NOTES

THE INDIAN GAMING REGULATORY ACT: A FORUM FOR CONFLICT AMONG THE PLENARY POWER OF CONGRESS, TRIBAL SOVEREIGNTY, AND THE ELEVENTH AMENDMENT

INTRODUCTION

In October 1988 the Indian Gaming Regulatory Act ("IGRA") became federal law.[1] At the time, many believed that IGRA was the long-awaited answer to a call for congressional action in the field of Native American reservation gambling.[2] Time and litigation, however, have demonstrated that IGRA has not only failed to address the need for effective legislation over tribal gaming operations, but also that the Act has adversely aligned conflicting doctrines of sovereignty and called into question the scope of congressional authority over Native American affairs.

At issue is the power of Congress under the Indian Commerce Clause of the United States Constitution.[3] Both tribes and states have challenged IGRA on the grounds that Congress exceeded its constitutional authority by impermissibly abridging tribal and state sovereignty. The center of the debate is a provision of IGRA which permits tribes to operate high-stakes gambling operations, such as casinos, only under the authority of a tribe-state compact.[4] Under this compact, tribes must surrender to state jurisdiction while states must permit reservation gaming. The failure of a state to negotiate for such a compact gives a tribe a federal cause of action to compel good faith negotiations.[5] The tribes that have challenged IGRA argue that the compact provision is invalid for two reasons. First, the provision violates tribal sovereignty by coercing tribes to surrender to state jurisdiction in order to enjoy the economic benefits of establishing

---

1. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 100 Stat. 2487 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1988 & Supp. IV 1992) and 18 U.S.C. §§ 1166-1168 (1988 & Supp. IV 1992)).

2. *See infra* part I.A (discussing pre-IGRA attempts to regulate reservation gambling).

3. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . .").

4. *See infra* part I.B (discussing IGRA's provisions).

5. *See infra* part I.B (discussing IGRA's provisions).

reservation gaming.[6] Second, Congress violated its "trust responsibilities" by exposing tribes to state jurisdiction and divesting tribal authority over reservation conduct.[7] Similarly, those states which have objected to IGRA complain that the Act violates state sovereignty. The states contend that the decision to permit gambling is one of state policy, and therefore beyond the scope of congressional power.[8] Furthermore, the states argue that the Eleventh Amendment to the Constitution[9] bars federal court jurisdiction for any cause of action arising under IGRA.[10]

The federal district courts have answered tribal challenges to IGRA by summarily holding that the Indian Commerce Clause confers upon Congress the plenary power to divest tribes of their sovereignty.[11] The states' objections, however, have presented the federal courts with a greater challenge. The courts are sharply divided on the issue of whether Congress possesses the power to abrogate state sovereign immunity.[12] Even those courts that agree as to result disagree on the proper analysis. The consequence is a confused and uncertain body of law that highlights IGRA's flaws and questions the reach of congressional power under the Indian Commerce Clause. As a result, the only certainty in IGRA jurisprudence is that the need for effective reservation gambling legislation remains unfulfilled.

This note briefly discusses pre-IGRA reservation gaming jurisprudence, IGRA's regulatory scheme, and the legislative history and policies supporting the Act. The note then focuses on a detailed analysis of IGRA's conflict with tribal sovereignty and the Eleventh Amendment. This analysis examines the various approaches of the federal courts and concludes that the federal judiciary's failure to resolve tribal and state claims equitably has

---

6. *See, e.g.*, Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990). In 1992 tribal gaming operations generated approximately six billion dollars in revenues. W. John Moore, *A Winning Hand?*, 1993 NAT'L J. 1796, 1797.

7. *Swimmer*, 740 F. Supp. at 9; *see infra* notes 86-89 and accompanying text (discussing the federal trust obligation).

8. *See, e.g.*, Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1551-52 (S.D. Ala. 1992); *see also* Glenn M. Feldman, *The Great Casino Controversy: Indian Gaming in Arizona*, ARIZ. ATT'Y, July 1993, at 19, 21.

9. U.S. CONST. amend. XI (providing the states with qualified sovereign immunity from suit in federal court).

10. *See infra* part II.B.

11. *See, e.g.*, *Swimmer*, 740 F. Supp. at 9; *see also infra* notes 103-12 and accompanying text.

12. *See infra* part II.B.2.

frustrated Congress's goals and rendered IGRA ineffective.

I. BACKGROUND

A. Regulation of Reservation Gambling Before IGRA

Prior to IGRA, no federal legislation directly regulated gambling operations conducted on American Indian reservations.[13] Furthermore, the states were powerless to regulate reservation gaming due to the doctrine of tribal sovereignty which sheltered reservations from state jurisdiction.[14] While some federal statutes allowed for the enforcement of state criminal laws on tribal lands,[15] a series of court decisions construed the statutes strictly and in favor of the tribes.[16] Thus, these statutes proved to be limited avenues for state regulation. As a result, tribes enjoyed the opportunity to establish gaming ventures as a means toward economic growth and self-sufficiency with few regulatory constraints.

The Seminole tribe of Florida was the first tribe to enter the high-stakes gambling industry when it initiated a large-scale bingo operation on its reservation in 1979.[17] A challenge by the State of Florida led to the landmark decision *Seminole Tribe of Florida v. Butterworth*.[18] In *Butterworth*, a local sheriff threatened to enforce state gambling laws on the reservation. The tribe brought an action in federal court seeking a declaration that the laws did not extend onto the reservation and an injunction

---

13. *See* S. REP. NO. 446, 100th Cong., 2d Sess. 1-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072-73; *see generally* Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151 (1989) (discussing pre-IGRA attempts to regulate reservation gaming and the need for federal legislation).

14. *See infra* notes 90-98 and accompanying text.

15. *See* Sokolow, *supra* note 13, at 152-55. The federal laws were: The Assimilative Crimes Act, 18 U.S.C. § 13 (1988); the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1988); the Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-1178 (1988 & Supp. IV 1992); and Public Law 280, 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), and 28 U.S.C. § 1360 (1988).

16. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (the Organized Crime Control Act of 1970 and Public Law 280); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. Unit B Oct. 1981) (the Organized Crime Control Act of 1970 and Public Law 280); United States v. Farris, 624 F.2d 890 (9th Cir. 1980) (the Gambling Devices Act of 1962).

17. S. REP. NO. 446, *supra* note 13, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 3072.

18. *Butterworth*, 658 F.2d at 310.

against their enforcement.[19] The court held that the tribe could conduct gaming free from state interference because the State lacked jurisdiction to enforce its regulatory laws on tribal land.[20]

Butterworth was significant not only because it opened the door for reservation bingo operations, but also because it applied Public Law 280[21] narrowly in the context of tribal gaming.[22] Public Law 280 is a federal statute that initially granted criminal and civil jurisdiction over reservation matters to six states.[23] The law also provided any other state with the option to assume criminal and civil jurisdiction over reservations within its borders.[24] Florida was one of ten states to exercise this option.[25] However, the court narrowly construed this grant of jurisdiction to include only that conduct which was "prohibited as against the public policy of the state," not conduct which was "merely regulated by the state."[26]

The court relied on the United States Supreme Court decision *Bryan v. Itasca County* which held that civil jurisdiction under Public Law 280 applied only to the resolution of private causes of action,[27] not "general civil regulatory powers."[28] Thus, the *Butterworth* court applied a "civil/regulatory versus criminal/prohibitory analysis" to determine whether Florida possessed proper jurisdiction.[29] Because Florida law permitted certain non-profit organizations to operate bingo games, the state's bingo laws were found to be civil/regulatory in nature, not crimi-

---

19. *Id.* at 311.

20. *Id.* at 314-15.

21. 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), and 28 U.S.C. § 1360 (1988); *see* Sokolow, *supra* note 13, at 167-74 (providing a full discussion of Public Law 280 in the reservation gaming context); *see generally* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 362-63 (1982 ed.).

22. *Butterworth*, 658 F.2d at 315.

23. 18 U.S.C. § 1162(a). The six states were: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. *Id.*

24. 25 U.S.C. §§ 1321-1322.

25. COHEN, *supra* note 21, at 362; *see* FLA. STAT. ANN. § 285.16 (West 1991). While Public Law 280 was subsequently amended to prohibit further state assumptions of jurisdiction without tribal consent, those states that acquired jurisdiction prior to the amendment retained their jurisdiction under the Act. 25 U.S.C. § 1326.

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

27. Bryan v. Itasca County, 426 U.S. 373, 383-85 (1976).

28. *Id.* at 390.

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

nal/prohibitory.[30] Consequentially, the state lacked the jurisdiction to regulate the tribe's bingo games. While *Bryan* was the first case to announce a civil/regulatory versus criminal/prohibitory test under Public Law 280, *Butterworth* was the first case to apply the analysis to gambling laws, concluding that such laws were civil/regulatory if the state allowed some forms of gambling.

The *Butterworth* decision inspired tribes across the country to open high-stakes bingo games. During the 1980s, only five states prohibited all forms of gambling.[31] Thus, under the *Butterworth* court's reasoning, tribes were free to run games in almost every state. By 1988, over 100 tribes opened bingo games which collectively generated annual revenues of over 100 million dollars.[32] By the mid-1980s, tribes sought to expand their operations beyond bingo to include card games and slot machines.[33] The critical questions were whether the regulatory versus prohibitory test of *Butterworth* applied to high-stakes gambling, and if so, whether laws governing such gambling were civil/regulatory, thus barring state jurisdiction on reservations. The Supreme Court answered both questions in the affirmative in *California v. Cabazon Band of Mission Indians*.[34]

In *Cabazon*, the State of California and the County of Riverside sought to enforce their bingo and card game regulations on the reservations of the Cabazon and Morongo Bands of Mission Indians.[35] The tribes responded with an action seeking declaratory and injunctive relief.[36] The State asserted that it had authority to enforce its laws under Public Law 280.[37] The Court sanctioned the *Butterworth* civil/regulatory versus criminal/prohibitory analysis of Public Law 280 in a reservation

---

30. *Id.* at 314.

31. I. Nelson Rose, *in* INDIAN GAMING AND THE LAW 3, 10 (William R. Eadington ed., 1990) (the five states were: Arkansas, Hawaii, Indiana, Mississippi, and Utah).

32. S. REP. NO. 446, *supra* note 13, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 3072.

33. Eric J. Swanson, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 474 (1992).

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

35. *Id.* at 205-06.

36. *Id.*

37. *Id.* at 207. The State also asserted jurisdiction under the Organized Crime Control Act of 1970 ("OCCA"), but the Court denied this claim because OCCA permitted only federal enforcement of a state's criminal laws, not state enforcement. *Id.* at 212-14.

gaming case, and affirmed summary judgment for the tribes.[38] The Court concluded that because California did not prohibit all forms of gambling (the state allowed a lottery and pari-mutuel horse-race betting), gambling did not violate the State's public policy.[39] Furthermore, though California did not permit card games, the State did not expressly prohibit them; thus, the State could not extend its jurisdiction onto tribal lands.[40]

Cabazon seemed to open the door for high-stakes reservation gambling of all forms. As long as the state in which the reservation existed did not expressly prohibit gambling, the state could not regulate tribal gaming operations. As a reaction to this permissive rule, Congress passed IGRA.

B. IGRA's Provisions

IGRA is a detailed regulatory scheme that attempts to strike a balance between competing state and tribal interests in the field of Native American reservation gambling. The Act divides gaming into three categories with corresponding regulatory jurisdiction.[41] The first category, "class I gaming," includes social games for prizes of minimal value and traditional ceremonial games.[42] Class I gaming falls within the exclusive jurisdiction of the tribes.[43] The second category, "class II gaming," covers bingo, limited card games, pull-tabs, and lotto.[44] Games under Class II are governed by the tribes concurrently with the federal government.[45] However, class II gaming is permitted only if the state in which the tribe resides permits similar gaming for any group, and if the gaming occurs under the authority of a tribal ordinance or resolution.[46] The final category, "class III gaming,"

---

38. *Id.* at 211.

