> No such mutuality of concession existed, however, for removal of immunity between the states and the Indian tribes.<sup>347</sup> The Court concluded the states could not have made such a mutual concession with Indians because Indians were not part of the Constitutional Convention.<sup>348</sup> *Blatchford* is based on the principle that the tribes could not surrender their immunity in a convention to which they were not parties. Therefore, if

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338. *Id.* at 785 (differentiating between the abrogation of state sovereignty and the delegation to tribes of a federal government exemption from state sovereign immunity).

339. *Id.* at 779-80.

340. 292 U.S. 313 (1934) (holding that, in suit by a foreign nation to recover funds due under bonds from state, states shall be immune from suit unless they surrender immunity in the plan of the convention).

341. *Blatchford*, 501 U.S. at 780-81 (concluding that traditional principles of sovereignty restrict both suits by individuals and those by sovereigns).

342. *Id.* at 779.

343. *Id.* at 782.

344. *Id.*

345. *Id.* at 781.

346. *Id.* at 782.

347. *Id.*

348. *Id.*

the convention did not surrender the tribes' immunity to the states, it could not surrender the states' immunity to the tribes.<sup>349</sup>

*Blatchford* separately discussed abrogation.<sup>350</sup> The Court found that 28 U.S.C. § 1362 did not satisfy the clear statement test<sup>351</sup> because it failed to reflect, in unmistakably clear language, a congressional intent to abrogate the defense of state immunity from suit in federal court.<sup>352</sup> Thus, the Court held that § 1362, which granted the federal courts the power to hear suits on Indian matters, did not abrogate the states' immunity under the Eleventh Amendment.<sup>353</sup> Because the Court found that Congress did not intend § 1362 to abrogate, the Court never reached the issue of congressional authority to abrogate.

### 7. *Cotton Petroleum Corp. v. New Mexico* — Comparing the Two Commerce Clauses

In *Union Gas*, the Supreme Court spoke of the Congressional power to abrogate under the "Commerce Clause," but failed to distinguish between the Interstate Commerce Clause and the Indian Commerce Clause. It is clear, however, that the Court's decision pertained to regulating interstate commerce, making the Interstate Commerce Clause the portion of the Commerce Clause relevant to their decision. Part of the debate over abrogation under IGRA is whether the congressional power to abrogate is different for the two pieces of the Commerce Clause. Extending *Union Gas* to Indian Commerce requires courts to find congressional authority to abrogate under the Indian Commerce Clause equal to that under the Interstate Commerce Clause.

The courts in IGRA sovereign immunity cases have used the Supreme Court's decision in *Cotton Petroleum Corp. v. New Mexico*<sup>354</sup> in evaluating whether congressional power under each of the two clauses is different. States have argued that *Cotton*

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349. The Court stated that Indian tribes were immune from suits by the states and that "if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the *States'* immunity for the benefit of the tribes." 501 U.S. at 782.

350. *Id.* at 787.

351. See *infra* notes 364-67 and accompanying text.

352. 501 U.S. at 787.

353. *Id.*

354. 490 U.S. 163 (1989). *Cotton Petroleum*, a non-Indian company, leased reservation lands having oil and gas wells. 490 U.S. at 168. The company paid severance taxes to both the tribe and the State of New Mexico. *Id.* The company argued that the state and tribal taxes constituted an unlawful multiple burden on interstate commerce. *Id.* at 187-88. Under the Interstate Commerce Clause, when more than one state seeks to tax the same activity from which a business receives income from several states, an apportionment formula must be used so that a state taxes only the activities conducted within its

*Petroleum* is authority for the proposition that Congress has no power to abrogate under the Indian Commerce Clause.<sup>355</sup> One court cited the Supreme Court's statement that while the purpose of the Interstate Commerce Clause is to limit state power to ensure free trade, "the central function of the Indian Commerce Clause is to provide Congress plenary power to legislate in the field of Indian Affairs" as precedent to limit *Union Gas* to Interstate Commerce.<sup>356</sup>

*Cotton Petroleum* involved facts and legal issues clearly distinguishable from the IGRA abrogation cases. Therefore, most courts have properly found it inapplicable.<sup>357</sup> The question presented in *Cotton Petroleum* was whether tribes should be treated like states for the purpose of deciding if a state tax on nontribal activities conducted on tribal lands should be apportioned to offset taxes imposed upon the same activity by the tribal government.<sup>358</sup> The Court held that the tribes were not like the states for Commerce Clause purposes.<sup>359</sup> While the Court remarked that the two Commerce Clauses had "different applications," the Court did not differentiate the clauses with respect to congressional abrogation power. Furthermore, despite this seeming distinction, the Court again emphasized that "plenary power" is the basis of Congressional exercise of the Indian Commerce Clause.

## VII. FEDERAL CASE LAW ON IGRA ABRIGATION

The central dispute between the tribes and the states is whether Congress, in enacting IGRA, in fact abrogated state sovereignty under the Eleventh Amendment. Federal courts have applied a two-step test to resolve this dispute. First, did Congress intend to abrogate state sovereignty through IGRA? Second, did Congress possess the constitutional power to abrogate state sovereign immunity in IGRA?

The tribes assert that the Indian Commerce Clause, under which IGRA was enacted, provides the necessary abrogation

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355. See, e.g., *Seminole Tribe*, 11 F.3d at 1027 (stating that *Cotton Petroleum* describes the central functions of each clause differently, thus mandating different treatment for each clause in abrogation cases).

