SCOPE OF GAMING UNDER THE INDIAN GAMING REGULATORY ACT OF 1988 AFTER *RUMSEY V. WILSON*: WHITE BUFFALO OR BROWN COW?

INTRODUCTION

When the first white buffalo born in North America since 1923[1] arrived into the herd of farmers Dave and Valerie Heider of Janesville, Wisconsin, in August 1994, crowds of strangers descended on the Heider's farm to pay homage and to bear witness.[2] Legend has it that the birth of a white buffalo is a sign of good

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[1] Big Medicine, the only other white buffalo born in this century, lived for 36 years and died in 1959. *See* Megan Garvey, *The Great White Hope, Rare Buffalo a Beacon of Unity to Native Americans*, WASH. POST, Sept. 20, 1994, at D1.

[2] " 'I couldn't believe it,' Heider said, still shaking his head, 'That kind of thing only happens in fairy tales—and, now I know, in Indian tales, too.' " John Switzer, *Dakota Indians See Hope in Calf's Birth*, COLUMBUS DISPATCH, Sept. 28, 1994, at 8B.

> Long ago during a cold, snowy winter, when there was no food in a Sioux village . . . a half-dozen hunters went out in search of game. In a swirl of snow, a woman with long flowing black hair appeared, dressed in white buckskins, and handed them a sacred pipe and tobacco. She instructed them how to use the pipe and how to pray and then changed into a white buffalo calf and disappeared.

Id. (Selma Walker, founder of the Native American Indian Center in Columbus, Ohio).

fortune and a harbinger of prosperous times.[3]

But Native Americans have learned to be cautious about promises, whether their source is the Great Spirit or the federal government: "Lakota elders on the Pine Ridge Reservation of South Dakota say that a few months must pass before it is known whether the calf is truly an albino, because white calves have been born but have turned brown after about three or four months."[4]

In 1987, the U.S. Supreme Court delivered a white buffalo of sorts to the Indian nations of the United States. In *California v. Cabazon Band of Mission Indians*,[5] the Court held that states could not prevent Indian tribes from conducting a wide range of commercial gaming activities on their tribal lands. The result has been a virtual explosion of tribal economic development.[6] Eight years later, however, this white buffalo may in fact be losing its white coat. The struggle that has ensued over the scope of permissible gaming following *Cabazon*, pitting the federal government, the states, the tribes, and the non-Indian gaming industry against one another in litigation that has spanned fifteen years,[7] is coming to a crossroads.[8] A recent decision in the Ninth Circuit, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,[9] threatens to gut the Indian Gaming Regulatory Act of 1988[10] ("IGRA"), legislation passed by Congress in reaction to the *Cabazon* decision. *Rumsey* can potentially sever IGRA's connection to the *Cabazon* holding, thereby threatening to undo the astounding change of fortune that many

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[3] The birth of a white buffalo is "a symbol of hope, rebirth and unity for the Great Plains Indian tribes." Garvey, *supra* note 1, at D1. Legend also has it that the father of the white calf will die so that another white offspring will not be born. Just days after the birth of "Miracle," the Heiders' white calf, her father, an otherwise healthy young bull, died of unknown causes. *See The Christmas Covenant*, U.S. NEWS & WORLD REP., Dec. 19, 1994, at 62.

[4] Tim Gilgo, *White Buffalo Calf a Positive Sign*, OMAHA WORLD HERALD, Oct. 1, 1994, at 15.

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

[6] "Since . . . 1988, there has been a dramatic increase in the amount of gaming activity among the Indian tribes. Indian gaming is now estimated to yield gross revenues of about $4 billion per year and net revenues are estimated at $750 million. There are about 160 Class II bingo and card games in operation and there are now over 100 tribal/state compacts governing Class III gaming in 20 states . . . ." 140 CONG. REC. S14,729 (daily ed. Oct. 7, 1994) (statement of Sen. McCain).

[7] The struggle over the scope of permissible gaming following *Cabazon* began with Seminole Tribe v. Butterworth, 491 F. Supp. 1015 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (Former 5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *See infra* notes 45-71 and accompanying text.

[8] *See infra* notes 263-83 and accompanying text.

[9] 41 F.3d 421 (9th Cir. 1994) [*Rumsey II*]. The district court decision is reported at 1993 WL 360652 (No. 92 Civ. 812, E.D. Cal. July 20, 1993) [*Rumsey I*]. The Ninth Circuit denied the petition for rehearing at 64 F.3d 1250 (9th Cir. 1995) [*Rumsey III*].

[10] Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (1994)).

Indian tribes have enjoyed since the expansion of Indian gaming began in the early 1980s.

The decision in *Rumsey* goes to the very heart of IGRA, questioning the application of the broad standards of *Cabazon*, which permit Indian tribes to conduct a relatively wide range of gaming activities. A panel conflict has arisen in the Ninth Circuit over interpretation of IGRA's "scope of gaming" provisions as a result of the holding in *Rumsey*. The contested issue is whether the intent of Congress was to create, in effect, a de facto affirmative action program or to limit a set of judicially created privileges. These issues were not resolved by the passage of IGRA. Regardless of the resolution of that conflict, however, the issue of what Congress intended to do by passing IGRA will almost certainly confront the Supreme Court in the near future.[11] There are also strong indications that Congress, unable to resolve the issue in the 103d session,[12] will not exercise its preemptive power in the 104th, but will await the Supreme Court's judicial determination of the issue.[13] Whether the coat of the white buffalo of Indian gaming remains white, whether Indian gaming retains its extraordinarily beneficial nature for Indian tribes, and how the fortunes of non-Indian gaming, including the substantial revenue-producing potential of the state lotteries, are thereby affected, depends on the outcome of this legal controversy.

This Note will consider the impact of *Rumsey* on the scope of permissible gaming on Indian tribal lands. The legal history of gambling in general (part I), and Indian gaming in particular (part II) will be surveyed. A discussion of the legislative history of IGRA (part III) and the decision in *Cabazon* (part IV) will be followed by an examination of the relevant provisions of IGRA itself (part V). Finally, the case law which grew out of the controversy over the scope of gaming under IGRA (part VI) and an analysis of *Rumsey* and the Ninth Circuit panel conflict (part VII), including a look at the attempt of the 104th Congress to react to the evolving legal quandary (epilogue), will conclude the discussion.[14]

I. History of Gambling

Long before Indians began the current wave of experimentation with commercial gaming as a source of revenue, gambling had

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11 *See infra* note 262.
12 *See infra* notes 266-85 and accompanying text.
13 *See infra* note 263.
14 *See infra* appendix.

become embedded in the American cultural identity. Building on English gambling practices that included lotteries and horse racing,[15] Americans developed their own brand of gaming that reflected the entrepreneurial and expansionist spirit of the country at the various stages of its development.[16]

Even before the Revolutionary War, American governments had used lotteries as sources of state revenue to make up for weak tax bases.[17] That use, both private and public, continued from colonial times through the Civil War, but it was not until the opening of the West that American gambling took on its unique form. "[B]oth gambling and westering thrived on high expectations, risk taking, opportunism, and movement, and both activities helped to shape a distinctive culture."[18]

The frontierism that gave rise to the surge in gambling, however, inspired an equal reaction from the more puritanical strain of the American spirit.[19] Lottery scandals[20] and a desire by frontier settlements to "bring their societies into line with eastern standards"[21] combined with this traditional American puritanism to squash the spread of gambling in the late nineteenth century. By 1910, "[t]he United States was once again virtually free of legalized

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15 English gambling itself drew on the more ancient tradition of Egyptians, Chinese, Japanese, Greeks, Romans, and Germanic tribes. Mike Roberts, *The Constitutionality of Gaming in Tennessee*, 61 TENN. L. REV. 675, 677 (1994).

16 JOHN M. FINDLEY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS 3-10 (1986).

17 Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992). Much of this revenue was used to establish universities. Harvard, Yale, Columbia, Pennsylvania, Princeton, Dartmouth, and William and Mary were all started with money raised in part from lotteries. Thomas L. Hazen, *Public Policy: Rational Investments, Speculation, or Gambling?—Derivatives, Securities and Financial Futures and their Effect on the Underlying Capital Markets*, 86 NW. U. L. REV. 987, 1037 (1992). This is especially interesting in light of the fact that tribes, which are required by law to allocate profits from gambling operations to tribal governmental programs, 25 U.S.C. § 2710(b)(2)(B), (d)(2)(A), are now, in effect, using the same technique of voluntary taxation that was employed extensively by the states early in their own history. "[T]ribes have . . . turned to . . . lotteries, numbers games and other forms of gambling as a convenient form of voluntary taxation." Brief for Appellees at 3, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (No. 85-1708).

18 FINDLEY, *supra* note 16, at 4.

19 *See generally* REUVEN BRENNER, GAMBLING AND SPECULATION: A THEORY, A HISTORY, AND A FUTURE OF SOME HUMAN DECISIONS (1990).

20 Roberts, *supra* note 15, at 678. The Louisiana post-Civil War lottery known as "The Serpent" became a national phenomenon. Ninety-three percent of its gross revenues came from outside of Louisiana. There were accusations of organized crime corruption and eventually it was closed down when Congress banned the sale of lottery tickets through the mail, Act of Sept. 19, 1890, ch. 908, 26 Stat. 465 (1890) (current version at 18 U.S.C. § 1302 (1994)) and by any means of interstate commerce, Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (1895) (current version at 18 U.S.C. § 1301 (1994)).

21 FINDLEY, *supra* note 16, at 6.

gambling."[22]

Gambling in America, fueled not only by a universal interest in gaming,[23] but by the seminal American penchant for taking risks,[24] rose again in the wake of the Great Depression. This "third wave"[25] brought with it another unique American contribution, one that is of particular concern in the scope of Indian gaming controversy: gambling by machine.

The first slot machine was invented and marketed in 1887 by Charles Fey, a San Francisco mechanic.[26] Small and relatively inexpensive, the machines were placed in taverns and other locales outside the casinos, which were the target of the anti-gambling forces at the time. In a legal controversy remarkably similar to that involving the role of electronics in today's modern games,[27] manufacturers and operators managed to stay one step ahead of efforts to ban their machines by pushing statutory definitions to their limits.[28] Despite the efforts of the states, the machines proliferated.

In 1931, Nevada legalized casino gambling[29] and gave birth to Las Vegas, the mecca of American gambling. Throughout the 1930s, states across the nation legalized parimutuel racing.[30] In 1964, New Hampshire became the first state to conduct a state lottery since the end of the second wave and the Louisiana lottery

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22 I. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 97 (1992).

23 "People have been gambling since the dawn of recorded history." Rychlack, *supra* note 17, at 13.

24 *See* BRENNER, *supra* note 19, at 90-122 (comparing the phenomena of gambling and business speculation, including commodities, stock and real estate speculation, and the insurance industry).

25 The first had followed the birth of the country and the second the Civil War. *See* Rose, *supra* note 22, at 94-97.

26 Cory Aronovitz, *To Start, Press the Flashing Button: The Legalization of Video Gambling Devices*, 5 SOFTWARE L.J. 771, 774 n.10 (1992) (citing Rufus King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L. & CRIMINOLOGY 199 (1964)).

27 *See infra* appendix.

28 Some operators, for example, dispensed mints with each play in an attempt to fall within the statutory definition of a "vending machine." *See* State v. Apodaca, 32 N.M. 80 (N.M. Ct. App. 1926). "The appellant contends that the player operating the machine in question is not engaged in a game of chance, because, while he enjoys the possibility of winning, there is no chance of loss, since, for each nickel deposited, he is sure to obtain value in chewing gum." *Id.* at 81-82. *See also* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976 93 (1977). The new games that were invented posed interpretational problems for the courts of the early part of the twentieth century. Those statutes that were enacted did not account for the quick-changing technological advancements in the gambling field. Therefore, the ever-changing devices often fell within a loophole in the statutes. *See* Aronovitz, *supra* note 26, at 775 n.21. The Oneida Tribe of New York State has recently proposed a new challenge to the modern definition of the slot machine. *See infra* note 355.

29 Act of Mar. 19, 1931, ch. 99, 1931 Nev. Stat. 165. Lotteries, however, are illegal in Nevada.

30 *See* Rose, *supra* note 22, at 97 n.25.

scandal.[31]

The subsequent spread of state lotteries[32] and the rise of the eastern counterpart to Las Vegas in Atlantic City brought the third wave into full force and began to effect a fundamental change in public attitude toward gambling. "Government no longer merely allows some forms of gambling to exist—it now actively promotes gambling."[33] This new role for state governments brought them into conflict with the federal government over regulatory policies[34] and with the gambling industry over questions of competition.[35] Most recently, the states have come into conflict with Indian tribes over questions of tribal and state sovereignty and the right of Indians to conduct their own games.

II. History of Indian Gaming

Gambling is not unknown in traditional Indian culture. Wagers on contests of skill, horse races, a variety of dice games, and a unique Indian game known as the stick game[36] have been popular with many Indian tribes for thousands of years.[37] After contact with European culture, "Indians interacted with non-Indians in the Spanish, Mexican and American periods [and] non-Indians were encouraged to participate in gambling games, which included card and dice games and horse races."[38]

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31 *See id.* at 97 n.27; *see also supra* note 20.

32 By 1985, 25 states were conducting state lotteries. *See* I. Nelson Rose, Gambling and the Law 2 (1986). In 1990, U.S. lotteries alone netted $7.7 billion. Int'l Gaming & Wagering Bus., June 15, 1991, at 1 (table), 22.

33 Rose, *supra* note 22, at 97.

34 The role of state government was brought into conflict with the federal government over organized crime. *Cf., e.g.*, Organized Crime Control Act, 18 U.S.C. § 1955 (1994). Gambling devices are felt to present special regulatory problems because of their technology and are covered separately under the "Johnson Act," 15 U.S.C. §§ 1171-1178 (1994).

35 "Given their enormous resources, billions of dollars, and millions of people, state operators can effectively wipe out casinos and racetracks." Rose, *supra* note 22, at 97.

36 Two medicine men organize opposing teams of 10 to 40 players who will sit across from one another during the contest. One team member hides a stick or bone while a team member from the other side, who has paid for the right to guess, tries to find where the bone is hidden. This is made more difficult by teams members on both sides who are drumming and singing while others shake rattles or move their hands about in the air.

George Everett, *Native American Games*, WIN Mag., Feb.-Mar. 1992, at 65.

37 Experts for both sides in *Cabazon* agreed that prior to contact with Western Civilization, Indian tribes, in particular the Cahuilla peoples, whose gaming operations were the subject-matter in *Cabazon*, engaged in "intensive gambling [at] practically all inter-village or tribal gatherings." Declaration and Report of Prof. William Wallace, California State University, Appellant's Brief, Joint Appendix at 168, *Cabazon* (No. 85-1708). Dr. Lowell Bean, Professor of Anthropology at California State University at Hayward, concurred: "[Gambling] has at no time in the history of the Cahuilla peoples ceased as a significant activity, including today." *Id.* at 210.

38 *Id.* at 210-13.

While the third wave of gambling[39] was sweeping the country and gaining great momentum with the reemergence of state lotteries,[40] Indian tribes were undergoing a wave of their own. The political atmosphere of the late 1960s and early 1970s found its way onto tribal lands, and the movement for increased Indian sovereignty enjoyed a resurgence.[41]

Taking advantage of the liberalization of public attitudes toward gambling, Indian tribes tapped into their own tradition of gaming and began conducting bingo games on their tribal lands.[42] Many of these games had wager limits that exceeded those permitted by the state and therefore quickly attracted a sizeable clientele comprised primarily of non-Indians.[43]

The states opposed this assertion of tribal independence. Not only did it defy laws that the states felt were applicable, but it presented competition for the same gambling dollars that the states were trying to attract for their own state lotteries.[44]

Relying on a particular interpretation of the complex scheme of interacting sovereignties that currently comprises American Indian law, the states moved to suppress the spread of high-stakes bingo on Indian lands by attempting to extend the reach of their own gambling laws onto the reservations. Challenged by the states' attempts to shut down their bingo operations, tribes brought actions for declaratory relief in the federal courts[45] claiming that the states had no jurisdiction over games conducted by Indians on tribal land. The Seminole Tribe of Florida was the first tribe to bring such a declaratory action, and the decision of the Fifth Circuit in October 1981, upholding the right of the tribes to conduct games free of state regulation, applied reasoning that was paralleled both

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39 *See supra* note 25.

40 The third wave of gambling gained momentum beginning with the New Hampshire lottery in 1964. *See supra* note 31.

41 VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 21-24 (1983) (citing various acts of Congress including the 1968 Indian Civil Rights Act, the Indian Education Act of 1972 and the Indian Self-Determination and Education Assistance Act of 1975, and Presidential statements encouraging tribal independence (Johnson in 1968, Nixon in 1970, Reagan in 1983)).

42 *Cf.* Brief for Appellees at 3-6, *Cabazon* (No. 85-1708).

43 *Cf. Tribal Games: New Day Dawns for Indian Tribes in the Midwest,* CASINO PLAYER, June 1994, at 22-24.

44 In the western states, particularly California, with its 103 tribes and proximity to Las Vegas, resistance also came from the non-Indian gaming industry. *See infra* note 87.

