INDIAN GAMING: CONGRESS SENDS THE TRIBES INTO A CONSTITUTIONAL FRAY, BUT DID IT INTEND TO?

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I. INTRODUCTION

Mississippi has managed to avoid a federal/state war. At its heart, the conflict over Indian gaming is a conflict over the power to regulate. From the federal perspective, Indian gaming is a matter of tribal sovereignty and national commerce of constitutional proportions.[1] From the state perspective, it represents a loss of control over an enterprise traditionally regulated by the states.[2] In many states Indian gaming means a loss of regulatory control and revenue which cannot be reached for taxation. In Mississippi, as in many other states, those who are unhappy about gaming may see the Choctaw casino on tribal land as adding insult to injury. Those who are comfortable with gaming must still accept the loss of regulatory control and the insulation of some gaming revenues from the state treasury.[3] Acceptance of Congress' division of

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[1] Congress is given plenary power over Indian matters in U.S. CONST. art. I, § 8, cl. 3.

[2] U.S. CONST. amend. X.

[3] The Mississippi Band of Choctaws does not share its gaming revenue with the State. Telephone Interview with Kathy Waterbury, Director, Miscellaneous

authority means the avoidance of a major blood letting by law suit. Other states and tribes have not avoided this conflict.[4]

California v. Cabazon Band of Mission Indians[5] changed the landscape of the federal and state division of authority. First, the Court reiterated that the tribes retain some of the attributes of sovereignty and that tribal sovereignty depends on and is subordinate only to federal authority.[6] The Supreme Court decided that state gaming laws are unenforceable on reservations within a state's borders if a state otherwise permits such gaming.[7] Congress then perceived the regulatory vacuum[8] and took up the Court's invitation to regulate.[9]

Absent Congress' express consent to state regulation, tribes acting within their reservations are sovereign.[10] Congress' consent to state regulation is an exercise of its plenary power over Indian matters.[11] Congress could have regulated or even prohibited Indian gaming.[12] Congress responded to the *Cabazon Band of Mission Indians* decision with regulation through the Indian Gaming Regulatory Act (IGRA).[13]

Division of State Tax Commission (April 25, 1995).

[4] *See, e.g.*, Cabazon Band v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 2709 (1994) (involving consolidated litigation including, among others, Eastern Band of Cherokees, Poarch Band of Creeks, San Manuel Band of Spokanes and Delaware Tribe of Western Oklahoma, with following states as intervenors: Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Kansas, Michigan, Mississippi, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming).

[5] 480 U.S. 202 (1987).

[6] *Cabazon Band of Mission Indians*, 480 U.S. at 207.

[7] *Id.* at 220-21.

[8] *See* Indian Gaming Regulatory Act [hereinafter IGRA], 25 U.S.C.A. § 2701(2), (3) (West Supp. 1994).

[9] *Cabazon Band of Mission Indians*, 480 U.S. at 207.

[10] *Id.* at 207.

[11] FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (1982).

[12] *Cabazon Band of Mission Indians*, 480 U.S. at 221.

[13] 25 U.S.C.A. § 2701-2721 (West Supp. 1994).

II. OVERVIEW OF THE IGRA

In the IGRA, several groups share the regulatory role. First, Congress acknowledged its own power to guide federal Indian law.[14] It then divided the remaining power between tribes and states, giving the power of regulation to the tribes where the activity is not prohibited by the state.[15] To accomplish this division of power, gaming is divided into three categories.

Class I gaming is within the exclusive control of the tribes. This is little more than a prosaic signal that the tribes may continue traditional games, activities and ceremonies. These may have some aspects of gambling, but are not thought of as traditional gambling in the white culture. The keys are the social nature of the games as part of Indian culture and the games' minimal prizes.[16]

Class II gaming is a happenstance created by political developments just before the *Cabazon Band of Mission Indians* decision.[17] The growth of bingo, including its electronic variations, has made this a distinct category. In it also are authorized card games which are played at other locations in the state. Because so many states have come to accept charitable bingo, and a smaller but still significant number have authorized some card games, Congress seems to accept the notion that this is a distinct category, somehow less invidious. Congress shows its higher confidence by conferring the right to offer these games if the state permits the same type of gaming to non-Indians.[18] Federal power is preserved by the

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[14] *Id.* § 2701(2), (3).

[15] *Id.* § 2710. This lengthy section explores and discusses tribal regulation of each class of gaming. *Id.*

[16] *Id.* § 2703(6). Class I gaming involves purely tribal ceremonial games and celebrations. *Id.*

[17] *Id.* § 2703(7). Subsection seven deals with activities that are acceptable as Class II gaming, as well as those activities that are clearly excluded. *Id.*

[18] *Id.* Thrown into this category of bingo and authorized card games are other games played on tribal land in Michigan, North Dakota, South Dakota and Washington which were operating before the IGRA became law. *Id.* § 2703(7)(C).

requirement of approval of the tribal license or ordinance by the chairman of the National Gaming Commission.[19]

Class III gaming, a vast category, includes all other forms of gaming.[20] It is a default category; if it is not Class I or Class II then it is Class III. Class III gaming includes most of what the general public thinks of as gambling. It includes casino-type games such as card games, dice games, roulette and slot machines, pari-mutuel wagering, horse racing, dog racing and lotteries.[21]

This three-class scheme generates what appears to be a division of regulatory authority. While technically true, the reality is that the federal government remains preeminent while Congress defers to the states to control what games are played as well as the operating constraints. It reiterates federal preeminence by stating that the state control flows from Congress' grant of power. It is a grant that can be withdrawn by Congress should it decide to preempt the arena. While leaving the type of gaming to state judgment, it grants to tribes the power to operate with the state grant through tribal licensing authority. Congress chose to concentrate the exercise of federal power in the approval of tribal ordinances,[22] approval of management contracts,[23] and closure of games or modifications to licenses for violations of the law and National Gaming Commission regulations.[24]

There is virtually no affirmative statement of tribal authority over gaming. The IGRA comes closest to such a statement with regard to Class I gaming.[25] An affirmative grant of "exclusive jurisdiction" sounds very positive, but recall that this is Congress legislatively granting the power to tribes that

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[19] *Id.* § 2703(7).

[20] *Id.* § 2703(8).

[21] *Id.*; *see also* Cheyenne River Sioux Tribe v. State, 3 F.3d 273, 275 (8th Cir. 1993) (discussing various types of Class I, II and III gaming).

[22] 25 U.S.C.A. § 2710(d)(2)(b).

[23] *Id.* § 2711(b). This section lists requirements for approval of tribal management contracts. *Id.*

[24] *Id.* § 2713. Civil penalties may be imposed for regulatory violations. *Id.*

[25] *Id.* § 2710(a). Class I is the only gaming class under the complete jurisdiction of the tribe. *Id.*

are viewed as sovereigns in some respects. It is no more than another example of the paradox of the legislative branch of one sovereign specifying the role of an equal. The power of exclusive jurisdiction should not be gainsaid, yet it is a power that can be withdrawn by Congress.

Authority over Class II gaming appears to be shared between the tribe and the federal government. This two-party sharing is also an illusion. While the tribe determines whether to permit bingo and the allowed card games, and the federal gaming commission regulates them,[26] there is in each state the implied power to prevent Class II gaming by denying it to its other citizens.[27] A state intent on ending Indian gaming can do so by ending all gaming of that type within its territory.[28] This effectively reserves to the states a veto power where the affirmative power of control is given to the tribe. Both state and tribe then have the power to determine the extent and nature of gaming on the reservations. It may be a blunderbuss of a veto, requiring the state to have the fortitude to address wider issues of gaming policy, but it is power. The regulatory power to control the structure and manner of operation is retained, in large part, by the federal government.[29] The gaming commission determines compliance with licenses and the Gaming Act.[30]

Also buried is the same inherent power seen above with Class I gaming. Congress can revisit the area and end Indian gaming or impose any additional restrictions appropriate in the exercise of its plenary power over Indian matters.[31] This shared authority makes for the most complex of interlocking layers in the area most desirable for gaming development: casino-type gaming, the type chosen by the Choctaw Band in

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[26] *Id.* § 2710(b). Certain conditions must be met before jurisdiction over Class II gaming can be conferred on the tribe. *Id.*

[27] *Id.*

[28] *Id.* § 2710(b)(1)(A). In order for gaming to be allowed on the reservation, the state must have legal gaming elsewhere within the state. *Id.*

[29] *Id.* § 2713.

[30] *Id.*

[31] *See Cheyenne River Sioux Tribe*, 3 F.3d at 275.

Mississippi and many other tribes. The tribe is anything but preeminent.

The hypothesis developed in Parts B and C below is that the cases have overemphasized the constitutional questions of coordinate power and sovereignty. In Part B the constitutional basis for preeminent federal authority will be explored. The main purpose will be establishment of the scope of congressional power. It will be shown that this power was wielded lightly by Congress in deference to the state role. In Part C the political and constitutional implications of this decision to share power will be brought to the surface. It will show that the growing majority of cases which allows the tribes to sue states to implement the IGRA's provisions is correct, but the analysis would profit from greater reliance on purposive interpretation of the statute's provisions. To give Congress its due, the statute should be seen as a statement of its plenary power that does not raise constitutional questions. Congress could have bypassed the states, but in giving the states a role Congress did not cut into state sovereignty, it expanded it. The marginal loss in sovereign immunity is more than balanced by the increase in state influence over Indian matters.

