

Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act

By WILLIAM T. BISSET*

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Introduction

Tremendous sums of money are at stake in legal gaming. More than \$300 billion was wagered legally in 1991, with casinos accounting for \$240.5 billion, lotteries \$21 billion, and pari-mutuels, including

* Litigation Partner, Hughes Hubbard & Reed, Los Angeles. J.D., Michigan; B.S., University of Rochester. The author wishes to thank Steven L. Sevrin, a former associate of the firm, for his assistance in the preparation of this Article.

horses, greyhounds and jai alai, \$17.9 billion.¹ Of the amounts wagered, the gaming industry retained revenues of \$26.7 billion in 1991, with casinos accounting for \$9 billion, lotteries \$10.2 billion and parimutuels \$3.65 billion.²

The fastest-growth of legal gaming has been on Indian reservations. Between 1990 and 1991, gross wagering on Indian reservations increased more than 100%, from \$2.6 billion to \$5.4 billion,³ and gross revenues increased almost 48% from \$488.6 million to \$720.2 million.⁴ In contrast, spending on most other forms of gaming declined slightly in 1991, following many years of steady increases.⁵

I. Development of Indian Gaming

Significant gaming on Indian reservations began in 1979, when the Seminole Tribe of Florida became the first tribe to run a bingo game for non-Indians.⁶ A local sheriff threatened to stop the game on grounds that it violated a Florida statute barring most forms of gaming. In response to the sheriff's threat, the Seminole Tribe filed an action in federal court for a declaratory judgment permitting gaming to continue and injunctive relief barring the sheriff from further threatening to intervene. The district court held that the state anti-gambling statute could not be enforced against the Tribe and further enjoined the sheriff from enforcing the statute. The Fifth Circuit affirmed.⁷ The court of appeals announced two important principles governing the relations between states and tribes, both of which remain valid today. First, "states lack jurisdiction over Indian reservation activity until granted that authority by the federal government. . . ."⁸ Second, a state that has jurisdiction over Indian

1. Eugene M. Christiansen, *Gross wagering handle up a mere 0.35%, to \$304.1B*, INT'L GAMING & WAGERING BUS., July 15-Aug. 14, 1992, at 22, 22 [hereinafter Christiansen, *Gross Wagering*].

2. Eugene M. Christiansen, *Despite flat handle, U.S. gross gaming revenue rises 1.8% to record \$26.7B*, INT'L GAMING & WAGERING BUS., Aug. 15-Sept. 14, 1992, at 16, 16 [hereinafter Christiansen, *Flat Handle*]. In contrast, Americans spent less than \$5 billion on movie tickets in 1991. Christiansen, *Gross Wagering*, *supra* note 1, at 24.

3. See Christiansen, *Gross Wagering*, *supra* note 1, at 22.

4. See Christiansen, *Flat Handle*, *supra* note 2, at 16.

5. See Christiansen, *Gross Wagering*, *supra* note 1, at 22.

6. S. REP. NO. 446, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3072.

7. *Seminole Tribe v. Butterworth*, 658 F.2d 310, 311-12 (5th Cir. 1981).

8. *Id.* at 312.

lands cannot prohibit gaming on them unless the state prohibits such gaming throughout the state.⁹

Butterworth and its progeny sanctioned the explosive growth of an Indian gaming industry immune from state regulation and lacking substantial federal regulation. By 1988, there were more than 100 organized bingo games on Indian territories, generating over \$100 million in annual revenues for Indian tribes.¹⁰

With so much money at stake, it is not surprising that Indian gaming also generated enormous controversy: law enforcement officials feared the involvement of organized crime;¹¹ some gaming industry executives expressed concern about new competition;¹² state officials complained about their inability to tax Indian games that drew customers away from taxable non-Indian games.¹³

Despite this controversy, Indian gaming still had strong support in Congress from legislators who believed the federal government had a moral duty to provide financial support to Indian tribes so as to improve the lives of Native Americans. This duty stemmed principally from promises the United States made when it persuaded tribes to cede key elements of their sovereignty and become essentially wards of the federal government.¹⁴

Congress recognized Indian gaming as a practical vehicle for bettering Indian life.¹⁵ Moreover, gaming offered the added advantage of requiring little federal assistance at a time of deep concern over the growing budget deficit.

By the mid-1980s, Congress had several regulatory proposals under consideration. Trying to balance Indian and non-Indian interests, the House of Representatives passed its first Indian gaming bill (H.R. 1920) on April 21, 1986. A product of compromise, the bill

9. *Id.* at 312-16 (citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980)).

10. S. REP. NO. 446, *supra* note 6, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 3072.

11. *See* 25 U.S.C. § 2702(2) (1988); S. REP. NO. 446, *supra* note 6, at 28, *reprinted in* 1988 U.S.C.C.A.N. at 3098 (quoting letter from John R. Bolton, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Daniel K. Inouye (Jan. 14, 1988)).

12. S. REP. NO. 446, *supra* note 6, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 3103 (quoting Sen. John McCain).

13. *Id.*

14. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207, 220-28 (1942) ("the relation of the Indians to the United States is . . . distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians").

15. *See* 25 U.S.C. § 2701(4) (1988) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government").

called for a five-year moratorium on many of the most profitable games.¹⁶

In June 1986, the Supreme Court granted certiorari in *California v. Cabazon Band of Mission Indians*¹⁷ to resolve whether federal law barred state and local governments from applying their anti-gaming laws on Indian lands. Concerned that the Court would impose new restrictions on Indian gaming, Indian tribes became more willing to compromise on the House gaming bill then pending before the Senate. In contrast, opponents of Indian gaming were confident that the Court would rule in their favor and pressed the Senate to transfer jurisdiction over Indian gaming to the states. The bill died in the Senate, however, when no action was taken before the end of the term.¹⁸

The Supreme Court announced its decision in *Cabazon* in February 1987. The Court held that neither state nor local laws applied to regulate Indian gaming absent explicit congressional consent. The decision was more favorable to Indian tribes than either the advocates or foes of Indian gaming had expected, and it changed the tenor of congressional debate. Suddenly, Indian tribes had judicial support; states no longer had control over Indian gaming and the federal government had failed to regulate it. To prevent tribes from conducting essentially unregulated gaming and to give states some control over gaming within their borders, Congress ultimately passed the Indian Gaming Regulatory Act (IGRA) in 1988.¹⁹ IGRA reflects a complicated balancing of Indian, federal and state interests that is unusually dependent on continuing good faith on all sides.