45 *Seminole,* 491 F. Supp. 1015; Oneida Tribe of Indians of Wis. v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981); Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (appeal from S.D. Cal., Keep, J., slip op.), *cert. denied,* 461 U.S. 929 (1983); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Williquette, 639 F. Supp. 689 (W.D. Wis. 1986); Cabazon Band of Mission Indians v. California, 783 F.2d 900 (9th Cir. 1986) (appeal from C.D. Cal., Waters, J., slip op.).

in the later district and circuit court opinions and, ultimately, in the United States Supreme Court decision in *Cabazon.*

In December 1979, having completed construction on a $900,000 bingo hall on its reservation in Broward County, Florida, about seven miles outside of Fort Lauderdale, the Seminole Indian Tribe began conducting a bingo operation that was not in conformance with the terms of the Florida bingo statute.[46] The tribe claimed that the state lacked authority to supersede tribal law with respect to the games because it lacked the specific grant of authority from the federal government, required by the Constitution.[47]

The states responded by arguing that the federal government had, in fact, granted such authority. Public Law 280[48] had ceded criminal and civil adjudicatory jurisdiction to the states over Indian lands within their borders.[49]

Public Law 280 grew out of the long tradition of exclusive federal authority over Indians and Indian land that the Constitution and several early decisions of the Supreme Court had granted to Congress.[50] The justification for that policy had always been the protection of the tribes from incursion by local, non-Indian inhabitants.[51]

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46 FLA. STAT. ANN. § 849.0931 (West 1994). This statute is the successor to § 849.093, repealed as of June 1, 1992; *see* 1991 Fla. Laws ch. 91-421, § 3. The Seminole tribal ordinance, which authorized the games, required more frequent operation than the state law permitted (four days minimum as opposed to two days maximum). Maximum prize amount was non-conforming ($100 as opposed to $25). There were also more jackpots per night than permitted (multiple as opposed to one) and employees were compensated in violation of the Florida statute's ban on any employee compensation.

47 *See infra* note 50.

48 Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-1162, 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360 (1994)).

49 Public Law 280 originally granted jurisdiction to five enumerated states: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added by amendment in 1958. Pub. L. No. 85-615, 72 Stat. 545 (1958). In addition, § 7 of Public Law 280 permitted other states to elect to assume jurisdiction, either partial or full, without the consent of the tribes concerned. 25 U.S.C. §§ 1321-1322. This provision was later repealed by Pub. L. No. 90-284, § 403(b), 82 Stat. 73, 79 (1968), but Florida's assumption of full jurisdiction was effected before the repeal, FLA. STAT. ANN. § 285.16 (West 1994), and thus remained in force at the time of the action in *Seminole. See infra* notes 99-106 and accompanying text.

50 U.S. CONST. art. I, § 8, cl. 3; Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). In these cases, Chief Justice John Marshall interpreted the Indian Commerce Clause of the Constitution as granting "plenary power" over the tribes within the context of a trust relationship, "resembl[ing] that of a ward to his guardian." *Cherokee Nation,* 30 U.S. at 17.

51 The Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790), ch. 13, 2 Stat. 139 (1802), and ch. 161, 4 Stat. 729 (1834), besides limiting trade between whites and the tribes, prohibited all alienation of Indian land except by treaty, a power held exclusively by the federal government. U.S. CONST. art. 1, § 10, cl. 1; *id.* art. 2, § 2, cl. 2; *id.* art. 1, § 8, cl. 3. This measure was arguably an incorporation by the new nation of principles that had been codified by the previous sovereign, the English Crown, in its Royal Proclamation of 1763 (a document which is still in force in Canada), which reserved title to Indian lands exclusively for the Crown, subject only to a right of occupancy by tribes. This right could be extin-

Notwithstanding early judicial efforts to interpret the broad constitutional grant of power over the tribes to the federal government in favor of Indian interests, expansionism exerted considerable pressure on the actual public policy of the nation.[52] Gradually, the federal government extended its own laws onto Indian lands, first against non-Indians committing crimes against Indians,[53] then against Indians committing crimes against non-Indians.[54] Finding a need to supplement the relatively sparse federal law which could be applied under the Enclaves Act, Congress finally enacted the Assimilative Crimes Act[55] ("ACA") which, in effect, federalized state law, making the violation of a state statute a federal crime, punishable under federal law.[56] State jurisdiction over Indian lands remained largely prohibited up until the middle of the twentieth century.[57] Aside from several congressional grants of jurisdiction to specific states over specific tribes,[58] the general status of state

guished only by treaty or proclamation of the Crown itself. *Cf.* Johnson v. McIntosh, 21 U.S. 543 (1823). The Trade and Intercourse Acts were meant both to enumerate the general powers granted in the Constitution and to assure the tribes that the relationship enjoyed with the Crown, with whom many of the tribes had sided during the Revolutionary War, would be largely maintained under the new sovereign. *Cf.* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 39-41 (1987).

52 Despite Justice Marshall's decisions in *Cherokee Nation* and *Worcester*, President Jackson, who reportedly said at the time, "Marshall has made his decision, now let him enforce it," cooperated with Georgia officials to coerce the Cherokees into signing a treaty relinquishing all of their lands within the state and imposing upon them the brutal forced relocation that later came to be known as the "Trail of Tears." *See* United States v. Bureau of Indian Affairs, 715 F.2d 1156, 1158-59 (7th Cir. 1983).

53 Act of Aug. 4, 1790, ch. 34, 1 Stat. 138 (1790); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (1799); Act of Mar. 20, 1802, ch. 13, 2 Stat. 139 (1802).

54 Federal Enclaves Act, Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152 (1994)).

55 18 U.S.C. § 13 (1994) (originally enacted in 1825).

56 Consistent with the policy purpose of regulating relations between Indians and non-Indians and respecting Indian sovereignty, crimes by Indians against Indians were not covered by this legislation. Federal jurisdiction over the most serious criminal offenses (murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, sexual abuse, and theft) by Indians against Indians was extended to Indian lands, Major Crimes Act, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)), after the Supreme Court decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883). In 1968, tribal jurisdiction over crimes committed by Indians against Indians was further reduced by the Indian Civil Rights Act of 1968, § 202, 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303 (1994)), leaving only misdemeanors and offenses punishable by fines of less than $5000 covered by tribal courts.

57 Two cases toward the end of the nineteenth century, United States v. McBratney, 104 U.S. 621 (1882), and Draper v. United States, 164 U.S. 240 (1896), seemed to extend jurisdiction over murder on Indian land, regardless of the identity of the parties, to the states. But both decisions applied to crimes by non-Indians against non-Indians on Indian land and both have been widely criticized. *Cf.* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 109-12 (1988).

58 *E.g.*, Act of June 25, 1948, ch. 645, § 3243, 62 Stat. 683, 827 (1948) (codified as amended at 18 U.S.C. § 3243 (1994)) (congressional grant to the State of Kansas of jurisdiction over crimes by Indians against Indians within its borders).

jurisdiction over Indian land remained the same up until the passage of Public Law 280 and the Supreme Court decision in *Williams v. Lee*.[59] In 1953, however, Congress radically altered the balance between the three sovereignties when it passed Public Law 280.[60]

It is the precise meaning of the grant of civil jurisdiction in Public Law 280 that lies at the core of the controversy regarding the scope of Indian gaming. That section reads:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other 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 . . . .[61]

Whether the statute was intended to grant only adjudicatory jurisdiction ("civil causes of action"), or whether it was meant to also encompass legislative power ("those civil laws . . . of general application") was not clear. The ambiguity was not resolved until 1976, when the Supreme Court ruled in *Bryan v. Itasca County*[62] that the intent of Congress was to simply provide a forum for the resolution of disputes. "[I]f Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers . . . it would have expressly said so."[63]

Since Florida had assumed full jurisdiction pursuant to section 7 of Public Law 280, the issue in *Seminole* became the nature of the state's bingo statute: if it was a *criminal* provision, Public Law 280 extended its reach onto the Seminole's tribal land and the operation of the bingo games would have to conform to the state law. If, on the other hand, the statute were viewed as a *civil* law, according to *Bryan*, it could have no effect on Indian land.

Distinguishing a series of Ninth Circuit cases that had faced the problem in regard to other issues,[64] the *Seminole* court turned

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59 358 U.S. 217 (1959). Although *Williams* held that permitting state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," *id.* at 223, the possibility remained that a state regulation might be permitted where essential tribal relations were not involved. *Id.* at 220.

60 *See supra* note 48.

61 28 U.S.C. § 1360(a).

62 426 U.S. 373 (1976).

63 *Id.* at 390.

64 United States v. Farris, 624 F.2d 890 (9th Cir. 1980) (interpretation of Organized Crime Control Act); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (building codes); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (fireworks);

to a detailed analysis of the Florida statute. Whether or not there were criminal penalties attached to violation of the statute was not held to be dispositive of a criminal/prohibitory nature. "A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one."[65] The salient inquiry "requires a consideration of the *public policy* of the state on the issue . . . and the intent of the legislature in enacting the . . . statute."[66]

The court found that the only type of gambling prohibited by the Florida constitution, as recently amended, were "lotteries,"[67] and therefore the legislature was free to regulate or prohibit any other type of gambling. With regard to bingo, the legislature decided to enact a law that permitted some organizations, under certain circumstances, to conduct bingo games.[68] Therefore, "[w]here the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed."[69]

This application of the *Bryan* interpretation of Public Law 280 now forms the analytical framework in which virtually all discussion[70] takes place. To a great extent, it expresses the core of the majority opinion in *Cabazon.* And already the rejoinder is evident.

The dissent in *Seminole* agreed with the majority's analytical approach but differed on the conclusion; it saw the Florida bingo statute as clearly prohibitory because it forbade the *precise* type of bingo game in question, that is, a bingo game with prizes above the statutory limit. "As a matter of fact, it is because such activity is prohibited in Florida that this business was started and is successful."[71] The point of contention between the majority and the dissent in *Seminole* was one of the breadth of the applicable category; in determining the reach of state law, does one consider the state policy toward the kind of game or the *precise instance* of the game in question? Should the baseline category for applying the criminal/prohibitory-civil/regulatory test of *Bryan* be broad and inclusive or

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Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) (zoning ordinance).

65 *Seminole,* 658 F.2d at 314.

66 *Id.* (emphasis supplied).

67 FLA. CONST. art. X, § 7.

68 The Florida statute permits organizations "engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar activities" to conduct bingo operations. FLA. STAT. ANN. § 849.0931(1)(c).

69 *Seminole,* 658 F.2d at 314-15.

70 *See supra* note 45.

71 *Seminole,* 658 F.2d at 317.

should it be restricted to a narrowly defined subset? The debate over the scope of gaming that culminates in the *Rumsey* decision revolves around this axis.

III. Legislative History of IGRA

Tribes responded to the decision in *Seminole*[72] by setting up over 180 bingo operations by 1983.[73] More than twenty of those grossed between one and twelve million dollars per year.[74] Congress was not unaware of this trend.[75] Beginning in the 98th Congress, legislation began to be introduced to address the concerns of the states, the federal government, and the non-Indian gaming industry about the spread of Indian gaming.

Initially, no distinctions were drawn between types of games. The 98th Congress considered legislation[76] that simply called for regulation of all Indian gaming by the Secretary of the Interior in an oversight scheme modeled after that used by the Nevada Gaming Commission.[77] The Department of Justice, expressing an opinion that it was to reiterate throughout the Indian gaming debate, questioned the ability of the federal government to maintain adequate oversight capable of keeping organized crime out of tribal gambling operations.[78] The legislation was viewed largely as a knee-jerk reaction to *Seminole*, and widespread dissatisfaction led to its failure to reach the House floor.[79]

In the 99th Congress, the first legislative attempts to deal with the question of scope of permissible gaming were put forward: the Indian Country Gambling Regulation Act[80] incorporated the dis-

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72 There were similar rulings in *Oneida, Barona,* and *Lac du Flambeau. Cf. supra* note 45.

73 Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 392 n.20 (1993).

74 *Id.* Some tribes did particularly well: the Seminole tribe grossed $20 million from three bingo sites in 1982, with a net profit of $2.7 million dollars. Carla DeDominicis, *Betting on Indian Rights*, 3 Cal. Law. 29 (1983).

75 The federal government was instrumental in many cases in helping to establish that trend. It began with President Reagan's policy statement on Indians in 1983. Statement on Indian Policy, Jan. 24, 1983, I Pub. Papers 96, 97 (1983) ("It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government."). The federal government actively encouraged bingo as a means of economic development by providing approvals of tribal bingo ordinances and even guaranteeing some eight million dollars in construction loans for bingo facilities. 132 Cong. Rec. S12,017-18 (daily ed. Aug. 15, 1986) (statement of Sen. Andrews).

76 H.R. 4566, 98th Cong., 1st Sess. (1983).

77 This minimum federal standards approach is likely to be revisited in legislation considered by the 104th Congress. *See infra* note 260.

78 *Indian Gambling Control Act: Hearings on H.R. 4566 Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 2d Sess. 15 (1984) (statement of Rep. William Richardson).

79 Santoni, *supra* note 73, at 396.

80 H.R. 2404, 99th Cong., 1st Sess. (1985) (offered by Rep. Norman Shumway).

sent's position in *Seminole*, requiring the Secretary of the Interior to determine that the specific form of gambling and the manner and extent of the proposed operation did not violate the state's public policy.[81] In other words, the bill mandated that the narrowest possible baseline category was to be used in applying the *Bryan* criminal/prohibitory-civil/regulatory analysis.

Sentiment as to the efficacy of this scheme ran both pro and con. On the one hand, rival legislation was introduced[82] that did not contain such explicit interpretative instructions, but did require similar approval by the Secretary of the Interior for all Indian games.[83] On the other hand, there were those who wanted to dispense with the entire civil/regulatory-criminal/prohibitory test insofar as Indian gaming was concerned. They advocated having the federal government assign all regulation of gambling on Indian lands to the states that were ostensibly in the best position to effectively enforce gambling laws in general.[84]

The resulting compromise[85] produced the tripartite classification scheme,[86] which was ultimately incorporated into IGRA and which has since generated considerable controversy. In an effort to assuage the fears of the states, the gaming industry, and federal

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[81] *Id.* § 4(b)(1).

[82] Indian Gaming Control Act, H.R. 1920, 99th Cong., 1st Sess. (1985) (introduced by Rep. Morris Udall, Apr. 2, 1985). S. 902, introduced by Sen. Dennis DeConcini on Apr. 4, 1985, was similar to H.R. 1920.

[83] The tribes expressed concern about the nebulous alternative proposed in H.R. 1920. If the *Bryan* test, as applied in *Seminole*, was to be retained, but no statutory interpretative guidelines were to be provided, as they were in H.R. 2404, who would normally make the determination of what constituted the state's public policy toward proposed gaming and how would that determination be made? *See Gambling on Indian Reservations and Lands: Hearings on S. 902 Before the Senate Select Comm. on Indian Affairs*, 99th Cong., 1st Sess. 280 (1985) [hereinafter *Hearings on S. 902*]. The de facto process of declaratory judgements that began in the pre-IGRA bingo cases (*Seminole, Oneida, Barona,* and *Lac du Flambeau*; *see infra* appendix and notes 300-28 and accompanying text) and continued after passage of IGRA was finally codified in S. 2230, 103d Cong., 2d Sess. (1994), the 103d Congress's attempt to amend IGRA. *See infra* notes 263-82 and accompanying text.

[84] *See Hearings on S. 902, supra* note 83, at 107 (1985) (testimony of Robert Corbin, Attorney General of Arizona); *see also supra* note 82. Regulation of gambling has traditionally been a state prerogative. "[T]he federal government has only become involved in the regulation of gambling when it appeared that the state or local police were not doing their jobs, particularly, when it looked like a large scale gambling operation had bought off all of the local cops." Rose, *supra* note 22, at 97.

[85] The compromise was not reached until the second session of the 99th Congress, when H.R. 1920 was amended and reported to the Committee of the Whole House on Mar. 10, 1986.

[86] The gaming classes are defined as follows: Class I (ceremonial gaming); Class II (bingo, lotto, pull tabs, tip jars, punch boards, and card games, with the specific exclusion of banking card games such as chemin de fer, baccarat, and blackjack); Class III (all gaming that is not Class I or Class II, for example, banking cards, all slot machines, casinos, horse and dog racing, jai-alai, and "electronic or electromechanical facsimiles of games of chance."). S. REP. No. 446, 100th Cong., 2d Sess. 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3077. *Cf. infra* appendix.

agencies about the infiltration of organized crime,[87] while at the same time reassuring tribes that they would not be deprived of the economic opportunities which had been afforded them by the "bingo cases,"[88] Congress, in effect, drew a line in the sand. On the one side, it placed games that were being conducted by tribes at the time, pursuant to the recent judicial decisions. On the other, it placed games that were currently being conducted only by the states and the gaming industry. Whether or not the distinction, from its genesis in House Bill 1920, was based on some genuine social concern, such as greater susceptibility to infiltration by organized crime, as was claimed by the states and gaming industry, or whether it merely represented an arbitrary bifurcation based on political and economic compromises is a question which is especially relevant in the wake of the avalanche of litigation that followed the implementation of the IGRA classification scheme.

IV. *CABAZON*

As these compromises were being hammered out in Congress, the Supreme Court docketed *California v. Cabazon Band of Mission Indians.*[89] Certiorari was granted soon afterward.[90] Although there is some disagreement as to precisely how the possibility of a judicial determination of the issues was assessed by the concerned parties,[91]

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[87] The sincerity of the states and the gaming industry in proffering fear of organized crime as the reason for their opposition to the expansion of Indian gaming was attacked in no uncertain terms by members of the Senate Select Committee on Indian Affairs.

> As the debate [over IGRA] unfolded, it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition. . . . Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity.

S. REP. NO. 446, *supra* note 86, at 33, *reprinted in* 1988 U.S.C.C.A.N. at 3103 (statement of Sen. McCain).

"We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness." *Id.* at 36, *reprinted in* 1988 U.S.C.C.A.N. at 3105 (statement of Sen. Evans); *see* S. REP. No. 660, 102d Cong., 2d Sess. 68-75 (1992) (Paul L. Maloney, Senior Justice Department Counsel for Policy, Criminal Division, testifying that there was little evidence of criminal activity in Indian gaming).

