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# The IGRA and the Eleventh Amendment: Indian Tribes Are Gambling When They Try to Sue a State, 27 J. Marshall L. Rev. 193 (1993)

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# THE IGRA AND THE ELEVENTH AMENDMENT: INDIAN TRIBES ARE GAMBLING WHEN THEY TRY TO SUE A STATE

## AN ILLUSTRATIVE CASE

To best understand the complex interplay between state regulation of gambling on Indian reservations and the Indian Gaming Regulatory Act (IGRA),[1] it is helpful to read the following hypothetical.

The Tatanka Indian Tribe is a federally recognized tribe[2] located in the state of Caledonia.[3] In the past, the tribal government[4] received the majority of its funds from the federal government. Over the past decade, however, the federal government has urged the Tatanka Tribe to generate a larger proportion of the tribal government's funds in the hope that one day the tribe will become economically independent.[5]

In 1986, the Tatanka began operating bingo[6] games at the community center, a room with the capacity for one hundred players.[7]

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1. 25 U.S.C. § 2701 (1988).

2. The Advisory Council on California Indian Policy Act of 1992 defines a federally recognized Indian tribe as "any Indian tribe, band, group, or community . . . that has been federally recognized or acknowledged by the United States Government through an Act of Congress, a Federal judicial decision, or an administrative decision by the Secretary pursuant to part 83 of title 25, Code of Federal Regulations." Pub. L. No. 102-416, § 3, 106 Stat. 2131, 2132 (1992).

3. The Tatanka Tribe has over two hundred members residing on its reservation which is ruled by a tribal government.

4. The Tatanka have adopted a constitution and are governed by such pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (1934).

5. The federal government has expressed its desire to remove tribal nations from federal funding in the enactment of the Indian Gaming Regulatory Act. 25 U.S.C. § 2702 (1988). Congress stated that the purpose of this Act is to promote tribal economic development and self-sufficiency. *Id.*

6. For the purposes of the Indian Gaming Regulatory Act, the term "bingo" is defined as the game of chance, manual or electronic:

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

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

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards.

*Id.* § 2703(7)(A)(i) (1988).

7. The Tatanka reservation contained no natural resources from which the tribe could generate revenue, so the tribe turned to gambling. In 1988, the Tatanka were conducting bingo games five nights a week, and the stakes have been gradually increasing.

The bingo games are run exclusively by tribal members[8] and are attended mostly by non-Indians who reside in close proximity to the reservation.[9] The Tatanka are proud of their success, and the bingo operations provide tribal revenue of which the Tatanka are in dire need. The Tatanka are optimistic that expanding their bingo operations would enable the tribe to provide a better future for those living on the reservation.[10]

Prior to November 1988, the Tatanka government regulated its bingo games without interference from the state or federal governments.[11] However, in 1988, Congress passed the Indian Gaming Regulatory Act[12] which provided for the regulation of gambling activities on Indian lands throughout the nation.[13] In order to continue bingo operations under the IGRA, the tribe had to submit an ordinance to the Chairman of the National Indian Gaming Commission, which regulates the bingo games.[14] The Tatanka did not wish to jeopardize the funds generated from bingo and submitted their resolution to the Chairman in February 1989. The Chairman approved the ordinance, and the Tatanka continued to operate bingo games on their reservation.

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8. The bingo operations provide employment for over twenty Tatanka Indians. However, over one quarter of the tribal population is still unemployed. Over a third of the tribe's members do not have the equivalent of a high school education, and the present dropout rate does not indicate any improvement.

9. The Tatanka reservation is located on the border of two states with cities with populations over 100,000 within sixty miles of the reservation in each state. Most patrons of the bingo games reside in either of these cities.

10. The Oneida Tribe of Wisconsin has established a hotel, printshop, and other businesses through its casino operations and the tribal budget is up twenty-fold with the employment rate up tenfold. Susan Stanich, *Indians Say States Stack the Deck Against Reservation Gambling Operations*, WASH. POST, Aug. 2, 1992, at A16. The Mille Lacs Band of Chippewa Indians in Minnesota generated more than $22 million in the first 208 days of operating a casino which employed 900 full and part-time people. Patrick, *Viva Mille Lacs!*, CORP. REP. MINN., Apr. 1992, at 48. The tribe placed $15 million of tax-exempt bonds on the market backed by casino revenues. Karen Pierog, *Indian Tribes Come Back to Muni Market with Big Revenues from Casino Gambling*, BOND BUYER, Aug. 27, 1992, at 1. The tribe plans to build a grade school, a high school, a health clinic, and make infrastructure improvements with the proceeds. *Id.*

The average unemployment rate on our nation's reservations in early 1992 was forty percent. James N. Baker, *Gambling on the Reservations*, NEWSWEEK, Feb. 17, 1992, at 29. This is certain to change, as such tribes, for example, as the Mashantucket Pequot Indians in Connecticut opened a $58 million casino which employs 2300 people. *Id.* Reservation gambling is now a $1 billion industry. *Id.*

11. Caledonia allows non-profit charities to conduct similar bingo games and "casino nights," with strict limitations on wager amounts. Though the prizes offered at the Tatanka bingo games exceed these limits, Caledonia has made no attempt to restrict these Tatanka operations.

12. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988).

13. *Id.*

14. *Id.* § 2710(b)(1)(B).

The Tatanka government believes the success of the bingo games illustrates that a larger scale operation could be prosperous.[15] The tribal government contacted a gambling management firm in late 1990 for the purpose of building and operating a casino on the Tatanka reservation.[16] The management firm advised the Tatanka of the requirements the tribe needed to meet before the Tatanka could conduct such gambling activities on their reservation. Among these is the IGRA requirement that the Tatanka notify Caledonia of its proposal to conduct casino-type gambling.[17] Further, the tribe and the state must reach an agreement which will govern the gambling activities on the Tatanka reservation.[18]

In March 1991, the Tatanka government informed the governor of Caledonia of its desire to engage in casino-type gambling and requested a meeting with the state officials in order to negotiate an agreement pursuant to the IGRA. The Tatanka and state officials met several times, the State remained unwilling to negotiate with the Tatanka regarding any type of gambling beyond the bingo games presently operated on the reservation.[19] The Tatanka felt that their requests were in compliance with the IGRA and that the state was not negotiating in good faith as required by the IGRA.[20]

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15. The capacity of the tribe's community center has limited the growth of the bingo games, and the Tatanka remain highly dependent on diminishing federal funds. The tribal government leaders believe expanding their gambling operations could solve many of the tribe's financial worries. The Tatanka want to open a casino similar to those in Las Vegas or Atlantic City, except on a smaller scale. Moreover, they need assistance from outside the tribe in the areas of funding and management.

16. Though most Indian tribes require outside help to run a casino, they must be very careful in their selection. In October 1990, the Seneca-Cayugas of Oklahoma hired Wayne Newton Enterprises to manage their failing casino. David Segal, *Dances with Sharks: Why the Indian Gaming Experiment's Gone Bust*, WASH. MONTHLY, Mar. 1992, at 26. To get the casino back on track, the tribe was asked to add $524,000 to the salary of Wayne Newton, who is half American Indian, $125,000. *Id.* The casino grossed $12.5 million in 1991, but Newton Enterprises' books showed an improbable debt of $360,000 which the tribe was asked to cover (the tribe never saw Newton's $125,000 again either). *Id.* The total payment made to the tribe the same year was $13,000, while the salary of Newton's floor manager was seven times that amount. *Id.* When jackpot winners were unable to get their checks cashed, the tribe brought legal action and had their contract with Newton Enterprises rescinded. *Id.* at 27. It is yet to be decided who will cover the accumulated debt. *Id.*

17. 25 U.S.C. § 2710(d)(2)(A) (1988).

18. *Id.* § 2710(d)(1)(C).

19. Caledonia operated a lottery and instant win games which the state desired to protect. The state felt the bingo games on the Tatanka reservation posed no serious threat to the state-run gambling, but a casino had great potential to infringe upon Caledonia's gambling profits. Today, thirty-three states run lotteries, and in 1991 these states netted a total of $8 billion. Taegan D. Goddard, *Legalized Gambling Can Benefit Marketplace*, S.F. CHRON., Aug. 12, 1992, at A19. With lotteries generating such governmental funds, the states are very interested in protecting the lotteries from competing operations. See *infra* note 56 for a discussion of state legalized gambling.

20. 25 U.S.C. § 2710 (d)(3)(A) (1988).

In December 1991, the Tatanka brought suit against Caledonia and the governor in federal district court, asking the court to order Caledonia to comply with the IGRA and to negotiate in good faith with the Tatanka. The court, however, granted the state's motion to dismiss on the ground that the Eleventh Amendment of the Constitution barred the action. Therefore, the Tatanka can sue neither the state nor the governor to compel them to negotiate an agreement with the tribe regarding gambling regulation on the Tatanka reservation because they do not have access to a forum in which to raise these contentions. Thus, the Tatanka's hope of generating revenue from casino-type gambling has died, and, along with it, the Tatanka's hope of becoming fiscally self-sufficient.

## INTRODUCTION

The hypothetical dilemma the Tatanka faced represents the current constraints the law places on Indians who attempt to achieve economic independence through funds generated by casino-type gambling. In response to the increasing number of tribes engaging in gambling activities,[21] Congress enacted the IGRA with the intent of promoting tribal government, economic development, and self-sufficiency.[22] However, recent federal district court decisions prevent Indian tribes from realizing these goals.[23]

The IGRA provides that a state and an Indian tribe must enter into an agreement (tribal-state agreement) which will govern the gambling activities on the tribe's land.[24] After a state receives a request from an Indian tribe to negotiate a tribal-state agreement, the state must negotiate the agreement in good faith.[25] The IGRA further provides that United States district courts shall have jurisdiction over any action brought by an Indian tribe arising from the state's failure to conduct negotiations in good faith.[26] However, federal district courts cannot enforce the provisions of the IGRA because the Eleventh Amendment bars any action by an Indian tribe

21. Over half of our nation's Indian reservations are now operating a casino of some kind on their land. *Gambling: Bugsy and the Indians*, ECONOMIST, Mar., 1992, at 27.

22. 25 U.S.C. § 2702 (1988).

23. *See generally* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, *enforced*, 784 F. Supp. 1549 (S.D. Ala. 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991) (addressing the issue of whether the Eleventh Amendment bars Indian tribes from bringing suit against a state under the IGRA).

24. 25 U.S.C. § 2710(d)(3)(B) (1988).

25. *Id.* § 2710(d)(3)(A).

26. *Id.* § 2710(d)(7)(A)(i).

against a state or state official.[27]

The Eleventh Amendment confirms the notion that the states entered the Union with their sovereignty intact.[28] Thus, the federal courts are limited by the Eleventh Amendment and cannot provide remedies for all state violations of the Constitution or federal laws.[29] For example, states are immune from actions brought by foreign nations[30] and individuals, whether or not they reside in the particular state.[31] The Eleventh Amendment also provides the states with immunity from suits brought by Indian tribes.[32]

However, the Eleventh Amendment has not completely barred actions arising from a state's violation of the Constitution or federal laws.[33] Three generally recognized exceptions exist which remove the state's sovereign immunity shield. First, a state may consent to a suit and waive its immunity.[34] In the context of the IGRA, however, it is not realistic that a state will consent to suit brought by an Indian tribe.[35] Second, the state will not afford immunity to an individual officer if the officer has violated the Constitution or federal laws.[36] The IGRA requires the state to come to an agreement with the Indian tribe, hence, an order requiring an officer of the state to conduct good faith negotiations with the tribe is not available because the state is the real party in interest.[37] Finally, in certain situations, Congress can abolish a state's sovereign immu-

27. *See Poarch*, 776 F. Supp. at 553 (holding that the Eleventh Amendment bars Indian tribes from bringing action against a state and its officials under the IGRA).

28. THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without* [the Sovereign's] *consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." *Id.* (emphasis in original).

29. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 174 (2d ed. 1987).

30. *See* Monaco v. Mississippi, 292 U. S. 313, 322-24 (1934) (holding that states' Eleventh Amendment immunity also bars suits brought against states by foreign nations).

31. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (holding that the Eleventh Amendment also bars suits brought by a citizen against his own state).

32. U.S. CONST. amend. XI; *see* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991) (holding that states did not waive their immunity from suits brought by Indian tribes when the states ratified the Constitution).

33. TRIBE, *supra* note 29, at 176.

34. *See generally* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 283 (1959); Clark v. Barnard, 108 U.S. 436, 447 (1883); Carr v. City of Florence, 916 F.2d 1521, 1524 (11th Cir. 1990) (holding that states may consent to suit and thereby waive their sovereign immunity).

35. See *infra* notes 170-213 and accompanying text for a discussion of the states' lack of consent to suit under the IGRA.

36. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651 (1974); *Ex Parte* Young, 209 U.S. 123 (1908).

37. See *infra* notes 214-246 and accompanying text for an application of *Ex parte Young* to the IGRA.

nity by enacting a federal law which clearly expresses this intention.[38] Congress did not have the authority to abrogate the states' immunity through the IGRA because this law was enacted pursuant to the Indian Commerce Clause of the Constitution.[39] Therefore, under the IGRA as it presently exists, federal district courts cannot order a state to negotiate with an Indian tribe because the Eleventh Amendment bars this action.

This Note argues that the IGRA in its present state fails to provide the Indian tribes with a forum in which to raise contentions arising from a state's violation of the IGRA and demonstrates how Congress can and should rectify this deficiency. Part I of this Note discusses the general evolution of federal Indian law leading up to the enactment of the IGRA and the present interpretation of the Eleventh Amendment. Part II analyzes the three exceptions by which states are not furnished Eleventh Amendment immunity and discusses why each does not apply to the IGRA. First, Part II shows that states have not consented to suit under the IGRA. Next, it demonstrates why an Indian tribe may not seek redress against an individual state officer in an IGRA action. Finally, Part II concludes that Congress lacked the authority to abrogate the states' sovereign immunity when it enacted the IGRA. In Part III, this Note submits that Congress could have achieved its purpose by enacting the IGRA pursuant to the Interstate Commerce Clause rather than the Indian Commerce Clause. In conclusion, this Note proposes that, by enacting the IGRA pursuant to the Interstate Commerce Clause of the Constitution, Congress may remedy its failure to provide a forum in which Indian tribes may raise allegations based on violations of the IGRA.