A. The Sovereign Immunity Issue

During the early 1980s, Indian tribes began taking advantage of liberalized attitudes toward gaming in many states by operating high stakes bingo games.[32] Indian gaming was first approved by the Supreme Court in *California v. Cabazon Band of Mission Indians*.[33] For the *Cabazon Band of Mission Indians* Court, the key issue was whether under state law gaming was a "civil/regulatory" rather than a "criminal/prohibitory" matter.[34]

The Supreme Court noted that the inquiry into whether the state scheme was "civil/regulatory" in nature, should "proceed in light of traditional notions of Indian sovereignty and

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[32] *Cabazon Band of Mission Indians*, 480 U.S. at 204-05.
[33] *Id.* at 202.
[34] *Id.*

the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[35] The Court held that a state was not justified in imposing its own regulatory scheme on tribal gaming operations in light of "compelling federal and tribal interests supporting them," concluding that such regulation would "impermissibly infringe on tribal governments."[36]

The following year Congress addressed the issue of Indian gaming head-on by enacting the Indian Gaming Regulatory Act.[37] Congress sought to mediate the bitter dispute between many states and tribes with a compromise among the sovereigns.[38] Congress classified the various forms of gaming,[39] divided the authority, redrew the lines of authority to ensure that states were given a role, and authorized the tribes and states to negotiate the terms under which other forms of gaming would be played.[40]

Congress reasserted its plenary power first established in *Worcester v. Georgia*.[41] Its exercise came in response to the Court's affirmation of the plenary power and restatement that states lacked jurisdiction over Indian tribes and lands.[42] Congress used its constitutionally-derived plenary power over Indian affairs to encourage states to participate through negotiated regulation.[43]

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[35] *Id.* at 216.

[36] *Id.* at 222.

[37] 25 U.S.C. §§ 2701-2721 (1988).

[38] *Id.* §§ 2701-2721.

[39] *See, e.g., id.* § 2703. The Act defines gaming by creating three "classes." Class I includes only "social games" with small prizes or traditional Indian games connected with tribal ceremonies or celebrations. Class II includes bingo, lotto, pull-tabs and other games similar to bingo. Class III includes all other forms of gaming. Class I games are regulated by the tribes. Class II games are regulated by the tribes and the Indian Gaming Commission. Class III games can only be lawfully played on reservations after a compact has been signed by tribe and state and approved by the Secretary of Interior. Regulation of such games is provided in the compacts themselves. *Id.*

[40] *Id.* §§ 2701-2721.

[41] 31 U.S. (6 Pet.) 515 (1832).

[42] *Worcester*, 31 U.S. (6 Pet.) at 520.

[43] 25 U.S.C. § 2710(d) (1988). During hearings on the IGRA, the states tes-

Congress provided that sovereign immunity from suit in specific and limited instances would be waived for both tribes and states.[44] In order to protect tribes from states refusing to negotiate over Class III gaming, thus frustrating tribal gaming rights, Congress granted tribes the right to sue states in federal court to complete the compacting process.[45] At the same time, Congress granted both tribes and states the right to sue each other for violations of approved compacts.[46] Finally, Congress gave the Secretary of Interior authority to bring suit against tribes or states if necessary to enforce Indian gaming regulations.[47]

The legislative history of the IGRA supports the assertion that Congress was responding to the Supreme Court's call for congressional action where civil/regulatory matters are seen by the Court as being preempted by congressional power.[48]

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tified before Congress that they should be allowed to regulate Indian gaming. S. REP. NO. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

[44] 25 U.S.C. § 2710 (1988).

[45] *Id.* § 2710.

[46] *Id.*

[47] The United States district courts shall have jurisdiction over

> (i) 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,
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> (ii) any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
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> (iii) any cause of action initiated by the Secretary to enforce the procedures. . . .

25 U.S.C.A. § 2710(d)(7)(A).

[48] The legislative history of the IGRA states:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal - Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that

Congress thought it had preempted state regulations,[49] and it thought this preemption would give states an incentive to participate in a regulatory partnership.[50]

In recent suits by tribes against states under the IGRA, some circuit courts of appeal have found the Act to be an unlawful abrogation of state immunity.[51] The district courts are also split on the Eleventh Amendment issue.[52]

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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.

Consistent with these principles, the committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, 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.

S. REP. NO. 446, 100th Cong. 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

[49] The legislative history of the IGRA states:

S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Id. at 3076.

[50] The legislative history states:

It is the Committee's intent that the compact requirement for Class III not be used as justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction.

Id. at 3083.

[51] Seminole Tribe v. Florida, 11 F.3d 1016, 1026 (11th Cir. 1994). *Contra* Cheyenne River Sioux Tribe v. State, 3 F.3d 273, 280-81 (8th Cir. 1993).

[52] *Compare* Saul Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F.

B. Traditional Eleventh Amendment Views

1. Express Consent or Waiver

One bar to an Eleventh Amendment defense arises when the sovereign expressly consents to be sued.[53] The language used in waiving immunity must be clear and understandable because the Court will not imply waiver of the Amendment's protection.[54] Thus, if a state wishes, it can allow itself to be sued provided the language used clearly manifests this intent.

2. State Participation

Another way consent can be found occurs when a state participates in a federal program which mandates that the participant consent to suit. In *Parden v. Terminal Railway*,[55] the Supreme Court held that the state, as owner and operator of a railroad, could not plead sovereign immunity when it was sued under the Federal Employers' Liability Act.[56] The *Parden* ruling has not been extended by the Court. For instance, the Court did not imply consent when a state operated a non-profit hospital.[57] The Court also limited the *Parden* exception when a state participated in federal programs which

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Supp. 1484 (W.D. Mich. 1992), *appeal dismissed*, 5 F.3d 147 (6th Cir. 1993) *with* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991), *aff'd sub nom.* Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994).

[53] *See, e.g.*, Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 308-09 (1990) (holding that statutory consent provision acted to waive Eleventh Amendment immunity).

[54] *See, e.g., Feeney*, 495 U.S. at 305 (stating that waiver is effective only where clearly established by text); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (requiring clear indication of waiver), *reh'g denied*, 473 U.S. 926 (1985); Edelman v. Jordan, 415 U.S. 651, 673, (stating that intent to waive immunity must be clear and unambiguous), *reh'g denied*, 416 U.S. 1000 (1974).

[55] 377 U.S. 184 (1964).

[56] *Parden*, 377 U.S. at 184-85. The Court rejected the argument of Alabama that the railway was a state agency which had not waived its sovereign immunity. *Id.* The Court held that by enacting FELA, Congress effectively abrogated sovereign immunity for the railway. *Id.* at 187-88.

[57] Employees v. Missouri Dep't of Public Health & Welfare, 411 U.S. 279 (1973).

provided federal funds in accordance with federal law.[58]

3. Express or Implicit Relinquishment of Sovereign Immunity

The third type of case is one in which a private citizen sues a state, seeking money or injunctive relief. The basis of jurisdiction is consent by the state through its express or implicit relinquishment of sovereign immunity. The *Pennhurst State School and Hospital v. Halderman*[59] case is an example, as is *Parden v. Terminal Railway*.[60] In these Category III cases the three key characteristics are: (1) a private plaintiff; (2) monetary or injunctive relief sought against the state; and (3) an implicit consent to suit.[61]

Blatchford v. Native Village of Noatak[62] was a bad case for the tribes only because there was no clear abrogation as there is with the IGRA. The Supreme Court is not hostile to jurisdiction which was explicitly granted in order to implement a congressional plan for its control of Indian affairs as trustee for the tribes. If one can see why the sovereign immunity cases are in separate categories, this proposition becomes clear. Because of the traditional deference paid to congressional acts in furtherance of its role as a tribal trustee, and because of the presence of a clear statement of abrogation, the IGRA cases should be nothing more than a continuation of the line of cases beginning with *Worcester v. Georgia*[63] in 1832

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[58] *See, e.g., Atascadero State Hosp.* 473 U.S. at 246-47 (holding that acceptance of funds under federal Rehabilitation Act did not amount to consent to be sued in federal court); *Edelman*, 415 U.S. at 673 (stating that participation in program which provides federal monies for public transportation system does not establish consent to be sued).

[59] 465 U.S. 89 (1984).

[60] 377 U.S. 184 (1964).

[61] We could construct other categories that might be close to the *Blatchford* category but in which jurisdiction is premised on consent as is the premise in category III. The key factors would be: (1) tribal suit, (2) money or injunction sought, and (3) consent alleged to waive sovereign immunity. Since our focus is on abrogation we will not look at cases in these other possible categories. Therefore, we will simply categorize those precedents which might control.

[62] 501 U.S. 775 (1991); *see infra* notes 116-52, 164-68 and accompanying text for a discussion of *Blatchford*.

