

**SUCH GAMING CAUSES TROUBLE:  
CONSTITUTIONAL AND STATUTORY  
CONFUSION WITH THE INDIAN GAMING  
REGULATORY ACT**

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## I. ORIGIN OF THE SPECIES

Indian relations have always been within the exclusive purview of the federal government. Article I, section 8 of the U.S. Constitution grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>1</sup> The Supreme Court has interpreted this provision as a grant to Congress of plenary and exclusive jurisdiction over Indian affairs.<sup>2</sup> As such, the states may only legislate in the realm of Indian affairs where Congress has granted the states power to do so.<sup>3</sup> One area where Congress has delegated some authority to the states is in the area of crime control. Under a 1953 law popularly known as Public Law 280,<sup>4</sup> state courts are empowered to enforce violations of state penal law on Indian reservations.<sup>5</sup> Public Law 280 also empowers those same state courts to adjudicate private civil disputes arising on Indian reservations.<sup>6</sup> Many tribal governments at the time lacked adequate judicial infrastructure, and it was believed that the states’ local courts would be able to do a better job of handling these cases than the federal district courts, which were often distant and hard to access from Indian reservations.<sup>7</sup> Public Law 280, however, does not empower state governments to assume general civil-

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1. U.S. CONST., art. I, § 8.

2. *Morton v. Mancari*, 417 U.S. 535, 551-53 (1974).

3. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57 (1978).

4. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26 and 28 U.S.C. § 1360 (2006)).

5. “Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.” 18 U.S.C. § 1162(a) (2006).

6. “Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.” 28 U.S.C. § 1360(a) (2006).

7. S. REP. NO. 83-699, at 5 (1953).

regulatory control over Indian reservations—rather, Public Law 280’s grant of civil jurisdiction is limited to providing a forum for Indian litigants who might otherwise be unable to have their grievances redressed.<sup>8</sup> Not all states are covered by Public Law 280, but the vast majority of Indians in the United States live in Public Law 280 jurisdictions.<sup>9</sup>

The Indian Gaming Regulatory Act of 1988 (IGRA), the statute that regulates Indian gaming in the United States, adapts Public Law 280’s division between civil-regulatory laws and penal laws (or, in Supreme Court parlance, “criminal-prohibitory laws”) to regulate Indian gaming. If a state authorizes a particular form of gaming under its civil-regulatory laws, Indian tribes are free to operate that game or type of game. If state law applies its criminal-prohibitory laws to ban a particular form of gaming, Indians may not operate that game or type of game. Unlike Public Law 280, the IGRA applies nationwide.

The IGRA, however, is poorly drafted and ambiguous, and fails to specify standards for how to determine whether a state approaches a particular game under its civil-regulatory laws or its criminal-prohibitory laws. Ordinarily, this would not be a problem. Under long-standing principles of administrative law, the agency charged with administering the IGRA would develop binding regulations interpreting the ambiguous language, meaning that the question would be resolved at the agency level.<sup>10</sup> The trouble is that the IGRA has no such administering agency, because the statute delegates nearly all authority for regulating Indian gaming to state regulators. This means that the task of interpreting the IGRA falls to the federal courts, which have developed diametrically opposed methods of how to decide whether a specific state gaming law is civil-regulatory or criminal-prohibitory. This circuit split, which has existed since the mid-1990s, is the primary topic of this paper.

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8. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 385 n. 11 (1976).

9. For a more detailed overview of Public Law 280 see generally Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998).

10. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-5 (1984).

### A. Prehistory

The story of how of casino gaming became a multi-billion dollar industry begins in an unlikely place: in a mobile home owned by Russell and Helen Bryan, two Chippewa Indians living on the Leech Lake Reservation, Itasca County, Minnesota.<sup>11</sup> The Itasca County tax assessor had sent the Bryans a property tax bill of \$147.95; Helen Bryan, with five children and an unemployed husband to support, could not afford the tax bill and contacted the reservation's newly-established Legal Aid office. Legal Aid agreed to represent the Bryans and others similarly situated, seeking a declaratory judgment that the State of Minnesota lacked authority to tax Indians residing on reservation lands. The Bryans lost at trial and appealed to the Minnesota Supreme Court, which held that Minnesota was indeed empowered to tax Indians on reservation lands.<sup>12</sup> The Bryans then appealed again to the Supreme Court of the United States, which granted *certiorari* and reversed the Minnesota Supreme Court.<sup>13</sup>

Writing for a unanimous Court in *Bryan v. Itasca County*, Justice Brennan opined that Public Law 280 did not confer states the power to tax Indians or Indian-owned property on reservation land.<sup>14</sup> Rather, Public Law 280 constituted two distinct and limited grants of jurisdictions to the states. First, Public Law 280 created a limited grant of civil jurisdiction to state courts over Indian country to permit members of Indian tribes without satisfactory "tribal law-and-order organizations" to seek civil relief. (Tribal judiciaries at the time were notoriously inadequate, and the distant federal district courts were not convenient fora for Indians to have their grievances redressed.) Second, Public Law 280 created a grant of criminal jurisdiction to state law enforcement officers to stop on-reservation crime.<sup>15</sup> Congress' did so because many tribes of the day were not sufficiently well-organized to curb

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11. For an excellent, in-depth account of the circumstances of *Bryan* see generally Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008).

12. See *Bryan v. Itasca Cnty.*, 228 N.W.2d 249, 256 (Minn. 1975), *rev'd*, 426 U.S. 373 (1976).

13. See *Bryan*, 426 U.S. at 373.

14. *Id.* at 393.

15. *Id.* at 385 n. 11.

on-reservation lawlessness. Congress believed that this problem would “best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.”<sup>16</sup>

The *Bryan* court explicitly rejected the idea that Public Law 280 was a general grant of civil jurisdiction over tribal lands, referencing the “consistent and uncontradicted references in the legislative history to ‘permitting State courts to adjudicate civil controversies’ arising on Indian reservations, and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.”<sup>17</sup> Justice Brennan’s opinion barred the states from assuming general civil-regulatory control over Indian reservations unless explicitly provided by Congressional enactment.<sup>18</sup>

Freed from burdensome state-level regulations and bureaucracy after *Bryan*, Indian tribes pursued a variety of schemes to promote economic development, most of which were grounded in this newfound exemption. For instance, the Cabazon Band of Mission Indians started a successful mail-order tobacco operation and opened a liquor business, using their tax-exempt status to undercut local liquor merchants.<sup>19</sup> (The Cabazon Band also proposed, but ultimately killed, a proposal to sell “traditional Indian herbs” to the public such as marijuana and peyote.)<sup>20</sup> The Seminole Tribe in Florida opened a high-stakes bingo parlor, the first of its kind, in 1979.<sup>21</sup>

Of these projects, gaming proved the most lucrative and, ultimately, the most widespread. State authorities, unhappy with these operations, eventually hit on the idea of using state anti-gambling statutes to shut down Indian bingo and keno halls.<sup>22</sup> Public Law 280 and *Bryan* were put on a collision course—did the state anti-gambling penal laws apply, or was the state trying to apply its civil-regulatory regime to Indian gaming in violation of *Bryan*? The circuit courts of ap-

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16. H.R. REP. NO. 83-848, at 5-6 (1953).

17. *Bryan*, 426 U.S. at 384 (internal citations omitted).

18. *Id.* at 385-86.

19. *See* Washburn, *supra* note 11, at 958.

20. *Id.*

21. *See* Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981).