[88] The reference to "bingo cases" includes *Seminole, Barona, Oneida* and *Lac du Flambeau. Lac du Flambeau* actually involved the game of pull-tabs, but IGRA eventually included pull-tabs in the definition of Class II games. 25 U.S.C. § 2703(7)(A)(i)(III). *Cf. infra* appendix; *infra* notes 300-28 and accompanying text.

[89] 480 U.S. 202 (1987) (docketed Apr. 29, 1986).

[90] Certiorari for *Cabazon* was granted on June 10, 1986. 476 U.S. 1168 (1986).

[91] The Senate Report claims the tribes, fearing an adverse decision, became more willing to negotiate, while the states and gaming industry, fearing a decision adverse to their interests, became more insistent on a legislative grant of jurisdiction to the states. S. REP. No. 446, *supra* note 86, at 4, *reprinted in* 1988 U.S.C.C.A.N. at 3073-74. Professor Santoni, on the other hand, saw the tribes holding out for a favorable decision that would grant them greater latitude in the operation of gambling than any of the proposed legislation,

it is undisputed that the Supreme Court's decision to hear *Cabazon* effectively scuttled the course of House Bill 1920 in the 99th Congress.

When the 100th Congress convened, Senators Inouye,[92] Evans, and Daschle introduced Senate Bill 555, a bill that was based in large part on House Bill 1920 from the 99th Congress. At the same time, Representative Udall introduced House Bill 2507 in the House, giving tribes jurisdiction over both Class II and Class III gaming subject only to approval of tribal ordinances by the Chairman of the National Indian Gaming Commission[93] ("NIGC"). Six days later the Supreme Court handed down its decision in *Cabazon.*

The Cabazon and Morongo bands of Cahuilla Indians had been conducting bingo and card games on their reservations in southern California. Those games, sanctioned by both tribal ordinances[94] and approvals from the Secretary of the Interior[95] were not in conformance with California state law.[96] The State of California and the county of Riverside attempted to enforce their laws with respect to the tribes' games on their reservation lands and, in response, the Indians instituted an action in federal district court for declaratory relief. The district court granted summary judgment for the tribes, and the Ninth Circuit affirmed.[97] Subsequently, the Supreme Court, cognizant of the trend started by the decision in *Seminole,* and having recently decided similar questions of the applicability of state law with respect to other activities on Indian land,[98] granted certiorari.

California offered three alternative grounds for application of

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while the states saw the possibility that the Supreme Court might deny all gaming rights to the Indians. Santoni, *supra* note 73, at 401.

92 Sen. Daniel K. Inouye (D-Haw.) was Chairman of the Senate Select Committee on Indian Affairs at the time. Sen. John R. McCain (R-Ariz.), former Vice Chairman, is the current Chairman.

93 Both the Senate bill and the House bill called for establishment of this special commission to oversee Indian gaming. The proposed composition of the Commission underwent some modification during the negotiation process (shrinking from seven to three members) but the basic concept, originally proposed in H.R. 1920, *supra* note 82, was retained in all bills introduced in the 100th Congress.

94 *See Cabazon,* 480 U.S. at 206.

95 Pursuant to 25 U.S.C. § 81 (1994), all agreements made with Indians "relative to their lands" are subject to approval by the Secretary of the Interior.

96 CAL. PENAL CODE § 326.5 (West 1987), permitted bingo if conducted by a charitable organization, if staffed by members of the organization who were not compensated for their services, and if prizes did not exceed $250 per game. Both tribes operated their games under ordinances which explicitly forbid prize limits and permitted compensation for employees. *See supra* note 93.

97 *Cabazon,* 783 F.2d 900.

98 Rice v. Rehner, 463 U.S. 713 (1983) (regulation of liquor on Indian lands); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (state sales tax on cigarettes sold to non-Indians held applicable on Indian land).

state law to the games in question. First, as a Public Law 280 state, California had been granted criminal jurisdiction on Indian lands within its borders. The statute in question, the State argued, was a criminal sanction which the tribes were therefore required to obey. Second, the Organized Crime Control Act of 1970[99] ("OCCA") banned gambling on Indian land in any state in which a gambling business "is a violation of the law of a State or political subdivision in which it is conducted."[100] California, being such a state, could therefore, according to the State's reasoning, enjoin tribes from conducting the games in question. And third, federal common law, which required a balancing of state, tribal, and federal interests in the determination of the reach of state laws onto Indian land, favored the State's interest and therefore permitted interdiction of the tribes' games by the state.

As was the case in *Seminole*, the precise distinction between criminal and civil laws under Public Law 280 was the critical factor with respect to the first of these arguments. Courts had struggled with the concept in other contexts for some time.[101] The Court in *Cabazon* relied on *Bryan v. Itasca County*[102] to provide the definitive reading of American Indian law on this problem. The Court viewed the mere use of criminal penalties as insufficient, since attachment of such a penalty could transform any civil law into a criminal one,[103] rendering the distinction meaningless.

Bryan held that the intent of Congress as expressed in section 7 of Public Law 280[104] was "to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes."[105] Looking at

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99 18 U.S.C. § 1955.

100 *Id.* § 1955(b)(1)(i).

101 "To prohibit [an activity] implies putting a stop to [it] . . ., to end it fully, completely, and indefinitely," while regulation "implies that [the activity] shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934); *see* Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987) (applying a regulatory/prohibitory test to the Assimilative Crimes Act ("ACA"), holding that New Mexico's gambling laws on horse racing were regulatory and thus inapplicable to the reservation, while state laws on greyhound racing were prohibitory and were incorporated into federal law by the ACA); *Marcyes*, 557 F.2d 1361 (Washington's fireworks laws were prohibitory and therefore applied to Indian reservations through the ACA).

102 426 U.S. 373 (1976).

103 "[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between § 2 [the grant of criminal jurisdiction] and § 4 [the grant of civil adjudicatory jurisdiction] of that law could easily be avoided and total assimilation permitted." *Cabazon*, 480 U.S. at 211. Note that Justice Stevens did not accept this proposition. *Id.* at 224-25; *cf. infra* note 112 and accompanying text.

104 *See infra* note 160.

105 *Bryan*, 426 U.S. at 383.

the legislative history of Public Law 280, the Court found an "absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations."[106] Thus, the question of whether state law may be applied on Indian lands is determined by the criminal or civil character of the relevant state law. The *Cabazon* Court accepted the interpretation of *Bryan* offered by the Ninth Circuit in *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*:[107] "[W]hether the state and county laws apply [conduct of Indians on Indian land] depends on whether the laws are classified as civil/regulatory or criminal/prohibitory."[108] The Supreme Court found that "[t]he shorthand test [for that determination] is whether the conduct at issue violates the State's public policy."[109]

In assessing California's "public policy" toward the bingo and card games that the Cabazon and Morongo tribes wanted to conduct, the Court looked not simply at the statute in question, but at the full range of California laws that related to gambling in general.[110] Since all regulations involve some degree of prohibition,[111] the only way to distinguish a regulation from a true prohibition is to look at the controlling statute in context, that is, within the framework, if any, of the set of laws in which it is a subset. And therein lies the crux of the disagreement between the majority and the dissent in *Cabazon*. The majority interpreted the *Bryan* search for public policy as requiring a broadening of the relevant legal category to afford a wider perspective on the meaning of the specific law in question. The dissent saw the public policy determination as growing directly out of the statute itself, without the need to refer to other statutes or to find a "context" at all.

> To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour.[112]

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106 *Id.* at 384.

107 694 F.2d 1185.

108 *Id.* at 1188; *see supra* note 45.

109 *Cabazon*, 480 U.S. at 209 (emphasis supplied).

110 Public policy must be approached as a global concept and, accordingly, any inquiry into the nature of a particular state law must extend beyond the confines of the law's own provisions. . . . A state's public policy must be gleaned from the totality of the laws enacted by the state affecting the conduct in issue.
Rumsey I, 1993 WL 360652, at *3-4 (interpreting the "public policy" standard announced by the Supreme Court in *Cabazon*).

111 Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947).

112 *Cabazon*, 480 U.S. at 224-25 (Stevens, J., dissenting).

It is this disagreement over the breadth of the applicable category that translates directly into a preference for a greater or lesser scope of permissible gaming and that dominates post-IGRA cases.

Quickly dismissing the OCCA argument,[113] the Court addressed the possibility that state law might be made applicable, whether or not Public Law 280 was in force, by operation of federal common law. The federal common law regulating the reach of state law onto Indian land is founded on principles first enunciated by John Marshall in 1832.

> [First, an Indian] nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of [the states] can have no force.[114]

> [Second, the Indian nations] may . . . be denominated domestic dependent nations . . . [t]heir relation to the United States resembles that of a ward to his guardian.[115]

The course of history notwithstanding, these remained the fundamental principles underlying Indian law through the middle of the twentieth century.[116] Over the ensuing thirty years, however, the concept that there might be cases in which state law extended onto reservations without an explicit grant from Congress began to emerge.[117] Thus, the clash of sovereignties was transformed from a

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113 OCCA made it a federal crime to conduct a gambling business in a state in which the conduct of such a business is "a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b)(1)(i). *See supra* note 98. A circuit conflict between the Ninth and Sixth Circuits existed as to whether the criminal/prohibitory-civil/regulatory standard should be applied to the OCCA in determining whether an activity violated "the law of the state." The Ninth Circuit said yes in *Barona*, 694 F.2d 1185. In United States v. Dakota, 796 F.2d 186 (6th Cir. 1986), the Sixth Circuit said no. The Court sidestepped the resolution of the conflict by ruling that regardless of the applicability of the *Bryan* test, enforcement of OCCA was a *federal* prerogative, despite the statute's use of state law as a guidepost. The Court also stated that "[t]here is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect." *Cabazon*, 480 U.S. at 213-14. The technique of federalizing state law was also used in the Assimilative Crimes Act, 18 U.S.C. § 13 ("A violator of the ACA is charged with a federal offense and is tried in federal court, but the crime is defined and the sentence prescribed by state law."). *See* CANBY, *supra* note 57, at 122.

114 *Worcester*, 31 U.S. at 561.

115 *Cherokee Nation*, 30 U.S. at 17.

116 Much of the federal statutory law, for example, the Trade and Intercourse Acts, ACA, Federal Enclaves Act, and Major Crimes Act, placed great import, accordingly, on the status of the parties (whether the parties were Indian or non-Indian), and on the locale of the incident or controversy (whether or not it took place on Indian land). The result was a complex set of concurrent and exclusive jurisdictions. A divorce, for example, in which the plaintiff is a non-Indian and the defendant an Indian, both domiciled in Indian county falls under the exclusive jurisdiction of the tribes, while a reversal of the plaintiff's and defendant roles produces concurrent jurisdiction between the state and the tribe. *Cf.* CANBY, *supra* note 57, at 153-54, 161-63.

117 McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 170-71 (1973) ("State laws

bright line into a question of competing interests, with particular emphasis placed on the traditional role of the activity in Indian culture.[118] The issue came to be phrased as a preemption analysis: with respect to a given state law, were the state interests strong enough to overcome a presumption of preemption by federal law in favor of federal and tribal interests?[119] Precisely where the presumption lies, with state law or federal law, remains a point of contention,[120] but the principle is uncontested. Under certain circumstances, state law may govern on Indian land without an explicit congressional grant.

Applied to the facts in *Cabazon*, the balancing of state, federal, and tribal interests, according to the majority, came out in favor of the tribes. The state's interest in preventing the infiltration of organized crime, while bona fide, was viewed as relatively weak compared to the shared federal and tribal interest in economic development on the reservation. The federal interest was expressed very clearly in a policy address made by President Reagan,[121] by a policy directive issued by the Assistant Secretary of the Interior,[122] and by evidence that the Secretary of the Interior, pur-

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generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." (citations omitted)); *but see Colville*, 447 U.S. 134 (holding that the state interest in collecting sales tax on cigarettes outweighed the tribal interest in economic development, especially when the activity involved primarily non-Indians purchasing a product that had been imported onto Indian land and was promptly removed therefrom); *and* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (although state law held to be preempted by federal law in the instant case, formula was established by which a state law that serves an extremely important state interest could interfere with tribal state government).

118 *Cf. Rice*, 463 U.S. 713 (states can require state license for operation of a liquor business on tribal land, since the activity of liquor sales was one over which the Indians had not traditionally exercised sovereign control).

119 "State jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Mescalero*, 462 U.S. at 334. However "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 331-32.

120 "Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders." *Cabazon*, 480 U.S. at 222 (Stevens, J., dissenting). "Justice Stevens appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary . . . '[t]hat is simply not the law.' " *Id.* at 216 n.18 (quoting White Mountain Apache v. Bracker, 448 U.S. 136, 151 (1980)).

121 *See supra* note 75.

122 On Mar. 2, 1983, the Assistant Secretary of the Interior stated that the department would "strongly oppose" any legislation which sought to limit the right of Indians to conduct bingo operations on their reservations. "Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced." *Cabazon*, 783 F.2d at 905 (and cited in the Supreme Court Brief for Appellees at 2, *Cabazon* (No. 85-1708)).

suant to powers given to him in the Indian Financing Act of 1974,[123] had made grants and guaranteed loans worth approximately $8 million for the construction of bingo facilities. As a result, California was denied an alternative to clearing the *Bryan* criminal/prohibitory-civil/regulatory threshold for applying its laws to the bingo and card games of the tribes.

The tribes emerged from the *Cabazon* decision with a test that permitted the use of a very broad baseline category with which to measure the civil/regulatory nature of state law and seemed assured of a very wide scope of permissible gaming. Congress, however, had the final word.

V. IGRA

Presented with the fait accompli that, absent an expression of congressional will, the Supreme Court's *Cabazon* test for determining the applicability of state law to gambling on Indian lands would stand, the parties in the legislative battle reassessed their positions and re-engaged the negotiations. On June 2, 1988, Senators Inouye, McCain, and Evans introduced Senate Bill 1303, the Senate's version of House Bill 2507.[124]

Senate Bills 1303 and 555, the pre-*Cabazon* 100th Congress Senate bills, ascribed fundamentally different significance to the distinction between Class II and Class III games. Senate Bill 1303 permitted tribes to conduct both classes so long as the activities were not prohibited by state law, under the meaning of that phrase as expounded in *Cabazon*, and a tribal ordinance was approved by the Chairman of the National Indian Gaming Commission.[125] Senate Bill 1303 took *Cabazon* at its broadest possible interpretation, applying it to gambling in general, rather than just bingo. This position, originating with House Bill 2507's sponsor Representative Morris Udall, strongly favored Indian interests.

Senate Bill 555, on the other hand, required the tribes' consent to state jurisdiction, including *all* state licensing and regulatory requirements, in order to conduct any Class III games.[126] The definitional line between the classes remained the same, with bingo and non-banking card games comprising Class II and all

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123 25 U.S.C. §§ 1451-1543 (1994).

124 Hearings were held on both S. 555 and S. 1303 on June 18, 1987. *See infra* note 128. Those hearings and the subsequent report of the Senate Select Committee, S. REP. No. 446, *supra* note 86, *reprinted in* 1988 U.S.C.C.A.N. 3071, form the main body of legislative history that has served as an important elucidatory tool in many of the cases that followed passage of IGRA.

125 *See supra* note 92.

126 S. 555, 100th Cong., 1st Sess. § 11(d)(2)(A) (1987).

other games falling into Class III,[127] but the significance of the line took on much greater meaning. Senate Bill 555 gave *Cabazon* a narrower reading. It permitted states to strictly control the extent of non-bingo gaming on Indian lands. That the states would use that power to impede the operation of any Class III gaming was a foregone conclusion.[128]

What emerged from the negotiations that followed the June 1988 hearings was a compromise between the two positions that introduced the concept of the tribal-state compact. In effect, the determination of which state laws, if any, would govern the operation of Class III games on Indian lands was left to a mandatory negotiation process. As part of this determination, any state that regulated rather than prohibited Class III gaming would be required to negotiate in good faith with tribes over the exact extent and manner in which state law would apply to the operation of Class III games on Indian land.[129]

As a precursor to determination of the need for a compact, Congress attempted to incorporate the holding of *Cabazon* into the IGRA scope of gaming scheme. The manner in which the permissibility of a game is determined is codified in sections 2703 and 2710. Section 2703 provides definitions for the three classes.[130] Section 2710 describes the process by which games in each class are considered, approved, and regulated. Under the provisions of that section, Class I games are "within the exclusive jurisdiction of the Indian tribes."[131] Class II games are regulated by the tribes sub-

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127 25 U.S.C. § 2703(7)-(8). *Cf. infra* appendix; *supra* notes 300-28 and accompanying text.

128 *Gaming Activities on Indian Reservations and Lands: Hearings on S.555 and S.1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 101 (1987) (statement of Sen. McCain).

129 The mandatory elements of the compacting process, that is, the good faith requirement and 25 U.S.C. § 2710(d)(7)(B), the provision subjecting the states to the jurisdiction of federal district court in the event of a breach of the good faith requirement, have raised the possibility of a conflict with the 10th and 11th Amendments to the Constitution. States have repeatedly challenged the validity of IGRA on the basis of these claims. *See* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir. 1994); Ponca Tribe of Okla. v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994); *see infra* note 286; *see also infra* note 137 on management contracts; notes 140 & 263 on gaming on newly acquired trust lands.

The compacting process, first used in IGRA, has been suggested for use in other debates over the extension of state law onto Indian land. The Mescalero Apaches of New Mexico, for example, have indicated their willingness to permit tribal land to be used as a temporary nuclear waste storage site. Strong state opposition threatens to scuttle the project and the compacting process has been raised as a possible solution to the confrontation. *Mescalero Apache Seek Storage Site for Radioactive Waste* (ABC World News Tonight broadcast, June 8, 1994) (Barry Serafin, reporter).