39. *Id.* at 210.

40. *Id.*

41. 25 U.S.C. §§ 2703, 2710 (1988 & Supp. IV 1992). IGRA also established the National Indian Gaming Commission. *Id.* § 2704. The Commission's powers include the monitoring of Class II gaming, inspection of premises, and conducting background investigations. *Id.* § 2710(b)(1)-(3). The Commission Chairman's powers include the approval of tribal gaming ordinances, *id.* § 2705(a)(4), and the approval of tribal state compacts. *Id.* § 2710(d)(A)(iii).

42. *Id.* § 2703(6).

43. *Id.* § 2710(a)(1).

44. *Id.* § 2703(7)(A).

45. *Id.* § 2710(a)(2).

46. *Id.* § 2710(b)(1)(A)-(B).

covers all remaining forms of gambling.[47] To conduct class III gaming, IGRA requires that three criteria be met: (1) the state permits similar gaming for any group, (2) the tribe passes an ordinance or resolution authorizing the gaming, and (3) the gaming occurs under the authority of a tribe-state compact.[48] The compact details the permissible gambling conduct and allocates the degree of state criminal and civil jurisdiction.[49]

If a tribe wishes to operate Class III gaming, it must request the state in which its lands are located to enter into negotiations for a compact.[50] Upon receiving the request, the state is obligated to negotiate in good faith.[51] If the state refuses to negotiate, or to do so in good faith, then the tribe may sue the state in federal court.[52] While the compact requirements envision a negotiated settlement between tribes and states, the provisions only aggravate an historic tension between rival sovereigns.[53] The tribes' sense of sovereignty does not include submission to state jurisdiction, while the states' notion of sovereign immunity under the Eleventh Amendment does not yield to suit in federal court. Thus, the Class III vision of negotiated compromise was threatened from its inception by an inherent and apparently irreconcilable tension.

C. The Policies and Legislative History of IGRA

During the 1980s tribal gambling activity increased dramatically.[54] With this increase in reservation gambling, the states became concerned over the potential infiltration of organized crime.[55] In addition, the states feared that unregulated reservation gaming produced unfair economic competition with state regulated gambling.[56] The states became frustrated and called upon Congress to act. The product of this pressure was IGRA.

---

47. *Id.* § 2703(8).
48. *Id.* § 2710(d)(1)(A)-(C).
49. *Id.* § 2710(d)(3)(C).
50. *Id.* § 2710(d)(3)(A).
51. *Id.*
52. *Id.* § 2710(d)(7)(A).
53. *See* Wendell George, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 105, 108.
54. *See* S. REP. NO. 446, *supra* note 13, at 2-3, *reprinted in* 1988 U.S.C.C.A.N. at 3072.
55. *Id.*
56. *Id.* at 33, 1988 U.S.C.C.A.N. at 3103; *see also* Stewart L. Udall, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 21, 26-27.

Congress's central goal was to provide a regulatory scheme that respected the interests of the states and the tribes. IGRA's statement of policy reflects this end. The purpose of the Act was to provide gaming as a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments" while recognizing state concerns regarding "organized crime and other corrupting influences."[57] The result of this effort was the creation of the tribe-state compact. Congress felt that the best way to preserve the interests of both parties was to allow the tribes and the states to negotiate as equal sovereigns.[58] Such a compact, it was thought, would leave intact the recognized sovereignty of tribes while addressing the concerns and frustrations expressed by the states. Senator Harry Reid stated, "the bill was as fair as we could make it, and it provided protection to states without violating either the *Cabazon* decision or the concept of Indian sovereignty."[59] The bill was a political compromise that attempted to solve the problem through peaceful negotiation rather than active legislation.[60]

However, the compact provision was not thoroughly considered before it was passed by Congress. In the Senate, the controversial compact provision was added to the original bill without debate as an amendment.[61] In the House, the bill was passed without committee hearings and with an unrecorded vote just two hours before the 100th Congress adjourned.[62] Perhaps if Congress had examined the compact provision more closely, it would have realized that the negotiation requirement merely converted a complex problem into an unworkable stalemate that stifled tribal opportunities. While the compact provision reflected an appealing concept of peaceful negotiations and compromise, the provision in reality aggravated conflicting notions of sovereignty

---

57. 25 U.S.C. § 2702 (1988).

58. S. REP. NO. 446, *supra* note 13, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3076.

59. Harry Reid, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 15, 19.

60. The idea for a compact had its genesis in the Fort Mojave Project. William N. Thompson, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 29, 39. In order to avoid protracted litigation, the Fort Mojave tribe and the State of Nevada entered a compact to allow reservation gambling subject to state regulation. *Id.* Congress hoped that this model would serve as an inspiration to tribes and states across the country. *Id.* However, the critical element in the Fort Mojave Project was the voluntariness of the compact. By contrast, the offensive element of IGRA is that all negotiations are compelled.

61. *Id.* at 33.

62. *Id.* at 34.

in the context of historic adversity. The need was for Congress to enact decisive legislation, not to pass a law that told the parties to work it out for themselves. However, because Congress failed to take responsibility, the permissive rule of *Cabazon* was put aside as tribes and states prepared for litigation in the federal courts.

II. THE APPLICATION OF IGRA IN THE FEDERAL COURTS

The case law interpreting IGRA demonstrates that Class III gaming is the clear center of controversy. While some courts have clarified the definition of Class II gaming,[63] or have limited tribal tax exemptions under IGRA,[64] most claims have arisen under the compact provisions for regulating high-stakes gambling. Both tribes and states have argued that the provisions for Class III gaming are offensive to traditional notions of sovereignty. Tribes have challenged IGRA as a violation of their right to self-government and as a violation of Congress's trust responsibilities toward the tribes.[65] The states, in turn, have asserted that IGRA infringes upon their right to determine their own executive and legislative policies, and that IGRA's provision for tribal suits against states violates the Eleventh Amendment.[66] The following is an examination of tribal and state challenges, and an analysis of the federal judiciary's response to these claims.

A. Tribal Challenges

1. Background: The Doctrine of Tribal Sovereignty

The paramount tribal concern in the field of Native American affairs is sovereignty.[67] "[W]ithout sovereignty," tribal leader Harold A. Monteau has stated, "we do not survive as Indian

---

63. *See, e.g.*, Spokane Indian Tribe v. United States, 972 F.2d 1090 (9th Cir. 1992); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399 (D. Minn. 1992); Oneida Tribe of Indians v. Wisconsin, 742 F. Supp. 1033 (W.D. Wis. 1990).

64. *See, e.g.*, Cabazon Band of Mission Indians v. California, 788 F. Supp. 1513 (E.D. Cal. 1992).

65. *See, e.g.*, Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990).

66. *See, e.g.*, Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991).

67. Eddie Tullis, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 99, 99-100.

nations."[68] As the United States settled North America and "conquered" Native nations, tribes lost most of their land and much of their population;[69] what they retained was their sovereignty.[70] Thus, the tribes' central objection to IGRA is that the Act infringes upon their sovereignty by requiring them to expose their reservations to state jurisdiction if they choose to take advantage of gaming opportunities.[71] State jurisdiction over tribal lands offends Native sovereignty not only because it limits tribal rights to self-government, but also because the states have historically been hostile toward tribal interests.[72] Because IGRA requires tribes to acquiesce to state regulatory laws, the tribes argue that Congress has violated tribal sovereignty, congressional trust duties, and the federal policy of protecting tribes from the jurisdiction of the states.

While the history of Native relations reflects that the United States has not fully respected tribal sovereignty, the protection of Native sovereignty has nevertheless been expressly recognized as a legal doctrine and as federal policy.[73] The Supreme Court has consistently held that tribes have retained their status as sovereign governments.[74] For example, in *United States v. Mazurie,* the Court acknowledged the tribes' sovereign power "over both their members and their territory."[75] Moreover, the

---

68. Harold A. Monteau, *in* INDIAN GAMING AND THE LAW, *supra* note 31, at 111, 112.

69. *See generally* Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986).

70. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); COHEN, *supra* note 21, at 232.

71. *See, e.g.*, Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990).

72. *See* S. REP. NO. 446, *supra* note 13, at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075 ("State jurisdiction on Indian lands has traditionally been inimical to Indian interests."); *see also* George, *supra* note 53, at 108.

73. *See* S. REP. NO. 446, *supra* note 13, at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075 (recognizing "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land"); President Ronald Reagan's 1983 Statement on Indian Policy, PUB. PAPERS 96-100 (1983) (stating the executive policy of promoting tribal self-government); *see also* The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988 & Supp. IV 1992).

74. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991) ("Indian tribes are sovereigns"); United States v. Wheeler, 435 U.S. 313, 328 (1978) (recognizing the "retained sovereignty" of tribes); *Worcester*, 31 U.S. (6 Pet.) at 559 (recognizing the settled principles of Native political independence and powers of self-government); *see also* COHEN, *supra* note 21, at 232.

75. United States v. Mazurie, 419 U.S. 544, 557 (1975).

Court has sanctioned the power of a tribe to determine its own form of government and to control governmental decisions.[76] Finally, because tribes are recognized as sovereign governments, they enjoy sovereign immunity from suit.[77]

Congress has also recognized the doctrine of tribal sovereignty, specifically in the reservation gaming context. The legislative history of IGRA reflects that "by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished."[78] The Senate Report statement of policy further acknowledges "the strong Federal interest in preserving the sovereign rights of tribal governments."[79] Thus, in enacting IGRA, Congress purported to respect tribal rights to self-government. However, while Native sovereignty is a recognized legal doctrine and federal policy, it is fragile in light of Congress's plenary power over tribal matters.

The Indian Commerce Clause to the United States Constitution[80] confers upon Congress the plenary power to regulate the field of Native American affairs.[81] Due to this power, Native sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[82] However, while tribal sovereignty is dependent upon the federal government, Congress's power to abrogate this sovereignty is not as absolute as the phrase "subject to complete defeasance" might imply.[83] First, congressional abrogation of sovereignty must be clear and explicit;

---

76. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

77. Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172 (1977); *Martinez*, 436 U.S. at 59-60 (holding that federal court jurisdiction over claims against a tribe interferes with tribal autonomy and self-determination).

78. S. REP. NO. 446, *supra* note 13, at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075.

79. *Id.*

80. U.S. CONST. art. I, § 8, cl. 3; *see supra* note 3 (providing the text of the Indian Commerce Clause).

81. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); *see also* COHEN, *supra* note 21, 207-11.

82. United States v. Wheeler, 435 U.S. 313, 323 (1978). One district court has observed, "[a]s against Congress, tribal sovereignty is but a stick in front of a tank." Native Village of Venetie v. Alaska, 687 F. Supp. 1380, 1392 (D. Alaska 1988).

83. *See* COHEN, *supra* note 21, at 217-20 ("Plenary does not mean 'absolute' in the sense that it may be exercised free of constitutional limits or judicial review."); *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 413-15 (1980) (congressional power over tribal lands is not absolute).

the courts will not infer such an abrogation.[84] Thus, statutes which abrogate tribal sovereignty will be liberally construed, and all ambiguity will be resolved in favor of the tribes.[85] Second, and more significantly, Congress is limited by its trust responsibilities toward Native peoples.[86] This trust responsibility is analogous to a fiduciary duty and provides tribes with a means to challenge governmental action adverse to tribal interests.[87] Under the trust doctrine, Congress is obligated to protect the basic needs and welfare of tribes.[88] Thus, any action that Congress takes to abrogate tribal sovereignty must be examined in light of Congress's "unique obligation toward the Indians."[89]

Finally, tribal sovereignty is subordinate only to the federal government, not to the states.[90] As a general principle, state law cannot apply to Indian affairs within tribal lands.[91] There are, however, two exceptions to this principle. First, Congress may expressly authorize the extension of state jurisdiction onto reservations.[92] However, complete application of state law on reservations might violate Congress's trust responsibilities.[93] Furthermore, Congress has recognized the vitality of allowing state jurisdiction over tribal matters and generally follows the federal policy of protecting the tribes from the force of state

---

84. Washington v. Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 690 (1979).

85. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

86. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-85 (1977); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (The relationship of tribes to the United States "resembles that of a ward to his guardian.").

87. Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 706-07 (1989).

88. *Id.*

89. Morton v. Mancari, 417 U.S. 535, 555 (1974).

90. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); Washington v. Confederated Tribes of Coleville Indian Reservation, 447 U.S. 134, 154 (1980); *see also* Oneida County v. Oneida Nation, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

91. *Cabazon*, 480 U.S. at 214; *see generally* COHEN, *supra* note 21, at 259.

92. *Cabazon*, 480 U.S. at 207; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973); see *supra* note 15 (providing a list of federal statutes authorizing the application of state law to reservation conduct in the gambling context).

93. *See infra* notes 122-43 and accompanying text.

law.[94] As a second exception, state law might apply in the absence of superseding federal law (as expressed in the Constitution, treaties with the tribes, federal statutes, or federal policy) under certain "exceptional circumstances."[95] This exception requires a balancing test and a determination of whether state jurisdiction has been preempted by federal law.[96] In determining whether state jurisdiction has been preempted,[97] the courts analyze the state jurisdictional interest "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[98] Therefore, tribal sovereignty is strongest as against the states.

These principles of Native American sovereignty were raised by the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe in an action challenging IGRA. In *Red Lake Band of Chippewa Indians v. Swimmer*, the District Court for the District of Columbia upheld the validity of IGRA against the tribes' claims that Congress violated tribal sovereignty and congressional trust responsibilities.[99] However, the court's reasoning is not entirely sound and relies upon a cursory analysis rather than an application of doctrines of sovereignty and trust as meaningful limits to congressional power.

2. *Red Lake Band of Chippewa Indians v. Swimmer*

In *Red Lake Band of Chippewa Indians v. Swimmer* the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe

---

94. S. REP. NO. 446, *supra* note 13, at 5-6, *reprinted in* 1988 U.S.C.C.A.N. at 3075 (Congress recognizes that "[s]tate jurisdiction on Indian lands has traditionally been inimical to Indian interests."). "Even when Congress has enacted laws to allow limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands." *Id*; *see also* COHEN, *supra* note 21, at 261-62.

95. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983); *see also Cabazon*, 480 U.S. at 215.

96. *See Cabazon*, 480 U.S. at 216-17.

97. State jurisdiction will be found to have been preempted "'if it interferes or is incompatible with federal and tribal interests reflected in federal law.'" *Id.* at 216 (quoting *Mescalero Apache Tribe*, 462 U.S. at 334).

98. *Id.* at 216-17 (quoting *Mescalero Apache Tribe*, 426 U.S. at 334-35, in support of the conclusion that the state interest in preventing the infiltration of organized crime did not justify the extension of state gambling laws to the reservations).

99. Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9, 10 (D.D.C. 1990).

brought an action against the Department of the Interior ("the Department") to prevent the implementation of IGRA.[100] The tribes attacked the legitimacy of IGRA on the grounds that it violated both their right to self-determination and the federal trust responsibilities toward the tribes.[101] The court disagreed and granted the Department's motion to dismiss the complaint.[102]

On the issue of sovereignty, the tribes asserted that IGRA violated their rights to "self-determination and self-governance guaranteed by the treaties between the Indian tribes and the United States government and by aboriginal rights never surrendered by the Indian tribes."[103] The court, however, declined to apply tribal sovereignty as a limit on Congress's plenary power over Native American affairs. Rather, the court held that Congress has the power to abrogate provisions of a treaty, and that any sovereignty derived from aboriginal rights is "subject to complete defeasance at the will of Congress."[104] The court further dismissed the tribes' claims that IGRA allowed state encroachment on Native sovereignty.[105] In support of its conclusion, the court reasoned that Congress itself, not any state, encroached upon tribal sovereignty.[106]

The tribes also claimed that IGRA violated Congress's federal trust obligations toward the tribes. They argued that IGRA was passed to prevent Native competition with the non-native gaming industry, not to protect tribal interests.[107] The court acknowledged that the trust doctrine imposed a limit on congressional authority: "'Congress' [sic] power . . . . "[is] subject to limitations

---

100. *Id.* at 10.

101. *Id.* The tribes also raised other challenges, in their complaint and in response to the Department's motion to dismiss, which this note does not discuss. These challenges attacked IGRA as a violation of: (1) Article III federal court jurisdiction; (2) the Due Process Clause of the Fifth Amendment; (3) the Treaty Clause of Article 1 of the Constitution; (4) the Indian Self-Determination and Education Assistance Act; (5) the Equal Protection Clause of the Fifth Amendment; and (6) as an impermissible delegation of congressional power to the Chairman of the Gaming Commission. *Id.* at 10-11 & n.2.

102. *Id.* at 15.

103. *Id.* at 11.

104. *Id.*

105. *Id.* at 12.

106. *Id.*

107. *Id.*

inhering in . . . . a guardianship."'"[108] The court further recognized that while the trust doctrine had traditionally been viewed as merely a moral obligation of Congress to act in good faith, the United States Supreme Court had recently held that congressional decisions in Native American affairs were reviewable.[109] The court then announced that the proper test was to determine whether the congressional "'exercise of its plenary power was reasonably related to its trust responsibilities toward the [Indians].'"[110] Because IGRA's legislative history demonstrated the intent to protect tribes from organized crime, the court concluded that Congress had fulfilled its obligation to protect the tribes' interests.[111] Accordingly, the court dismissed the tribes' complaint on the issue of congressional trust obligations.[112]

3. Comment on *Swimmer*

Swimmer is disturbing because the court failed to address adequately the true nature of the tribes' sovereignty claim, and because it failed to apply the trust doctrine as a meaningful limit on Congress's power to regulate tribal affairs. The court's reliance on generalized statements of congressional plenary power provided a simplistic analysis for the complex sovereignty issues presented by IGRA. Similarly, the court's approach to the tribes' trust doctrine claim was manipulative and failed to apply the Supreme Court's recent revitalization of the doctrine. In short, the decision perfunctorily dismissed legitimate tribal objections to IGRA.

The *Swimmer* court correctly asserted that Congress's plenary power under the Indian Commerce Clause includes the power to abrogate Native sovereignty.[113] However, the court failed to acknowledge that this power is not absolute.[114] Rather, the

---

108. *Id.* at 13 (quoting Littlewolf v. Lujan, 877 F.2d 1058, 1063 (D.C. Cir. 1989) (quoting United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980))).

109. *Id.* at 13 (citing Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

110. *Id.* (quoting *Littlewolf*, 877 F.2d at 1064).

111. *Id.* at 13-14.

112. *Id.* at 14.

113. *See supra* notes 80-89 and accompanying text.

114. *See* COHEN, *supra* note 21, at 217-20 ("Plenary does not mean 'absolute' in the sense that it may be exercised free of constitutional limits or judicial review."); *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 413-15 (1980) (Congress's power

court simply cited Congress's broad powers and dismissed the complaint. Furthermore, the court did not adequately address the tribes' claim that IGRA subjected the tribes to state encroachment of tribal sovereignty. The court's sole response to this claim was that "case law presented by [the tribes] that prohibit [sic] state encroachment on Indian sovereignty . . . is not applicable to the situation presented here, where Congress, itself, has encroached upon the Indians' sovereignty."[115] This statement fails to acknowledge that IGRA gives states the power to abridge tribal sovereignty by forcing tribes to surrender to state jurisdiction. The offensive element of IGRA is that Congress delegated reservation jurisdiction to the states rather than assuming federal jurisdiction over reservation gaming.[116] Under IGRA tribal high-stakes gaming opportunities are foreclosed unless a tribe sacrifices its sovereignty to the state.[117] Thus, the issue of state encroachment must be addressed before a tribal sovereignty claim can be dismissed legitimately.

The *Swimmer* court could plausibly have reached the same result while still addressing the state encroachment issue. It has been established that Congress possesses the power to extend state jurisdiction over reservation conduct.[118] Congress can therefore require tribes to exchange gaming opportunities for the imposition of state jurisdiction. However, Congress's power in this regard may be limited by its trust obligations.[119] Furthermore, the Supreme Court has observed that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply

---

to control and manage tribal affairs is not absolute.).

115. *Swimmer*, 740 F. Supp. at 12.

116. *See* George, *supra* note 53, at 108 (arguing that due to the historic tension between tribes and states, only the federal government, with which the tribes already have a relationship, should have jurisdiction over tribal lands). Congress initially considered a federal assumption of jurisdiction over reservation gaming, but the Department of Justice and the Department of the Interior objected to the increased enforcement duties which were perceived as best left to the states. S. REP. NO. 446, *supra* note 13, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 3073. However, federal jurisdiction to enforce state laws provided the enforcement scheme in the Organized Crime Control Act and the Assimilative Crimes Act. *See* Sokolow, *supra* note 13, at 152-53. While these statutes were not entirely effective in regulating reservation gaming, the laws were not directed specifically at tribal gambling operations whereas IGRA is. State jurisdiction over reservation conduct is offensive not only because of the historic tension between states and tribes, but also because states are not obligated by any trust duties toward the tribes.

117. *See supra* notes 48-53 and accompanying text.

118. *See supra* note 92.

119. *See infra* notes 122-43 and accompanying text.

rooted in the Nation's history."[120] Congress thus strains strong policy and firm understandings when it expands the reach of state jurisdiction over Native lands. Finally, while the court's conclusion can be justified by a more expansive analysis, the court's failure to supply a complete rationale indicates the court's unwillingness to explore the tribes' claims seriously.

The court's analysis of the tribes' trust doctrine claim is more tenuous. First, the court manipulated controlling precedent and IGRA's legislative history in order to avoid concluding that the trust doctrine provides a substantive limit to Congress's power. Second, the court evaded recent Supreme Court rulings that have heightened judicial obligations to review congressional acts which allegedly violate federal trust duties.[121] While the court paid more attention to the trust doctrine claim than it did to the sovereignty claim, the court nevertheless demonstrated that it would not enforce a limit on congressional power.

The court began its analysis by acknowledging that the trust doctrine limits congressional authority over tribal matters.[122] But the court's application of the doctrine was highly deferential to Congress and failed to reach the level of scrutiny required by precedent.[123] The court charged the tribes with the heavy burden of overcoming a presumption of legitimacy for congressional acts.[124] However, the Supreme Court decision *United States v. Sioux Nation of Indians* rejected the notion that congressional acts in Native affairs are subject to a presumption of legitimacy.[125] The *Sioux Nation* Court held that the determination of whether a congressional act "was appropriate for protecting and advancing the tribe's interest" required a "thoroughgoing and impartial examination of the historical record."[126] The Court further opined that "[a] presumption of congressional good faith cannot serve to advance such an inquiry."[127] Thus, due to

120. McClanahan v. State Tax Comm'n, 411 U.S. 164, 168 (1973) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)); *see supra* notes 73-79 and accompanying text.

121. *See infra* notes 125-30 and accompanying text.

122. *Swimmer*, 740 F. Supp. at 13.

123. *See Sioux Nation*, 448 U.S. at 417.

124. *Swimmer*, 740 F. Supp. at 13.