With strong congressional support, Indian gaming grew rapidly. Many states, however, have reneged on their part of the IGRA compromise and have wrongly convinced federal district courts to hold key sections of IGRA unconstitutional.

II. Structure of IGRA

IGRA divides gaming activities into three classes, each subject to a different set of rules. Class I games are social games conducted "for prizes of minimal value" or "traditional forms of Indian gaming" and are regulated solely by Indian tribes.²⁰ Class II games include bingo

16. See S. REP. NO. 446, *supra* note 6, at 3-4, reprinted in 1988 U.S.C.C.A.N. at 3073-74.

17. 480 U.S. 202 (1987).

18. See S. REP. NO. 446, *supra* note 6, at 4, reprinted in 1988 U.S.C.C.A.N. at 3074.

19. 25 U.S.C. §§ 2701-2721 (1988 & Supp. III 1991).

20. *Id.* §§ 2703(6), 2710(a)(1).

and non-banking card games (i.e., games where the casino has no economic interest in who wins or loses), which are regulated by the National Indian Gaming Commission.²¹ Class II games are permitted on Indian lands only if “located within a State that permits such gaming for any purpose.”²² If, for example, a state permits charitable organizations, but no other entities, to operate casino games, an Indian tribe will be able to operate a casino game. Finally, Class III games include “all forms of gaming that are not class I gaming or class II gaming.”²³ These include slot machines, lotteries, and banking and percentage games. Class III games are permitted on Indian lands only if “located in a State that permits such gaming for any purpose” and if “conducted in conformance with a Tribal-State compact.”²⁴

Many Indian tribes have sought Tribal-State compacts authorizing them to operate lucrative Class III games. IGRA details the procedures that states and tribes must follow in negotiating such compacts. Once a tribe requests that a state enter into negotiations, the state is bound to negotiate “in good faith.”²⁵ Possible negotiation subjects include: “the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;” “the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;” “standards for the operation of such activity and maintenance of the gaming facility, including licensing;” and “any other subjects that are directly related to the operation of gaming activities.”²⁶

If a state refuses to negotiate, or does not negotiate in good faith, IGRA authorizes a tribe to bring an action against the state in federal court to compel good faith negotiations.²⁷ The court must dismiss the tribe’s action if it concludes that the state has negotiated in good faith.²⁸ If the court concludes the state has not negotiated in good

21. *Id.* §§ 2703(7), 2706, 2710(b)(1).

22. *Id.* § 2710(b)(1).

23. *Id.* § 2703(8).

24. *Id.* § 2710(d)(1)(B),(C).

25. *Id.* § 2710(d)(3)(A).

26. *Id.* § 2710(d)(3)(C). State taxation of Indian gaming is permitted only to the extent “necessary to defray the costs of regulating such activity.” *Id.* §§ 2710(d)(3)(C)(iii), 2710(d)(4).

27. “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 . . . or to conduct such negotiations in good faith.” *Id.* § 2710(d)(7)(A)(i).

28. In determining whether a state has negotiated in good faith, the court “may take into account the public interest, public safety, criminality, financial integrity, and adverse

faith, the court must order the state and tribe to conclude a compact within sixty days.²⁹

If a compact is not concluded within sixty days, the state and the tribe each must submit a proposed compact to a court-appointed mediator. Each party's proposed compact must represent its "last best offer."³⁰ The mediator then chooses one of the two proposed compacts, and submits it to the state and the tribe.³¹ The state loses its right to negotiate a compact if it does not consent to the mediator's choice within sixty days of receiving it. In such a case, the Secretary of the Interior must prescribe a compact consistent both with the compact the mediator selected and with state law.³² IGRA does not allow the state any role in administering that compact.³³ On the other hand, if the state does consent to the mediator's choice, the resulting compact has the same effect as a compact entered into voluntarily.³⁴

Compacts entered into voluntarily must be approved by the Secretary of the Interior.³⁵ If the Secretary does not accept or reject a compact within forty-five days of receiving it, the compact is "considered to have been approved by the Secretary" to the extent that it is consistent with IGRA.³⁶

III. State Opposition to IGRA

Despite strong tribal objections, Congress, through its enactment of IGRA, gave the states a substantial role in Class III gaming. The tribes feared states would find ways to obstruct their games, and time has validated their fears. When tribes have brought IGRA-sanctioned actions in federal court against states that have failed to negotiate gaming compacts in good faith, many states have raised "states' rights" challenges to the constitutionality of IGRA.³⁷ Specifically,

economic impacts on existing gaming activities, and shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." *Id.* § 2710(d)(7)(B)(iii)(I)-(II).

29. *Id.* § 2710(d)(7)(B)(iii).

30. *Id.* § 2710(d)(7)(B)(iv).

31. *Id.* § 2710(d)(7)(B)(iv), (v).

32. *Id.* § 2710(d)(7)(B)(vii)(I).

33. *Id.* § 2710(d)(7)(B)(vii).

34. *Id.* § 2710(d)(7)(B)(vi).

35. *Id.* § 2710(d)(8).

36. *Id.* § 2710(d)(8)(C).

37. See *Cheyenne River Sioux Tribe v. State*, 3 F.3d 273 (8th Cir. 1993); *Seminole Tribe v. State*, 801 F. Supp. 655 (S.D. Fla. 1992); *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. State*, 784 F. Supp. 1549 (S.D. Ala. 1992); *Ponca Tribe of Indians v. State*, No. 92-988-T, slip op. (W.D. Okla. Sept. 8, 1992); *Spokane Tribe of Indians v. State*, 790 F. Supp. 1057 (E.D.

states have argued that IGRA violates the Eleventh Amendment by unconstitutionally subjecting them to suit in federal court and violates the Tenth Amendment by unconstitutionally requiring them to regulate in accordance with federal rules.³⁸ The constitutional issues raised by the states have divided the district courts.