130 25 U.S.C. § 2703(6)-(8). *See supra* note 86 and *infra* appendix.

131 25 U.S.C. § 2710(a)(1).

ject to two conditions: 1) an ordinance is enacted by the tribe and approved by the Chairman of the NIGC; and, most importantly, 2) "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity . . . ."[132] The language chosen for this second condition was clearly designed to reflect the holding in *Cabazon*. "[I]f the intent of a state law is generally to prohibit certain conduct, . . . [then state law can reach onto Indian lands], but if the state law generally permits the conduct at issue, subject to regulation, . . . [then it cannot reach onto Indian lands]."[133]

Class III games are to be regulated according to the terms of a tribal-state compact[134] subject to the same two conditions required of Class II games, that is, an ordinance enacted by the tribe and approved by the Chairman of the NIGC and a requirement that "such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ."[135] The language used in section 2710(b)(1)(A) (governing Class II) and section 2710(d)(1)(B) (governing Class III) is identical. The significance of this identity, whether Congress intended to apply the criminal/prohibitory-civil/regulatory test as applied in *Cabazon* to games that were later classified as Class III under IGRA, is the critical point of contention that separates the Ninth Circuit's decision in *Rumsey* from other circuits that have considered the issue.

VI. Post-IGRA Case Law

With the passage of IGRA, the uncertainty left by the expansive potential of the *Cabazon* decision was diminished. Tribes began a virtual whirlwind frenzy of investment in gaming operations.[136] A series of lawsuits arose over a number of issues, including management contracts,[137] the constitutionality of the mandatory compacting process, with its requirement of good faith

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132 *Id.* § 2710(b)(1)(A).

133 *Cabazon*, 480 U.S. at 209.

134 25 U.S.C. § 2710(d)(1)(C).

135 *Id.* § 2710(d)(1)(B).

136 The estimated annual earnings on gaming now equal or exceed all of the revenues derived from Indian natural resources. In addition, Indian gaming has generated tens of thousands of new jobs for Indians and non-Indians. On many reservations gaming has meant the end of unemployment rates of 90 or 100 percent and the beginning of an era of full employment.
140 Cong. Rec. S14,729 (daily ed. Oct. 7, 1994) (statement of Sen. McCain). *Cf. supra* note 6.

137 *See* Althemier & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993); United States v. Buffalo Bros. Management, Inc., 20 F.3d 739 (7th Cir. 1994); Rita, Inc. v. Flandreau Santee Sioux Tribe, 798 F. Supp. 586 (D.S.D. 1992); U.S.A. *ex rel.* Glenn A. Hall Litigation, 825 F. Supp. 1422 (D. Minn. 1993).

on the part of the state,[138] the classification of games, both electronic and non-electronic,[139] and the status of gaming on lands acquired after the passage of IGRA.[140] Of concern here, however, are those cases that raise the issue of the permissible scope of gaming on Indian land as determined under IGRA. Subsequent to its passage, cases addressing this issue reached the appellate level in five circuits.[141]

Whether IGRA incorporated or superseded the holding in *Cabazon* with respect to the threshold for applicability of state law was publicly debated both during and after passage of the bill. Tribes have maintained that the holding was, in fact, fully incorporated,[142] while the states and their gaming industry allies have maintained that it was not.[143] Underlying the technical debate was a disagreement over the purpose of IGRA itself: was it designed to limit the import of *Cabazon* by restricting tribes to only such gaming, particularly Class III games, which were permitted under state law, or, as Senator Evans expressed in comments appended to the Senate Report, was it meant to "acknowledge[ ] that inherent rights are expressly reserved to the tribes,"[144] thereby affording tribes, in essence, an affirmative action program? The public debate notwithstanding, three of the four circuit courts that consid-

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138 *See Flandreau Santee*, 798 F. Supp. 586; *see also infra* note 286.

139 *See infra* appendix.

140 Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir.), *cert. denied*, 115 S. Ct. 298 (1994). In Aug. 1994, a citywide referendum approved the transfer of 135,000 square feet of land in the Greektown area of downtown Detroit to the Chippewa for the purpose of establishing a casino. Michigan Governor Engler, pursuant to the power granted to him under IGRA, has yet to decide on whether or not to allow the operation of gaming on these new trust lands. Iver Peterson, *An Indian Reservation? Right in Detroit?*, N.Y. TIMES, May 27, 1995, at A6.

141 The Second, Seventh, Eighth, Ninth, and Tenth Circuits have each dealt with this issue. The Tenth Circuit, one of the three circuits deciding in favor of the tribes, did not address the scope of gaming issue as directly as the other circuits and therefore will not be discussed in greater detail here. In United Keetowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170, 1179 (10th Cir. 1991), the Tenth Circuit used a rather circular reference to Senate Report 446, *see supra* note 86, which had commented that bingo, the proposed game in question, was prohibited by state law in only five states, Oklahoma not among them. The court arrived at its own determination that the applicable state law was civil/regulatory with respect to bingo. Therefore this decision did not make any significant contribution to the debate.

142 *See Amendments to the Indian Gaming Regulatory Act: Hearings Before the Senate Select Comm. on Indian Affairs*, pt. 2, 103d Cong., 2d Sess. 195 (1994) [hereinafter *IGRA Amendments Hearings*] (statement of Rick Hill, Chairman, National Indian Gaming Association, accompanied by Gary Royer, Frank Ducheneaux, and Sharon House).

143 *See, e.g., id.* at 115 (statement of James E. Doyle, Attorney General of Wisconsin, accompanied by Nelson Kempsky, Executive Director, Western Conference of Attorneys General); *State Perspectives on the Clarification of the Indian Gaming Regulatory Act of 1988: Hearing Before the Senate Select Comm. on Indian Affairs*, pt. 1, 103d Cong., 2d Sess. 195 (1994) (testimony of Hon. Mike Sullivan, Governor of Wyoming).

144 S. REP. NO. 446, *supra* note 86, at 36, *reprinted in* 1988 U.S.C.C.A.N. at 3105.

ered the matter prior to *Rumsey* decided that the correct legal interpretation of IGRA favored the Indian position.

A. *Second Circuit*

In a decision that ultimately led to the construction and operation of the largest casino in the United States,[145] the Second Circuit was the first circuit to address the threshold question after the passage of IGRA.[146] The Mashantucket Pequots, a federally recognized Connecticut tribe with some 318 members,[147] sought to force the state to negotiate a compact with regard to certain Class III games that were permitted by Connecticut law[148] for certain nonprofit organizations at sessions commonly referred to as "Las Vegas Nights." The State contended that the proposed games were commercial, and therefore under section 2710(d)(1)(B) that they were prohibited by state law. Accordingly, the State was not required to enter into negotiations for a compact. "[T]he State argues that its limited authorization of the conduct of 'Las Vegas nights' by nonprofit organizations does not amount to a general allowance of 'such [casino-type] gaming,' within the contemplation of section 2710(d)(1)(B)."[149] In effect, the State was arguing that the correct baseline category relevant to the term 'such gaming' was not the field of all gambling games, or even all games that might be classified as Class III, but rather the narrow subset of the specific games in question, in this case, commercial Class III games.

The district court took a different view of this statutory language. In particular, its reading of the phrase "such gaming" explicitly followed the guidance provided by the *Cabazon* decision, which had looked to the public policy of California with respect to

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145 Foxwoods, the Mashantucket casino in Ledyard, Connecticut, is also "the most profitable casino in the nation . . . [it made] more than $800 million last year, twice as much as either of the nation's two next-most profitable casinos, the Taj Mahal in Atlantic City and the MGM Grand in Las Vegas, Nev." Kirk Johnson, *Tribes Promised Land is Rich but Uneasy*, N.Y. TIMES, Feb. 20, 1995, at A1.

146 Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990) (decided Sept. 4, 1990), *cert. denied*, 499 U.S. 975 (1991). The Eighth Circuit handed down a ruling six months earlier, on Mar. 2, 1990, United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990), but that decision related to "grandfathered" games, that is, games that were being operated by tribes prior to the passage of IGRA. *See* 25 U.S.C. § 2703(7)(C)-(F).

147 *See supra* note 145.

148 CONN. GEN. STAT. § 7-186(a)-(p) (1989). Permitted games included blackjack, poker, dice, money-wheels, roulette, baccarat, chuck-a-luck, pan game, over and under, horse race games, acey-ducey, beat the dealer, and bouncing ball.

149 *Mashantucket*, 913 F.2d at 1029. That section 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 . . . ." 25 U.S.C. § 2710(d)(1)(B). *See infra* note 155 and accompanying text.

"all forms of gambling."[150] Citing the legislative history of IGRA,[151] the court noted that the State's position was contrary to the stated purpose of IGRA, since it permitted the State to impose its regulatory scheme without the mandatory compacting process.

> Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.[152]

The State's argument in *Mashantucket,* with respect to the permissibility of the Class III games in question,[153] is precisely the same argument that the Ninth Circuit was to accept five years later in *Rumsey.*[154]

In *Mashantucket,* Connecticut argued that difference in the language of section 2710(b)(1), covering Class II games,[155] and the language of section 2710(d)(1), covering Class III games,[156] indicated a distinction that Congress was seeking to make with regard to the reach of state regulation over the two types of games. The State cited cases[157] that held that the criminal/prohibitory-civil/regulatory test was not applicable to another federal statute,[158] which used federal reference to state law similar to that used in IGRA. The Second Circuit pointed out, however, that OCCA, as conceded by the *Dakota* court, was "not enacted for the benefit of Indian tribes,"[159] an important interpretative factor in statutory construction of federal Indian law.[160] IGRA, on the other hand,

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150 *Cabazon,* 480 U.S. at 210.

151 S. REP. NO. 446, *supra* note 86, at 13-14, *reprinted in* 1988 U.S.C.C.A.N. at 3083-84. The same passage is cited by Judge O'Scannlain in his decision in [*Rumsey II*] to support an opposite conclusion. *See infra* notes 233-55 and accompanying text.

152 *Mashantucket,* 913 F.2d at 1030-31.

153 The State had argued alternatively and unsuccessfully that it was not required to negotiate a compact because the Pequots had failed to pass a tribal ordinance prior to requesting negotiations. *Cf. id.* at 1028.

154 *See infra* notes 232-56 and accompanying text.

155 "An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if . . . such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity . . . ." 25 U.S.C. § 2710(b)(1)(A).

156 "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 . . . ." *Id.* § 2710(d)(1)(B).

157 *Dakota,* 796 F.2d 186; United States v. Burns, 725 F. Supp. 116 (N.D.N.Y. 1989), *aff'd sub nom.* United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).

158 Organized Crime Control Act, 18 U.S.C. § 1955; *see supra* notes 99 and 113 and accompanying text.

159 *Dakota,* 796 F.2d at 188.

160 "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous pro-

was clearly intended to benefit the tribes. Its purpose is explicitly laid out in section 2702:

> The purpose of this [Act] is 1) to provide a statutory basis for *the operation of gaming by Indian tribes as a means of promot*ing tribal economic development, self-sufficiency, and strong tribal governments; 2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, [and] to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . .[161]

Legislative history, moreover, indicated that the compacting process was created as a compromise mechanism by means of which the competing interests of the state in regulating gambling activities within its borders could be balanced with those of the tribes and federal government in fostering economic development on the reservations. "After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met . . . ."[162] To hold that the *Bryan* criminal/prohibitory-civil/regulatory test that *Cabazon* had applied to state gambling laws was not mandated by IGRA for Class III games would mean that "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would . . . become a dead letter."[163]

In effect, the Second Circuit rejected the State's contention that a preliminary threshold test should be applied in questions of permissible scope of gaming under IGRA before application of the criminal/prohibitory-civil/regulatory threshold test. That test would have determined whether the *Cabazon* test was the appropriate standard to use with respect to proposed Indian games. If a game was deemed Class III, then, according to the State, a different test would be applied, one that presumably involved a narrow interpretation of the term "such gaming" in section 2710(d)(1)(B). But the court concluded that "the district court was correct in applying the *Cabazon* criminal/prohibitory-civil/reg-

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visions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 195 (1989); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). The Court in *Bryan* characterized this canon as "eminently sound and vital." *Bryan*, 426 U.S. at 392. *See infra* notes 248-52 and accompanying text.

161 25 U.S.C. § 2702(1)-(2).

162 S. REP. NO. 446, *supra* note 86, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083.

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

ulatory test to class III gaming."[164] Since the Second Circuit affirmed the district court's application of the *Cabazon* test, with its use of a broad comparison category for determination of the regulatory nature of state law, the net effect of *Mashantucket* was to require those states[165] that permitted charity gaming to negotiate compacts with tribes that wished to conduct commercial gaming.

Although framed as a question of the applicability of the *Cabazon* test to Class III games, the underlying conceptual debate in *Mashantucket* is one over the *breadth* of the category against which a proposed game would be compared in order to determine the criminal/prohibitory-civil/regulatory nature of state law. A broad baseline, such as that used by the Supreme Court in *Cabazon*, would produce a greater likelihood that the game in question would be subject to mandatory compact negotiations, since the permissibility of any gambling would render a state's laws regulatory and not prohibitory. The narrow baseline, which Connecticut conceded was not the holding in *Cabazon*, would make it very difficult for tribes to conduct any game that was not specifically permitted under state law. It was this more direct approach that Wisconsin attempted to use in its argument before the Seventh Circuit.

B. *Seventh Circuit*

The scope of the gaming decision in the Seventh Circuit, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,[166] which spawned a similar explosion in Indian gaming in its constituent states,[167] was handed down the following year. The opinion was written by Chief Judge Barbara Crabb, author of the pre-IGRA bingo decision in *Oneida Tribe of Indians v. Wisconsin*,[168] and is considered a particularly well-reasoned and thorough investigation.

At issue was negotiation of a tribal-state compact over the operation of "casino games, video games and slot machines."[169] Even though the State of Wisconsin conducted three types of lotteries,

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164 *Id.* But see the opposite conclusion reached by the Ninth Circuit in *Rumsey II, infra* notes 236-42 and accompanying text.

165 *Mashantucket* is only applicable to those states within the jurisdiction of the Second Circuit.

166 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed on other grounds*, 957 F.2d 515 (7th Cir. 1992) (Easterbrook, J.) (ruling that the State's appeal was not timely).

167 Wisconsin has seventeen Indian-owned casinos; Minnesota has eighteen. The Mystic Lake Casino of the Shakopee Mdewakanton Dakota tribe has over 4,000 employees on an annual payroll of $70 million. *Tribal Games*, CASINO PLAYER, June 1994, at 22-23.

168 518 F. Supp. 712. *See supra* note 45 and accompanying text; *see also supra* notes 72, 83, & 88 and accompanying text.

169 *Lac du Flambeau*, 770 F. Supp. at 482.

and on-track parimutuel betting was allowed within the State, attorneys for the State had questioned the validity of compacts that had been negotiated between the State and the Sokaogon and Lac Du Flambeau Indian tribes, permitting "casino games, including video gaming machines, blackjack, roulette, slot machines, poker and craps," activities which the State's attorneys claimed were not "conducted by anyone else in Wisconsin."[170] On advice of counsel, Wisconsin broke off the negotiations and the tribes sued in federal court for both declaratory relief, barring the State from enforcing its gambling laws on Indian lands, and injunctive relief to force the State, according to IGRA provisions,[171] to reopen the negotiations.

In *Lac Du Flambeau*, Wisconsin did not attempt to distinguish between Class II and Class III games as to the applicability of the criminal/prohibitory-civil/regulatory test, as Connecticut had in *Mashantucket*, and as California would in *Rumsey*.[172] Instead, the state sought to narrow the baseline category by concentrating on the term "permits" in the threshold provisions of IGRA,[173] arguing that "usual dictionary meaning" of the term meant "formally or expressly granting leave."[174] The State argued that absent an explicit grant of permission to conduct the games in question, the tribes could not conduct the proposed games.

Chief Judge Crabb rejected this argument on two grounds. First, she asserted that the State's argument of the plain meaning of the statutory term was simply incorrect. "[The State's] reading of 'permits' ignores the other meanings assigned to the word, such as '[t]o 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.' "[175] At best there was ambiguity obviating the use of the plain meaning statutory canon.[176]

Second, the court held that the State's argument ran contra to

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170 *Id.* at 483. *Cf.* 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B).

171 *Id.* § 2710(d)(7)(B)(ii)(II). *See infra* note 286.

172 Chief Judge Crabb, nonetheless, supported her reasoning by referring to portions of the Senate Report, S. REP. No. 446, *supra* note 86, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3075-76, which discussed Class II gaming and pointed out that "[a]lthough the Senate committee was speaking of class II activities, its comments are equally applicable to the requirement for class III activities." *Lac du Flambeau*, 770 F. Supp. at 485. Thus, even though the parties did not address the issue, it is clear that Chief Judge Crabb would have difficulty with Judge O'Scannlain's interpretation of IGRA as expressed in *Rumsey II*. *See infra* notes 233-39 and accompanying text.

173 *See supra* note 132 and accompanying text.

174 *Lac du Flambeau*, 770 F. Supp. at 484.

175 *Id.* at 485 (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)).

176 Chief Judge Crabb's preliminary resort to plain meaning is paralleled in the *Rumsey* decision. There the judges split on the adequacy of plain meaning, with a concurrence holding that the majority's discussion of legislative history was unnecessary since plain meaning trumped all other possible interpretations. *See infra* text accompanying note 247.