[63] 31 U.S. 515 (1832).

and continuing through *Morton v. Mancari*[64] and *Moe v. Confederated Slaish and Kootenai Tribes*.[65] It is the principle of special congressional duty and power in Indian affairs that distinguishes the abrogation of immunity in this context making it appropriate where it might not be if it rested solely on the congressional power to regulate interstate commerce.

4. Abrogation of Sovereign Immunity

Most significant among the distinguishing factors which courts fail to consider is the importance of Congress' plenary powers under the Indian Commerce Clause. Congress' regulatory power in Indian affairs extends even to abrogation of the states' immunity. There can be no question that congressional power in the area of Indian affairs is plenary.[66] Courts are disregarding this clear principle. Most recently in *Seminole Tribe*, the Court of Appeals for the Eleventh Circuit said "that Congress, when it enacted [the] IGRA pursuant to the Indian Commerce Clause, lacked the power to abrogate the states' sovereign immunity."[67] Thus, the Indian Commerce Clause has one objective which is to empower Congress with the plenary authority to legislate in matters concerning Indi-

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[64] 417 U.S. 535 (1974).

[65] 425 U.S. 463 (1976).

[66] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). "[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . ." *Id.* "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." Oneida County v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. . . ." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the constitution itself." Morton v. Mancari, 417 U.S. 535, 551-52 (1974). "Congress has plenary authority over Indian affairs. This power is rooted in . . . the Indian Commerce Clause. . . ." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 361 (7th Cir.), *cert. denied*, 464 U.S. 805 (1973). "The nature of Congressional power in Indian matters is paramount and plenary." Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279, 282 (C.D. Cal. 1969), *aff'd*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 1033 (1972).

[67] *Seminole Tribe*, 11 F.3d at 1024.

ans.[68]

Courts are deciding, without proper supporting case law, that Eleventh Amendment immunity may only be abrogated under Section Five of the Fourteenth Amendment or the Interstate Commerce Clause. When confronted with a case involving the IGRA and the Indian Commerce Clause, courts invariably turn to cases which can be easily distinguished from the unique issues present in matters concerning Indians. *Pennhurst State School and Hospital v. Halderman* concerned a citizens' class action suit based on state law against a state institution seeking injunctive relief.[69] By a vote of five to four, the Court held that federal courts lack jurisdiction in suits for injunctive relief against state officials based on state law.[70] In *Atascadero State Hospital v. Scanlon*,[71] an individual citizen brought suit based on federal law seeking monetary damages.[72] By a vote of five to four, the Court held the suit was barred by the Eleventh Amendment because the federal law in question lacked a clear expression of unequivocal congressional intent to abrogate the immunity.[73] *Pennsylvania v. Union Gas Co.*,[74] involved a company sued by the federal government for environmental cleanup costs under a federal law who filed a third party complaint against the state seeking monetary damages.[75] By a five to four vote the Court held that the federal court has jurisdiction in a suit for damages by virtue of the congressional authority under the Interstate Commerce Clause.[76] Five Justices voted that the federal statute clearly expressed a congressional intent to permit suit for monetary damages against a state in federal court for conduct prohibited by the act in question.[77] Four of the ma-

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[68] *Cotton Petroleum Corp.*, 490 U.S. at 192.
[69] Penhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 92-93 (1984).
[70] *Pennhurst State Sch. & Hosp.*, 465 U.S. at 89-91, 98.
[71] 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985).
[72] *Atascadero State Hosp.*, 473 U.S. at 236.
[73] *Id.* at 234-35, 242.
[74] 491 U.S. 1 (1989).
[75] *Union Gas*, 491 U.S. at 6.
[76] *Id.* at 3.
[77] *Id.* at 8.

jority Justices voted that Congress has the authority to make states liable for monetary damages pursuant to the Commerce Clause, while Justice White concurred that Congress has authority under Article I of the Constitution to abrogate the states' Eleventh Amendment immunity but did not agree with the supporting reasoning of the majority opinion.[78] In *Dellmuth v. Muth*,[79] a citizen sued based on federal law for monetary damages.[80] By a five to four vote the Court held that the Federal Act did not abrogate the state's immunity because the intent of Congress was not unmistakably clear in the Act.[81]

None of these cases are dispositive on a case involving the IGRA. When the IGRA is involved state law is not an issue. Similarly, monetary damages and injunctive relief are not of importance. Furthermore, a suit is not brought by an individual. The sole issue is whether Congress has authority under the Commerce Clause of the Constitution to waive state immunity for the specific purposes set forth in the IGRA when it clearly intends to do so.

As the closeness of the votes in these cases indicates, the Eleventh Amendment abrogation cases are complex, difficult cases. *Union Gas* especially is muddled by the plethora of diverging views on the reasons for approving or denying congressional abrogation in a specific act of Congress.[82] But this much is clear: *Union Gas* establishes that Congress does have authority under Article I to abrogate a state's Eleventh Amendment immunity.[83] This clarifies and reinforces the majority opinions in *Atascadero* and *Dellmuth* which imply such authority if the language in the congressional enactment is explicit and unequivocal.[84]

The fact remains, however, that courts around the country

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[78] *Id.* at 14, 56-57.
[79] 491 U.S. 223 (1989).
[80] *Dellmuth*, 491 U.S. at 226.
[81] *Id.* at 223-24.
[82] *Union Gas*, 491 U.S. at 1.
[83] *Id.* at 14.
[84] *Atascadero State Hosp.*, 473 U.S. at 239-40; *Dellmuth*, 491 U.S. at 223.

sometimes make this fundamental error. *Union Gas* and the other interstate commerce cases do not speak directly to the question of abrogation when the issue concerns Indian affairs, which must be examined with reference to the Indian Commerce Clause.[85] Courts obscure the law by failing to distinguish the two distinct lines of cases, choosing instead to ensure the state will always win.

For Congress to abrogate the immunity granted by the Eleventh Amendment, the language of the statute must clearly demonstrate this intent.[86] The IGRA possesses just such clear language.[87] Thus, because of the language used in the IGRA, Congress intended to abrogate states' immunity under the Eleventh Amendment.

A second type of consent to suit is found in the "plan of the convention." The question under the plan of convention is whether the states surrendered their immunity when they ratified the Constitution. One example is waiver of immunity against suits by the United States.[88] Another exception to an Eleventh Amendment defense by a state is a waiver of immunity in a suit against a sister state.[89] In *Blatchford*, the Su-

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[85] *Union Gas*, 431 U.S. at 1.

[86] *Union Gas*, 491 U.S. at 7. Acting under § 5 of the Fourteenth Amendment, Congress may override sovereign immunity granted by the Eleventh Amendment, but only by indicating its intent in an "unmistakenly clear" manner. *Id.*

[87] 25 U.S.C.A. § 2710(7)(A) (West Supp. 1994). The statute reads:

> (7)(A) The United States district courts shall have jurisdiction over—
> (i) 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,
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

Id.

[88] *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (holding that no constitutional language or case law supported position that United States could not sue state).

[89] *See, e.g.*, South Dakota v. North Carolina, 192 U.S. 286, 314 (1904) (stating that Court has jurisdiction over "controversies between two or more states").

preme Court confronted the issue of whether the states, by ratifying the Constitution, waived their immunity to suits by Indian tribes.[90] The Court drew a comparison between suits among states and suits among a state and an Indian tribe.[91] Relying on the "plan of the convention" argument, the Court held the states did not waive their sovereign immunity.[92]

5. *Other Recognized Exceptions: The* Ex Parte Young *Doctrine*

One exception to the Eleventh Amendment is a suit for injunctive relief. This exception allows a suit against a state official to prevent the enforcement of a state statute which violates the Constitution.[93] The *Ex Parte Young* fiction essentially withdraws sovereign immunity, which normally protects governmental officials, when the official attempts to enforce a state statute repugnant to the United States Constitution.[94] *Ex Parte Young* is effective in assigning responsibility to the individual actor when he attempts to act contrary to federal law or the Constitution.[95] Historically, *Ex Parte Young* has been the most successful foil to the Eleventh Amendment defense.[96] Even though a court may provide injunctive relief, a secondary effect of compliance with the order may involve the

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[90] *Blatchford*, 501 U.S. at 781. The Court noted the lack of support for an argument that immunity to suits by tribes was waived through adoption of the Constitution. *Id.*

[91] *Id.* at 782.

[92] *Id.* The Court held that the surrender of immunity among states existed due to the mutuality of the surrender, a mutuality which did not exist with regard to Indian tribes since the tribes enjoyed immunity from suits by states. *Id.*

[93] *See generally Ex Parte Young*, 209 U.S. 123 (1908) (holding state Attorney General not immune to action seeking injunctive relief from enforcement of statute).

[94] *Ex Parte Young*, 209 U.S. at 159-60. The Court held that the state could not grant an official any immunity relieving him of his "responsibility to the supreme authority of the United States." *Id.*

[95] Christopher Lafuse, Note, *Beyond Blatchford v. Native Village of Noatak: Permitting the Indian Tribes to Sue the States Without Regard to the Eleventh Amendment Bar*, 26 VAL. U. L. REV. 639, 654 (1992).

