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The Reservation Gambling Fury: Modern Indian Uprising or Unfair Restraint on Tribal Sovereignty?

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I. INTRODUCTION

In 1979 the Seminole Tribe of Florida became the first tribe in the nation to open a large-scale, high-stakes bingo operation. During the 1980s, Indian-sponsored gambling—from bingo parlors to Las Vegas-style casinos—rapidly spread until one-third of the 330 reservations in the United States were participating.[1] In just a little over a decade, Indian gambling has become a financial windfall to more than 150 tribes across the nation. Although this windfall income has helped Indian tribes become self-sufficient through tribal economic development, Indian-sponsored gambling has met with stiff opposition from states concerned with the criminal activity often associated with gambling.

On October 17, 1988, Congress passed the Indian Gaming Regulatory Act (IGRA), a comprehensive piece of federal legislation that governs the operation of Indian gambling establishments.[2] The express purpose of the IGRA was to balance the Indians' interest in tribal sovereignty with the states' interest in guarding its citizens from corrupt gaming activities and organized crime infiltration.[3] Following the passage of the IGRA, confusion surrounding its interpretation led to initial court decisions favorable to tribes and resulted in a climate in which high-stakes, casino-style gaming on Indian reservations flourished nationwide.[4] States watched helplessly as gaming activities invaded their borders to an extent not likely contemplated by Congress. As a result of the initial neglect of the legislative intent behind the Act,[5] states have responded by asserting sovereign immunity under the Eleventh Amendment.[6] Recently federal courts have responded with decisions that demonstrate a pattern of

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1. Leah Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater,"* 69 IND. L. REV. 255, 257 (1993).

2. 25 U.S.C. § 2700 (1988).

3. S. REP. No. 446, 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 [hereinafter S. REP. No. 446].

4. Eric Swanson, *The Reservation Gaming Craze*, 15 HAMLINE L. REV. 471 (1992).

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

6. *See infra* part III.B.

deference to state sovereignty and of constraints on future reservation gambling.[7]

II. THE EVOLUTION OF INDIAN GAMING

An examination of the evolution of Indian gaming reveals three distinct phases. The first phase was the birth of Indian gaming in 1979 with the establishment of a large-scale, organized bingo facility by the Seminole Tribe in Florida. From that single facility, Indian gaming experienced explosive growth, spreading to over 100 reservations during the 1980s.[8]

The second phase of the Indian gaming evolution was the attempt by states to assert their jurisdiction to either prohibit or regulate Indian gaming activities. Strong opposition by tribes to any attempted regulation by states resulted in judicial intervention and the development of caselaw governing these kinds of conflicts.

The final and most significant phase of Indian gaming began with the enactment of the IGRA in 1988. The IGRA demonstrates Congress' intent to balance the interests of the three sovereigns—the individual, the state, and the tribe—while regulating Indian gaming activities.

A. Gambling on or Near Reservations

Following the immediate financial success of the Seminole Tribe's bingo operation, Indian-sponsored gambling exploded on tribal lands during the 1980s. By the mid-1980s, one-third of the nation's Indian reservations had some form of organized gambling. Exempt from state gambling and tax laws, Indian gambling operations brought millions of dollars to once economically depressed Indian communities.

Revenue generated by Indian gaming activities has continued to grow at a phenomenal rate even in recent years. In 1991, Indian gaming operations generated more than $1.3 billion,[9] growing to $6 billion in 1992.[10] As tribes typically retain nearly one-third of the revenues as profit, they are becoming self-sufficient through tribal economic development, a goal announced by the Reagan administration in 1983.[11] The hundreds of millions of dollars profited in recent years have made up for cuts in federal funding. Profits have gone toward health,

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7. *Id.*

8. S. REP. No. 446, *supra* note 3.

9. Lorber, *supra* note 1, at 258.

10. Amber J. Ahola, *Call it Revenge of the Pequots*, 27 U.S.F. L. REV. 907, 910 n.26 (1993).

11. Ronald Reagan, President's Message on Indian Policy (Jan. 24, 1983), *in* 19 WEEKLY COMP. PRES. DOC. 98, 99.

education, and community development programs. Income from gambling has been used to pave roads, build sewer and water projects, and to fund community centers, college education, and chemical dependency programs. This prosperity stands in contrast to the situation just fifteen years ago, when seventy percent of reservation inhabitants were welfare-dependant and living in trailers with two or three other families.[12]

On more than one occasion, reservation gambling has also been a boon to nearby economically depressed cities. When the St. Croix tribe opened a casino in Turtle Lake, Wisconsin, jobs and real estate development boomed and bank deposits at local banks jumped ten percent.[13] In Redwood Falls, Minnesota, another site of a reservation casino, unemployment during the recession of the early 1990s remained below two percent, homes sold within days of being listed, and new businesses moved to the area.[14]

But despite the apparent benefits of Indian gaming, state officials have raised concerns about immoral and criminal activity. Since tribal governments are not required to report large cash transactions, law enforcement authorities worry that reservation facilities will be used to launder drug money. Further, without regulation, there are dangers of games being rigged, payoffs not being made, and profits not being used to benefit the tribe. The detrimental impact that reservation gambling has on revenues from state-sanctioned gambling has been estimated at $15 billion per year.[15]

But whether reservation gaming has actually had a detrimental impact on neighboring communities has yet to be proven.[16] In 1992, the Department of Justice reported that it found no widespread or successful effort by organized crime to infiltrate Indian gaming operations. In fact, the Department of Justice indicated that the Federal Bureau of Investigation had reported fewer than five open investigations of organized criminal activity involving Indian gaming. On the other hand, congestion, traffic accidents, and the need for police service increased after a casino was built near Redwood Falls, Minnesota. Also, in the Minneapolis-St. Paul area where tribes operate several casinos, membership in the local chapter of Gamblers Anonymous increased nearly sixfold in the past ten years and calls to the group's telephone hotline tripled during 1991.[17]

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12. Lorber, *supra* note 1, at 258.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

Particularly appealing to tribes was the prospect of opening gambling operations in urban areas. Tribes sought to capitalize on provisions of the Indian Reorganization Act of 1934, which allows the federal government to acquire off-reservation land and convert it into Indian land for the tribes' use and benefit.[18] This process generally leaves state and local governments with little or no control over activities that are potentially harmful to their communities.