125. *Sioux Nation*, 448 U.S. at 415-16; *see also* Ezra, *supra* note 87, at 722-23, 730-32 (discussing *Sioux Nation*, the Court's rejection of the presumption of legitimacy, and the revitalization of a heightened review of congressional acts in tribal affairs).

126. *Sioux Nation*, 448 U.S. at 415-16.

127. *Id.* at 416.

federal trust obligations, Congress is not entitled to the usual presumption of legitimacy when it acts in the field of Native American affairs. The *Swimmer* court's reliance on such a presumption is therefore misplaced.

While *Sioux Nation* was a land takings case, its holding applies to all congressional acts over tribal matters. The requirement that Congress act in good faith when determining fair compensation for taken land arises directly from Congress's obligations as trustee to the tribes.[128] This trust obligation restricts Congress not only in the management of tribal lands, but in all of its dealings with Native Americans.[129] Thus, *Sioux Nation* reflects a shift in the judiciary's role when reviewing congressional exercises of power over the tribes, and the *Swimmer* court erred by failing to accept its new role.[130]

Had the *Swimmer* court engaged in the thorough and impartial review required by *Sioux Nation*, a different conclusion might have been reached. First, the court's finding, that protecting tribes from organized crime demonstrated congressional consideration of tribal welfare,[131] is not supported by the "historical record."[132] The historical record of reservation gaming and IGRA's legislative history evince that all concerns over organized crime reflected the states' interests as opposed to tribal interests.[133] The court's reliance on a state interest to support the proposition that Congress acted in furtherance of tribal interests is manipulative and unsound, especially in light of the historic tension between the states and the tribes in the field of reservation gambling. Furthermore, even if protecting tribes from organized crime were found to constitute sufficient congressional good faith, the concern over the potential infiltration of organized crime was not supported by the evidence. *Sioux Nation* clarifies that "the question whether a particular measure was appropriate for protecting and advancing the tribe's interests" must be

---

128. *Id.* at 415 (Congress's power is "'subject to limitations inhering in . . . a guardianship.'" (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935))).

129. *See supra* notes 86-89 and accompanying text.

130. *See* Ezra, *supra* note 87, at 723 (discussing the shift from judicial deference favoring congressional paternalism over the tribes to a more serious and meaningful review).

131. *Swimmer*, 740 F. Supp. at 13-14.

132. *Sioux Nation*, 448 U.S. at 416.

133. *See supra* notes 54-56 and accompanying text; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

answered by "a consideration of all the evidence presented."[134] The legislative history to IGRA demonstrates that "in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity."[135] Therefore, the *Swimmer* court's conclusion is questionable because the court, rather than relying on a consideration of tribal interests, relied upon a state interest that was unsupported by the evidence or the historical record.

An examination of tribal interests and the effect of IGRA on the tribes demonstrates that the Act adversely affects tribal welfare. For many tribes, establishing games is the sole or primary source of income and employment.[136] As the Supreme Court stated, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."[137] Moreover, tribal revenues from gambling often support tribal health and education programs.[138] In addition, gaming revenues often support infrastructure developments and tribal services such as schools, clinics, and police and fire departments.[139] Thus, reservation gambling not only furthers the tribal interest in self-determination and self-sufficiency, but it also advances the federal interest in weaning tribes from federal assistance by supporting strong tribal governments.[140]

---

134. *Sioux Nation*, 448 U.S. at 415.

135. S. REP. NO. 446, *supra* note 13, at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075. After the passage of IGRA, evidence surfaced that suggested recent organized criminal involvement with tribal games. Swanson, *supra* note 33, at 491-93. However, the evidence before Congress at the time IGRA was passed, and at the time *Swimmer* was decided, reflects that this assertion was unsupported by the historic record.

136. *See, e.g.*, *Cabazon*, 480 U.S. at 218-19.

137. *Id.* at 219.

138. *Id.* at 205 n.2; *see* Francis X. Clines, *With Casino Profits, Indian Tribes Thrive*, N.Y. TIMES, Jan. 31, 1993, at A1 (discussing tribal use of gambling proceeds to provide college tuition for tribal members, to support travel programs for tribal elders, and to hire archaeologists to disinter tribal history).

139. Moore, *supra* note 6, at 1796-97 (Revenues from gaming on the Mille Lacs Band Reservation in Minnesota "go to the tribal government, which is in the midst of building homes, roads, a health clinic and two schools."); Jonathan Littman, *And the Dealer Stays*, CAL. LAW., Jan. 1993, at 45, 46 (The Sycuan Band of Mission Indians in California maintains its own fire and police departments, a day care center, and a library.).

140. *Cabazon*, 480 U.S. at 216-19; *see also* S. REP. NO. 446, *supra* note 13, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 3073; Littman, *supra* note 139, at 46 ("[T]he El Cajon tribe hasn't taken a federal subsidy in eight years" due to the economic self-sufficiency gained by gaming.); *see* President Ronald Reagan's 1983 Statement on Indian Policy, PUB. PAPERS, 96-100 (1983) (stating the executive policy of promoting strong tribal govern-

IGRA adversely affects these tribal and federal interests because it forecloses tribal gaming opportunities unless a tribe enters a compact that allows state jurisdiction over its reservation. Congress purported to respect tribal concerns regarding expanded state jurisdiction. The Senate Report on IGRA states:

> Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands
>
> . . . .
>
> Consistent with th[is] principle[ ], . . . unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.[141]

While Congress colored the issue in the language of "consent," in reality the tribes are coerced to accept state jurisdiction in order to support their economic development with gaming. The passage above implies that unless a tribe consents, state jurisdiction will not apply "for the regulation of Indian gaming activities." However, if the tribes do not "consent," then there are no gaming opportunities to regulate. It is ironic and illogical to require tribes to surrender their self-determination by "consenting" to state jurisdiction in order to strengthen their self-reliance. The tribal need for gaming as an economic foundation is based on a need for strong self-governance and self-sufficiency. But if tribes must surrender their self-governance, then the purpose of reservation games is lost. Such a result strains even the *Swimmer* court's rational basis test for fulfilling congressional trust obligations.

It is therefore difficult to view IGRA as furthering tribal welfare and, thus, within Congress's trust obligation toward the tribes. The deprivation of tribal economic opportunity can be justified only as protective of the gaming industry and of the states' interests, despite the historic tendency of states to prevent tribes from becoming strong governmental bodies.[142] IGRA thus

---

ments).

141. S. REP. NO. 446, *supra* note 13, at 5-6, *reprinted in* 1988 U.S.C.C.A.N. at 3075.

142. *See* Udall, *supra* note 56, at 27 (characterizing the record of state treatment of tribes as a "record of general hostility, usually directed towards anything Indians want to do that impinges upon what states have traditionally done or want to do in the future").

strains Congress's trust responsibilities and contradicts federal executive and legislative policy.

The *Swimmer* decision is an unsound and undesirable answer to tribal challenges to IGRA. The court was too willing to allow unlimited congressional power over tribes. But the greater problem highlighted by *Swimmer* is the federal judiciary's tendency to dismiss tribal challenges to congressional action by broad reference to Congress's plenary power rather than by engaging in a thoughtful and sensitive analysis. Yet, when states challenge the scope of Congress's plenary power under the Indian Commerce Clause, courts struggle to find limitations in order to preserve state sovereignty interests.[143] This disparate treatment of challenges reflects an unfortunate and disturbing trend in American Indian Law.

B. State Challenges

The typical scenario that gives rise to a state sovereign immunity challenge under IGRA commences with a tribe's request that a state enter negotiations for the formulation of a Class III gaming compact.[144] Upon receiving the request, the state fails to negotiate or negotiates in bad faith.[145] The tribe responds by bringing an action in federal court to compel negotiations under IGRA.[146] The state then counters with a motion to dismiss the cause for lack of subject matter jurisdiction, claiming that the Eleventh Amendment to the federal constitution[147] deprives the court of the power to hear the tribe's claim.[148] The conclusion to this scenario depends upon which district court hears the motion. The courts are divided, and even those courts which reach similar results fail to concur on the proper analysis. The result is an uncertain body of jurisprudence that frustrates the implementation of IGRA, stifles tribal gaming opportunities, and protracts litigation.

---

143. *See infra* part II.B.

144. *See supra* notes 47-53 and accompanying text (discussing IGRA's provisions for Class III gaming).

145. *See, e.g.*, Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991).

146. *Poarch Band*, 776 F. Supp. at 550; *Spokane Tribe*, 790 F. Supp. at 1057.

147. U.S. CONST. amend. XI.

148. *Poarch Band*, 776 F. Supp. at 550; *Spokane Tribe*, 790 F. Supp. at 1057.

1. Background: State Sovereign Immunity and the Eleventh Amendment

> 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 states "entered the federal system with their sovereignty intact."[150] This residual sovereignty is reflected in the doctrine of state sovereign immunity arising under the Eleventh Amendment and the case law interpreting it. Under the Eleventh Amendment, the federal judiciary cannot exert jurisdiction over any suit against a state by citizens of another state, or by citizens of a foreign state.[151] Furthermore, the Eleventh Amendment has been broadly interpreted beyond its plain language to bar suits against a state by its own citizens.[152] Recently, the Supreme Court has extended this bar to prohibit suits brought by foreign sovereigns[153] and Indian tribes.[154]

While sovereign immunity bars federal jurisdiction over suits against states, courts have recognized three exceptions to this doctrine. First, a state may expressly or implicitly waive its immunity to suit.[155] Second, state officials may be sued in their official capacities.[156] This exception applies only if the state is not the real party in interest and the action arises from the official's ministerial duties.[157] Finally, Congress may abrogate

---

149. U.S. CONST. amend. XI.

150. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991).

151. U.S. CONST. amend. XI.

152. Hans v. Louisiana, 134 U.S. 1, 21 (1890).

153. *Blatchford*, 111 S. Ct. at 2582 (citing Monaco v. Mississippi, 292 U.S. 313, 330 (1934)).

154. *Id.* at 2582-83.

155. *Id.* at 2581.

156. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-03 (1984); *Ex Parte* Young, 209 U.S. 123, 159-60 (1908); Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1550-51 (S.D. Ala. 1992).

157. *Young*, 209 U.S. at 155-58; *see also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); *Poarch Band*, 784 F. Supp. at 1552.

state sovereign immunity.[158] However, abrogation is valid only if: (1) Congress possesses the power to abrogate state sovereign immunity when enacting a particular law, and (2) Congress clearly and unambiguously expresses its intent to abrogate state sovereignty.[159]

In the IGRA context, the controversy revolves primarily around the congressional abrogation exception.[160] Neither the states nor the courts deny that Congress explicitly and unambiguously expressed its intent to abrogate state sovereign immunity,[161] but the states and tribes vehemently contest whether Congress possessed the power to do so. At issue is whether the Indian Commerce Clause[162] confers upon Congress sufficient power over Indian affairs to abridge a state's immunity to suit under the Eleventh Amendment.

The Supreme Court announced the abrogation exception in *Fitzpatrick v. Bitzer*.[163] In *Fitzpatrick*, the Supreme Court held that section five of the Fourteenth Amendment provided Congress with the constitutional authority to subject states to suits for damages in federal court.[164] According to the Court, "the Eleventh Amendment, and the principle of state sovereignty

---

158. Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23 (1989); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 104-18 (1988) (discussing congressional abrogation of state sovereign immunity).

159. *See Union Gas*, 491 U.S. at 7; Seminole Tribe of Fla. v. Florida, 801 F. Supp. 655, 657-58 (S.D. Fla. 1992).

160. While some disputes arise under the exceptions of waiver and state officer action, *see, e.g.*, *Poarch Band*, 776 F. Supp. at 553-57, 562-63, this note focuses on the abrogation exception, because it is the primary controversy and it highlights a judicial willingness to limit congressional plenary powers over tribal affairs.