356. *Id.* (quoting *Cotton Petroleum*, 490 U.S. at 192).

357. See *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1431 (10th Cir. 1994) (concluding that *Cotton Petroleum* is not dispositive because "[t]he obvious differences between two clauses . . . do not lead us to conclude that Congress lacks the power to abrogate . . . under the Indian Commerce Clause); *Spokane Tribe*, 28 F.3d at 995 ("The Court's holding in *Cotton Petroleum* . . . is inapplicable.") (citations omitted).

358. *Cotton Petroleum*, 490 U.S. at 191.

power. The Supreme Court, however, has never ruled that the Indian Commerce Clause provides a basis for congressional abrogation. To date, the Court has decided only that the Interstate Commerce Clause and Section Five of the Fourteenth Amendment provide the basis for abrogation. IGRA raises the issue of whether Congress also has power to abrogate state sovereign immunity under the Indian Commerce Clause.

The federal circuits are split on whether IGRA erases Eleventh Amendment immunity. The Tenth Circuit in *Ponca Tribe of Oklahoma v. Oklahoma*,<sup>360</sup> the Ninth Circuit in *Spokane Tribe of Indians v. Washington*,<sup>361</sup> and the Eighth Circuit in *Cheyenne River Sioux Tribe v. South Dakota*<sup>362</sup> hold that IGRA abrogates state sovereign immunity. The Eleventh Circuit in *Seminole Tribe v. Florida*,<sup>363</sup> concludes that Congress lacked the authority to abrogate state immunity when it enacted IGRA. Not unexpectedly, the circuit courts that provide reasoning in finding abrogation have embraced plenary power theory as the basis for their rulings and the circuit that rejects abrogation has emphasized surrender theory as its governing philosophy.

#### A. Intent to Abrogate

When Congress enacted IGRA, it intended to abrogate state immunity. To abrogate the states' Eleventh Amendment immunity Congress must unequivocally express its intent<sup>364</sup> or be "unmistakably clear in the language of the statute."<sup>365</sup> It is not

360. 37 F.3d 1422 (10th Cir. 1994), *rev'g* *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992), *Pueblo of Sandia v. King*, No. CIV-92-613 JC, 1992 WL 540817 (D.N.M. Nov. 3, 1992), and *Mescalero Apache Tribe v. New Mexico*, slip op. No. CIV-92-076 JC (D.N.M. 1992); *aff'g* *Kickapoo Tribe of Indians v. Kansas*, 818 1423 (D. Kan. 1993).

361. 28 F.3d 991 (9th Cir. 1994).

362. 3 F.3d 273 (8th Cir. 1993).

363. 11 F.3d 1016 (11th Cir.) *rev'g* *Seminole Tribe v. Florida* 801 F. Supp. 655 (S.D. Fla. 1992); *aff'g* *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Alabama 1991). IGRA has been held not to abrogate state immunity in two district court decisions in other circuits. *See* *Sault Ste. Marie Tribe v. Michigan*, 800 F. Supp. 1484 (W.D.Mich) 1992; *Mississippi Band of Choctaw Indians v. Mississippi*, No. CIV.A J90-0386(B), 1991 U.S. Dist. LEXIS 19397 (S.D. Miss. Apr. 9, 1991). The Michigan federal district court which decided *Sault Ste. Marie* is contained in the Sixth Circuit and the Mississippi federal district court which decided *Choctaw* is located in the Fifth Circuit.

364. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual.").

365. *Id.* at 228 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *Blatchford*, 501 U.S. at 775 ("[C]ases require Congress's exercise of the power to abrogate state sovereign immunity . . . to be exercised with unmistakable clarity."). This standard is known as the "clear statement rule." *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 110 n.439 (1988).



enough that a statute authorizes suit in federal court;<sup>366</sup> the statute must provide more than a permissible inference of congressional intent to abrogate.<sup>367</sup> While the courts disagree on whether Congress *actually* abrogated state immunity in enacting IGRA, they agree that it *intended* to abrogate.<sup>368</sup> Because the circuits agree that IGRA clearly expresses Congressional intent to abrogate state sovereign immunity, the first step of the two-step test is satisfied.

### B. Congressional Power to Abrogate

To determine if Congress has in fact abrogated state sovereignty under the Eleventh Amendment, courts must next decide whether Congress possessed the power to abrogate in this instance.<sup>369</sup> This question is not as easy as the first because the Supreme Court has yet to decide whether Congress has this power under the Indian Commerce Clause. The Court has upheld congressional authority to abrogate when legislating under Section Five of the Fourteenth Amendment<sup>370</sup> and when enacting laws pursuant to the Interstate Commerce Clause.<sup>371</sup>

Indian tribes argue that Congress also has the power to abrogate state immunity under the Indian Commerce Clause.<sup>372</sup> Federal courts have considered two arguments, under two rationales, for whether Congress' power to abrogate extends to the Indian Commerce Clause. First, the Interstate Commerce Clause and the Indian Commerce Clause may be equals and

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366. *Blatchford*, 501 U.S. at 786-87 n.4.; *Atascadero*, 473 U.S. at 246.

367. *Dellmuth*, 491 U.S. at 230. In *Union Gas*, the Supreme Court described a "cascade of plain language" which had expressed intent to abrogate Eleventh Amendment immunity. *Union Gas*, 491 U.S. at 11.