Cabazon, "on which Congress relied in drafting the Indian Regulatory Gaming [sic] Act."[177] In language that clearly indicated a strong adherence to the broad comparative category public policy test, Chief Judge Crabb read *Cabazon* to mean that

> [i]f the [state] policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.[178]

Rejecting the "express permission" argument and applying her reading of *Cabazon* to the games in question, regardless of their IGRA classification,[179] Chief Judge Crabb found that Wisconsin voters had passed an amendment to the state constitution permitting the operation of a state lottery, and thus had "evidence[d] a state policy toward gaming that is now regulatory rather than prohibitory in nature."[180] The State proffered the counterargument that even if Wisconsin's public policy toward Class III games was viewed as regulatory, Wisconsin was not required under IGRA to negotiate the "specific activities in dispute because it does not permit [them],"[181] but the court pointed out that such logic would effectively permit states to impose their regulatory schemes on states,[182] contrary to the intent of Congress in passing IGRA. Chief Judge Crabb therefore held that the state was required to negotiate a compact with regard to "any activity that includes the elements of prize, chance, and consideration[183] and that is not prohibited expressly by the Wisconsin Constitution or state law."[184] Thus the state's "end run" attempt to require negotiation only on "exact games"—in effect, a narrow reading of the "such gaming" language of 2710(d)(1)(B)—was defeated in the Seventh Circuit. The argument, however, was not dead.

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177 *Lac du Flambeau*, 770 F. Supp. at 485.
178 *Id.*
179 *See supra* note 172.
180 *Lac du Flambeau*, 770 F. Supp. at 486.
181 *Id.* at 487.
182 *See supra* note 162.
183 Chief Judge Crabb used a standard definition of gambling in the decision. *See* JOHN SCARNE, THE NEW COMPLETE GUIDE TO GAMBLING 14-15 (1986); *see generally* Aronovitz, *supra* note 26.
184 *Lac du Flambeau*, 770 F. Supp. at 488.

C. *Eighth Circuit*

By 1993, the Eighth Circuit had already discussed the scope of gaming under IGRA once before. In connection with the "grandfather" clauses of IGRA,[185] the court had ruled in *United States v. Sisseton-Wahpeton Sioux Tribe*[186] that different hours of operation and wager limits did not cause a game to fall outside the "such gaming" language of section 2710(b)(1)(A) and 2710(d)(1)(B).[187] In other words, a difference between some secondary characteristic of a game[188] that did not go to its nature, but rather affected only the manner in which the game was played, and the state's definition of a permissible form of the game, would not permit the state to claim that the game was "prohibited." Failure to match the precise form of the state's statutory definition would not be viewed as a failure to clear the civil/regulatory threshold as set forth in IGRA.[189]

In 1993, however, the Eighth Circuit was presented with a slightly different question and, arguably, came down with a radically different answer. The Cheyenne River Sioux Tribe of South Dakota, dissatisfied with the State's offers in compact negotiations, most notably its refusal to negotiate a compact over traditional keno games, use of higher bet limits, and plans for use of newly acquired trust lands,[190] brought suit in federal district court[191] to force the state to conduct negotiations over the contested issues.

Contrary to the stance taken by the courts in *Mashantucket* and *Lac Du Flambeau*, the district court took a "narrow baseline" position. Rejecting the tribe's contention that since the South Dakota offered "video keno" on its state-wide video lottery system, the State was required to negotiate a compact with respect to traditional keno, the district court found that "the 'such gaming' language of section 2710(d)(1)(B)" required only that the State negotiate with

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185 25 U.S.C. § 2703(7)(C)-(F); *see supra* note 146. These subsections granted a grace period to certain games, Class II and Class III, in certain states, that would have otherwise required tribal ordinances and/or tribal-state compacts. The purpose was to permit the operators and states time to readjust their regulatory schemes without completely shutting down the operations.

186 897 F.2d 358.

187 *Id.* at 366-67.

188 *See infra* notes 272-81 and accompanying text.

189 The court in *Sisseton* was not required to reach the determination, similar to those arrived at in *Mashantucket* and *Rumsey*, that IGRA intended a different threshold standard for Class III games, since the Class III games in question were grandfathered, under the provisions of § 2703(7)(C)-(F); grandfathered Class III games are treated as Class II games for purposes of the other sections of the Act.

190 *See supra* note 139.

191 *Cheyenne River Sioux Tribe*, 830 F. Supp. 523.

respect to video keno, not traditional keno.[192] In other words, the court here adopted the position put forth by Wisconsin in *Lac du Flambeau*: the relevant category for determination of the criminal/prohibitory-civil/regulatory nature of a state law is the *exact game*, not the broader, more inclusive backdrop of "all forms of gambling" used by Chief Judge Crabb in *Lac Du Flambeau*, or even some intermediate set, such as all forms of keno. Here the determinative set was traditional keno, since state law did not permit anyone to conduct "such gaming," and therefore the state was not required to negotiate a compact for its use by Indian tribes. Given the reluctance of the courts to allow the use of video technology in Indian gambling activities,[193] this was an arguably anomalous result.[194] But it was this interpretation of the appropriate breadth of reference category for application of the *Bryan* criminal/prohibitory-civil/regulatory test, that was the one adopted by the Ninth Circuit in *Rumsey II*.

D. *Ninth Circuit*

The Ninth Circuit, encompassing nine states containing some two hundred federally recognized Indian tribes[195] is, in a sense, at the center of the Indian gaming controversy. It is the source of the seminal *Cabazon* decision. Las Vegas, America's gambling "capital," is within its jurisdiction. Six of its nine states have at least some degree of Public Law 280 jurisdiction.[196] At the end of 1994, the Ninth Circuit broke stride with the other circuits by declaring ex-

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192 Both are Class III games, although there has been litigation about the classification of the underlying game of keno, *e.g.*, Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399 (D. Minn. 1992), *aff'd*, 16 F.3d 261 (8th Cir. 1994). *See infra* notes 300-26 and accompanying text.

193 *See* Sycuan Band of Mission Indians v. Roache, 38 F.3d 402 (9th Cir. 1994); Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir.), *cert. denied*, 114 S. Ct. 2709 (1994) [*Cabazon 1994*]; Citizen Band Potawatomi Indian Tribe of Okla. v. Heaton, No. 92 Civ. 2095, 1993 WL 264540 (W.D. Okla. Feb. 2, 1993); Spokane Indian Tribe v. United States, 972 F.2d 1090 (9th Cir. 1992); *Cook*, 922 F.2d 1026. All of these cases were decided against individuals or tribes that wanted to conduct video gaming.

194 Opponents of Indian gaming continually pointed to the greater dangers involved with machine gambling. "In our view, there is no justification for carving out an exception for slot machines on which vedeo [sic] or electronic bingo is played." Executive Communication by John R. Bolton, Assistant Attorney General, S. REP. No. 446, *supra* note 86, at 24, *reprinted in* 1988 U.S.C.C.A.N. at 3094. The Department of Justice was concerned with possible conflicts with the Gambling Devices Act (the "Johnson Act," 15 U.S.C. § 1175) and with an expansive definition of "electromechanical bingo" to encompass slot machines, thereby permitting tribes to operate slot machines as Class II devices. *Id; see infra* appendix and notes 328-57 and accompanying text.

195 This figure does not include the more than 500 small bands that live in Alaska. Hawaii has no federally recognized tribes.

196 Two states have original Public Law 280 jurisdiction: California and Oregon. Washington, Nevada, Idaho, and Arizona voluntarily assumed jurisdiction subsequent to enactment of varying degrees. Arizona, for example, has assumed jurisdiction only with respect

plicitly that *Cabazon*, rather than being the basis for interpretation of IGRA, was, in fact, contrary to certain provisions of the Act and therefore had been overruled by it.

The issue of the scope of gaming first reached the Ninth Circuit in 1994 in *Sycuan Band of Mission Indians v. Roache*.[197] The question in *Sycuan* was whether or not the state had a right to seize video pull-tab games, which it contended were prohibited under California law. Under the IGRA classification scheme, electronic facsimiles of Class II games are considered Class III and, if not prohibited by state law, are therefore subject to a tribal-state compact.[198]

Judge William E. Canby, Jr. is one of the nation's leading experts in Indian law[199] and author of the opinion in *Sycuan*.[200] His decision gave an unambiguous indication of the Ninth Circuit's interpretation of correct application of IGRA's scope of gaming provision, at least with respect to Class II games. "[T]he state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees."[201] His determination with respect to Class III games, however, was less clear.

Ruling that the games in question were, in fact, Class III games,[202] the court sidestepped the question of whether or not it thought the *Cabazon* threshold test applied to Class III. Instead the court pointed out that under IGRA, only the federal government had the power to enforce the provisions of that statute on Indian lands.[203] Therefore the state had no standing to seize the video pull-tab games. Since the games were Class III activities, however, they could only be played subject to a tribal-state compact, and absent such a compact, could not be used in the tribes' gaming operations.[204]

The opinion's language, however, left doubt as to the court's concept of the applicable threshold test for Class III games. In par-

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to issues relating to the regulation of air pollution. *See* ARIZ. REV. STAT. ANN. § 49-561 (1988).

197 38 F.3d 402, *reh'g denied*, 54 F.3d 535 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 297 (1995).

198 *See infra* appendix.

199 Judge Canby is also author of AMERICAN INDIAN LAW. *See supra* note 57.

200 The other members of the Ninth Circuit panel in *Sycuan* were Judges Betty B. Fletcher and Cynthia Holcomb Hall.

201 *Sycuan*, 54 F.3d at 539.

202 *Id.* at 542; *see infra* note 334 and accompanying text.

203 *Id.* at 539.

204 The district court actually ordered the seized games to be returned to the company that had leased the games to the tribes. *Id.* at 537.

ticular, the court's powerful statement on the breadth of the reference category for the "such gaming" threshold[205] is prefaced by the following phrase: "[I]nsofar as the State's argument is directed at Class II-type gaming . . . ."[206] Moreover, the court concluded that "California had no . . . jurisdiction to enforce its gambling laws against the gaming operations of the Barona, Sycuan, or Viejas Indian Reservations, *at least insofar as the Bands were engaged in the type of gaming that would fall within Class II of IGRA.*"[207] There is an implication that a different conclusion might otherwise be reached with respect to Class III games.[208] There is no indication as to what that conclusion might be, but nonetheless, a distinct note of ambiguity lingers in the opinion.

There were several indicators in the opinion that despite this ambiguity, the court felt the Class III games in question had cleared the threshold set out in section 2710(d)(1)(B),[209] and that the same standards had been applied in arriving at that conclusion as would have been applied had the games been Class II. The court concluded that "[t]he Band cannot employ [the video pull-tab games] in the absence of a Tribal-State compact,"[210] implying that such absence may be the only missing element in satisfaction of section 2710(d)(1)(B).[211] A footnote at this point in the opinion goes on to describe the other route by which the games might be permitted, that is, under the mandatory mediation process.[212] It seems unlikely that the court would discuss satisfaction of the second prong of the IGRA scheme for Class III games,[213] if it did not assume that the first prong had somehow been satisfied.

In addition, Judge Canby's particular expertise in the field

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205 *See supra* text accompanying note 201.

206 *Sycuan*, 54 F.3d at 539.

207 *Id.* (emphasis supplied).

208 This implication was recognized by the Ninth Circuit panel in *Rumsey III*, which explicitly asked the government to address the ruling in *Sycuan* in its reply to the petition for rehearing. The panel was concerned with the possibility of inconsistency with its own holding in *Rumsey II*. Response to Petition for Rehearing at 1, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995) [*Rumsey III*] (No. 93-16609).

209 *See supra* note 156.

210 *Sycuan*, 54 F.3d at 543.

211 Section 2710(d)(1) delineates the three requirements for lawful conduct of Class III games on Indian land: a valid tribal ordinance, § 2710(d)(1)(A); clearance of the "threshold," § 2710(d)(1)(B); and a valid tribal-state compact, § 2710(d)(1)(C).

212 There is one other route by which Indian tribes can maintain Class III gambling. If the state fails to bargain in good faith and a federal court orders mediation, and the state fails to enter the compact chosen by the mediator, the Secretary may prescribe procedures under which the tribe may conduct Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii)(II). The record does not show that any of the prerequisites for this procedure exist in this case.

Sycuan, 54 F.3d at 543-44 n.6.

213 *See infra* notes 224-27 and accompanying text.

might also be read as an indication that he did not, in fact, mean to imply a difference in standards for Class II and Class III games. The rationale behind the threshold test is rooted in the jurisprudence of both Public Law 280 and federal common law,[214] with which Judge Canby is no doubt intimately familiar. Other experts, notably Chief Judge Crabb in *Lac du Flambeau,* have specifically ruled that there is no difference between the treatment of the classes under IGRA[215] and a reasonable reading of the language of the opinion could be made to show that the ambiguous phrases were merely linguistic conveniences employed to enhance the logical flow of the argument. Absent a definitive clarification from the court, however, the holding of the opinion remains uncertain.[216]

VII. *RUMSEY I* AND *II*

At virtually the same time that the Barona, Sycuan, and Viejas bands were pursuing their action, the Rumsey Indian Rancheria of Wintun Indians joined with eight other federally recognized tribes[217] to sue the State of California and its governor, Pete Wilson, in a declaratory relief action[218] over the state's refusal to negotiate a Tribal-State compact concerning the introduction of a number of additional games into pre-existing tribal gaming operations. The proposed games included non-electronic, banked, and percentage card games, and a variety of video and other electronic or symbol matching games. When the Ninth Circuit[219] ruled against the Indians in *Rumsey II,* holding that IGRA had superseded the Supreme Court's 1987 decision in *Cabazon,*[220] and that the statute required the application of the narrower baseline category favored by opponents of Indian gaming, not only was a circuit conflict created with the Second, Seventh, and Tenth Circuits, but the possibility of a panel conflict between Judge Canby's holding in *Sycuan* and Judge O'Scannlain's in *Rumsey II* was also created within the Ninth Circuit itself.

Rumsey began with a district court decision[221] that primarily favored the tribal viewpoint. Judge Garland E. Burrell saw the ac-

214 *See supra* notes 101-20 and accompanying text.
215 *See supra* note 172; *see also Mashantucket,* 913 F.2d at 1031; *Sisseton,* 897 F.2d at 367-68.
216 *Sycuan,* 54 F.3d 535, *as amended on denial of rehearing* (Apr. 28, 1995), *cert. denied,* 116 S. Ct. 297.
217 Seven tribes subsequently joined in a cross-appeal.
218 *Rumsey II,* 41 F.3d 421.
219 Judge Diarmuid F. O'Scannlain wrote the opinion for a panel that also included Chief Judge J. Clifford Wallace and Judge Robert J. Kelleher.
220 *Rumsey II,* 41 F.3d at 426.
221 *Rumsey I,* 1993 WL 360652.

tion as "a new phase in the ongoing relationship between the Tribes and the State of California,"[222] that had begun with the Supreme Court's decision in *Cabazon*, regarding bingo games conducted by the Cabazon and Morongo tribes. In the court's view, the controversy in *Rumsey* was simply an extension of the debate to a new set of games, with the effect of IGRA added to the mix. That effect was seen clearly as an incorporation of the "totality of the laws enacted by a state" approach that the Supreme Court had applied in *Cabazon*, rather than any narrower comparison to laws about specific games. The relevant inquiry was, according to the court, "[whether] the prohibited activity is a small subset or facet of a larger, permitted activity high-stakes unregulated bingo compared to all bingo games or whether all but a small subset of a basic activity is prohibited."[223]

In facing the "breadth of category" issue head-on, the court hit upon an analytical framework for application of the *Cabazon* test which arguably resolved the dilemma. Explicitly finding that IGRA did not intend different threshold treatment for Class II and Class III games,[224] the district court concluded that the proper application of *Cabazon* and IGRA was "conjunctive," and resulted in a two-part test for the applicability of state law.

> First, the court must ascertain whether the state permits each proposed game to be played "for any purpose by any person." If a game is permitted, then the plain language of IGRA establishes that the [Class III] game is the proper subject of a Tribal-State compact . . . where a proposed game has not been permitted by the state . . . the court must ascertain the state's public policy as it relates to the gaming activity by examining the state's entire statutory scheme . . . as determined from the totality of its laws . . . .[225]

This two-part analytical framework was vigorously opposed by the State in its appeal. The State felt that "[n]othing in the IGRA itself remotely hints at a second-level test. . . . Indeed, the court's 'second-level' test is employed only by courts, when a State has de-

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222 *Id.* at *3.

223 *Id.* at *4 (quoting Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992)).

224 *Id.* at *6. The court quoted Senate Report 446 at *6, substituting "Class III" for "Class II" in the text and citing *Mashantucket* and *Sisseton* as supportive of this undifferentiated interpretation. "[T]he 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 upon those activities to determine whether [Class III] games are allowed in certain states." *Id.* (quoting S. REP. No. 446, *supra* note 86, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3075-76).

225 *Id.*

clined to negotiate with a Tribe . . . ."[226] The State complained that because the two-part test required "a thorough, 'global' review of state public policy by a court,"[227] there was no way for a state to ascertain its obligation to negotiate under IGRA.