161. *See Seminole Tribe*, 801 F. Supp. at 658 ("It is beyond peradventure that . . . Congress made its intention to abrogate the States' immunity . . . 'unmistakably clear in the language of the statute.'" (citation omitted)); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1488-89 (W.D. Mich. 1992); *Poarch Band*, 776 F. Supp. at 557-58. The relevant section of IGRA which supports this conclusion provides:

> 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 under paragraph (3) or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i) (1988).

162. U.S. CONST. art. I, § 8, cl. 3; *see supra* note 3 (providing the text of the Indian Commerce Clause).

163. *Fitzpatrick*, 427 U.S. at 445.

164. *Id.* at 456; *see* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[165] The Court reasoned that the Fourteenth Amendment reflected an express shift in the relationship between the states and the federal government because the amendment simultaneously limited state authority while granting Congress the power to enforce that limit.[166] The federal courts, relying on *Fitzpatrick*, have since recognized congressional power to abrogate state sovereign immunity when Congress has acted under its plenary powers arising from several constitutional sources: the Bankruptcy Clause,[167] Article I war powers,[168] the extradition powers,[169] and the Copyright Clause.[170] Recently, in *Pennsylvania v. Union Gas Co.*, the Supreme Court extended Congress's abrogation power to congressional acts under the Commerce Clause.[171]

In *Union Gas*, the Court held that under the Interstate Commerce Clause,[172] Congress has the power to abrogate state sovereign immunity if Congress's intent to do so is clear and unambiguous.[173] The plurality opinion used two theories to support this holding. First, Congress has "plenary power" under the Commerce Clause to regulate commerce among the states. This plenary power includes the authority to abrogate any portion of state sovereignty that might obstruct effective regulation.[174] Second, the plurality adopted an "implied consent" theory: by ratifying the Constitution, the states consented to suit to enforce

---

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

166. *Id.* at 452-56.

167. U.S. CONST. art. I, § 8, cl. 4; *see In re* McVey Trucking, 812 F.2d 311, 323 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987) ("Congress may abrogate state immunity to suit pursuant to any of its plenary powers," including the Bankruptcy Clause.).

168. U.S. CONST. art. I, § 8, cl. 11; *see* Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1080 (5th Cir. 1979) ("[N]othing in the history of the eleventh amendment, the doctrine of sovereign immunity, or the case law indicates that Congress, when acting under an article I, section 8 delegated power, lacks the authority to provide for federal court enforcement of private damage actions against the states.").

169. U.S. CONST. art. IV, § 2, cl. 2; *see* County of Monroe v. Florida, 678 F.2d 1124 (2d Cir.), *cert. denied*, 459 U.S. 1104 (1982).

170. U.S. CONST. art. I, § 8, cl. 8; *see* Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979); BV Eng'g v. University of Cal., L.A., 657 F. Supp. 1246, 1249-50 (C.D. Cal. 1987), *aff'd*, 858 F.2d 1394 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

171. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 23 (1989).

172. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

173. *Union Gas*, 491 U.S. at 7, 23.

174. *Id.* at 14.

any regulation that Congress enacted under its constitutional authority.[175] Justice White provided a concurrence necessary to obtain a majority in the holding, but he "d[id] not agree with much of [the Court's] reasoning" and did not supply his own.[176] In IGRA jurisprudence, the critical issue is whether *Union Gas* applies when Congress acts under the Indian Commerce Clause.

2. The Case Law

To date, eight district court decisions constitute the federal judiciary's response to the questions raised regarding Congress's power under the Indian Commerce Clause to abrogate state sovereign immunity. Of those eight, only five are reported:[177] *Poarch Band of Creek Indians v. Alabama*,[178] *Spokane Tribe of Indians v. Washington*,[179] *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*,[180] *Seminole Tribe of Florida v. Florida*,[181] and *Kickapoo Tribe of Indians v. Kansas*.[182] The courts in *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie* refused to exert jurisdiction over tribal claims against the respective states, concluding that Congress lacked the power to abrogate state sovereign immunity when it passed IGRA.[183] However, none of these courts concurred on the reasons why Congress lacked such power, or on which precedent controlled the outcome. Only the courts in *Seminole Tribe* and *Kickapoo Tribe* found sufficient congressional power to abrogate state sovereign immunity and held that jurisdiction over the tribe's claim was

---

175. *Id.* at 19-20.

176. *Id.* at 57 (White, J., concurring).

177. The three unreported cases are: Ponca Tribe of Oklahoma v. Oklahoma, Civ. No. 92-988 (W.D. Okla. Sept. 8, 1992) (holding that Congress lacked the power to abrogate the Eleventh Amendment when it enacted IGRA); Pueblo of Sandia v. Bruce King, Civ. 92-613 (D.N.M. Nov. 13, 1992) (same); Cheyenne River Sioux v. South Dakota, Civ. 92-3009 (D.S.D. Jan. 8, 1993) (holding that Congress had the power to abrogate the Eleventh Amendment under the Indian Commerce Clause when it passed IGRA); *see* Feldman, *supra* note 8, at 22.

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

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

180. Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992).

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

182. Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993).

183. *See infra* notes 186-227 and accompanying text.

proper.[184] Though *Seminole Tribe* and *Kickapoo Tribe* are in the minority in their conclusions, the decisions represent sound and honest applications of legal doctrine, and they reflect an appropriate response to a state's Eleventh Amendment defense.[185]

a. *Poarch Band of Creek Indians v. Alabama*

In *Poarch Band of Creek Indians v. Alabama*, the Poarch Band of Creek Indians ("tribe") filed suit against the State of Alabama and its Governor alleging that the State had failed to negotiate in good faith for a Class III gaming compact under IGRA within the statutory time period.[186] The tribe sought declaratory and injunctive relief compelling the State to enter a compact that would permit the tribe to open gambling operations.[187] The State filed a motion to dismiss the cause on the grounds of sovereign immunity under the Eleventh Amendment.[188] The court, finding that Congress lacked the power to abrogate state sovereign immunity when it acted under the Indian Commerce Clause, granted the State's motion and dismissed the complaint.[189]

The *Poarch Band* court began its abrogation analysis by acknowledging that IGRA demonstrated sufficiently clear congressional intent to abrogate state sovereign immunity.[190] The central issue was therefore whether Congress possessed the constitutional power to do so. The court relied on three theories to support its conclusion that the Indian Commerce Clause did not confer upon Congress the power to abrogate sovereign

---

184. *See infra* notes 228-52 and accompanying text.

185. While all eight cases are on appeal, no circuit has yet addressed the issue. Feldman, *supra* note 8, at 22.

186. Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 552 (S.D. Ala. 1991).

187. *Id.* at 552-53.

188. *Id.* at 553.

189. *Id.* at 557-63. While the court dismissed the tribe's claim against the State, the court granted the tribe's motion to amend its complaint to continue its action against the Governor as a state official. *Id.* at 563-64. After the tribe amended its complaint, the court dismissed the tribe's claim against the Governor on the grounds that the decision to allow gambling is one of state policy and therefore discretionary, not ministerial, under *Ex Parte Young*, 209 U.S. at 158. Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1551 (S.D. Ala. 1992). The court further concluded that the action was barred because the State, not the Governor, was the real party in interest. *Id.* at 1552.

190. *Poarch Band*, 776 F. Supp. at 557.

immunity.

First, the court concluded that *Pennsylvania v. Union Gas Co.*[191] did not control the decision.[192] In support of this conclusion, the court noted that *Union Gas* was "not directly on point," but failed to state how the case significantly differed.[193] The court further found that *Union Gas* "should not be given an expansive application" because of "the shaky ground on which it stands."[194] The court opined that *Union Gas* was "shaky" because Justice White's concurrence, necessary for a majority in the holding, was "mysterious" and "laconic" and thereby provided only a "'four-and-a-half' vote majority."[195] Moreover, the court found the retirements of Justices Brennan and Marshall, members of the *Union Gas* plurality, to be additional factors weakening the authority of *Union Gas*.[196] Finally, the court relied upon a statement in a recent Supreme Court case, *Cotton Petroleum Corp. v. New Mexico*,[197] which held that Indian tribes could not be treated as states under the Interstate Commerce Clause.[198] The *Cotton Petroleum* opinion states that "[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications."[199] Relying on this statement, the *Poarch Band* court reasoned that the *Union Gas* analysis was limited to the Interstate Commerce Clause and could not be extended to the Indian Commerce Clause.[200]

The second theory used by the *Poarch Band* court was that the holding in *Peel v. Florida Department of Transportation*, that Congress had the power to abrogate state sovereign immunity

---

191. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that Congress has the power to abrogate state sovereign immunity when it acts pursuant to the Interstate Commerce Clause). *See supra* notes 171-76 and accompanying text (discussing *Union Gas*).

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

193. *Id.* The Interstate Commerce Clause and the Indian Commerce Clause are part of the same constitutional provision. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

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

195. *Id.* at 558-59.

196. *Id.* at 559.

197. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

198. *Poarch Band*, 766 F. Supp. at 559 (citing *Cotton Petroleum*, 490 U.S. at 191-93).

199. *Cotton Petroleum*, 490 U.S. at 192, *quoted in Poarch Band*, 776 F. Supp. at 559.

200. *Poarch Band*, 776 F. Supp. at 559.

when acting under its war powers,[201] was not controlling precedent.[202] The court distinguished the scope of congressional power under the War Powers Clause from that derived from the Indian Commerce Clause. On the one hand, the war power of the federal government is "supreme" and "transcendent."[203] On the other hand, "while it does provide Congress with plenary power to legislate in the field of Indian affairs, . . . [the Indian Commerce Clause] is not 'transcendent' in the sense that the War Power is."[204] The court did not elaborate on how a transcendent power is broader than a plenary power. Furthermore, the court concluded that *Peel* was unsound authority because it relied upon precedent decided before the Supreme Court announced the abrogation theory in *Fitzpatrick*.[205] Although the Supreme Court relied upon the same precedent as the foundation for its holding in *Union Gas*, the *Poarch Band* court found reliance on this precedent to be a threat to the vitality of *Peel*.[206]

As a final theory, the *Poarch Band* court found that plenary power alone was insufficient to abrogate state sovereign immunity.[207] The court declined to view *Fitzpatrick* as holding that Congress may abrogate sovereign immunity when it acts under its plenary powers. Rather, the court found that the Fourteenth Amendment was unique because section one of the Amendment specifically limited state authority.[208] Unlike the Fourteenth Amendment, the court reasoned, "the Commerce Clause's own terms do not embody the same limitations on state authority."[209] Thus, the court held that the Indian Commerce Clause did not empower Congress to abrogate state sovereign immunity when it enacted IGRA.

---

201. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1081 (5th Cir. 1979).

202. *Poarch Band*, 776 F. Supp. at 559-62.

203. *Id.* at 560 (quoting *Peel*, 600 F.2d at 1081).

204. *Id.* (citation omitted).

205. *Id.* at 560-61; *see supra* notes 163-66 and accompanying text (discussing the holding in *Fitzpatrick*).

206. *See Poarch Band*, 776 F. Supp. at 560-61.

207. *Id.* at 562-63.

208. *Id.* at 562. Section one of the Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

209. *Poarch Band*, 776 F. Supp. at 562.

b. *Spokane Tribe of Indians v. Washington*

In *Spokane Tribe of Indians v. Washington*, the District Court for the Eastern District of Washington addressed the abrogation issue, under facts analogous to those considered by *Poarch Band*.[210] Like the *Poarch Band* court, the *Spokane Tribe* court held that Congress lacked the power to abrogate state sovereign immunity when it enacted IGRA.[211] However, the *Spokane Tribe* court's analysis differed significantly from the analysis of *Poarch Band*.