368. *Ponca Tribe*, 37 F.3d at 1428 ("Congress has unmistakably expressed its intent to subject suits to federal court under IGRA . . ."); *Spokane Tribe*, 28 F.3d at 995 ("Congress' intent could not be much clearer."); *Seminole Tribe*, 11 F.3d at 1024 ("Congress intended to abrogate the states' sovereign immunity."); *Cheyenne River Sioux Tribe*, 3 F.3d at 281 ("[E]xpress provision for federal jurisdiction over claims under the IGRA is sufficient to abrogate the states' eleventh amendment immunity.').

369. *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550, 558 ("However, whether Congress has the power to [abrogate], no matter how clear it makes its intentions, is another question entirely.').

370. *Fitzpatrick*, 427 U.S. at 456.

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

372. Both the Indian and Interstate Commerce Clauses are found in Article I, Section Eight of the Constitution, which gives Congress the power "To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art I. § 8, cl. 3.

therefore both give Congress the power to abrogate state sovereign immunity. Second, each of the two clauses may have distinct and separate applications. Thus, Congress may not have *per se* power to abrogate under the Indian Commerce Clause as it does under the Interstate Commerce Clause.

*Union Gas* is a key case in weighing the two alternatives. A restrictive interpretation of *Union Gas* suggests that the Indian Commerce Clause is not the equal of the Interstate Commerce Clause. A milder reading leads to the opposite conclusion. Thus, courts have turned to the Supreme Court's decisions in *Fitzpatrick*, *Blatchford*, and *Cotton Petroleum*, to help determine whether Congress has the power to abrogate state sovereign immunity under the Indian Commerce Clause.

### 1. Minority View — No Power to Abrogate

The Eleventh Circuit is the only circuit to hold Congress powerless to abrogate under the Indian Commerce Clause. From the outset, the court in *Seminole Tribe v. Florida*<sup>373</sup> framed its rejection of IGRA abrogation in terms of surrender theory. If Congress possessed plenary power to abrogate state immunity under the Indian Commerce Clause, or any other constitutional provisions for that matter, the court believed that the power must have been a consequence of a state surrender of its immunity to suit or a result of state consent.<sup>374</sup> The court's exclusive concern with surrender of state immunity left not a prayer that the court would find that Congress possessed power to abrogate.

In *Seminole Tribe*, Indian tribes sued Florida and Alabama to compel compact negotiations under IGRA.<sup>375</sup> The court determined that immunity would exist unless the court found any of three types of consent — express consent, consent through participation in a federal program, *a la Parden*, or by implied consent resulting from state surrender of immunity in the "plan of convention."<sup>376</sup>

373. 11 F.3d 1016 (11th Cir. 1994).

374. *Id.* at 1021-22.

375. *Id.* at 1020-21.

376. *Id.* at 1021-22, 1023. The Eleventh Circuit also considered whether suits could be brought by Indian tribes to enforce IGRA under the legal fiction of *Ex Parte Young* that permits federal injunction to force a state officer to comply with federal law, in this case the governors of Florida and Alabama. It rejected the fiction, finding that suits against state governors to compel them to negotiate IGRA compacts were essentially suits against the states, and that to permit such suits one of the types of state consent to sue must exist. *Id.* at 1028-29.

The court quickly disposed of express consent because neither Florida nor Alabama had consented in their constitutions, statutes, or judicial decisions.<sup>377</sup> The court gave slightly more attention to consent under the *Parden* doctrine.<sup>378</sup> Invoking *Parden*, the tribes argued that because the states have attempted to benefit from IGRA then they should be held to have consented to the downside of the legislation — federal jurisdiction over IGRA suits. The Eleventh Circuit found *Parden* inapplicable because of its distinguishable facts and because *Parden's* doctrine of consent by conduct is virtually dead law.<sup>379</sup>

The Eleventh Circuit declared that *Blatchford* governed its resolution of whether, under the plan of convention, states surrendered their sovereign immunity to suits from Indian tribes as they had for suits by states.<sup>380</sup> The court assumed that the “plan of convention” theory expressed in *Blatchford* was based on the principle of waiver rather than abrogation. The court declared that because *Blatchford* found no mutuality of concession between the states and the tribes, the states could not be said to have surrendered their immunity to the tribes under the plan of convention.<sup>381</sup>

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

378. *Id.* at 1022-23.

379. *Id.* The Eleventh Circuit pointed out that *Parden* was the “first — and, to date last — time” that the Supreme Court found that a state had waived its immunity to suit by participating in a federal program. *Id.* at 1022. The court noted that *Parden* was decided largely by its facts, and those facts involved the unique instance where a state had entered into a “private” activity regulated by the federal government. *Id.* at 1023. The court found that state-tribal compact negotiations were hardly a private activity, and thus differed both factually and in principle from *Parden*. *Id.*

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

381. *Id.* The district court in the litigation which the circuit court reversed had belittled reliance upon plan of convention theory for determining the existence of congressional power to abrogate. *Seminole Tribe v. Florida* 801 F. Supp. 655, 662 (S.D. Fla. 1992). It regarded plenary congressional power to abrogate as the central thrust of *Union Gas*. *Id.* at 660-61 n.6. The district court called the “plan of convention” surrender of sovereignty a “waiver” argument more than a “abrogation” argument, and maintained that in the Indian affairs context this was rejected by the Supreme Court in *Blatchford*. *Id.* The district court spurned the conclusion it saw in *Spokane Tribe and Sault Ste. Marie* that the Supreme Court in *Blatchford* determined that Congress lacked the power to abrogate under the Indian Commerce Clause. *Id.* at 663 n.10. The *Seminole Tribe* court contended that *Blatchford* should be regarded as a “waiver” case and its concerns over the absence of mutuality of concession between the tribes and states should be limited to that context. *Id.* at 663. The court added that even if the waiver principles expressed in *Blatchford* were relevant to the question of Congressional abrogation power, they were not important in determining the extent of abrogation power under