But in effect, the court's test is nothing more than a tautological scheme by which the holding of *Cabazon* can be more methodically applied by either the states or the courts. In fact, the court's application of this test to the specific facts in *Rumsey* resulted in a "split" decision that gave something to each side. The electronic, banking, and percentage games were deemed so similar to games conducted by the state in its lottery that state law had to be viewed as regulatory in nature and therefore inapplicable to the tribes. Those proposed banking and card games that had traditional casino themes, however, were seen as being against the public policy of California, since the voters of the state had recently approved a constitutional amendment prohibiting "casinos of the type currently operating in Nevada and New Jersey."[228] The court thus divided the "breadth of category" question in two: when positive permission is granted under state law, the law cannot be seen as prohibiting other similar games, but when a negative sanction has been imposed, its effect must be confined only to the specific type of game in question. Thus, a positive grant may lead to use of a wider field of gaming, while a negative sanction can be interpreted as prohibiting only the narrow field of the game specified.[229]

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226 Appellants' First Brief on Appeal at 6-7, *Rumsey II*, 41 F.3d 421 (9th Cir. 1994) (No. 93-16609). The State questioned Judge Burrell's interpretation of Senate Report 446 on the treatment of Class II and Class III thresholds, citing a decision by the U.S. District Court for the Southern District of Florida that itself questioned the applicability of the *Cabazon* decision to games classified as Class III under the IGRA scheme:

> The Court [in *Cabazon*] was not presented with, and thus did not address, the situation where a state adopted a regulatory attitude toward some forms of gambling which would fall under the IGRA's rubric of Class III gaming (e.g. parimutuel betting and a state lottery), but prohibited the specific Class III activities proposed by a tribe.

Seminole Tribe of Fla. v. Florida, No. 91 Civ. 5756, 1993 WL 475999 (S.D. Fla. Sept. 22, 1993), at *5.

227 Appellants' First Brief on Appeal at 7, *Rumsey II* (No. 93-16609).

228 CAL. CONST. art IV, § 19(e).

229 Judge Burrell's two-part test was adopted by the drafters of S. 2230, *supra* note 83, the 103d Congress's attempt to amend IGRA. S. 2230 goes into more detail in specifying the contours of the second part of the test. In addition to paraphrasing the IGRA standard, "[a]s a matter of state law any person, organization, or entity within the State may engage in the disputed gaming activity for any purpose . . . .," S. 2230, *supra* note 83, §§ 2, 3 and the *Cabazon* standard, "the disputed gaming activity . . . shall be the subject of negotiation if . . . *State law permits the disputed gaming activity subject to regulation.*", *id.*, S. 2230 adds a third criterion where a state law that is otherwise prohibitory (the first prong of Judge Burrell's test) can be deemed not to control a particular game: "[If the game's] *principal characteristics* are not distinguishable from a gaming activity that is not prohibited by State criminal law and there is no rational basis for differentiating between the disputed gaming

The tribe's only objection to Judge Burrell's decision was with respect to the holding on casino games. In its cross-appeal, the tribe argued that the intent of California's constitutional amendment was to ban "casinos" and not "casino-type gaming," that is, the physical structures rather than the gaming operations usually conducted therein.[230] The tribe was clearly pleased with the remainder of the district court's ruling, including the two-part test which it explicitly defended. "The district court's interpretation of IGRA's provisions regarding the scope of permissible gaming was properly based on the statute's plain language and legislative history."[231]

Although framed with particularity,[232] the question before the Ninth Circuit panel addressed the more fundamental structural issue of how the determination of the scope of gaming should be made under IGRA. The question came down to two specific points in Judge Burrell's decision: his substitution of Class III for Class II in interpreting the Senate Report, and his ruling that "IGRA and *Cabazon* apply conjunctively"[233] to yield a two-part test for the applicability of state law with respect to Indian gaming.

The Ninth Circuit decision[234] took a very straightforward approach with the particulars in the case. Insofar as the slot ma-

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activity and the activity not prohibited by the State." *Id.* (emphasis supplied). Thus, if this third criterion were applied to the two sets of games in *Rumsey*, the electronics games, while prohibited by a state law which is arguably criminal, did not differ in their "principal characteristics" from the state's lottery games, activities that were "not prohibited by State criminal law" and could not be rationally differentiated from the lottery games. Therefore, they would have been made subject to negotiations under the S. 2230 scheme. The casino games, on the other hand, would fail the first prong by dint of the constitutional amendment, and could find no similar games within the state that were *not prohibited* by State criminal law. Therefore, they would be excluded, as they were in Judge Burrell's ruling, from compact negotiations. The rejection by the Ninth Circuit panel in *Rumsey II* of this two-part test parallels the failure of the parties to agree on the issues surrounding the scope of gaming in S. 2230. *See infra* epilogue.

230 "Section 19(e) [of the California Constitution] refers to 'casinos,' which are buildings in which games are played, not to types of games." Appellees/Cross-Appellants' First Brief on Appeal at 29, *Rumsey II* (No. 93-16609).

231 *Id.* at 6 (citing *Mashantucket*, *Lac du Flambeau*, and *Seminole* in support).

232 The tribes characterized the issue presented to the Ninth Circuit as "whether the district court erred in concluding that traditional casino banked and percentage card games are not proper subjects for negotiation in a tribal-state compact . . . ." Appellees/Cross-Appellants' First Brief on Appeal at 2, *Rumsey II* (No. 93-16609). The state's characterization was "[w]hether the district court erred in ruling that Plaintiffs' proposal to operate slot machines [and banking and percentage card games] . . . is a proper subject of negotiation . . . for the reason that uncontroverted evidence establishes that state law prohibits slot machine gambling [and banking and percentage card games] to all persons, under all circumstances, and . . . is, therefore, not lawful on Indian lands pursuant to Section 11(d)(1)(b) of the IGRA, 25 U.S.C. § 2710(d)(1)(B)." Appellants' First Brief on Appeal at 1, *Rumsey II* (No. 93-16609).

233 *Rumsey I*, 1993 WL 360652, at *6.

234 *Rumsey II*, 41 F.3d 421.

chines, banking, and percentage games were prohibited by California statutes,[235] the Indian games in question were prohibited as a matter of state law, and therefore, in accordance with section 2710(d)(1)(B), were not subject to negotiation in a tribal-state compact. The tribe's argument that the broader, "totality of the laws" standard of *Cabazon* was mandated by IGRA to be applied to the games in question was flatly rejected.[236] Instead, the court found that Congress intended Class II and Class III games to be treated differently insofar as the application of a threshold test was concerned. The court found that the proper test for Class III games, was given not by *Cabazon*, but by the plain language of the statute, in particular, section 2710(d)(1)(B).

The manner in which Judge O'Scannlain pries section 2710(d)(1)(B) loose from its moorings in Indian statutory and case law[237] is critical. Referring back to the State's dictionary argument in *Lac du Flambeau*,[238] Judge O'Scannlain found that the Ninth Circuit adopted the meaning of the term "permits"[239] in a prior case,[240] and therefore rendered the controlling language of section 2710(d)(1)(B) "unambiguous." The court in effect separated sec-

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235 CAL. PENAL CODE §§ 330 (banked or percentage card games), 330a, and 330b (slot machines) (West 1988).

236 The tribes continued to assert on appeal, as they had in the summary judgment proceeding in district court, that the language of § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity") supports their position that IGRA intended that *Cabazon* be fully incorporated by virtue of its undifferentiated treatment of all gaming activity. The author of this Note, while sympathetic to the tribes' position, disagrees. Section 2701 is entitled "Findings." It is certainly arguable therefore that the import of the contents of that section is limited to a description of the then-existing state of facts or law. A finding is "[a] conclusion by way of reasonable inference from the evidence." BLACK'S LAW DICTIONARY 632 (6th ed. 1990). That the tribes may conduct gaming activities on their lands that is "not specifically prohibited by Federal law" may, in fact, have been Congress's evaluation of the state of the law after *Cabazon*. Given the nature of the first four clauses of § 2701 ("(1) numerous Indian tribes have become engaged in or have licensed gaming activities . . . (2) Federal courts have held that [Section 81 of this title] requires Secretarial review . . . (3) existing Federal law does not provide clear standards . . . (4) a principal goal of Federal Indian policy is to promote tribal economic development . . . ."), this is not an entirely implausible reading. In their petition for rehearing, the tribes de-emphasized their reliance on this argument, reducing it to an assertion of ambiguity requiring resolution in favor of the Indian tribes. Appellees/Cross-Appellants' Petition for Rehearing and Suggestion for Rehearing In Banc at 8, *Rumsey II* (No. 93-16609). The court was adamant: "We reject this reading of IGRA." *Rumsey II*, 41 F.3d at 426.

237 *See supra* notes 102-06 and accompanying text.

238 The State's dictionary argument in *Lac du Flambeau* was effectively rebutted by Chief Judge Crabb. *Cf. Lac du Flambeau*, 770 F. Supp. at 488; *see supra* note 174 and accompanying text.

239 The dictionary definition of "permits" is "[t]o 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." BLACK'S LAW DICTIONARY 1140 (6th ed. 1990).

240 United States v. Launder, 743 F.2d 686 (9th Cir. 1984) (non-Indian law case concern-

tion 2710(d)(1)(B) from any association with *Cabazon* or its progenitor, *Bryan*, and fashioned a completely different threshold test based on narrow, "categorical prohibitions."[241] IGRA may have used the same language to describe the threshold analyses to be applied to Class II and Class III,[242] but, the court argued, "[i]dentical words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent."[243]

Freeing the threshold test for Class III games from the interpretation applied by Chief Judge Crabb in *Lac Du Flambeau* and the Second Circuit in *Mashantucket*, Judge O'Scannlain's new standard dispensed with the kind of public policy inquiry that Justice White described in *Cabazon*. Instead, Judge O'Scannlain substitutes a narrow one-for-one matching test based on the meaning of section 2710(d)(1)(B) as interpreted by the editorial staff of Black's Law Dictionary: "California does not allow banked or percentage card gaming . . . [and] electronic gaming machines fitting the description of 'slot machines' are prohibited."[244]

Having settled the matter, however, the opinion takes a curious twist at this point. As if unconvinced by his own argument, Judge O'Scannlain opines that "[b]ecause we find the plain meaning of the word 'permit' to be unambiguous, we need not look to IGRA's legislative history."[245] Nevertheless, he then proceeds to point out that reference to legislative history "helps to clarify why the word ['permits'] has different meanings with respect to Class II and Class III gaming"[246] and he embarks on a discussion of the

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ing criminal liability for one who "permits or suffers" a fire to burn out of control on federal land).

241 The term is not the court's, but that of counsel for the state in its various briefs, *cf.* Third Brief on Cross-Appeals (Appellants' Second Brief), *Rumsey II* (No. 93-16609) *passim.* The tribes effectively attacked this attempt to attach a particular "plain language" meaning to the term "permits" in their brief supporting the petition for a rehearing.

> When Congress uses a term of art that has been defined by prior judicial interpretation, federal courts assume "Congress intended it to have its established meaning." McDermott International, Inc. v. Wilander, 498 U.S. 337, 342 (1991). . . . The term "permits" has clearly acquired a special meaning by a process of judicial construction. It is a shorthand reference to the civil/regulatory - criminal/prohibitory test, which fundamentally asks whether the conduct violates the State's public policy.

Petition for Rehearing at 10, *Rumsey II* (No. 93-16609).

242 *See supra* note 185.

243 *Rumsey II*, 41 F.3d at 427 (quoting Vancoster v. Sullivan, 920 F.2d 1441, 1448 (9th Cir. 1990)) (internal quotation marks omitted).

244 *Id.* at 426.

245 *Id.* at 427.

246 *Id.* A discussion of four passages from Senate Report 446 in support of his thesis ensues, culminating in the citation of a two-page section of the report, S. REP. No. 446, *supra* note 86, at 13-14, *reprinted in* 1988 U.S.C.C.A.N. at 3083-84, in support of his contention that Congress indicated that Class III gaming would be more subject to state regula-

Senate Report in search of such clarification.

The questionable effectiveness of the use of the legislative history notwithstanding, a more salient issue is raised by its appearance in the opinion. It is unclear from the language of the opinion whether or not the resort to legislative history is a determinative part of the holding of this case or merely dicta. In his concurrence, Judge Wallace points out:

> [T]he discussion of the legislative history of the [IGRA] is unnecessary. Having concluded that the plain language of the Act controls this case, our opinion should end. The discussion of the Act's legislative history gives the impression that the Act is not as clear as we say, and that some additional reason is required before we hold as we do.[247]

The question becomes particularly critical in light of the arguments put forth by the tribes in their petition for a rehearing. The tribes maintain that Judge O'Scannlain's announcement that "[i]n interpreting the IGRA, we use our traditional tools of statutory construction" contravenes the Supreme Court's instructions that "the standard principles of statutory construction do not have their usual force in cases involving Indian law."[248] That is, statutes passed for the benefit of dependent Indian tribes "are to be liberally construed in favor of the Indians."[249] Unless Judge O'Scannlain is taking the highly unusual position, albeit consistent with the wardship relationship between the federal government and the Indian nations,[250] that denial of the right to conduct games is actually in the tribes' favor since it protects them from the infiltration of organized crime and other criminal activity, this canon was violated.

Moreover, the court's interpretation of the plain language ignored ambiguities in the statutory language and therefore erroneously superseded the canon of interpretation for Indian law which holds that ambiguities in statutes concerning Indian tribes must be

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tory schemes. The court's paraphrase of this portion of the Senate Report, however, on which it places great weight, is mistaken. "Congress . . . indicated that Class III gaming would be more subject to state regulatory schemes [than Class II gaming]." *Rumsey II*, 41 F.3d at 428. Congress may have intended Class III games to be "more subject to state regulatory schemes." But the only mechanism discussed in the section cited by Judge O'Scannlain is the *compacting process*, not the threshold determination, which is an entirely different mechanism, covered by an entirely different section of IGRA. There is no mention of the threshold test in the cited pages.

247 *Id.* (Wallace, J., concurring).

248 *Blackfeet Tribe*, 471 U.S. at 766.

249 *Id.*

250 *Cherokee Nation*, 30 U.S. at 17. *See supra* text accompanying note 114.

resolved in the Indians' favor.[251] The tribes point out in their petition for rehearing that the court focused on the term "permits" in section 2710(d)(1)(B) to the exclusion of the term "such gaming," which it modifies and which is quite arguably a very ambiguous term. It is, in fact, precisely this term which has produced so much controversy over the scope of permissible gaming: does it refer to a broad, generalized category of gaming, as in the *Cabazon* standard, or is it confined to a narrow range, as the states argued in district court in *Rumsey I*?[252] Failure to recognize the ambiguity in that term therefore violated a required canon of statutory construction.

Looking back to the holding in *Mashantucket*,[253] the tribes also contended in their petition that the effect of the panel's holding was to subject tribes "to the full corpus of state law."[254] If the panel accepted the government's argument that 1) the plain language of IGRA did not call for application of the *Cabazon* threshold test to Class III games, and 2) Congress intended categorical prohibitions[255] to determine the permissible scope of gaming, then the effect would be the direct application of state law, rather than a balancing process that recognized the established principle of Indian sovereignty within the context of federal plenary power.[256] The argument highlights the diametrically opposed positions of the parties in the scope of gaming controversy. Tribes assert their right to exercise their sovereignty in determining permissible Indian conduct within their territory and states simply seek to extend their sovereign power onto reservation land by limiting tribal gaming to precisely those games that the state permits elsewhere in the state. That the conflict remains unresolved and is expressed in this pivotal case in such fundamental terms is a clear indication that IGRA is in dire need of amendment.[257]

Is Judge O'Scannlain's pronouncement of the optional nature of his discussion of the legislative history of IGRA sufficient to sever it from the holding of the case? Or does his disclaimer fail to break

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251 *Cf. Blackfeet*, 471 U.S. at 766; *Bryan*, 426 U.S. at 393; *Barona*, 694 F.2d at 1190. *Cf. also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n.17 (1978).

252 The *Rumsey II* panel itself relied on an Eighth Circuit case, *Cheyenne River Sioux Tribe*, 3 F.3d 273, in which the court found that tribes could not conduct traditional keno despite the fact that they were permitted to conduct video keno, an anomalous outcome that resulted from a "narrow" category holding similar to that in *Rumsey*. *See supra* note 184.

253 *See supra* notes 146-65 and accompanying text.

254 Petition for Rehearing at 12, *Rumsey II* (No. 93-16609).

255 "Categorical prohibitions" is the government's term for a narrowly defined reference category for determination of the criminal/prohibitory-civil/regulatory nature of state law. *Cf.* Response to Petitions for Rehearing at 4, *Rumsey II* (No. 93-16609).

256 *Cf. Mescalero*, 462 U.S. 324; *Bracker*, 448 U.S. 136; *see supra* notes 49-55 and accompanying text.

257 *See infra* notes 262-80 and accompanying text.

the nexus between the two, thereby incorporating his view of legislative history of IGRA, however flawed, into the holding of the case and making the decision more resistent to overruling by the Ninth Circuit en banc, or by the Supreme Court? Judge Wallace clearly read the latter interpretation into the opinion. Regardless of the validity of the interpretation of the legislative history, the opinion stands more exposed to the tribes' rehearing challenge and ultimately to review by the Supreme Court on the basis of its plain language argument alone.

Whether its justification is found in statutory language or legislative history, however, Judge O'Scannlain's ruling was quite clear with respect to the two classes of games and the appropriate threshold test for each. His reading of IGRA was that Congress intended to implement its interpretation of *Cabazon* as affecting only bingo and card games, a set of gaming activities that became codified as Class II games under IGRA. Even if that were not the case, and *Cabazon* had held that Indians could conduct any type of gaming as long as it was not against a state's public policy, IGRA, as the expression of Congress's will, overruled *Cabazon*.[258]

The clarity of Judge O'Scannlain's classification position in *Rumsey II*, however, is matched by a corresponding degree of ambiguity in Judge Canby's opinion in *Sycuan*.[259] Exactly what sort of test Judge Canby had in mind when he seemed to distinguish Class II and Class III games with respect to the appropriate threshold for applicability of state law remains an unanswered question with the potential to create a panel conflict in the Ninth Circuit. Arguably, Judge Canby intended no distinction at all, since his holding with respect to Class III games in that case is confined to a finding that state enforcement is preempted by IGRA itself. This effectively reserves exclusive jurisdiction over all infractions of the statute for the federal government.[260] And despite any inherent ambiguity in his opinion, there is little indication, either in his opinion in *Sycuan* or in any of his writings on Indian law, that Judge Canby agrees with the sharp bifurcation in threshold tests expounded by Judge O'Scannlain in *Rumsey II*. Nevertheless, the language of the opinion leaves room for the possibility of another quite reasonable

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258 This interpretation, however, confuses the two prongs of IGRA's scope of permissible gaming test. Congress did intend the state to have a voice in regulation of Class III games, but only through the negotiated compacting process, not through application of its own civil/regulatory laws. *See supra* note 241.