First, the *Spokane Tribe* court never questioned the vitality of *Union Gas*. The court clearly acknowledged *Union Gas* as binding authority.[212] But the court avoided the application of *Union Gas* by concluding that a "significant difference exists between congressional power stemming from the Indian Commerce Clause and congressional power stemming from the Interstate Commerce Clause."[213] Like the *Poarch Band* court, the *Spokane Tribe* court relied upon *Cotton Petroleum Corp. v. New Mexico*[214] to distinguish the two Commerce Clauses. In *Cotton Petroleum*, the Supreme Court asserted that it was inappropriate to apply doctrine developed from commerce "among the states" to intercourse "'with' Indian tribes."[215] Reference to this statement enabled the *Spokane Tribe* court to conclude that *Union Gas* was inapposite to the Indian Commerce Clause. However, having dismissed the applicability of *Union Gas*, the court never independently analyzed congressional power under the Indian Commerce Clause. Rather, the court merely distinguished the two Commerce Clauses and concluded that Congress lacked the power to abrogate state sovereign immunity when it passed IGRA.

Second, the court invoked a "'mutuality of concession theory' to support its conclusions.[216] Relying on the Supreme Court

---

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

211. *Id.* at 1061.

212. *Id.* at 1060.

213. *Id.* at 1061.

214. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

215. *Id.* at 192.

216. *Spokane Tribe*, 790 F. Supp. at 1061 (quoting Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2582-83 (1991)).

decision *Blatchford v. Native Village of Noatak*,[217] the court found that because tribes retained immunity from suit by states, states retained immunity from suit by tribes.[218] This finding, according to the court, underscored a crucial difference in the relationship among states and tribes under the Indian Commerce Clause as compared with the relationship of sister states under the Interstate Commerce Clause. The court stated: "[the] difference is that States have surrendered immunity to each other, creating a 'mutuality of concession,' but Indian Tribes have retained immunity to suits by States, so no mutuality of concession exists."[219] The court therefore concluded that the two Commerce Clauses were substantively distinct and that *Union Gas* did not control the outcome.

c. *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*

A state motion to dismiss a tribal claim of bad faith negotiations presented the District Court for the Western District of Michigan with the issue of whether or not Congress may abrogate state sovereign immunity under the Indian Commerce Clause. In *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, the court agreed with the *Poarch Band* and *Spokane Tribe* courts and concluded that Congress lacked the power to do so.[220] Accordingly, the court granted the state's motion to dismiss.[221]

Sault Ste. Marie is significant because it reached its conclusion while expressly rejecting the primary rationale of *Poarch Band* and *Spokane Tribe*. Both *Poarch Band* and *Spokane Tribe* relied upon *Cotton Petroleum Corp. v. New Mexico* to demonstrate the substantive difference between the Interstate Commerce and the Indian Commerce Clauses. This distinction was important to the analysis of those courts because it enabled their evasion of *Union Gas*. The *Sault Ste. Marie* court, however, found *Cotton Petroleum* to be inapplicable because *Cotton Petroleum* did not address Congress's power to abrogate sovereign immunity; rather,

---

217. *Blatchford*, 111 S. Ct. at 2583 (holding that the Eleventh Amendment bars suits by tribes against states, absent waiver, consent, or abrogation).

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

219. *Id.* (quoting *Blatchford*, 111 S. Ct. at 2582-83).

220. Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489-90 (W.D. Mich. 1992).

221. *Id.* at 1490.

Cotton Petroleum considered only whether tribes should be treated as states for purposes of tax apportionment.[222] The court consequently declined to rely on *Cotton Petroleum* as a basis for distinguishing the Commerce Clauses.

Nevertheless, the court concluded that *Union Gas* should not be extended to cover controversies arising under the Indian Commerce Clause.[223] The court's refusal to extend *Union Gas* was supported by two concerns. First, *Union Gas* was a plurality opinion and should be accorded only a narrow application.[224] Second, one of the theories supporting *Union Gas*, the "implied consent" of the states to suit by ratifying the Constitution,[225] subsequently had been held inapplicable to tribal suits against states in *Blatchford v. Native Village of Noatak*.[226] The court thus held that "it would be inappropriate to extend *Union Gas* to apply to the Indian Commerce Clause."[227] However, having concluded that *Union Gas* did not apply, the court failed to examine congressional power under the Indian Commerce Clause to determine whether this plenary power, independent of the Interstate Commerce Clause, authorized Congress to abrogate state sovereign immunity.

d. *Seminole Tribe of Florida v. Florida*

In *Seminole Tribe of Florida v. Florida*, the United States District Court for the Southern District of Florida denied the State's motion to dismiss on Eleventh Amendment grounds.[228] Unlike the other district courts which have addressed the Eleventh Amendment abrogation issue, the *Seminole Tribe* court concluded that Congress possessed the power to abrogate state sovereign immunity when it enacted IGRA.[229] Accordingly, the court found that federal jurisdiction over the tribe's bad faith negotiations claim was proper.

---

222. *Id.* at 1489; *see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-93 (1989).

223. *Sault Ste. Marie*, 800 F. Supp. at 1489.

224. *Id.*

225. *See supra* note 175 and accompanying text.

226. *Sault Ste. Marie*, 800 F. Supp. at 1489; *see Blatchford*, 111 S. Ct. at 2582-83.

227. *Sault Ste. Marie*, 800 F. Supp. at 1489-90.

228. Seminole Tribe of Fla. v. Florida, 801 F. Supp. 655, 656 (S.D. Fla. 1992).

229. *Id.* at 658.

The court began its analysis with an extensive overview of the scope of Congress's plenary power over Indian affairs.[230] The court then recognized that "it has repeatedly been observed that Congress may abrogate the States' immunity when it acts pursuant to a plenary grant of authority plainly embodied in the textual framework of the Constitution."[231] The court concluded that Congress's plenary power over tribal affairs was a "substantial basis upon which to find congressional power to abrogate when legislating pursuant to that authority."[232]

Next, the court examined *Union Gas* and, unlike the courts in *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie*, concluded that *Union Gas* applied to the Indian Commerce Clause.[233] While the *Seminole Tribe* court recognized *Union Gas* as a plurality opinion, the court felt bound to the holding because a majority of the justices supported it.[234] The court opined that *Union Gas* could not be evaded by distinguishing between the Interstate and Indian Commerce Clauses, since the plenary authority of Congress under the Indian Commerce Clause "is at least as broad as Congress's interstate commerce power."[235] The court thus focused on the actual power derived from the Commerce Clauses rather than its application (as was the focus of the courts in *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie*). By examining the power accorded to Congress under the Commerce Clauses, the court found any distinction in application irrelevant, "especially since congressional power over both interstate and Indian commerce derives from precisely the same Constitutional clause, Article I, § 8, cl. 3, and, . . . [Congress's] power in both areas is plenary."[236]

Finally, the court expressly rejected the holdings of *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie*, finding their analyses

---

230. *Id.* at 659-60.

231. *Id.* at 660 (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989); Hutto v. Finney, 437 U.S. 678, 693-94 (1978); Richard Anderson Photography v. Brown, 852 F.2d 114, 123-24 (4th Cir. 1988) (Boyle, J., concurring in part and dissenting in part), *cert. denied*, 489 U.S. 1033 (1989); United States v. Union Gas Co., 832 F.2d 1343, 1356 (3d Cir. 1987); *In re* McVey Trucking, 812 F.2d 311, 323 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987); Malone v. Schenk, 638 F. Supp. 423, 426 (C.D. Ill. 1985)).

232. *Id.* at 660.

233. *Id.* at 661 ("*Union Gas* is binding authority on this Court. It is a mistake to simply dismiss *Union Gas* as being inapposite . . . .").

234. *Id.*

235. *Id.*

236. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3).

unpersuasive.[237] First, as discussed above, the court found Congress's plenary power under the Indian Commerce Clause to be sufficient alone to authorize abrogation of state immunity.[238] Thus, any attempt to avoid *Union Gas* by distinguishing the clauses was inappropriate because the power under both is plenary. Second, the court observed that reliance upon *Cotton Petroleum* to distinguish the Commerce Clauses was unsound. The mere statement that the Commerce Clauses "'have very different applications'" does not address the question of congressional power under the Clauses;[239] the power itself derives from the same source. The only difference is in application, and then only so far as the Interstate Commerce Clause applies to commerce among the states, while the Indian Commerce Clause applies to Indian affairs.[240] Finally, the court stated that reliance upon *Blatchford*[241] was "misplaced."[242] The court noted that *Blatchford* was a waiver of immunity case, not an abrogation case, and that *Blatchford* never addressed Congress's powers of abrogation under the Indian Commerce Clause.[243] The court therefore held that the Indian Commerce Clause gave Congress the power to abrogate state sovereign immunity.

---

237. *Id.* at 661-62.

238. *Id.* at 661.

239. *Id.* at 662-63 (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)).

240. *Id.* at 663. The court found the statement from *Cotton Petroleum* that the commerce clauses "have very different applications" to be an unpersuasive grounds for distinction. *Id.* The court stated:

> [T]hat decision goes on to note: "In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the states even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs."

Id. at 663 (quoting *Cotton Petroleum*, 490 U.S. at 192). Implicit in the court's reasoning is that a difference in application of power does not distinguish the scope of that power. In a footnote, the court cited several sources of authority which support the conclusion that all article I, § 8, cl. 3 power is the same. *Id.* at 662 n.8.

241. *Blatchford* held that states retain their immunity from suits by tribes due to a lack of mutuality of concession. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2583 (1989).

242. *Seminole Tribe of Fla.*, 801 F. Supp. at 663.

243. *Id.*

e. *Kickapoo Tribe of Indians v. Kansas*

The most recent case to address the Eleventh Amendment issue is *Kickapoo Tribe of Indians v. Kansas*.[244] Expressly rejecting the reasoning and holdings of the majority of courts, the *Kickapoo* court held that Congress possessed the power to abrogate state sovereign immunity when it enacted IGRA.[245] Accordingly, the court denied the State's motion to dismiss for lack of jurisdiction.[246]

The *Kickapoo* court attacked *Sault Ste. Marie*, *Spokane Tribe*, and *Poarch Band* for failing to adhere to Supreme Court precedent.[247] According to the court, *Union Gas* was binding authority, and could not be evaded by any meaningful distinction between the Interstate Commerce Clause and the Indian Commerce Clause. The court stated, "[t]oo quick to say the last rites over *Union Gas* and too eager to rely on a distinction without a difference, the majority [of district courts] offer an approach unpersuasive to this court."[248] As the *Kickapoo* court observed, the holding in *Union Gas* was supported by a majority of the Supreme Court. While the personnel of the High Court had changed since *Union Gas*, the *Kickapoo* court opined "[s]peculation over what the currently constituted Court may do in a given case may be academically satisfying, but it does not impel this court to ignore viable precedent."[249]

Like the *Seminole Tribe* court, the *Kickapoo* court focused its analysis on the power derived from the Commerce Clause rather than on the subject matter of that power. The court explained that Congress's power over Indian affairs is at least equal to Congress's power over interstate commerce.[250] Together, the Commerce Clauses grant Congress plenary power over interstate

---

244. Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993).

245. *Id.* at 1431-32.

246. *Id.*

247. *Id.* at 1427-28.

248. *Id.* at 1428. The court added "[t]o read *Union Gas* as only applying to the Interstate Commerce Clause works a disservice to the broad reasoning in that opinion, defies the plain language of the Constitution, and overlooks a long line of precedent on Congress' [sic] plenary power over Indian commerce." *Id.* at 1429.

249. *Id.* at 1428.