After dispensing with consent, the *Seminole Tribe* court considered Congress' power to abrogate under the Indian Commerce Clause. The court noted that the Supreme Court had only found that Congress possessed the power to abrogate state sovereign immunity under Section Five of the Fourteenth Amendment and the Interstate Commerce Clause.<sup>382</sup> The tribes attempted to fit IGRA within one of Congress' established abrogation powers.<sup>383</sup> The court, however, rejected the tribes' arguments that IGRA was enacted pursuant to both Section Five of the Fourteenth Amendment and the Interstate Commerce Clause.<sup>384</sup> *Seminole Tribe* found it implausible that IGRA was enacted pursuant to the Fourteenth Amendment or the Interstate Commerce Clause and readily discarded this claim.<sup>385</sup> The Eleventh Circuit concluded that IGRA was enacted "solely under the Indian Commerce Clause."<sup>386</sup>

The court declined to expand *Union Gas* to find that Congress had power abrogate under the Indian Commerce Clause. The court began its analysis by characterizing *Union Gas* as weak authority because it was a "badly fractured" plurality decision.<sup>387</sup> The Court also concluded that *Union Gas* was not applicable for two reasons. The court first asserted that a "fair reading" of the Supreme Court decision was that it was intended only to apply to the Interstate Commerce Clause.<sup>388</sup> The court concluded that the *Union Gas* opinion was not framed in terms of the Commerce Clause as a whole to include both

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382. *Seminole Tribe*, 11 F.3d at 1023.

383. *Id.* at 1025-26.

384. *Id.* at 1025.

385. *Id.* at 1025-1026. The tribes contended that *Fitzpatrick's* holding that Congress may abrogate Eleventh Amendment immunity when legislating pursuant to Section 5 of the Fourteenth Amendment extended to granting Congress authority to abrogate state immunity in IGRA. *Id.* at 1025. The justification offered for this contention was that IGRA implicated the Fourteenth Amendment because the law creates both a liberty interest and property interest for Indian tribes under *Board of Regents v. Roth*, 408 U.S. 564 (1992). 11 F.3d at 1025. The Eleventh Circuit determined that IGRA created no *Roth*-type property or liberty interests and thus the tribes could not rely on *Fitzpatrick*. *Id.* The tribes also tried to fit IGRA within *Union Gas* by arguing that Congress passed IGRA pursuant to the Interstate Commerce Clause with the goal of shielding Indian gaming from the influence of organized crime and other corrupting influences. *Id.* Portraying organized crime as a burden to interstate commerce, the tribes argued that because Congress sought to legislate in this area, that IGRA was enacted pursuant to the Interstate Commerce Clause. *Id.* at 1025-26. The court disagreed, stating that congressional concern about organized crime was not directed at relieving a burden on interstate commerce but at protecting Indian tribes. *Id.* at 1026.

386. *Seminole Tribe*, 11 F.3d at 1026.

387. *Id.*

388. *Id.* at 1027.

the Interstate and Indian Clauses. The court felt that *Union Gas* confirmed the two clauses' uniquely different qualities and purposes.<sup>389</sup> The court noted that while *Cotton Petroleum* was not controlling because it dealt with completely different issues, the decision shed light on the differences between the clauses.<sup>390</sup>

The court's second reason for not extending *Union Gas* was somewhat odd. The court revived *Parden*<sup>391</sup> to illustrate that Congress lacked the authority to abrogate under the Indian Commerce Clause.<sup>392</sup> The court stated that *Union Gas* "primarily relied" upon *Parden* and that both cases were concerned with applying federal law to states engaging in functions which typically involve private parties.<sup>393</sup> In contrast, the court found that states functioned in their ordinary governmental roles in negotiating compacts with Indian tribes under IGRA. Thus, the court concluded that even if *Union Gas* could be extended to justify "congressional abrogation power under the Indian Commerce Clause *in general*," such power did not exist when Congress legislated in an area typically reserved to the states, such as negotiating compacts with Indian tribes.<sup>394</sup>

## 2. Majority View — Power to Abrogate.

Three circuits have held that Congress has the power to abrogate state sovereign immunity to suit under the Indian Commerce Clause. The decisions of the Tenth Circuit in *Ponca Tribe of Oklahoma v. Oklahoma*<sup>395</sup> and the Ninth Circuit in

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389. *Id.*

390. *Id.* (quoting *Cotton Petroleum*, 490 U.S. at 192) ("[T]he Interstate Commerce Clause and the Indian Commerce Clause have different applications."). The Eleventh Circuit noted that *Cotton Petroleum* described the Interstate Commerce Clause as conferring upon Congress plenary power to limit state activity in order to maintain free trade among the states. *Id.* In contrast, the court noted, the Supreme Court believed that the central function of the Indian Commerce Clause was to provide Congress with plenary power to legislate in the field of Indian affairs. *Id.*

391. The court took the *Parden* decision as dead law for the purpose of holding that the state had not by their conduct consented to an IGRA lawsuit. *Seminole Tribe*, 11 F.3d at 1023.

