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A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming

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COMMENT

A HOUSE OF CARDS: HAS THE FEDERAL GOVERNMENT SUCCEEDED IN REGULATING INDIAN GAMING?

I. INTRODUCTION

The United States has a special relationship with Indian tribes.[1] By use of the Constitution and numerous treaties, the federal government has endeavored to protect tribes from states, which have often coveted Indian lands and assets and have sought to impose their will on the Indian tribes and people.[2] In 1831, the Supreme Court held in *Cherokee Nation v. Georgia*[3] that Indian Nations have the full legal right to manage their own affairs, govern themselves internally, and engage in legal and political relationships with the federal government and its subdivisions.[4] Yet the Court also recognized that tribal sovereignty is dependent on, and subordinate to, the federal government.[5]

The Indian Gaming Regulatory Act[6] ("IGRA" or "the Act"), passed by Congress in 1988, both recognizes and infringes upon tribal sovereignty. IGRA was enacted, *inter alia*, to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . . ."[7] IGRA's regulatory structure authorizes Indian tribes to conduct gaming activities on tribal lands.[8] While allowing complete freedom for

1. Throughout this Comment the terms "Indian tribes" or "tribes" shall mean any federally recognized Indian tribe.

2. *Indian Nations are Sovereign Governments*, (visited July 28, 1996) <http://www.dgsys.com/~niga/history.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*). *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

3. 30 U.S. 1 (1831).

4. *Id.*

5. *Cabazon*, 480 U.S. at 207 (citations omitted).

6. Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (1994).

7. *Id.* § 2702(1).

8. *Id.* §§ 2701–21.

tribal and social games, IGRA "provides a system of joint regulation by the tribes and the federal government" for bingo and similar games "and a system for compacts between tribes and states for regulation" of "Las Vegas" style games.[9]

In the eight years since its passage, IGRA has been attacked in court on several fronts.[10] Many of the decisions have resulted in restrictions on the types of gaming allowed on Indian lands.[11] The most recent attack occurred in *Seminole Tribe v. Florida*,[12] in which the United States Supreme Court held that IGRA violates the Eleventh Amendment.

This Comment analyzes the Indian Gaming Regulatory Act and the arguments and decisions affecting Indian gaming. Part II provides a general overview and background of IGRA, outlining its regulatory structure. Part III considers the constitutional challenges to IGRA. This section will address the recent Eleventh Amendment challenge in *Seminole Tribe v. Florida*. This part also analyzes the Tenth Amendment challenges to IGRA by exploring several federal court decisions. Assuming that IGRA, at a minimum, imposes on the states a duty to negotiate, Part IV focuses on the classification of certain types of games, including whether a state "permits" high-stakes casino games. Finally, Part V presents the author's view that IGRA only partially succeeds in regulating Indian gaming. The author contends that Congress intended to allow tribes to conduct many forms of games, and that, in some instances, the courts have incorrectly interpreted IGRA, thus unjustly restricting tribal gaming.

II. BACKGROUND

A. Indian Gaming in the United States

Tribal governments began sponsoring large-scale gaming in the late 1970s. As state lotteries began to proliferate, several Indian tribes began to raise revenues by operating bingo games that offered prizes larger than those allowed under state law.[13] The Penobscot Nation and the Seminole

9. S. REP. NO. 100-446, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.

10. *See* discussion *infra* Part III.

11. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (holding that states cannot be sued in federal court); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994) (holding that states must negotiate with the tribes for only those casino games that are permitted in the state).

12. 116 S. Ct. 1114 (1996).

13. *History of Tribal Gaming* (visited May 28, 1996)

Tribe were the first tribes to establish these high-stakes bingo games.[14] These tribes opened bingo gaming halls to raise revenue.[15] Local law enforcement agencies surrounding the Penobscot and Seminole bingo facilities brought actions to enjoin the gaming operations. The tribes prevailed in these suits because the courts found that the laws were civil in nature and such regulation was beyond the state's regulatory authority.[16] As a result of the Penobscot Nation's and Seminole Tribe's successes, other tribes established gaming operations. Currently, many tribes rely on gaming revenue for their survival and economic prosperity.[17]

Gaming operations have become the single largest source of income for Indian tribes.[18] Historically, Indian agricultural resources had been the largest source of income, bringing in an estimated $550 million annually.[19] In addition, revenues from oil, gas, minerals, and forestry total almost $300 million annually.[20] However, income from Indian gaming sources eclipses the combined revenue from Indian natural resources and agriculture.

Indian gaming has also generated tens of thousands of new jobs for both tribal and non-tribal members,[21] ending unemployment rates of 90 to 100% and beginning an era of full employment for tribal members.[22] Increased employment is only one of the benefits derived from gaming operations. IGRA requires Indian tribes to appropriate the profits from gaming activities to fund tribal government operations or programs and to promote economic development.[23] Virtually all of the proceeds from Indian gaming activities are used to fund the social, welfare, education, and health needs of Indian tribes.[24] Schools, health facilities, roads, and

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<http://www.dgsys.com/~niga/history.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

14. The Penobscot Nation in Maine established its operations in 1977. The Seminole Tribe in Florida established its gaming operations in 1979. *See* Penobscot Nation v. Stilphen, 461 A.2d 478, 479–80 (Me. 1983); *see also* Seminole Tribe v. Butterworth, 491 F. Supp. 1015 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (5th Cir. Unit B 1981).

15. Keith D. Bilezerian, Note, *Ante Up or Fold: States Attempt to Play Their Hand While Indian Casinos Cash In*, 29 NEW ENG. L. REV. 463, 465 (1995).

16. *See id.*

17. *Id.* at 465 n.15.

18 141 CONG. REC. S3401 (daily ed. Mar. 2, 1995) (statement of Sen. McCain).

19. *Id.*

20. *Id.*

21. *Statistics on Economic Impact of Indian Gaming* (visited July 28, 1996) <http://www.dgsys.com/~niga/stats.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

22. 141 CONG. REC. S3401 (daily ed. Mar. 2, 1995) (statement of Sen. McCain).

23. 25 U.S.C. § 2710(b)(2)(B) (1994).

24. *Where The Proceeds Go: Helping Indian Nations Recover From Centuries of Economic*

other vital infrastructure are built by Indian tribes with proceeds from Indian gaming.[25]

In 1993, the Cabazon tribe in Indio, California, reported $63 million in wagers.[26] The Tribe did not disclose its profit, but it was substantial enough to fund a child-care center, a museum, and free housing and to provide $60,000 payments to each of the thirty tribe members.[27] The Mashantucket Pequot tribe in Connecticut expanded the Foxwoods Casino in 1993.[28] With the addition, it was the largest in the Western Hemisphere and had a projected income of over $225 million.[29] The success of the casino enabled the Tribe to donate $10 million to the Smithsonian Institute to help build the National Museum of the American Indian.[30]

Advocates consider Indian gaming one of the best methods of bringing economic self-sufficiency to tribes. Conversely, opponents perceive gaming as bringing organized crime to a group of people who cannot adequately protect themselves.[31] Supporters of Indian interests respond that fear of organized crime is simply a smoke screen to hide the real reason for opposition: fear of economic competition.[32] As Senator John McCain (R-Ariz.), a supporter of Indian gaming, explained during a Senate hearing on Indian Gaming:

> [I]n 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[s] and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe[s] have is negotiable.[33]

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and Social Neglect (visited July 28, 1996) <http://www.dgsys.com/~niga/proceeds.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

25. 141 CONG. REC. S3401 (daily ed. Mar. 2, 1995) (statement of Sen. McCain).

26. Tom Gorman & Paul Lieberman, *Showdown at Hand over Indian Video Gaming Boom*, L.A. TIMES, July 12, 1994, at A16.

27. *Id.*

28. Gerald M. Carbone, *Foxwoods Tops Casino Heap*, PROVIDENCE J., Sept. 3, 1993, at A1.

29. *Id.*

30. John E. Mulligan, *Pequots Give $10 Million to Smithsonian*, PROVIDENCE J., Oct. 25, 1994, at A1.

31. Chet Lunner, *Trump, Congressman Argue Over Indian Casino Gaming*, Gannett News Service, Oct. 5, 1993, *available in* LEXIS, News Library, GNS File; *see* Jay Romano, *3 Indian Tribes Stir Casino Fears*, N.Y. TIMES, Aug. 1, 1993, § 13 at 1. For example, Donald Trump brought suit to block Indian gaming, arguing that Class III gaming brings organized crime into the area.

32. Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 519 (1995).

33. S. REP. NO. 100-446, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103.

Many members of Congress focused on the fear of organized crime.[34] However, Senator Chic Hecht (D-Nev.) admitted that economic factors were the true reason for opposing gaming. "[T]he 32 States that have Indian lands within their borders can anticipate severe negative impacts on legal gambling revenues as a result of reservation gaming .... Revenues from charitable games other than bingo ('Las Vegas Nights,' pull-tabs, etc.) would decline by $27 million ...."[35] Citing the need to standardize Indian gaming and prevent the infiltration of criminal elements into Indian gaming operations, Congress passed IGRA.[36]

Since the passage of IGRA, many tribes have taken advantage of a great opportunity to raise revenue; consequently, the amount of gaming among Indian tribes increased.[37] In 1993, Indian gaming generated almost $4 billion in gross revenue and approximately $750 million in net revenue.[38] Today, there are approximately 260 gaming operations on 170 reservations in twenty-two states.[39] Additionally, there are 124 tribes in twenty-four states conducting a variety of gaming operations under 140 compacts.[40]

B. Pre-IGRA Regulation of Activities on Indian Lands

During the 1950s, Congress became concerned with the social and living conditions on Indian lands and resolved to correct the situation.[41] Believing that the tribes were unable to handle basic regulatory

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34. *Id.* at 36, *reprinted in* 1988 U.C.C.A.N. 3071, 3105; Kelly, *supra* note 32, at 519.

35. Kelly, *supra* note 32, at 519 (quoting *Gaming Activities on Indian Reservations and Lands: Hearings on S. 555 and S. 1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 187 (1987)).

36. 25 U.S.C. §§ 2701, 2702(2) (1994).

37. However, fewer than one-third of all tribes in the United States have gaming operations. *Statistics on Economic Impact of Indian Gaming* (visited July 28, 1996) <http://www.dgsys.com/~niga/stats.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

38. 141 CONG. REC. S3401 (daily ed. Mar. 2, 1995) (statement of Sen. McCain). Nationwide gaming revenues exceeded $29.9 billion in 1992. *Id.* Although Indian gaming revenues are increasing at a rapid pace, Indian gaming accounted for only five percent of the total gaming revenues in 1992. *Where the Proceeds Go: Helping Indian Nations Recover from Centuries of Economic and Social Neglect* (visited July 28, 1996) <http://www.dgsys.com/~niga/proceeds.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

39. Bilezerian, *supra* note 15, at 465.

40. National Indian Gaming Commission, *Tribal-State Compact List*, Sept. 30, 1995 (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

41. Bilezerian, *supra* note 15, at 466 (citing H.R. REP. NO. 83-848, at 5 (1953)).

functions,[42] Congress opined that the best solution was to confer certain authority on the states in which the reservations were located.[43] Congress concluded that the lapse in law enforcement authority should be remedied by conferring criminal jurisdiction to the states that indicated an ability and willingness to accept such authority.[44] Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin accepted the responsibility of enforcing their criminal laws on Indian lands.[45] Tribes retained criminal jurisdiction over their members if the state did not assume such jurisdiction. Public Law 280[46] was the beginning of federal legislation addressing the recurring issue of state regulation of Indian lands.