250. *Id.* at 1431 ("The breadth and depth of Congress' [sic] powers under the Indian Commerce Clause are equal to, if not greater than, its powers under the Interstate Commerce Clause.").

commerce and Indian affairs while depriving the states of the power to regulate in those fields. Because *Union Gas* holds that Congress may abrogate state sovereign immunity when it acts pursuant to its plenary powers, Congress may abrogate state sovereign immunity when it acts under the Indian Commerce Clause.[251] The court therefore concluded that "Congress' [sic] power to regulate Indian commerce includes the power to abrogate states' immunity" and that federal jurisdiction under IGRA was thus proper.[252]

3. Comment on the Case Law

The federal courts' response to the states' Eleventh Amendment defense is unsatisfactory for several reasons. First, the cases demonstrate a dramatic inconsistency both in approach and in result. As a consequence, IGRA jurisprudence is marked by uncertainty and instability. This lack of stability threatens IGRA as a viable solution to unregulated reservation gambling, and hinders tribal opportunities to use gaming as an economic means toward self-sufficiency. Second, a majority of courts that have addressed the issue have displayed a result-oriented willingness to limit Congress's plenary power over Indian affairs in order to protect the states' interests. This inclination to limit congressional power is disturbing not only because the courts fail to exercise similar concern on behalf of tribal interests,[253] but also because it threatens the integrity of their legal analysis, which must be compromised in order for the courts to reach their desired result.

Of the five reported cases addressing the state sovereign immunity question, three have concluded that Congress, while endowed with plenary power over Native American affairs, lacks the power to abrogate a state's immunity to suit.[254] None of these courts, however, provided a sufficient rationale for evading *Union Gas*.[255] Moreover, having dismissed the precedential value of *Union Gas*, the courts failed to examine adequately the scope and nature of Congress's power under the Indian Commerce

---

251. *Id.*

252. *Id.* at 1431-32.

253. *See infra* parts II.A.2-3.

254. *See infra* part II.B.2.

255. *See supra* notes 171-76 and accompanying text (discussing the holding in *Union Gas*).

Clause. In *Spokane Tribe* and *Sault Ste. Marie*, the courts neglected this issue entirely.[256] While the *Poarch Band* court at least considered the question, it failed to give effect to the abrogation doctrine of *Fitzpatrick* and its progeny.[257] Only the courts in *Seminole Tribe* and *Kickapoo Tribe* appear to have approached this issue with sound analysis and honest recognition of legal doctrine. If the other courts had approached these cases with the same degree of acumen, then perhaps IGRA jurisprudence would not suffer the uncertainty and confusion that currently undermines IGRA's fruition.

The major flaw in the *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie Tribe* courts' reasoning is the conclusion that *Union Gas* does not apply to the Indian Commerce Clause. In *Union Gas*, a majority of Justices agreed that Congress may abrogate state sovereign immunity when it acts pursuant to its plenary power under the Interstate Commerce Clause.[258] In the IGRA context, most courts have refused to extend this holding to the Indian Commerce Clause by using either one of two rationales: (1) *Union Gas* is a plurality opinion and should be accorded a narrow application;[259] and (2) the Commerce Clauses are substantively distinguishable.[260] Neither rationale is persuasive.

Although it is prudent to limit plurality decisions to the specific contexts in which they arose, the IGRA cases do not require an expansive reading of *Union Gas* in order to uphold abrogation.[261] At issue in *Union Gas* was whether Congress possessed the *power* under the Interstate Commerce Clause to abrogate state sovereign immunity. It was therefore the power conferred on Congress, not the subject matter of that power, that informed the Court's decision. Both the Interstate Commerce Clause and the Indian Commerce Clause are found in the same

---

256. *See supra* parts II.B.2.b-c.

257. *See supra* part II.B.2.a.

258. Pennsylvania v. Union Gas Co. 491 U.S. 1, 19 (1989). The court in Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423, 1428 (D. Kan. 1993), recognized "[b]eginning with the irrefutable, a majority of the Supreme Court held in *Union Gas* that Congress has the power to override the states' Eleventh Amendment immunity in the exercise of its Commerce Clause power."

259. *See, e.g.*, Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558-59 (S.D. Ala. 1991).

260. *See, e.g.*, Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1060-61 (E.D. Wash. 1991).

261. *See, e.g.*, *Kickapoo Tribe*, 818 F. Supp. at 1428 ("Resort to an expansive reading of *Union Gas* is unnecessary, for just a fair reading demonstrates it is controlling here.").

constitutional provision.[262] Furthermore, Congress's power under each clause is plenary.[263] Thus the actual power conferred upon Congress is the same.

Both clauses, as sub-clauses of the Commerce Clause, operate in the same manner to shift the balance of the state-federal relationship under the constitutional system. It is this shift of balance that either confers or withholds the power of Congress to abrogate state immunity. As the Supreme Court stated in *Union Gas*, "'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce,' and that '[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.'"[264] The operative theme is power, not interstate commerce. Through the Commerce Clause, the states *empowered* Congress to regulate commerce among the states, thereby shifting the state-federal balance in favor of Congress. In the same constitutional provision, the states *empowered* Congress to regulate the field of Native American affairs. By granting Congress this power, the states surrendered any sovereignty that would obstruct effective legislation in this field. This conclusion flows directly from the *Union Gas* holding and does not require a judicial expansion of that case.

The courts' desire to read *Union Gas* narrowly, therefore, does not require the conclusion that *Union Gas* does not apply at all. The fact that the case was a plurality decision does not thereby deprive it of all vitality. Nor can one seriously accept the *Poarch Band* court's conclusion that *Union Gas* was supported only by "four-and-a-half" votes.[265] Justice White's concurrence may have been "laconic" and "mysterious"[266] in the eyes of the court, but such characterizations cannot convert an opinion that provided a majority in the holding into a meaningless half vote. Furthermore, the *Poarch Band* court's theory that the retirements of Justices from the Court somehow weakens the authority of the

---

262. U.S. CONST. art. I, § 8, cl. 3.

263. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (holding that the Indian Commerce Clause "provide[s] Congress with plenary power"); Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1909 (1992) (holding that the Interstate Commerce Clause provides Congress with plenary power).

264. *Union Gas*, 491 U.S. at 14 (quoting Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191-92 (1964)).

265. *Poarch Band*, 776 F. Supp. at 558-59.

266. *Id.* at 558.

Court's rulings, would, if accepted, render much of constitutional law void.[267] Such rationalizations suggest that the court was aware of the weak legal ground upon which its ruling rested.

The courts' attempts to distinguish the Commerce Clauses are similarly tenuous. Because the power granted to Congress via the Indian Commerce Clause is "at least as broad as Congress's interstate commerce power,"[268] it is unpersuasive to distinguish *Union Gas* by reference to the subject matter of the clauses. The mere fact that one clause applies to commerce among the states, and the other applies to Indian affairs, does not mean that the power being applied is different. The power, derived from the same constitutional source, is simply being applied to different circumstances.

Those courts that try to distinguish the clauses do so by manipulating language from the Supreme Court opinion in *Cotton Petroleum Corp. v. New Mexico*.[269] In *Cotton Petroleum*, the Court stated:

> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. . . . The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.[270]

The courts in both *Poarch Band* and *Spokane Tribe* cited to portions of this statement to conclude that *Union Gas* did not apply to IGRA cases.[271] Such reliance is misplaced. First, *Cotton Petroleum* never addressed Congress's power to abrogate state sovereign immunity. Rather, *Cotton Petroleum* discussed only whether tribes could be treated as states under the Inter-

---

267. As the court in *Kickapoo Tribe* stated, "Speculation over what the currently constituted Court may do in a given case may be academically satisfying, but it does not impel this court to ignore viable precedent." *Kickapoo Tribe*, 818 F. Supp. at 1428.

268. Seminole Tribe of Fla. v. Florida, 801 F. Supp. 655, 661 (S.D. Fla. 1992).

269. *Cotton Petroleum*, 490 U.S. at 163.

270. *Id.* at 192.

271. *See Poarch Band*, 776 F. Supp. at 559; *Spokane Tribe*, 790 F. Supp. at 1061.

state Commerce Clause for purposes of tax apportionment.[272] For this reason, the courts in *Sault Ste. Marie* and *Seminole Tribe* declined to use *Cotton Petroleum* as a basis for distinction.[273] Second, the *Cotton Petroleum* Court never addressed the *power* that Congress possessed, but only the application of that power. The Court stated that the two Commerce Clauses required "different applications."[274] This statement does not suggest that the scope of Congress's power under the clauses is different. Rather, it suggests that the power is applied differently depending upon the circumstances. The *Cotton Petroleum* Court clarified that the Interstate Commerce Clause applies to "maintaining free trade among the States," while "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[275] The power, however, is plenary under both and remains unchanged. It is this power, not its application, that controls the analysis of congressional abrogation. It is misleading, therefore, to analyze abrogation by limiting the discussion to the application of the clauses.

The doctrine of abrogation demonstrates that plenary power alone is sufficient to empower Congress to abrogate state sovereign immunity.[276] The Supreme Court in *Union Gas* observed "that every Court of Appeals to have reached this issue has concluded that Congress has the authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution."[277] Similarly, the Seventh Circuit has held that "Congress may abrogate state immunity to suit pursuant to any of its plenary powers."[278] It is the plenary nature of the power that is decisive, not the precise source of that power. Thus, even if *Union Gas* did not directly apply to the Indian Commerce Clause, an independent analysis of Congress's plenary power under the clause would dictate the same

---

272. *See Cotton Petroleum*, 490 U.S. at 191-93.

273. *Sault Ste. Marie*, 800 F. Supp. at 1489; *Seminole Tribe*, 801 F. Supp. at 662.

274. *Cotton Petroleum*, 490 U.S. at 192.

275. *Id.*

276. *See supra* notes 163-71 and accompanying text.

277. *Union Gas*, 491 U.S. at 15 (citing United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1987); *In re* McVey Trucking, 812 F.2d 311 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); Peel v. Florida Dept. of Transp., 600 F.2d 1070 (5th Cir. 1979); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979)).

278. *McVey Trucking*, 812 F.2d at 323.

conclusion: that Congress has the power to abrogate state sovereign immunity under the Indian Commerce Clause.

Because Congress's power under the Indian Commerce Clause is plenary, and plenary power is alone sufficient to abrogate state sovereign immunity, it is surprising that two courts, in *Spokane Tribe* and *Sault Ste. Marie*, neglected to address this issue. The *Spokane Tribe* and *Sault Ste. Marie* courts simply distinguished the Commerce Clauses, found *Union Gas* inapplicable, and concluded that Congress lacked the authority to abrogate state sovereign immunity when it enacted IGRA.[279] However, having found *Union Gas* inapposite to the Indian Commerce Clause, sound analysis requires an independent examination of Congress's power under the Indian Commerce Clause. It is insufficient merely to distinguish *Union Gas* and dismiss the case. The courts' failure to engage in such an independent analysis intimates that the courts were more concerned with reaching a desired result than providing a complete and reasoned rationale.

While the *Poarch Band* court recognized the need to examine further the issue of Congress's plenary power independently of *Union Gas*, its conclusions ignore legal doctrine and are unpersuasive. First, the court attempted to distinguish and discredit *Peel*.[280] *Peel* held that Congress may abrogate a state's sovereign immunity when it acts pursuant to its war powers.[281] According to the *Poarch Band* court, Congress's war powers and its plenary power over Indian affairs are significantly different. While the war powers are "supreme" and "transcendent," the power over Indian affairs is plenary, and "not 'transcendent' in the sense that the War Power is."[282] However, the court never explained what characteristic of the war powers provided that distinction. Rather, the court relied upon the semantic difference between the words "plenary," "supreme," and "transcendent." This analysis is particularly vulnerable in light of the Supremacy Clause which makes any federal exercise of plenary power supreme and transcendent as to the states.[283]

---

279. *See Spokane Tribe*, 790 F. Supp. at 1060-61; *Sault Ste. Marie*, 800 F. Supp. at 1489-90.