[96] Kenneth C. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962).

disbursement of state funds. However, any monetary repercussions from a court decision are only ancillary and therefore permissible.[97]

Ex Parte Young cannot be used in two specific instances. Executive officials cannot be compelled to perform discretionary acts.[98] Additionally, the doctrine is not allowed by the courts if the suit is really against the state.[99]

Allowing tribes to sue is similar to other recognized exceptions. Justice Scalia raised a similar objection in *Union Gas*, when he sought to distinguish *Fitzpatrick v. Bitzer*[100] as merely a later limitation on the Eleventh Amendment by the Fourteenth Amendment.[101] Justice Brennan, however, observed, "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."[102]

The United States District Court for the District of Kansas also rejected this objection in a recent Indian abrogation case, stating, "Assuming chronology was relevant to the Constitutional analysis, Justice Brennan rightly observed that the principle of sovereign immunity, which the Eleventh Amendment is said to affirm, existed well before the states even ratified the Constitution."[103] The Supreme Court long ago held in *Ex Parte Young* that every suit against a state official is not a suit against a state. The trial court ruled that the *Ex Parte Young* doctrine does not apply in the instant case be-

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[97] Edelman v. Jordan, 415 U.S. 651, 668 (1974).

[98] *Ex Parte Young*, 209 U.S. at 158. The Court noted that an official could be compelled to perform only those tasks ministerial in nature. *Id.*

[99] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984). A suit against a state, disguised as a suit against an official, is barred regardless of whether the relief sought is monetary damages or an injunction. *Id.* at 102.

[100] 427 U.S. 445 (1976).

[101] Pennsylvania v. Union Gas Co., 491 U.S. 1, 41-42 (1989) (Scalia, J., concurring in part and dissenting in part).

[102] *Union Gas*, 491 U.S. at 18. Justice Brennan argued that the Eleventh Amendment did not affect congressional power to abrogate sovereign immunity. *Id.*

[103] Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423, 1429 (D. Kan. 1993), *aff'd*, 37 F.3d 1422 (10th Cir. 1994).

cause the tribe "does not seek to compel him to perform a neglected ministerial act."

Hafer v. Melo[104] was a suit for monetary damages against a state official for wrongful dismissal of state employees.[105] In *Hafer*, the Court distinguished between "official-capacity" and "personal-capacity" claims.[106] The Court held, under the reasoning of *Scheuer v. Rhodes*,[107] that state officials are not absolutely immune from personal liability even when their acts are necessary to carrying out the functions of government.[108]

The IGRA cases fall within the nature of "prospective" relief approved by the Court under the *Ex Parte Young* doctrine in *Edelman v. Jordan*.[109] There the Court noted that *Ex Parte Young* required a state attorney general "to conform his future conduct of that office to the requirement of the Fourteenth Amendment."[110]

The relief sought and granted in *Ex Parte Young* and *Edelman* are analogous to the relief sought by a tribe. The tribes seek under the IGRA only orders for the governors to prospectively comply with the IGRA. The orders would require the governors to carry out the affirmative duty under the IGRA of negotiating in good faith. The IGRA does not compel a governor to approve a compact if he does not choose to. The Act provides the governor two options, either (1) to negotiate in good faith, or (2) to advise the tribe that he does not wish to participate in gaming regulation. The tribe then could seek

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[104] 502 U.S. 21 (1991).

[105] *Hafer*, 502 U.S. at 23.

[106] *Id.* at 25. The Court referred to Kentucky v. Graham, 473 U.S. 159 (1985), and defined "official-capacity" actions as actions against the government entity framed as actions against an officer. *Id.* The Court further stated that "personal-capacity" actions sought to impose liability upon an official as an individual "for actions taken under color of state law." *Id.*

[107] 416 U.S. 232 (1974).

[108] *Hafer*, 502 U.S. at 28. The Court stated that a grant of absolute immunity required an "inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 28-29.

[109] 415 U.S. 651 (1974).

[110] *Edelman*, 415 U.S. at 664.

approval of its plan from the Secretary of Interior without participation by the state.

Congress chose not to impose a federal regulatory scheme on the states' gaming policy and operations but merely provided "incentives" for the states to negotiate in good faith with the tribes for mutual benefit. Framing the regulatory scheme in terms of "incentives" for the state rather than imposing direct federal regulation indicates not only a close reading of recent Supreme Court rulings but careful attention to the Court's articulated tests for express abrogation of the states' sovereign immunity.

In *New York v. United States*,[111] for example, the Supreme Court held that monetary and access "incentives" in the Low-Level Radioactive Waste Policy Amendments Act of 1985 did not violate the Tenth Amendment.[112] The Court noted that "[t]his is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out *incentives* to the States as a method of influencing a State's policy choices."[113]

6. The Implications of Congressional Power for Sovereign Immunity

Recent court decisions have erroneously concluded that Congress lacks authority under the Indian Commerce Clause to abrogate the Eleventh Amendment.[114] The Eleventh Amendment to the United States Constitution provides that "[t]he 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."[115] Recent actions brought by Indian tribes against states were unsuccessful due to the Eleventh Amendment

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[111] 112 S. Ct. 2408 (1992).
[112] *New York*, 112 S. Ct. at 2427.
[113] *Id.* at 2423 (emphasis added).
[114] Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994).
[115] U.S. CONST. amend. XI.

defense. Some decisions concluded the state had neither expressly nor impliedly waived its immunity from suit. Other courts held that while Congress may abrogate a state's immunity through Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause, this power is unavailable to Congress under the Indian Commerce Clause. These courts concluded, therefore, that Congress lacks the power under the Constitution to abrogate the Eleventh Amendment, even when exercising its powers granted in Article I under the Indian Commerce Clause. This reasoning is wrong.

The majority of courts dismissing tribal suits to enforce the IGRA saw this as no more than an extension of *Blatchford v. Native Village of Noatak*.[116] *Blatchford* was an action against Alaska to establish the Tribe's right to revenue which the State diminished in a way that the Tribe believed violated its rights.[117] In other words, the decision reached only the issue of whether a lawsuit could be maintained to establish the State's monetary obligation under a state-created program.[118] The *Blatchford* Court specifically reserved judgment as to the propriety of a lawsuit to establish the right to injunctive relief.[119] The Tribe's argument for jurisdiction over its claim of monetary obligation was predicated on the general grant of jurisdiction contained.[120] The Court refused to read this as adequate to reflect an "unmistakably clear intent" by Congress to abrogate Eleventh Amendment immunity.[121] The Act's general grant of jurisdiction was not enough to overcome the State's reserved sovereign immunity where the Tribe sued for monetary damages.[122]

Most significant is the *Blatchford* Court's determination that there is not inherent in the Eleventh Amendment an exception for a tribe to sue a state. In other words, the Court

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[116] 501 U.S. 775 (1991).
[117] *Blatchford*, 501 U.S. at 775.
[118] *Id.* at 778-79.
[119] *Id.* at 788.
[120] *See* 28 U.S.C.A. § 1362 (West 1984).
[121] *Blatchford*, 501 U.S. at 785.
[122] *Id.* at 786.

did not buy the "in the plan of the convention" traditional exception for suits by one state against another.[123] The tribe was treated more as a foreign state rather than a domestic sister state for Eleventh Amendment purposes.[124] Without this traditional exception and without an express abrogation by Congress, the majority opinion pauses only shortly before doing away with jurisdiction over the monetary claim.[125] The case fits traditional Eleventh Amendment analysis if viewed as a straightforward failure by Congress to unmistakably abrogate the states' immunity to federal suit.[126]

C. Sovereign Immunity and the IGRA

When they apply tradition and sovereign immunity principles to the IGRA provision permitting the tribes to sue the states, the courts are trying to make *Blatchford* something it is not by forming an amalgam of its holding and the traditional reluctance to find clear abrogations or waivers of immunity by the states. By shifting from *Blatchford* into the wholly separate line of cases which discuss immunity in the context of ordinary domestic citizen suits, the courts bring into the discussion a group of cases inapposite where the special relationship of tribe, state and federal government is in question. Simply because *Blatchford* involves sovereign immunity does not lead one inexorably to the conclusion that all sovereign immunity cases and doctrines are applicable.

The courts should filter out those cases not involving tribal suits and consider *Blatchford* in its tribal suit context. Instead, the courts begin with *Blatchford's* conservative statement about abrogation and pile onto it the Court's reluctance to find abrogation or waiver of immunity in other contexts, typically simple interstate commerce cases of ordinary citizens from one state suing another state. Courts try to escape being caught in this collapsing of doctrines by the simple move of

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[123] *Id.* at 782.
[124] *Id.*
[125] *Id.* at 778-88.
[126] *Blatchford*, 501 U.S. at 785-86.

noting that the Supreme Court has drawn the distinction between Interstate Commerce Clause cases and Indian Commerce Clause cases, warping the Court's simple observation that a distinction exists into doubtful inferences that congressional power is somehow lessened in Indian matters.[127] They offer no authority for this.