Although Public Law 280 granted jurisdiction over criminal matters to certain states, whether those states had jurisdiction over civil suits involving Indians was subject to judicial interpretation.[47] In *California v. Cabazon Band of Mission Indians*[48] and *Bryan v. Itasca County*,[49] the United States Supreme Court interpreted Public Law 280 as conferring jurisdiction to states over private civil litigation involving Indians but not as granting the states "general civil regulatory authority" over them.[50] Thus, when a state seeks to enforce its laws on Indian lands under the authority granted by Public Law 280, the court must determine whether the law is criminal in nature, and thus fully applicable to the tribe, or civil in nature, and applicable only as it may be relevant in private civil litigation involving tribal members.[51]

The *Bryan* Court simplified this distinction by creating two classes of laws. Those that are "criminal/prohibitory" are enforceable by the state, and those that are "civil/regulatory" are unenforceable. The Court established the following test for determining whether a particular law is "criminal/prohibitory" or "civil/regulatory:"

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law] 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at

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42. *Id.* (citing H.R. REP. NO. 83-848, at 5–6).

43. *Id.*

44. *Id.* at 466–67 n.27 (quoting H.R. REP. NO. 83-848, at 6).

45. *Id.* at 467 n.29 (citing 18 U.S.C. § 1162(a) (1953)).

46. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in 18 U.S.C. § 1162 (1994), and 28 U.S.C. § 1360 (1994)).

47. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Bryan v. Itasca County, 426 U.S. 373 (1976).

48. 480 U.S. 202 (1987).

49. 426 U.S. 373 (1976).

50. *Cabazon*, 480 U.S. at 208 (citing *Bryan*, 426 U.S. at 385, 388–90).

51. *Id.*

> issue, subject to regulation, it must be classified as civil/regulatory and [Public Law] 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.[52]

If a state generally permits an activity, but regulates the manner in which the activity is conducted, the state will not be allowed to enforce such laws or regulations on Indian lands.

For example, California allows charitable organizations to operate bingo games, but it limits the amounts that can be won per game.[53] Under the test set out by *Bryan*, California's laws are civil/regulatory because the State generally permits bingo, but subjects the operation of bingo games to regulation. Thus, California could not enforce its laws on Indian lands as it could in the rest of the state. If a state wants to prohibit tribes from operating a certain type of gaming activity, for instance, card clubs, the state must generally prohibit the operation of card clubs within its borders.[54]

After the *Cabazon* decision, the Seminole Tribe opened a high stakes bingo hall in Broward County, Florida.[55] The Tribe believed that it was not subject to the regulations regarding bingo games in the state.[56] For instance, the Tribe did not abide by the statute that limited the maximum pot per game.[57] The Tribe opened the casino despite a threat from the local sheriff to arrest anyone playing bingo at the Tribe's gaming hall.[58] In turn, the Tribe sued to enjoin the State from enforcing its bingo regulations.[59] The court determined that Florida's bingo laws were civil/regulatory rather than criminal/prohibitory; therefore, the State had no authority to apply its bingo laws on tribal land.[60] In reaching its decision, the court examined State law and State public policy and found Florida's law and policy permitted gaming.[61] Further, the court declined

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52. *Id.* at 209.

53. CAL. PENAL CODE § 326.5(n) (West 1988 & Supp. 1996).

54. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

55. Seminole Tribe v. Butterworth, 491 F. Supp. 1015, 1016 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (5th Cir. Unit B 1981).

56. *Id.*

57. *Id.* at 1017.

58. *Id.*

59. *Id.* at 1016.

60. *Id.* at 1020; Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 770 (1995).

61. *See Seminole Tribe*, 491 F. Supp. at 1018–20.

to classify the bingo statute as criminal even though the statute provided for penal sanctions.[62]

The decision in *Seminole Tribe v. Butterworth* opened the door for high-stakes bingo as a revenue source on Indian reservations throughout the country.[63] Subsequent decisions also made a distinction between criminal/prohibitory and civil/regulatory statutes.[64] Those cases led to a new era of gaming on Indian lands—the *Cabazon* Court stated that the government was going to take a "hands-off" approach to Indian gaming and allow the tribes to govern themselves.[65] This policy, however, was short lived.

Congress exercised its plenary powers over Indian affairs and enacted IGRA for several reasons: (1) the lack of clarity in the regulation of Indian gaming;[66] (2) the uncertainty of whether tribal, state, or federal laws governed the regulation of Indian gaming;[67] and (3) fear that organized crime would infiltrate Indian gaming.[68] Congress expressly determined that "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."[69] Although Congress intended IGRA to preempt state law governance of Indian gaming,[70] IGRA incorporated state law for the purpose of determining whether Class II or Class III games can be operated on Indian lands.[71] Additionally, IGRA recognized the importance of state laws and public policy during the negotiation of a Tribal-State compact for the operation of Class III games.[72]

Many observers of the actions surrounding the development of IGRA said: "Like most compromises, IGRA ha[d] something for everyone to

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62. *Id.* at 1020.

63. Kelly, *supra* note 32, at 503.

64. Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981); *accord* Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982).

65. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221–22 (1987).

66. 25 U.S.C. § 2701(3) (1994).

67. *Id.* § 2702(3).

68. *See generally* S. REP. NO. 100-446, at 1–2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071–72.

69. 25 U.S.C. § 2701(5) (1994).

70. S. REP. NO. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076.

71. *Id.* at 35, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3104; *see* discussion *infra* Parts II.C.1–3 for the distinction between Class I, II, and III games.

72. *Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

hate."[73] Tribal leaders denounced the bill and warned of possible negative repercussions if IGRA passed.[74] Doran Morris, chairman of the Omaha Tribe, stated that the legislation would be "economically disastrous" and was the result of "the gaming lords of Las Vegas [who] have seduced certain members of Congress into supporting the state jurisdiction provision in order to preserve the Las Vegas monopoly."[75] In the aftermath of the *Cabazon* decision, legislators and the gambling industry were more conciliatory, but some tribes were still opposed to IGRA.[76] Tribal members in South Dakota opposed the bill principally because the Tribal-State compact was, in their opinion:

> [A] derogation of the status of Indian tribes as domestic sovereign nations. The direct or indirect application of State law in Indian country ... is a dangerous and unwarranted precedent for further inroads upon tribal sovereignty. They further believe that opponents to Indian self-determination and strong tribal government will use this unwarranted precedent as a justification for State taxation, zoning, water regulation and further jurisdiction over tribal economic activities.[77]

Despite the rampant debate, both the House and the Senate easily passed IGRA. In order to alleviate the tension between Indian affairs and the federal government, Congress had to exercise its plenary power over the Tribes in order to establish nationwide standards for the regulation of the Indian gaming industry.

C. An Overview: The Indian Gaming Regulatory Act

IGRA provides a system for regulating gaming on Indian lands. Congress enacted IGRA pursuant to the Indian Commerce Clause, which grants Congress plenary power over Indian affairs.[78] IGRA establishes a three-tiered regulatory scheme to determine what type of gaming is conducted and a method of entering into an agreement with the state to

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73. Kelly, *supra* note 32, at 506 (citing 138 CONG. REC. E1399 (daily ed. May 14, 1992) (statement of Rep. Faleomavaega)).

74. *Id.*

75. Dinah Wisenberg, States News Serv., Sept. 7, 1988, *available in* LEXIS, News Library, SNS File.

76. Kelly, *supra* note 32, at 506–7.

77. *Id.* at 507 (citing 134 CONG. REC. S12656 (daily ed. Sept. 15, 1988) (statement of Sen. Daschle, opposing the bill)).

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

conduct casino type gaming. The level of state and/or federal regulation depends upon the type, or class, of gaming.[79] State and federal governments have no regulatory control over tribal or social games.[80] Bingo and lotto type games are regulated jointly by the tribe and federal government.[81] Tribes and states employ an agreement process to regulate casino or high-stakes gaming.[82]

1. Class I Gaming

Class I gaming[83] may be operated by the tribe without restrictions by state or federal governments.[84] For example, a friendly game of "Go Fish" would qualify as social gaming. Class I gaming, because of its social and ceremonial scope, has not been a source of litigation.

2. Class II Gaming

Class II includes games that were played by the tribes at the time IGRA was enacted.[85] Tribes may conduct Class II gaming if: "(A) such Indian gaming is located within a State that *permits such gaming* for any purpose by any person, organization or entity . . . and (B) the governing body of the Indian tribe adopts an ordinance" that permits such gaming.[86] Thus, states have very little control over whether Class II gaming is played and have no control over its regulation.

Class II gaming includes lotto and bingo games.[87] Pull-tabs,[88] punch boards, tip jars, instant bingo, and other games similar to bingo are permitted if played at the same location as bingo.[89] Class II gaming also permits non-banked card games such as poker if the games are played in a

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79. *See* 25 U.S.C. § 2710 (1994).

80. *Id.* §§ 2703(6), 2710(a)(1).

81. *Id.* § 2703(7)(A), 2710(a)(2).

82. *Id.* § 2710(d). These "agreements" are termed "compacts" by IGRA. *Id.*

83. 25 U.S.C. § 2703(6). "The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." *Id.*

84. *Id.* § 2710(a)(1).

85. Cox, *supra* note 60, at 775.

86. 25 U.S.C. § 2710(b)(1) (emphasis added).

87. *Id.* § 2703(7)(A)(i).

88. "Pull-tabs" are paper card games in which players purchase outwardly-identical cards from a box and open tabs to determine if the card is a winner. Each box includes a predetermined number of winning and losing cards, thus the casino operator has no interest in the outcome of any particular game. *See* Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 827 F. Supp. 26, 28 n.2 (D.D.C. 1993), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994).

89. *Id.* § 2703(7)(A).

state that authorizes, or at least does not explicitly prohibit, such games.[90] This class is further defined by what it excludes: "banking card games, including baccarat, chemin de fer, or blackjack (21), . . . [and] electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[91] Many of these games would have been classified as Class II under IGRA as it was originally introduced.[92] The enacted version of IGRA, however, expressly prohibits electronic facsimiles of games of chance from Class II.[93]

3. Class III Gaming

Class III games typically involve high stakes and are viewed as the type that attract organized crime, thus requiring closer regulation.[94] Class III gaming includes those games not found in Class I or II.[95] Thus, all electronic versions of Class II games, slot machines, roulette, and blackjack, are examples of Class III gaming.[96] Specifically, Class III gaming is allowed only if such games are:

> (A) authorized by an ordinance or resolution that–
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> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
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> (ii) meets the requirements of subsection (b) of this section, and
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> (iii) is approved by the Chairman,
>
> (B) located in a State that *permits such gaming* for any purpose by any person, organization, or entity, and
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> (C) conducted *in conformance with a Tribal-State compact* entered into by the Indian tribe and the State under paragraph (3) that is in effect.[97]

Typically, one would associate Class III gambling with casino games played in Las Vegas or Atlantic City. Class II and Class III gaming are

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90. *Id.*

91. *Id.* § 2703(7)(B).