## I. THE EVOLUTION OF FEDERAL INDIAN LAW AND THE ELEVENTH AMENDMENT

### *A. Gambling and Federal Indian Law*

Indian law fundamentally differs from all other areas of American law. This unique status derives from the disparate natures of a state and an Indian tribe[40]; unlike a state, an Indian tribe is an individual sovereign capable of making and enforcing its own laws outside the federalist structure.[41] In 1831, Chief Justice John Mar-

38. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress has the power to abrogate the states' immunity under the Interstate Commerce Clause and Section Five of the Fourteenth Amendment respectively).

39. U.S. CONST. art. I, § 8, cl. 3; see *infra* notes 247-306 and accompanying text for a discussion of Congress' power to abrogate and its limitations.

40. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231-42 (1982).

41. *See generally* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980); Williams v. United States, 327 U.S. 711,

shall characterized Indian tribes as "domestic dependent nations."[42]

### 1. State Intrusion upon Tribal Sovereignty

In the early development of Indian law, states had no power over Indians.[43] Only the federal government retained the power to exercise jurisdiction over Indian activities,[44] except when Congress expressly granted such power to the states.[45] However, in the late 19th century, courts began to consider the effect of their decisions upon the states when deciding issues relating to Indian tribes.[46] This balance of interests, which has continued throughout the evolution of Indian law, also includes the interests of the federal government.[47]

As courts began weighing the interests of the state, federal, and tribal governments, the resulting opinions often led to confusion.[48] In *Williams v. Lee*,[49] the Supreme Court introduced the infringement test, the first widely accepted test to weigh these interests. A violation of the infringement test occurred when a state intruded upon a tribe's self-governing powers.[50] Subsequently, the Supreme Court developed a test which gave the states a stronger influence in tribal government, holding that the state has the power to apply its laws to Indians unless preempted by treaties or federal statutes.[51] However, in order to promote tribal

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713 (1946); United States v. Chavez, 290 U.S. 357, 360 (1933); United States v. Ramsey, 271 U.S. 467, 481 (1926) (noting Indian tribes' dependency on funds from the federal government).

42. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

43. Worcester v. Georgia, 31 U.S. 515, 561 (1836). For an overview of the development of Indian law, see Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 151-63 (1990); Richard Monette, Comment, *Indian Country Jurisdiction and the Assimilative Crimes Act*, 69 OR. L. REV. 269, 269-79 (1990); Connie K. Haslam, Case Note, *Indian Sovereignty: Confusion Prevails—California v. Cabazon Band of Mission Indians*, 63 WASH. L. REV. 169, 169-75 (1988).

44. *Williams*, 327 U.S. at 713; *Chavez*, 290 U.S. at 360; *Ramsey*, 271 U.S. at 471.

45. Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); Williams v. Lee, 358 U.S. 217, 219 (1959); United States v. Quiver, 241 U.S. 602, 605-06 (1916); Jones v. Meehan, 175 U.S. 1, 13 (1899) (discussing limitations on tribal sovereignty).

46. United States v. McBratney, 104 U.S. 621, 630 (1882).

47. *See* Rice v. Rehner, 463 U.S. 713 (1983); Bryan v. Itasca County, 426 U.S. 373 (1976); United States v. Dakota, 796 F.2d 186 (6th Cir. 1986); United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (discussing the interests of the states, Indian tribes, and federal government in the context of federal Indian law).

48. COHEN, *supra* note 40, at 240.

49. 358 U.S. 217 (1959).

50. *Id.* at 223.

51. This preemption analysis was introduced in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

independence, courts were to construe any ambiguities in federal statutes in favor of the Indians.[52] Originally, tribal Indians only had to answer to the federal government,[53] but as Indian law evolved, the courts gave the interests of states greater weight.[54]

### 2. *States' Attempt to Ban Indian Gambling*

Indian tribal sovereignty has been the nucleus of several attempts to generate revenue to support a tribal government.[55] The most recent venture sweeping the tribal nations is the operation of gambling facilities on reservation grounds.[56] The proliferation of Indian gambling resulted in much debate throughout the 1970s and continues to be a source of conflict today.[57] Before Congress directly addressed the issue of gambling on Indian reservations, however, the states traveled various avenues in efforts to enforce their gambling laws on reservations.

The Assimilative Crimes Act (ACA)[58] opens the door for an in-

52. *Bryan*, 426 U.S. at 392; Antoine v. Washington, 420 U.S. 194, 202 (1975); Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. White, 508 F.2d 453, 461 (8th Cir. 1974).

53. *See* Williams v. United States, 327 U.S. 711 (1946); United States v. Chavez, 290 U.S. 357 (1933); United States v. Ramsey, 271 U.S. 467 (1926) (holding that tribes are answerable only to the federal government).

54. The adoption of the infringement test, which was then broadened under the preemption analysis, illustrates this development. *See supra* note 50 and accompanying text.

55. The sovereign immunity status has prompted Indian tribes to take advantage of their tax exempt condition in many forms. Their struggle to avoid state interference did not begin with the surge of gambling on reservations. Examples of comparable conflicts include the tax-free sales of tobacco and alcohol on Indian reservations. Rice v. Rehner, 463 U.S. 713 (1983); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). The states eventually won these battles and were able to tax the sales of tobacco and alcohol to non-Indian consumers. *Id.* This forced tribes to look to other methods of translating their unique status into economic gain.

56. Over half of the 280 Indian reservations in the country now offer gambling in some form. *Gambling: Bugsy and the Indians*, ECONOMIST, Mar. 21, 1992, at 27. Under the IGRA, it is a prerequisite to allowing Indian gaming that the state in which the tribe resides allows a similar form of gambling. The Indian tribes are not alone in the recent adoption of gambling to achieve financial gain. Several states have such gambling activities as lotteries, scratch-and-win games, and pull-tab games already in existence. This validates the Indian tribes' right to conduct gaming under the IGRA because gambling is not against the public policy of these states.

Currently, one-third of the states permit charities to conduct casino nights under strict regulations. *Id.* at 28. It follows, then, that the possibility of large scale casinos on Indian reservations exists in one-third of the states, provided the remaining criteria of the IGRA are fulfilled. Presently, thirty-three states run lotteries in this country, while only Utah and Hawaii ban gambling entirely. Goddard, *supra* note 19, at A19.

57. The Supreme Court issued more decisions on Indian law in the 1970's than in any other period in our nation's history. Robert C. Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29 (1983).

58. 18 U.S.C. § 13 (1969). The ACA provides, in relevant part:

crease in the power of a state over tribal lands[59] within its borders. The ACA provides that anyone guilty of a crime not made punishable by the laws of the Federal Criminal Code may be held accountable if the conduct violated the laws of the state in which it occurred, but the federal government has the sole power of enforcing the ACA.[60] Congress' policy behind the establishment of the ACA is to prevent any possible shortcomings in the federal criminal law.[61] Hence, through the ACA, Indian nations are to be indirectly amenable to the criminal laws of the state in areas where the federal law is silent.[62]

After receiving limited jurisdiction over Indian tribes, the states attempted to extend it past the criminal statutes. The enactment of Public Law 280[63] gave certain named states the power to exercise broad criminal jurisdiction and limited civil jurisdiction over tribal lands.[64] Civil jurisdiction was limited to that deemed

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> Whoever . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such a place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

*Id.*

59. Indian lands are defined as land within the limits of any reservation under the jurisdiction of the United States, including rights-of-way transgressing the reservation. DeCoteau v. District County Court, 420 U.S. 425, 427 (1975).

60. *Id.*; 18 U.S.C. § 13 (1969).

61. United States v. Sharpnack, 355 U.S. 286, 288-89 (1958); Williams v. United States, 327 U.S. 711, 714 (1946); United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977).

62. *Marcyes*, 557 F.2d at 1364.

63. Pub. L. No. 280, 67 Stat. 588 (codified at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a) (1984)). Section 1162(a) provides:

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

Section 1360(a) further provides:

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

28 U.S.C. § 1360(a) (1984).

64. 28 U.S.C. § 1360(a). California, Minnesota, Nebraska, Oregon, and Wisconsin (known as the "mandatory states") originally assumed these jurisdictional grants under Public Law 280. *Id.* The purpose in enacting Public Law 280 was an effort to aid reservations lacking adequate law enforcement institutions in which lawlessness posed a serious threat. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 541-42 (1975).

necessary to resolve private disputes[65] and did not apply to a state's regulatory statutes which were thus unenforceable on Indian territory.[66] Therefore, in the states in which it applied, Public Law 280 was often the determinative statute when a state attempted to compel conformity of Indian gaming[67] with existing state restrictions.[68]

In deciding a Public Law 280 case, a court had to determine, first, whether the relevant state law was criminal or civil in nature.[69] If the state law was civil or regulatory, the state was powerless to enforce the law on Indians. However, if the law was criminal or prohibitory in nature, the state could enforce the law on Indians and apply their own sanctions if the court found that the Indians had violated the law.[70] Public Law 280 did not apply in every state, and the states in which it did not apply sought to regulate the tribes' gambling by other means.

In attempting to ban Indian gaming, the states further contended that state laws on gambling were applicable to reservations under the Organized Crime Control Act (OCCA).[71] Under the OCCA, a violation of a state or local gambling law became a federal

65. Bryan v. Itasca County, 426 U.S. 376, 383 (1976); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 313 (5th Cir. 1986).

66. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987).

67. For the purposes of this note, the terms "gambling" and "gaming" are used synonymously.

68. *Cabazon*, 480 U.S. at 208; *Bryan*, 426 U.S. at 383; *Seminole Tribe*, 658 F.2d at 313.

69. *See generally Cabazon*, 480 U.S. 202 (1987); United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U. S. 1111 (1981); United States v. County of Humboldt, 628 F.2d 549 (9th Cir. 1980); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) (utilizing the criminal/prohibitory and civil/regulatory distinction).

70. In Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), the court was faced with deciding whether California's "bingo" laws were criminal or civil and whether they applied to gaming on Indian land within California. In applying Public Law 280, the court made the distinction that if a state generally intends to prohibit a specified conduct it may apply its law to Indians under Public Law 280; however, if the conduct is generally permitted but subject to regulation, the state may not enforce its law on an Indian reservation because Congress has not expressly granted this type of civil jurisdiction to the state. *Id.* at 1189. Under this analysis, the determining factor often employed in holding a statute to be criminal/prohibitory was whether the conduct was against the state's public policy. *Id.* However, this test did not result in consistent case law for future courts to look to for guidance and, thus, a uniform series of Indian gaming regulations was in demand. *Id.* at 1190.

71. 18 U.S.C. § 1955 (1974). The OCCA provides, in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

offense.[72] However, the federal government enacted the OCCA to prevent the furtherance of organized crime and made no mention of gambling on Indian land.[73] Furthermore, only the federal government could initiate an OCCA proceeding.[74] However, due to the policy of promoting economic independence on reservations, the federal government was hesitant to institute such proceedings.[75] States themselves could not properly bring an action to prevent Indian gaming under the OCCA.[76] Thus, by way of the ACA, Public Law 280, and the OCCA, states were unable to restrict the gambling conducted on Indian reservations.

*3.* California v. Cabazon Band of Mission Indians

The Supreme Court addressed the issue of a state's power to enforce its gambling regulations on Indian land in *California v. Cabazon Band of Mission Indians*.[77] The Cabazon Band of Mission Indians conducted bingo and card games under the approval of a federal ordinance.[78] The State of California and Riverside County attempted to enforce their statutes restricting the operation of bingo games, and Riverside County also sought to apply its ordinances which prohibited card games under Public Law 280 and the OCCA.[79] The tribe instituted an action seeking to enjoin the state and county from enforcing their ordinances inside the reservation.[80]

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(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

*Id.*

72. In the application of the OCCA, the prohibitory/regulatory test is not utilized to establish whether Indian gambling violates state law. The courts need only find that the gambling operations are not consistent with the state's public policy. *Barona Group*, 694 F.2d at 1190. Further, unlike Public Law 280, the OCCA was not limited to specified states and could thus apply nationwide. 18 U.S.C. § 1955 (1974).

73. Christine Guzman, *Indian Gambling on Reservations*, 24 ARIZ. L. REV. 209, 212 (1982).

74. United States v. Dakota, 796 F.2d 186, 188 (6th Cir. 1986).

75. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 (1987). The Supreme Court stated this policy in *Cabazon*:

We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government.

*Id.*

76. *Dakota*, 796 F.2d at 188, *aff'd*, *Cabazon*, 480 U.S. at 214.

77. 480 U.S. 202 (1987).

78. The federal ordinance allowed the Cabazons to operate bingo games to generate tribal funds and promote economic development. *Id.* at 206.

79. *Id.* at 205.

80. *Id.* at 206.

The Supreme Court employed the prohibitory/regulatory test in deciding whether Public Law 280 authorized the enforcement of California's bingo laws on the reservations.[81] The Court held that because California permitted numerous gambling activities—including bingo and a state lottery—California regulated gambling and could not enforce its bingo laws on the Cabazons under Public Law 280 reasoning that gambling was not against the public policy of the State.[82] The Supreme Court further ruled that the state of California could not enforce its gambling laws against Indian tribes under the OCCA because the statute gives no indication that states are to aid in enforcing federal criminal statutes.[83] Thus, California and Riverside County were enjoined from enforcing their gambling laws on the Indian reservations.[84]

The *Cabazon* decision left states with little opportunity to enforce their gambling restrictions and regulations on Indian reservations.[85] The rise in state operated gambling[86] meant that Indians

81. *Id.* at 210. The Supreme Court approved the prohibitory/regulatory test as employed in Bryan v. Itasca County, 26 U.S. 373 (1976). *Id. See also* Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1986); Barona Group of the Captain Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U. S. 929 (1983) (employing the prohibitory/regulatory distinction).