22. *Id.*

peal split; it was evident that Supreme Court intervention would eventually be necessary to resolve it.<sup>23</sup>

*B. Cabazon and the bingo boom of the 1980s*

The issue finally came to the Supreme Court in 1987, in *California v. Cabazon Band of Mission Indians*.<sup>24</sup> At the time, the Cabazon Band of Mission Indians, the same Indian tribe that had considered selling “traditional Indian herbs” to the public, operated a high-stakes bingo parlor and card club on their reservation in Riverside County, California, about two hours east of downtown Los Angeles. The State of California sought to apply its statutory restrictions on bingo to the Cabazon Indians under Public Law 280 and sought criminal penalties for violations of the California anti-gambling statute.<sup>25</sup> The Cabazon Band, in contrast, claimed that the law at issue was fundamentally civil-regulatory, not criminal-prohibitory. The state of California permitted other persons to operate similar games under regulatory restrictions, the Indians argued, meaning that the bingo law in question was actually civil-regulatory and outside the scope of jurisdiction under *Bryan*.

The Supreme Court sided with the Cabazon Band. The majority opinion held that if state law completely banned a particular form of gaming, Public Law 280’s criminal jurisdiction would apply, giving the state the ability to restrict gaming operations on reservation lands.<sup>26</sup> If state law fell short of a total ban, *Bryan* would apply, giving Indian tribes free rein to run gaming operations on tribal lands, including games not authorized by state law.<sup>27</sup> The Court declined to establish a bright-line rule regarding which state laws were “civil-regulatory” in nature and which were “criminal-prohibitory,” instead preferring to examine the totality of the circumstanc-

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23. See, e.g., *Cabazon Band of Mission Indians v. Cnty. of Riverside*, 783 F.2d 900, 902-03 (9th Cir. 1986) (likewise finding criminal jurisdiction inapplicable); *Iowa Tribe of Indians v. Kansas*, 787 F.2d 1434, 1440 (10th Cir. 1986) (finding criminal jurisdiction applicable); *Butterworth*, 658 F.2d at 316-17 (finding criminal jurisdiction inapplicable).

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

25. The California statute at issue outlawed all bingo games except for low-stakes charity bingo. Violators of the statute were subject to misdemeanor criminal prosecution. The Cabazon Band was holding high stakes bingo games with bets far above the limits prescribed by law. CAL. PENAL CODE § 326.5 (West 2012); *Cabazon*, 480 U.S. at 205.

26. *Cabazon*, 480 U.S. at 211.

27. *Id.* at 209-11.

es.<sup>28</sup> This reliance on the totality of the circumstances was predicated on the lack of precedent on point at the lower court level. Thus, the Supreme Court effectively kicked the issue back down to the lower courts, showing faith in the lower courts' ability to develop precedent case-by-case. In the words of the majority opinion, "the lower courts have not demonstrated an inability to identify prohibitory laws."<sup>29</sup>

*Cabazon* led to an immediate explosion in Indian gaming operations. Congress estimated that, at the time of *Cabazon*, Indian gaming generated at least \$100 million in annual revenues for tribes;<sup>30</sup> since then, Indian gaming has grown to be a \$26.5 billion industry.<sup>31</sup> Gaming, already a lucrative enterprise before its explicit judicial sanction, soon became a major driver of some Indian reservations' economic development, as Indian tribes opened high-stakes bingo parlors by the dozens.<sup>32</sup> Congress, seeking to regulate this burgeoning industry and keep organized crime out of Indian gaming, passed the Indian Gaming Regulatory Act of 1988 in response.<sup>33</sup>

## II. THE INDIAN GAMING REGULATORY ACT

### A. *Structure of the Act*

The IGRA establishes a framework for regulating Indian gaming. The IGRA divides Indian gaming into three classes: Class I, Class II, and Class III. Class I games are "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations," and are subject to tribal regulation but not state or federal regulation.<sup>34</sup> Class II games include "the game of chance commonly known as bingo (whether or not electronic, computer, or other

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28. *Id.*

29. *Id.* at 211 n. 10.

30. S. REP. NO. 100-446, at 2 (1988).

31. NATIONAL INDIAN GAMING COMMISSION, GAMING REVENUES 2005-2009.

32. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 266 (2004); *see also* Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245, 246 (D. Conn. 1986).

33. S. REP. NO. 100-446, at 5 (1988).

34. 25 U.S.C. § 2703(6) (2006).

technologic aids are used in connection therewith)<sup>35</sup> as well as non-banking card games<sup>36</sup> “that are explicitly authorized by the laws of the State.”<sup>37</sup> Class II gaming is not subject to state regulation, but is subject to tribal regulation, as well as federal regulation by the National Indian Gaming Commission. “All forms of gaming that are not class I gaming or class II gaming,” from horse racing to lotteries to slot machines to blackjack, are classified as Class III.<sup>38</sup> Class III gaming is subject to a complex web of federal, state, and tribal regulations. At present, about 220 tribes operate commercial (i.e., Class II or III) gaming enterprises.

The cornerstone of the IGRA’s Class III regulatory scheme is the Tribal-State Compact, a negotiated agreement that allocates civil and criminal jurisdiction between the Indian tribe and the State, addresses minimum licensing and safety standards, and sets forth the form and manner in which games are to be conducted.<sup>39</sup> To operate Class III games, a tribe must execute a Tribal-State Compact with the state where the gaming facility will be located.<sup>40</sup> A Tribal-State Compact governing Class III gaming is only permitted if conducted “in a State that permits *such gaming* for any purpose

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35. § 2703(7)(A)(i).

36. Banking card games are played against the dealer, rather than against other players. The most well-known examples of this type of game are blackjack and baccarat.

37. To illustrate this provision: In California, it is legal to gamble in card rooms, provided that no banking games are played. As such, an equivalent tribal-operated card room would be Class II. In a state without such legal card rooms, the same tribal-operated card room would be Class III. § 2703(7)(A)(ii).

38. § 2703(8); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 48-9 (1996) (providing examples of Class III games).

39. “Any Tribal-State compact negotiated . . . may include provisions relating to—  
(i) 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; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C) (2006).

40. § 2710(d)(1).

by any person, organization, or entity.”<sup>41</sup> If the state government does not enter into Tribal-State Compact negotiations in “good faith,” the IGRA requires that the State and the Tribe enter mediation to decide on compact terms.<sup>42</sup> If the state still refuses to accede to a mediated compact, or if the state refuses to negotiate by exercising its immunity to suit under the Eleventh Amendment, the Tribe may petition the Secretary of the Interior for a compact.<sup>43</sup> These provisions exist because Congress was concerned that state governments would act in bad faith during the compact process in order to protect existing commercial gaming enterprises against Indian competition.<sup>44</sup> The Secretary of the Interior is required to negotiate compact terms for the operation of Class III games on Indian land when all other attempts to negotiate with the State have been exhausted.<sup>45</sup>

During Tribal-State Compact negotiations, states are required to negotiate operational terms for “such gaming.” The IGRA, unfortunately, leaves “such gaming” undefined. In context, there are two ways that the phrase can be interpreted. The phrase can be interpreted as dealing with Class III gaming as a whole—in other words, if a state permits some Class III gaming that state must negotiate operational terms for all forms of Class III gaming. This interpretation, known as the “class-based test,” has been applied by the Second and Tenth Circuits.<sup>46</sup> “Such gaming” can also be interpreted as requiring negotiation for only those Class III games that are legal under state law. This alternative interpretation has been adopted by the Eighth and Ninth Circuits.<sup>47</sup> This circuit split is the primary topic of this paper; I will analyze the

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41. *Id.* (emphasis added).

42. § 2710(d)(7)(B).

43. *Seminole*, 517 U.S. at 75-76.

44. S. REP. NO. 100-446, at 13 (1988).

45. 25 U.S.C. § 2710(d)(7)(B)(vii) (2006). There are no current examples of Tribal-Federal Compacts. All current Class III compacts have been negotiated with state governments.