259 *See supra* notes 200-16 and accompanying text.

260 *Cf.* 18 U.S.C. § 1166. *See supra* notes 206-15 and accompanying text.

reading, consistent with Judge O'Scannlain's ruling and lethal to the continued health of Indian gaming.

EPILOGUE: SENATE BILL 2230

The evolving controversy over judicial interpretation of IGRA has not gone unnoticed by the legislative branch. In considering Senate Bill 2230, the Indian Gaming Regulatory Amendments Act of 1994,[261] the 103d Congress attempted to address most of the issues being litigated in the courts. Ultimately, those attempts were unsuccessful, but the course of the negotiation suggests the likely form of legislation that might emerge after the Supreme Court resolves the outstanding issues[262] and dispels the uncertainty in the parties' bargaining positions that produced the stalemate over Senate Bill 2230.

As the litigation over IGRA piled up, it became obvious that some sort of modification would have to be made in the original Act. The constitutionality of the compacting process, the status of gaming on newly acquired lands,[263] supervision of management contracts,[264] as well as the scope of gaming, were all issues for which IGRA had failed to provide durable mechanisms. Scope of gaming in particular exhibited the numerous uncertainties that have been described in this Note, including the appropriate threshold test, the distinction between Class II and Class III games,[265] and the proper governmental organ for making determinations as to threshold clearance and classification.

Following adverse rulings on the 10th and 11th Amendment issues, the governors of several states asked the administration to take action to resolve the various controversies surrounding IGRA. Senator Daniel Inouye, Chairman of the Senate Select Committee on Indian Affairs, reluctant at first,[266] finally relented and brought together representatives of the tribes, the National Association of

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261 S. 2230, *supra* note 83.

262 *See infra* note 284 on the likelihood of certiorari in *Rumsey II*; *infra* note 286 on grant of certiorari in the 10th and 11th Amendment cases.

263 IGRA gives the governor of the state in which gaming activities on lands acquired after the date of passage of IGRA are located veto power over conduct of the games. Tribes have vigorously opposed this provision. It has been suggested that the power conflicts with the Appointments Clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2. *Cf.* Leah L. Lorber, Note, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 IND. L.J. 255, 271-73 (1993).

264 *See supra* note 137.

265 *See infra* appendix.

266 "[It was] my personal view that it was too soon to rush to judgment on the viability of the Act . . . ." *IGRA Amendments Hearings*, *supra* note 142, at 1 (statement of Sen. Inouye). "After all, although the gaming measure was enacted into law in 1988, it wasn't until April 1991 that the nominations to the Commission [were] completed, and the Commission

Attorneys General, and the National Association of Governors to negotiate the terms of legislation to amend IGRA.

The difficult negotiation process did produce a working bill and hearings were held on July 25, 1994, but Senator Inouye had made it clear that "there would be no agreement until there was agreement on all matters,"[267] and a final compromise proved beyond the reach of the parties. In a somewhat rancorous finale,[268] negotiations fell apart during the committee hearings in July and efforts to re-engage them when Congress returned after the summer break were unsuccessful.

Throughout the negotiations, however, it was quite evident that the parties were keeping a steady eye on the *Rumsey* controversy. For example, in a tooth-and-nail struggle over language that sought to incorporate Judge Burrell's reasoning in the district court decision,[269] with respect to the breadth of category in the second prong of the two-part threshold test,[270] the parties split hairs over the wording of section 10(a)(7)(C)(ii)(I) of Senate Bill 2230.

In the three proposed drafts of that section,[271] the language began with the first prong of Judge Burrell's test that "a disputed gaming activity . . . shall be the subject of negotiation if . . . (i) [it] is not prohibited as a matter of state criminal law."[272] It then goes on to set up the second prong,[273] that "(ii) even if the disputed activity is prohibited as a matter of State criminal law, the gaming activity meets one or more of the following criteria."[274]

Two of the three criteria then listed were relatively straightfor-

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could begin the work of promulgating regulations." 140 CONG. REC. S7561 (daily ed. June 23, 1994) (statement of Sen. Inouye).

267 *Id.*

268 "Apparently, there are those who wish to disassociate themselves from the recommendations they previously submit-fed [sic] to the Committee . . . . [I]t saddens me to see these letters . . . ." *IGRA Amendments Hearings, supra* note 142, at 1 (statement of Sen. Inouye).

269 Judge Burrell's decision was handed down on July 25, 1993, three weeks after the July 2, 1993 start of negotiations over S. 2230. *Cf.* 140 CONG. REC. S7561 (daily ed. June 23, 1994) (statement of Sen. Inouye).

270 [L]ast July we came to an agreement with the negotiating team, rejected by the Governors, that provided for a two step test to determine scope of gaming, a test for use by a federal court in a declaratory judgment procedure when the parties could not agree on scope of gaming for a particular Compact in a particular state.

IGRA Amendments Hearings, supra note 142, at 195 (statement of Rick Hill, Chairman, National Indian Gaming Association, accompanied by Gary Royer, Frank Ducheneaux, and Sharon House).

271 The section is designed to provide guidelines for federal courts in declaratory actions brought to determine the permissibility of gaming activities.

272 S. 2230, *supra* note 83, § 10(a)(7)(C)(i).

273 *Id.*

274 *Id.* § 10(a)(7)(C)(ii).

ward. "State law permits the disputed gaming activity subject to regulation"—a paraphrase of the *Bryan-Cabazon* civil/regulatory standard, and "any person, organization, or entity within the State may engage in the disputed gaming activity for any purpose," a restatement of IGRA's scope of gaming threshold provision.[275]

The third, however, presented considerable difficulty for the parties. The tribal working draft stated: "(1) the fundamental characteristics are substantially similar to a gaming activity that is not prohibited as a matter of state criminal law."[276]

In other words, as long as there was another gaming activity substantially similar to the disputed activity, the disputed activity would clear the threshold. The video games proposed by the Indians were deemed similar to California's state lottery games by Judge Burrell in *Rumsey I* and were, therefore, permissible.

The states sought to limit that formula by formally introducing the concept of "principle characteristics,"[277] and by requiring the consideration of state interest in the determination: "(1) its principal characteristics are indistinguishable from a gaming activity that is not prohibited as a matter of state criminal law where there is no justifiable state interest."[278]

This not only tended to narrow the baseline category by requiring the disputed activity to coincide precisely with a gaming activity that was not prohibited by state criminal law, but also introduced the possibility that some unspecified "state interest"[279] might override the other criteria. Presumably such a state interest could be purely economic, as in the case of a state with a successful lottery that provided a significant portion of state revenue.

The final version attempted a compromise position, deleting the state's interest factor and substituting a general test of "rationality" for distinguishing similar games. "Its principal characteristics are not distinguishable from a gaming activity that is not prohibited by State criminal law and there is no rational basis for differen-

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275 *Id.* § 10(a)(7)(C)(ii)(II), (III).

276 *IGRA Amendments Hearings, supra* note 142, at 19 (testimony of Rick Hill).

277 The term "principle characteristics" means the pace of play, complexity or type of choices for the player, appearance of the activity, nature of the interaction with the operator, other players or machine, and other attributes of a gaming activity which would be perceived by and be significant to a player familiar with games of chance.

S. 2230, *supra* note 83, § 4(23). The definitions section of S. 2230, § 4, was greatly expanded from the corresponding section of IGRA, 25 U.S.C. § 2703, including new definitions of banking game (§ 4(2)), Class II gaming (§ 4(5)), electronic aid (§ 4(9)), electronic facsimile (§ 4(10)), gambling device (§ 4(11)), lottery game (§ 4(17)), slot machine (§ 4(26)), and social gaming activity (§ 4(27)).

278 *IGRA Amendments Hearings, supra* note 142, at 19 (testimony of Rick Hill).

279 "State interest" was *not* included in the definitions section of S. 2230.

tiating between the disputed gaming activity and the activity not prohibited by the State."[280]

Despite the efforts of the parties, however, even this proved unacceptable. The tribes rejected it. "The proposed language . . . is very narrowly crafted and limits the public policy analysis . . . fewer gaming activities will be subject to compact negotiation, even those games not contrary to the state's public policy."[281]

Whether these changes would have accomplished their goal of clarifying a previously ambiguous statute is an open question. The characterization of the bill's application of *Cabazon* notwithstanding,[282] several provisions are clearly attempts to restrict the import of that case.[283]

CONCLUSION

There is every indication that regardless of the disposition on the petition for rehearing, or of the ultimate outcome should the petition be granted, the holding of the Ninth Circuit in *Rumsey II* will be appealed to the Supreme Court.[284] Pending judicial resolution, Congress is apparently going to play wait and see. The only legislation slated for introduction in the 104th Congress will be minimum federal regulatory legislation similar to that used in federal environmental statutes to be implemented for both Class II games that are conducted subject to tribal ordinance and NIGC approval, and for Class III games that are conducted subject to tri-

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280 S. 2230, *supra* note 83, § 10(a)(7)(C)(ii)(I). Also added was an enumeration of five categories of games that were "distinguishable" and therefore could not serve as "carriers," as the state's lottery games "carried" the Indians video games into a regulated activity in the district court's decision in *Rumsey I* or the parimutuel and lottery games carried the bingo games in *Cabazon*. Under the S. 2230 scheme, however, Connecticut's "Las Vegas Nights" games could conceivably have carried the Pequot's games, since they are not distinguished by either the principle characteristics definition or included in the enumerated activities.

281 *IGRA Amendments Hearings*, *supra* note 142, at 18 (testimony of Rick Hill).

282 "The bill we are introducing incorporates the explicit standards of the *Cabazon* decision to guide all parties in determining the permissible gaming activities under the laws of any State." 140 CONG. REC. S7561 (daily ed. June 23, 1994) (statement of Sen. McCain).

283 The term "prohibited as a matter of State criminal law," for example, is defined in § 4 as "an activity in a State which, under the law of that State, is subject to prosecution and a criminal sanction." S. 2230, *supra* note 83, § 4. This is a direct affront to the *Bryan* and *Cabazon* decisions, which held that the mere imposition of a criminal penalty could not transform an otherwise civil regulation into a criminal law. *See supra* note 103.

284 *See infra* Postcriptus. According to attorneys familiar with the case, an application for certiorari to the U.S. Supreme Court will very likely follow the denial of a rehearing. Given the conflict between the circuits (*see supra* part VI) and Congress's failure to resolve the matter, there is more than a fair chance that the Court will consent to hear the case. Telephone interviews with George Forman, Attorney for the Sycuan Band of Mission Indians (Jan. 17, 1995); and Art Bunce, Attorney for Agua Caliente Band of Cahuilla Indians and Barona Group of Capitan Grande Band of Mission Indians, cross-appellants in *Rumsey III* (Jan. 31, 1995).

bal-state compacts.[285] Legislation on the 10th and 11th Amendment challenges and on scope of gaming issues will await the outcome of pending cases.[286]

The Court will then be in a very similar position with regard to the scope of the gaming question to that in which it found itself in 1986, when it granted certiorari in *Cabazon*. The failure of Senate Bill 2230, like the impasse reached over House Bill 1920 just prior to the *Cabazon* decision, will place the Court in the role of judicial mediator in an essentially political controversy that Congress has been unable to resolve. The Court will be asked to rule on the reach of state law under IGRA, ultimately deciding in a judicial context whether the purpose of IGRA was to create a level playing field, granting tribes no more gaming rights than are permitted by the states in which their reservations are located, or whether it was meant to protect the sovereign right of the tribes to create their own laws,[287] thereby effectively allowing them to conduct a wider scope of gaming than permitted on surrounding state land. In effect, does *Rumsey* strip IGRA of its connection to *Cabazon*? Whether or not an edict from the Supreme Court is the correct or best method to settle this controversy is questionable, but it is clear that regardless of its efficacy, such a determination is on the horizon for resolution of this issue.

Back on the farm, expectations are realistic: Dave Heider is preparing for the long haul, planning to keep his farm open to the thousands who have made the pilgrimage to pay homage to the white buffalo. He could be doing this for years, he said. "Or maybe she'll shed this coat in November, turn brown, and everyone will go away."[288]

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285 Telephone interview with Eric Eberhard, Majority Staff Director for the Senate Select Committee on Indian Affairs (Jan. 30, 1995).

286 *Id.* In a 5-4 decision handed down as this article was going to press, the Supreme Court upheld Florida's Eleventh Amendment challenge to § 2710(d)(7), the provision of IGRA granting tribes the right to sue states for failure to negotiate a compact on Class III gaming. Overruling its own decision in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), the Court held that the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, did not grant Congress the power to expand the scope of the federal courts' Article III power by abrogating states' soverign immunity. Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996). *See supra* note 129. The import of this decision for the right of individuals to seek redress from states reaches beyond the field of American Indian Law.

287 "[A]bsent governing Acts of Congress, the question has always been . . . the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220.

288 *Plains Indian Legend of the White Buffalo is Reborn for Native American Believers*, BALTIMORE SUN, Sept. 19, 1994, at 1D.

APPENDIX

Judge O'Scannlain's position in *Rumsey II* is founded on the existence and strength of the distinction between the two classes of games in IGRA. "Congress envisioned different roles for Class II and Class III gaming . . . and indicated that Class III gaming would be more subject to state regulatory schemes."[289] That distinction itself has been a heavily litigated issue.

The classification scheme came into the picture in the first revision of House Bill 1920 in the 99th Congress. Politically, it was an effort to confront the trend that had started in the late 1970s and had been supported by the federal court decisions in *Seminole, Oneida, Barona,* and *Lac du Flambeau.* The gaming operations in those cases were confined primarily to bingo and non-banking card games.[290] The states, the non-Indian gaming industry and certain parts of the federal government, in particular, the Department of Justice, attempted to limit the import of the decisional law and prevent Indian gaming from expanding beyond the type of games being conducted at that time. Their claim was that more sophisticated games presented greater problems for law enforcement, since there was an increased danger of infiltration by organized crime.[291] States often claimed that a greater level of associated illegal activities such as prostitution, drugs, and weapons justified a greater state interest in regulation of Class III activities. Both of these concerns have proven to be somewhat overstated[292] and may belie the real interest of states in resisting the expansion of Indian gaming, namely competition with existing state gambling operations.[293] The primary purpose, therefore, of the classification scheme was to permit application of different regulatory schemes to the three categories through the compacting process.

Under IGRA as enacted, Indian gaming is divided into three classes. Class I includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individ-

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289 *Rumsey II,* 41 F.3d at 428.

290 *See infra* note 325.

291 The justification for this increased danger was often nebulous. The greater revenue associated with banking games in a form that could be siphoned off and utilized by organized crime to fund other illegal activities was often cited. *Cf.* S. REP. No. 446, *supra* note 86, at 28, *reprinted in* 1988 U.S.C.C.A.N. at 3098 (executive communication from Department of Justice).

292 "The Department of Justice advised the committee that there was no evidence of substantial criminal activity associated with Indian gaming." 140 CONG. REC. S14,729 (daily ed. Oct. 7, 1994) (statement of Sen. McCain).

293 Note the states' proposed language for § 10(a)(7)(C)(ii)(I) of S. 2230, *supra* notes 271-77, which attempted to introduce consideration of a "justifiable state interest" in judicial determination of the scope of permissible gaming.

uals as a part of, or in connection with, tribal ceremonies or celebrations."[294] This class has presented little controversy.[295] Class III games are defined as "all forms of gaming that are not class I gaming or class II gaming."[296] Therefore, the substance of the classification scheme is contained within the section that defines Class II games.[297]

IGRA carves out the Class II category with both positive and negative articulations. Explicitly incorporated were bingo,[298] pull-tabs, lotto, punch boards, tip jars, instant bingo, non-banking card games,[299] and "other games similar to bingo."[300] Excluded were banking card games, including baccarat, chemin de fer, blackjack,[301] and slot machines or "electronic or electromechanical facsimiles of any game of chance."[302]

Two areas of controversy emerged from this codification. Both concerned tribal contentions that particular games be included in Class II, and therefore not subject to negotiation. The first had to do with the *characteristics* of games. Much of this debate centered around whether or not games were "banked," or whether they were "similar to bingo." The second area concerned the use of *electronics* in games.[303]

A. *Characteristics*

The attempt to distinguish types of games by characteristics was, in a sense, fated for controversy from the start. The ultimate purpose of the division, to permit circumspection by law enforce-

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294 25 U.S.C. § 2703(6).

295 S. 2230 does offer a new definition of social gaming activity and makes it clear that social gaming activities may not "carry" disputed gaming activities over the *Cabazon* threshold, that is, S. 2230 explicitly eliminates social gaming activities as a reference category for the determination of the criminal/prohibitory-civil/regulatory nature of a state law. S. 2230, *supra* note 83, § 10(a)(7)(C)(ii)(III).

296 25 U.S.C. § 2703(8).

297 *Id.* § 2703(7).

298 Bingo is defined by three necessary criteria in § 2703(7)(A)(i)(I) ("played for prizes, including monetary prizes, with cards bearing numbers or other designations"), § 2703(7)(A)(i)(II) ("the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined"), and § 2703(7)(A)(i)(III) ("the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards").

299 *Cf.* 25 U.S.C. § 2703(7)(B)(i), which *excludes* banking card games from Class II.