The states' concerns—and the tribes' potential for profit—increase dramatically when Indian gaming moves from the reservation to the cities. In addition to the social and criminal concerns, lands taken into trust for Indian tribes are removed from the reach of zoning and other land use regulations. Revenues generated by gaming activities are free from taxation,[19] and urban traffic problems are the city's responsibility to solve. State officials have unanimously felt that it was a terrible injustice to force communities to live with the detriments of organized gambling without reaping any of its direct benefits. Sensing this threat to state sovereignty and fearing that increased Indian gambling operations could be infiltrated by organized crime, various government agencies expressed the need for federal or state oversight of gaming activities, or both.[20]

B. Pre-IGRA Litigation

As large-scale bingo games became commonplace in the early 1980s, states attempted to assert their jurisdiction on Indian reservations. The tribes' vigorous opposition to such attempts produced two important court decisions: *Seminole Tribe v. Butterworth*[21] and *California v. Cabazon Band of Mission Indians*.[22] Both decisions utilized the civil-regulatory, criminal-prohibitory[23] test for determining when a state could assert its jurisdiction over Indian gaming activities. *Seminole* and *Cabazon* provided the groundwork for the enactment of the IGRA, as well as useful insights into the analysis that would later be used by federal courts in litigation involving Indian gaming under the IGRA.

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18. 25 U.S.C. § 465 (1992). This section states: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing land for Indians . . . . Such lands . . . shall be exempt from State and local taxation."

19. 25 C.F.R. § 1.4 (1992).

20. S. REP. No. 446, *supra* note 3.

21. 658 F.2d 310 (Former 5th Cir. Unit B 1981).

22. 480 U.S. 202 (1987).

23. *See* Bryan v. Itasca County, 426 U.S. 373 (1976) (developing the civil-regulatory, criminal-prohibitory test for determining when a state has jurisdiction over Indian reservations).

1. Seminole Tribe v. Butterworth

Shortly after the Seminole Tribe opened the nation's first large-scale reservation bingo operation in 1979, the county sheriff threatened arrests on the Seminole reservation. The Seminole Tribe sued the county, seeking a declaratory judgment and injunctive relief.[24] In holding for the Seminole Tribe, the court found that states do not generally have jurisdiction on Indian reservations unless specifically granted that jurisdiction by Congress.[25] However, under Public Law 83-280,[26] Congress gave certain states, including Florida, criminal jurisdiction over activities occurring on reservations. Although Florida had a statute regulating bingo, the State needed to show that bingo was prohibited through criminal sanctions.[27] Because the Florida statute allowed regulated bingo games, the court concluded that Florida's approach to bingo was civil-regulatory in nature rather than criminal-prohibitory. Therefore, the State could not assert its jurisdiction over the Seminole Tribe's bingo operations.[28]

After *Seminole*, tribes across the nation seized the opportunity to strike it rich with high-stakes bingo gaming. By 1988, more than 100 tribal bingo facilities, grossing over $100 million, were in operation in states where bingo was not expressly prohibited by law.[29] Yet by the mid-1980s tribes were seeking to expand their gaming activities to include card games. This expansion produced another state challenge to tribal gambling.

2. California v. Cabazon Band of Mission Indians

In response to the Cabazon Tribe's attempt to run a bingo and draw-poker casino on its reservation, California threatened to subject the tribe to its criminal statues governing bingo, poker, and other card games.[30]

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24. *Seminole Tribe*, 658 F.2d at 311.

25. *Id.* at 312-13.

26. Act of Aug. 15, 1953, ch. 505 § 7, 67 Stat. 590 (codified as 18 U.S.C. § 1162 (1984) and 28 U.S.C. § 1360 (1976), repealed by Act of April 11, 1968, Pub. L. No. 90-284, § 403(b), 82 Stat. 79 (1984)). The first section specifically granted to California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska criminal jurisdiction on the reservations. The second section allowed for state assumption of civil jurisdiction to the extent necessary to resolve private disputes between Indians and private citizens. The Act also granted to other states, including Florida, the right to assume criminal and civil jurisdiction by legislative enactment, and although this section was repealed by the Act of April 11, 1968, any concessions of jurisdiction made pursuant to the Act prior to its repeal were not affected.

27. *Seminole Tribe*, 658 F.2d at 312-13.

28. *Id.* at 315-16.

29. S. REP. No. 446, *supra* note 3.

30. *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

When the Cabazon Tribe sought declaratory relief, the federal district court granted summary judgment against the State.[31] The case was appealed to the Supreme Court. Using the civil-regulatory, criminal-prohibitory test relied on in *Seminole*, the Court affirmed the district court's decision.[32] Because California operated or allowed a state lottery, parimutuel horse-race betting, and bingo—and because the State failed to expressly prohibit poker-type card games—the Court reasoned that such games were presumably not contrary to the State's public policy.[33] The Court thus concluded that California had adopted a civil-regulatory approach to gambling and could therefore not assert its jurisdiction over Cabazon tribal gambling operations.[34]

What *Seminole* had done for reservation bingo, *Cabazon* did for high-stakes, casino-style gambling. *Seminole* allowed tribes to operate bingo games in states where bingo was allowed but regulated. *Cabazon* seemed to support the notion that if a state allowed some types of gaming activities, a state's approach to gambling in general would be interpreted as civil-regulatory, absent express prohibitions of specific types of gaming. Together, these two cases created an atmosphere in which tribes impulsively expanded gaming operations across the nation. This environment led to the Congressional debate over regulation of these activities and ultimately to the enactment of the IGRA.

C. The Indian Gaming Regulatory Act

1. Legislative History

Congress first attempted to address the issue of regulating gambling on Indian lands in 1983 with House Bill 4566. Although the bill did not make it to the floor, it demonstrated what was necessary: a compromise of state, tribal, and federal interests in Indian gaming without overly infringing on tribal sovereignty. With this bill, Congress began to address the need for uniform regulation of Indian gaming commerce.[35] When it eventually enacted the IGRA in 1988, Congress' intent was "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."[36] The IGRA was also intended to address states'

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31. *Id.* at 206.
32. *Id.* at 211.
33. *Id.* at 210.
34. *Id.* at 211-14.
35. Peter T. Glimco, *The IGRA and the Eleventh Amendment: Indian Tribes are Gambling When They Try to Sue a State*, 27 J. MARSHALL L. REV. 193, 197 (1994); *citing* H.R. 4566, 98th Cong., 1st Sess. (1983) and S. 902, 99th Cong., 1st Sess. (1985).
36. 25 U.S.C. § 2702(1) (1988).

concerns by preventing the infiltration of organized crime and other corrupting influences, to assure that gaming on Indian lands was conducted fairly and honestly, and to establish federal authority and standards over gaming.[37]