Representative of this approach is the court's holding that the IGRA violates principles of sovereign immunity found in *Poarch Band of Creek Indians v. Alabama*.[128] There the court drew the same inference of lessened authority,[129] and bolstered it with the almost irrelevant observation that the Supreme Court's major pronouncement on the great extent of congressional power, the pronouncement found in *Union Gas*, an Interstate Commerce Clause case, was a bare plurality.[130] Here is the fallacy. Just because the Court's doctrinal understanding of abrogation in Interstate Commerce Clause cases is unclear, that does not mean that the same weakness should be carried over to Indian Commerce Clause cases. The courts are unwilling to see the political flip side of the coin they hold. They fail to recognize that the distinction between Indian and interstate commerce cases might lead to a conclusion of greater power where Congress seeks to abrogate immunity in Indian matters. The lower courts seem to reason from a political premise that it is good to bring the tribes more within the states' power. They see constitutional doctrine to support this where there is none. The Supreme Court's stated distinction between interstate commerce power and Indian affairs can be used to say that the limitation in interstate commerce cases is wholly inapplicable.

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[127] *See, e.g.*, Spokane Tribe v. Washington, 790 F. Supp. 1057, 1060-61 (W.D. Wash. 1991), *rev'd*, 28 F.3d 991 (9th Cir. 1994).

[128] 776 F. Supp. 550 (S.D. Ala. 1991), *aff'd sub nom.* Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994).

[129] *Poarch Band of Creek Indians*, 776 F. Supp. at 559.

[130] *Id.* at 558-59.

D. Blatchford *Does Not Diminish the Plenary Powers of Congress in Indian Affairs*

What I offer below is an analysis of the decisions which trace this tension to differences found in the separate, but related doctrines surrounding Indian Commerce Clause and Interstate Commerce Clause cases. This distinction can be used to place our issue within the framework of Eleventh Amendment doctrine in two very different ways. One way is to use it as the majority of district courts have and see a further strengthening of sovereign immunity. The other is to see it as a strengthening of Congress' power to abrogate based on its special role as trustee of tribal integrity and administrator of tribal power.

In *Blatchford*, a tribe filed suit against a state seeking both monetary damages and injunctive relief under a federal jurisdictional statute.[131] By a six to three vote, the Court held that suit for monetary damages was barred by the Eleventh Amendment because the State had not consented to suit, it had not waived its immunity against tribes in the "plan of the convention," and the federal jurisdictional statute on which the suit was based was neither a general delegation to tribes of the federal government's authority to sue states on behalf of the tribes nor an abrogation of the states' immunity.[132] The Court did not rule on the abrogation of the injunctive relief claim and remanded that issue to the lower court.[133]

If a court views the IGRA provision as merely an extension of *Blatchford*, it is in error. This is a serious misreading of *Blatchford*, because *Blatchford* did not involve a clear statement of congressional intent.[134]

The *Blatchford* Court reached only the question of wheth-

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[131] *Blatchford*, 501 U.S. at 778.
[132] *Id.* at 778-88.
[133] *Id.* at 788.
[134] *Id.* at 786.

er tribes could sue a state for monetary damages.[135] This makes it a poor precedent for the IGRA's injunctive relief provision. The Court specifically reserved judgment on the claim for injunctive relief.[136] The Court further ruled that the jurisdictional statute underpinning that suit did not reveal an "unmistakable clear intent" by Congress to abrogate the immunity.[137] On this basis, *Blatchford* should be read as a traditional Eleventh Amendment analysis of the failure of Congress to clearly state its intent to abrogate the states' immunity. Under such a reading, the result in *Blatchford* does not compel a dismissal in this case. Indeed, the case implies that a clear congressional statement of intent would have supported jurisdiction.[138] But in any event, because the Court in *Blatchford* never reached the issue in the present case—congressional power to abrogate—it cannot be dispositive.

It is also notable that in *Blatchford*, Justice Scalia not only passed up an opportunity to overrule *Union Gas*, but he did not even bother to distinguish it.[139] Instead, in *Blatchford* the Court addressed *Moe v. Confederated Salish and Kootenai Tribes*,[140] and ignored the quagmire of *Union Gas*.[141]

Turning to *Moe* rather than attempting to distinguish *Union Gas* is the correct move. Use of *Moe* recognizes that the Indian commerce cases, rather than the interstate commerce cases, contain the appropriate doctrines.[142] The Court found in *Moe* that the Indian tribes could sue states on matters "arising under the Constitution" and laws of the United States "in some respects as broad as that of the United States suing

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[135] *Id.* at 788.
[136] *Blatchford*, 501 U.S. at 788.
[137] *Id.* at 786.
[138] *Id.*
[139] *Id.* at 778-88.
[140] 425 U.S. 463 (1976).
[141] *Blatchford*, 501 U.S. at 783-86.
[142] *Moe*, 425 U.S. at 473-75.

as the tribe's trustee."[143] In *Moe*, a tribe sued a state in federal court for injunctive relief from state taxation. The *Blatchford* Court refused to extend the "in some respects" language of *Moe* into a "general" access to the federal courts.[144] Also, the purported hindrance to jurisdiction in *Moe* was another federal statute, a congressionally-created limitation rather than a constitutional one.[145]

By focusing on *Moe* and the language of 28 U.S.C. § 1362, the *Blatchford* Court tacitly recognized that a clear statement of abrogation in an area traditionally reserved to Congress, such as tribal affairs, makes the matter so special that the otherwise significant case of *Union Gas* is not even worth mentioning.[146] Immunity might stand but it must at least be questioned with traditional deference to congressional management of Indian affairs.

Blatchford simply does not support an inference that congressional control over Indian affairs is of a lesser constitutional moment. The majority opinion of Justice Scalia, who vigorously dissented in *Union Gas*, marshals arguments to defeat both abrogation and the idea of state consent to suit.[147] If lessened deference to the Indian Commerce Clause were plausible it would certainly have been set forth in the *Blatchford* majority opinion.

E. Three Categories of Sovereign Immunity Cases

The Indian Gaming Regulatory Act was enacted under Congress' legislative grant found in the Indian Commerce Clause.[148] In the same sentence of Article I where the Interstate Commerce Clause is found so also is the Indian Commerce Clause. Extending the logic of *Union Gas*, the Indian

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[143] *Id.* at 465-66.

[144] *Blatchford*, 501 U.S. at 783-84.

[145] *Id.* at 783-86.

[146] *Id.* at 778-88.

[147] *See* U.S. CONST. art. 1, § 8; *see also* Joseph J. Weissman, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WAS. L. REV. 123, 154 (1993).

[148] Weissman, *supra* note 147, at 154.

Commerce Clause, like the Interstate Commerce Clause, must also be a plenary power of Congress.[149] If the Interstate Commerce Clause can limit the actions of a state, so also must the Indian Commerce Clause limit the same state's actions.[150]

In *Seminole Tribe v. Florida*,[151] the Court of Appeals for the Eleventh Circuit held that even though Congress plainly and clearly intended to abrogate the sovereign immunity of states in the IGRA, Congress lacks the power under the Constitution to abrogate the Eleventh Amendment, even when exercising its powers granted in Article I under the Indian Commerce Clause.[152]

The Eleventh Circuit Court of Appeals and other courts around the United States which refuse to recognize the plenary power of Congress under the Indian Commerce Clause err in a clearly recognizable manner. Courts lump all Eleventh Amendment cases together and fail to properly consider the effects of distinguishing circumstances. These distinguishing circumstances include: (1) some cases are based on express congressional abrogation while others rely on implicit or consensual abrogation of sovereign immunity; (2) the identity of parties, with some cases brought by individual citizens and others by sovereign Indian tribes; and (3) the identity of claims, that is, that some cases involve claims for monetary damages while others involve injunctive relief.

It is the interplay of these three distinguishing circumstances which created the three distinct categories of abrogation cases. In Category I, the focus is on the origin of abrogation. The strongest case is where abrogation is express and flows from Congress' constitutional power. Category II cases focus on the relief sought. Injunctions are more favorably viewed than a request for monetary damages. Category III cases are distinct because the focus is on the identity of the

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[149] *Id.*
[150] *Id.*
[151] 11 F.3d 1016 (11th Cir. 1994).
[152] Seminole Tribe v. Florida, 11 F.3d 1016, 1024 (11th Cir. 1994).

parties. One state suing another is a strong case for abrogation; a private foreign citizen suing a state represents a weak circumstance.

F. Blatchford *Does Not Diminish Congress' Plenary Power*

1. Explicit Abrogation is the Key Factor in Distinguishing Categories

A survey of the Supreme Court's decisions on sovereign immunity suggests that there is much to the Eleventh Amendment that is not present in its succinct words.[153] While the words mean little, the various principles of subject matter jurisdiction, limits on federal diversity jurisdiction and common law sovereign immunity have all been used to impart meaning. The Court's Brobdingnagian jurisprudence leaves clarity behind in favor of breadth and complexity. Despite this, there are some common factors that will help us determine the propriety of the IGRA's remedial provision. These factors include (1) identity of the party suing; (2) relief sought, and (3) basis for subjecting the state to a suit.