392. *Id.* at 1028.

393. *Id.*

394. *Id.*

395. 37 F.3d 1422 (10th Cir. 1994). The Tenth Circuit also held that the Tenth Amendment and the *Ex Parte Young* doctrine did not bar IGRA suits.

*Spokane Tribe v. Washington*<sup>396</sup> provide detailed reasoning for their holdings and thus are discussed in this section.<sup>397</sup>

*Ponca Tribe* and *Spokane Tribe* are firmly grounded on plenary power theory. Both courts had no reluctance to treat *Union Gas* as based on plenary power reasoning and to extend that reasoning to the Indian Commerce Clause.<sup>398</sup> The Ninth Circuit in *Spokane Tribe* viewed *Fitzpatrick* and *Union Gas* as recognizing that Congress has the power to abrogate Eleventh Amendment immunity when it relies on a constitutional provision which gives the legislative branch “plenary power over matters affecting the states.”<sup>399</sup> This was not surrender or waiver theory but clear abrogation doctrine. The Tenth Circuit in *Ponca Tribe* expressed the doctrine as permitting Congress to “remove” the constraint of the Eleventh Amendment when Congress legislates “pursuant to certain constitutional provisions bestowing plenary powers on Congress.”<sup>400</sup>

The *Ponca Tribe* and *Spokane Tribe* courts were undaunted by the fact that *Union Gas* was a plurality opinion. Both courts found that despite the difference between the reasoning of the *Union Gas* plurality and the concurrence the opinions agreed on the narrow grounds that Congress held power to abrogate the Eleventh Amendment immunity when acting pursuant to the Interstate Commerce Clause.<sup>401</sup>

Both *Ponca Tribe* and *Spokane Tribe* recognized that the Supreme Court in *Fitzpatrick* and *Union Gas* held that Congress possessed plenary power to abrogate the Eleventh Amendment when legislating pursuant to Section Five of the Fourteenth Amendment<sup>402</sup> and the Interstate Commerce Clause.<sup>403</sup> Therefore, in order to conclude that Congress had the power to abrogate under the Indian Commerce Clause, these courts had to find

396. 28 F.3d 991 (9th Cir. 1994).

397. The decision of the Eighth Circuit in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993), receives only slight treatment here because it provides almost no reasoning for its holding, except to explicitly adopt the conclusion (and perhaps implicitly the reasoning) of the district court in the *Seminole Tribe*, *Seminole Tribe v. Florida*, 801 F. Supp. 665 (S.D. Fla. 1992), litigation that had extended *Union Gas* to apply to the Indian Commerce Clause and found that Congress had the plenary power to abrogate under IGRA. *Cheyenne River Sioux Tribe* in part also seems to be based on express consent. 3 F.3d at 280. After perfunctorily concluding that IGRA precluded Eleventh Amendment immunity, the Eighth Circuit, seemingly to bolster this conclusion, mentioned that by actively engaging in compact negotiations the states had accepted the benefits of the Indian gaming law. *Id.* at 281. *But see Seminole Tribe*, 11 F.3d at 1020.

398. *Ponca Tribe*, 37 F.3d at 1430; *Spokane Tribe*, 28 F.3d at 996.

399. *Spokane Tribe*, 28 F.3d at 995.

400. *Ponca Tribe*, 37 F.3d at 1429 (emphasis added).

401. *Ponca Tribe*, 37 F.3d at 1430; *Spokane Tribe*, 28 F.3d at 996, 997.

402. *Ponca Tribe*, 37 F.3d at 1429; *Spokane Tribe*, 28 F.3d at 995.

403. *Ponca Tribe*, 37 F.3d at 1429; *Spokane Tribe*, 28 F.3d at 995.

that at least the same degree of plenary power was contained in that clause as in the Fourteenth Amendment and the Interstate Commerce Clause. This was no problem for the two circuits. The Tenth Circuit stated, “[W]e perceive no constitutional distinction between the plenary powers bestowed in the Fourteenth Amendment, the Interstate Commerce Clause, and the Indian Commerce Clause.”<sup>404</sup> The Ninth Circuit likewise, referring to plenary power as the basis for abrogation, found the analysis developed by the Supreme Court in *Union Gas* and *Fitzpatrick* to be equally applicable to the Indian Commerce Clause.<sup>405</sup> Plenary power was plenary power to these courts.

Neither court found *Cotton Petroleum* authority to distinguish between the plenary power bestowed by the Interstate Commerce Clause and the Indian Commerce Clause. Both courts, in fact, cited *Cotton Petroleum* as authority to find plenary power in the Indian Commerce Clause and thus congressional abrogation authority.<sup>406</sup> *Ponca Tribe* pointed out that the different applications of the two commerce clauses was not what was significant.<sup>407</sup> What was significant to the Court was the fact that both clauses were based on plenary power and meant to allow the federal government to limit state authority.<sup>408</sup>

The Eleventh Circuit in *Seminole Tribe* had regarded the Supreme Court’s doctrine of mutuality of concession as stated in *Blatchford* as controlling.<sup>409</sup> *Ponca Tribe* and *Spokane Tribe* found *Blatchford* irrelevant and unimportant.<sup>410</sup> In *Spokane Tribe*, the court noted that *Blatchford*’s holding that a general waiver of immunity by the states from tribal suits cannot be inferred from the Constitution did not resolve the more pertinent question of whether Congress had plenary power to abrogate under the Indian Commerce Clause.<sup>411</sup> In other words, as *Ponca Tribe* noted, the Supreme Court decision was concerned with waiver of immunity from suit between the states and tribes, not with Congress’s ability to abrogate state immunity when exercising its plenary power to act on behalf of the Indians.<sup>412</sup>

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403. *Ponca Tribe*, 37 F.3d at 1429; *Spokane Tribe*, 28 F.3d at 995.