The IGRA's legislative history reveals that the strongest opposition to allowing any tribal regulation of Indian gaming came from states where many forms of gambling were already legal.[38] The logical inference is that the real focus of the debate centered on a fear that Indians, being free from most or all of the constraints placed upon existing gaming activities, would have an unfair competitive advantage against non-Indian gaming, resulting in injury to the states in the form of lost tax revenues. After all, absent Congressional consent a state may not impose a tax on property or activities on Indian lands.[39]

The IGRA was the outgrowth of several years of discussion and negotiation among tribes, states, the gaming industry, the executive branch, and Congress.[40] Congress considered the law enforcement concerns of tribes, states, the federal government, and "the need to fashion a means by which differing public policies of these respective governmental entities [could] be accommodated and reconciled."[41] The threat of the Courts intruding upon territory Congress considered its own was also a significant factor in Congress' decision to act. Congress believed that the Congress, not the judiciary, had the responsibility to balance the competing policy interests and to determine the framework for regulating gaming on Indian lands.[42]

When the IGRA was finally enacted in 1988, it was viewed by many legislators and Indians as being unfavorable to tribal interests. However, this proved not to be the case. The judiciary continued to construe Indian legislation in favor of the tribes,[43] as it had done in *Seminole* and *Cabazon*.

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37. *Id.* § 2702(2)-(3).

38. *See* S. REP. No. 446, *supra* note 3, at 5.

39. Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

40. S. REP. No. 446, *supra* note 3, at 3071.

41. *Id.* at 3076.

42. *Id.* at 3073 ("[I]n the final analysis, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands."). Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) ("Congress' authority over Indian matters is extremely broad, and the role of the courts in adjusting relations between and among tribes and their members correspondingly restrained.").

43. *See infra* part III.A.

2. The Provisions of the IGRA

With the IGRA, Congress divided gambling into three classes, each class subject to differing degrees of tribal, state, and federal jurisdiction and regulation. Class I gaming is defined to include social and traditional Indian games played for minimal prizes by individuals at tribal ceremonies and gatherings.[44] Class I games are under the exclusive jurisdiction of the tribes.[45]

Class II gaming is defined as bingo and games similar to bingo such as pull-tabs, lotto, tip-jars, punch boards, and instant bingo. Class II gaming also includes electronic, computer, or other technological aids used in connection with these bingo-type games.[46] Certain card games operated by Indians in four named states prior to May 1, 1988 are also included in class II by virtue of a grandfather clause.[47] While it is within the jurisdiction of the tribes, class II gaming is legal only where such gaming is otherwise permitted within the state[48] and is subject to oversight by the National Indian Gaming Commission (NIGC), a federal agency created by the IGRA.[49]

Class III gaming includes all other forms of gaming.[50] Such activity is legal only if the following criteria are met: (1) it is authorized by tribal resolution and approved by the chairman of the NIGC; (2) it is located in a state that permits such gaming for any purpose by any person, organization, or entity; and, (3) it is conducted in conformance with a tribal-state compact.[51]

The IGRA provides that any tribe having jurisdiction over lands upon which class III gaming is to be conducted must request that the state in which the lands are located enter into negotiations to create a compact governing class III games. The state, upon receiving such a request, is required under the IGRA to negotiate in good faith in an attempt to form such a compact.[52] In the event that the state fails to negotiate a compact

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44. 25 U.S.C. § 2703(6) (1988).
45. *Id.* § 2710(a)(1).
46. *Id.* § 2703(7)(A)(i).
47. *Id.* § 2703(7)(C). The grandfather clause provides that included in class II gaming are those card games played in the states of Michigan, North Dakota, South Dakota, and Washington that were actually played in those states by Indian tribes on or before May 1, 1988, "but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such [s]tate on or before such date, as determined by the Chairman." *Id.*
48. *Id.* § 2710(b)(1)(A).
49. *Id.* §§ 2704(a), (b)(1); 2710(b)(1) to (c).
50. *Id.* § 2703(8).
51. *Id.* § 2710(d)(1)(A)(I)-(1)(C).
52. *Id.* § 2710(d)(3)(A).

in good faith, the IGRA gives federal courts the jurisdiction to preside over actions initiated by Indian tribes. Upon a finding that a state has failed in its duty to negotiate in good faith, a court must order the state and tribe to conclude a compact within sixty days, or, in the event of an impasse, submit the dispute to a court-appointed mediator to select the governing compact. Finally, if the state refuses to consent to the mediator's compact within sixty days, the Secretary of the Interior will determine how gambling on Indian lands will be regulated.[53]

III. RESERVATION GAMING UNDER THE IGRA

A. Round One: The Tribes Attack

Following the enactment of the IGRA, gaming activities on Indian reservations increased at a staggering pace. With the lack of regulations regarding the interpretation of the IGRA provisions, states were forced to resort to litigation to prevent Indian tribes from opening and operating full-scale casinos. The initial result was a series of court decisions that weighed heavily in favor of tribal gaming. Much to the dismay of the states, it appeared that if the states allowed even the most insignificant form of gambling, the state would be forced to negotiate and allow tribes within its borders to operate almost any form of gambling, even if it was different from that allowed by the state.[54]

1. Regulation or Prohibition?

Mashantucket Pequot Tribe v. Connecticut[55] became the first significant case to interpret the scope of the IGRA class III provision: gaming allowed for any purpose by any person, organization, or entity. The Pequots, already operating a class II bingo game in Connecticut, sought to enter into a compact with the State to permit class III high-stakes games. The Pequots wanted to engage in the regular operation of casino-style games, such as "Las Vegas Nights," which the State permitted as fundraisers for certain non-profit organizations.[56] In accordance with the IGRA, the tribe requested that the State enter into negotiations to form a compact. The State refused, claiming that the tribe only had the right to conduct "Las Vegas Nights" subject to the same regulations imposed by the State on non-profit organizations. The tribe

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53. *Id.* § 2710(d)(7)(B)(I).

54. *See infra* part III.A.1.