As to identity, the most suspect class of suits is those against a state by a private citizen of another state. These lawsuits fall squarely within the language of the Eleventh Amendment and involve a factual scenario similar to *Chisholm v. Georgia*,[154] which spurred adoption of the Amendment.[155] Much less controversial are suits against a state by the United States or other state.

Because of its origin, great jurisprudential energy has gone into discussion of the second factor: relief sought. Mone-

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[153] The language of the Eleventh Amendment reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[154] 2 U.S. (2 Dall.) 419 (1793).

[155] Lafuse, *supra* note 95, at 645-46. *Chisholm* was an action initiated by a South Carolina citizen against the state of Georgia. *Id.* at 645. In response to *Chisholm*, where the Supreme Court held that the federal courts had jurisdiction, Congress proposed and passed the Eleventh Amendment. *Id.* at 645-46.

tary awards are most suspect, while injunctive relief is more favored. The idea is that, like the power to tax, the power to sue for money is the power to destroy. This principle also reflects the common law concern of protecting the sovereign's treasury.

The third factor is the basis for making the state amenable to suit. The three most common bases are (1) "plan of the convention," (2) federal removal of the bar in order to make workable federal power, and (3) consent of the state, express or implied.[156]

Suppose we begin by pegging *Union Gas* as a "Category I" case. In *Union Gas*, a private citizen sued a state seeking money damages.[157] The federal court jurisdiction was premised on congressional power to regulate interstate commerce.[158] The key factors for a Category I case are: (1) citizen suing state, (2) money sought, and (3) interstate commerce power invoked.

2. *Some Category I Cases and Traditional Sovereign Immunity*

Abrogation of a state's immunity can be accomplished through legislation passed by Congress under the Interstate Commerce Clause of the Constitution. The Supreme Court allows a state's immunity to be limited if Congress acts pursuant to Article I of the Constitution under the Interstate Commerce Clause.[159] The Court held in *Pennsylvania v. Union Gas* that Congress can abrogate a state's immunity when legislating pursuant to the Interstate Commerce Clause.[160] *Union Gas* addressed whether a state could be sued for damages in federal court under the Comprehensive Environmental

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[156] *See supra* notes 66-92 and accompanying text.

[157] *Union Gas*, 491 U.S. at 5-6.

[158] *Id.* at 15. The Court acknowledged that although the issue had never been squarely addressed, congressional power under the Commerce Clause included the power to abrogate immunity. *Id.*

[159] *Id.*

[160] *Id.*; *see also* Lafuse, *supra* note 95, at 658 (discussing holding of *Union Gas*).

Response, Compensation, and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act (SARA).[161] A plurality of the Court held the state's immunity was abrogated by CERCLA and SARA even though this legislation was passed under the Interstate Commerce Clause.[162] The plenary power of Congress under the Interstate Commerce Clause provides power to the federal government which can limit the power of the states.[163]

3. *Category II Cases*

Blatchford is a Category II case. The key factors for a Category II case are: (1) tribe suing state, (2) money and injunctive relief sought, and (3) Indian powers invoked.

In *Blatchford*, native villages of Alaska instituted an action against a state official seeking a court order which would require the state to make payments to the villages, which were allegedly warranted under a revenue-sharing statute.[164] The district court granted an injunction, then dismissed the claim as a violation of the Eleventh Amendment.[165] The Court of Appeals for the Ninth Circuit reversed, holding that the State enjoyed no immunity from suits brought by Indian tribes.[166] The Supreme Court held that the Eleventh Amendment barred claims for monetary damages by Indian tribes against a state absent congressional abrogation of immunity or state consent which were not present in the case.[167] The

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[161] *Union Gas*, 491 U.S. at 5. CERCLA is codified as amended at 42 U.S.C. §§ 9601 *et seq.* (1988).

[162] *Lafuse*, *supra* note 95, at 658 n.164. The plurality consisted of Brennan, Marshall, Blackmun and Stevens. *Id.*

[163] Lafuse, *supra* note 95, at 658.

[164] Blatchford v. Native Village of Noatak, 501 U.S. 775, 778 (1991). The Native Village challenged the actions of the Commissioner of Alaska's Department of Community and Regional Affairs who had altered the scope of the revenue-sharing program, causing less money to be paid to the native village. *Blatchford*, 501 U.S. at 778.

[165] *Id.*

[166] *Id.* The court of appeals initially held that 28 U.S.C. § 1362 abrogated the state's immunity, then on reconsideration held that suits by Indian tribes were not within the scope of the state's immunity. *Id.*

[167] *Id.* at 779-88. The Court rejected arguments by the native village seeking

Supreme Court remanded the tribe's claim seeking an injunction to the lower court.[168]

4. *Category III Cases*

One of the fundamental purposes behind the Eleventh Amendment was to prevent suits against a state which would result in the payment of damages. In order to protect state budgets, therefore, suits for damages are not allowed under the Amendment unless one of three exceptions is present. In Category III cases, we focus on this basis for abrogating sovereign immunity. Most controversial are suits in which the basis is unclear or weak. Least controversial are suits in which Congress has waived the immunity or the state has consented to being sued. Because the IGRA's relief is in the nature of an injunction, it presents the best circumstance for abrogating state immunity.

III. THE SPECIAL STATUS OF INDIAN NATIONS AND TRIBES

Any intelligent exploration of Native American legal matters must begin with the relationship between Indian tribes and the United States. It is necessary to examine this paradigm since "Indian law is founded in the political relationship between the United States and the Indian tribes."[169] From the outset, however, one discovers that Indian law is a complex mixture of many elements from many different areas of the human experience. As Felix Cohen explained, "Our Indian law originated, and can still be most clearly grasped, as a branch of International law. . . ."[170] Both explorers and settlers on the newly "discovered" North American continent found themselves confronted by firmly established aboriginal peoples. All the land, therefore, was not uninhabited and free

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to establish an absence of immunity or, in the alternative, state consent to suit or congressional abrogation of immunity. *Id.*

[168] *Id.* at 788.

[169] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (1982).

[170] Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942).

for the taking. Negotiations with Indians became a necessity. "Whatever theoretical conflicts existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists."[171] Thus, a subtle yet paramount distinction of historical fact arises in

> [t]hat practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners. What we acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession. What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.[172]

After the founding of the United States in 1776, the need to negotiate with Native Americans became the responsibility of the new government. The presence of the Indian Commerce Clause in Article I of the United States Constitution clearly illustrates this point.[173] While the United States continued to grow, the power and influence of the Indian nations diminished. Then, in *Worcester v. Georgia*,[174] Chief Justice Marshall endeavored to explain what position Indian tribes possessed in relation to the United States.[175] Chief Justice Marshall wrote, "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[176]

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[171] Cohen, *supra* note 170, at 55.
[172] *Id.*
[173] *See* U.S. CONST. art. I, § 8, cl. 3.
[174] 31 U.S. (6 Pet.) 515 (1832).
[175] *Worcester*, 31 U.S. (6 Pet.) at 557-61.
[176] *Id.* at 557.

This premise is based on the power granted to Congress by the Indian Commerce Clause.[177] Chief Justice Marshall concluded that Georgia's laws "interfere[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union."[178]

But how does an Indian tribe acquire its special place in American law?[179] An Indian tribe must be federally recognized. "Historically, the federal government has determined that certain groups of Indians will be recognized as tribes. . . ."[180] "In most instances the question of tribal existence can be resolved by reference to a treaty, statute, executive order, or agreement recognizing the tribe in question."[181] Tribes can also be recognized if they receive services through the Bureau of Indian Affairs.[182] "Such determinations are incident to the Indian Commerce Clause of the Constitution . . . ."[183]

After examining the United States-Indian tribe relationship, the next issue is to determine what limits on tribal sovereignty exist. The greatest impediment Indian nations confront

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[177] *Id.* at 559.

[178] *Id.* at 561.

[179] In discussing Indian tribes the only issue is what is necessary to achieve political recognition. The classification of tribes from an ethnological approach is beyond the scope of this paper and will, therefore, be omitted.

[180] Cohen, *supra* note 170, at 3.

[181] Even though treaties are no longer made with Indian tribes, treaties remain an important source of federal Indian law. 25 U.S.C. § 71 (1976) (ending powers of federal government to make treaties with Indian tribes as of March 3, 1871, but upholding validity of treaties made prior to that date). One treaty example is the Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478 (treaty of New Echota). An example of a statute is the Indian Trade and Intercourse Act. 25 U.S.C. § 177 (1976). Executive actions created Indian reservations when in 1855 the President withdrew land for Indian use. Exec. Order of May 14, 1855. Congress eliminated the power to create reservations through executive order in 1919. 43 U.S.C. § 150 (1976). Agreements became important after the termination of treaty-making powers. Agreements were ratified by both houses of Congress in a similar manner as treaties. *See, e.g.*, Act of Mar. 1, 1901, ch. 675, 31 Stat. 848.

[182] Cohen, *supra* note 170, at 6.

[183] *Id.* at 3.

when they seek to enforce and preserve their constitutional rights against the states is the Eleventh Amendment.[184] The plenary power of Congress, however, can abrogate the Eleventh Amendment. Congress has abrogated the states' sovereign immunity in the IGRA which was enacted pursuant to the Indian Commerce Clause.[185] Thus, by granting full effect to the IGRA, the rights and privileges of Indian nations recognized in *Worcester v. Georgia* many years ago can finally be acknowledged.