Cheyenne River Sioux Tribe v. State,³⁹ the single appellate precedent directly on point, appeared in August 1993. While it correctly resolves the issues, it fails to provide the analytical support necessary for a seminal constitutional decision in an important economic and political sphere.

A. Eleventh Amendment

The Eleventh Amendment provides that "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."⁴⁰ The Eleventh Amendment has been held in certain circum-

Wash. 1991); *Poarch Band of Creek Indians v. State*, 776 F. Supp. 550 (S.D. Ala. 1991). "States' rights" has lately become a hot topic in the Supreme Court and is close to the core of some of the Justices' legal philosophies. See, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 n.1 (1988). As the composition of the Court changes over time, however, it remains to be seen whether "states' rights" will remain powerful.

38. One wonders how much consideration states have given to the consequences of renegeing on the IGRA compromise and invalidating the statute in court. Without IGRA, *Cabazon* would leave the states no regulatory role at all, and states would be "left with the alternative of having the federal government negotiate compacts with the tribal governments for the conduct of Class III gaming, and of comprehensive federal regulation of Indian gaming." Letter from Sen. Daniel K. Inouye to Gov. John Ashcroft 2-3 (June 16, 1992) (intending to influence the 1992 National Governors' Conference).

39. 3 F.3d 273 (8th Cir. 1993).

40. U.S. CONST. amend. XI. It is unclear whether a tribe can bring an IGRA action in state court against a non-consenting state. The answer depends in part on whether federal courts have exclusive jurisdiction over IGRA actions. In general, "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). *But cf.* CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 3527, at 246-47 (1984) (quoting Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 (1957) ("if a complaint directly requests the affirmative relief provided by the statute, the action is considered as 'arising under' that statute and is therefore exclusively within the jurisdiction of the federal courts"))).

If a state court has jurisdiction over an IGRA action, the state cannot invoke the Eleventh Amendment as a defense because the Eleventh Amendment applies only to actions brought in federal court. Arguably, the state also cannot invoke its own sovereign immunity defenses because federal law is supreme and authorizes the action against the

stances to bar suits against a state by private parties, foreign sovereigns and Indian tribes.⁴¹ There are, however, three important exceptions. First, Congress can abrogate state sovereign immunity on behalf of third parties, including Indian tribes, under certain circumstances. Second, a state can consent to suit in federal court or waive its immunity to suit, either expressly or implicitly. Third, state officials (as opposed to states themselves) may be sued under certain circumstances to obtain prospective injunctive relief.⁴²

1. Abrogation

a. Supreme Court Test

The 1991 United States Supreme Court decision in *Blatchford v. Native Village of Noatak* clearly indicates that Congress can abrogate state sovereign immunity on behalf of Indian tribes. In that case, two Indian tribes brought an action in federal court against the State of Alaska for changing the formula under which revenue-sharing payments were made to tribal governments. The tribes sought an order requiring the State to pay them the money they would have received under the old formula. The district court in Alaska "initially granted an injunction [against the State] to preserve sufficient funds for the 1986 fiscal year, but then dismissed the suit as violating the Eleventh Amendment."⁴³ The Ninth Circuit reversed, first on the ground that a federal statute, 28 U.S.C. § 1362, "constituted a congressional abrogation of Eleventh Amendment immunity, and then, upon reconsideration, on the ground that Alaska had no immunity against suits by Indian tribes."⁴⁴ The Supreme Court reversed, holding that the Eleventh Amendment bars actions by Indian tribes against states absent state consent or congressional abrogation of state immunity.

The tribes in *Blatchford* raised three principal arguments against state immunity. The first was that states waived their sovereign immunity as it pertains to Indian tribes when they ratified the Constitution, just as they had waived their immunity to actions brought by the federal government and other states.⁴⁵ The Supreme Court rejected that argument, finding that the states' surrender of immunity from suit by

state. *Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare*, 411 U.S. 279, 287 (1973) (recognizing the issue but not resolving it where federal statute authorized suits "in any court of competent jurisdiction").

41. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991).

42. See *Seminole Tribe*, 801 F. Supp. at 657.

43. *Blatchford*, 111 S. Ct. at 2580.

44. *Id.*

45. *Id.* at 2582-83.

the federal government was based on the structure of the federal system, which demands the supremacy of federal power. It found nothing in the text of the Constitution or the "plan of the convention" to suggest that Indian tribes possess similar powers.⁴⁶ Moreover, the Court determined that the states' surrender of immunity from suit by sister states was based on the mutuality of the concession.⁴⁷ However, it found no such mutuality exists with Indian tribes.

Indian tribes enjoy immunity against suit by states, as it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the *States'* immunity for the benefit of the tribes.⁴⁸

The second argument the tribes raised against state immunity was that they could sue the State of Alaska because the federal government had delegated its power to sue states to the tribes.⁴⁹ The Supreme Court rejected that argument as well. The Court acknowledged that the federal government has

standing to sue on behalf of Indian tribes as guardians of the tribes' rights, and that since "the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States," no Eleventh Amendment bar would limit the United States' access to federal courts for that purpose.⁵⁰

But the Court denied that the federal government had delegated its power to sue states to the tribes. The statute under which the tribes sued the State of Alaska gives federal courts jurisdiction over all civil actions brought by Indian tribes based on federal questions.⁵¹ The Court concluded that the effect of the statute is only to permit tribes to bring all their civil actions in federal court, regardless of the amount in question; but the statute does not give Indian tribes the right to sue states.⁵² In passing, the Court also expressed doubt as to whether the federal government could delegate its power to void state immunity to a third party.⁵³

The third argument the tribes raised was that Congress abrogated state immunity by way of 28 U.S.C. § 1362. The Court began the anal-

46. *Id.* at 2582 n.2.

47. *Id.* at 2582.

48. *Id.* (citation omitted).