55. 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

56. *Id.* at 1026 (allowing blackjack, poker, dice, roulette, etc. during charitable "Las Vegas Nights").

subsequently filed suit against the State under the IGRA due to the State's failure to negotiate in good faith.[57]

A federal district court granted summary judgment in favor of the Pequot Tribe. The court held that by allowing certain non-profit entities to engage in "Las Vegas Nights," even though subject to tight regulations, Connecticut's approach to gambling in general was civil-regulatory rather than criminal-prohibitory.[58] The court found casino-style class III gaming to be a type of gaming allowed in Connecticut for any purpose by any individual, organization, or entity, and thus, required Connecticut to enter into negotiations to determine the extent of state regulations.[59] As a result of this ruling, the Pequot Tribe is currently operating one of the largest tribal casinos in the nation, creating over 2,000 jobs and generating $100 million a year in revenue.[60]

Following *Mashantucket*, a federal district court handed down a ruling that struck fear into the leaders of thirty-six states then operating state lotteries. In *Lac du Flambeau Indians of Lake Superior Chippewa v. Wisconsin*,[61] the Flambeau Tribe requested negotiations with the State regarding the tribe's proposal to open a casino on their reservation. The State refused, objecting to the proposed gaming because Wisconsin expressly prohibited all forms of class III gaming except lotteries and on-track parimutuel wagering.[62] The State argued that casino games were simply not allowed in Wisconsin for any purpose by any person, organization, or entity, within the meaning of the IGRA, and that the State should therefore not be required to negotiate a compact with the tribe.[63] The Flambeau Tribe, following the *Cabazon* rationale, argued that in determining whether a state's criminal laws would apply to reservation gaming, the court must analyze the state's policy toward gaming in general.[64] The court agreed with the tribe and concluded that the issue was not whether the particular games are allowed, but whether that state's public policy toward class III gaming in general is prohibitory or regulatory. The court went on to find that because Wisconsin

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57. *Id.* at 1027.

58. *Id.* at 1031-32.

59. *Id.* at 1032. The Pequot Tribe could not conduct these games without state oversight, but the tribe was not automatically subjected to the regulations imposed by the state on "Las Vegas Night" operations.

60. Swanson, *supra* note 4, at 474.

61. 770 F. Supp. 480 (W.D. Wis. 1991).

62. *Id.* at 483.

63. *Id.* at 484-85.

64. *Id.* at 485. If the policy of the state is to generally prohibit all forms of gambling, then the state's policy toward gambling is viewed as criminal-prohibitory. Alternatively, if the state permits some forms of gambling—even subject to strict regulations—the state's policy toward gambling is viewed as civil-regulatory.

permitted a state-run lottery, the State's general policy toward class III gaming was civil-regulatory in nature. The State was ordered to enter negotiations with the Flambeau to conclude a compact governing class III games.[65]

2. Class II or Class III?

Under the IGRA it is advantageous for tribes to avoid the cumbersome compact negotiation process required to conduct class III gaming. Tribes have attempted to circumvent this process by taking advantage of the confusion surrounding the Act and by introducing class III games under the guise of class II gaming. A major benefit of having an activity classified as class II gaming is that it is subject only to oversight by the NIGC, and is free from state regulation. Classifying a particular game as a class II game also allows tribes to offer the game immediately to the public. The existence of such advantages created a temptation for tribes to simply engage in illegal activity and wait for it to be challenged.[66]

The IGRA defines class II games as including bingo and bingo-like games such as pull-tabs. However, class II also includes electronic, computer, or other technological aids used in connection with these bingo-type games.[67] Using the ambiguous "technological aids" language, tribes have sought out video machines that play like slot machines, which are class III games, but which could arguably be defended as class II "technological aids" to bingo.[68] Following conflicts in several states, the NIGC issued regulations that expressly classify specific video devices as class III games and not class II "technological aids."[69]

Another example of a common attempt to falsely classify a game is illustrated by the actions of the Oneida Tribe of Wisconsin.[70] That tribe attempted to run a lottery without a compact. The State argued that lotteries are class III and not class II games. The Oneida Tribe operated two games on the reservation called "Big-Green" and "Cash-3." Both games would have players select a series of numbers at one dollar per play. Once a week tribal officials would randomly select numbers. Players whose numbers matched the ones selected by the tribe would win a jackpot, often amounting to $500,000 or more.[71]

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65. *Id.* at 486.
66. Swanson, *supra* note 4, at 476.
67. 25 U.S.C. § 2703(7)(a)(I) (1988).
68. Swanson, *supra* note 4, at 476.
69. 25 C.F.R. § 502.4 (1995).
70. *See* Oneida Tribe of Indians v. Wisconsin, 742 F. Supp. 1033 (W.D. Wis. 1990).
71. *Id.* at 1034-35.

When threatened with prosecution, the Oneida Tribe sought a declaratory judgment that the games were class II, not class III games and, therefore, were permissible without a compact with the State. The tribe argued that class II gaming explicitly allows "lotto," a term commonly used to refer to lotteries. The court was not persuaded. In holding for the State, the court found that all of the games defined to be class II were bingo, or bingo-like games where a board is used, numbers are called, and the first player with a winning sequence prevails. The "Big Green" and "Cash-3" games were found to be wholly different in kind from bingo.[72] The Oneida tribe was prohibited from operating these lotteries on the reservation without first seeking a compact with the State.

3. The Grandfather Loophole

Another method by which tribes attempted to circumvent class III requirements was through the IGRA's grandfather clause.[73] The first IGRA ruling on a tribe's attempt to expand its gaming activities via the grandfather exception is found in *Sisseton-Whapeton Sioux v. United States Department of Justice*.[74] The Sioux Tribe had started a blackjack operation on a South Dakota reservation on April 15, 1988, just six months prior to the enactment of the IGRA, and before May 1, 1988—the threshold date for triggering the IGRA grandfather clause. The tribe made some changes to its operation by increasing the number of tables and hours of operation. The United States filed a suit against the Sioux, claiming that the expansion violated federal law. The federal court found that the IGRA grandfather clause did not apply to the tribe's blackjack games because the tribe had exceeded both the nature and the scope of its pre-May 1, 1988 activity, contrary to the requirements of the clause.[75]

But on appeal, the Eighth Circuit reversed the district court, holding that the grandfather provision did apply because the tribe had not changed the "nature and scope" of its pre-May 1, 1988 operation. The court concluded that the only requirements necessary to satisfy the IGRA's "nature and scope" provision were that both the gambling operation and the specific games played must have been in place on or before May 1, 1988.[76]

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72. *Id.* at 1037.

73. *See supra* note 47 for language from the IGRA grandfather clause.

74. 718 F. Supp. 755 (D.S.D. 1989), *rev'd*, 897 F.2d 358 (8th Cir. 1990).

75. Sisseton-Whapeton Sioux v. United States Dep't of Justice, 897 F.2d 358, 359 (8th Cir. 1990).

76. *Id.* at 363.