IV. THE PLENARY POWER OF CONGRESS OVER INDIAN AFFAIRS IS EVEN MORE SPECIAL THAN ITS POWER OVER INTERSTATE COMMERCE

Even the later-adopted Fourteenth Amendment has been an incomplete check on the Article I explicit and inherent Indian powers of Congress. The plenary power of Congress to regulate and administer pursuant to the explicit Indian treaty commerce and inherent Indian trust powers is sufficiently great to stand in the face of the later-adopted Fourteenth Amendment checks on federal and state power. In *Morton v. Mancari*,[186] the Court unanimously upheld the Indian Preference Act in the face of a Fourteenth Amendment equal protection challenge.[187] Despite the Amendment's later adoption, the Court took it as established constitutional doctrine that the special duties owed to Indians prevented the Amendment from having any force to overturn congressional policy based on its legitimate role as trustee for the tribes.[188] Isn't it therefore clear that the Eleventh Amendment, also adopted later, cannot be said to contain an implicit repeal of accepted congressional trust power? How is Congress to enforce its scheme under the plenary power if states can resist by challenging jurisdiction?

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[184] Indians were not United States citizens until 1924. 8 U.S.C. § 1401(b) (1982).

[185] 25 U.S.C. §§ 2701-2721 (1988 & Supp. IV 1992).

[186] 417 U.S. 535 (1974).

[187] *Morton*, 417 U.S. at 551.

[188] *Id.* at 551-52.

The Eleventh must bow just as the Fourteenth did in *Morton*.

It seems that Congress can be assumed to be aware of the "unmistakably clear" intent to abrogate the immunity rule. After all, it followed the formula in the IGRA. We assume Congress was aware of the Court's upholding of the Indian Preference Act in *Morton* in the face of that case's Fourteenth Amendment challenge. We can further assume that Congress addressed the challenge of accepted doctrine and adopted its statutory formula knowing that the effect would be diminution of state immunity in favor of shared regularity control through the tribal/state compact.

Congress' purpose was to regulate gaming rather than permit it without limitation or bar it absolutely. It recognized the state's interest in two ways—the first in allowing Class III gaming only where it already exists, and the second in making the tribe and state come to agreement as to scope. Where the state refuses both of these entreaties it should be treated as a grant to the Secretary of the Interior of the ultimate authority to determine the scope of gaming. If the state's Eleventh Amendment argument succeeds, the state will gather unto itself the veto power over Indian gaming which was intended to be broken by the IGRA. If Congress has the unquestioned power to permit gaming on any basis it chooses, then why not characterize the state's assertion of Eleventh Amendment immunity as the refusal to deal? The posture should be one of tribal compliance with all steps up to the submission of variant plans to the Secretary of the Interior for his choice over the objection of the state.

In other words, the courts should treat this as an issue of statutory interpretation where the statute appears to require the doing of nugatory or futile acts. Should a state refuse to negotiate, the refusal should be the basis for sending the dispute forward, not dismissed. The courts should issue an order to the effect that the statute has been complied with and the matter is now ripe for decision by the Secretary of the Interior. It is an appropriate order since it is a federal question and one of statutory interpretation. In addition, it would not invoke the critical mass of Eleventh Amendment jurisprudence dealing

with the hailing of states into federal court for monetary judgments. Instead it raises only the injunctive or equitable remedies which have no impact on the state treasury.

V. IGRA IS A CLEAR STATEMENT OF CONGRESSIONAL ABROGATION

Congressional concern and intent in the IGRA to abrogate the state's sovereign immunity is manifested in several ways. First, Congress clearly heeded the admonition of Justice Stevens' dissent in *California v. Cabazon Band of Mission Indians*,[189] in which he criticized the Court for doing what Congress should do in exercising its plenary powers.[190] Recognizing the unsettled disputes over regulation of gaming on Indian reservations, Congress promptly exercised its plenary powers in Indian affairs by enacting the IGRA.

Second, in the IGRA, Congress through the Senate committee report on the Act provides a clear and unequivocal statement of its intent to grant federal court jurisdiction to resolve disputes between the states and tribes through the state-tribe compact process. This is entirely consistent with the "clear statement" principles enunciated in the series of interstate commerce cases cited above.

Third, Congress chose not to impose a federal regulatory scheme on the states' gaming policies and operations but merely to provide "incentives" for the states to negotiate in good faith with the tribes for mutual benefit. Framing the regulatory scheme in terms of "incentives" for the states rather than imposing direct federal regulation indicates not only a close reading of recent Supreme Court rulings but careful attention to the Court's articulated tests for express abrogation of the states' sovereign immunity.

Fourth, it is striking that in the IGRA, Congress waived not only the immunity of states but also tribes. Either entity can sue in federal court to obtain compliance of executed com-

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[189] 480 U.S. 202, 227 (1987) (Stevens, J., dissenting).

[190] *Cabazon Band of Mission Indians*, 480 U.S. at 227 (Stevens, J., dissenting).

pacts. Furthermore, Congress authorized the federal government to bring suit against either or both tribes and states if necessary to carry out the provisions of the Act. In the IGRA both state and tribal immunity are abrogated by Congress.[191] States are not even required by the IGRA to participate in the regulation of Indian gaming but only to negotiate with tribes in good faith if they wish to do so. Congress has waived immunity of tribes so that states can enforce regulations established in their compacts with tribes, as well as waiving the immunity of tribes to enforce suits by the federal government.[192]

VI. CONGRESSIONAL INTENT SUPPORTS THE ARGUMENT FOR ABROGATION AND AVOIDS THE CONSTITUTIONAL ISSUE

A. Interpretation Before Constitutional Confrontation

It is a familiar principle that federal courts do not pass on the constitutionality of an act of Congress if, by fair construction, the constitutional issue can be avoided.[193] This principle, founded on prudence, has grown to the status of a rule.[194] Courts should avoid unnecessary constitutional rulings. This has been said to be even stronger where the ruling is one about the relative constitutional authority of the federal branches of government.[195] This seems to encompass prudence in the case of relative constitutional authority of Congress and states. For just as the Court should be reluctant to issue a ruling empowering one branch at the expense of another, it ought to be cautious in empowering one level of government at the expense of the other. This caution is in part found in the notion of reserved state power contained in the Tenth and Eleventh Amendments.

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[191] For basis of tribal sovereign immunity, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[192] 25 U.S.C. § 2710(d)(7)(A) (1988).

[193] Zobest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2465 (1993).

[194] *Zobest*, 113 S. Ct. at 2466 (referring to principle as "prudential rule"); United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988) (stating this is "[e]stablished practice").

[195] American Foreign Serv. Assoc. v. Garfinkel, 490 U.S. 153, 161 (1989).

It has been said by the Court in the case of *Escambia County v. McMillan*[196] that it is a "principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[197] This sounds in jurisdiction, but should be considered in the context of this case's issue. *Escambia County* involved a conflict between the Voting Rights Act and a state statute calling for election of some county officials on an at-large basis.[198] Appellate jurisdiction exists only where interpretation of the federal statute affects a state statute.[199] The legitimate issue of jurisdiction rested on the presence or absence of a state/federal conflict rather than the need to address the constitutional issue. Jurisdiction was present were the federal statute to invalidate the state statute even without an issue of constitutional interpretation.

The rule seems to be a compound of jurisprudence principles. Judges should be conscious of their role as final arbiters of constitutional matters. Only their sound and effective judgments prevent mistakes which are determinative.[200] These final decisions concern a fundamental government structure, relative power and the extent of personal liberty. Fallibility should suggest to the reflective judge not only deliberation but avoidance.[201] Where the exercise of this great power can, in proper and faithful fulfillment of the judicial duty be avoided, the power is commensurate with duty. Second, an unnecessary constitutional decision violates other basic constitutional law principles such as avoiding unique controversies and advisory opinions.[202]

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[196] 466 U.S. 48 (1984) (per curiam).

[197] *Escambia County*, 466 U.S. at 51 (1984).

[198] *Id.* at 50-51.

[199] *See* 28 U.S.C. § 1254(2) (1988); *see also Escambia County*, 466 U.S. at 52-53 (Marshall, J., dissenting).

[200] Ashwander v. Tennessee Valley Auth. 297 U.S. 288, 341-42, 345-46 (Brandeis, J., concurring).

[201] *Ashwander*, 297 U.S. at 345-46 (Brandeis, J., concurring).

[202] *Id.* (Brandeis, J., concurring).

This reluctance raises constitutional issues to a level along statutory interpretation. Its soundness may lie in the relative authority of the Congress and Court. Should legislation be interpreted badly, it can be corrected. Should the Constitution be mangled, Congress can only begin the amendment process needed to change the result.