46. See *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312 (10th Cir. 2004); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031-32 (2d Cir. 1990); *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991).

47. See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-59 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278-79 (8th Cir. 1993); *accord Seminole Tribe of Fla. v. Florida*, 1993 WL 475999 at \*16 n.1 (S.D. Fla. Sept. 22, 1993), *rev'd on other grounds*, 11 F.3d 1016 (11th Cir. 1994).

class-based test first.

*B. The circuit split*

1. The class-based test

The class-based test treats the phrase “in a state that permits such gaming” as a simple yes/no question: Does the state in question permit any form of Class III gaming? If yes, then that state is required to negotiate terms for the operation of the full range of Class III games.<sup>48</sup> A state seeking to prevent Indians from operating casino-style games can avoid this requirement by banning Class III gaming outright, as Utah and Hawaii have done.<sup>49</sup> The state can also avoid this requirement to negotiate by asserting its Eleventh Amendment immunity to suit.<sup>50</sup> (In the event that that occurs, the tribe has no recourse but to petition the Secretary of the Interior for a compact, cutting the state out of the process entirely.) Under the class-based test, a state must permit *all* forms of Class III gaming—everything from blackjack to slot machines to horse racing—or else it must ban those games outright. The Second Circuit and Tenth Circuit have applied the class-based test.<sup>51</sup>

The Second Circuit first developed the class-based test in the case of *Mashantucket Pequot Tribe v. Connecticut*. There, the question initially arose because Tribal-State Compact negotiations between the State of Connecticut and the Mashantucket Pequot Tribe had reached an impasse over Class III gaming. The State of Connecticut refused to negotiate operational terms for casino games that were banned by state law, such as baccarat, roulette, and slot machines.<sup>52</sup> The Tribe sued, seeking to require the state to return to the negotiating table, or alternatively, to force mediation as prescribed by the IGRA.<sup>53</sup> The Second Circuit ruled in the Tribe’s favor. To permit states to make more fine-grained distinctions, the *Mashantucket* court held, would necessarily permit states to

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48. *Mashantucket*, 913 F.2d at 1031-32.

49. UTAH CONST. art. VI, § 27; HAW. REV. STAT. §§ 712-1220 to 712-1224 (2012).

50. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75-76 (1996).

51. *See Mashantucket*, 913 F.2d at 1031-32.

52. *Id.* at 1030.

53. 25 U.S.C. § 2710(d)(7)(B) (2006).

assume full regulatory jurisdiction over Indian gaming, thereby making the IGRA “a dead letter.”<sup>54</sup>

The Tenth Circuit, in *Northern Arapaho Tribe v. Wyoming*, faced a nearly identical fact pattern. In *Arapaho*, the Northern Arapaho Tribe sought a judicial declaration of bad faith from the Tenth Circuit, citing the State of Wyoming’s refusal to negotiate operational terms for Calcutta and pari-mutuel wagering.<sup>55</sup> Applying the class-based analysis from *Mashantucket*, the Tenth Circuit ordered the state to return to the negotiating table.<sup>56</sup> (The Tenth Circuit, however, added that the state’s defenses would also fail under the alternative game-based test.)<sup>57</sup>

These circuits argue that such a test for Class III games is in line with the plain language and overall intent of the statute. These courts cite the Senate committee report for IGRA, which explicitly endorsed the use of a class-based test for Class II gaming but was silent on Class III gaming.<sup>58</sup> These courts held that Congress meant to encourage negotiated gaming compacts between tribes and states as equal sovereigns, and to prevent states from acting in bad faith to protect existing gaming enterprises, thereby justifying the one-size-fits-all approach.<sup>59</sup> The emphasis under the class-based test falls on “in a state that permits *such gaming*,” i.e., requiring an examination of Class III gaming as a whole.

In jurisdictions where the class-based test applies, Las Vegas-style Indian gaming results. Gaming in Connecticut provides a good illustration of this. Before *Mashantucket*, gaming in Connecticut was limited to pari-mutuel betting, the state lottery, and charitable gaming,<sup>60</sup> with all other gaming

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54. *Mashantucket*, 913 F.2d at 1031.

55. “Pari-mutuel” betting is the technical term used to describe the betting system used in horse races, greyhound races, and jai alai.

56. *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312-13 (10th Cir. 2004).

57. *Id.* at 1311. (“We conclude that Wyoming must negotiate with the Tribe under either approach regarding the full gamut of any game, wager or transaction”).

58. *See United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (“the legislative history reveals that Congress intended to permit a particular [Class II] gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.”).

59. *Mashantucket*, 913 F.2d at 1031; S. REP. NO. 100-446, at 13 (1988).

60. These types of state laws are colloquially known as “casino night” or “Las Vegas night” laws. Forty-seven states and the District of Columbia have statutes permitting non-profits to operate games of chance in some form. Typical casino night statutes

banned.<sup>61</sup> Afterwards, nearly all forms of Class III gaming were made legal to operate, but only by two specific tribes. This statutory monopoly, granted to the Mashantucket Pequot Tribe, owner of Foxwoods, and the Mohegan Tribe, owner of Mohegan Sun, exists to this day.<sup>62</sup>

## 2. The game-based test

The alternative, the game-based test, created by the Eighth Circuit in *Cheyenne River Sioux Tribe v. South Dakota*,<sup>63</sup> and adopted by the Ninth Circuit in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,<sup>64</sup> declines to treat Class III gaming as an all-or-nothing proposition. Rather, the game-based test applies a more fine-grained version of *Cabazon*'s analysis to each individual game to determine if civil-regulatory or criminal-prohibitory jurisdiction would apply under Public Law 280.<sup>65</sup> If an individual game is subject to state civil-regulatory jurisdiction, then *Bryan* applies, and the Indians may operate it regardless of the limitations the state has placed on it.<sup>66</sup> Common restrictions include bet limits, operating hour restrictions, and restrictions on the kinds of people who can operate games. Thus, if a state statute permits charitable groups to operate slot machines, an Indian tribe may operate slot machines commercially, state anti-commercial-gambling statutes notwithstanding.<sup>67</sup>

In *Cheyenne River Sioux*, the Eighth Circuit held that the state of South Dakota, which permitted video keno but banned traditional keno, was not obligated to negotiate with a tribe regarding games banned by state law, though the court did not develop its analysis in depth.<sup>68</sup> The next year, the Ninth Circuit took a similar position in *Rumsey*, adopting and

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contain strict bet limits, mandate the use of volunteer labor, and require the operator to be a registered nonprofit. See, e.g., VT. STAT. ANN. tit. 13, § 2143 (2012)

61. CONN. GEN. STAT. §§ 7-186a-186l (1989) (repealed 2003), § 7-186m (1989) (repealed 1988), §§ 7-186n -186p (1989) (repealed 2003).

62. §§ 53-278a to 53-278g, 52-553.

63. 3 F.3d 273, 278-79 (8th Cir. 1993).

64. 64 F.3d 1250, 1257-59 (9th Cir. 1994).

65. See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-59 (9th Cir. 1994).

66. *Id.* at 1258; accord *Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268, 1282-83 (D. Idaho 1994).

67. See *Cheyenne River Sioux v. South Dakota*, 3 F.3d 273, 278-79 (8th Cir. 1993).

68. *Id.* at 279.

expanding on the Eighth Circuit's opinion. In *Rumsey*, the Rumsey Rancheria of Wintun Indians of Yolo County, California, sought to operate slot machines and banking card games, games prohibited by contemporary California law.<sup>69</sup> Citing *Cheyenne River Sioux*, the Ninth Circuit rejected the Rumsey Rancheria's claims, holding that "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."<sup>70</sup> The *Rumsey* court held that the statutory language should be treated as "in a state that *permits* such gaming," not "in a state that permits *such gaming*," as the Second Circuit held in *Mashantucket*.<sup>71</sup> In other words, the Ninth Circuit asks whether a particular game is permitted, not whether Class III gaming is permitted as a whole.