404. 37 F.3d at 1430.

405. *Spokane Tribe*, 28 F.3d at 996.

406. *Ponca Tribe*, 37 F.3d at 1430; *Spokane Tribe*, 28 F.3d at 995.

407. 37 F.3d at 1431.

408. *Id.*

409. 11 F.3d at 1022.

410. *Ponca Tribe*, 37 F.3d at 1431; *Spokane Tribe*, 28 F.3d at 995.

411. 28 F.3d at 995.

412. 37 F.3d at 1431.

Twenty-two states are in the Eighth,<sup>413</sup> Ninth,<sup>414</sup> and Tenth<sup>415</sup> Circuits, which have held that IGRA abrogates state sovereign immunity from suit by tribes to enforce the compact provision of the statute. Three states are within the Eleventh Circuit,<sup>416</sup> which permits states to repel these suits with the Eleventh Amendment defense. Moreover, federal district courts in two other states in other circuits have held that state sovereign immunity bars IGRA suits.<sup>417</sup> Whether or not IGRA's compact provision is enforceable against state sovereign immunity is an open question in the twenty-three states encompassed in federal circuits that have not resolved the issue. In sum, the enforceability of the IGRA compact provision is at an impasse.

### VIII. CONCLUSION

Gaming is a success for those tribes which have undertaken it,<sup>418</sup> although with the proliferation of gaming competition around the country there is no guarantee that this success will be universal and lasting. At the moment gaming enterprises are truly a "new buffalo" for many tribes.<sup>419</sup> The states' failure to

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413. The Eighth Circuit consists of South Dakota, North Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas.

414. The Ninth Circuit consists of Arizona, California, Nevada, Oregon, Idaho, Washington, Montana, Alaska, and Hawaii.

415. The Tenth Circuit includes Oklahoma, Kansas, New Mexico, Colorado, Utah, and Wyoming.

416. The Eleventh Circuit includes Florida, Georgia, and Alabama.

417. See *Sault Ste. Marie Tribe v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Mississippi Band of Choctaw Indians v. Mississippi*, No. CIV.A 190-0386(B), 1991 U.S. Dist. LEXIS 19397 (S.D. Miss. Apr. 9, 1991).

418. Myron Ellis, Chairman of the Minnesota Indian Gaming Association, described the beneficial impact for Indians of gaming in his state which had been fostered by IGRA:

As Indian gaming enterprises have begun to thrive, the economic deserts of the reservations have begun to bloom. Subsidiary and support businesses, like motels and hotels, cafes, transportation companies, and food and beverage supply companies, — both on an [sic] off the reservations — have found new life in this time of recession and more jobs were saved or created.

Tribes have used their revenues to fund their government operations and to develop and support tribal educational, social, and community development efforts in a time of declining Federal funding. Some tribes are using their revenues to diversify their economic base and to fund individual member economic enterprises. Wasn't this what [IGRA] was all supposed to be about?

*Implementation of the Indian Gaming Regulatory Act: Hearings Before the Senate Select Committee on Indian Affairs*, 100th Cong., 2nd Sess. 214 (Feb. 5, 1992) (statement of Myron Ellis, Chairman of the Minnesota Indian Gaming Association).

419. See *supra* notes 37-46 and accompanying text (explaining that gambling provides Indians with the hope of economic self-sufficiency).



live up to the compact obligation is crippling, if not killing, this new source of economic sustenance for Indians.

Public policy, on the one hand, and proper constitutional interpretation, on the other, are the two dimensions which come into play when considering state use of the Eleventh Amendment defense to avoid IGRA compacting with Indian tribes or to gain better negotiating leverage in such compacts. States are effectively sabotaging the compact provisions by invoking the Eleventh Amendment, to assert that tribes have no remedy and Congress has no authority to subject them to the jurisdiction of the federal courts.<sup>420</sup>

As a matter of public policy, the most apt words to describe state behavior are "betrayal" and "bad faith." The states' behavior in IGRA compacting should certainly be no surprise, for it has long characterized state relations with Indian tribes. Indians initially opposed IGRA's requirement of compacts as an unwarranted grant of state authority over Indian gaming and an infringement of tribal sovereignty. Nevertheless, Indian tribes have honorably played by the rules established by Congress, despite serious reservations. In contrast, the states have not played by the rules for which they themselves lobbied. Now, the states claim that IGRA cannot be enforced against them. This is like giving Indians blankets in the summer, and asking for their return in winter.

The better legal argument is on the side of the Indians, not the states, on the Eleventh Amendment issue. First, Congress clearly stated that IGRA was meant to benefit the Indians.<sup>421</sup> Congress enacted IGRA in light of the Supreme Court's long adopted tenet that when federal legislation is meant to benefit Indians, any collision between state and Indian sovereignty is to be resolved in favor of the Indians.<sup>422</sup> The majority view of the federal courts appears to follow this fundamental tenet but some courts either ignore or misunderstand it.