92. Cox, *supra* note 60, at 775. As originally introduced, IGRA included electronic facsimiles of games of chance (e.g., electronic pull-tabs) in Class II. *Id.*

93. 25 U.S.C. § 2703(7)(B) (1994).

94. Edward P. Sullivan, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1127 (1995) (citing I. Nelson Rose, *Gambling and the Law – Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 105 (1992)).

95. *Id.*; 25 U.S.C. § 2703(8) (1994).

96. 25 U.S.C. §§ 2703(6)–(8); *see* discussion *supra* Part II.C.1–2.

97. *Id.* § 2710(d) (emphasis added).

differentiated based upon the player's relationship with the house. The house does not care who wins or loses when it operates Class II games; it merely regulates the operation of the games and will make a profit as long as the games are played. In Class III gaming, for example, blackjack, players play against the house; thus, the house has an interest in who wins or loses.

i. Tribal-State Compact

Class III gaming is permitted through a Tribal-State compact.[98] This compact is an agreement between the state and the tribe that describes the type of gaming that will be permitted and the conditions under which such gaming can be conducted. Congress' purpose in requiring a Tribal-State compact was to create a mechanism to balance the interests of the states and the tribes.[99] The states' interests include public safety, economic prosperity, and the interplay between state public policy and the operation of Class III gaming on tribal lands.[100] The states' interests must be balanced against tribal interests, which include tribal sovereignty, revenue raising, and self-determination.[101] The compact was also intended to put the states and the tribes on a level playing field, where two equal sovereigns would negotiate.[102]

The Indian tribe seeking to establish Class III gaming must request that the state in which it is located enter into compact negotiations.[103] The state, upon receiving the request, must negotiate in good faith with the

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98. 25 U.S.C. § 2710(d)(3)(B). The compacting process is very unusual. The federal government has plenary power over Indian affairs; thus, the states only have authority to govern Indian affairs because the federal government delegated its authority to the states. Only through IGRA do the states receive any authority to govern, or apply state regulatory laws on Tribal lands. The Tribal-State compact allows the states to have significant influence over gaming on Indian lands. However, "the compact requirement for class III [gaming is] not [to] be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

99. Marianne T. Caulfield, *Will It Take a Move by the New York Yankees for the Seneca Nation to Obtain a Class III Gaming License?*, 44 CATH. U. L. REV. 279, 297–98 (1994); S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. "This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." S. REP. NO. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076.

100. *See* S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

101. *See id.*

102. *Id.*; *see* Caulfield, *supra* note 99, at 298.

103. 25 U.S.C. § 2710(d)(3)(A).

tribe to enter into a Tribal-State compact.[104] IGRA provides the parameters for such compact. Among other terms, a compact may include provisions concerning the application and enforcement of tribal and state criminal and civil laws or regulations, state assessments to offset the cost of regulation, and standards for the operation and maintenance of the gaming facilities.[105]

ii. Procedure for Compact Conclusion

The Secretary of the Interior ("the Secretary") is authorized to approve negotiated Tribal-State compacts.[106] The Secretary has forty-five days to approve or disapprove a compact after it has been submitted.[107] The Secretary may disapprove a compact if it violates IGRA, other federal laws, or the obligations of the United States to Indians.[108]

IGRA also vests the federal district courts with jurisdiction over actions arising from a state's refusal to negotiate with a tribe or failure to negotiate in good faith.[109] A tribe may initiate an action within 180 days from the date of the request to enter into compact negotiations.[110] If the parties do not enter into a compact, the tribe must prove that the state either was unresponsive to the request for compact negotiations[111] or did not respond to the request in good faith.[112] To exonerate itself, the state must prove that it negotiated with the Indian tribe in good faith.[113]

When determining whether a state has negotiated in good faith, the court may consider public interest, public safety, and the adverse economic impacts on existing gaming operations.[114] If the court finds that the state has failed to negotiate in good faith, it will issue an order requiring the state and the tribe "to conclude such a compact within a sixty-day period."[115] If the state and tribe fail to enter into a compact within this

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104. *Id.* Whether the tribe's 'good faith' requirement is met when it refuses to negotiate is debatable.

105. *Id.* § 2710(d)(3)(C).

106. *Id.* § 2710(d)(8)(A).

107. *Id.* § 2710(d)(8)(C).

108. *Id.* § 2710(d)(8)(B).

109. 25 U.S.C. § 2710(d)(7)(A)(i). This feature of the act implicates the state's Eleventh Amendment immunity. *See* discussion *infra* Part III.A.

110. *Id.* § 2710(d)(7)(B)(i).

111. The circuit court in Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994), read this part of IGRA very narrowly.

112. 25 U.S.C. § 2710(d)(7)(B)(ii).

113. *Id.*

114. *Id.* § 2710(d)(7)(B)(iii).

115. *Id.*

period, the parties must submit their respective last best offers to a court-appointed mediator.[116] The mediator selects the compact that best comports with the Act and other applicable federal laws.[117] The state then has sixty days to consent to this compact.[118] If the state does not consent, the state is removed from the process and the Secretary will prescribe procedures for conducting Class III gaming.[119]

III. ARGUMENTS AGAINST THE APPLICATION OF IGRA

IGRA has spawned considerable litigation. Many states oppose the operation of Class III gaming within their borders. Some states, in fact, flatly refuse to negotiate Tribal-State compacts because of fundamental moral and legal disagreements with Indian tribes regarding the scope of gaming that can be conducted in the states.[120] In such cases, IGRA authorizes tribes to sue in federal court to compel states to negotiate. In response, states argue that IGRA violates the Tenth Amendment and/or the Eleventh Amendment.[121]

Recently, in *Seminole Tribe v. Florida*,[122] the United States Supreme Court held that the Eleventh Amendment precludes tribes from suing states in federal court to compel negotiation of a Tribal-State compact.[123] This decision prevents tribes from using IGRA's federal court remedy.

States have also argued that IGRA violates the Tenth Amendment's implied limitation on Congress' power to regulate the states. Although this argument has not been pursued in state court, states have had mixed success with this argument in federal courts.[124] In response to these issues,

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116. *Id.* § 2710(d)(7)(B)(iv).

117. *Id.*

118. 25 U.S.C. § 2710(d)(7)(B)(vii).

119. *Id.* The Secretary of the Interior, after consultation with the Tribe, will prescribe procedures for conducting Class III gaming that are consistent with tribe law and the compact chosen by the mediator. *Id.*

120. S. REP. NO. 104-861, at 10 (1996). The legislative history of IGRA addresses the argument that gaming is a moral wrong and should not be conducted by Indian tribes. Senator Evans stated: "Lotteries and other forms of gambling abound in many States, charities, and church organization nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live." S. REP. NO. 100-446, at 36 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3105.

121. The Eleventh Amendment is a jurisdictional bar; the Tenth Amendment affects the merits of the case.

122. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (5-4 decision).

123. *Id.* at 1133.

124. Kelly, *supra* note 32, at 522; *see, e.g.*, Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th

brought by anyone except the United States or another state.[131] The Court has held that suits against the states in federal court were not contemplated when the Constitution established the judicial power of the United States.[132] A state can waive its immunity and thereby consent to suit in federal court by a state legislative enactment or by a provision in the state's constitution.[133] Generally, states have not waived their immunity privilege for violations of IGRA.[134]

2. Abrogation by Express Congressional Intent

Courts use a two-pronged analysis to determine if Congress has effectively abrogated a state's immunity: first, did Congress "unequivocally express its intent to abrogate the immunity" of the states;[135] and second, did Congress have the power to abrogate state sovereign immunity in this circumstance?[136]

i. Prong One: Did Congress Express Its Intent to Abrogate State Immunity?

Congress' intent to abrogate immunity must be "exercised with unmistakable clarity."[137] This rule stems from recognition of the important role played by the Eleventh Amendment and the policy it reflects.[138] The Supreme Court held in *Atascadero State Hospital v. Scanlon*[139] that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[140] *Seminole Tribe* clarified that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only

131. *See Seminole Tribe*, 116 S. Ct. at 1122.

132. *Id.* (citing Hans v. Louisiana, 134 U.S. 1, 15 (1890)).

133. Seminole Tribe v. Florida, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996).

134. *See* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 554–63 (S.D. Ala. 1991), *aff'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd sub nom.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

135. *Seminole Tribe*, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

136. *Id.*

137. Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 (1991).

138. *Seminole Tribe*, 116 S. Ct. at 1123.

139. 473 U.S. 234 (1985).

140. *Id.* at 246.

Congress could probably amend IGRA to cure the Tenth Amendment defect. However, Congress could not cure the Eleventh Amendment defect and still retain the federal court remedy. Thus, an overhaul of IGRA's Class III gaming regulations may be necessary.

A. Eleventh Amendment

In *Seminole Tribe*, Florida successfully challenged IGRA on Eleventh Amendment grounds.[125] The Supreme Court interpreted the Eleventh Amendment to "stand not so much for what it says, but for the presupposition . . . which it confirms."[126] According to the Court, that presupposition has two parts: first, each state is a sovereign entity in our federal system; and second, it is inherent in the nature of state sovereignty that states are not amenable to suit in federal court without their consent.[127]

Despite the Eleventh Amendment's strong guaranty of immunity, the Court has held that this right can be abrogated in three instances. First, a state can consent to suit in a federal court by waiving its immunity.[128] Second, Congress can expressly abrogate a state's sovereign immunity in certain situations.[129] Third, state officials may be subject to suit in federal court where the suit seeks injunctive relief in order to end a continuing federal law violation.[130]

1. State's Waiver of Immunity—Express Consent

For more than a century, the Supreme Court has held that federal courts do not have jurisdiction over suits against unconsenting states

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Cir. 1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. 1993), *aff'd in part, rev'd in part*, 64 F.3d 1250 (9th Cir. 1994) (as amended).

125. 116 S. Ct. 1114 (1996). The Eleventh Amendment states: "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.

126. *Seminole Tribe*, 116 S. Ct. at 1122 (quoting Blatchford v. Native Village, 501 U.S. 775, 779 (1991)).

127. *Id.* (citing Hans v. Louisiana, 134 U.S. 1, 13 (1890)).

128. *See id.* at 1123.

129. *Id.* Prior to the Supreme Court's decision *Seminole Tribe*, Congress had this power when acting under the Interstate Commerce Clause, Fourteenth Amendment, and possibly the Indian Commerce Clause. Sullivan, *supra* note 94, at 1132–33. Subsequent to this decision, Congress can only abrogate states' Eleventh Amendment Immunity pursuant to the Fourteenth Amendment.