280. *Poarch Band*, 776 F. Supp. at 559-62; *see Peel*, 600 F.2d at 1070.

281. *Peel*, 600 F.2d at 1080. Congress's war powers are provided at U.S. CONST. art. I, § 8, cl. 11.

282. *Poarch Band*, 776 F. Supp. at 560.

283. U.S. CONST. art. VI, cl. 2; *see, e.g.*, Cipollone v. Liggett Group, 112 S. Ct. 2608 (1992).

The court's analysis also ignores Chief Justice John Marshall's observations in *Worcester v. Georgia*.[284] Marshall noted that from the time of the Continental Congress to the enactment of the Constitution, the powers of war and the power over Indian affairs were conferred entirely upon Congress.[285] Before the Articles of Confederation, the Continental Congress assumed the complete powers of war due to the need for unity and confidence.[286] "From the same necessity, and on the same principles, congress assumed the management of Indian affairs."[287] Under the Articles of Confederation, the "confederation found congress in the exercise of the *same powers* of peace and war in our relations with Indian nations."[288] Finally, the Constitution "conferr[ed] on congress the power of war and peace . . . and of regulating commerce *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions."[289] Chief Justice Marshall made it abundantly clear that Congress's war powers and its power over Native American affairs are of the same magnitude and nature.

The court's attempt to discredit *Peel* is similarly unsound. According to the court, *Peel* improperly relied upon precedent decided before the Supreme Court announced the abrogation doctrine in *Fitzpatrick*.[290] Such a conclusion is weak in light of *Union Gas*, because the *Union Gas* Court expressly sanctioned the *Peel* approach.[291] Moreover, the cases relied upon by *Peel* were the same cases that the Supreme Court invoked to support its conclusion in *Fitzpatrick*.[292] The *Poarch Band* court's conclusion is further weakened because *Peel* relied on *Fitzpatrick* itself as the primary precedent.[293] As a final rationalization, the court attempted to undermine *Peel* by observing that *Peel* had never

---

284. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

285. *Id.* at 558-59.

286. *Id.* at 558.

287. *Id.*

288. *Id.* at 558 (emphasis added).

289. *Id.* at 559.

290. *Poarch Band*, 776 F. Supp. at 560-61; *see supra* notes 163-66 and accompanying text (discussing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

291. *See Union Gas*, 491 U.S. at 15.

292. *Compare Fitzpatrick* 427 U.S. at 451-56 *with Peel*, 600 F. 2d at 1070.

293. *Peel*, 600 F.2d at 1080.

been cited as authority by the Eleventh Circuit.[294] This observation is unpersuasive because *Peel* has been cited with approval by the Supreme Court, and by the federal circuit courts outside the Eleventh Circuit.[295] There is nothing fundamentally unique about the Eleventh Circuit's stamp of approval. Moreover, no federal court of appeals that has addressed congressional abrogation has declined to follow *Peel*. The *Poarch Band* court's attempt to avoid *Peel*, therefore, relied on analysis of questionable merit.

The *Poarch Band* court's second approach was the theory that plenary power alone was insufficient to abrogate state sovereign immunity.[296] In support, the court found that the *Fitzpatrick* holding was limited to the unique nature of the Fourteenth Amendment.[297] According to the court, the Fourteenth Amendment was unique because section one of the amendment specifically limited state authority while section five specifically granted authority to Congress.[298] This express shift in the state-federal relationship was important to the court because "it altered the provisions of the previously enacted Eleventh Amendment."[299] The court concluded that because the "Commerce Clause's own terms do not embody the same limitations on state authority found in the Fourteenth Amendment," *Fitzpatrick* did not apply to the Indian Commerce Clause.[300]

The court's reasoning is flawed because it ignores the abrogation doctrine and the inherent limitations on state authority imposed by the Constitution. First, it is settled that Congress may abrogate state immunity when it acts pursuant to its plenary power, not just the plenary power found in section five of the

---

294. *Poarch Band*, 776 F. Supp. at 561.

295. *See Union Gas*, 491 U.S. at 15 (1989); Reopell v. Massachusetts, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S.Ct 637 (1991); BV Eng'g v. University of Cal., L.A., 858 F.2d 1394, 1397 (9th Cir. 1988); *In re* McVey Trucking, 812 F.2d 311, 315 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987); United States v. Union Gas Co., 832 F.2d 1343, 1355 (3d Cir. 1987); County of Monroe v. Florida, 678 F.2d 1124, 1132 n.8 (2d Cir. 1982); Familias Unidas v. Briscoe, 619 F.2d 391, 405 (5th Cir. 1980).

296. *Poarch Band*, 776 F. Supp. at 562.

297. *Fitzpatrick* held that Congress may abrogate state sovereign immunity when it acts under section five of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 456.

298. *Poarch Band*, 776 F. Supp. at 562; *see supra* note 208 (providing the text of section one of the Fourteenth Amendment); *see supra* note 164 (providing the text of section five of the Fourteenth Amendment).

299. *Poarch Band*, 776 F. Supp. at 562.

300. *Id.*

Fourteenth Amendment.[301] The *Union Gas* Court stated that "the lower courts have rightly concluded that it makes no sense to conceive § 5 [of the Fourteenth Amendment] as somehow being an 'ultraplenary' grant of authority."[302] Second, the Supreme Court in *Oneida County v. Oneida Indian Nation* assumed that Congress was empowered to abrogate state sovereign immunity when acting under the plenary Indian Commerce power.[303] While *Oneida* did not address congressional abrogation, it expressly acknowledged that the abrogation doctrine could extend to Congress's power over Indian affairs. Finally, while section one of the Fourteenth Amendment specifically limits state authority, state authority is also limited by Article I, section eight: "Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power from the States."[304] The same shift in the state-federal relationship as compelled by the Fourteenth Amendment is reflected in the operation of the Article I grants of plenary power. Thus, the Commerce Clauses, together with the Necessary and Proper Clause,[305] limit state authority to the same extent that state authority is abridged by the Fourteenth Amendment.[306]

The *Poarch Band* court was further persuaded by the historical fact that the Fourteenth Amendment was enacted after the Eleventh Amendment, while the Commerce Clauses were enacted prior to the Eleventh Amendment.[307] According to the court, the chronology of the constitutional enactments supported the determination that the Fourteenth Amendment's grant of plenary power was unique. The states, by ratifying the Fourteenth Amendment, knew that sections one and five "altered the

---

301. *See Union Gas*, 491 U.S. at 15 (Interstate Commerce Clause); *McVey Trucking*, 812 F.2d at 323, (Bankruptcy Clause); *Peel*, 600 F.2d at 1080 (war powers); *BV Eng'g*, 858 F.2d at 1394 (Copyright Clause).

302. *Union Gas*, 491 U.S. at 17.

303. Oneida County v. Oneida Indian Nation, 470 U.S. 226, 252 (1985).

304. *Union Gas*, 491 U.S. at 16.

305. U.S. CONST. art. I, § 8, cl. 18.

306. *See* James Sherman, Comment, *Altered States: The Article I Commerce Power and the Eleventh Amendment in* Pennsylvania v. Union Gas, 56 BROOK. L. REV. 1413 (1991). Sherman argues that the Article I enforcement provision that is analogous to section five of the Fourteenth Amendment is the Necessary and Proper Clause. *Id.* at 1429-30. Thus, he concludes that an examination of Article I and the Fourteenth Amendment "reveals no basis for distinguishing between the two powers for Eleventh Amendment purposes." *Id.* at 1430.

307. *Poarch Band*, 776 F. Supp. at 559-60, 562.

provisions of the previously enacted Eleventh Amendment."[308] This argument assumes that the Fourteenth Amendment somehow altered the Eleventh Amendment, which in turn limited Congress's power under Article I. This underlying assumption misconstrues the Constitution. The Eleventh Amendment limits apply only to the federal judiciary's power under Article III. The Amendment does not address Congress's power under Article I.[309] Furthermore, the Fourteenth Amendment does not "alter the provisions" of the Eleventh Amendment. Section five of the Fourteenth Amendment confers upon Congress the plenary power to enforce the first four sections, and the amendment never addresses federal court jurisdiction.[310] By granting Congress power, section five amends Article I while leaving the Eleventh Amendment intact. Moreover, the abrogation doctrine is an exception to the Eleventh Amendment's guarantee of sovereign immunity.[311] Thus, it is the abrogation doctrine, not the Fourteenth Amendment, that limits the Eleventh Amendment. The *Poarch Band* court's reliance on a misconstruction of the Constitution's structure undermines the strength of its conclusions.

While the courts in *Poarch Band*, *Spokane Tribe*, and *Sault Ste. Marie* concluded that Congress lacked the constitutional authority to abrogate state sovereign immunity when it enacted IGRA, the analyses invoked to support the conclusion are tenuous and often disingenuous. These courts relied upon questionable evasions of precedent, linguistic manipulations, and constitutional misconstruction in order to limit Congress's power over Indian affairs. The courts' struggle to find such a limit, however, was inspired by the courts' desire to protect the states' interest. It is disturbing that when tribes seek to limit Congress's power under the Indian Commerce Clause, the courts will cursorily dismiss the claim because Congress's power is plenary,[312] but when states challenge the same power, the power becomes subordinate to state sovereignty concerns. This disparity of treatment not only evinces

---

308. *Id.* at 562.

309. *See Union Gas*, 491 U.S. at 18 (The "language of the Eleventh Amendment gives no hint that it limits *congressional* authority; it refers only to the *judicial power*.").

310. *See* U.S. CONST. amend XIV; *see also Union Gas*, 491 U.S. at 18 ("It would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power.").

311. *See supra* notes 158-76 and accompanying text.

312. *See supra* parts II.A.2-3.

a judicial bias against Native American claims, but also threatens the integrity of the federal judiciary. By struggling to reach a desired conclusion, the courts have applied legal doctrine inconsistently and carelessly. The result is an unstable and uncertain body of jurisprudence which leaves the field of reservation gambling in a state of greater disarray than that which existed before IGRA.

CONCLUSION

By enacting IGRA, Congress intended to provide a regulatory solution to tribal, state, and federal concerns in the field of reservation gambling. However, the case law arising under IGRA demonstrates that Congress's intent has failed to reach fruition. IGRA, while attempting to encourage peaceful compromise and negotiation, has provided an unintended forum for conflict between adverse notions of sovereignty. The states and the tribes have revitalized an historic tension resulting in litigation challenging IGRA as an act beyond Congress's constitutional power. Both argue that the Indian Commerce Clause, while granting Congress the plenary power over Native American affairs, is necessarily limited by sovereignty interests. In the middle of the controversy are the federal courts.

The federal courts' response to the complex sovereignty issues has aggravated the problem. The courts have not addressed the state and tribal claims equitably. Rather, the judiciary has contributed to the chronic erosion of Native American rights to self-government and self-determination. Furthermore, the courts have created an unreliable and unstable jurisprudence which has obstructed the implementation of federal policy and hindered the growth of tribal economic opportunity. By refusing jurisdiction over tribal IGRA claims, the courts have permitted the states to stonewall tribal attempts to enter compacts for gaming development. By refusing to enforce a meaningful trust obligation on Congress, the courts have left the tribes without redress. As a result, the states' interests are preserved while the tribes' interests are ignored. This consequence reflects neither the balanced consideration of competing interests that informed the

Cabazon[313] decision, nor the negotiated compromise that inspired the passage of IGRA.

Eric D. Jones

313. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); *see supra* notes 34-40 and accompanying text (discussing *Cabazon*).