49. *Id.* at 2583.

50. *Id.* at 2583.

51. 28 U.S.C. § 1362.

52. *Blatchford*, 111 S. Ct. at 2584.

53. *Id.*

ysis of this argument by restating “a simple but stringent test: ‘Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.’”⁵⁴ Applying this test to section 1362, the Court found that the statute did not reflect an “unmistakably clear” intent to abrogate immunity. “[T]he text is no more specific than [28 U.S.C.] § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that [28 U.S.C.] § 1331 suffices to abrogate immunity for all federal questions.”⁵⁵ *Blatchford* makes clear, however, that Congress *can* abrogate state immunity on behalf of any entity, including but not limited to Indian tribes, as long as it makes its intention “unmistakably clear in the language of the statute.”⁵⁶

Blatchford clarifies the Supreme Court’s 1989 decision in *Pennsylvania v. Union Gas Co.*⁵⁷ In that case, the Court ruled that Congress can abrogate state sovereign immunity when it legislates pursuant to the Interstate Commerce Clause. Justice Brennan’s four-Justice plurality opinion reasoned that Congress possessed such power mainly by virtue of its constitutional authority to regulate interstate commerce. His opinion added that Congress has such power when it legislates pursuant to *any* plenary power.⁵⁸ Justice White, who provided the majority’s fifth vote, agreed.⁵⁹ Other federal courts have

54. *Id.* at 2585 (citing *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)).

55. *Id.*

56. *Id.*

57. 491 U.S. 1 (1989).

58. *Id.* at 15.

59. *Id.* at 57 (White, J., concurring in part, dissenting in part). The four dissenting Justices in *Union Gas* criticized the majority for “muddl[ing] Eleventh Amendment jurisprudence.” *Id.* at 44 (Scalia, J., dissenting). They argued that any analysis of state sovereign immunity must recognize the “continuing validity” of *Hans v. Louisiana*, 134 U.S. 1 (1890), which they read to hold “that the Eleventh Amendment precludes individuals from bringing damage suits against States in federal court” *Union Gas*, 491 U.S. at 30 (Scalia, J., dissenting). The plurality held that *Hans* does not apply where Congress has the power to abrogate state immunity. *Id.* at 7, 23. Justice White apparently agreed. *Id.* at 57 (White, J., concurring in part, dissenting in part) (finding that Congress has authority to abrogate state immunity under Article I, not referring to *Hans*).

The dissenters argued that *Hans* does not permit Congress to abrogate state immunity, since *Hans* would mean “nothing at all” if states had to depend entirely on Congress’ goodwill to avoid being sued. *Id.* at 35, 36 (Scalia, J., dissenting). According to the dissenters, “state immunity from suit in federal courts is a structural component of federalism, and not merely a default disposition that can be altered by action of Congress.” *Id.* at 38 (Scalia, J., dissenting). The *Union Gas* dissent plays down the fact that *Hans* does not address the question of whether Congress has the power to abrogate state immunity. *Hans* held only that one particular statute, the Judiciary Act of 1875, did not abrogate state

reached the same conclusion.⁶⁰

Blatchford resolved any doubts *Union Gas* may have left as to when Congress can abrogate state immunity. All Congress must do to abrogate state immunity is legislate pursuant to an Article I power⁶¹ and make its intention to abrogate “unmistakably clear in the language of the statute.”⁶² Congress’ abrogation power is not confined to legislation arising under the Interstate Commerce Clause, as some subsequent district court decisions have wrongly held.⁶³

b. IGRA Abrogates State Immunity

IGRA abrogates state immunity with respect to suits brought by Indian tribes under IGRA. Congress enacted IGRA pursuant to the Indian Commerce Clause, an Article I power giving Congress plenary power over Indian affairs.⁶⁴ It is “unmistakably clear in the language of the statute” that Congress intended in IGRA to abrogate state immunity by specifically providing for suits against recalcitrant states in federal court.⁶⁵

immunity. The case did not consider the broader question of whether Congress has the power to abrogate state immunity.

The dissent also expressed concern that if Congress can abrogate state immunity under an Article I power such as the Interstate Commerce Clause, it can abrogate state immunity under any Article I power. *Id.* at 42 (Scalia, J., dissenting). Indeed, that is precisely what the Supreme Court and courts of appeal have concluded. *Id.* at 14-19, 57 (plurality and concurring opinions); *In re McVey Trucking, Inc.*, 812 F.2d 311, 323 (7th Cir., cert. denied, 484 U.S. 895 (1987)). As the *Union Gas* plurality opinion noted: “The language of the Eleventh Amendment gives us no hint that it limits congressional authority; it refers only to ‘the judicial power’ and forbids ‘constru[ing]’ that power to extend to the enumerated suits—language plainly intended to rein in the Judiciary, not Congress.” *Union Gas*, 491 U.S. at 18.

60. *McVey Trucking*, 812 F.2d at 323 (bankruptcy); *Peel v. Florida Dep’t of Transp.*, 600 F.2d 1070, 1080 (5th Cir. 1979) (war powers); *BV Eng’g v. University of California*, 657 F. Supp. 1246, 1248 (C.D. Cal. 1987), *aff’d*, 858 F.2d 1394 (9th Cir. 1988), cert. denied, 489 U.S. 1090 (1989) (patents, trademarks and copyrights).

61. *Union Gas*, 491 U.S. at 15.

62. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2584 (1991) (citing *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)); cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-26, at 185-89 (2d ed. 1988).

63. See *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Ponca Tribe of Indians v. State*, No. 92-988-T, slip op. (W.D. Okla. Sept. 8, 1992); *Spokane Tribe of Indians v. State*, 790 F. Supp. 1057 (E.D. Wash. 1991); *Poarch Band of Creek Indians v. State*, 776 F. Supp. 550 (S.D. Ala. 1991).