It is important to understand the context in which this decision was made. The U.S. Supreme Court had developed the canons of construction that courts should broadly construe federal actions that establish or prescribe Indian rights and that courts must narrowly construe actions that limit Indian rights.[77] The entire basis for the initial post-IGRA status of reservation gaming was the liberal interpretation courts gave to the civil-regulatory, criminal-prohibitory test.

Indian gaming was therefore continuing to flourish under the Supreme Court's early decisions. The fact that courts had been somewhat strict in their interpretation of what constitutes class II gaming had minimal effect because of the lax interpretation given to the grandfather clause and the strict enforcement of the IGRA provision requiring states to negotiate class III compacts with Indian tribes.

B. Round Two: The States Retaliate with the Eleventh Amendment

After repeated defeat in trying to challenge the regulatory/prohibitory dichotomy, states may have recently found a key to successfully restricting future growth in reservation gambling. That solution is found in the Eleventh Amendment to the Constitution.

Despite the IGRA requirements that states negotiate in good faith to form regulatory compact agreements with Indian tribes wanting to engage in class III gaming, and despite the numerous instances where federal courts have compelled states to yield to that requirement, states continued to ignore Indian requests to engage in negotiations. Tribes predictably exercised their IGRA right to file suit against non-cooperative states, fully expecting a federal court would order the state to comply with the request. Beginning in the early 1990s states began to respond to such suits, not by arguing that their policy toward gambling was prohibitory as had been done unsuccessfully in the past, but with a new and more powerful argument. The new strategy, first employed by the State of Alabama in 1991,[78] was for the state to simply make a motion to dismiss based on state sovereign immunity under the Eleventh Amendment.[79]

The immunity afforded states by the Eleventh Amendment precludes federal jurisdiction over states, with a few exceptions, in suits by state

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77. McClanahan v. Arizona State Tax Commission, 41 U.S. 164, 174 (1973) (ambiguous expressions must be resolved in favor of the Indians); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943) (treaties must be construed to favor the Indians).

78. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991).

79. U.S. CONST. amend. XI ("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.").

citizens or citizens of foreign nations. Unless the IGRA's specific Congressional grant of federal court jurisdiction[80] falls under one of the few exceptions to the Eleventh Amendment, the states' obligation to negotiate in good faith with Indian tribes for class III casino-style gaming activities will be unenforceable in federal court.

Since 1890[81] courts have held that under the Eleventh Amendment states enter the federal system with their sovereignty intact, that the judicial authority in Article III[82] is limited by state sovereignty, and that a state is not subject to suit in federal court unless it has consented to be sued, either expressly or in the plan of convention.[83] The courts today recognize two exceptions to a state's sovereign immunity: either a state can consent to suit or Congress can abrogate a state's immunity under some circumstances. Only when a state relinquishes its sovereign immunity by one of these two means is it subject to federal court jurisdiction, thereby alleviating the Eleventh Amendment prohibition.

1. Consent

Under our federal system of government, there are two ways a state can consent to federal court jurisdiction: an explicit consent to a particular lawsuit, and an implied consent deemed given by the state when it joined the Union and adopted the U.S. Constitution.

a. Express Consent. If a state expressly consented to suit, the federal district court would have jurisdiction to rule on the tribe's claim under the IGRA. However, the issue of what constitutes express consent was a question that presented an initial obstacle. A federal district court resolved this question in *Poarch Band of Creek Indians v. Alabama*.[84] The Poarch Band tribe filed suit in federal court to compel the State to enter into negotiations for class III gaming. The State answered and filed

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80. U.S. CONST. art. I, § 8, cl. 3. Congress passed the IGRA pursuant to its power under the Indian Commerce Clause. Article I grants Congress power to regulate commerce with Indian tribes. The Indian Commerce Clause has since been interpreted as giving Congress "plenary power" (or "all that is required") over Indian affairs, including Indian tribes, their government, their members, and their property. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 319 (1978).

81. Hans v. Louisiana, 134 U.S. 1 (1890).

82. Article III of the Constitution vests the judicial power of the United States in one supreme court and such inferior courts as Congress may from time to time establish. U.S. CONST. art. III.

83. Ahola, *supra* note 10, at 916 (The theory behind consent inherent in the "plan of convention" is that the states, in ratifying Article I of the Constitution, ceded a portion of their sovereignty to the national government and created a limitation on their sovereign immunity in the "acceptance of the constitutional plan." (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25 (2d ed. 1988)).

84. 776 F. Supp. 550 (S.D. Ala. 1991).

a motion to dismiss based on the Eleventh Amendment's sovereign immunity. The tribe argued that Alabama had expressly consented to suit because the Attorney General's office had asserted that it would intervene on behalf of the State if the State was not named as a party.[85] The court found that no express consent had been given because any consent or waiver on behalf of a state must come through legislative enactment,[86] and the Alabama legislature had neither consented to the suit nor waived the State's immunity.

At present, no state legislature has expressly waived its sovereign immunity in the IGRA context. With the current level of state opposition to Indian gaming within state borders, it is unlikely that any state will specifically surrender its Eleventh Amendment immunity. Those few states that do not currently oppose Indian gaming have opted to either negotiate in good faith for a regulatory tribal-state compact or to not assert the Eleventh Amendment as a defense in federal court.[87] Thus, no tribe has been successful, nor is any tribe likely to be successful, in suing a state under the IGRA pursuant to the express consent exception to the Eleventh Amendment.

b. Implied Consent. Under the implied consent theory, states are considered to have waived their immunity by granting certain powers to the federal government when they entered the Union and adopted the Constitution. This waiver is referred to as the consent inherent in the plan of convention. The theory states that by entering a field of economic activity that is federally regulated, the state impliedly consents to be bound by that regulation and to be subject to suit in federal court.[88] Two specific requirements must be met to invoke the doctrine. First, Congress must state its intention to subject states to suit in federal court through "unmistakably clear language." Second, the state must constructively or impliedly consent to suit by entering a field of economic activity that is federally regulated by accepting the benefits of such an activity.