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420. See *supra* notes 47-53 and accompanying text (explaining that states are undoing Indian gaming).

421. IGRA is primarily designed to benefit Indian tribes by allowing them to develop gaming "... as a means of promoting economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1) (1988).

422. "The Committee . . . trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in cases involving Indian tribes." S. Rep. No. 446, *supra* note 3, at 15. The Committee noted that IGRA recognized and intended to "... preserve the principles which have guided the evolution of Federal-Indian law for over 150 years." *Id.* at 5. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (stating that disputes between tribal and state authority are subject to the "eminently sound and vital canon that federal statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.") (citations omitted).

The Continental Congress intensely debated the respective roles of the states and the federal government in relations with Indian tribes and in the Articles of Confederation accepted a compromise splitting jurisdiction between them.<sup>423</sup> This arrangement was completely unworkable and a source of friction between the states and federal government during the period of confederation.<sup>424</sup> The clear and direct language of the Article I Indian Commerce Clause that “[t]he Congress shall have power . . . to regulate commerce . . . with the Indian tribes” was meant by the Constitutional Convention of 1787 to disown and eliminate the proviso reserving state authority over Indian affairs under the Articles of Confederation.<sup>425</sup> James Madison explained that the Indian Commerce Clause was intended to erase any misunderstanding as to the sharing of powers by the states and central government in Indian affairs.<sup>426</sup> The framers of the Constitution drafted the Indian Commerce Clause to eliminate state power to regulate Indian affairs and to place the matter squarely in the hands of the federal government.<sup>427</sup> Congressional power over Indian affairs was to be exclusive and plenary.

The Supreme Court decision in *Union Gas* is the principal reference in the dispute among federal courts determining whether the Indian Commerce Clause allows Congress to abrogate state sovereign immunity by enacting IGRA.<sup>428</sup> The court ruling in favor of the states regarded *Union Gas* as resting on surrender

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423. Article IX, clause 4 of the Articles of Confederation provided:

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, *provided that the legislative right of any state within its own limits be not infringed or violated.*

*Id.* (emphasis added). As a result of this provision, during the period of confederation the reach of national government power over Indian affairs and the limitation on it which arose out of reserving states’ rights was a matter which generated considerable confusion and debate, and “these limitations rendered federal power of no practical value.” *Dick v. United States*, 208 U.S. 340, 356 (1908).

424. Robert N. Clinton & Maragert T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 23 (1979).

425. *Id.* at 29.

426. James Madison noted that, as a result of the Constitution, referring apparently to the Commerce Clause, that “The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory.” THE FEDERALIST NO. 42, 284 (James Madison) (J. Cooke ed. 1961).

427. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (“With the adoption of the Constitution, Indian relations became the exclusive province of federal law.”).

theory, reasoning that it must be shown that the “plan of convention” meant the states to consent to abrogation of their sovereignty when Congress legislated pursuant to the Indian Commerce Clause.<sup>429</sup> Putting aside for the moment the plenary power theory that congressional power over Indian affairs is complete and exclusive and erases state authority, this view fails to see that surrender theory itself cuts the other way to abrogate state sovereign immunity under the Indian Commerce Clause. While the part of the Commerce Clause at issue in *Union Gas* is clearly the interstate portion, the Court did not differentiate it from the Indian commerce provision which occupies the same sentence. Not distinguishing between the interstate or Indian parts, *Union Gas* unequivocally states that when the Commerce Clause was enacted the states fully consented to congressional authority to regulate commerce and thereby in aggregate relinquished their immunity. The Supreme Court made very clear that state consent was uniform, immediate, irreversible, and not subject to case-by-case exceptions.<sup>430</sup> It is hard to imagine that permanent state immunity was surrendered in the Interstate Commerce Clause and not in the Indian Commerce Clause because both are in the same sentence.

The view that *Union Gas* is inapplicable because it does not apply to federal legislation adopted pursuant to the Indian Commerce Clause is without merit. At a minimum, both the Indian Commerce Clause and the Interstate Commerce Clause are commensurate, and thus even under surrender theory, IGRA is not unenforceable under the Eleventh Amendment. But in a perverse way, the federal courts siding with the states are correct in regarding the two sections of the Commerce Clause as not being equals. For when the plenary power theory is entered in the equation, it becomes clear congressional power under the Indian Commerce Clause is greater than under the Interstate Commerce Clause. Under the Interstate Commerce Clause, states share power to regulate non-Indian commerce within their borders with Congress. However, because congressional power to regulate Indian commerce is plenary, the states share no authority with Congress unless Congress allows this to occur.

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429. See *supra* part VII.B.1.

430. . . . [T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not “unconsenting”; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Moreover, the crux of the Supreme Court's decision in *Cabazon* is that the states have no inherent power to regulate Indian gaming in particular because they lack power over Indian affairs in general.<sup>431</sup> As a result of *Cabazon*, the states would have had no say in Indian gaming had Congress not enacted IGRA. In devising compacting, Congress extended the opportunity and privilege to the states to have a voice in Indian gaming. Congress need not have shared its power in this way with the states. It stands to reason that Congress likewise can choose to subject the states to suit in federal courts for mistreating this privilege.