82. *Cabazon*, 480 U.S. at 211. The Supreme Court included in its analysis California's public policy on gambling. The fact that California ran a state lottery, permitted betting on horse racing, and allowed the operation of bingo games persuaded the Court that California's gambling policy was not prohibitory but regulatory. *Id.* The Court further noted that Public Law 280 does not authorize the enforcement of local laws on Indian reservations. *Id.* at 212. Thus, Riverside County could not prohibit the card games operated by the Cabazons under Public Law 280. *Id.*

83. *Id.* at 212. The Court did note the inconsistency in the application of the OCCA in the district courts. The Ninth Circuit in United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), and *Barona*, 694 F.2d 1185, has looked to the public policy of the state to determine whether tribal activities violate state law under the OCCA. And the Sixth Circuit in United States v. Dakota, 796 F.2d 186 (6th Cir. 1986), has stated there need not be a prohibitory/regulatory distinction made under the OCCA because the authority of the federal government is being exercised. *Id.* However, the Supreme Court failed to resolve this discrepancy by holding that the enforcement of federal criminal statutes under the OCCA is reserved for the federal government. *Cabazon*, 480 U.S. at 214.

84. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987). Before concluding, the Court also weighed the state, tribal, and federal interests presented in the case. The Court considered the federal interests of promoting tribal self-government, economic development, and self-sufficiency, the tribal interests of generating revenues for the tribal government and services; and the state interest of preventing the infiltration of corruption and organized crime into the state. *Id.* at 219. The Court found that the federal and tribal interests outweighed the interests of the state because the gambling operations were the sole means of raising revenue and employing tribal members on the Cabazon reservation. *Id.* at 220.

85. While the *Cabazon* ruling did address the form in which the application of Public Law 280 was to be applied, the ruling was still specific upon the facts presented and a broad interpretation of its holding was difficult. *Id.*

were able to operate similar gambling on their reservations in those states.[87] Furthermore, once the court determined that a state permitted some form of gambling and regulated its use, Indian tribes could conduct gambling on their reservations without interference or limitations from the state's regulations.[88] Thus, Indians were free to regulate their gaming as they saw fit, which usually resulted in much more extensive gambling than was permitted under state regulations.[89]

The majority of visitors to Indian gaming operations consisted typically of non-Indian gamblers, and the state's interest in regulating these activities persisted. However, the tribes and the federal government were interested in the revenues gambling could provide for tribal governments. After the Supreme Court addressed the issue of gambling on Indian reservations,[90] it was evident that Congress needed to consider the interests of the three sovereigns involved (state, tribal, and federal) and to instill a more uniform regulation as the number of tribes partaking in gambling grew.[91]

86. See *supra* note 56 for a discussion which demonstrates the rise in state operated gambling.

87. *Cabazon*, 480 U.S. at 222. This was true in states directly affected by Public Law 280 as well as those in which it did not apply. If the state permitted some form of gambling, Indian gambling did not offend the state's public policy and Public Law 280 would not authorize the enforcement of state gambling laws on reservations. *Id.* at 209. The federal government would not seek to prohibit the Indian gaming via the OCCA because this would contradict the federal policy of promoting tribal self-sufficiency. *Id.* at 219.

88. *See id.* at 222. After the court has determined a state may not enforce its gambling laws on Indian land, Indian gaming did not need to adhere to the state's gambling regulations at all. For the most part, the tribes were free to regulate the gaming activities themselves. *Id.* One exception to this was found in the Gambling Devices Act (GDA), 15 U.S.C. §§ 1171-1178 (1988). The GDA does not prohibit gaming in general, but only prohibits the use of specific gambling devices, such as slot machines on Indian lands. For an illustration applying the GDA, see United States v. Blackfeet Tribe, 369 F. Supp. 562 (D. Mont. 1973); United States v. Farris, 624 F.2d 890 (9th Cir. 1980).

89. For example, in Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), the district court held that the state could not enforce its gambling laws on the reservation because they were regulatory in nature. The court also stated that "[w]here the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed." *Id.* at 314-15.

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

91. *See Cabazon*, 480 U.S. at 222. In *Cabazon*, the Supreme Court did address the interests of the state, tribal, and federal governments. However, the Court's balancing of these interests was not applicable to the general issue of gambling on Indian reservations. The Court looked specifically at the fact that the Cabazon reservation contained no natural resources from which revenue may have been generated. *Id.* at 218. The Court found the tribe's interest in continuing the operation of gambling to be very strong as it was their only means of raising funds. *Id.* at 219. Further, the only interest claimed by the state was the possibility of organized crime influencing the tribal gaming. *Id.* The Court did not weigh other possible state interests, such as rise in crime rates or the rise in alcoholism that generally are attributed to gambling because

The growing case law on Indian gaming did not fulfill this need and left many issues unresolved.[92] The states' inability to obtain jurisdiction over Indian territory absent express Congressional consent[93] also made it necessary for states to seek to compel Congress to enact legislation regulating gambling on Indian territory.

### *B. The Indian Gaming Regulatory Act (IGRA)*

Before 1988, there was no federal statute directly addressing the legality of gambling on an Indian reservation.[94] This resulted in federal courts applying various statutes enacted for other purposes to settle controversies arising from Indian gaming.[95] However, as courts based their opinions on these broader statutes, their holdings either banned or permitted the gambling on Indian reservations without attempting to provide regulated gaming as a remedy.[96] Finally, after years of inconsistent holdings, Congress enacted the IGRA in 1988.[97] This enactment has resolved many questions about the extent of permissible gambling on Indian territory.[98]

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these were not offered to the Court for consideration. Thus, the balancing of interests in *Cabazon* was very specific to the facts presented and did not provide for uniform application to all Indian gambling cases. *See id.* at 222.

92. Before the IGRA, courts were reluctant to regulate Indian gambling. A court's usual remedy either banned all gambling activities or enjoined the state from enforcing its gambling laws on reservations. This resulted in either a tribal or state interest having no effect. A compromise between these two interests was needed. *See generally Cabazon*, 480 U.S. at 218-19 (discussing the tribe's interest in detail while quickly dismissing the interests of the state).

93. In order for states to assert jurisdiction, they must follow the rule expressed in McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 170-71 (1973), that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *Id.* at 170-71 (quoting United States Dept. of the Interior, FEDERAL INDIAN LAW 845 (1958)).

94. In order to enforce their gambling regulations on Indian land, states claimed jurisdiction under a variety of federal statutes. See *supra* notes 55-76 and accompanying text for a discussion of the statutes under which states sought to enforce such regulations.

95. *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Oneida Tribe v. Wisconsin, 518 F. Supp. 712 (W.D. Wi. 1981); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983); People v. Snyder, 532 N.Y.S.2d 827 (N.Y. Sup. Ct. 1988) (demonstrating the various statutes applied in Indian gambling controversies).

96. *See Cabazon*, 480 U.S. 202; *Barona*, 694 F.2d 1185; *Seminole Tribe*, 658 F.2d 310; *Oneida Tribe*, 518 F. Supp. 712; *Penobscot Nation*, 461 A.2d 478; *Snyder*, 532 N.Y.S.2d 827 (illustrating the remedies provided in Indian gaming conflicts).

97. Indian Gaming Regulatory Act, Pub. L. No. 100-497 (codified at 25 U.S.C. §§ 2701-2721 (1991).

98. The inconsistent analyses and holdings of the pre-IGRA cases are no longer binding on a court attempting to resolve the applicability of state gambling laws to tribal lands because the adoption of the IGRA provides a uniform

Congress first attempted to address the issue of regulating gambling on Indian land in 1983 with House Bill 4566.[99] Although the bill did not make it to the floor, it demonstrated what was necessary: a compromise of state, tribal, and federal interests on Indian gaming without overly infringing upon tribal sovereignty.[100] With this bill, Congress began to address the need for a more uniform regulation of the Indian gambling industry.

Several bills addressing Indian gaming found their way to congressional committees during the Ninety-ninth Congress. One such measure was Senate Bill 902,[101] which required federal standards and approval of management contracts for Indian gaming, set up a gambling commission and required gambling regulations to correspond to existing state regulations.[102] House Bill 1920[103] further included a provision that tribes may use revenue generated from gambling only to promote tribal governments.[104] House Bill 1920 also established three classes of gambling, each with separate jurisdictional regulations.[105] Finally, Senate Bill 2557[106] focused primarily on the regulation of bingo, while incorporating into the regulation the test of Public Law 280.[107] Senate Bill 2557 prohibited bingo on reservations in all states except those which permitted some form of bingo.[108] However, since Congress did not enact any of these bills, the Indian gaming issue remained unresolved.

In 1988, the regulation came from the 100th Congress, five years after the introduction of House Bill 4566.[109] The congressional answer originated as Senate Bill 555,[110] which included several sections found in preceding bills on Indian gaming activities.[111] Senate Bill 555, which became the Indian Gaming Regulatory Act, demonstrates the legislature's effort to balance the three sovereigns' interests while enacting a consistent means of

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system of regulation. 25 U.S.C. §§ 2701-2721 (1991). However, a historical background leading up to the enactment of the IGRA is helpful in understanding the need for a uniform regulation and the reasons this regulation took the form that it did.

99. H.R. 4566, 98th Cong., 1st Sess. (1983).
100. *Id.*
101. S. 902, 99th Cong., 1st Sess. (1985).
102. *Id.*
103. H.R. 1920, 99th Cong., 2d Sess. § 11(b)(2)(8)(i)-(iv) (1986).
104. *Id.*
105. *Id.* § 19 (5)(A)-(C). The three classes of gambling are similar to those described in the IGRA and discussion of these classes is included in the IGRA background. See *infra* notes 120-28 and accompanying text for a discussion of the three classes of gambling.
106. S. 2557, 99th Cong., 2d Sess. (1986).
107. *Id.*
108. *Id.*
109. H.R. 4566, 98th Cong., 1st Sess. (1983).
110. S. 555, 100th Cong., 1st Sess. (1987).
111. *Id.*

regulating gaming activities on Indian lands.[112]

The 100th Congress found that many tribes had engaged in gaming as a means of generating revenues to support their governments, yet the existing federal law provided confusing standards for regulating Indian gambling.[113] In addition to including the policies of promoting economic development, self-sufficiency, and tribal government,[114] Congress declared that the purpose of the IGRA was "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences . . . and to declare that the establishment of . . . Federal standards for gaming on Indian lands . . . [is] necessary to meet congressional concerns regarding gaming . . . ."[115]

Within the Department of the Interior, the IGRA established the National Indian Gaming Commission (NIGC).[116] The Commission, which has the authority to oversee the gambling on Indian land, is funded by tribal gaming operations.[117] The NIGC monitors tribal gaming, inspects the premises of Indian gaming, conducts background searches on parties involved in operations as it sees fit, and reviews the ledgers and audits of tribal gaming operations.[118] Furthermore, the Chairman of the NIGC has the authority to temporarily close gaming operations not conforming to the IGRA, to approve tribal gaming ordinances, and to approve any contracts made between Indian tribes and outside firms in connection with managing the gaming operations on Indian land.[119]

The IGRA, like House Bill 1920, categorized gambling into three classes.[120] Class I gaming includes social games for prizes of

112. *Id.* The IGRA survived a constitutional challenge since Congress has unlimited power over Indian tribes and the enactment of the IGRA was a reasonable exercise of Congress' plenary power in which the state's interest in regulating Indian gaming and the tribal interests in self-government were balanced. *See* Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.C. Cir. 1990) (upholding the constitutionality of the IGRA).

113. 25 U.S.C. § 2701(1), (3) (1988).

114. *Id.* § 2701(4).

115. *Id.* § 2702(2), (3).

116. *Id.* § 2704. The Commission is composed of three full-time members, two of which must be members of an Indian tribe. *Id.* This reflects the federal policy of tribal self-government. *Id.*

117. *Id.* § 2706(a)(2), (3), (b)(1). The Commission is also authorized to provide guidelines for assessing civil fines upon tribal gaming activities and collecting such fines. *Id.*

118. 25 U.S.C. § 2706(b)(1)-(4) (1988).

119. *Id.* § 2705 (a)(1)-(4). The chairman is authorized to levy and collect civil fines. *Id.*

120. 25 U.S.C. § 2703 (1992). The IGRA adopted many aspects of prior Indian gambling bills; the approval of management contracts, the institution of a national gambling commission, the requirement that gambling funds be used solely for general tribal government purposes, and the division of gambling into three classes from Senate Bill 902, 99th Cong., 1st Sess. (1985), and House Bill 1920, 99th Cong., 2d Sess. § 19(5)(A)-(c).

little value and forms of gaming involved with traditional tribal ceremonies.[121] The IGRA excludes Class I gaming from regulation, and the tribes are afforded exclusive jurisdiction.[122] Class II gaming is defined as bingo-type games and card games operated in conformity with state regulations.[123] The IGRA permits gambling of this type on Indian lands if the state in which the tribe is located allows any form of the gaming, and the tribe adopts an ordinance regulating the gaming which meets the approval of the Chairman of the NIGC.[124]

Class III gaming includes all forms of gambling that are not described in Class I or Class II, including blackjack, lotteries, and slot machines.[125] Class III gaming must meet the requirements of Class II gaming to be lawful under the IGRA.[126] In addition, the tribes must conform to a tribal-state compact addressing the restrictions and regulations of Class III gaming activities.[127] The tribes must request that the state enter negotiations for such a compact, and states have to negotiate in good faith.[128]

The IGRA also places restrictions on the use of revenues generated from gaming activities. Revenues are to be used only to fund tribal government operations, to provide general welfare to tribe members, to promote economic development of the tribe, or to fund charitable entities or local government agencies.[129] However, the net revenues from gaming may be dispersed to individual tribe members as well, provided such a plan is fair to all members and is approved by the Secretary of the Interior.[130] Also, any such disbursements are subject to federal taxation.[131] Thus, the IGRA promotes tribal economic development without directly benefitting individual members of the tribe.