64. U.S. CONST. art. 1, § 8, cl. 3.

65. *Seminole Tribe v. State*, 801 F. Supp. 655, 658 (S.D. Fla. 1992) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); citing 25 U.S.C. § 2710(d)(7)(A)(i) (giving district courts jurisdiction over “any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe . . . or to conduct such negotiations in good faith”).

c. District Court Interpretations of IGRA

Six federal district courts have addressed the question of whether Congress had the power to abrogate state immunity in IGRA. Surprisingly, only one of these decisions has correctly interpreted the controlling Supreme Court case. In *Seminole Tribe v. State*, the court correctly held that the State of Florida could not invoke the Eleventh Amendment as a defense to an action to compel the state to negotiate a gaming compact. The court applied existing precedent to hold that Congress may abrogate state immunity whenever it legislates pursuant to an Article I power and makes its intention to abrogate "unmistakably clear in the language of the statute."⁶⁶

Other district courts have woefully misinterpreted the precedent.⁶⁷ The court in *Spokane Tribe of Indians v. State*⁶⁸ cited *Blatchford* for the proposition that states did not waive their immunity to suit by Indian tribes at the constitutional convention.⁶⁹ That much is true; *Blatchford* held that neither states nor Indian tribes waived their immunity to the other.⁷⁰ The issue, however, is whether Congress can abrogate state immunity with respect to a suit by an Indian tribe. The question is one of congressional power, not Indian power.

[A]lthough the lack of State-Indian mutuality may undercut the argument that the States *waived* their immunity to any and all suits by Indian tribes, the importance of that want of mutuality is diminished when a suit is brought pursuant to explicit congressional authorization, since the linchpin of abrogation must be the nature of the power pursuant to which Congress raised the Eleventh Amendment barrier.⁷¹

Since the Constitution gives Congress plenary power over Indian affairs, Congress has the authority to abrogate state immunity with respect to suits by Indian tribes.⁷²

In upholding states' Eleventh Amendment arguments, district courts have read *Blatchford* not to address the question whether Congress had the power to abrogate state immunity on behalf of Indian

66. *Id.* at 658-61.

67. After *Cheyenne River Sioux Tribe*, 3 F.3d 273 (8th Cir. 1993), one hopes that these decisions ultimately will be reversed or overruled on appeal. Presently, however, unnecessary constitutional problems and delay make it difficult for Indian tribes to obtain financing for their projects.

68. 790 F. Supp. 1057 (E.D. Wash. 1991).

69. *Id.* at 1061.

70. *Blatchford v. Village of Noatak*, 111 S. Ct. 2578, 2581 (1991).

71. *Seminole Tribe*, 801 F. Supp. at 663.

72. *Id.* at 660-61.

tribes.⁷³ But the Court in *Blatchford* held that Congress does have the power to abrogate state immunity whenever it makes its intention "unmistakably clear in the language of the statute."⁷⁴ The Court would not have considered whether Congress intended to abrogate state immunity in 28 U.S.C. § 1362 if it doubted Congress' power to do so. The *Union Gas* holding, finding that Congress has the power to abrogate state immunity whenever it legislates pursuant to an Article I power, convincingly supports this analysis.⁷⁵

The district courts have also misinterpreted *Union Gas*, particularly by denigrating it as a mere plurality opinion which they believe they can ignore.⁷⁶ None of these decisions considers the effect of Justice White's concurring opinion in *Union Gas* or, more generally, the binding effect of a Supreme Court plurality opinion.

The four Justices in the *Union Gas* plurality held that Congress has the power to abrogate state immunity when it legislates pursuant to any Article I power.⁷⁷ Justice White agreed "that Congress had the authority under Article I to abrogate the Eleventh Amendment immunity of the States."⁷⁸ Had Justice White thought otherwise, he would have limited the power to abrogate to legislation arising under the Interstate Commerce Clause, the constitutional provision directly in question in *Union Gas*. In fact, even the four dissenters agreed that if Congress could abrogate state immunity under the Interstate Commerce Clause, it could abrogate state immunity under *any* Article I power.⁷⁹

However one reads the concurring and dissenting opinions, a plurality opinion is just as controlling as a majority opinion.⁸⁰ In *Marks v. United States*,⁸¹ the Supreme Court instructed lower courts on how to

73. Even the court in *Seminole Tribe*, which barred the State of Florida from invoking the Eleventh Amendment as a defense to an IGRA action, made this mistake. *Id.* at 663 ("*Blatchford* is wholly silent on the principal issue raised here of congressional power to abrogate . . .").

74. *Blatchford*, 111 S. Ct. at 2584 (citing *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)).

75. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 15 (1989).

76. See, e.g., *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. State*, 776 F. Supp. 550, 558-59 (S.D. Ala. 1991).

77. *Union Gas*, 491 U.S. at 14-19.

78. *Id.* at 57 (White, J., concurring in part, dissenting in part). Justice White obviously disagreed with much of the plurality's reasoning, but he did not say why. *Id.*

79. *Id.* at 42 (Scalia, J., dissenting).

80. *Planned Parenthood v. Casey*, 947 F.2d 682, 693-94 (3rd Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 112 S. Ct. 2791 (1992).

81. 430 U.S. 188 (1977).

determine the binding effect of a plurality opinion: "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"⁸² The "narrowest grounds" on which Justice White concurred in *Union Gas* are that Congress has the power to abrogate state immunity when it legislates pursuant to any Article I power. Hence, lower courts *must* follow that holding.

Several district courts have refused to follow *Union Gas* in IGRA actions based on speculation that it is likely to be modified or overruled.⁸³ They base their argument on the fact that Justices Brennan and Marshall have been replaced by conservative Justices Souter and Thomas, who may agree with the dissenters' position. Such personalized subjective jurisprudence is improper.

The district court decisions further misinterpret *Union Gas* by arguing that Congress cannot abrogate state immunity under the Indian Commerce Clause, regardless of Congress' authority under the Interstate Commerce Clause, because the two clauses "have very different applications."⁸⁴ Not only does the argument ignore the fact that *Blatchford* and *Union Gas* permit Congress to abrogate state immunity when legislating pursuant to any Article I power, it also fails on its own terms. Undisputedly, the Interstate and Indian Commerce Clauses are different. The Interstate Commerce Clause maintains "free trade among the states even in the absence of implementing federal legislation," while the Indian Commerce Clause "provide[s] Congress with plenary power to legislate in the field of Indian affairs."⁸⁵ But this difference is irrelevant to whether Congress has the power to abrogate state immunity when legislating under the Indian Commerce Clause, where its power is at least as great as its power under the

82. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Determining the "narrowest grounds" for a concurrence may be difficult when there are more than two opinions in the majority. See *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991). The required analysis is generally beyond the scope of this article.