It is so well settled, it has become a rubric.[203] Courts should not address the issue of sovereign immunity if a fair construction of the IGRA will permit them to avoid the issue. It takes only a small leap to bring this rubric to bear on the sovereign immunity issue. Given Congress' plenary power in Article I of the Constitution and that power's prior invocation by Congress to justify the IGRA, courts can look to congressional intent to determine the amount of control the legislature was willing to confer. Should a state choose not to take up the congressional offer of joint authority, the proper response is to declare Congress' intent that the Secretary of the Interior in conjunction with the tribe will determine the extent to which gaming will be allowed.

B. Analogous Case Law

The Supreme Court has not yet stated that the IGRA issues discussed herein are merely matters of federal statutory interpretation and not valid constitutional questions. However, the Court has applied this doctrine in other areas of law where it determined the intent of a federal statute and never reached the constitutional questions raised by the parties. A few examples will illustrate this point.

Two cases which discuss various aspects of takings by the federal government have some significance with respect to the IGRA issues discussed herein. In *Ruckelshaus v. Monsanto Co.*,[204] Monsanto, an applicant for registration of a pesticide, sought an injunction to negate the provision of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requiring

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[203] United States v. Locke, 471 U.S. 84, 92 (1985).
[204] 467 U.S. 986 (1984).

data consideration and disclosure to the Environmental Protection Agency when applying to register a pesticide on the grounds that such provisions constituted an unconstitutional taking of trade secrets and commercial information.[205] The district court found that the provisions of FIFRA did not adequately compensate Monsanto for its disclosure of trade secrets, and the court declared those sections of FIFRA unconstitutional because they violated the Fifth Amendment.[206] On appeal, the Supreme Court recognized a property right in a trade secret,[207] but held that the disclosure required did not constitute a taking.[208] The Court noted that a statute exists, specifically Section 3(c)(1)(D)(ii) of the FIFRA,[209] which provides just compensation for any potential taking of property in the form of trade secrets.[210] Therefore, the Court did not reach the Fifth Amendment taking issue.

With respect to the IGRA cases, *Ruckelshaus* bolsters the argument that, where Congress has provided for relief through a statute, the court should defer to Congress' intent and enforce the statute. Clearly, Congress did not intend for tribes to be hamstrung by states refusing to negotiate in good faith. The clear intent of Congress when tribes and states reach an impasse in negotiations is for a tribe to raise its concerns directly with the Secretary of the Interior. Congress did not intend for the tribes to be without recourse when the states invoke their sovereign immunity.

Another takings case, *United States v. Locke*,[211] involved allegations that the extinguishing of mining claims under the Federal Land Policy and Management Act when mining claim owners had failed to follow notification procedures explicitly constituted an unconstitutional taking of property without just compensation.[212] The Court offered a lengthy discussion of

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[205] *Ruckelshaus*, 467 U.S. at 990-92.
[206] *Id.* at 999-1000.
[207] *Id.* at 1003-04.
[208] *Id.* at 1012-13.
[209] *Id.* at 995 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).
[210] *Ruckelshaus*, 467 U.S. at 1013.
[211] 471 U.S. 84 (1985).
[212] *Locke*, 471 U.S. at 91. In that case, petitioners argued that substantial

statutory interpretation which is relevant to the IGRA cases in stating:

> Going behind the plain language of a statute in search of a possible contrary, congressional intent is "a step to be taken cautiously, even under the best of circumstances." When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation.[213]

In applying this language to the IGRA, it could be argued that Congress clearly intended for tribes to be able to overcome sovereign immunity claims by states; otherwise, Congress would have never added the provision allowing tribes to bring their grievances to the Secretary of the Interior once good faith negotiations break down and the tribe has brought suit against the state.[214]

One other case should also be discussed in regard to this question of statutory interpretation versus constitutional issue. In 1977, the Supreme Court was faced with the issue of whether a court could grant additional procedural rights under the Administrative Procedure Act—rights which were not granted by the agency in which Congress had bestowed such rule-making procedural authority.[215] The dispute in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*[216]

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compliance with Section 314 of the Federal Land Policy and Management Act requiring owners of mining claims to file a notice of intention "prior to December 31 of each year" was insufficient when the petitioner failed to file such notice until December 31. *Id.* at 91-92, 93-95.

[213] *Id.* at 95-96 (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)) (citations omitted).

[214] *See* text of IGRA and discussion of such provisions herein.

[215] Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978). The facts and history of this case, which includes two previous decisions by the Circuit Court of Appeals for the District of Columbia Circuit, are complex and will be summarized only to the extent necessary to relate the significance of the case to this article.

[216] 435 U.S. 519 (1978).

stemmed from a disagreement over the regulatory powers granted by the Atomic Energy Act of 1954 to the Atomic Energy Commission (AEC),[217] the Atomic Safety and Licensing Appeal Board (Appeal Board), and the Atomic Safety and Licensing Board (Licensing Board).[218]

The dispute involved the licensing of a nuclear power plant and the AEC's adoption of rulemaking proceedings for a hearing to deal with "the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors.[219] The AEC's adoption of these proceedings effectively prevented the Licensing Board from utilizing full and formal adjudicatory proceedings in the future.[220] This decision led to the dispute in *Vermont Yankee* when Consumers Power Co. applied for a permit to build two nuclear reactors and, after being denied the permits, petitioned the Licensing Board to reopen its proceedings.[221] Consumers argued that the Council for Environmental Quality had revised its regulations concerning the preparation of environmental impact statements, and the environmental impact statements drafted by the AEC and considered by the Licensing Board in reaching its decision were no longer valid under the new regulations.[222] Thus, the environmental impact statements had to be revised for another hearing to reconsider the denial of the nuclear reactor permits.[223]

The AEC declined to reopen the proceedings, and Consumers appealed the decision to the Court of Appeals for the Dis-

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[217] *Vermont Yankee*, 435 U.S. at 527. The licensing and regulatory functions of the AEC were transferred pursuant to the Energy Reorganization Act of 1970 to the Nuclear Regulatory Commission. *Id.* at 527 n.2.

[218] *Id.* at 525-29.

[219] *Id.* at 529 (quoting proceedings of Appeal Board).

[220] *Id.* at 530. In justifying its decision to implement such procedures for the hearing, the AEC stated, "The record does not indicate that any evidentiary material would have been received under different procedures." *Id.* at 530 n.7.

[221] *Vermont Yankee*, 435 U.S. at 530-31.

[222] *Id.* at 532.

[223] *Id.*

trict of Columbia Circuit.[224] Despite the AEC's compliance in following all statutorily-required procedures in evaluating Consumers' applications, the court held that the proceedings were inadequate.[225]

In delivering the opinion of the United States Supreme Court, Justice Rehnquist initially recognized that the Administrative Procedure Act contains provisions which contain:

> [T]he maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them *if the agencies have not chosen to grant them*.[226]

This means when Congress grants the right to an agency to dictate the procedural rules and safeguards permissible under a statute, the courts cannot step in and deviate from the steps taken by the agency endowed with such power by Congress. Put another way, courts cannot reinterpret Congressional intent and tailor it to suit their notions of what is procedurally proper. In *Vermont Yankee*, the AEC had the full authority of Congress to establish all procedural rules concerning the licensing of nuclear reactor sites and this authority cannot be curtailed by an appellate court.[227] The same argument might

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[224] *Id.* at 533.

[225] *Id.* at 536.

[226] *Vermont Yankee*, 435 U.S. at 524 (emphasis added). As an example of this concept, the Court cited language from FCC v. Schreiber, 381 U.S. 279 (1965), where the Court stated:

> [The principle developed as] an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

Schreiber, 381 U.S. at 290.

[227] *Vermont Yankee*, 435 U.S. at 543. The Court recognized that the procedural rules could be struck down or modified by an appellate court if legitimate constitutional concerns were raised. *Id.* Without using so many words, the Court has invoked the principle that, if disputes can be resolved through federal statutory interpretation, then they are unless a ripe constitutional question is raised.

be made by analogy to the states' involvement in IGRA cases because the statutes clearly intend for good faith negotiations to occur between the tribes and states. The states cannot unilaterally circumvent Congressional intent by refusing to negotiate, then shroud themselves in sovereign immunity to prevent further action by a tribe.[228]

VII. CONCLUSION

Courts have failed to adequately examine and distinguish Eleventh Amendment cases. Differentiating circumstances include express congressional abrogation versus implicit or consensual abrogation of sovereign immunity. Since some cases are brought by individual citizens and others by sovereign Indian tribes, identity of the parties provides another instance. The type of relief sought is also distinguishing since some cases involve claims for monetary damages while others seek injunctive relief. In addition to these factors, courts have now determined that Article I powers cannot be exercised to diminish the Eleventh Amendment since the Amendment came later in time. Finally, and most disturbing, a new, unsupported constitutional premise has emerged. Today, there appears from nowhere a qualitative distinction between the Indian and the Interstate portions of the Commerce Clause. More than 160 years ago the United States Supreme Court recognized the sovereign immunity which Indian tribes enjoy.[229] The time has come to recognize tribal autonomy by giving full effect to Congressional legislation passed under the Indian Commerce Clause, in the same way courts do to other congressional acts which do not involve Indian nations.

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[228] *See* text of IGRA and discussion herein of the legislative intent behind its procedures.

[229] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).