130. *Ex Parte* Young, 209 U.S. 123 (1908).

by making its intention unmistakably clear in the language of the statute."[141]

Relying on the legislative history and the text of the Act, courts have found that Congress expressed its intent to abrogate states' immunity in IGRA.[142] In *Seminole Tribe*, the Supreme Court analyzed the various sections and agreed with the Eleventh Circuit, and virtually every other court that has addressed the issue, in holding that Congress made an unmistakably clear statement of its intent to abrogate state immunity.[143] IGRA vests jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a state to enter into negotiations . . . or to conduct such negotiations in good faith."[144] After determining that the federal courts were given the jurisdiction to hear suits arising under IGRA, the Court had to determine whether or not Congress intended that the state would be the defendant in such a suit.[145]

The Court found that the provisions of 25 U.S.C. § 2710(d)(7)(B) resolved any doubt as to the identity of the defendant.[146] Most of the subsections of 25 U.S.C. § 2710(d)(7) refer to the "State" in a context that makes it clear that the state is the defendant to the suit brought by an Indian tribe. For example, 25 U.S.C. § 2710(d)(7)(B)(iii) provides that if the court "finds that the state has failed to negotiate in good faith . . . , the court shall order the State . . ."; and 25 U.S.C. § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court." In reviewing these sections and others, the Court found that "the numerous references to the 'State' in the text . . . make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit."[147]

The Eighth and Ninth Circuits addressed the issue of whether IGRA is an unmistakable abrogation of state immunity in *Cheyenne River Sioux Tribe v. South Dakota*[148] and *Spokane Tribe of Indians v. Washington*,[149]

141. *Seminole Tribe*, 116 S. Ct. at 1123 (quoting Dellmuth v. Muth, 491 U.S. 223 (1989)).

142. Spokane Tribe of Indians v. Washington, 28 F.3d 991, 994 (9th Cir. 1994). "Every federal court that has considered the issue has concluded that the IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity." *Id.* (citations omitted).

143. *Seminole Tribe*, 116 S. Ct. at 1123–24; *see, e.g.*, Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994); *Spokane Tribe*, 28 F.3d at 994; Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993).

144. *Seminole Tribe*, 116 S. Ct. at 1124 (quoting 25 U.S.C. § 2710(d)(7)(A)(i) (1994)).

145. *Id.* at 1123–24.

146. *Id.*

147. *Id.* at 1124.

148. 3 F.3d 273 (8th Cir. 1993).

149. 28 F.3d 991 (9th Cir. 1994).

respectively. Both courts found that IGRA authorizes suit in federal court for injunctive relief and that the Act only contemplates a tribe's suit against a state. The Eighth Circuit held that Congress' "express provision for federal jurisdiction over claims under the IGRA is sufficient to abrogate the states' [E]leventh [A]mendment immunity."[150] The Ninth Circuit held the state was not immune from litigation because "IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity."[151] Based on this construction and the text of IGRA, the Ninth Circuit found that the provision making the states susceptible to suit in the federal courts is the clearest statement of Congressional intent short of mentioning the Eleventh Amendment or sovereign immunity.[152]

The *Seminole Tribe* Court correctly found that Congress clearly indicated its intent to abrogate state sovereign immunity. Determining that Congress clearly or unmistakably expressed its intent to abrogate state immunity is not, however, the end of the Eleventh Amendment analysis. In order for this expression of intent to be upheld, it must be made pursuant to a valid exercise of power.[153]

ii. Prong Two: Does Congress Have the Power to Abrogate State Sovereign Immunity?

Congress may abrogate state sovereign immunity only if it is acting pursuant to a constitutional grant of authority. In *Seminole Tribe*, the Court considered whether IGRA was "passed pursuant to a constitutional provision granting Congress the power to abrogate."[154]

(a) Historical Treatment of Congress' Power to Abrogate

The Supreme Court has identified two potential sources of constitutional authority under which Congress may abrogate the states' immunity from suit in federal court: (1) the Interstate Commerce Clause[155] and (2) section five of the Fourteenth Amendment.[156] In

150. *Cheyenne River Sioux Tribe*, 3 F.3d at 281.

151. *Spokane Tribe*, 28 F.3d at 994.

152. *Id.* at 995.

153. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1124 (1996) (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).

154. *Id.* at 1125.

155 U.S. CONST., art. 1, § 8, cl. 3.

156. Jeffery B. Mallory, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will Seminole Tribe v. Florida be Seminal?*, 7 ST. THOMAS L. REV. 791, 801 (1995).

Pennsylvania v. Union Gas,[157] a plurality of the Supreme Court held that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity.[158] The *Union Gas* Court found that power to regulate interstate commerce would be incomplete without the power to cause the states to be liable in federal court for their actions.[159] In *Fitzpatrick v. Bitzer*,[160] the Court found that the Fourteenth Amendment expanded federal power.[161] The Court concluded that section one of the Fourteenth Amendment contained prohibitions expressly directed at the states and that section five gave Congress the power to enforce those prohibitions.[162] Thus, prior to *Seminole Tribe*, both the Interstate Commerce Clause and the Fourteenth Amendment were viable sources of congressional authority.

(b) *Seminole Tribe*: Finding a New Limitation

The district court decided that Congress passed IGRA pursuant to the Indian Commerce Clause, and the Seminole Tribe did not challenge that decision.[163] Thus, the Supreme Court did not address whether Congress passed IGRA pursuant to some other grant of power, i.e., the Interstate Commerce Clause.[164] Accordingly, the issue in *Seminole Tribe* was whether the Indian Commerce Clause allows Congress to abrogate states' sovereign immunity, as the Interstate Commerce Clause was found to do in *Union Gas*.

The Seminole Tribe asserted that *Union Gas* should control.[165] The Tribe argued that

> [t]here is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause. Indeed, Congress' plenary power over Indian affairs lends more, not less, credence to the argument that abrogation under the Indian Commerce Clause is within the power of Congress.[166]

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157. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996).

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

159. *Id.* at 19.

160. 427 U.S. 445 (1976).

161. *Id.* at 455.

162. *Id.*

163. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1125 (1996).

164. *Id.*

165. *Id.*

166. Petitioner's Brief at *17, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (No. 94-12), *available in* 1995 WL 143442 (citation omitted).

Contrasting the Interstate Commerce Clause with the Indian Commerce Clause, the Tribe asserted that the latter grants Congress exclusive power over Indian Affairs.[167] The tribe then went one step further, arguing "[t]he abrogation power must be available under the Indian Commerce Clause, in order to protect the tribes from state action denying federally guaranteed rights."[168] The tribe supported this claim by stating that the states have representatives in Congress to protect the states' interests, but the tribes must rely on the federal government to protect them from the states because they have no congressional representation.[169] This imbalance, in part, drove Congress to enact IGRA, thereby providing a federal court remedy to balance the power over Indian affairs among the federal government, the states, and the tribes.[170]

Citing *Cotton Petroleum Corp. v. New Mexico*,[171] Florida asserted that there was no basis to import the power to abrogate under the Interstate Commerce Clause to the Indian Commerce Clause.[172] The *Cotton* Court found that "the Interstate Commerce and the Indian Commerce Clauses have very different applications."[173] In *Seminole Tribe*, Florida focused on the purposes of the Interstate and Indian Commerce Clauses rather than their effect. The State argued that the intent of the Interstate Commerce Clause is to maintain free trade among the states, whereas the central purpose of the Indian Commerce Clause is to provide Congress with plenary power over Indian affairs.[174]

The federal government's plenary power over Indian affairs is central to the State's argument that the Indian Commerce Clause and the Interstate Commerce Clause are "wholly dissimilar."[175] Because of the different rationales, the State argued that the Interstate Commerce Clause grants the power to abrogate state sovereign immunity because Congress' authority would be "incomplete" without the power to abrogate state immunity.[176] Finally, the State asserted that because Congress already has authority over Indian affairs, its power is "complete," and it is therefore not "necessary"

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167. *See id.*

168. *Id.* at *20.

169. *Id.* at *21.

170. *Id.*

171. 490 U.S. 163 (1989).

172. Respondent's Brief at *8–9, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (No. 94-12), *available in* 1995 WL 271443.

173. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1126 (1996) (quoting *Cotton Petroleum*, 490 U.S. at 192).

174. *Id.*

175. Respondent's Brief at *21–22, *Seminole Tribe*, 116 S. Ct. 1114.

176. *Id.* at *23 (citing Pennsylvania v. Union Gas, 491 U.S. 1, 19–20 (1989)).

to have the power to abrogate state immunity as it has under the Interstate Commerce Clause.[177]

The Supreme Court began its discussion in *Seminole Tribe* by reviewing its decision in *Union Gas*.[178] The Court stated that the Indian Commerce Clause grants greater authority to the federal government than the Interstate Commerce Clause.[179] The next logical conclusion is that if the tribes' partial cession of power of Interstate Commerce includes a relinquishment of their sovereign immunity, a total cession of their authority under the Indian Commerce Clause would also include relinquishing state sovereign immunity. According to this theory, when the states ratified the Constitution, they relinquished some of their sovereignty. Specifically, the grant of authority to the federal government over the regulation of interstate commerce necessarily implied the power of enforcement in the federal courts.[180] Consequently, the Indian Commerce Clause is a total grant of authority to the federal government over Indian affairs, and grants no less power to the federal government than the Interstate Commerce Clause, a partial grant over interstate commerce.[181] The Court concluded that there is basically no distinction to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause in favor of the states.[182] Thus, by logical consequence, Congress, acting pursuant to the Indian Commerce Clause, should have no less power under the Indian Commerce Clause than it does when acting pursuant to the Interstate Commerce Clause. The Court, however, did not assume that its previous decision in *Union Gas* was correct, and considered the state's argument that *Union Gas* should be reconsidered and overruled.[183]

The Court found that the *Union Gas* plurality decision created confusion among the lower courts that sought to understand and apply it.[184] The Court stated that the plurality's decision in *Union Gas* varied greatly from established principals of federalism.[185] Prior to *Union Gas*, it was well established that Congress could not use any constitutional

177. *Id.*

178. *Seminole Tribe*, 116 S. Ct. at 1126.

179. *Id.*

180. *See id.*

181. *See id.*

182. *Id.* at 1127.

183. *Id.* The Court stated that it is willing to reconsider earlier decisions in constitutional cases, because correction through legislative action is nearly impossible. *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

184. *Seminole Tribe*, 116 S. Ct. at 1127.

185. *Id.*

authority other than the Fourteenth Amendment to expand federal court jurisdiction beyond the bounds of Article III.[186] The Court concluded that the *Union Gas* decision departed from established law and was of questionable precedential value because a majority of the *Union Gas* Court expressly disagreed with the plurality's rationale.[187] The *Seminole Tribe* Court thus overruled the decision in *Union Gas*.[188]

In overruling *Union Gas*, the Court reaffirmed the principle of state sovereign immunity. The Court stated that "Eleventh Amendment [immunity] is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."[189] The Court affirmed that the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to sidestep the jurisdictional limitations placed by the Constitution.[190] Thus, Congress did not have the power to abrogate state sovereign immunity when enacting 25 U.S.C. § 2710(7)(A), which provided that the tribes could sue the states in federal court.

The practical effect of the *Seminole Tribe* decision is that the tribes have no federal means to enforce the provisions of IGRA. The tribes must rely on the states' willingness to negotiate. If a state refuses to negotiate, the tribes face a critical decision: they can either operate Class III games without a Tribal-State compact or request the Secretary to prescribe rules for the operation of Class III games. If a tribe decides to conduct Class III gaming without a Tribal-State compact, the tribe will do so at its own peril. Operating Class III games in the absence of a Tribal-State compact is a violation of federal law.[191] This activity could result in criminal punishment or an injunction prohibiting the operation of Class III games.