83. See, e.g., *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. State*, 776 F. Supp. 550, 558-59 (S.D. Ala. 1991).

84. *Poarch Band*, 776 F. Supp. at 559 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)); see *Spokane Tribe of Indians v. State*, 790 F. Supp. 1057, 1060 (E.D. Wash. 1991) (citing *Cotton Petroleum*).

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

Interstate Commerce Clause.⁸⁶ *Cotton Petroleum Corp. v. New Mexico*, the case that the *Poarch Band* and *Spokane Tribe* courts cite as holding otherwise, has nothing to do with the issue of Congress' power to abrogate state immunity.⁸⁷

2. Consent/Waiver

The second exception to the Eleventh Amendment is consent to suit or waiver of immunity from suit. A tribe may bring an IGRA action in federal court against a state that consents to suit or waives its immunity from suit.⁸⁸ *Blatchford* precludes a waiver based on states' ratification of the Constitution.⁸⁹ However, if a state has entered into an IGRA gaming compact that provides for resolution of subsequent suits in federal court, an enforceable waiver would presumably be found.⁹⁰

3. *Ex Parte* Young

The third exception to the Eleventh Amendment is the *Ex parte Young* doctrine that state officials may be sued to obtain prospective injunctive relief. In *Ex parte Young*,⁹¹ the Supreme Court enjoined Minnesota's Attorney General from enforcing a state law that violated the Fourteenth Amendment's Due Process Clause. The Attor-

86. *Seminole Tribe v. State*, 801 F. Supp. 655, 662 n.8 (S.D. Fla. 1992) (citing, inter alia, *Wabash R. v. United States*, 168 F. 1, 4 (7th Cir. 1909) ("other provisions of the Constitution which may limit the exercise of the power over interstate commerce may have no application to foreign commerce [or Indian commerce]")).

87. *Sault Ste. Marie Tribe*, 800 F. Supp. at 1489; see *Seminole Tribe*, 801 F. Supp. 655, 662-63 (S.D. Fla. 1992). The court in *Sault Ste. Marie Tribe* nonetheless barred the Tribe's IGRA action against the State of Michigan on Eleventh Amendment grounds, "both because *Union Gas* was a plurality opinion and because at least part of the rationale of the *Union Gas* holding that Congress can abrogate state sovereign immunity when legislating pursuant to the Interstate Commerce Clause was that states had implicitly agreed to such regulation when forming the union." *Sault Ste. Marie Tribe*, 800 F. Supp. at 1489 (citations omitted; emphasis added). As discussed above, this reasoning fails on both counts. See *supra* notes 45-48, 76-82 and accompanying text.

88. *Spokane Tribe*, 790 F. Supp. at 1060 (acknowledging the principle, but holding that there was no basis "to find the State has consented to be sued").

89. *Blatchford v. Village of Noatak*, 111 S. Ct. 2578 (1991).

90. It may even be that a state waives any claim to immunity for a federal suit based on a failure to negotiate in good faith with one tribe if it has taken advantage of IGRA by entering into compacts with other tribes. See *Cheyenne River Sioux Tribe v. State*, 3 F.3d 273, 280-81 (8th Cir. 1993). However, this seems contrary to existing Supreme Court precedent. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding state participation in federal programs insufficient to establish state's consent to be sued in federal court). In any event, most cases will concern states that have not entered into any compacts and are being sued on that very count.

91. 209 U.S. 123 (1908).

ney General argued that the Court could not limit his discretion to enforce state law. The Court accepted the principle, but said that it did not apply to these facts. That is, because a state official has no right to violate the United States Constitution or federal statutory law, "[a]n injunction to prevent him from doing that which he has no legal right to do is not an interference with" his discretion.⁹² A state official who violates federal law does not share the state's immunity from suit. Violating federal law strips the official of his "official or representative character" and subjects him "to the consequences of his individual conduct."⁹³

Interpreted broadly, *Ex parte Young* could effectively override all states' claims of Eleventh Amendment immunity, since the penalties imposed against the states' officials are likely to compel compliance. The Supreme Court, however, has limited the scope of *Ex parte Young* by requiring a plaintiff invoking the case to satisfy three requirements. The plaintiff must (1) allege a violation of federal law, (2) name a state official and not the state as a defendant, and (3) request prospective injunctive relief.⁹⁴

The *Ex parte Young* doctrine seems to permit an Indian tribe to bring an IGRA action against the state officials responsible for negotiating a gaming compact. All the tribe must do is allege a violation of federal law (i.e., IGRA); name state officials rather than the state as defendants; and request only prospective injunctive relief, such as an order requiring negotiations in good faith.

Three federal district courts have considered whether state officials can be sued under IGRA where a state cannot be sued directly. None of these courts, however, has applied the law correctly. In *Spokane Tribe*, the Tribe sued the State of Washington and two state officials for refusing to negotiate a gaming compact in good faith.⁹⁵ The

92. *Id.* at 159.

93. *Id.* at 160. A state official "will be stripped of his authority if he acts in violation of the United States Constitution or federal statutory law." *Barnes v. Cohen*, 749 F.2d 1009, 1019 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) ("Thus, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law."); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 656 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 89 (1984) ("Thus it is quite plain that the Eleventh Amendment is no bar to the prospective injunctive relief which was ordered by the district court insofar as that relief is predicated on constitutional or federal statutory claims.").

94. *TRIBE*, *supra* note 62, § 3-25, at 177 n.25 (2d ed. 1988) (citing, *inter alia*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 125 (1908)).