Another provision of the IGRA includes the regulation of management contracts.[132] This section seeks to prevent Indians from entering into unfair management contracts and provides tribes with a minimum guaranteed payment.[133] It limits management

121. 25 U.S.C. § 2703(6) (1988).
122. 25 U.S.C. § 2710(a)(1) (1988).
123. *Id.* § 2703(7)(A)(i),(ii) (1988). Class II gaming does not include any banking card games such as blackjack or baccarat, or any slot machines or similar electronic games. *Id.* § 2710(7)(B).
124. *Id.* § 2710 (b)(1)(A),(B). Here Congress adopted requirements similar to those involved in a Public Law 280 analysis.
125. 25 U.S.C. § 2703 (8) (1988).
126. *Id.* § 2710(d)(1)(A)(ii).
127. *Id.* § 2710(d)(1)(c).
128. 25 U.S.C. § 2710(d)(3)(A) (1988).
129. *Id.* § 2710(b)(2)(B)(i)-(v).
130. *Id.* § 2710(b)(3).
131. *Id.* § 2710(b)(3)(D).
132. *Id.* § 2711.
133. 25 U.S.C. § 2711(b)(3).

contracts to a period of five years[134] and requires strict financial and accounting disclosure.[135] This reflects Congress' intent to promote Indian self-sufficiency and economic independence while preventing the infiltration of organized crime into the Indian gaming industry.

Congress established a uniform statutory basis[136] to regulate the gambling on Indian lands throughout the nation.[137] In enacting the IGRA, Congress determined that prior existing federal law provided confusing standards for regulating Indian gambling.[138] The IGRA has clarified the prerequisites needed to operate gambling activities on reservations and defined the permitted types of games. Through the IGRA, Congress addressed the conflict between states and tribes regarding the issue of gambling on Indian lands. However, the process which enables a tribe to operate class III gambling[139] fails to grant federal district courts the jurisdiction to hear claims based on this section brought by an Indian tribe because the Eleventh Amendment of the Constitution bars such action.

### *C. The Eleventh Amendment in Relation to the IGRA*

#### *1. The Relevant Portions of the IGRA*

The IGRA permits Class III games only when they are authorized by a tribal ordinance approved by the Chairman of the NIGC, located on a reservation in a state that permits similar games, and in compliance with the terms of a tribal-state agreement (compact).[140] Prior to operating Class III gaming, a tribe must negotiate with the state and enter into a compact.[141] The IGRA requires

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134. *Id.* § 2711(b)(5).
135. *Id.* § 2711(b)(1).
136. *Id.* §§ 2701-2721 (1991). The IGRA is not completely uniform. The application of the IGRA varies somewhat from state to state depending on the degree of gambling permitted in a state, *id.* § 2710(b)(1)(A), and depending on the terms agreed to in a tribal-state compact. *Id.* § 2710(d)(3)(A).
137. *Id.* § 2702 (2), (3).
138. 25 U.S.C. § 2701(3).
139. *Id.* § 2710(d).
140. *Id.* § 2710(d)(1). This section provides:

> (d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of [Class II gaming], and
>
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . .

*Id.*

141. *Id.* § 2710(d)(3)(A), which provides:

the state to act in good faith[142] in negotiating the compact.[143]

In the event that the state fails to negotiate a compact in good faith, the IGRA gives federal district courts the jurisdiction to preside over actions initiated by an Indian tribe.[144] If the federal court finds that the state has failed to negotiate in good faith, the court may order the state and tribe to finalize a compact within sixty days.[145] Further, the IGRA gives the court the authority to appoint a mediator to select the governing compact if the state and tribe fail to come to an agreement within the sixty day allotment.[146] Finally, if the state does not consent to the mediator's compact in sixty days, the Secretary of the Interior, in consultation with the tribe, will determine how gambling on the Indian land will be regulated.[147]

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Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

*Id.*

142. Good faith is defined as "a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations." BARRON'S LAW DICTIONARY 208 (3d ed. 1991).

143. 25 U.S.C. § 2710(d)(3)(A).

144. *Id.* § 2710(d)(7)(A)(i), which states:

The United States 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 for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

*Id.*

145. *Id.* § 2710(d)(7)(B)(iii), which states as follows:

If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.

*Id.*

146. *Id.* § 2710(d)(7)(B)(iv)-(v). This section states:

If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court. The mediator appointed by the court . . . shall submit to the State and the Indian tribe the compact selected by the mediator . . . .

*Id.*

147. 25 U.S.C. § 2710(d)(7)(B)(vii), which states:

If the State does not consent during the 60-day period . . . to a proposed compact submitted by a mediator . . . the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

*Id.*

Despite Congress' intent to require the states' to negotiate a tribal-state compact in good faith, the aforementioned provisions of the IGRA are unenforceable. The Eleventh Amendment[148] bars an Indian tribe from bringing suit against a state which has failed to negotiate a tribal-state compact in good faith. Hence, the federal district courts do not have the jurisdiction to hear claims brought by Indian tribes pursuant to Section 2710 of the IGRA.

### 2. *The Eleventh Amendment Constraints*

The provisions of the IGRA which grant tribes the authority to conduct casino-type gambling on their lands are unenforceable because states are immune from suit under the Eleventh Amendment. The Eleventh Amendment of the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[149] The Eleventh Amendment bars suits against a state government by citizens of another state or foreign country.[150]

As interpreted by the Supreme Court, the Eleventh Amendment also bars suits against a state by one of its own citizens even though this is not explicitly stated.[151] The Court recently explained:

> Despite the narrowness of its terms, since *Hans v. Louisiana* . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty[152] . . . and that a State will therefore not be subject to suit in a federal court unless it has consented to suit, either expressly or in the "plan of the convention."[153]

Furthermore, the Supreme Court has extended this immunity against foreign sovereigns, though the Eleventh Amendment only

148. U.S. CONST. amend. XI.

149. *Id.*

150. Fitts v. McGhee, 172 U.S. 516, 530 (1899).

151. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (holding that states are immune from suits brought by their own citizens under the Eleventh Amendment).

152. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991) (citing Welch v. Texas Dept. of Highways & Public Trans., 483 U.S. 468, 472 (1987); Employees v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 290-294 (1973)).

153. *Blatchford*, 111 S. Ct. 2578, 2581 (citing Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 310 (1990); *Welch*, 483 U.S. at 474; *Atascadero State Hosp.*, 473 U.S. at 238; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)).

expresses that states shall be immune from suit by individuals.[154] However, like most principles in our laws, there are exceptions to the Eleventh Amendment concept of sovereign immunity.

First, states may expressly waive sovereign immunity through legislative enactments which intentionally relinquish the state's immunity.[155] Though disfavored, sovereign immunity may also be overcome if a state has implicitly consented to suit.[156] Further, an individual state officer who acts in violation of the Constitution or federal laws is not afforded the state's immunity.[157] Finally, under some circumstances the state's consent is not necessary, and Congress itself can abrogate the Eleventh Amendment immunity.[158]

Before 1991, federal courts did not consider the inability of an Indian tribe to bring suit against a state under the IGRA.[159] This is because federal courts interpreted 28 United States Code Section 1362[160] as an abrogation of states' Eleventh Amendment immunity.[161] Thus, in an IGRA claim, the court would not have to rule on whether the IGRA itself needed to fall within one of the excep-

154. *See* Monaco v. Mississippi, 292 U.S. 313, 330 (1934) (holding that there was no basis found in the plan of the convention by which a foreign state may overcome a state's Eleventh Amendment immunity).

155. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974); Clark v. Barnard, 108 U.S. 436, 447 (1883) (illustrating how states may waive their sovereign immunity).

156. *See Edelman*, 415 U.S. at 673; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (stating that courts are reluctant to find a state has implicitly consented to suit).

157. *See Halderman*, 465 U.S. at 131-32; *Ex parte* Young, 209 U.S. 123, 150-51 (1908); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 562-63 (S.D. Ala. 1991) (holding actions against state officials are not barred by the Eleventh Amendment if the official has violated a federal law or the Constitution).

158. *See* Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989); *Atascadero State Hosp.*, 473 U.S. at 238; Fitzpatrick v. Bitzer, 427 U.S. 445,456 (1976); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, No. 1: 90-CV-611, 1992 WL 71384, at *2 (W.D. Mich. March 26, 1992) (holding that Congress has the power to abrogate the states' immunity in certain situations). The Eleventh Amendment is also limited in that it is a bar to suit only against the state and its agencies, and not local governments or their agencies. Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-01 (1979).

159. *See generally* Oneida Tribe of Indians v. Wisconsin, 951 F.2d 757 (7th Cir. 1991); United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170 (10th Cir. 1991); Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990); Sisseton-Wahpeton Sioux Tribe v. United States Dept. of Justice,.718 F. Supp. 755 (N.D. S.D. 1989) (demonstrating the various theories states proposed in attempting to restrict Indian gambling).

160. 28 U.S.C. § 1362 (1988). Section 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Id.*

161. *See generally Oneida Tribe of Indians*, 951 F.2d at 759; United Keetoowah Band of Cherokee Indians, 927 F.2d at 1173; *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 743 F. Supp. at 646; *Sisseton-Wahpe-*

tions discussed above because the court would establish jurisdiction under section 1362.[162]

However, in *Blatchford v. Native Village of Noatak*,[163] the Supreme Court held that Section 1362 was not an abrogation of states' Eleventh Amendment immunity.[164] The Court reasoned that given Section 1331,[165] which gave federal courts jurisdiction to hear certain civil actions in which the amount in controversy exceeded $10,000,[166] the purpose of Section 1362 was to eliminate the minimum amount in controversy for certain claims brought by tribes.[167] The Supreme Court ruled that Section 1362 granted the federal courts jurisdiction to hear such claims, but did not abrogate the states' Eleventh Amendment immunity.[168] Thus, a tribe seeking relief must establish federal court jurisdiction independent of Section 1362 in order to overcome the states' sovereign immunity.[169] The IGRA does not override the Eleventh Amendment immunity because it does not fall within one of the recognized exceptions.

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*ton Sioux Tribe*, 718 F. Supp. at 755 (holding that 28 U.S.C. § 1362 effectively confers jurisdiction upon the federal district courts).

162. The jurisdictional problem contained in the IGRA was not an issue prior to the Supreme Court case, Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991), in which the Court held that 28 U.S.C. § 1362, in itself, was not an abrogation of the state's Eleventh Amendment immunity. *Id.* at 2582. Prior to the Blatchford holding, the federal district courts were not required to establish jurisdiction under the IGRA itself because the courts used § 1362 to establish jurisdiction to hear Indian claims such as those pursuant to the IGRA. *Oneida Tribe*, 951 F.2d at 759.

163. 111 S. Ct. 2578 (1991).

164. *Id.* at 2585.

165. 28 U.S.C. § 1331(a) (1964) (amended 1976, 1980). At the time section 1362 was enacted, section 1331 stated: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." *Id.* The $10,000 requirement was amended 1980. *Id.*

166. *Id.*

167. *Blatchford*, 111 S. Ct. at 2583. The *Blatchford* Court stated this reasoning finds support in the title of the Act which adopted section 1362: "To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes." *Id.* (citing 80 Stat. 880).

168. *Blatchford*, 111 S. Ct. at 2585 n.4. The Court stated:

> In asserting that § 1362's grant of jurisdiction to 'all civil actions' suffices to abrogate a state's defense of immunity, . . . the [dissent] has just repeated the mistake of the Court in Chisolm v. Georgia, 2 Dall. 419 (1793) . . . the case that occasioned the Eleventh Amendment itself. The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct. . . . The [dissent's] view returns us . . . to the beginning of this 200-year struggle.

*Id.* (emphasis in original).

169. Spokane Tribe v. Washington, 790 F. Supp. 1057, 1060 (E.D. Wash. 1991) (holding that sovereign immunity must be overcome by a source independent of 28 U.S.C. § 1362).

## II. The Application of the Eleventh Amendment to the IGRA

The Eleventh Amendment to the United States Constitution grants the states immunity from suits in federal courts. However, an Indian tribe may overcome this immunity if it can show the state has consented to suit and waived its immunity, if it obtains an order requiring a state official to enter into a tribal-state compact, or if Congress abrogated the states' immunity when it enacted the IGRA. The following analysis addresses these exceptions to sovereign immunity in the context of the IGRA.

### *A. States Have Not Waived Sovereign Immunity*

An Indian tribe may attempt to overcome a state's sovereign immunity by claiming the state has consented to suit under the IGRA. An Indian tribe intending to operate Class III gaming on its reservation must first negotiate an agreement with the state in the form of a tribal-state compact.[170] If, during negotiations, the tribe and the state come to an impasse, or if the state refuses to negotiate, the tribe may bring suit in a federal district court under the IGRA.[171] However, Section 1362 gives the district court the authority to merely hear the case,[172] and the tribe must still overcome the state's Eleventh Amendment immunity.[173]

The tribe can defeat this jurisdictional problem if it can show that the state has consented to suit and, thus, waived its sovereign immunity. The Supreme Court stated that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' "[174] Thus, it is possible for a tribe to defeat the state's immunity by showing that the state explicitly consented to a particular lawsuit or that the state implicitly consented to the suit when it adopted the United States Constitution.[175] In the case of a tribe bringing action under the IGRA, the states have not consented, either expressly or by adopting the Constitution, to waive their Eleventh Amendment

170. 25 U.S.C. § 2710(d)(3)(A) (1988).

171. *Id.* § 2710(d)(7)(A)(i).

172. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2585 (1991).

173. *Spokane Tribe*, 790 F. Supp. at 1060.

174. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984) (citing The Federalist No. 81 (Alexander Hamilton)); Monaco v. Mississippi, 292 U.S. 313, 322-323 (1934); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 553-554 (S.D. Ala. 1991)).