The game-based test relies on the long-standing interpretive principle of *expressio unius est exclusio alterius*, that to express one thing implies the exclusion of the other. The *Rumsey* court found that Congress intended to permit states to take their own gaming laws into account when entering into negotiations with Indian tribes. In its report, the Senate Committee explicitly endorsed the class-based test for Class II gaming, but remained silent regarding Class III gaming.<sup>72</sup> The Ninth Circuit found this omission, when combined with the statements of the legislation's sponsors, dispositive.

### *C. Tenth Amendment issues of the IGRA*

In addition to the questions of ordinary statutory interpretation, the class-based test raises Tenth Amendment issues, issues that should discourage its application.<sup>73</sup> In particular, the class-based interpretation raises the possibility that Congress might be unconstitutionally coercing the states into administering a federal program. Three previous courts have been presented with this Constitutional issue, and none has

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69. Many of California's Indian tribes are organized by "ranchería," an archaic Spanish word that translates roughly as "hamlet" or "village."

70. *Rumsey*, 64 F.3d at 1258.

71. *Id.* (emphasis added).

72. *Id.* at 1259.

73. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

addressed the question.<sup>74</sup> The Supreme Court's jurisprudence in *South Dakota v. Dole*,<sup>75</sup> *New York v. United States*,<sup>76</sup> and *National Federation of Independent Businesses v. Sebelius*<sup>77</sup> define Congress' powers with respect to state legislatures. Under *Dole*, *New York*, and *Sebelius*, Congress is empowered to provide state legislatures with incentives, financial or otherwise, to conform to federal direction provided that a four-part test is satisfied.<sup>78</sup> First, the incentives must exist to provide for the general welfare;<sup>79</sup> second, Congress' incentives must be unambiguous, letting states decide whether or not the incentives are worth the policy changes;<sup>80</sup> third, the condition imposed must be reasonably related to the federal interest in the program in question;<sup>81</sup> fourth, Congress' incentives must not violate any other provision of the Constitution.<sup>82</sup>

The Supreme Court added to this test in *New York v. United States*, holding that federal incentives cannot provide such heavy negative incentives that they rise to the level of coercion, such that the states are virtually required to regulate pursuant to federal direction.<sup>83</sup> This includes any statute that requires state legislatures to choose between two federally delineated alternatives.<sup>84</sup> The *New York* corollary to the *Dole* test makes the class-based test problematic: under the class-based test, states must eliminate all Class III gaming or permit Class III gaming as a whole, a Hobson's choice of the type explicitly forbidden by *New York*.<sup>85</sup>

Finally, in the high-profile *Sebelius* decision, the Court upheld the general principles of *Dole* and *New York*, but Justice Roberts' opinion striking down parts of the Affordable Care Act explicitly declined to draw a bright line between unconstitutional coercion and constitutional persuasion under

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74. See *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1019 n.2 (11th Cir. 1994), *aff'd on other grounds*, 517 U.S. 44; *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992).

75. 483 U.S. 203, 211-12 (1987).

76. 505 U.S. 144, 175-77 (1992).

77. 132 S. Ct. 2566 (2012).

78. *Dole*, 483 U.S. at 207.

79. *Id.*

80. *Id.*

81. *Id.* at 207-08.

82. *Id.*

83. See *New York v. United States*, 505 U.S. 144, 167, 188 (1992).

84. *Id.*

85. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990).

the Tenth Amendment.<sup>86</sup> It remains to be seen whether the issue will rise again.

Here, an in-depth discussion of these three cases is warranted. In *Dole*, the state of South Dakota challenged provisions of the National Minimum Drinking Age Act (“NMDA”) requiring states to maintain a drinking age of 21 or face the loss of federal highway funds.<sup>87</sup> South Dakota argued that the Tenth Amendment barred the federal government from imposing such “coercive” conditions on the receipt of the money. Writing for the majority, Justice Rehnquist held that the federal government’s conditions were constitutional, laying out a four-part test to determine whether federal incentives to the states are constitutional. First, Congress’ incentives must be in the service of the general welfare;<sup>88</sup> second, the costs and consequences of declining Congress must be unambiguous;<sup>89</sup> third, the conditions imposed must be pursuant to an authorized Congressional power and reasonably related to the use of that power;<sup>90</sup> fourth, Congress’ incentives must not violate any other portion of the Constitution.<sup>91</sup>

Justices O’Connor and Brennan, dissenting, argued that the NMDA was independently barred by the 21st Amendment.<sup>92</sup> Justice O’Connor further claimed that the expenditures were not reasonably related to the actions in question. Both Justices, however, agreed that Rehnquist’s test was proper for determining Constitutionality.<sup>93</sup>

The next development to refine this test was *New York v. United States*.<sup>94</sup> Here, the state of New York challenged provisions of the Low Level Radioactive Waste Policy Amendments Act that required the State of New York to secure access to a low-level radioactive waste disposal site or face penalties for noncompliance.<sup>95</sup> There were three noncompli-

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86. Nat’l Fed’n of Indep. Buss. v. Sebelius, 132 S. Ct. 2566, 2606-7 (2012).

87. *Dole*, 483 U.S. at 205.

88. *Id.* at 207.

89. *Id.*

90. *Id.* at 207-8.

91. *Id.*

92. *Id.* at 212 (Brennan, J., dissenting).

93. *Dole*, 483 U.S. at 212 (Brennan, J., dissenting).

94. *See New York v. United States*, 505 U.S. 144, 167 (1992).

95. Low Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986), *invalidated by New York v. United States*, 50 U.S. 144 (1992).

ance penalties that New York found objectionable: first, financial incentives; second, restrictions on states' ability to use out-of-state disposal sites; third, a provision that obligated the state of New York "to take title to the waste, be obligated to take possession of the waste, . . . [and] be liable for all damages directly or indirectly incurred [as a result of the waste]."<sup>96</sup> Justice O'Connor, writing for the Court, held that the financial incentives were Constitutional under *Dole* and that the use restrictions were permissible under the Commerce Clause. However, the take-title provision was struck down as impermissibly coercive.<sup>97</sup>

Lower courts have generally interpreted *New York* as imposing a totality-of-the-circumstances test for determining whether coercion exists.<sup>98</sup> Scholars generally concur, though some consider the coercion question to be a "fourth-and-a-half" prong of the test.<sup>99</sup> Since *New York*, there has been no Supreme Court jurisprudence further developing this test.<sup>100</sup> The *Sebelius* case, of course, used *Dole-New York* to strike down the Affordable Care Act's mandatory Medicaid expansion, but Justice Roberts' opinion refused to lay out a bright line standard.<sup>101</sup>

The game-based test does not raise any Tenth Amendment issues the way that the class-based test does, because the states are not required to make any changes to their gaming policies in order to comply with Congress' intent in passing the IGRA.<sup>102</sup> Rather, the game-based test only requires that the states permit Indians to operate games on a level playing field with other non-Indian operators, commercial or not.<sup>103</sup>

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96. 42 U.S.C. § 2021e(d)(2)(C) (1991), *invalidated by* *New York v. United States*, 505 U.S. 144 (1992).

97. *New York*, 505 U.S. at 186-87.

98. *See, e.g.*, *West Virginia v. U.S. Dep't of Health and Human Servs.*, 289 F.3d 281, 292-93 (4th Cir. 2002); *United States v. Meienberg*, 263 F.3d 1177, 1183 (10th Cir. 2001); *accord* *Bryant v. Mortgage Capital Res. Corp.*, 197 F. Supp. 2d 1357, 1366 (N.D. Ga. 2002).