Although Florida prevailed in *Seminole Tribe*, the State may not be as fortunate in the "big picture." One commentator noted that if the part of IGRA requiring tribes and states to enter into compacts for Class III gaming is declared unconstitutional under a Tenth or Eleventh Amendment challenge, the "states will have won the battle, but lost the war."[192] The

186. *Id.* at 1128 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). "The plurality's citation of prior decisions for support was based upon what we believe to be a misreading of precedent." *Id.* (citing Pennsylvania v. Union Gas, 491 U.S. 1, 40–41 (1989) (Scalia, J., dissenting)).

187. *Id.* at 1127.

188. *Id.* at 1128.

189. *Id.*

190. *Seminole Tribe*, 116 S. Ct. at 1131–32.

191. 18 U.S.C. § 1166 (1994).

192. I. Nelson Rose, *Gambling and the Law – Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 108–09 (1992).

states will have lost because IGRA provides a method for the states to influence the regulation of Class III gaming on tribal lands.

On the other hand, if IGRA is found to be "dead letter," and its constitutional provisions not severable, after the decision in *Seminole Tribe*, the states and tribes will be left with the law laid down by the Supreme Court in *Cabazon*.[193] Under *Cabazon*, tribes could have any form of gambling not specifically prohibited by state law, i.e., criminal/prohibitory laws.[194] If this analysis is correct, it would be more advantageous for a state to attack IGRA in another manner.[195]

3. Abrogation Due to Violation of Federal Laws: The Doctrine of *Ex Parte Young*

The *Ex Parte Young*[196] doctrine is the third exception to the general rule of state immunity. The *Seminole Tribe* Court considered the assertion that the *Ex Parte Young* doctrine allows a tribe to sue a state official to compel the state to enter into negotiation for a Tribal-State compact. In this situation, a tribe would bring suit against a state official for failing to comply with the provisions of IGRA, rather than suing the state itself. If a party brings suit against a state official, the Eleventh Amendment does not bar suit in federal court against the state for alleged violations of federal law. A state officer who violates federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."[197] Despite Congress' ability to abrogate state immunity to uphold federal constitutional rights, discretionary acts of state officials are outside this exception to the Eleventh Amendment.[198] Thus, the application of *Ex Parte Young* has broad implications in light of the Supreme Court's decision in *Seminole Tribe*.[199]

The tribes assert that negotiation under IGRA is not a discretionary act of state officials, but rather the Act mandates good faith negotiations between the state and the Indian tribe. Therefore, courts can use the

193. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

194. Rose, *supra* note 192, at 109.

195. *See* discussion *infra* Part IV.

196. 209 U.S. 123 (1908).

197. *Id.* at 160.

198. Bilezerian, *supra* note 15, at 485.

199. The Seminole Tribe argued the doctrine of *Ex Parte* Young as an alternative to its bringing suit against the state in federal court to compel the state's negotiation of a compact. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

"stripping doctrine" to compel a state official to negotiate a Tribal-State compact on behalf of the state.

The Court held that *Ex Parte Young* cannot be used to enforce IGRA.[200] The Court reasoned that *Ex Parte Young* is inapplicable because IGRA's remedial scheme[201] was specifically designed to enforce its negotiation provisions.[202] The Tribe argued that, pursuant to *Ex Parte Young*, federal courts can exercise jurisdiction over a state governor. The Tribe asserted that the Court has also had jurisdiction over suits against a state official when the suit sought prospective injunctive relief to end a violation of federal law.[203] The Court, however, determined that the situation presented in *Seminole Tribe* was sufficiently different than *Ex Parte Young* to preclude its application.[204]

The Court found that Congress passed 25 U.S.C. § 2710(d)(3) in conjunction with an intricate remedial scheme in 25 U.S.C. § 2710(d)(7).[205] When Congress creates a remedial scheme for the enforcement of a particular right, the courts have refused to supplement that scheme with the doctrine of *Ex Parte Young*.[206] The Court held that if 25 U.S.C. § 2710(d)(3) could be enforced in a suit under *Ex Parte Young*, the remedial scheme in 25 U.S.C. § 2710(d)(7) would have been extraneous.

As a result of *Seminole Tribe*, the Court deprived the tribes of another method to compel the state to enter into compact negotiations. The Court apparently failed to recognize that the intricate remedial scheme it relied upon to find *Ex Parte Young* inapplicable was the same remedial scheme that violated the Eleventh Amendment. Tribes will be forced to argue that IRGA's severability clause[207] is still valid and that the remedial scheme in 25 U.S.C. § 2710(d)(7)(A) is severable from the constitutional portions of 25 U.S.C. § 2710. Therefore, the tribes can still submit proposed compacts

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200. *Id.* at 1133.

201. 25 U.S.C. § 2710(d)(7) (1994).

202. *Seminole Tribe*, 116 S. Ct. at 1132.

203. *Id.* (citing Green v. Mansour, 474 U.S. 64, 68 (1985)). The state asserted that the violation of federal law was the Governor's failure to negotiate a compact. *Id.*

204. *Id.* (citation omitted).

205. *Id.*

206. *Id.*

207. "In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect." 25 U.S.C. § 2721 (1994). The Eleventh Circuit in *Seminole Tribe* found that there is no "strong evidence" to ignore the severability clause. Seminole Tribe v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996).

to the Secretary to prescribe rules for the operation of Class III gaming on state lands.

Congress may be able to rectify the *Seminole Tribe* Court's decision that *Ex Parte Young* is inapplicable by amending IGRA in one of two ways: (1) by including a statement that it is Congress' intent to permit the application of the *Ex Parte Young* doctrine, or (2) by deleting the detailed remedial scheme, and leaving only the mandate to the states to negotiate a Tribal-State compact.

B. The Tenth Amendment

The Tenth Amendment[208] limits the federal government's power by reserving all non-enumerated powers to the states or to the people.[209] Over the past two decades, the Supreme Court has frequently changed the extent to which the Tenth Amendment protects the states from Congress' exercise of its commerce power.

1. Tenth Amendment Jurisprudence

Prior to the Court's decision in *National League of Cities v. Usery*,[210] the Tenth Amendment provided the states with little or no protection from the federal government.[211] In *National League of Cities*, the Court held Congress could not legislate in a manner that restricts the states' ability to function in the federal system.[212] The Court found that a regulation passed pursuant to the Interstate Commerce Clause is invalid if Congress regulates the "States as states,"[213] the regulation concerns an undoubted attribute of state sovereignty, and the regulation displaces the state's

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208. The Tenth Amendment states: "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.

209. *See* New York v. United States, 505 U.S. 144, 157 (1992). In *New York*, the Court held:

> [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id.

210. 426 U.S. 833 (1976).

211. Sean Brewer, Note, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L.J. 469, 483 (1995).

212. *National League of Cities*, 426 U.S. at 843 (citing Fry v. United States, 421 U.S. 542, 547 (1975)).

213. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287 (1981) (citations omitted).

freedom "to structure integral operations in areas of traditional governmental functions."[214]

The protection afforded states by *National League of Cities* ended when it was overruled by the Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[215] Finding it difficult to define the areas of traditional governmental functions, the Court held that the structure of the federal government itself protects the states.[216] Because the federal legislative branch consists of representatives from each state, the interests of the state are adequately protected. It follows that the states' representatives would not pass a bill that would infringe on the states' rights. Once Congress acts pursuant to its Commerce Clause powers, *Garcia* holds that the Tenth Amendment may provide little or no judicial protection—the states' representatives in Congress were supposed to have already provided the protection.[217]

The Tenth Amendment was once again at issue in *New York v. United States,* which involved a Congressional regulation holding each state responsible for the disposal of low-level radioactive waste produced within its borders.[218] The Low Level Radioactive Waste Policy Amendments Act (the "Radioactive Waste Act") included three types of incentives that encouraged states to provide for disposal of the waste.[219] In reaching its decision, the Court reexamined the Tenth Amendment as a judicially enforceable limitation on the power of the federal government.

The Court held Congress could not use its power to compel the states to regulate the disposal of radioactive waste.[220] More specifically, the Tenth Amendment prevents Congress from "commandee[ring] the legislative process of the States by directly compelling . . . the [state legislature] to enact and enforce a federal regulatory program."[221]

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214. *Id.* at 288.

215. 469 U.S. 528 (1985).

216. *Id.* at 550.

217. *See* Brewer, *supra* note 211, at 484–85.

218. 505 U.S. 144 (1992).

219. Brewer, *supra* note 211, at 485–86. The first type were monetary incentives. The Radioactive Waste Act permitted states to collect surcharges for all radioactive waste from other states. Twenty-five percent of such surcharges was transferred to the federal government to be redistributed to those states that complied with the Radioactive Waste Act's timetables. *Id.* at 486 n.86. Second, the Radioactive Waste Act provided access incentives. The Radioactive Waste Act provided that any state that failed to either join a regional compact or declare its intent to have a disposal site within its borders by 1986 could be charged double surcharges. *Id.* The most severe incentive was the take-title provision. This provision mandated that any state that was unable to provide for the disposal within its borders was to take title to the waste. *Id.*

220. *New York*, 505 U.S. at 161.

221. *Id.*

Congress can, however, urge a state to enact legislation that conforms to a federal regulatory program by offering the state incentives.[222] Thus, Congress is free to offer incentives to encourage states to act in certain ways.

The Court allowed two permissible incentive schemes through which Congress may encourage states to regulate. First, Congress may condition federal funds on the state's compliance with federal regulations.[223] Second, Congress may offer the states the choice of either regulating the area themselves in compliance with federal standards or having state law preempted by federal regulation.[224]

Inherent in the notion of a permissible Congressional regulation is choice: the states must retain the right to refuse to comply with the regulations. Although the state's choice may result in the loss of conditional federal funding, it is not compelled to accept the money or adopt the federal regulatory program.[225] In essence, states must balance the need for federal funds against the desire for autonomy when choosing whether to regulate according to federal standards. The states thus retain the ultimate decision of whether to adopt the federal regulatory program.[226]

2. Application of Tenth Amendment Jurisprudence to IGRA

To prevent the application of IGRA, states argue that the plain language of the Act unconstitutionally mandates the states to negotiate with the tribes to reach a compact.[227] The Act requires that upon receiving a request to negotiate a Tribal-State compact "the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact."[228] If the state chooses not to negotiate, the tribe can attempt to force them to do so.[229]

Under *New York*, states argue that IGRA is unconstitutional because it compels the state either to enter into a compact or to negotiate. Under IGRA, the Secretary has the power to prescribe regulations when a state

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222. *Id.* at 167.

223. *Id.*; *see* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

224. *New York*, 505 U.S. at 167; Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289–90 (1981).

225. Brewer, *supra* note 211, at 488.

226. *Id.* at 488–89.

227. *See generally* Ponca Tribe v. Oklahoma, 834 F. Supp. 1341 (W.D. Okla. 1992), *aff'd in part, rev'd in part*, 37 F.3d 1422 (10th Cir. 1994).

228. 25 U.S.C. § 2710(d)(3)(A) (1994) (emphasis added).