At least three different arguments have been made by tribes in the federal district courts asserting that the implied consent exception applied. First, a tribe might be able to sue a state on behalf of the United States because the states were not immune to suits by the federal government. Second, the states may have impliedly waived their immunity whenever Congress acted pursuant to its plenary powers under the Indian Commerce Clause. Third, the grant of federal court jurisdiction may be a

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85. *Id.* at 554.
86. *Id.*
87. Ahola, *supra* note 10, at 939.
88. Blatchford v. Native Village of Naotak, 501 U.S. 775, 778 (1991).

valid waiver of immunity because Congress clearly stated its intent to subject states to suit in federal court and the states entered a field of federally regulated economic activity by accepting the benefits of the IGRA.

i. Can Tribes Sue States on Behalf of the United States? Because states are not immune to suits by the United States, if a tribe sued a state in the representative capacity of the federal government, the state could not assert Eleventh Amendment immunity. In *Poarch Band*, the tribe argued that its suit against Alabama was, in reality, a suit by the United States to which Alabama had no immunity.[89] The tribe argued that the IGRA allowed the Secretary of the Interior to file suit against a state to enforce the mediation process, and thus, their suit could actually have been brought by the United States.

The *Poarch Band* court did not agree. The court found that under the IGRA, the tribe could not possibly be acting on behalf of the United States because the federal government could not sue a state for failure to negotiate in good faith. Rather, the court pointed out that the IGRA allowed the Secretary to bring a later action to enforce mediation procedures under the IGRA only after the state and tribe failed to reach an agreement.[90] In *Poarch Band*, as would necessarily be the case anytime a tribe brought an action for failure to negotiate in good faith, the action had not reached a point where the Secretary could become involved. Therefore, when suing under the IGRA, it is impossible for a tribe to meet the requisite condition that the action be the identical action that the United States could bring. Consequently, a tribe cannot qualify as a representative of the United States and thereby implicate the implied consent exception to sovereign immunity.

ii. Waiver of Immunity When Congress Enacts Legislation Pursuant to the Indian Commerce Clause. If states waive their sovereign immunity in the plan of convention, whenever Congress enacts legislation pursuant to the Indian Commerce Clause, the Eleventh Amendment would not be a bar to suit because the IGRA was enacted pursuant to the Indian Commerce Clause. In *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*,[91] the tribe made this argument. The tribe argued that a state would not be immune to any suit by an Indian tribe because the state had given up that right when it adopted the Constitution and accepted the Indian Commerce Clause. The court dismissed this argument, stating that

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89. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 554 (S.D. Ala. 1991) (A waiver of immunity against suits by the United States has been held to be one type of consent inherent in the plan of convention.).

90. *Id.* at 555.

91. 800 F. Supp. 1484 (W.D. Mich. 1992).

Blatchford controlled. In *Blatchford*, the Supreme Court addressed the issue of whether states had generally waived their immunity to tribes through the plan of convention. The Court held that the states had not, noting that waiver of immunity would only be found against particular litigants in two contexts: suits by sister states, and suits by the United States.[92] The Court indicated that the states had surrendered their immunity from one another when they joined the convention, while tribes, on the other hand, were immune from suits by states.[93] The Court reasoned that "if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes."[94] The district court thus concluded that the "mutuality of immunity" doctrine discussed in *Blatchford* applied to suits by tribes arising under legislation enacted pursuant to the Indian Commerce Clause as well as to other types of suits by tribes.[95]

The Supreme Court's decision in *Blatchford* apparently precludes tribes from ever claiming any kind of waiver inherent in the plan of convention. Whether states had waived their immunity when Congress legislated pursuant to the Indian Commerce Clause would thus have to be analyzed under the test the Court developed for an implied waiver: unmistakably clear intent by Congress and state entrance into a field of federally regulated economic activity.

iii. Waiver of Immunity by Receiving Benefits Under the IGRA. If Congress' intent was unmistakably clear in the IGRA, and if the states are found to have entered a field of federally regulated economic activity by accepting the benefits of the IGRA, then, theoretically, the implied consent exception to the Eleventh Amendment allows tribes to sue states in federal district court. In *Poarch Band* the tribe argued that Alabama had waived its sovereign immunity by accepting the benefits of the IGRA. Because the IGRA clearly conditioned participation in the federal gaming program on a waiver of sovereign immunity, the tribe argued that both requirements of the implied consent doctrine had been satisfied.[96] Although the court agreed that there was no question that Congress had clearly expressed in the IGRA its intent to allow states to be sued by tribes in federal court, the court ultimately concluded that Alabama had not consented to suit under the implied waiver doctrine.[97]

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92. Blatchford v. Native Village of Naotak, 501 U.S. 775, 780 (1991).
93. *Id.* at 780-83.
94. *Id.* at 782.
95. *Sault Ste. Marie Tribe,* 800 F. Supp. at 1488.
96. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 556 (S.D. Ala. 1991).
97. *Id.* at 557.

The Poarch Band Tribe claimed that Alabama participated in the IGRA by negotiating to obtain jurisdiction over gaming activities on Indian land. Furthermore, Alabama had benefitted from its participation in the IGRA because the State would be able to sue the tribe and enforce state laws on tribal lands. The court refuted the tribe's arguments, stating that "the primary way for a state to subject itself to suit under the IGRA [was] to do nothing.[98] According to the court, even if Alabama had negotiated to some extent, mere negotiation under the IGRA fell far short of consent. "If simply engaging in negotiations is enough to constitute consent . . . the state was faced with [a] choice of negotiating and consenting to suit or refusing to negotiate and being sued for failure to negotiate."[99] The court concluded by stating that the implication of the IGRA was to compel states to negotiate, thereby making the act of negotiating involuntary and even less an act of consent.[100] States unable to freely choose to participate can hardly be said to have constructively or impliedly waived their sovereign immunity.

None of the arguments set forth above succeeded in persuading the court, which ultimately held that the requirements of the implied consent theory had not been met. Based on the above analysis, it seems unlikely that tribes can use the implied waiver exception to the Eleventh Amendment to bring suit against states under the IGRA.

2. Abrogation

One possible remaining approach available to tribes to sue states in federal court is the abrogation exception. In certain situations Congress has the ability to abrogate[101] a state's Eleventh Amendment sovereign immunity. Before Congress can act however, two requirements must be met. First, Congress must make its intent to subject states to suit in federal court unmistakably clear in a governing statue. Second, Congress must have the power to abrogate.

a. Intent to Abrogate. There is little room for debate concerning Congress' intent to subject states to federal court jurisdiction under the IGRA. The IGRA states that U.S. district courts "shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe

98. *Id.*

99. *Id.*

100. *Id.* ("Upon receiving [a request to negotiate], the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." (citing 25 U.S.C. § 2710(d)(3)(A) (1988)) (emphasis added)).