175. *See Poarch Band*, 776 F. Supp. at 554 (stating states can waive sovereign immunity expressly or by implication when they joined the Union).

immunity.[176]

At one time, the standard to determine whether a state expressly waived its immunity was whether the state intentionally relinquished its constitutional right not to be sued.[177] Today, however, most courts require that express consent be given through legislative enactment.[178] It is highly unlikely that a state which wishes to restrict gambling on Indian land will explicitly consent to be sued by a tribe under the IGRA in the event that its negotiations for a tribal-state compact come to a halt. In fact, only one tribe has even asserted this claim, and it was not successful.[179] Therefore, an Indian tribe suing for enforcement of the IGRA will not overcome a state's immunity by arguing that the state expressly consented to such suit.[180]

More viable is the possibility that a state implicitly consented to be sued under the IGRA by Indian tribes when it adopted the Federal Constitution. By accepting the Constitution, a state consented to jurisdiction that was "inherent in the constitutional plan."[181] Courts have found this constructive consent in various forms; for example, states are not immune from suits by the United States[182] or by sister states.[183] Because the Eleventh Amendment has been interpreted far beyond its literal language, federalism principles behind the amendment have governed its application.[184]

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176. *Id.* at 557; Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, (W.D. Mich. 1992) (holding that Michigan did not implicitly surrender its immunity by adopting the Constitution).

177. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (discussing the standard for determining if a state has consented to suit).

178. *See* Carr v. City of Florence, 916 F.2d 1521 (11th Cir. 1990) (stating that the state must declare its intention to waive immunity through legislative enactment).

179. *See* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 554 (S.D. Ala. 1991) (holding that the state did not expressly consent to suits brought by Indian tribes under the IGRA).

180. *Id.*

181. Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

182. *See* United States v. Texas, 143 U.S. 621, 642 (1892) (relying upon United States v. North Carolina, 136 U.S. 211 (1890), *rev'd on other grounds*, West Virginia v. United States, 479 U.S. 305, 311 (1987)) (holding that states implicitly consented to be sued by the federal government when they ratified the Constitution).

183. *See* South Dakota v. North Carolina, 192 U.S. 286, 295 (1904) (holding that states implicitly waived their immunity from suits brought by other states when they joined the Union).

184. *See* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (stating that the Eleventh Amendment has been extended far beyond its literal language). "Federalism" signifies "a system of government wherein power is divided by a constitution between a central government and local governments, the local governments maintaining control over local affairs and the central government being accorded sufficient authority to deal with national needs and affairs." TRIBE, *supra* note 29, § 3-4, at 28. Federalism principles play a major role in the interpretation of the United States Constitution. *Id.*

Federalism principles do not suggest that states have consented to suits brought by Indians when the state adopted the Constitution. Indian tribes in this country are "domestic dependent nations" with attributes of sovereignty.[185] Thus, tribes do not fit into a general category previously described in relation to the Eleventh Amendment (individuals, sister states, United States government, or foreign sovereigns). In hopes of overcoming a state's immunity from suit, tribes have claimed they fit into the category of a sister state.[186] Indian tribes are domestic and have been held distinct, for Eleventh Amendment purposes, from foreign states.[187] Indian tribes are not individuals because they have attributes of sovereignty.[188] Indian tribes, like the states, were present in this country when the Union was formed.[189] The United States has sued the states for the benefit of Indian tribes in the past, but only recently have the tribes been recognized as possessing the ability to act for themselves.[190] Thus, tribes claim that the Eleventh Amendment should not bar an Indian tribe from bringing suit against one of the states because sister states and the federal government are not barred from doing such.

However, a state did not surrender its immunity from suits by Indian tribes when it adopted the Constitution.[191] The states' consent to suit by the United States for the benefit of Indians is not consent to suit by the Indians themselves.[192] States are not granted Eleventh Amendment immunity in suits by sister states and the United States because of the role each state played in the formation of the Union.[193] States are not immune from suits by

185. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

186. *See* Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1163 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2578 (1991) (stating that Indian tribes possess characteristics similar to states).

187. *Cherokee Nation*, 30 U.S.(5 Pet.) at 18.

188. Turner v. United States, 248 U.S. 354, 361 (1919).

189. *Native Village of Noatak*, 896 F.2d at 1163.

190. *See id.* at 1163-64 (holding that, though the federal government has sued the states on the Indian tribes' behalf in the past, when the tribes brought suit against the states themselves, the states retain their Eleventh Amendment immunity).

191. *See* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2580 (1991) (holding that the states did not waive their immunity from suits brought by Indian tribes when the states joined the Union).

192. *Id.* at 2584. The *Blatchford* Court ruled:

> The consent, "inherent in the convention," to suit by the United States — at the instance and under the control of responsible federal officers — is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

*Id.*

193. *Id.*

sister states.[194] This is justified by the fact that the concession is mutual.[195] For example, because Illinois is not immune from a federal suit brought by New York, New York is not immune from suit by Illinois. Illinois' and New York's immunities in relation to each other are equal.

However, Indian tribes were not represented parties in the constitutional convention and, thus, could not have surrendered their sovereign immunity.[196] Further, tribes are granted immunity from suits brought by a state.[197] If a state implicitly consented to suit by a tribe, the states' and the tribes' immunities in relation to each other would be unbalanced in favor of the tribe. Therefore, Indian tribes are not to be treated as sister states, and a suit brought by a tribe against a state under the IGRA will not overcome the state's immunity because the state did not consent to being sued by an Indian tribe in a federal court when the state joined the Union.[198]

A state may also implicitly consent to suit under the theory expressed in *Parden v. Terminal Railway*.[199] Under *Parden*, when a tate voluntarily engages in an activity which the federal government has regulated pursuant to the Commerce Clause, the state has constructively consented to suit under that federal regulation.[200] Applying *Parden* to the IGRA, if a state voluntarily engages in the conduct of regulating Class III gambling described in Section 2710 of the IGRA, the state may be held to have implicitly consented to a lawsuit brought by an Indian tribe.[201]

However, courts have interpreted the *Parden* theory quite narrowly.[202] Since that case was decided, no court has found consent

194. *See* South Dakota v. North Carolina, 192 U.S. 286, 295 (1904) (holding states waived their immunity from suits by other states when they adopted the Constitution).

195. *See Blatchford*, 111 S. Ct. at 2582-83 (holding that it is the mutuality of concession which makes the states' surrender of immunity from suits by sister states plausible and that there is no such mutuality with Indian tribes).

196. *Id.*

197. *See* Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (holding that Indian tribes possess sovereign immunity from suits brought by the states).

198. *Blatchford*, 111 S. Ct. at 2582. The Court justified its holding according to the principle that the federal courts shall be as accessible to the Indians as they are to other citizens by stating: "But of course, denying Indian tribes the right to sue States in federal court does not disadvantage them in relation to 'all other persons.' [The Indian tribe is] asking for access more favorable than that which others enjoy." *Id.*

199. 377 U.S. 184 (1964).

200. *Id.* at 187; Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 556 (S.D. Ala. 1991).

201. *See Poarch Band of Creek Indians*, 776 F. Supp. at 557 (holding that Alabama did not implicitly consent to suit by negotiating a tribal-state compact with the tribe).

202. *See id.* at 556 (stating that the *Parden* theory of implicit consent should not be applied expansively).

to suit under the *Parden* theory.[203] In *Edelman v. Jordan*,[204] the Supreme Court limited the *Parden* theory of consent to situations in which Congress has expressly indicated that participation in an activity by a state will result in a waiver of immunity.[205]

Today, the standard for determining whether Congress intended a state to be amenable to suit is whether a federal regulation states this "in unmistakably clear language."[206] The IGRA states that the federal courts will have jurisdiction to hear causes of action arising from a state's failure to negotiate a tribal-state compact in good faith in unmistakably clear language.[207] But in order to establish consent under the *Parden* theory, the state must voluntarily engage in an activity which Congress has regulated.[208]

The IGRA regulates a state's negotiations with a tribe to enter into a tribal-state compact.[209] However, the activity of merely negotiating with a tribe is insufficient conduct to waive a state's Eleventh Amendment immunity.[210] Further, under the IGRA, a tribe may bring suit against a state which refuses to negotiate an agreement to regulate Class III gaming.[211] Thus, negotiating a tribal-state compact does not appear to be voluntary conduct for the state. The state is faced with the choice of refusing to negotiate and risking suit or negotiating and waiving its immunity to suit.[212] Hence, a state which does not enter negotiations with a tribe pursuant to the IGRA cannot be held to have waived its Eleventh Amendment immunity under the *Parden* theory by voluntarily engaging in the activities regulated by the IGRA.[213] Therefore, a tribe must over-

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203. *Id.*
204. 415 U.S. 651 (1974).
205. *Id.* at 673. The Court noted that constitutional rights are not commonly surrendered by merely implied consent. *Id.*
206. Welch v. Texas Dep't of Highways & Pub. Trans., 483 U.S. 468, 478 (1987).
207. *See* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557 (S.D. Ala. 1991) (holding that Congress expressed its intention to grant federal district courts the authority to hear IGRA cases in unmistakable clarity).
208. *Id.* at 556; Parden v. Terminal Ry., 377 U.S. 184 (1964).
209. 25 U.S.C. § 2710 (1988).
210. *See Poarch Band*, 776 F. Supp. at 557 (holding that Alabama did not sufficiently engage in regulated activity by negotiating with the Indian tribe).
211. 25 U.S.C. § 2710(d)(3)(A) (1988).
212. *Poarch Band*, 776 F. Supp. at 557.
213. In *Parden*, the Supreme Court ruled that a state may not plead sovereign immunity when it is sued under the Federal Employers' Liability Act (FELA) because the state chose to own and operate a railroad twenty years after FELA was enacted. Parden v. Terminal Ry., 377 U.S. 184, 192 (1964). The Court held that when the state voluntarily engaged in this activity, it necessarily consented to be sued under the FELA. *Id.*

The circumstances surrounding a state conducting negotiations with an Indian tribe pursuant to Section 2710 of the IGRA can be distinguished from the facts of the *Parden* case. By merely negotiating with an Indian tribe, a state has not engaged in any business or interstate commerce. *See id.* at 192. Unlike the state of Alabama in *Parden*, a state which negotiates with a tribe does not

come the state's sovereign immunity by either the *Young* doctrine or by establishing that Congress abrogated the state's immunity by enacting the IGRA because states will not expressly or implicitly consent to a lawsuit brought by a tribe under the IGRA.

### *B. An Individual Officer May Not Bear the Burden for the State Under the* Young *Doctrine*

An Indian tribe which brings an action against a state for failing to negotiate a tribal-state compact in good faith cannot circumvent the state's Eleventh Amendment immunity under the *Young* doctrine.[214] Under *Ex parte Young*,[215] one may bring a suit against a state officer to enjoin the official's violation of federal law.[216] The state official is not afforded immunity under the Eleventh Amendment in such situations.[217] However, in an IGRA claim, a federal court cannot assert jurisdiction over a state official based on *Young* for two reasons. First, the court cannot compel the official to perform a discretionary act. Second, the state is the real party in interest, not the official.[218]

In *Ex parte Young*, the Supreme Court held that state officials who violate the Constitution or federal laws are not afforded the state's immunity under the Eleventh Amendment.[219] The Court reasoned that, because the state could not authorize such conduct, the state official was stripped of his representative status and could

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stand to profit monetarily by conducting this activity. Further, Congress has retained any benefit a state may obtain under the IGRA, such as overcoming the Indian's own sovereign immunity, until after a tribal-state compact has been concluded. Thus, during the negotiation period itself, the state does not benefit by engaging in activity pursuant to the IGRA.

214. *See* Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549 (S.D. Ala. 1992) (holding that the Indian tribe's action against the state official is barred by the Eleventh Amendment).

215. 209 U.S. 123 (1908).

216. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (holding that the court may grant prospective injunctive relief against a state official who violates the federal laws or Constitution).

217. TRIBE, *supra* note 29, § 3-27, at 189.

218. *See Poarch Band*, 784 F. Supp. at 1552 (holding that a court may not order a state official to negotiate with an Indian tribe in good faith because this is not a ministerial duty and the state is the real party in interest).

219. *Ex parte Young*, 209 U.S. at 155-56. In *Young*, the Supreme Court held that a federal district court could enjoin Minnesota's Attorney General from enforcing a railroad rate-setting statute which fined and imprisoned violators as criminals. *Id.* The Court held that Minnesota's statute violated the Fourteenth Amendment due process clause and stated:

> [I]ndividuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

*Id.*

be held accountable for his actions.[220] When a plaintiff sues a state official, the federal court may grant an injunction which governs the official's future conduct.[221] Thus, under *Young*, an Indian tribe may attempt to circumvent a state's sovereign immunity by bringing a suit against an individual rather than the state.

For example, an Indian tribe which intends to operate Class III gaming on its land must first negotiate a tribal-state compact with the state in which the tribal lands are located, and the IGRA provides that states must negotiate a compact in good faith.[222] Therefore, before a tribe commences Class III gaming on its land, it must notify a state official, for example, the governor, that the tribe wishes to negotiate a tribal-state compact pursuant to the IGRA.[223] If the negotiations are unsuccessful, the tribe may bring a suit against the state official alleging that the official acted in violation of a federal law by failing to negotiate the compact in good faith.[224] The tribe may contend that the state official is not granted the Eleventh Amendment immunity under the theory of *Young*. Thus, the tribe may ask the court to compel the state official to formulate a tribal-state compact under the provisions provided in the

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220. *Id.* at 159-60. The Court further ruled:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case 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.