99. *See* Lynn A. Baker, *The Twenty-Year Legacy of South Dakota v. Dole*, 52 S.D. L. REV. 468, 470 (2007). In any case, the analysis is virtually identical.

100. *See* *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that the statute in question regulated states *qua* database owners, not states *qua* states, making the Tenth Amendment inapplicable).

101. *Nat'l Fed'n of Indep. Buss. v. Sebelius*, 132 S. Ct. 2566, 2606-7 (2012).

102. *New York*, 505 U.S. at 177 ("[Congress may not] offer[] a state government no option other than that of implementing legislation enacted by Congress.").

103. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258

### III. WHY THE CLASS-BASED TEST INCORRECTLY INTERPRETS THE INDIAN GAMING REGULATORY ACT

There are three steps to interpreting the Indian Gaming Regulatory Act: first, through traditional tools of statutory interpretation, like the plain text of the statute, the legislative history, and legislative purpose; second, through the lens of the special Indian canons of interpretation that apply;<sup>104</sup> and third, by addressing the Tenth Amendment coercion question that arises.

The Indian Gaming Regulatory Act is a complex statute that creates a universal framework for regulating Indian gaming, covering everything from one-room bingo parlors to Foxwoods and Mohegan Sun, the two largest casinos in the nation. Examining the statute's structure and legislative history, Congress intended to provide a much more nuanced approach to commercial casino gambling than the one-size-fits-all approach advocated by Second and Tenth Circuits. There is some wiggle room, due to poor statutory drafting, but the general intent is fairly certain.

The relevant section of the Indian Gaming Regulatory Act reads: "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose by any person, organization, or entity."<sup>105</sup> However, Congress left "permits such gaming" undefined, as discussed *supra*.

#### *A. Traditional tools of statutory interpretation*

The obvious place to start parsing this ambiguous phrase is in the plain language of the statute.<sup>106</sup> When interpreting a statute, courts first turn to the obvious plain meaning of a statute in the absence of a specialized statutory definition.<sup>107</sup> If the statutory language itself is clear, a court will not resort

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(9th Cir. 1994).

104. Under normal circumstances, of course, the administering agency would promulgate binding rules interpreting the ambiguous language one way or the other. See *generally* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

105. 25 U.S.C. § 2710(d)(1) (2006).

106. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

107. *Id.*

to the legislative history.<sup>108</sup> The special Indian interpretive canons that give Indians the benefit of the doubt, discussed *infra*, do not apply when the language of the statute is clear on its face.<sup>109</sup>

The plain language of the statute states that Class III gaming is only permitted if conducted “in a State that *permits such gaming* for any purpose by any person, organization, or entity.”<sup>110</sup> It is important to note that part of the problem in deciding between interpretations of the IGRA is due to the differing constructions of “permits such gaming”: the Second and Tenth Circuits decouple “such gaming” from “permit,” while the Eighth and Ninth Circuits treat “permits” as the most important part of the clause.

To start with the dictionary definitions: Black’s Law Dictionary defines “permit” as “To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act.”<sup>111</sup> The statute’s requirement, that games be “permitted” for them to be the subject of negotiation for a compact, indicates that a particular game must be legal under state law, before they can be the subject of negotiation.<sup>112</sup> Obviously, a state that specifically legalized lottery tickets but outlawed slot machines would permit the former, i.e., have a civil-regulatory approach, and not permit the latter, using its penal laws. The alternative interpretation is, simply put, a stretch. Under the class-based test, “permits such gaming” covers all categories of Class III gaming, and overrides any state-law attempts to draw a distinction between types of Class III gaming. To employ the alternative interpretation would lead to a nonsensical result: it would suggest that Congress intended to grant Indian tribes the privilege to open casinos in every jurisdiction with a state lottery.<sup>113</sup>

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108. See *Burlington N. R.R. v. Okla. Tax Comm’n*, 481 U.S. 454, 461 (1987).

109. The special Indian canons of construction stemming from *Worcester* only apply when ambiguity in the statute exists, and the legislative intent is unclear. See *Rice v. Rehner*, 463 U.S. 713, 732–33 (1983).

110. § 2710(d)(1) (emphasis added).

111. BLACK’S LAW DICTIONARY (Revised 4th ed. 1968).

112. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

113. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990).

### *B. Legislative history of the IGRA*

The legislative history supports the use of the game-based test. The key to this discussion is the Senate committee report accompanying the IGRA. The committee report made its adoption of the class-based test explicit, but only for the specific Class II framework, for which judicial precedent already existed in *Cabazon*.<sup>114</sup> From the committee report:

The Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a state which impose a regulatory scheme . . . to determine whether Class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.<sup>115</sup>

In contrast, the Class III language is devoted to the negotiation process—anticipating that the specifics of how to conduct Class III gaming would be negotiated on a case-by-case basis between tribal and state authorities through the compact process. Again, from the committee report:

The Committee concluded that that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gambling, jai alai, and so forth.<sup>116</sup>

The committee report includes no further specifics as to which games must be negotiated by the states, and no notes endorsing the class-based test, such as exists in the Class II language.

Under the principle of *expressio unius*, the difference between the Class II and Class III language in the committee report is meaningful and indicates that Congress meant to give different meanings to the Class II language and Class III language.<sup>117</sup> There is nothing defining what is subject to negotiation in the committee report, presumably because Congress considered it self-explanatory that “all other games” of such disparate character and social impact as blackjack, slot

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114. S. REP. NO. 100-446, at 6 (1988).

115. *Id.*

116. *Id.* at 13.

117. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1259 (9th Cir. 1994).

machines, and lottery scratchers would be dealt with through Tribal-State negotiation.<sup>118</sup> One of the statute's major sponsors, Sen. John McCain, confirms this view, stating explicitly that the purpose of the IGRA was to provide a "level playing field in order [for tribes] to install gaming operations that are the same as the States in which they reside."<sup>119</sup>

### C. Legislative purpose

Any regulation of Class III gaming is described as an addition to a state's existing regulatory regime for gaming, rather than a mandate that requires states to expand the scope of their permissible gaming operations. From the Committee's report:

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 of jurisdiction.<sup>120</sup>

Thus, the logical inference is that Indian-operated Class III games were meant to operate within the existing superstructure of State-regulated gaming.<sup>121</sup> Much is made of the potential pitfalls in requiring states to assume regulatory authority over Indian gaming, and the difficulties of forcing states to permit Indian gaming without giving them full jurisdiction over reservation gaming.<sup>122</sup> The committee report deals with these jurisdictional issues in great detail, and notes the substantial state interest in regulating gaming activities. However, *Mashantucket*, the case creating the class-based test, glosses over these nuances, deeming it sufficient that a state's general public policy be at least partially civil-regulatory with respect to Class III gaming.<sup>123</sup>

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118. See S. REP. NO. 100-446, at 13.

119. 134 CONG. REC. S12653 (daily ed. Sept. 15, 1988) (statement of Sen. McCain).

120. S. REP. NO. 100-446, at 13-14 (emphasis added).

121. *Id.* at 13.

122. *Id.* at 13-14.

123. See *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990).

*D. Clear statement rule*

A class-based interpretation also violates the clear statement principle—the concept that Congress effects clear, sweeping changes to the law with clear, sweeping statements. Metaphorically, “[Congress] does not . . . hide elephants in mouseholes.”<sup>124</sup> The class-based test violates this principle, full-stop. Under the class-based test, if a state’s government permits *any* kind of Class III gaming, that state is deemed to have a civil-regulatory policy toward *all* Class III gaming, regardless of the limitations under which said Class III gaming operates.<sup>125</sup> It would be nonsensical and thoroughly silly to believe that Congress intended to force 48 of the 50 states to completely retool their respective gaming laws to permit casino gaming, absent a clear statement to the contrary.