101. To abrogate means to cancel or repeal by authority; to abolish. WEBSTER'S NEW WORLD DICTIONARY 4 (3d ed. 1988).

for the purpose of entering into a tribal-state compact . . . or to conduct such negotiations in good faith . . . ."[102] Virtually every court faced with the issue of Congress' intent in the IGRA to subject states to federal court jurisdiction has held that Congress was unmistakably clear in that regard.[103] Courts have left no uncertainty surrounding Congress' intent by concluding that it would be "difficult to imagine a clearer statement of Congress' intent to subject states to lawsuits in federal court,"[104] and that "Congress fully contemplated and expressed its desire to give the tribes a federal forum in which they could compel states to negotiate fairly with them."[105]

b. Power to Abrogate. Once it was settled that Congress had expressed an unmistakably clear intent in the language of the IGRA, the first prong of the abrogation test was met. The only remaining question was whether Congress had the power to abrogate state sovereign immunity. Until 1989, Supreme Court decisions had limited Congress' power to abrogate states' immunity to legislation enacted under Section 5 of the Fourteenth Amendment.[106] In 1989, the Court held in *Pennsylvania v. Union Gas Co.*[107] that Congress also has the authority to override states' immunity when legislating pursuant to the Interstate Commerce Clause.[108] However, the Court has yet to expressly extend this abrogation power to enactments pursuant to the Indian Commerce Clause, under which Congress enacted the IGRA.[109] The Court failed to specify whether their ruling was confined to the interstate commerce setting or whether it extended to the Indian commerce setting.

Currently, five federal district courts have addressed the issue of whether Congress had the authority to abrogate states' sovereign immunity when it enacted the IGRA under the Indian Commerce Clause. Of the five, only the district court in *Seminole Tribe v. State of Florida* held that Congress had this authority.[110] However, in *Poarch Band of*

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102. 25 U.S.C. § 2710(d)(7)(A)(I) (1988).

103. Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993); Seminole Tribe v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); *Poarch Band*, 776 F. Supp. 550.

104. *Poarch Band*, 776 F. Supp. at 558.

105. *Kickapoo*, 818 F. Supp. at 1427.

106. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

107. 491 U.S. 1 (1989).

108. *Id.* at 13-23.

109. *See* 25 U.S.C. § 2702 (1992) (stating that the purpose for enacting the IGRA under the Indian Commerce Clause was "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 government.").

110. *Seminole Tribe*, 801 F. Supp. at 658 (holding that Congress did abrogate the states' immunity in enacting the IGRA and had the constitutional power to do so under the Indian

Creek Indians v. Alabama the court held that Congress does not have the power to abrogate the states' Eleventh Amendment immunity when enacting legislation pursuant to the Indian Commerce Clause.[111] The Court noted that *Union Gas*, in which the Supreme Court recognized Congress' power to abrogate *vis-a-vis* the Interstate Commerce Clause, was merely a plurality decision. Thus, the *Poarch Band* court ruled that extending *Union Gas* to include Congressional abrogation power in legislative enactments under the Indian Commerce Clause would be an "unwarranted expansive application."[112]

The court also based its decision, in part, on the Supreme Court's ruling in *Cotton Petroleum Corp. v. New Mexico*.[113] In *Cotton Petroleum*, the Supreme Court declared that the Interstate Commerce and Indian Commerce Clauses have very different applications. The court further stated that the extensive caselaw that the Interstate Commerce Clause has promulgated is a result of the unique role of the states in our constitutional government and does not adapt well to cases which involve the Indian Commerce Clause.[114] Thus, the *Poarch Band* court concluded that this implication of *Cotton Petroleum*, coupled with the narrow interpretation of *Union Gas*, required a conclusion that Congress did not have abrogation powers when it enacted the IGRA pursuant to the Indian Commerce Clause.[115] Three other courts, applying similar reasoning, reached the same conclusion as the *Poarch Band* court.[116]

Commerce Clause).

111. 776 F. Supp. at 557-62.

112. *Id.* at 559.

113. 490 U.S. 163 (1989).

114. *See id.* at 192 (stating that the case law developed under the Interstate Commerce Clause should not be binding authority on cases brought under the Indian Commerce Clause).

115. The *Poarch Band* court stated:

> Because *Union Gas* is not directly on point, and with an eye toward the shaky ground on which it stands, this Court does not find the decision to be controlling. The weakness of the plurality opinion leads this Court to believe that it should not be given an expansive application and that, read narrowly, it does not require a determination that Congress had the power to abrogate Alabama's Eleventh Amendment immunity when it enacted the [IGRA].

Poarch Band, 776 F. Supp at 558.

116. *See* Spokane Tribe v. Washington, 790 F. Supp. 1057, 1060-61 (E.D. Wash. 1991) (holding that it was inappropriate to apply theories from the Interstate Commerce Clause to the Indian Commerce Clause); Blatchford v. Native Village of Naotak, 501 U.S. 775, 780-82 (1991) (holding that the Eleventh Amendment barred an action brought by an Indian tribe against a state because the state did not surrender this immunity when it adopted the Constitution); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992) (holding that Congress lacked authority to abrogate the states' immunity because when the states formed the Union they implicitly agreed to Congress' abrogation authority only under the Interstate Commerce Clause).

The nearly unanimous consensus among federal courts is that *Union Gas* should not have an expansive application until the Supreme Court gives further guidance regarding exactly what the decision meant and where it was leading.[117] At this time, there has been no clear message from the Supreme Court regarding Congress' power to abrogate state immunity under any Article I power. Had the Court intended Congress' power to abrogate state immunity to extend beyond the context of the Interstate Commerce Clause to the context of the Indian Commerce Clause, it could have easily included language to that effect in *Union Gas*. Thus, the Supreme Court's failure to provide the guidance desired by lower courts, coupled with the Court's discussion in *Cotton Petroleum*,[118] lends support to the position that the Court's ruling in *Union Gas* was not intended to extend Congress' abrogation power to legislation enacted under the Indian Commerce Clause.

IV. THE FUTURE OF INDIAN GAMING UNDER THE IGRA

The trend in federal court decisions during the early 1990s to move from the prohibitory-regulatory test to the application of consent and abrogation analysis has preserved state sovereignty in the domain of high-stakes casino-style gambling. Where once it appeared that states would have no defense against the flood of new tribal gaming activities, states may once again have the upper hand in determining what type of gaming activities are conducted within their borders.