*Id.*

221. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-03 (1984); *Edelman*, 415 U.S. at 677. In *Edelman*, the Court ruled it was proper to issue an injunction against the state official to prospectively enjoin him from failing to process aid to the aged, blind, or disabled, but the Court would not award retroactive relief for benefits which had been wrongfully withheld. *Id.* The Court recognized that an expansive reading of *Young* would hinder the protective value of the Eleventh Amendment. TRIBE, *supra* note 29, § 3-27, at 192. The *Edelman* exception to *Young* does not bar prospective remedies, even if they involve expenditures by the state. Hutto v. Finney, 437 U.S. 678, 692-93 (1978). The Court held in *Hutto* that, even though the award constituted monies that would be paid by the state, the award of attorneys' fees against state prison officials for their bad faith unconstitutional actions did not involve an Eleventh Amendment violation. *Id.* The Court has also stated that when monetary relief is sought against a state officer, the monetary relief must be ancillary to the prospective injunctive relief. Kentucky v. Grahm, 473 U.S. 159, 169 n.17 (1985). In *Pennhurst*, the Court further limited the scope of *Young*. *Pennhurst*, 465 U.S. 89, 120-21. The Court held that an allegation of a state officer's violation of state law, even if brought under pendent jurisdiction, would not remove the Eleventh Amendment bar because no federal constitutional predicate existed for limiting the sovereign immunity without a violation of federal law. *Id.*

222. 25 U.S.C. § 2710(d)(3)(A) (1988).

223. *Id.* § 2710(d)(2)(A).

224. *Id.* § 2710(d)(7)(A)(i).

IGRA.[225] For this reason, the court may grant an injunction governing the state official's future conduct under the *Young* doctrine.

However, courts have interpreted this doctrine narrowly.[226] The Supreme Court itself, in *Young*, stated that in a suit against a state official, the federal court may compel the official to perform his ministerial duty, but the court cannot direct the official to perform a discretionary act.[227] The United States District Court for the Eastern District of Washington, in *Spokane Tribe of Indians v. Washington*,[228] addressed the issue of whether compelling a state official to conclude a tribal-state compact as provided in the IGRA was an infringement of the officer's discretionary judgment.[229]

In *Spokane Tribe*, the tribe sent a letter to the governor of Washington requesting to negotiate a tribal-state compact pursuant to the IGRA.[230] After two years of unsuccessful negotiations, the tribe brought action against the governor of Washington premised on his failure to negotiate in good faith.[231] The court denied the governor's motion to dismiss because, under the *Young* doctrine, the governor's Eleventh Amendment immunity was voided.[232] While the court did not rule that compelling the gover-

225. See *supra* notes 144-47 and accompanying text for a discussion of the remedies available under the IGRA when a state has failed to conduct good faith negotiations.

226. *See supra* note 221. Eleventh Amendment jurisprudence involves two strands, namely the nature of the relief sought and the scope of the authorized action. *Tribe*, *supra* note 29, § 3-27, at 193-94. This is why the Court's analysis of the fiction adopted in *Young* has often been described as "incoherent, technical, and removed from first principles." *Id.* However, the IGRA action presented in this Note does not involve the analysis of both strands of the Eleventh Amendment. The relief sought in this action only involves an injunction ordering a state to negotiate in good faith. This clearly falls within the *Young* limitation of prospective injunctive relief.

227. *Ex parte* Young, 209 U.S. 123, 158 (1908). The *Young* fiction simply requires a state officer to act within the scope of his duty, and when he exceeds this duty, he is not acting on behalf of the state. TRIBE, *supra* note 29, § 3-27, at 189. Thus, an injunction may only require a state officer to carry out his official duties. *Id.* However, a federal court may order a state officer to exercise his discretion in the context of the Fourteenth Amendment. *See* Milliken v. Bradley, 433 U.S. 267 (1977). The Supreme Court has ordered state officials to institute a remedial desegregation program with the state financing the program, *id.*, and the Eleventh Circuit Court of Appeals has ordered the members of a state personnel board to hold a termination hearing to afford the terminated employee his Fourteenth Amendment procedural due process rights, Brown v. Georgia Dept. of Revenue, 881 F.2d 1018 (11th Cir. 1989). An IGRA action is not brought under the Fourteenth Amendment, and a federal court cannot order a state official to perform a discretionary act. Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1551 (S.D. Ala. 1992).

228. 790 F. Supp. 1057 (E.D. Wash. 1991).

229. *Id.* at 1062.

230. *Id.* at 1059.

231. *Id.* In this same action, the court granted the state's motion to dismiss the action against the state because the action was barred by the Eleventh Amendment and because the court was without jurisdiction. *Id.* at 1061.

232. *Id.* at 1063.

nor to negotiate with the tribe in good faith was included in the governor's ministerial duties, and thus a discretionary act, it reasoned that only by its assertion of jurisdiction over the governor would the tribe be left with a forum in which to present its contentions.[233] Thus, the necessity for giving the tribe a judicial forum outweighed any potential infringement of gubernatorial discretion.[234]

The balancing test applied by the *Spokane Tribe* court exceeds the scope of *Young*.[235] When the Supreme Court adopted this legal fiction in *Young*, it specifically stated that a court may only require an affirmative action which is ministerial in nature.[236] Two months after the *Spokane Tribe* case was decided, a federal district court in Alabama addressed this same issue.

In *Poarch Band of Creek Indians v. Alabama*,[237] after dismissing the state from the action for lack of jurisdiction, the court addressed the issue of whether a suit may be maintained against the governor for violating the IGRA by failing to negotiate with the tribe in good faith.[238] The court concluded that the *Young* doctrine did not give the court jurisdiction to order the governor to negotiate a compact with the tribe as contemplated by the IGRA because this required discretion on the governor's behalf.[239] Negotiating an

233. Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1063 (E.D. Wash. 1991). This decision of the court in *Spokane Tribe* is not in accordance with existing case law. The action at bar was not in the context of the Fourteenth Amendment due process rights, and thus, the court exceeded its authority by ordering a state official to perform a discretionary act. *See supra* note 227 (discussing those situations in which a court may order a state official to perform a discretionary act). Further, the court acknowledged that it was aware its ruling would infringe upon the state official's discretion; however, it nevertheless proceeded to break from precedent in light of this in order not to deprive the tribe of a forum in which to raise its contentions concerning the state's bad faith. *Spokane Tribe*, 790 F. Supp. at 1062-63.

234. *Spokane Tribe*, 790 F. Supp. at 1063.

235. *See supra* note 233 (discussing the balancing test the court invoked).

236. *Ex parte* Young, 209 U.S. 123, 158 (1908).

237. 784 F. Supp. 1549 (S.D. Ala. 1992).

238. *Id.* at 1550. The court dismissed the state in a prior action in which the court allowed the tribe to amend its complaint to include an action against the governor. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 563 (S.D. Ala. 1991). The tribe amended its complaint, and this action ensued. Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549 (S.D. Ala. 1992).

239. Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1551-52 (S.D. Ala. 1991). The court concluded:

> For this Court to order the Governor and the Tribe to conclude a Tribal-State compact . . . would clearly be to order the Governor to exercise discretion. Negotiating with the plaintiffs to institute a state policy is by no means ministerial and involves discretion in ways not contemplated by a court order directing a party to refrain from instituting a prosecution under an unconstitutional statute as in *Young*, to comply with federal time limits in processing AABD applications as in [Edelman v. Jordan, 440 U.S. 332 (1979)] . . . or to pay attorney's fees as in [Hutto v. Finney, 437 U.S. 678 (1978)]. Accordingly, this Court is without jurisdiction to order the Gover-

agreement which will govern the conduct of gambling activities on Indian land requires both the state representative and the tribal representative to exercise discretion because, in order to conclude such an agreement, some form of compromise is inevitable. The state representative must exercise discretion in determining which provisions to compromise and which provisions to push adamantly during negotiations for a tribal-state compact. Therefore, a court may not assert jurisdiction over a state official in an IGRA action because the court may not compel a state official to perform a discretionary act under *Young*.[240] Under this reasoning, the limited exception to sovereign immunity created by *Young* does not apply to the situation presented in this Note.

Furthermore, a suit against a state official under the IGRA may not be maintained under the theory of *Young* because such suit is in reality a suit against the state.[241] If the state is the real party in interest, the Eleventh Amendment bar is not removed by seeking injunctive relief against a state officer.[242] The state is considered the real party in interest when a potential judgment would restrain the state from acting or would compel it to act.[243] In an action based on the IGRA against a state official for failing to negotiate in good faith, the state is the real party in interest.[244]

The IGRA does not specify which individual or group is authorized to negotiate a compact on behalf of the state. The IGRA merely requires that "the state shall negotiate with the Indian tribe in good faith to enter into . . . a compact."[245] A suit in which a tribe brings

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nor to negotiate with the plaintiff Tribe or to conclude a Compact as contemplated by the [IGRA].

*Id.*

240. *See Ex parte* Young, 209 U.S. 123, 158 (1908) (holding that a court may only order a state official to perform ministerial duties).

241. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-102 (1984) (holding that an action may not be maintained against a state officer under *Young* when the state is the real party in interest).

242. *See* Cory v. White, 457 U.S. 85, 90 (1982) (demonstrating that, by distinguishing suits against state officers from impermissible suits against the state itself, *Edelman* did not intend to abandon *Young* in favor of a test which looked solely to the relief requested by the plaintiff).

243. *Pennhurst*, 465 U.S. at 101 n.11. The Court also explained that the state is the real party in interest where " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the judgment would be to restrain the Government from acting, or compel it to act." *Id.* (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

244. Poarch Band of Creek Indians, 784 F. Supp. 1549, 1552 (S.D. Ala. 1992). The court concluded that ordering the governor to negotiate a tribal-state compact with the tribe would only operate against the state because the state would be bound by any compact the governor negotiates. *Id.*

245. 25 U.S.C. § 2710(d)(3)(A) (1988). A state official, such as the governor, does not even possess the authority to enter a tribal-state compact on behalf of the state. Kansas v. Finney, 836 P.2d 1169, 1179 (Kan. 1992). In *Finney*, the Kickapoo Nation of Kansas and Governor Finney entered into a tribal-state compact. *Id.* at 1173-74. However, the Attorney General of Kansas brought an

an action against a state official seeking a decree requiring the official to conclude a tribal-state compact is in reality one against the state.[246] While the officer is compelled to act to negotiate a compact, it is the state itself which is affected by this order because it will be bound by this tribal-state compact even after the particular official is no longer in office. Thus, the *Young* doctrine does not impart jurisdiction to a federal court in such a suit against a state official under the IGRA because the state is the real party in interest and the Eleventh Amendment bars this action.

### C. *Congress Did Not Abrogate the States' Immunity When It Enacted the IGRA*

An Indian tribe may attempt to overcome the Eleventh Amendment bar by claiming that Congress abrogated the states' sovereign immunity when it enacted the IGRA pursuant to the Indian Commerce Clause.[247] Congress must satisfy two criteria in order to successfully abrogate the states' immunity. First, Congress must express its intent to nullify the states' immunity in unmistakably clear language.[248] Second, Congress must also possess the power to abrogate state sovereign immunity.[249] Thus far, the Supreme Court has held that Congress does possess this abrogation power when legislating under Section Five of the Fourteenth Amendment[250] or pursuant to the Interstate Commerce Clause.[251] How-

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action challenging the Governor's authority to negotiate and enter into such compact without the Kansas Legislature's approval. *Id.* The court concluded that the Governor did have the authority to negotiate with the tribe, but, without a legislative delegation of power to approve the compact, the Governor had no power to bind the state to the terms of the compact. *Id.* at 1179. Thus, following *Finney*, a court order requiring a state official to negotiate and enter into a compact with a tribe may not be carried out because the official most likely lacks the authority to enter into such a compact without legislative approval.

246. *See Poarch Band*, 784 F. Supp. at 552 (dismissing the action against the governor because the state was the real party in interest).

247. *See generally* Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1061 (E.D. Wash. 1991); *Poarch Band*, 784 F. Supp. at 562 (illustrating Indian tribes' attempts to overcome the states' immunity by claiming Congress nullified this immunity when it enacted the IGRA). The Indian Commerce Clause is found at Article III, Section Eight of the Constitution, and provides: "The Congress shall have Power To regulate Commerce with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

248. *See* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991); Dellmuth v. Muth, 491 U.S. 223, 226 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that congressional abrogation must be expressed in unmistakably clear language).

249. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress may remove the sovereign immunity bar when it legislates under Section Five of the Fourteenth Amendment).

250. *See id.* at 456 (holding that Congress has abrogation power under Section Five of the Fourteenth Amendment).

ever, Congress enacted the IGRA pursuant to the Indian Commerce Clause,[252] and the Court has yet to determine whether Congress has abrogation authority when legislating pursuant to that provision.

The United States Supreme Court has held that Congress may abrogate the states' sovereign immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.[253] To satisfy this requirement, Congress must literally include the states in its authorization to sue a class of defendants.[254] Congress expressed its intention to annul immunity in the IGRA by stating as follows:

> The United States 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 for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . . .[255]

Congress expressly provided federal jurisdiction over claims brought by Indian tribes against states to compel good faith negotiations under the IGRA. Furthermore, Congress made its intention to abrogate the states' immunity in unmistakable clarity by listing the states among the class of defendants against which this statute authorizes suit.[256] Therefore, because Congress expressed its intent to override the states' immunity in unmistakably clear language in the IGRA, the analysis must focus on whether Congress possessed the authority to make states amenable to suit in federal courts when legislating pursuant to the Indian Commerce Clause.[257]

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251. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 12 (1989) (holding Congress has abrogation power when legislating pursuant to the Interstate Commerce Clause).

252. U.S. CONST. art. I, § 8, cl. 3.

253. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991); Dellmuth v. Muth, 491 U.S. 223, 226 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (espousing the "unmistakably clear language" rule).

254. *See* Edelman v. Jordan, 415 U.S. 651, 672 (1974) (holding that a federal district court could not order Illinois officials to release and remit federally subsidized welfare benefits illegally withheld from Illinois citizens because Congress did not include Illinois in the authorized class of defendants).

255. 25 U.S.C. § 2710(d)(7)(A) (1988).

256. *See* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 657-58 (S.D. Fla. 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1488-89 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557-58 (S.D. Ala. 1991) (holding Congress clearly expressed its intent to abrogate the states' immunity in the IGRA).