This is because Class III gaming is a blanket category covering nearly every type of commercial gaming. Everything from horse racing,<sup>126</sup> to lotteries,<sup>127</sup> to poker<sup>128</sup> can fall into this category, and the social ills associated with gaming vary depending on the type of gaming involved.<sup>129</sup> Slot machines, for instance, greatly encourage problem gamblers, when compared to other forms of gaming, due to the low buy-in cost and various electromechanical tricks that make the odds of a winning bet seem higher than the odds posted on the machine.<sup>130</sup> Correspondingly, slot machines are much more heavily restricted than other forms of Class III gaming. At the time of the *Bryan* decision, for instance, slot machines were only legal in Nevada. State lotteries were largely restricted to the Northeast.<sup>131</sup> Even now, many states that permit Class III

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124. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

125. *See Mashantucket*, 913 F.2d at 1029.

126. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 432 (9th Cir. 1994).

127. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994).

128. *See Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1056 (D. Ariz. 2001), *but see* 25 U.S.C. § 2703(7)(B) (2006) (non-banking card games such as poker can fall under Class II if they are legal under state law).

129. Under the logic of the class-based test, of course, the existence of a state lottery alone would be sufficient to justify Indian casino gaming.

130. *See Roger Collier, Do Slot Machines Play Mind Games with Gamblers?*, 179 CAN. MED. ASS’N. J. 23, 23-24 (2008).

131. While dog tracks, horse tracks, and jai alai were more common than they are today, no major casino clusters existed outside of Las Vegas and Atlantic City. NATIONAL GAMBLING IMPACT STUDY COMMISSION, Report 1-3 (1999), available at

gaming heavily restrict gaming establishments beyond the limitations on specific game types. Many states, for instance, define gaming establishments as *per se* common-law nuisances, regardless of their legal status.<sup>132</sup>

The class-based test fails to effectively deal with these differences. Moreover, the class-based test oversimplifies state policy by treating state lotteries and horse tracks as functional equivalents of full-blown casinos. Kentucky's state gaming laws provide a valuable illustration of this premise. Kentucky permits pari-mutuel betting on horse races,<sup>133</sup> "Las Vegas Nights" for charity under the usual slate of restrictions,<sup>134</sup> and operates a state lottery. Kentucky outlaws all other forms of for-profit gaming.<sup>135</sup>

A court using the class-based test to examine the state of Kentucky's public policy toward gaming would have to conclude that its policy toward *all* gambling is civil-regulatory—after all, Kentucky has permitted wagering on horse races since Andrew Jackson was President,<sup>136</sup> even though it outlaws all other forms of commercial gaming.<sup>137</sup> If the Sixth Circuit were to apply the class-based test to Kentucky, however, these fine-grained distinctions would disappear. As soon as an Indian tribe sought the construction of a casino there, the state would have to choose between Las Vegas-style casinos and outlawing gambling entirely.<sup>138</sup>

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<http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>.

132. See, e.g., N.C. GEN. STAT. §§ 14-308, 19-1 (2012); CONN. GEN. STAT. § 53-278e (2012); FLA. STAT. § 849.20 (2012); 720 ILL. COMP. STAT. 5/28-3 (2012).

133. KY. REV. STAT. ANN. §§ 230.00-.990 (West 2012).

134. Charitable gaming operations are limited to ten hours gaming per week and may not offer prizes worth more than \$599, among other restrictions. See §§ 238.500-238.570 (West 2012).

135. Technically, it is not a crime in Kentucky to gamble, but it is a crime when a person "knowingly advances or profits from unlawful gambling activity," that is, when a person makes book. Depending on its severity, bookmaking can either be a misdemeanor or a felony. §§ 528.020, 528.030.

136. The oldest horse race in the United States, the Phoenix Stakes, has been run since 1831 in Lexington, Kentucky.

137. Wagering is not a crime, but accepting wagers is under Kentucky law. Depending on whether a threshold amount of \$500 is reached, accepting wagers is either a felony or a misdemeanor under Kentucky law. §§ 528.020-528.040.

138. See, e.g., Menominee Restoration Act, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (2006)); see also *United States v. Lara*, 541 U.S. 193, 203 (2004) (recognizing the right of Congress to re-instate Federal recognition of Indian tribes); *United States v. Holliday*, 70 U.S. 407, 419 (1866) ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same").

The only reason such a change has not yet occurred is because currently Kentucky has no federally-recognized Indian tribes. All of Kentucky's Indians were removed to Oklahoma by the Jackson Administration. Nevertheless, it is entirely possible that a previously removed tribe might seek to return to their old land and regain tribal recognition by an Act of Congress.<sup>139</sup> Recognition of tribes, or re-recognition of tribes whose recognition was previously terminated, has occurred at a slow but steady pace since the 1970s.<sup>140</sup> The Mashantucket Pequot Tribe, plaintiff in *Mashantucket* and present owner of Foxwoods Casino, is one such restored tribe.<sup>141</sup>

*E. The Indian canons are rarely applied and inapplicable to the IGRA*

Indian laws like the IGRA are subject to special interpretive canons, which to some extent supersede the standard rules of statutory construction.<sup>142</sup> Due to the special fiduciary relationship between Indian tribes and the United States, courts "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited."<sup>143</sup> This special treatment of Indian tribes has its origins in Justice McLean's concurrence in *Worcester v. Georgia*,<sup>144</sup> where Justice McLean argued that treaties with Indians should be interpreted with greater leniency than ordinary treaties, due to the Indians' weak bargaining position. "The language used in treaties with the Indians should never be construed to their prejudice . . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."<sup>145</sup> In modern times, this means that if a statute is facially ambigu-

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139. There are about 550 federally recognized tribes; of these, about 110 had their recognition terminated between 1950 and 1970. See *United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003).

140. Between 2008 and 2009, for instance, two additional tribes were recognized. See *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 74 Fed. Reg. 40218-02 (Aug. 11, 2009).

141. See Kathryn R. L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 61-62 (2002).

142. See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

143. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002).

144. 31 U.S. 515 (1832).

145. *Id.* at 581 (McLean, J., concurring).

ous, a court should rule in favor of the Indian tribe's rights under the *Worcester* line of cases.<sup>146</sup>

Indian tribes' lack of bargaining power created the foundation for Justice McLean's rule, but such treaties and statutes were as often ignored as honored.<sup>147</sup> As the federal government assumed an increasingly larger role in administering Indian affairs and transitioned from treaty making to legislation on behalf of the Indians,<sup>148</sup> the canon, originally only applicable to treaties, was adjusted to fit the new policy environment.<sup>149</sup>

That said, modern courts are reluctant to use the Indian canons dispositively; at least one circuit court has questioned the necessity of even maintaining such a canon in cases where a tribe has competent legal counsel available.<sup>150</sup> "The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated," and when the Indians are represented by competent legal counsel, "we think the rule of construction operates with less force."<sup>151</sup>

Of the IGRA cases that have arisen, the Indian-canon claim has been addressed only once. In *Rumsey*, the Ninth Circuit summarily dismissed the Rumsey Rancheria's attempts to use the Indian canons in one sentence: "Although statutes benefitting Native Americans generally are construed liberally in their favor, we will not rely on this factor to contradict the plain language of a statute."<sup>152</sup> Given the strength of the clear statement and plain text arguments in favor of the game-based test, there is little residual ambiguity for the Indian canons to cover.

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146. See, e.g., *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

147. For an excellent overview of how these canons have evolved over time, see generally David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37 (1999).

148. The United States renounced treaty-making with Indians in 1871, as the Indian Wars entered their final phase. Act of Mar. 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71).

149. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 (1976); see also *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

150. See *United States v. Atl. Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir. 1980).

151. *Id.*

152. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-59 (9th Cir. 1994).

*F. Mashantucket's Tenth Amendment Issues*

In addition to the statutory construction issues, the class-based test unnecessarily raises Tenth Amendment questions. Under the Tenth Amendment Congress may not require state legislatures to regulate according to Congressional direction. The class-based test potentially does so. The IGRA has been challenged twice under these grounds; both times the court declined to address the constitutional question and the case was decided on other grounds.<sup>153</sup> A better alternative is to avoid the constitutional questions altogether and apply the game-based test in its stead.

1. The Dole-New York standard for Tenth Amendment coercion of legislatures

In practice, the *Dole-New York* test discussed above places few, if any, restraints on Congressional power. The “general welfare” prong is extraordinarily deferential to Congressional statements of intent, and no statute has ever been successfully challenged under this provision, with the exception of the one-of-a-kind circumstances that surrounded the Affordable Care Act in the *Sebelius* case.<sup>154</sup> Likewise, the clear statement requirement has only had teeth in the Eleventh Amendment context,<sup>155</sup> an issue not applicable here because of the Supreme Court’s ruling in *Seminole v. Florida*.<sup>156</sup> Similarly, the “independent Constitutional bar” prong has only been challenged once. However, the case was decided on other grounds, thus the Supreme Court did not reach the Tenth Amendment question.<sup>157</sup> Even the relatedness prong, explicit-

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153. See *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1019 n.2 (11th Cir. 1994); *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz 1994).

154. The only other time that the issue has been litigated, the Ninth Circuit deferred to Congress’ statement of purpose. See *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1428-29 (9th Cir. 1989).

155. See Lynn A. Baker and Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L. J. 459, 464-466 (2003) (reviewing the circuit courts’ decisions with regard to the clear statement prong); see also *Counsel v. Dow*, 849 F.2d 731, 735-36 (2d Cir. 1989) (holding that the clear statement prong could apply retroactively).

156. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75-76 (1996).

157. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 214 (2003). In any case, in *Dole*, the Court held that an “independent Constitutional bar” would have to have been explicitly established elsewhere. See *Dole*, 483 U.S. at 209.

ly cited in Justice O'Connor's dissent in *Dole*,<sup>158</sup> has never been grounds for striking down a Congressional statute.<sup>159</sup> No other federal statute has been struck down on such grounds.<sup>160</sup>

2. The class-based test runs up against the Tenth Amendment's prohibition on coercion of legislatures

The class-based test clashes with the prohibitions on coercion of legislatures set forth in *Dole-New York* because the class-based test drafts state legislatures into the service of Congress, "compel[ling] the States to enact or administer a federal regulatory program."<sup>161</sup> There is simply no way for states to opt out of Congress' plan for Indian gaming, as the Tenth Amendment requires. Because of this, the IGRA's scope should be limited to cover only those games legal under state law, as in *Rumsey* and *Cheyenne River Sioux*, as opposed to forcing states to revamp their gaming laws to conform to the federal baseline.<sup>162</sup>

When the four-factor *Dole-New York* test is applied to *Mashantucket's* interpretation of the IGRA, the four factors, the "general welfare," "clear statement," "authorized power," and "independent Constitutional bar," prongs individually pose no major obstacle to the class-based test, however the net result is coercive under the totality of the circumstances, thus violating *Dole* and *New York*. The general welfare and clear statement powers prongs are superfluous under the class-based test. Given the level of deference afforded Congress in these two areas, and courts' unwillingness to question Congressional motivations, there is little reason to undertake anything beyond a cursory analysis of either prong—courts do not normally discuss, e.g., clear statement in their

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158. *Dole*, 483 U.S. at 218 (O'Connor, J., dissenting).

159. See Baker, *supra* note 155, at 466-67.

160. See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Virginia v. United States*, 926 F.Supp. 537, 543 (E.D. Va. 1995) (expressing "serious doubts" as to the viability of the coercion doctrine), *aff'd*, 74 F.3d 517 (4th Cir. 1996).

161. *New York v. United States*, 505 U.S. 144, 188 (1992).

162. See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-59 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281-81 (8th Cir. 1993).

analyses, and as such it is not a particularly part of the test.<sup>163</sup>

With regard to the “authorized power” prong, the Supreme Court has held that the commerce power extends to cover all forms of economic activity where the power to regulate has not been limited by another provision of the Constitution.<sup>164</sup> Here, the Commerce Clause explicitly grants Congress the power to regulate commerce among the several states and with the Indian tribes; the Indian Commerce Clause, explicitly “provide[s] Congress with plenary power to legislate in the field of Indian affairs.”<sup>165</sup> This plenary power under the commerce clause thus satisfies the “authorized power” prong of *Dole*.

However, following *New York’s* prohibition on coercion of state legislatures, the *Mashantucket* and the class-based test fail.<sup>166</sup> As has already analyzed, using Kentucky’s gaming laws as an example,<sup>167</sup> the class-based test of *Mashantucket* forces states to choose between Las Vegas-style casinos and no Class III gaming whatsoever, extinguishing any possibility of intermediate policies. Indeed, *Mashantucket* explicitly interprets the IGRA’s gaming classes to be the only ones permissible under the statute, and bars any further analysis of which games are subject to civil-regulatory jurisdiction.<sup>168</sup>

### 3. States’ ability to assert their Eleventh Amendment immunity to suit does not provide a viable refusal option

The Supreme Court has purportedly provided a way out for state governments to avoid executing the federal mandates of the IGRA. Under *Seminole Tribe v. Florida*, states retain the option to exercise their state sovereign immunity under the Eleventh Amendment and refuse to consent to suit

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163. See *West Virginia v. U.S. Dep’t of Health and Human Servs.*, 289 F.3d 281, 292-93 (4th Cir. 2002) (clear statement); *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1427-29 (9th Cir. 1989) (general welfare).

164. The Twenty-First Amendment, which exempts alcohol from Commerce Clause regulation, is one such example. See also *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

165. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); see also U.S. CONST., art. I, § 8, cl. 3; *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

166. Because *Mashantucket* preceded *New York*, the Tenth Amendment question was never raised.

167. See *supra* Part III, Section D.

168. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990).

by an Indian tribe seeking to return that state to the negotiating table. This option, while approved by the Supreme Court prior to *New York v. United States*, is not a realistic way for states to refuse to execute the federal mandate, and has little practical effect on states' ability to maintain intermediate gaming policies.

The Eleventh Amendment grants states a limited form of sovereign immunity. The Eleventh Amendment was originally passed in order to overrule *Chisholm v. Georgia*,<sup>169</sup> a case where the Supreme Court held that Article III, section 2's grant of diversity jurisdiction abrogated the states' common-law immunity to suit. The Eleventh Amendment overrode *Chisholm*, re-establishing the states' sovereign immunity to suit.<sup>170</sup> Further Supreme Court jurisprudence, and the passage of the Fourteenth Amendment, has placed limits on this sovereign immunity: states may not assert this immunity where state actions violate lawfully enacted federal statutes or the Constitution itself.<sup>171</sup> Such immunity is also curtailed if the Congressional statute in question is executed under the Fourteenth Amendment's enforcement power.<sup>172</sup>

Even in these highly specific contexts, however, there are two further major limitations on this power. First, this abrogation only permits private parties to sue state officials *ex officio* for injunctive relief.<sup>173</sup> Second, this ability to bypass state sovereign immunity is only available when Congress makes its intent to abrogate the several states' sovereign immunity explicit and "unmistakably clear."<sup>174</sup>

In the IGRA context, there is no question whether this sovereign immunity may be asserted. In *Seminole Tribe v. Florida*, the Supreme Court held that tribes could not enforce the IGRA's good-faith negotiation requirement in federal court if the state asserts its Eleventh Amendment immuni-

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169. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

170. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1821-22 (2010); see also *Hans v. Louisiana*, 134 U.S. 1, 13 (1890).