229. *Id.* § 2710(d)(7)(B)(iii).

fails to do so, therefore, the state is given no choice at all. *New York* held that offering the states a choice between unacceptable alternatives in effect commandeered their legislative process.[230] Thus, inasmuch as IGRA commandeers state legislative processes, it is unconstitutional.

In response, tribes argue that IGRA does not prohibit the exercise of state power. Rather, it provides states with an opportunity to attain regulatory control over conduct that the states would not normally reach.[231] Additionally, tribes assert that if states do not want to negotiate a Tribal-State compact, they relinquish this opportunity and allow the Secretary to prescribe rules for the operation of Class III gaming.[232] Thus, according to the tribe's argument, IGRA does not commandeer the state legislative process, but offers a permissible choice as contemplated in *New York.*

The states' argument that IGRA "commandeers" their legislative processes has occasionally been successful—but when successful, has been overturned on appeal. The Tenth Circuit addressed this issue in *Ponca Tribe v. Oklahoma.*[233] The district court in Oklahoma held that the Tenth Amendment precluded a suit by the Indian tribe because the State could not be compelled to enact a Class III gaming compact.[234] The court, relying on *New York*, noted that the reviewing court must examine the federal legislation to "determine whether Congress has properly 'encouraged a State to conform to federal policy choices,' or impermissibly compelled state regulation."[235] The district court interpreted IGRA as offering states a choice of action, but concluded that the choice was meaningless.[236] The court held there was no real alternative for the State because it did "not have the option of refusing to act."[237] Thus, the court concluded that the "critical alternative" was missing.[238] The possibility of compelling the State's compliance with a gaming compact approved by the Secretary was unconstitutional.[239]

On appeal, the Tenth Circuit held that IGRA did not violate the Tenth Amendment. The court came to this conclusion after an extensive

230. New York v. United States, 505 U.S. 144, 170 (1992).
231. Sullivan, *supra* note 94, at 1130.
232. *Ponca Tribe*, 834 F. Supp. at 1346–47.
233. *Id.*
234. *Id.* at 1347.
235. *Id.* at 1346 (quoting New York v. United States, 505 U.S. 144, 168 (1992)).
236. *Id.* at 1347.
237. *Id.*
238. *Ponca Tribe*, 834 F. Supp. at 1347.
239. *Id.*; *see* 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).

discussion of *New York v. United States*[240] and *FERC v. Mississippi*.[241] The court found "*New York* teaches that the Tenth Amendment prohibits a federal directive that *requires* the states to enact or enforce a federal regulatory program, [and] *FERC* instructs that Congress may require the states to *consider*, but not necessarily adopt, a federal program."[242] Thus, under *New York* and *FERC*, the federal government may direct states to *consider* the federal incentives or otherwise permissible regulations. The Tenth Circuit based its determination on several factors, including these decisions.

First, the court found that IGRA, rather than requiring the states to enact or to enforce a federal regulatory program, requires that each state *negotiate* in good faith with the tribe.[243] The court did not give much weight to the argument that a choice between negotiating in good faith or having regulations foisted upon a state is no choice at all. The court explained that the State's duty under IGRA is to make a good faith attempt to "craft a voluntary agreement with the Indian tribe . . . that is consistent with state policy."[244] Following this reasoning, IGRA is not a mandate to compact, but an attempt to encourage cooperative rule making between the tribes and the states.[245] In making this determination, the court differentiated 25 U.S.C. § 2710(d)(7)(B)(vi)[246] from the "take title" provision in *New York*.[247] The court found that the default provision in IGRA "stands in marked contrast to the statute in *New York*, which strictly confined the states' options to either enacting the federal program or taking title to radioactive waste generated within their borders . . . ."[248] Thus, IGRA does not compel the state to do anything—it is either permissibly coercive or not coercive at all.

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240. 505 U.S. 144 (1992).

241. 456 U.S. 742 (1982).

242. Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1433 (10th Cir. 1994). "Congress may not usurp state discretion by commanding the states to enact or enforce a federal program, but it may direct a state to consider implementing a federal program so long as the states retain the prerogative to decline Congress' invitation." *Id.* at 1433–34 (citation omitted).

243. *Id.* at 1434.

244. *Id.*

245. *Id.*

246. *Id.* at 1434 n.16. This section allows the Secretary of the Interior to prescribe and enforce regulations to govern Class III gaming if a state is found to have failed to negotiate in good faith.

247. *Id.* at 1434. In *New York*, the 'take title' provision required the state, if it did not comply with the federal statute, to take title to radioactive waste generated within their borders that could subject them to future liability. New York v. United States, 505 U.S. 144, 153 (1992).

248. *Ponca Tribe*, 37 F.3d at 1434.

If a state chooses not to enter into a compact after good faith negotiations, the state may have won a short-term victory over the tribe. In the short-term the tribe can not legally conduct Class III gaming. However, the failure to enter into a tribal-state compact is not dispositive of the issue of whether or not there will be Class III gaming in a particular state. IGRA allows for regulations to be promulgated by the Secretary consistent with state public policy. Thus, the federal government may ultimately override state law with regulations imposed by the Secretary.[249] Federal law explicitly states that an Indian tribe, pursuant to a valid Tribal-State compact, may conduct Class III games that would be otherwise illegal in the state.[250]

Second, the court found that "IGRA preserves state governmental accountability in the field of Indian gaming."[251] People presumably elect representatives who espouse their same views regarding Indian gaming. The *Ponca* court held that IGRA permits states to negotiate compacts in accordance with the views of the local electorate, whereas the statute in *New York* was a Congressional mandate to the states to enact a federal program.[252] Additionally, the court in *Ponca* reasoned that nothing in IGRA requires a state to compromise its policies regarding Class III gaming when negotiating a compact with the Indian tribe.[253] Therefore, if state public policy prohibits, prefers, or regulates certain types of Class III gaming, nothing in IGRA requires the state to compromise that policy.[254]

Third, the *Ponca* court found that IGRA does not impose a burden on state financial resources.[255] Citing the Supreme Court in *FERC,* the court stated that the mere expenditure of financial resources to comply with a federal statute is not a violation of the Tenth Amendment.[256] Nevertheless, the court found the states did not offer any evidence that IGRA requires them to expend excessive funds to negotiate in good faith.[257] Even if the states expend funds for good faith negotiations, a court would probably

249. *Id.* (In dicta, the court states that the imposition of regulations by the Secretary of the Interior "would not implicate the Tenth Amendment.") *Id.*

250. 18 U.S.C. § 1166(c)(2) (1994); *see* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1253 (9th Cir. 1994).

251. *Ponca Tribe*, 37 F.3d at 1434.

252. *Id.*

253. *Id.*

254. *Id.* "If a state has a policy [of] prohibiting all Class III gaming, then Indian Class III gaming is also . . . prohibited." *Id.*

255. *Id.* at 1434.

256. *Id.* at 1434–35 (citing FERC v. Mississipi, 456 U.S. 742, 770 n.33 (1982)).

257. *Ponca Tribe*, 37 F.3d at 1435.

determine that such expenditures did not rise to the level needed to violate the Tenth Amendment.

Finally, the court acknowledged that IGRA is similar to a "permissive" statute, as defined in *FERC*.[258] IGRA does not mandate the states to negotiate a compact with the Indian tribes, but requires the states to negotiate in good faith.[259] The court agreed that 25 U.S.C. § 2710(d)(7)(B)(iii), giving the court the power to order a state and Indian tribe to conclude a compact, could be construed as a Congressional mandate to regulate.[260] The court did not interpret this section literally because it is impossible for two parties to enter into an agreement if they do not agree.[261] The *Ponca* court, considering the statute as a whole, concluded IGRA's mandate that the states conclude a compact is not fatal.[262]

In reaching this conclusion, the court implicitly differentiated between a mandate to negotiate (which IGRA requires) and a mandate to compact (which IGRA does not require). Furthermore, the court determined that IGRA's directive to the states must be read in the context of the act as a whole.[263] The subsections that follow the mandate to conclude a compact provide alternatives if a state and tribe fail to agree to a compact.[264] These sections reveal that Congress did not intend IGRA to act as a mandate upon a state.[265] Had Congress intended to require a state to enter into compacts with Indian tribes, it would not have included the section allowing the Secretary to prescribe regulations for Class III gaming if the Tribal-State compact process fails.[266] Upon examination of relevant precedent, the court correctly found that IGRA does not violate the Tenth Amendment.

A district court in California also considered the constitutionality of IGRA under the Tenth Amendment.[267] There, the State argued that IGRA

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258. *Id.* at 1434.

259. *Id.*

260. *Id.* "If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact . . . the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii) (1994).

261. *Ponca Tribe*, 37 F.3d at 1435.

262. *Id.*

263. *Id.*

264. *Id.*; *see, e.g.*, 25 U.S.C. § 2710(d)(7)(B)(vi).

265. *Ponca Tribe*, 37 F.3d at 1435.

266. *Id.*

267. Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812 GEB, 1993 WL 360652, at *10 (E.D. Cal. July 20, 1993), *aff'd in part, rev'd in part*, 64 F.3d 1250

unconstitutionally coerced it to negotiate a compact with an Indian tribe.[268] The court used a three-tiered analysis in determining that IGRA did not violate the Tenth Amendment.[269]

First, the court found that IGRA did not require the State to regulate, but only to negotiate.[270] This rationale, like that employed by the Tenth Circuit, draws a fine line between the mandatory negotiation of a compact and mandatory regulation by entering into a compact. The court found that entering into negotiations that lead to a compact does not explicitly require the State to regulate the gaming activities.[271] Rather, negotiations under this rationale are the means by which a state and Indian tribe may express their concerns as they seek to reach a compact.[272] Thus, the court found that mandatory negotiation offers states a permissible choice between regulating Indian gaming themselves (through the compacting process) and adhering to regulations prescribed by the Secretary.[273]

Second, if the state and the tribe fail to negotiate a compact, IGRA does not unconstitutionally force the state to regulate. If the state decides not to participate in negotiation, it does not incur a penalty for its decision nor does the Act coerce those states that do not participate.[274] Rather, a state surrenders "an opportunity to influence federal regulation of Indian gaming which it would not otherwise have . . . ."[275] The court noted that if the compacting process fails or the state abstains from compacting, "the federal government, and not the state, assumes the full burden of regulating."[276] Thus, the state retains the option of entering into a compact with the Indians and having the federal government (the Secretary) regulate Class III gaming. The difference between the federal government regulating Class III gaming and federal government mandating that the states regulate Class III gaming is the crucial distinction that keeps IGRA from violating the Tenth Amendment.

(9th Cir. 1994) (as amended) (reversing the portion of the holding that California is obligated to negotiate with the Tribes on the proposed gaming activities; affirming the portion of the holding that the State need not negotiate over banked or percentage card games with traditional casino themes; remanding the case to the lower court to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise; and not addressing the Tenth Amendment claim).

268. *Rumsey*, 1993 WL 360652, at *11.

269. *See id.* at *11–14.

270. *Id.* at *11–12.

271. *Id.* at *11.

272. *Id.*

273. *Id.*

274. *Rumsey*, 1993 WL 360652, at *13.

275. *Id.* at *12.

276. *Id.* at *13.