95. *Spokane Tribe of Indians v. State*, 790 F. Supp. 1057 (E.D. Wash. 1991).

court dismissed the action against the state on grounds that it was barred by the Eleventh Amendment, but refused to dismiss the action against state officials because the Tribe would otherwise lack a forum in which to bring its action.⁹⁶

The *Spokane Tribe* court reached the right result for the wrong reason. The fact that the Tribe could not bring an action against the state did not, by itself, justify an action against state officials. If it did, the Eleventh Amendment would be easily circumvented and thus rendered useless. The *Ex parte Young* doctrine permits a plaintiff to bring an action against state officials only when he satisfies the requirements set forth by the Supreme Court. It is the Tribe's compliance with those requirements, not the lack of any alternative forum, that justifies the result in *Spokane Tribe*.

Another district court erroneously added two additional limitations on the *Ex parte Young* doctrine in an IGRA action:

The first is that a suit seeking to compel a state officer to perform a discretionary act may not be maintained. The second is that a suit naming a state officer which is in reality a suit against the State is barred by the Eleventh Amendment no less than if it had been brought against the State itself.⁹⁷

In *Poarch Band of Creek Indians v. State*, the court held that negotiating a gaming compact "is by no means ministerial and involves discretion such that an order requiring the governor to negotiate would exceed the scope of *Ex parte Young*."⁹⁸ It also held that the action against the governor was the equivalent of an action against the State of Alabama, since "the State itself would be the entity entering into any compact the governor negotiates."⁹⁹ Thus, the court permitted the Governor to invoke the Eleventh Amendment as a defense.¹⁰⁰

The *Poarch Band* court cited *Ex parte Young* for the proposition that a federal court cannot "control the discretion of an officer."¹⁰¹ This proposition is correct, but the court's interpretation of it is inaccurate. In *Ex parte Young*, the Supreme Court held that a state official who violates federal law is not acting within his discretion.

96. *Id.* at 1063.

97. *Poarch Band of Creek Indians v. State*, 784 F. Supp. 1549, 1551-52 (S.D. Ala. 1992).

98. *Id.* at 1551.

99. *Id.* at 1552.

100. *Id.* at 1551-52; see also *Ponca Tribe of Indians v. State*, No. 92-988-T, slip op. at 9 (W.D. Okla. Sept. 8, 1992) (following *Poarch Band's* reasoning).

101. *Poarch Band*, 784 F. Supp. at 1551. This is really a misquote of *Ex parte Young*, 209 U.S. 123 (1908), where the Supreme Court stated: "the court cannot control the exercise of the discretion of an officer." *Id.* at 158.

Similarly, a state official who violates IGRA by refusing to negotiate a gaming compact in good faith is not acting within his discretion.

The *Poarch Band* court also erred in barring the action against the Governor on the theory that it was essentially an action against the State of Alabama. In a sense, every action against a state official arguably is an action against the state. The effect of *Ex parte Young* and its progeny is to create a narrow exception to state immunity by permitting state officials to be sued in certain limited circumstances. An IGRA action against a state official does not violate the Eleventh Amendment because it fulfills the requirements the Supreme Court established for invoking *Ex parte Young*.¹⁰²

B. Tenth Amendment

1. Supreme Court Test

The Tenth Amendment provides “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁰³ Deciding whether the Tenth Amendment prohibits federal action is the same as deciding whether another portion of the Constitution authorizes the action.¹⁰⁴

In *New York v. United States*, the Court invalidated as inconsistent with the Tenth Amendment a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“Act”). The Act required states to “take title” to certain radioactive waste generated within their borders and to assume the corresponding liability if, by 1996, they did not ratify legislation entering themselves into a conforming interstate compact (or make appropriate internal arrangements) for the disposal of such waste.

Based largely on historical analysis of fundamental differences between the Articles of Confederation (which authorized the federal government to exercise power over states) and the Constitution (which authorized the federal government to exercise power directly

102. The cases that the *Poarch Band* court cites as holding otherwise are not on point. In *Cory v. White*, 457 U.S. 85 (1982), for example, the Supreme Court dismissed an interpleader action involving two state officials because the officials were not charged with violating any law. *Id.* at 88-91. In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court held that federal courts cannot grant prospective injunctive relief against state officials on the basis of *state-law* claims. *Id.* at 106.

103. U.S. CONST. amend. X.

104. *New York v. United States*, 112 S. Ct. 2408, 2419 (1992). *New York* is the key Supreme Court case interpreting the Tenth Amendment.

over individuals),¹⁰⁵ the Court held that, even in areas where federal power is supreme, "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"¹⁰⁶ The Court held that Congress may instead offer states (1) "incentives" to regulate in ways Congress deems appropriate or (2) the choice of regulating according to federal standards or (3) preemption of state law by federal law.¹⁰⁷ The critical underlying policy served by this distinction is one of political accountability: federal officials who regulate individuals directly would bear any resulting political fallout; they cannot be allowed to shift the "brunt of public disapproval" to state officials by forcing *them* to regulate.¹⁰⁸ The Court concluded:

The Federal Government may not compel the States to enact or administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.¹⁰⁹

Applying these principles, the Court unanimously held constitutional the portion of the Act allowing states to surcharge one another for accepting the waste and, ultimately, to deny access to other states.

The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citi-

105. Justice O'Connor's majority opinion in *New York* closely parallels her dissenting opinion in *FERC v. Mississippi*, 456 U.S. 742, 791-96 (1982). In the ten intervening years, of course, the composition of the Court changed dramatically.

106. *New York*, 112 S. Ct. at 2420 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Congress can enact legislation that state *courts* are required to apply under the Supremacy Clause. However, the Court held that "no comparable constitutional provision authorizes Congress to command state legislatures to legislate." *Id.* at 2430.

107. *New York*, 112 S. Ct. at 2423-24.

108. *Id.* at 2424.

109. *Id.* at 2435. The Commerce Clause authorizes Congress to preempt *all* state regulation in the field. *Cf. id.* at 2419-20. The Court held:

[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' powers to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes.