171. See *Ex parte Young*, 209 U.S. 123, 155-159 (1908); accord *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 474 (1987); *Green v. Mansour*, 474 U.S. 64, 68 (1985).

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

173. See *Ex parte Young*, 209 U.S. at 155-59.

174. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785-86 (1991).

ty.<sup>175</sup> In the event that a recalcitrant state asserted its Eleventh Amendment right, the Court held that Indian tribes can still negotiate compact terms with the Secretary of the Interior directly, ultimately permitting the states to wash their hands of any involvement with Indian gaming.<sup>176</sup> Under this route, the IGRA's non-negotiation provisions apply, permitting the tribe to seek a compact directly from the Secretary of the Interior.<sup>177</sup>

In theory, the Eleventh Amendment option is viable for those states interested in maintaining limited, highly regulated forms of gaming. In practice, the Eleventh Amendment option is simply unrealistic, as it leaves state governments saddled with the social costs of their citizens' gaming but none of the revenues to mitigate those costs.<sup>178</sup> The sheer amount of revenue involved with these gaming compacts is so enormous that very few states can resist the lure of easy money when combined with the leverage provided to Indian tribes by the class-based test. (Money under a Tribal-Federal compact would presumably go to the Interior Department, but no regulations on point exist, as no Tribal-Federal compacts exist, either.)

This leverage can make even the most recalcitrant state drop its long-held objections to casino gaming. In the Second Circuit, for instance, both Connecticut and New York rapidly dropped their objections to casino gambling after the *Mashantucket* case and commenced negotiations with their respective states' Indian tribes.<sup>179</sup> The result in Connecticut was the construction of Foxwoods and Mohegan Sun.<sup>180</sup> In New York, Governors Mario Cuomo and George Pataki negotiated Class III gaming compacts with the St. Regis Mohawk<sup>181</sup> and Oneida tribes,<sup>182</sup> in spite of New York State's long-standing consti-

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175. *Seminole Tribe of Fla. v Florida*, 517 U.S. 44, 75-76 (1996).

176. *Id.* at 73-74.

177. 25 U.S.C. § 2710(d)(7) (2006).

178. *See generally* DOUGLAS WALKER, *THE ECONOMICS OF CASINO GAMBLING* (2007).

179. Vermont lacks any federally recognized Indian tribes, and as such is not subject to the negotiation requirements.

180. BRETT DUVAL FROMSON, *HITTING THE JACKPOT: THE INSIDE STORY OF THE RICHEST INDIAN TRIBE IN HISTORY* 109-12 (2004).

181. Janet Gramza, *Mohawk gambling compact approved; two chiefs say the decision is "the dawning of a new era,"* THE POST-STANDARD (Syracuse, N.Y.), Dec. 7, 1993, at A1.

182. James Dao, *Accord Signed for a Casino in New York State*, N.Y. TIMES (Mar.

tutional prohibition on gambling.<sup>183</sup>

Even under the game-based test, Indian tribes maintain an immense amount of leverage, as the amount of revenue that gaming provides can greatly assist a state's budgetary needs. Take, for instance, the state of Florida. Florida, the defendants in *Seminole*, continued to litigate for nearly fifteen years after the Supreme Court's ruling. Ultimately, however, the lure of gaming money won out. In 2010, the state of Florida and the Seminole Tribe signed a Class III gaming compact.<sup>184</sup> The amount of leverage granted to Indian tribes is enormous, enough to be coercive under *New York*.

While useful as a negotiating tactic for states, the Eleventh Amendment route is not a realistic way for states to deal with the problems of Indian gaming under the class-based test. The federal compact provision has never before been used, and will likely never be used, for obvious reasons: a compact with the Secretary of the Interior leaves state governments to deal with the social problems associated with gambling, while tribal authorities receive all of the benefits—after all, non-Indians make up the vast majority of tribal casino patrons.<sup>185</sup> While such refusal to negotiate might prove politically viable in the short term, the financial drawbacks associated with non-negotiation eventually force the states to succumb. Indeed, the state of Florida and the Seminole Tribe of Florida, litigants in *Seminole*, eventually concluded a Class III gaming compact after another decade and a half of ugly litigation, despite the fact that the District Court was applying the game-based test.<sup>186</sup>

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11, 1993), <http://www.nytimes.com/1993/03/11/nyregion/accord-signed-for-a-casino-in-new-york-state.html>.

183. “[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith [. . .], and except pari-mutuel betting on horse races, [. . .] shall hereafter be authorized or allowed within this state.” N.Y. CONST. art. I, § 9 (2011). New York’s prior state constitutions also prohibited gambling, using various constructions similar in scope, but different in language. *See also id.* (1894); *Id.* § 10 (1846).

184. Mary Ellen Klas, *Crist signs bill for \$1 billion gambling pact*, TAMPA BAY TIMES (Apr. 6, 2010), <http://www.tampabay.com/news/business/corporate/crist-announces-1-billion-gambling-deal-with-seminoles/1085570>.

185. Cache Creek Casino, a fairly typical Class III gaming operation two hours north of San Francisco, has a hotel that can accommodate the entire population of the Rumsey Band of Wintun Indians, the tribe that owns the casino.

186. Josh Hafenbrack, *Seminole gambling – House says it’s a deal*, SUN SENTINEL

## IV. CONCLUSION

Since its passage, the Indian Gaming Regulatory Act has proved wildly successful at improving Indian tribes' economic status, but the Second and Tenth Circuits have deviated from Congress' original intent.<sup>187</sup> The IGRA was intended to put Indian tribes and state governments on an equal footing, not to give tribal governments undue leverage over state governments. This principle of tribal-state equality has been ignored by the Second and Tenth Circuits, which instead decided to force states to choose between no Class III gambling and all Class III gambling, treating state lotteries, race tracks, and off-track betting as functionally equivalent to craps, roulette and slot machines. Not only does this approach go against Congress' intent in passing the IGRA, but it also goes against the Tenth Amendment's anti-coercion doctrine, which prohibits the federal government from enlisting state legislatures and to enforce federal policies. The Eleventh Amendment option, created in *Seminole*, presents no viable alternative for a state seeking to maintain any form of regulated Class III gaming under the class-based test.

The alternative test, the game-based test from *Rumsey*, bypasses both problems. Simply put: if a state permits a game to be operated, Indian tribes should be able to operate it as well. On the statutory level, the game-based test bypasses the statutory interpretation problems by providing a uniform standard for all Indian gaming beyond small-scale Class I gaming. The game-based test also avoids the Tenth Amendment issues that the class-based test presents because the game-based test tracks state law. Applying the Public Law 280 standard, as modified by *Cabazon* and *Bryan*, there can be no coercion issue where a state's legislature and executive already have made the determination that a specific game is legal to operate under certain circumstances if that game does not violate the state's public policy. This division preserves states' ability to set public policy with regard to Class III gaming and leaves Indians and state governments with a lev-

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(Miami) (Apr. 6, 2010), [http://articles.sun-sentinel.com/2010-04-06/news/fl-seminole-gambling-deal-040610-20100406\\_1\\_mutuels-pari-blackjack](http://articles.sun-sentinel.com/2010-04-06/news/fl-seminole-gambling-deal-040610-20100406_1_mutuels-pari-blackjack); see also *Seminole Tribe of Florida v. Florida*, No. 91-6756, 1993 WL 475999 \*17 (S.D. Fla. Sept. 22, 1993).

187. See Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 55-57 (1995).

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