Finally, the court found the legislative history of IGRA supports its conclusion.[277] Congress exhibited that it was "clearly . . . cognizant of the Tenth Amendment when it acknowledged that a State need not forgo any State governmental rights to engage in or regulate [C]lass III gaming except whatever it may voluntarily cede to a tribe under a compact."[278] It is clear from the legislative history of IGRA that Congress realized it was offering the states an opportunity to influence the regulation and operation of Indian gaming.[279] Using reasoning slightly different from that of Tenth Circuit in *Ponca,* the *Rumsey* court reached the same conclusion: IGRA does not violate the Tenth Amendment.

The Eighth Circuit in *Cheyenne River Sioux Tribe v. South Dakota*[280] also held that IGRA did not violate the Tenth Amendment. The court stated IGRA did not compel the State to engage in negotiations and the State was free to choose its own course of action.[281] For three reasons, the court opined that IGRA permitted the State to decide its policy regarding Indian Gaming.[282] First, a state could continue to negotiate until a compact is formed.[283] Second, if negotiations failed, a state could wait for a judicial determination of whether negotiations should continue.[284] Third, the state could refuse to negotiate with a tribe, but, in doing so, would sacrifice its ability to safeguard its interest through a compact.[285] Because a state has an opportunity to negotiate a compact or to allow the Secretary to prescribe regulations, IGRA does not violate the Tenth Amendment.[286]

In light of the United States Supreme Court decision in *Seminole Tribe,* the Tenth Amendment will play a greater role in future challenges to IGRA. However, after *Seminole Tribe*, state courts are the only judicial forum in which to seek redress for alleged violations. The federal cases analyzed *supra* will likely play an important role in state court analyses, and possible future review by the United States Supreme Court. The

277. *Id.* at *14.

278. *Id.* at *13 (quoting Yavapai–Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992)).

279. *Id.* at *11–12; *see* S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083–84.

280. 3 F.3d 273 (8th Cir. 1993).

281. *Id.* at 281.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* The state's interests may not be preserved by the federal government prescribing rules for the operation of Class III gaming to the same extent if the state negotiated a Tribal-State compact on its own behalf. *See id.*

286. *Cheyenne River Sioux Tribe*, 3 F.3d at 281.

crucial question will be whether the compacting process is compulsory. If so, IGRA constitutes an impermissible federal regulation of the state. If not, IGRA only mandates negotiation, and thus is permissible because it does not "commandeer" the state legislative process.

IV. WHAT GAMES MAY A TRIBE OFFER?

Notwithstanding Tenth and Eleventh Amendment arguments against IGRA, a particular game must be categorized as either Class II or Class III. If a particular game is Class III, the issue becomes whether the state permits such gaming. If the state permits such gaming, the state must negotiate with the tribe for the operation of the games.

A. Is the Game Class II or Class III?

The Indian Gaming Commission ("the Commission") is authorized to promulgate regulations and guidelines necessary to implement the provisions of the IGRA.[287] The Commission's regulations governing Class II and Class III gaming have generated much controversy. If the Commission determines a game to be Class II, a tribe may operate the game without a Tribal-State compact.[288] The classification of electronic gaming devices as Class III is a major point of contention.[289] Tribes seek to reclassify video pull-tab machines because they most resemble the high revenue slot machines and at the same time represent an electronic version of games already permitted in the states, e.g., pull-tabs.[290]

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287. 25 U.S.C. §§ 2704, 2706(b)(10) (1994).

288. Cox, *supra* note 60, at 785.

289. *See* Shakopee Mdewakanton Sioux Community v. Hope, 16 F.3d 261 (8th Cir. 1994); *see also* Spokane Indian Tribe v. United States, 972 F.2d 1090 (9th Cir. 1992).

The Code of Federal Regulations defines Class III gaming as follows:

> Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to:
>
> (a) Any house banking game, including but not limited to—
>
> (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
>
> (2) Casino games such as roulette, craps, and keno;
>
> (b) *Any slot machines* as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;
>
> (c) Any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
>
> (d) Lotteries.

25 C.F.R. § 502.4 (1996) (emphasis added).

290. *See* Cox, *supra* note 60, at 785.

Generally, tribal challenges to the Commission's rules have not been successful. In *Cabazon Band of Mission Indians v. National Indian Gaming Commission*,[291] the Tribe asked the court for a declaratory judgment that video and computer assisted pull-tab games qualify as Class II games because they were exact replicas of the paper version.[292] The court stated that if it were to find that the electronic version of pull-tabs were not an electronic facsimile of the paper game, the Commission's regulation and the statutory definition included in IGRA would be rendered meaningless.[293] Thus, the court ruled that the electronic versions of pull-tabs are Class III games.[294]

In *Shakopee Mdewakanton Sioux Community v. Hope*,[295] the court reached a similar conclusion regarding the Commission's classification of keno as a Class III game.[296] The court rejected the Tribe's argument that keno is similar to bingo and should therefore be a Class II game.[297] The court found permissible the Commission's determination that Congress intended all casino games, including keno, to be within Class III.[298]

In *Sycuan Band of Mission Indians v. Roache*,[299] the Tribe challenged the trial court's decision that pull-tab machines were Class III devices.[300] The machine in question was a self-contained unit containing a computer linked to a video monitor and printer.[301] The machine accepts a player's money and then displays a video reproduction of a paper pull-tab ticket.[302] The player electronically "opens" the pull-tab to determine whether he or she is a winner. If the player is a winner, the machine, at the player's option, will print out a winning ticket for redemption by a cashier.[303] The game operates exactly like the paper pull-tab game: the video machine has a computer chip that has a predetermined and known number of winning

291. 827 F. Supp. 26 (D.D.C. 1993), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994).

292. *Id.* at 28, 32.

293. *Id.* at 32. "If the video pull-tab game is not an electronic facsimile, the court cannot imagine what would qualify as one .... [T]he court must recognize that what amounts to a tautology indeed is true: a facsimile is a facsimile is a facsimile." *Id.*

294. *Id.* at 33.

295. 798 F. Supp. 1399 (D. Minn. 1992), *aff'd*, 16 F.3d 261 (8th Cir. 1994).

296. *Id.*

297. *Id.* at 1411.

298. Cox, *supra* note 60, at 786 (citing *Shakopee Mdewakanton Sioux Community*, 798 F. Supp. 1399).

299. 54 F.3d 535 (9th Cir. 1994).

300. *Id.* at 541.

301. *Id.*

302. *Id.*

303. *Id.*

tickets from a finite pool of tickets with known prizes.[304] The court concluded that although this game represents a Class II game, it is an electronic facsimile of the pull-tab game and is therefore a Class III game.[305]

B. If a Game is Class III, Does a State Permit Such Gaming?

IGRA states that Class III gaming may occur on tribal lands if such lands are "located in a State that *permits* such gaming for any purpose by any person, organization, or entity . . . ."[306] Additionally it states that "[a]ny Indian tribe . . . shall request the State . . . to enter into negotiations for the purpose of [conducting Class III gaming and] . . . [u]pon receiving such a request, the State *shall* negotiate with the Indian tribe . . . [to conduct Class III gaming]."[307] These two sections require a state to enter into negotiations if requested and if the state *permits* such gaming.[308] States and tribes disagree about which forms of gaming states *permit*.[309] The courts have taken two approaches to this issue; some examine the gaming in question on a very general level.[310] In this situation, the courts make a determination of whether the state permits gaming. If the state permits gaming, the state must negotiate with the tribe to conclude a compact. Other courts take a game-by-game approach.[311] If the state does not permit a specific type of Class III gaming, the state will have no obligation to negotiate a compact with the tribe for that type of game.

The district court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*[312] held that the State had to negotiate compacts with the Tribe for all forms of Class III gaming because the State

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304. *Id.*

305. Cox, *supra* note 60, at 786.

306. 25 U.S.C. § 2710(d)(1)(B) (1994) (emphasis added).

307. *Id.* § 2710(d)(3)(A) (emphasis added).

308. These sections do not present problems for States that either permit or prohibit every form of gaming. Sullivan, *supra* note 94, at 1139–40. Nevada and New Jersey permit most forms of gaming and Utah and Hawaii prohibit most gaming. *Id.*

309. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210–11 (1987); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Coeur d'Alene Tribe v. Idaho, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995).

310. *See Rumsey*, 64 F.3d at 1253–54 (Canby, J., dissenting from decision denying rehearing *en banc*); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990).

311. *See, e.g.*, Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994).

312. 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992).

constitution authorized a state lottery and pari-mutuel betting, and did not prohibit other forms of gaming.[313] The court explained that Congress did not intend the term "permit" to limit the tribes to the specific types of gaming activities that are actually in operation in a state.[314] Because the court found that the State's public policy favored gaming, the court concluded that all State gambling statutes were regulatory and that all types of gaming were permitted.[315]

In another expansive reading of IGRA, the Second Circuit held in *Mashantucket Pequot Tribe v. Connecticut*[316] that the State's refusal to negotiate a compact with the tribe constituted bad faith under IGRA.[317] Connecticut permitted charitable organizations, under certain conditions, to conduct "Casino Nights."[318] The Tribe viewed this as an opportunity to begin casino gambling on its lands. Because the State felt that it did not permit such gaming, it refused the Tribe's request to negotiate.[319] Relying on the *Cabazon* rationale, the court rejected the State's argument.[320] The court held that Connecticut "permits games of chance, albeit in a highly regulated form"[321] within the meaning of IGRA. As a result, the State was forced to enter into negotiations and compacted with the tribe.

Recently, the Ninth Circuit, in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,[322] retreated from the expansive interpretation of IGRA. The court took up the issue of whether certain gaming activities are permitted under California law and whether the state was obligated to negotiate with the Tribe. The Tribe sought to negotiate a compact permitting the operation of certain electronic gaming devices and banking card games.[323] The underlying conflict between the parties was a differing

313. *Id.* at 488.

314. *Id.*

315. *Id.* at 486. The court reasoned that "the state is required to negotiate with plaintiffs over the inclusion in a tribal state compact of any [gaming activity] . . . that is not prohibited expressly by the Wisconsin Constitution or state law." *Id.* at 488.

316. 913 F.2d 1024 (2d Cir. 1990).

317. *Id.* at 1032.

318. Sullivan, *supra* note 94, at 1141.

319. *Mashantucket Pequot Tribe*, 913 F.2d at 1027.

320. *Id.* at 1031. The court held that high stakes gaming was not against the State's public policy. *Id.; see, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

321. *Id.* (quoting Mashantucket Pequot Tribe v. Connecticut, 737 F. Supp. 169, 176 (D. Conn. 1990)).

322. 64 F.3d 1250 (9th Cir. 1995).

323. *Id.* at 1255. The tribe wanted to operate electronic facsimiles of games permitted in non-electronic formats. Included among these games were electronic pull-tab machines, video poker, video bingo, video lotto, and video keno. Further, "a card game is 'banked' if a gaming operator participates in the game with the players and acts as a house bank, paying all winners

interpretation of whether California "permits" certain electronic and banking games.