257. This issue has been addressed in five United States district courts: four held that Congress does not have the power to abrogate state immunity *vis-a-vis* the Indian Commerce Clause, *Sault Ste. Marie*, 800 F. Supp. at 1489; Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1061 (E.D. Wash. 1991); *Poarch Band*, 776 F. Supp. at 561-62; Mississippi Band of Choctaw Indians v. Mississippi, No. J90-0386(B), slip op. at 13 (S.D. Miss. Apr. 9, 1991), and only one held otherwise, *Seminole Tribe*, 801 F. Supp. at 658. The Supreme

Supreme Court decisions have allowed Congress to abrogate states' Eleventh Amendment immunity since 1976.[258] The Court limited this power to congressional enactments under Section Five of the Fourteenth Amendment[259] for over a decade.[260] In 1989, the Supreme Court held, in *Pennsylvania v. Union Gas Co.*,[261] that Congress also has the authority to override states' immunity when legislating pursuant to the Interstate Commerce Clause.[262] However, the Court has yet to extend this abrogation power to congressional enactments pursuant to the Indian Commerce Clause, under which Congress enacted the IGRA.[263]

Currently, five federal district courts have addressed the issue of whether Congress had the authority to abrogate the states' sovereign immunity when it enacted the IGRA under the Indian Commerce Clause.[264] The district court in *Seminole Tribe v. Florida*[265]

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Court has yet to address the issue of whether Congress may abrogate the states' immunity when legislating pursuant to the Indian Commerce Clause.

258. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991). Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), was the first abrogation case. In determining that Congress abrogated the states' immunity by adopting the Equal Employment Opportunity Act of 1972, the Court in *Fitzpatrick* made use of the requirement that the language of the statute must clearly express Congress' intent to hold states amenable to suit. *Id.* at 451-52. The Court acquired this standard from the case law existing at the time on the principle of "implied consent," discussed *supra* notes 181-213 and accompanying text. As such, the *Fitzpatrick* decision created much confusion and the theories of implied consent and abrogation were often not distinguished. *Poarch Band*, 776 F. Supp. at 560. The Supreme Court in *Blatchford*, however, made it clear that implied consent and abrogation are two separate and distinct lines of inquiry. *Blatchford*, 111 S. Ct. at 2585.

259. Section Five of the Fourteenth Amendment enables Congress to enact appropriate legislation to enforce the guarantees of that Amendment. U.S. CONST. amend. XIV, § 5.

260. In *Fitzpatrick*, the Court limited Congress' abrogation power to Section Five of the Fourteenth Amendment because this subsequent Amendment, by its terms, necessarily curtailed the principles of state sovereignty contained in the Eleventh Amendment. 427 U.S. at 456.

261. 491 U.S. 1 (1989) (plurality opinion).

262. *Id.* at 13-23.

263. Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992). Congress stated that its purpose in enacting 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 governments." 25 U.S.C. § 2702 (1988).

264. *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 Commerce Clause); Sault Ste. Marie v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992); Mississippi Band of Choctaw Indians v. Mississippi, No. 90-386, 1991 WL 255614 (S.D. Miss. 1991) (holding that the tribe could not bring suit because of the state's sovereign immunity); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1061 (E.D. Wash. 1991) (denying congressional power to abrogate states' immunity under the Indian Commerce Clause); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557-58 (S.D. Ala. 1991) (holding that there was no abrogation of the states' Eleventh Amendment immunity in the enactment of the IGRA).

265. *Seminole Tribe*, 801 F. Supp. at 655.

was the only court to hold that Congress had this authority.[266] The *Seminole Tribe* court held that Congress may abrogate the states' immunity pursuant to the Indian Commerce Clause, just as it may nullify this sovereign immunity under the Interstate Commerce Clause,[267] because Congress possesses plenary power under both provisions.[268] The court also based its decision on the fact that congressional powers over both interstate and Indian commerce derive from the same section in the Constitution,[269] and concluded the IGRA properly nullified the state's immunity.[270]

However, in *Poarch Band of Creek Indians v. Alabama*,[271] the court held Congress does not have the power to abrogate the states' Eleventh Amendment immunity when enacting legislation pursuant to the Indian Commerce Clause.[272] This court noted the fact that *Pennsylvania v. Union Gas Co.*,[273] in which the Supreme Court held Congress may abrogate the states' immunity vis-a-vis the Interstate Commerce Clause,[274] was a five-to-four plurality decision.[275] As such, the *Poarch Band* court ruled extending *Union*

266. *Id.* at 658.

267. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 22-23 (1989) (plurality opinion) (holding that Congress may abrogate state immunity when legislating under the Interstate Commerce Clause).

268. *Seminole Tribe*, 801 F. Supp. at 660. In *Union Gas*, 491 U.S. 1 (1989) the Court stated that Congress' power in the context of the Commerce Clause is "plenary" in that "with one hand [it] gives power to Congress while, with the other, it takes power away from the States. . . . The important point . . . is that the provision both expands federal power and contracts state power . . . . " *Id.* at 16-17. In Morton v. Mancari, 417 U.S. 535 (1974), the Court noted the unique status of Indian tribes under federal law and stated that the Constitution itself implicitly and explicitly grants Congress plenary power to legislate pursuant to the special problems of Indians. *Id.* at 551-52.

269. U.S. CONST. art. I, § 8, cl. 3 (providing that "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). The court, however, overlooks the distinction expressed in this grant of authority to Congress. The Commerce Clause clearly distinguishes foreign Nations, the States, and Indian tribes as separate entities. *Id.*; *see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) (considering the three classes addressed in the Commerce Clause to be distinct entities).

270. *Seminole Tribe*, 801 F. Supp. at 661.

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

272. *Id.* at 557-62.

273. 491 U.S. 1 (1989) (plurality opinion).

274. *Id.* at 23.

275. *Poarch Band*, 776 F. Supp. at 558. The Supreme Court was oddly divided when it decided *Union Gas*, 491 U.S. at 23-57. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, authored the plurality opinion of the Court on the issue of abrogation. *Id.* In one paragraph of his concurrence, Justice White cast the deciding vote on the constitutional issue of abrogation by stating, "I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* at 57 (White, J., concurring); *see* HART & WECHSLER'S, THE FEDERAL COURTS & THE FEDERAL SYSTEM 93-94 (Paul M. Bator et al. eds., 3d ed. Supp. 1989)

*Gas* to include congressional abrogation power in legislative enactments pursuant to the Indian Commerce Clause would be an "unwarrantably expansive application" of this plurality decision.[276] The court also based this decision on the Supreme Court's ruling in *Cotton Petroleum Corp. v. New Mexico*.[277]

In *Cotton Petroleum*, a tax apportionment case, the Supreme Court declared the Interstate Commerce and Indian Commerce Clauses to have very different applications.[278] The Court further stated that the extensive case law which 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

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(demonstrating the confusion potentially generated by Justice White's concurrence). Justice Scalia and the three remaining judges dissented to the decision of the abrogation issue noting that "instead of cleaning up the allegedly muddled Eleventh Amendment jurisprudence produced by *Hans*, the Court leaves that in place, and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers." *Union Gas*, 491 U.S. at 44-45 (Scalia, J., concurring in part and dissenting in part). Thus, this plurality opinion does not deserve expansive application. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558 (S.D. Ala. 1991).

276. *Poarch Band*, 776 F. Supp. at 559. *See also Union Gas*, 491 U.S. at 19-23. This plurality opinion based abrogation on the plenary power of the Interstate Commerce Clause and the surrender of immunity in the "plan of the convention." *Id.* at 19. However, subsequent courts have been reluctant to extend the *Union Gas* decision not only because it was a plurality decision, but because it does not logically follow the precedent set in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *Poarch Band*, 776 F. Supp. at 562. It is clear that the subsequently enacted Fourteenth Amendment limits the provisions of the previously existing Eleventh Amendment. *Id.* at 560.

However, it is difficult to comprehend how an Article I power of Congress can limit the Eleventh Amendment because the amendment was adopted with the purpose of restricting the powers of the federal government under the original Constitution, not the other way around. *Id.* Further, the Eleventh Amendment did not even exist when Article I and the Constitution were adopted. Thus, the plurality opinion in *Union Gas* does not deserve an expansive application. For a more detailed discussion of *Union Gas*, see James Sherman, *Altered States: The Article I Commerce Power and the Eleventh Amendment in Pennsylvania v. Union Gas*, 56 BROOK. L. REV. 1413 (1991); Letitia A. Sears, *Pennsylvania v. Union Gas: Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living with Hans*, 58 FORDHAM L. REV. 513 (1989); Merritt R. Blakeslee, *The Eleventh Amendment and the States Immunity from Suit by a Private Citizen: Hans v. Louisiana and its Progeny after Pennsylvania v. Union Gas Company*, 24 GA. L. REV. 113 (1989).

277. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989).

278. *See Cotton Petroleum*, 490 U.S. at 191-92 (distinguishing the boundaries between the states' regulatory authority and Indian tribes' self-government). The Supreme Court stated that "It is also well established that the Interstate Commerce and the Indian Commerce Clauses have very different applications." *Id.* at 192. As Chief Justice Marshall stated, "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several states, and Indian Tribes . . . the convention considered them as entirely distinct." *Id.* (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831)).

which involve the Indian Commerce Clause.[279] Case law surrounding the Interstate Commerce Clause does not properly apply to trade with Indian tribes because states and tribes have concurrent jurisdiction over the same territory, whereas interstate commerce cases were developed in the context of commerce among states with mutually exclusive territorial jurisdiction.[280] Thus, the *Poarch Band Creek* court concluded that this implication of *Cotton Petroleum*, coupled with a 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.[281]

Two subsequent courts, applying slightly different reasoning, reached the same conclusion as the *Poarch Band* court. In *Spokane Tribe v. Washington*,[282] the court first relied upon *Cotton Petroleum*[283] to conclude that it was inappropriate to apply theories from the Interstate Commerce Clause to the Indian Commerce Clause.[284] The *Spokane Tribe* court also relied upon *Blatchford v. Native Village of Noatak*.[285]

In *Blatchford*, the Supreme Court held that in the context of the Interstate Commerce Clause, states have surrendered immunity to each other, producing a mutual concession, but in relation to the Indian Commerce Clause, Indian tribes have retained immunity from suits brought by states, and no mutual concession exists.[286] Because the tribes have retained their immunity from suits by states, the Court in *Blatchford* held that the states have retained

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279. *See Cotton Petroleum*, 490 U.S. 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).

280. *Id.*

281. *See* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558 (S.D. Ala. 1991) (holding that Congress lacks the authority to abrogate state immunity when legislating under the Indian Commerce Clause). There the 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 Indian Gaming Regulatory Act.

*Id.*

282. 790 F. Supp. 1057 (E.D. Wash. 1991).

283. *Cotton Petroleum*, 490 U.S. 163; *see supra* notes 276-80 and accompanying text (discussing this case).

284. *Spokane Tribe*, 790 F. Supp. at 1060-61.

285. *See* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (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 they adopted the Constitution).

286. *Id.* at 2582-83.

their immunity from suits brought by Indian tribes.[287] Relying upon *Blatchford* and *Cotton Petroleum*, the *Spokane Tribe* court concluded there was a substantial difference between congressional power arising from the Indian Commerce Clause and congressional power stemming from the Interstate Commerce Clause.[288] Thus, the court held that Congress did not have the authority to abrogate the states' sovereign immunity when it enacted the IGRA under the Indian Commerce Clause.[289]

The court in *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*[290] also held that Congress lacked the authority to abrogate the states' immunity under the Indian Commerce Clause.[291] This court based its decision upon a narrow reading of *Union Gas*[292] because it was a plurality opinion[293] and because it held that when the states formed the Union, they implicitly agreed to Congress' abrogation authority under the Interstate Commerce Clause.[294] Because *Blatchford* held that states did not agree to be sued by Indian tribes,[295] the *Sault Ste. Marie Tribe* court determined it would be inappropriate to extend *Union Gas* to apply to the Indian Commerce Clause, and therefore, Congress lacked the power to abrogate state immunity when legislating under the Indian Commerce Clause.[296]

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287. *Id.* at 2581-83. In *Blatchford*, the Court held that 28 U.S.C. § 1362 did not express Congress' intent to abrogate the states' immunity in unmistakably clear language and, thus, the Court did not address the issue of abrogation. *Id.* The importance of the mutuality of concession between the states and Indian tribes the *Blatchford* Court discusses is imported into abrogation by the *Union Gas* decision. *Union Gas*, 491 U.S. at 19-23.

288. *Spokane Tribe*, 790 F. Supp. at 1061.

289. *Id.* The court stated, "After reviewing the *Blatchford* and *Cotton Petroleum* decisions . . . [t]here is no basis for this court to conclude that Congress has the authority to abrogate states' Eleventh Amendment sovereign immunity to suits from Indian Tribes by enacting legislation pursuant to the Indian Commerce Clause." *Id.* at 1061.

290. 800 F. Supp. 1484 (W.D. Mich. 1992).

291. *Id.* at 1490.

292. 491 U.S. 1 (1989).

293. *See supra* note 275 (discussing the plurality opinion in *Union Gas*).

294. *Sault Ste. Marie*, 800 F. Supp. at 1489. *See supra* note 276 (demonstrating that *Union Gas* does not logically follow the Supreme Court's opinion in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

295. *See* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2582 (1991) (holding that the Eleventh Amendment bars an action brought by an Indian tribe against a state because the state did not surrender this immunity when it adopted the Constitution).

296. Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489-90 (W.D. Mich. 1992). The plaintiffs in *Sault Ste. Marie* also asked the court to declare the IGRA unconstitutional if the court found their suit barred by the Eleventh Amendment. *Id.* at 1490. The court failed to address this issue, however, because the plaintiffs had yet to bring suit against an officer of the state. *Id.* Thus, the court held that determining the constitutionality of the IGRA would be premature without first deciding if the suit can proceed under the doctrine of *Ex parte* Young, 209 U.S. 123 (1908). *Id.*

There is no basis to support the court's holding in *Seminole Tribe*[297] that Congress had the authority to abrogate the states' immunity when it enacted the IGRA pursuant to the Indian Commerce Clause.[298] First, *Union Gas* was a five-to-four plurality opinion and subsequent courts should not read it expansively.[299] Next, *Union Gas* held that Congress can abrogate state immunity when legislating under the Interstate Commerce Clause because the states implicitly agreed to this when they formed the Union.[300] The *Blatchford* court expressly ruled that the states did not agree to be sued by Indian tribes when joining the Union,[301] and thus, *Union Gas* cannot apply to the Indian Commerce Clause.[302] Finally, the Supreme Court opinions in *Cotton Petroleum*[303] and *Blatchford*[304] determined that there is a substantial difference between the congressional power stemming from the Interstate Commerce Clause and Congress' power when legislating pursuant to the Indian Commerce Clause.[305] For these reasons, when Congress enacted the IGRA pursuant to the Indian Commerce Clause, it lacked the authority to abrogate the states' sovereign immunity, and the Eleventh Amendment will bar a suit brought by an Indian tribe under the IGRA against a state arising from the state's lack of good faith negotiations.[306]

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297. Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992).

298. Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1061 (E.D. Wash. 1991).

299. *See supra* note 275 (illustrating the weakness of the plurality opinion in *Union Gas* and why it should be given less weight than a majority opinion).

300. *See* Pennsylvania v. Union Gas, 491 U.S. 1, 13-15 (1989) (holding that Congress has abrogation power when legislating pursuant to the Interstate Commerce Clause because Congress' power is plenary and the states implicitly agreed to these suits when they joined the Union); *see also supra* notes 260-61 and accompanying text (discussing Congress' abrogation power).

301. *See* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2582 (1991) (holding the Eleventh Amendment bars an action brought by an Indian tribe against a state because the state did not surrender this immunity when they adopted the Constitution).

302. *See* Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992) (holding that Congress does not have the power to abrogate state immunity when legislating under the Indian Commerce Clause).

303. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989).

304. *Blatchford*, 111 S. Ct. at 2582.

305. See *supra* notes 278-80 and 286-88 and accompanying text for a discussion of the Supreme Court's distinction between the Interstate and the Indian Commerce Clauses.

306. *See generally Sault Ste. Marie*, 800 F. Supp. 1484 (W.D. Mich. 1992); Mississippi Band of Choctaw Indians v. Mississippi, No. J90-0386(B), 1991 WL 255614 (S.D. Miss. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991) (holding that Congress lacked the authority to abrogate the states' sovereign immunity when it enacted the IGRA pursuant to the Indian Commerce Clause).

## III. Proposed Solution to Circumvent States' Eleventh Amendment Immunity

In the hypothetical case,[307] the Tatanka Indians strived to achieve financial security for their tribe. After having limited success conducting bingo games, the Tatanka attempted to reach this objective by operating casino-type gambling on their reservation. The Tatanka followed the procedures set forth in the IGRA and met with the state to negotiate an agreement to regulate the gambling conducted on the Tatanka reservation.[308] However, Caledonia officials were unwilling to allow the Tatanka to conduct forms of gambling which the IGRA authorizes.[309] After eight months of unsuccessful negotiations, the Tatanka brought suit against Caledonia and the governor in federal district court asking the court to order the state to comply with the IGRA and negotiate in good faith with the Tatanka.[310]

However, IGRA in its present form fails to give Indian tribes, such as the Tatanka, a forum in which to raise allegations of improper conduct on behalf of the states. As previously discussed, the Eleventh Amendment[311] bars a tribe's action against a state under the IGRA arising from the states' lack of good faith negotiations because Congress enacted the IGRA under the Indian Commerce Clause.[312] Furthermore, federal district courts are unable to assert jurisdiction over an Indian tribe's IGRA claim based on any of the exceptions to state sovereign immunity: consent/waiver,[313] the *Young* doctrine,[314] or congressional abrogation.[315] However, Congress could have avoided this jurisdictional problem, and the Tatanka could have had a forum in which to bring suit against the state, if Congress had enacted the IGRA under the Interstate Com-

307. *See supra* notes 2-20 and accompanying text (explaining the illustrative hypothetical case of the Tatanka Indians).

308. *See* 25 U.S.C. §§ 2701-2721 (1988); *see also supra* notes 140-47 and accompanying text (discussing the provisions in the IGRA which require Indian tribes to conclude a tribal-state compact before conducting casino-type gambling on their reservations).

309. *See* 25 U.S.C. § 2710 (1988); *see also supra* notes 120-27 and accompanying text (demonstrating the extent of gambling authorized by the IGRA).

310. *See* 25 U.S.C. § 2710 (d)(7)(A)(i); *see also supra* notes 143-46 and accompanying text (discussing the provision of the IGRA which grants district courts the authority to hear actions brought by Indian tribes).

311. U.S. Const. amend. XI.

312. U.S. Const. art. I, § 8, cl. 3.

313. *See supra* notes 170-213 and accompanying text (demonstrating that the consent/waiver exception of sovereign immunity does not apply to the situation presented in this Note).

314. *See supra* notes 214-46 and accompanying text for a discussion of the *Young* doctrine and why this principle will not remove the Eleventh Amendment bar from an Indian tribe's suit under the IGRA.

315. *See supra* notes 247-306 and accompanying text (discussing why Congress lacked the authority to abrogate the states' immunity when it enacted the IGRA under the Indian Commerce Clause).

merce Clause[316] instead of the Indian Commerce Clause.

Congress has the authority to abrogate the states' Eleventh Amendment immunity when legislating pursuant to the Interstate Commerce clause so long as it expresses its intention to do so in unmistakably clear language.[317] In the IGRA, Congress expressed its intention to abrogate state immunity with unmistakable clarity.[318] However, Congress enacted the IGRA pursuant to its authority under the Indian Commerce Clause,[319] under which it lacks the power to abrogate the states' immunity.[320] Thus, if Congress were to enact the IGRA under the Interstate Commerce clause, it would override the states' sovereign immunity and the federal district courts could than assert jurisdiction over the states in an IGRA action brought by an Indian tribe. Therefore, Congress should amend the IGRA to include a statement in its declaration of policy indicating that Congress intended to enact the IGRA pursuant to its authority under the Interstate Commerce Clause.[321]

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316. U.S. CONST. art. 1, § 8, cl. 3.

317. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-23 (1989) (holding that Congress may override the states' Eleventh Amendment immunity when legislating under the Interstate Commerce Clause).

318. *See* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 801 F. Supp. 1484, 1489 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557-58 (S.D. Ala. 1991) (holding that Congress clearly expressed its intent to abrogate the states' immunity in the IGRA).

319. *See* 25 U.S.C. § 2702 (1988); *supra* note 263 and accompanying text (illustrating Congress' intent to enact the IGRA under the Indian Commerce Clause).

320. *See generally Sault Ste. Marie*, 800 F. Supp. at 1489; Mississippi Band of Choctaw Indians v. Mississippi, No. J90-0386(B), 1991 WL 255614 (S.D. Miss. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1060-61 (E.D. Wash. 1991); *Poarch Band*, 776 F. Supp. at 557-58 (holding Congress lacked the authority to abrogate the states' sovereign immunity when it enacted the IGRA pursuant to the Indian Commerce Clause).

321. Section 2702 of the IGRA is entitled, "Congressional declaration of policy." 25 U.S.C. § 2702 (Supp 1993). This section provides:

> *The purpose of this chapter is—*
>
> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

*Id.* (emphasis added). Congress should amend this section of the IGRA to declare that it is legislating under the Interstate Commerce Clause in order to avoid the jurisdictional problems deriving from the Eleventh Amendment. Con-

Under the Interstate Commerce Clause, Congress has the power to regulate all commerce or activity which affects more than one state.[322] The power to regulate interstate commerce is broad and permits Congress to regulate all activities except those that are completely internal to a single state[323] or those only remotely affecting other states.[324] For example, in *Katzenbach v. McClung*,[325] a restaurant in Alabama did not permit African-American customers to dine at the restaurant in violation of Title II of the Civil Rights Act of 1964.[326] In deciding whether the discriminatory practices of the restaurant had a substantial effect on interstate commerce, the Court took into account the location of the restaurant, which was in close proximity to an interstate highway, and the fact that 46% of the food purchased came from out of state.[327] The Court held Congress could regulate the restaurant pursuant to the Interstate Commerce Clause because its policy of discriminating against African-American people had a restrictive effect upon their interstate travel and, thus, had a detrimental effect on the quantity of the restaurant's business.[328] This in turn affected interstate commerce because it would affect the amount of food the restaurant purchased from outside the state, thereby reducing the flow of money in the stream of interstate commerce.[329]

Likewise, gambling on Indian reservations affects interstate commerce because the practice depends upon goods and visitors from out of state. More likely than not, the Tatanka would have to obtain betting chips, blackjack and craps tables, roulette wheels, slot machines, or other gambling paraphernalia from outside the state. Moreover, the Tatanka reservation is located near the border

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gress may accomplish this by amending the italicized portion of the previous section of the IGRA as follows: "Under the Power granted in the Interstate Commerce Clause of the Constitution, the purpose of this chapter is . . . ."

322. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (enforcing National Labor Relations Board rules preventing unfair labor practices from affecting commerce). There, the Court stated that, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37.

323. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824) (holding that the power of Congress to regulate the shipping industry under the Interstate Commerce Clause preempted a conflicting New York licensing law which granted exclusive rights to operate ships in New York waters).

324. *See Jones & Laughlin*, 301 U.S. at 15 (stating that Congress does not have the power to regulate commerce which only trivially affects other states because this would destroy the concept of federalism).

325. 379 U.S. 294 (1964).

326. *Id.* at 297.

327. *Id.* at 303-05.

328. *Id.* at 300.

329. *Id. See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 271 (1964) (holding that Congress "has the power to regulate local instrumentalities . . . if their activities burden the flow of commerce among the States").

of two states and expects to attract visitors from both at its casino.[330] Therefore, conducting gambling on the Tatanka reservation would affect interstate commerce by increasing the number of travelers and goods flowing into the stream of commerce, and Congress could regulate this activity under the Interstate Commerce Clause.

A single local Indian gambling operation, such as that proposed by the Tatanka, may have only a minimal impact on interstate commerce as a whole because the amount of money and gamblers brought into the state are relatively small. However, due to the sheer number of tribes now partaking in Indian gambling,[331] the cumulative effect of Indian gambling on interstate commerce is substantial.[332] Since the enactment of the IGRA, reservation gambling has become a billion dollar industry.[333] This influx of money into the stream of commerce affects the states where Indian gambling occurs, states where those partaking in the gambling reside, and states where gambling paraphernalia is manufactured and sold. Therefore, the cumulative effect of Indian gambling on interstate commerce is substantial, and Congress should regulate Indian gambling under the Interstate Commerce Clause of the Constitution.

Congress should enact the IGRA[334] pursuant to the Interstate Commerce clause.[335] Congress has the power to enact the IGRA under this clause because Indian gambling has a substantial effect on interstate commerce. When Congress enacted the IGRA under the Indian Commerce Clause, it failed to provide a forum accessible to tribes to bring action when the states did not negotiate in good faith. Because Congress has the power to abrogate the states' immunity when regulating interstate commerce,[336] Congress may eliminate this jurisdictional problem by indicating that it intended

330. *See supra* note 9 (describing the location of the Tatanka reservation).

331. Today, over half of America's two hundred eighty Indian reservations are operating some type of casino. *Gambling; Bugsy and the Indians*, ECONOMIST, Mar. 1992, at 27. In 1992, Indian gambling operations grossed $5.4 billion. Rogers Worthington, *And Where it Stops Nobody Knows*, CHI. TRIB., Aug. 22, 1993, § 10, at 14, 15. There are currently 54 Indian casinos and 64 tribes now have tribal-state compacts with 19 states—in comparison with the 19 tribal-state compacts with 6 states which existed only two years ago. *Id.*

332. *See* Wickard v. Filburn, 317 U.S. 111, 124 (1942) (urging that even purely local activities may be "reached by Congress if [they collectively] exert . . . a substantial economic effect on commerce").

333. James N. Baker, *Gambling on the Reservations*, NEWSWEEK, Feb. 17, 1992, at 29. Revenues from the Indian gaming industry are now close to the $1.4 billion the Bureau of Indian Affairs spends on tribal services. *Gambling; Bugsy and the Indians*, ECONOMIST, Mar. 1992, at 27.

334. 25 U.S.C. §§ 2701-2721 (1988).

335. U.S. CONST. art. I, § 8, cl. 3.

336. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that Congress has the authority to abrogate the states' Eleventh Amendment immunity when legislating pursuant to the Interstate Commerce Clause of the Constitution).

to govern Indian gambling under the Interstate Commerce Clause. Therefore, Congress should amend the IGRA with a short statement declaring it is enacting the IGRA pursuant to its powers granted by the Interstate Commerce Clause of the Constitution.[337]

## CONCLUSION

The purpose of the Indian Gaming Regulatory Act is to promote tribal economic independence through gambling. Under the IGRA, an Indian tribe must enter an agreement with the state prior to conducting casino-type gambling on its reservation. However, although the IGRA requires states to negotiate this agreement in good faith, states may frustrate the purpose of the IGRA by stalling negotiations or refusing to negotiate at all because states are immune from suits brought by Indian tribes.

The Eleventh Amendment of the United States Constitution bars a suit brought by an Indian tribe against a state which has failed to negotiate a tribal-state agreement in good faith. Congress failed to abrogate the states' sovereign immunity when it enacted the IGRA under the Indian Commerce Clause and, as a result, Indian tribes lack a forum in which to raise their contentions.

Under the Interstate Commerce Clause, Congress has the authority to regulate Indian gambling and the power to abrogate states' Eleventh Amendment immunity. By abrogating the states' sovereign immunity, Congress would provide federal district courts with the jurisdiction to enforce the provisions of the IGRA against states and achieve the purpose of promoting tribal self-sufficiency. Therefore, Congress should amend the IGRA to declare it is enacted pursuant to the congressional authority under the Interstate Commerce Clause.

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337. See *supra* note 321 for an example of the form in which the amendment to the IGRA may successfully defeat the jurisdictional problems deriving from the existing IGRA.