Recent court decisions have frustrated the IGRA's attempt at balancing Indian and state interests. The current status of the IGRA fails to provide Indian tribes a forum in which to raise allegations of state non-cooperation. As previously discussed, the Eleventh Amendment bars a tribe's action against a state under the IGRA because Congress enacted the IGRA pursuant to the Indian Commerce Clause.[119] Furthermore, federal district courts are unable to assert jurisdiction over an Indian tribe's IGRA claim based on the exceptions to state sovereign immunity.[120]

Congress could have avoided this jurisdiction problem if it had simply enacted the IGRA under the Interstate Commerce Clause instead of the Indian Commerce Clause. Under the Interstate Commerce Clause, Congress has the power to regulate all commerce or activity that affects

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117. *Poarch Band*, 776 F. Supp. at 559.
118. *See supra* notes 112 and 113 and accompanying text.
119. *See supra* note 108.
120. *See supra* parts II.B.1 and III.B.2.

more than one state. Because the power to regulate interstate commerce is broadly interpreted, and gambling on Indian reservations depends upon goods and visitors from outside the state, Indian gaming falls within the scope of interstate commerce and is thus subject to Congressional control. Theoretically, Congress could resolve the confusion and controversy surrounding the IGRA by amending the Act with a simple statement indicating a Congressional intent that the IGRA be re-enacted pursuant to Congress' authority under the Interstate Commerce Clause.

Alternatively, the Supreme Court may soon decide to indulge the lower courts and rule on the applicability of its decision in *Union Gas*. Should the Court adopt the majority interpretation of the lower courts[121] under the IGRA, Congress would unquestionably lack the power to abrogate the states' Eleventh Amendment sovereign immunity and thus any suit by an Indian tribe could be repelled. Conversely, should the Court adopt the minority interpretation of the *Seminole* court[122] and expressly extend Congress' power to abrogate state immunity in the Indian commerce clause context, continued assertion by states of the sovereign immunity defense to suits by Indian tribes would become futile.

There is a third possible solution that requires no additional action by Congress or the Supreme Court. Under the current structure of the IGRA, if all provisions fail to produce a class III gaming compact between a state and Indian tribe, the question regarding regulation reverts to the Secretary of the Interior who must prescribe procedures under which class III gaming may be conducted.[123] Although a prerequisite to this event is a suit against the state by an Indian tribe,[124] where the sovereign immunity defense would prevail, action by the federal government against a state is not barred by the Eleventh Amendment.[125] This solution, however, is not desirable because it is at the mercy of the policies of the executive branch which are subject to change every four years. An administration sympathetic to state sovereignty would likely produce a very restrictive compact and conversely, an administration partial to tribal sovereignty would likely produce an extremely liberal compact. This potential inconsistency would only create additional opportunities for both Congress and the judiciary to intervene and further muddy the waters.

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121. *See supra* note 115 and accompanying text.
122. *See supra* note 109 and accompanying text.
123. 25 U.S.C. § 2710(d)(7)(B)(vii) (1988).
124. 25 U.S.C. § 2710(D)(3)(A) (1988).
125. *See supra* note 79.

V. CONCLUSION

The IGRA is still in its infancy and many important issues remain unresolved. However, at this time it is apparent that states must be allowed latitude in prohibiting or regulating class III gaming activities, especially where such activities are strictly regulated or prohibited by state policy. Class I and class II activities, because of their relatively harmless nature, are left to the jurisdiction of the tribes with only moderate oversight of class II activities by the NIGC. Class III activities, though, present very real concerns, especially in states that currently disdain such activities. Recognizing this, Congress enacted the IGRA as a means of balancing the tribes' interest in autonomy with the states' interest in exercising their police powers for the protection of their citizens.[126]

The IGRA was never intended to prevent class III gambling on Indian reservations. It was intended, rather, through the cooperative efforts of the tribes, the federal government, and the states, to allow adequate exercise of tribal sovereignty while ensuring sufficient protection against unscrupulous gambling operations. Because of failed cooperation between these three sovereigns, the Congressional intent of the Act is not being realized. Casinos have been permitted to open in states where gambling is generally prohibited, and have been prevented from opening in states where gambling is generally permitted and regulated.

The current adversarial relationship between tribes and states—and the inconsistency demonstrated by the judiciary—will inevitably force future action in this area. In fact, events that are likely to shape the future of Indian gaming have already commenced. Legislation prompted by state officials concerned about the enormous increase in reservation gaming was recently introduced in Congress by Representative Gerry Solomon of New York.[127] Although it is still too early to know Congress' intentions, Indian gaming officials fear that Congress will overhaul the IGRA and thereby weaken tribes' leverage in negotiating gambling compacts with states and give states greater latitude in limiting what games can be played on reservations.[128]

Of major significance in the judicial context is the recent grant of *certiorari* by the Supreme Court in an Indian gaming case.[129] In

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126. *See* S. REP. No. 446, *supra* note 3, 3072-73.

127. Jim Specht, *Indian Gaming Leaders Fear Reversals Under GOP*, GANNETT NEWS SERVICES, Jan. 18, 1995.

128. *Id.*

129. Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3556 (U.S. Jan 23, 1995) (No. 94-12).

Seminole Tribe of Florida v. State of Florida,[130] a consolidation of two appeals from district courts in Florida and Alabama, the Eleventh Circuit ruled that the states' Eleventh Amendment defenses were valid because Congress lacked the authority to abrogate the states' sovereign immunity when it enacted the IGRA pursuant to the Indian Commerce Clause. This decision is significant for two reasons. First, it marks the first time that a federal court other than a district court has ruled on the validity of the Eleventh Amendment defense and Congress' power to abrogate state immunity under the Indian Commerce Clause. Second, this decision prompted the Supreme Court to grant *certiorari*. The Court heard oral arguments on October 11, 1995, and at this writing a decision is still pending.[131]

Whatever course of action the future holds—whether legislative or judicial, restrictive or expansive—it is unlikely that the competing interests can be balanced to the satisfaction of all sides. Nor is it likely that future action will permanently resolve the present conflict. The interests are simply too diverse. On one side are the fundamental interests of tribal sovereignty and economic independence of Indian tribes who claim that Indian-government relations are a tribal-federal issue based on the concept of sovereign to sovereign. On the other side are the equally vital interests of state sovereignty, public safety, and social stability, advanced by states who feel their autonomy is being compromised. In this conflict of tribe versus state and wealth versus supremacy, justice ultimately demands that adequate consideration be given to the largest group of potential victims or beneficiaries, the American public, who so far seem the silent and forgotten player in this debate.

Brian M. Greene

130. 11 F.3d 1016 (11th Cir. 1994).

131. Transcript of Oral Arguments before the U.S. Supreme Court, Seminole Tribe of Florida v. State of Florida, 1995 WL 606007 (Oct. 11, 1995).