California asserted two arguments as to why it was not obligated to negotiate with the Tribe under IGRA. First, it argued that IGRA does not obligate it to negotiate with the Tribe because the games the Tribe sought to operate were illegal.[324] Second, the State asserted that IGRA violates the Tenth Amendment.[325]

The Tribe argued for a broad reading of IGRA, claiming that "a state 'permits' a specific gaming activity if it 'regulates' the activity in general rather than prohibiting it entirely as a matter of public policy."[326] Because California permits games similar to the proposed gaming activity, the Tribe concluded that the State regulates, and thus permits, the proposed gaming.[327]

The appellate court rejected the Tribe's reading of IGRA, taking a literal approach to IGRA.[328] The court held that 25 U.S.C. § 2710(d)(1)(B) was unambiguous.[329] Although California allows games that are similar to the proposed gaming activities, under this definition of "permit" the court held that the State did not have a duty to negotiate, with the possible exception of video slot machines.[330] The court stated succinctly:

> IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . In other words, a

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and retaining all other players' losses." *Id.* at 1255 n.2. A card game is a "percentage game" if the operator has no interest in the outcome but takes a percentage of all amounts wagered. *Id.* at 1255 nn.1–2 (citations omitted).

324. *Id.* at 1255. Under this reasoning, where a state does not "permit" gaming activities, because the games are illegal, a tribe has no right to operate such gaming activities. Thus, the state has no duty to negotiate with a tribe to operate such games. *Id.* at 1256.

325. *Id.* at 1256. The court never reached this argument because it found that the state was not obligated to negotiate.

326. *Id.*

327. *Id.*

328. *Rumsey*, 64 F.3d at 1257.

329. *Id.* The court used the definition of "permit" adopted in United States v. Launder, 743 F.2d 686 (9th Cir. 1984): "to suffer, allow, consent . . . ." *Id.* (citations omitted). Analyzing the legislative history of IGRA to bolster its decision, the court found that Congress only linked the Cabazon Court's "criminal/prohibitory" versus "civil/regulatory" test to Class II gaming. *Id.* at 1259. The court found that Congress envisioned different roles for Class II and Class III gaming. *Id.* Therefore, the court was able to justify the use of the plain meaning of "permit" in light of the legislative history. *Id.* (citing S. REP. NO. 100-466, at 6–9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076–79). In reaching this conclusion the court acknowledged that the *Mashantucket* court reached the opposite conclusion. *Id.* at 1259 n.5.

330. *Id.* at 1260.

> state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.[331]

In reaching its decision, the Ninth Circuit cited *Cheyenne River Sioux Tribe v. South Dakota*,[332] in which the Eighth Circuit rejected that Tribe's argument that the State must enter into negotiations for traditional keno because video keno was legal in the State.[333] In addition, the court interpreted the "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) so as not to require a state to negotiate with respect to forms of gaming it does not permit.[334]

The *Rumsey* decision restricts Indian affairs and defers to state public policy. Thus, a state may allow "casino nights" for charitable organizations without opening the door for Indian tribes to establish high-stakes casinos in the state. Accordingly, a state does not have to enter into compact negotiations if it does not "permit" the specific type of gaming the tribe seeks.

C. Rumsey: *The Decision That Toppled the House*

The Ninth Circuit's decision in *Rumsey* created a split among the circuits. Specifically, the interpretations of IGRA by the Second Circuit[335] and the Ninth Circuit[336] directly conflict. The *Rumsey* court held that the state only has to negotiate for games that the state already permits.[337] The *Mashantucket* court held that the Tribal-State compacting process is invoked unless it is determined, through the application of the *Cabazon* test, that "as a matter of criminal law and public policy, [the state] prohibit[s] [Class III] gaming activity."[338]

Both courts reached their decisions by interpreting 25 U.S.C. § 2710(d)(1)(B). The *Rumsey* court found this section to be unambiguous.[339] Although 25 U.S.C. §§ 2710(d)(1)(B) and 2710(b)(1)(A)

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331. *Id.* at 1258.

332. 3 F.3d 273 (8th Cir. 1993).

333. *Rumsey*, 64 F.3d at 1258 (citing *Cheyenne River Sioux Tribe*, 3 F.3d 273).

334. *Id.* (citing *Cheyenne River Sioux Tribe*, 3 F.3d at 279); *accord* Coeur D'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1280 n.9 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995).

335. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990).

336. Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994).

337. *Id.* The extent of this holding is questionable. For example, State X permits only lottery games, but forbids the use of slot machine themes (e.g., fruits) in the operation of the lottery games. In this situation it is not clear whether the *Rumsey* court would find that the tribe could negotiate for the operation of lottery games in general or if negotiation would be limited to the operation of lottery games without slot machine themes.

338. 913 F.2d at 1030 (quoting 25 U.S.C. § 2701(5) (1994)).

339. *Rumsey*, 64 F.3d at 1257.

have nearly identical language, the court determined that it did not have to follow the maxim that identical language in a statute should be interpreted to have the same meaning.[340] The court determined that these sections should be interpreted differently because the legislative history links the *Cabazon* test with Class II gaming and remains silent on the application of the *Cabazon* test to Class III gaming.[341] Thus, the court read a negative into the legislative history of IGRA. The Second Circuit, however, came to the opposite conclusion. The court stated that it was appropriate to follow the general principles of statutory construction.[342] "It is a settled principle of statutory construction that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear . . . in one place, it will be construed to have the same meaning in the next place.' "[343] Thus, the court found that because 25 U.S.C. § 2710(b)(1)(A) ties the *Cabazon* test to Class II gaming and the language of the sections governing Class II and Class III gaming is almost identical, the *Cabazon* test should be applied to Class III gaming, 25 U.S.C. § 2710(d)(1)(B), as well.[344]

The *Rumsey* decision also interprets IGRA in a manner contradictory to 18 U.S.C. § 1166(c)(2), which was enacted with IGRA. As a logical consequence of the *Rumsey* decision, the tribe is subject to the entire *corpus* of state law; thus, the tribe can only negotiate over those games that the state already allows. Tribes, however, may operate games that would otherwise be illegal in the state under 18 U.S.C. § 1166(c)(2).[345] If the *Rumsey* decision is correct, 25 U.S.C. § 1166(c)(2) is meaningless—under *Rumsey* the tribes could never operate or even negotiate for the operation of a game that would otherwise be illegal in the state. Thus, *Rumsey* renders 18 U.S.C. § 1166(c)(2) meaningless.

Rumsey is also inconsistent with a previous decision by the Ninth Circuit. The Ninth Circuit ruled in *Sycuan Band of Mission Indians v. Roache*[346] that, with regard to Class II gaming, "the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees."[347] Thus, the court found that

340. *Id.* at 1254–55.

341. *Id.*

342. *Mashantucket*, 913 F.2d at 1030.

343. United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978) (citations omitted).

344. *Mashantucket*, 913 F.2d at 1030.

345. 18 U.S.C. § 1166(c)(2).

346. 54 F.3d 535 (9th Cir. 1994).

347. *Id.* at 539. Arguably *Syucan* and *Rumsey* could be distinguished on their facts, but *Syucan's* holding seems to apply to both Class II and III games.

the tribes have the right to conduct all forms of Class II games if the state public policy generally permits or regulates this type of gaming.[348] The *Sycuan* decision, the dissent from rehearing *en banc* in *Rumsey,* both authored by Judge Canby, and the majority opinion in *Rumsey* clearly show that there is a division in the Ninth Circuit as to the application of the *Cabazon* test to Class III gaming. Judge Canby would apply the *Cabazon* test to determine if the state must negotiate on all Class III games if the state public policy generally permits such games. Judge O'Scannlain, who authored the *Rumsey* opinion, would find that a state must only negotiate for those games that it actually permits.

V. CONCLUSION: IGRA IS A HOUSE OF CARDS THAT HAS PARTIALLY COLLAPSED

Congress enacted IGRA to provide Indian tribes the opportunity to develop economic self-sufficiency through operation of most forms of gaming on their lands. When allowed to operate, Indian gaming achieves unprecedented success toward attaining Congress' goal. Tribes regulate Class I gaming, and the federal government and tribes regulate Class II gaming. With regard to Class I and Class II gaming, the law is settled. However, the regulation of Class III gaming has not been so favorable; the provisions governing Class III gaming are unsettled and such provisions continue to be challenged on various grounds.

Florida successfully challenged IGRA on Eleventh Amendment grounds in *Seminole Tribe.* Thus, tribes are prevented from bringing suit against the states in federal court for failing to negotiate a Tribal-State compact. In addition, the *Seminole Tribe* Court ruled that the doctrine of *Ex Parte Young* cannot be used to compel a state official to negotiate a Tribal-State compact if the state and tribe fail to reach a compact.[349]

States also have challenged IGRA on Tenth Amendment grounds, claiming that IGRA "commandeers" the legislative powers through the Act's mandatory negotiation provisions.[350] The courts held that IGRA does not violate the Tenth Amendment because IGRA does not impermissibly compel the states to regulate Indian gaming.

348. *See id.*

349. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

350. *See* discussion *supra* Part III.B.

Even if states agree to negotiate, states and tribes often disagree over the classification of certain games. Tribes argue that many games are Class II, and, therefore, they may operate the game without a compact. States argue that those same games are Class III, and before tribes can operate them, the tribes must have a compact. In addition, states have challenged the operative language that mandates compact negotiations. The tribes assert that if states allow any Class III gaming, they must negotiate the entire class of gaming. The debate over Class III gaming has brought uncertainty and conflicting court decisions to Indian gaming law.[351]

Several measures may be taken to provide stability to the regulations and regulatory structure surrounding Indian gaming. First, states may be removed from the Indian Gaming process entirely. This may be accomplished in one of two ways: Congress may employ the plenary powers granted by the Indian Commerce Clause, or states may voluntarily remove themselves. Second, Congress may amend IGRA to cure its constitutional flaw(s) by deleting the remedial scheme at the heart of the *Seminole Tribe* Court's decision or by adding a statement that the remedial scheme in IGRA is not intended to be an alternative to the doctrine of *Ex Parte Young.*

If Congress chooses to continue with the *status quo*, the tribes' alternatives are as follows: (1) they may request the Secretary to prescribe rules for the operation of Class III gaming; or (2) they may conduct Class III gaming in the absence of a Tribal-State compact. If the tribes choose the second option, conducting Class III gaming without a compact, they do so at their own peril. Although tribes cannot be prosecuted by the state, they may still be prosecuted by the federal government.[352]

Finally, the courts hold the keys to unlock the doors to interpreting IGRA. Certainly the courts should have the utmost of concern when interpreting IGRA to ensure that justice and congressional intent are carried out. Thus, the courts should allow the tribes to conduct an enterprise that will bring them out of decades of poverty. If they do not, the federal government and states will have once again perpetrated an

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351. The Ninth Circuit in *Rumsey* held that the state only has to negotiate for games that the state already permits. *Rumsey*, 64 F.3d 1250. The Second Circuit in *Mashantucket* held that the Tribal-State compacting process is invoked unless it is determined, through the application of the *Cabazon* test, that "as a matter of criminal law and public policy, [the state] prohibit[s] [Class III] gaming activity." Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1030 (2d Cir. 1990) (quoting 25 U.S.C. § 2701(5) (1994)).

352. 18 U.S.C. § 1166(d) (1994). "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section. . . ." *Id.*

injustice upon the Native American Indians by offering them a solution to their economic problems with the one hand and revoking it with the other.

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