Id. at 2424 (citations omitted).

zens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.¹¹⁰

The Court reached a contrary conclusion with respect to the "take title" portion of the Act. It stated as follows:

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. . . . On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.¹¹¹

2. *Application to IGRA*

It seems likely that the Supreme Court would hold that IGRA does not run afoul of the Tenth Amendment, either because it requires no action by states at all or because it does not impermissibly "coerce" state regulation in the manner found unconstitutional in *New York v. United States*.¹¹²

Absent IGRA, states would have no right to regulate Indian gam-

110. *Id.* at 2427.

111. *Id.* at 2428.

112. The distinction between "incentives" or "encouragement," on the one hand, and "coercion," on the other hand, is at best unclear and analytically unhelpful. As the Supreme Court earlier said in *FERC v. Mississippi*, 456 U.S. 742 (1982), "it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to 'coerc[e] the States' into assuming a regulatory role . . ." *Id.* at 766 (citation omitted).

ing at all.¹¹³ While cast in mandatory terms (states *shall* negotiate in good faith, *shall* submit proposed gaming compacts to court-appointed mediators, etc.¹¹⁴), IGRA (like most portions of the Act at issue in *New York*) should be read to afford states the *option* to choose between involving themselves in regulating Indian gaming¹¹⁵ or accepting tribal-federal regulation with *no* state involvement. The Act before the Court in *New York* contained similar language (“each State shall be responsible for providing . . . for the disposal of . . . low level radioactive waste”¹¹⁶) that the Court found was not mandatory. Despite the use of the word “shall” in the Act, the Court held that it could avoid what otherwise might have been serious constitutional problems by construing the language to provide incentives rather than a mandate for state regulation.¹¹⁷ Unlike the “take title” provision in the Act, which ultimately would require some sort of regulation by states, IGRA allows states to abandon the field entirely to federal (and tribal) authority. States need not regulate Indian gaming or bear any associated expense. Accordingly, IGRA does not violate the Tenth Amendment under the *New York* analysis.¹¹⁸

3. *Judicial Interpretation of IGRA*

In *Cheyenne River Sioux Tribe v. State*,¹¹⁹ the Eighth Circuit Court of Appeals held that because a state can ignore a tribe’s request to negotiate, despite the availability of incentives to participate in negotiations, IGRA does not contravene the Tenth Amendment.¹²⁰ In

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

114. See, e.g., 25 U.S.C. § 2710(d)(7)(B)(iv) (1988).

115. The Act at issue in *New York* authorized states to impose what otherwise would have been constitutionally impermissible discrimination on interstate commerce. See *New York*, 112 S. Ct. at 2429.

116. *New York*, 112 S. Ct. at 2415 (quoting 42 U.S.C. § 2021c(a)(1)(A)). Other parts of the Act not quoted by the Court provided, for example, that by July 1, 1986, each state without a disposal facility of its own “shall ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State.” 42 U.S.C. § 2021e(e)(1)(A) (1988) (emphasis added).

117. *New York*, 112 S. Ct. at 2425.

118. It seems likely that Justice O’Connor would agree, given the portion of her dissenting opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982), in which she expressed her view that the regulatory scheme at issue in *Hodel*, under which states could choose to submit their proposed state regulatory programs to the Secretary of the Interior for approval or could do nothing (in which case the Secretary would develop and implement an exclusively-federal program), was constitutional. *FERC*, 456 U.S. at 783 (O’Connor, J., dissenting).

119. 3 F.3d 273 (8th Cir. 1993).

120. *Id.* at 281.

so holding the court appropriately applied the *New York* analysis.

Outside the Eighth Circuit, only one federal district court has considered whether IGRA compels states to regulate Indian gaming; in *Ponca Tribe of Indians v. State*,¹²¹ the court held that IGRA did compel state regulation, and thus violated the Tenth Amendment.¹²² The court reasoned that "although a State will not necessarily be required to enact or enforce a regulatory program [under IGRA], the possibility of compulsion, that a state government would be commanded by Congress, acting through the Secretary of the Interior, to enact state regulation governing gaming, exists."¹²³

Although the *Ponca Tribe* court said that IGRA raised the "possibility of compulsion," the only "evidence" cited for its statement appears in a footnote suggesting that a compact prescribed by the Secretary of the Interior might require a state to enact implementing legislation or establish a regulatory mechanism.¹²⁴ The footnote lacks a citation to IGRA. That is not surprising, since IGRA does not compel states to regulate Indian gaming in this situation.¹²⁵

The Tenth Amendment bars acts of Congress that compel states to regulate. It does not bar acts of Congress that merely raise the "possibility" that a state might be compelled to regulate. Should that possibility become a reality, it would violate the Tenth Amendment. But, as discussed above, IGRA does not compel states to regulate Indian gaming. Even if it did, the offending portion of the statute could be voided and the rest of the statute retained.¹²⁶

Conclusion

Properly construed in accordance with existing Supreme Court precedent, the Tenth and Eleventh Amendments do not prevent Indian tribes from enforcing IGRA in accordance with its terms. States cannot invoke the Tenth Amendment as a defense because IGRA does not compel them to regulate Indian gaming. States cannot in-

121. No. 92-988-T, slip op. (W.D. Okla. Sept. 8, 1992).

122. *Id.* at 12. The *Ponca Tribe* court implied that all of IGRA was void. This need not be so, even if IGRA is held to violate the Tenth Amendment. Not only does IGRA specifically provide for the severability of any provision held to be invalid, 25 U.S.C. § 2721 (1988), the Supreme Court in *New York* upheld the rest of the Act, which lacked a severability provision, after severing the "take title" incentive on the ground that the Act, as judicially construed, gave states a choice between adopting the federal program and doing nothing. *New York*, 112 S. Ct. at 2434.

123. *Ponca Tribe*, No. 92-988-T, slip op. at 11.

124. *See id.* at 11 n.5.

125. *See supra* text accompanying notes 32-33.

126. *See supra* note 122.

voke the Eleventh Amendment as a defense because Congress both intended to abrogate state immunity in IGRA and had the power to do so. Cases holding otherwise misinterpret both IGRA and the United States Constitution.