The split in the federal courts over the constitutional enforceability of the compact provision has created an impasse for Indian gaming. There are two ways this impasse can be resolved in order to allow Indian gaming to proceed as Congress wished. One is a definitive resolution by United States Supreme Court, directly striking down the Eleventh Amendment defense to IGRA. The other solution, congressional action, seems unlikely to cure the problem anytime soon.

Two of the principal architects of IGRA, Senators Daniel Inouye, a Democrat from Hawaii, and John McCain, a Republican from Arizona, have been upset by the states' failure to fulfill their obligations to compact and their use of the Tenth and Eleventh Amendment defenses to achieve this result. On June 16, 1992, the Senators, who were the majority and minority chairs, respectively on the Senate Select Committee on Indian Affairs, wrote the nation's governors and insisted they deal fairly with the Indians or face amendments to IGRA leaving the states out of the Indian gaming process entirely.<sup>432</sup> The governors ignored this warning and continued to use the Eleventh Amendment impede compacting.<sup>433</sup> Indian tribes have urged Congress to amend IGRA to allow Indian gambling with federal approval, rather than state compacts, if the states continue using their constitutional defenses.<sup>434</sup>

Indian allies in Congress have introduced several bills to bypass the states if they raise constitutional objections or otherwise impede compacting.<sup>435</sup> Unfortunately for the Indians,

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431. *Cabazon*, 480 U.S. at 215.

432. *Oversight Hearing before the Subcommittee on Native American Affairs of the House Committee on Natural Resources, Implementation of Public Law 100-497, The Indian Gaming Regulatory Act of 1988*, 103rd Cong., 1st Sess. 348 (Apr. 2, 1993) [hereinafter *Oversight Hearings*] (position paper of the National Indian Gaming Association, *Tribal Gaming and the Need for Corrective Legislation to Remove Obstacles to Compacting*).

433. *Id.*

434. *Id.* at 342.

435. See H.R. 1028, 103d Cong., 1st Sess. (1993) (allowing a tribe to apply

states also have their allies in Congress who have been introducing amendments to IGRA to bolster state ability to resist or refuse compacts and subordinate Indian law to state law for gaming.<sup>436</sup> The contradictory legislative proposals from both sides have prevented a legislative solution to the stalemate.

The National Indian Gaming Commission has authorized at least 75 tribal-state compacts around the nation.<sup>437</sup> So it is apparent that tribal gaming is proceeding forward to some degree. In some instances where states have failed to complete negotiations the tribes have taken matters in their own hand and proceeded with Class III gaming without approved compacts. The National Indian Gaming Commission reported that at the end of 1992 at least 33 Class III tribal gaming establishments had taken this action.<sup>438</sup> Most of the Indian nations, however, seek to have IGRA "work as it was intended to

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to the National Indian Gaming Commission for a Class III certificate if a state fails to consent to federal court jurisdiction or raises a defense against such jurisdiction); H.R. 6158, 102d Cong., 2d Sess. (1992) (allowing states the option to enter into Class III compact negotiations and allowing tribes to seek National Indian Gaming Commission certification for Class III gaming if a state fails to consent to jurisdiction or a federal court finds it lacks jurisdiction to enforce compact provision); H.R. 2788, 101st Cong., 1st Sess. (1988) (providing additional time to conduct state/tribal compact negotiations).

436. See S. 1035, 103d Cong., 1st Sess. (1993) (shifting burden of proof from a state to the United States in a compact negotiation action initiated by the United States on behalf of a tribe); H.R. 2323, 103d Cong., 1st Sess. (1993) (limiting Class III gaming to those kinds of gaming expressly specified by state law); H.R. 2287, 103d Cong., 1st Sess. (1993) (placing a moratorium on Tribal-State gaming compacts); H.R. 1953, 103d Cong., 1st Sess. (1993) (barring any type of Class III gaming on Indian lands unless specifically allowed by the state); H.R. 1953, 103d Cong., 1st Sess. (1993) (limiting Class III gaming to those activities expressly authorized by state law); H.R. 1261, 103d Cong., 1st Sess. (1993) (prohibiting any type of Class III gaming on Indian lands unless specifically allowed by the state); H.R. 6172, 102d Cong., 2d Sess. (1992) (excluding from evidence that a state has not negotiated a compact in good faith a state's demand that negotiations gaming activities contemplated a compact with a tribe be conducted on the same basis as those conducted by any other person or entity under state law); H.R. 1670, 102d Cong., 1st Sess. (1991) (requiring the agreement of any state located within 45 miles of the proposed location of any gaming activity on newly acquired Indian land before such activity may be conducted).

437. *Oversight Hearing Before the Subcommittee on Native American Affairs of the House Committee on Natural Resources on Implementation of Public Law 100-497, The Indian Gaming Regulatory Act of 1988, Serial No. 103-17, Part III*, 103d Cong., 1st Sess. 12 (June 25, 1993) [hereinafter *Oversight Hearings*] (statement of James Bilbray, Congressman from Nevada).

438. *Oversight Hearings*, *supra* note 437, at 12 (June 25, 1993) (statement of Rep. Bilbray, inserting into record U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, SURVEY REPORT: IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT, No. 93-I-349 (Dec. 1992)).

work.”<sup>439</sup> Until the compact controversy is definitely resolved by Congress or the Supreme Court, the Indians’ “New Buffalo” will remain hobbled.

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<sup>439</sup>. *Oversight Hearings*, *supra* note 437, at 341 (Apr. 2, 1993) (statement of John Kieffer, Vice Chairman, Spokane Tribe of Indians).



## **NOTES**