300 *Id.* § 2703(7)(A)(i)(III). Section 2703(7)(C)-(F), the "grandfather" clauses, also include existing operations of games that would otherwise have been classified as Class III and Class II for limited periods of time. *See* § 2703(7)(D)-(F); (7)(C) (limitations on expansion); *see also supra* note 184.

301 25 U.S.C. § 2703(7)(B)(i).

302 *Id.* § 2703(7)(B)(ii).

303 As the debate developed and became more sophisticated, questions of characteristics entered the realm of electronics. *See infra* notes 337-48 and accompanying text.

ment agencies, was not directly connected to the mode by which the division was accomplished. If greater cash flow was at the root of the law enforcement problem, the line between the classes was, to a large extent, a broad and arbitrary one. In actuality, it was merely an attempt to separate games that were more likely to produce larger returns from those that were not.

Courts were uniform in denying Indians' arguments with respect to IGRA's treatment of games' characteristics. In *Oneida Tribe of Indians v. Wisconsin*[304] and *Spokane Indian Tribe v. United States*,[305] tribes attempted to use the language of IGRA to show that since states conducted games called "Lotto," tribes were permitted to do the same, since "lotto" is explicitly specified as one of the five enumerated Class II games in section 2703(7)(A)(i). The Seventh and Ninth Circuits, however, looked past the titular similarity and found that the lottery game conducted by the states, its appellation notwithstanding, was fundamentally different from the bingo-like game commonly known as "lotto."

The court in *Spokane* found the language of IGRA to be ambiguous. It compared the dictionary definitions of lotto, "a game played with 'cards bearing rows of numbers in which a caller draws numbered counters from a stock and each player covers the corresponding numbers if they appear on his card, the winner being the one who first covers one complete row,' "[306] and lottery, "[a game] 'in which players choose numbers that are matched against those of the official drawing, the winning numbers typically paying large cash prizes,' "[307] Finding no guidance in section 2703(7)(A), the court turned to the legislative history to provide support for a de facto, albeit a politically based, distinction.

> Mr. Chairman, I want to thank you for including an amendment to clarify that lotto games are played only at the same location as bingo games which are class II games under the bill. I believe there are other Senators who have questioned whether lotto and lotteries are interchangeable terms. This amendment makes it clear that they are not and that traditional type lottery games are indeed class III. As such, lotteries may only be conducted by a tribe if such games are otherwise legal in the State and if the tribe and the State have reached a compact to regu-

304 951 F.2d 757 (7th Cir. 1991).

305 972 F.2d 1090.

306 *Id.* at 1094 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1338 (4th ed. 1976)).

307 *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1138 (2d ed. 1987)).

late such games.[308]

The court's argument in *Oneida* is somewhat weaker, relying upon a plain meaning that the *Spokane* court did not find. Drawing upon historical and dictionary definitions of bingo and lotto to form a relationship of identity, Judge Wood opined that "[i]n the parlance of mathematicians and logicians, lotto and . . . bingo are subsets of the set, lottery. . . . The term 'lotto' can no more be construed to mean lottery than can the term 'bingo.' "[309] One could just as easily argue that the participation of lotto in the larger set lottery makes it, by nature, a lottery-type game.

The Nation Indian Gaming Commission promulgated six relevant rules in an attempt to rectify what was widely perceived as a problematic definitional scheme[310] regarding the characteristics of Class II and Class III games.

The Commission retained the tripartite format of the positive definitions of Class II games employed in IGRA.[311] Bingo, as defined by three criteria, essentially identical to the criteria used in IGRA, including "electronic, computer, or other technologic aids" thereto, is specifically denominated as Class II.[312] The same list of enumerated games, minus lotto, is also included.[313] Non-banking card games, whose definition had been split between positive and negative clauses in IGRA,[314] is defined in a single clause here. Another section defines house banking games as "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win."[315]

The rules elaborated on IGRA's "similar to bingo" provision by providing an explicit definition that simply cross-referenced the three criteria delineated in section 502.3(a) and excluded house banking games as defined in section 502.11. Tribes objected to the rules as effectively reducing the scope of Class II gaming below what Congress had intended in IGRA. In *Shakopee Mdewakanton*

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308 134 CONG. REC. S12,643 (daily ed. Sept. 15, 1988) (statement of Sen. Domenici).

309 *Oneida*, 951 F.2d at 762.

310 The NIGC held hearings pursuant to its duty to promulgate regulations. A meticulously documented preamble recorded a wide range of criticisms of IGRA provisions. Definitions under the Indian Gaming Act, 25 C.F.R. § 502.1 (1995).

311 *Id.* § 502.3 (Class II gaming).

312 *Id.* § 502.3(a). The NIGC, responding to *Spokane* and *Oneida*, added "lotto" to this section in an effort to clarify the identity between the two, presumably as distinct from lotteries. In IGRA, lotto was listed as one of the enumerated games similar to bingo.

313 *Id.* § 502.3(b).

314 25 U.S.C. § 2703(7)(A)(ii), (B)(i).

315 25 C.F.R. § 502.11.

Sioux Community v. Hope,[316] the Eighth Circuit consolidated three challenges to the NIGC final rules that had the effect of classifying the game of keno as a Class III gaming activity subject to a tribal-state compact. While section 502.4 explicitly lists keno as a Class III game,[317] the tribes argued that the NIGC regulations were "arbitrary and capricious."[318]

Keno, a game brought to the United States by Chinese immigrants in the 1890s,[319] is played by choosing from numbers 1 through 80 on a card, and matching those numbers to twenty that are chosen at random by the operator of the game.[320]

The disagreement between the NIGC and the tribes came down to the NIGC's contention that keno failed to qualify as a game "similar to bingo," since it did not exhibit the third criteria required under both IGRA and the NIGC regulations; keno is not a game "won by the first person covering a previously designated arrangement of numbers or designations on [such] card[s]."[321] Moreover, the Commission contended, keno is a house banking game and therefore, under both its own regulation[322] and IGRA,[323] is a Class III game.

In their unsuccessful attack on this position,[324] the tribes demonstrated the level of detail to which the characteristics issue must descend in order to address the relevant factors. The tribe contended, for example, that the NIGC's interpretation of the third criteria for bingo[325] was flawed on two points. First, the NIGC's contention that the "arrangement" or "designated pattern" was irrelevant in determining winners in keno "because all that is

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316 16 F.3d 261, 263-65.

317 "Class III gaming means . . . [c]asino games such as roulette, craps, and keno." 25 C.F.R. § 502.4(a)(2).

318 Under the standard set in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), a court that is asked to review an agency decision must defer to a reasonable agency interpretation of statutory provisions.

319 The Chinese version, utilizing 90-120 ideograph characters rather than the American 80 numbers, has been played in China for over two thousand years. GAMBLING TIMES GUIDE TO CASINO GAMES 77 (Jerrold Kazdoy ed., 1990).

320 SCARNE, *supra* note 183, at 492.

321 Brief for Appellee at 25, Shakopee Mdewakanton Sioux Community v. Hope, 16 F.3d 261 (8th Cir. 1994) (No. 92-2954) (citing 25 U.S.C. § 2703(7)(A)(i)(III); 25 C.F.R. §§ 502.9 and 502.3(3) ("[players] win the game by being the first person to cover a designated pattern")).

322 25 C.F.R. § 502.4(a)(2).

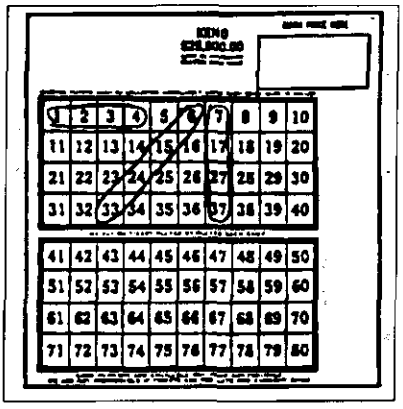
323 25 U.S.C. § 2703(7)(B), (8).

324 The Eighth Circuit declined to question the NIGC's judgment on the matter. "In light of the Commission's thorough consideration of the issues raised by the Tribes, we cannot conclude that the Commission acted arbitrarily . . . . We need not be persuaded that an agency reached the best possible decision in order to uphold reasonable agency action." *Shakopee*, 16 F.3d at 265.

325 The application to bingo was intended to parallel games "similar to bingo," pursuant to 25 C.F.R. § 502.9.

important is that a certain number of numbers picked by the player match the numbers drawn"[326] was incorrect. This was also true in some cases of bingo.[327] Moreover, in u-pick-em bingo, one of the enumerated Class II games, "players designate the winning numbers either by selecting numbers from a preprinted card or by filling in the blanks on a card with no preprinted numbers."[328]

The tribes demonstrated that the arrangement was just as relevant in keno as it was in bingo. If, for example, "a keno player designate[s] 3 separate groups of 4 connected numbers to win . . . the player may win in several ways. The player wins if all 12 numbers are drawn, or if the 4 numbers in any one group are called, or if the 8 numbers in any two groups are called."[329] The third criteria would therefore be satisfied. The NIGC also claimed that keno failed to fall within Class II because it was a "banking" game.[330] The banking issue cuts to the heart of the reasoning behind the classification scheme.



The division between banked and non-banked games was first proposed in House Bill 3605, a bill introduced by the Nevada delegation.[331] Prior to that time, all card games, both banking and non-banking, had been considered Class II games. The justification for drawing the line was that with greater "corruptibility" of the games, the house could presumably manipulate the odds. Aside from demonstrating the essentially political nature of the distinction, however, the tribes showed that "corruptibility" was a concern with regard to all games.[332]

Notwithstanding the tribes' detailed and exhaustive attack on

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326 Joint Reply Brief of all Appellants at 25, *Shakopee* (No. 92-2954).

327 For example, bingo cases involving "blackout bingo," which simply requires all the numbers on a card to be covered. ROGER SNOWDEN, GAMBLING TIMES GUIDE TO BINGO 30-31, 76 (1986).

328 Joint Reply Brief of all Appellants at 6, *Shakopee* (No. 92-2954). This latter description was stipulated to by the NIGC in *Shakopee*. *See* Stip. ¶ 19, App. 2059-60, *cited in Shakopee* (No. 92-2954).

329 Joint Reply Brief of all Appellants at 5, *Shakopee* (No. 92-2954).

330 A banked game is a game in which the house plays as a participant that can win, takes on all players, pays all winners, and collects from all losers. *See* 25 C.F.R. § 502.11.

331 H.R. 3605, 103d Cong., 1st. Sess. (1993).

332 There is potential for corruption even in bingo, where the house can plant with a collaborator a "winning" set of cards with numbers that the house has contrived to call. SCARNE, *supra* note 183, at 219-22.

the issue, the question in *Shakopee* was not whether or not house banking is a characteristic representative of some fundamental difference between games, and the Eighth Circuit recognized that. The NIGC regulations reasonably reflected the will of Congress as expressed in the definition of Class II games in IGRA.[333] That section clearly placed banking card games in Class III[334] and, regardless of the justification for that placement, the NIGC regulations were faithful to that intent. That was as far as the court was permitted to go in reviewing the NIGC regulations and the court limited its ruling accordingly.

B. *Electronics*

The problem with respect to the use of electronics in games under IGRA arises from tension between the two different statutory sections that attempt to define the permissible and non-permissible uses of electronics in Indian gaming activities. Section 2703(7)(A)(i) explicitly includes within the positive definition of Class II games, the use of "electronic, computer or other technologic aids"[335] used in connection with bingo. Section 2703(7)(B)(ii), however, excludes "electronic or electromechanical facsimiles of any game of chance or slot machine of any kind."[336] The Senate Committee attempted to clarify the distinction.

> The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such

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333 25 U.S.C. § 2703(7).
334 *Id.* § 2703(7)(B)(i), (8).
335 *Id.* § 2703(7)(A)(i).
336 *Id.* § 2703(7)(B)(ii).

> technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.[337]

The precise meaning of each of these sections and interpretation of the Senate Committee's comments has led to litigation that has reached both the Ninth Circuit and the Circuit for the District of Columbia. The issue in all of those cases was the classification status of *video pull-tab games.*

Pull-tab is one of the games explicitly enumerated in IGRA as Class II.[338] It is played by purchasing a card on which several preprinted numbers are covered in some fashion. The player reveals the hidden numbers by peeling back a tab and winners are determined by matching their numbers to various combinations of predetermined number sets.[339]

In *Spokane Indian Tribe v. United States,*[340] *Cabazon Band of Mission Indians v. National Indian Gaming Commission,*[341] [*"Cabazon 1994"*] and *Sycuan Band of Mission Indians v. Roache,*[342] tribes sought to show that video versions of this game were not subject to tribal-state compacts. The tribes advanced two arguments to that end. The first depended on the "broadening participation" concept expressed in the Senate Committee's report. The games, the tribes contended, were of the type Congress wanted tribes to operate because they pitted "player against player" rather than "player against machine," and therefore tended to broaden participation in the activity.[343] The salient concept is that of the "deal," a shuffle of the winning combinations that is the reference for determining the award of prizes. A single deal is employed for a number of different players.[344] Therefore, the tribes argued that the use of technology in the video pull-tabs games in question did not permit "a single participant [to play] a game with or against a machine,"[345] but rather encouraged "broadened participation." This argument

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337 S. REP. No. 446, *supra* note 86, at 9, *reprinted in* 1988 U.S.C.C.A.N at 3079.

338 25 U.S.C. § 2703(7)(A)(i)(III).

339 SNOWDEN, *supra* note 327, at 30.

340 972 F.2d 1090.

341 14 F.3d 633, *cert. denied,* 114 S. Ct. 2709.

342 38 F.3d 402. *See supra* notes 197-217 and accompanying text.

343 Appellant's Brief at 38, Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir. 1994) [*Cabazon 1994*] (No. 93-5255).

344 This can be accomplished sequentially over time, that is, players using the same machine within a fixed period of time participate in the same "deal," or by means of "networked" technology that allows different machines at the same or different locations to be "linked." "All terminals in the same group draw opportunities from the same deal." *Id.* at 23; *see infra* note 352.

345 S. REP. No. 446, *supra* note 86, at 9, *reprinted in* 1988 U.S.C.C.A.N at 3079 ("[T]he

is consistent with Congress's intent that the tribes be given the opportunity to take advantage of modern methods of conducting Class II games, as expressed both in the Senate Report and in the related provisions on house banking games.

The second argument that tribes offered in support of their contention that electronic versions of Class II games were not Class III activities was an attempt to confine the definition of "facsimile" to exclude the concept of *identity*. "[The video pull-tab games in question] do not offer a copy of the game of pull-tab, but the game of pull-tab itself."[346] The essential inquiry, the tribes asserted, was the "fundamental characteristics" of the video version of the games. Games which displayed all the fundamental characteristics of a game were not "facsimiles" because, in order to be a "facsimile," there must be a "copy, or imitation, something other than the genuine article."[347] In the case of video pull-tabs, both paper and electronic versions shared "the critical game elements of a *known* number of winning tickets at fixed, predetermined and known prize levels, and the certainty that when all tickets have been played, all winning tickets will have been distributed," therefore, they were the same game.[348]

The court in *Cabazon 1994*, apparently perturbed by the tribes' foray into this deconstructionist interpretation,[349] responded to the tribes' contention that video pull-tabs met the congressional intent of affording them the use of technology that "would merely broaden the potential participation levels"[350] by interpreting the "single participant" limitation expressed in the Senate Report as being *non-exclusive*. "[T]he tribes are wrong to suppose that the example mentioned in this passage must be the *only* type of electronic copies Congress meant to include under § 2703(7)(B)

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game is more attractive and may be played more quickly, with more players and at enhanced revenue levels.").

346 Petition for Rehearing for Appellee/Cross-Appellant at 7, Sycuan Band of Mission Indians v. Roache, 38 F.2d 402 (9th Cir. 1994) (No. 93-55430).

347 Appellant's Reply Brief at 3, *Cabazon 1994* (No. 93-5255). *See supra* notes 276-85 and accompanying text.

348 Petition for Rehearing at 7 n.6, *Sycuan* (No. 93-55430).

349 We view it as something other than "plain English" to say that only electronic versions of games different from the originals are exact duplicates. The meaning of words in a statute do not necessarily correspond with dictionary definitions. Context matters. So often does history. Yet there are limits to how far language, written in the formal style of a statute, may be wrenched. We would no sooner take "yes" to signify "no" than we would take "same" to denote only "different."

Cabazon 1994, 14 F.3d at 636.

350 *Id.* (quoting S. REP. No. 446, *supra* note 86, at 9, *reprinted in* 1988 U.S.C.C.A.N. at 3079).

(ii)."[351] The court did not provide any examples of what the other types of electronic copies might be. Thus, a very nebulous reading of the congressional intent on a critical scope of the gaming issue coupled with a refusal to review the relevant NIGC regulations produced a decision in *Cabazon 1994* that provided little guidance in the resolution of an outstanding ambiguity in electronic game classification.[352]

None of the courts, in fact, accepted the tribes' arguments.[353] As was the case for distinctions made on the basis of characteristics, the problem with the distinction between electronic and non-electronic gaming under the IGRA classification scheme is that it does not reflect a terribly significant objective difference between the two types of games. Rather, it reflects part of the compromise settlement that emerged from the protracted negotiations among the states, the tribes, and the federal government over the extent of Indian gaming that Congress would sanction in the wake of the *Seminole* and *Cabazon* decisions. The states sought to restrict the import of *Cabazon* to minimize competition to their lucrative participation in the third national wave of gambling,[354] namely, state lotteries. Thus, one of the definitional components of the distinction between games that Indians would be permitted to conduct "as of right" (involving only approval of a federal regulatory agency), and those which would require a negotiation process

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351 *Id.* at 637 (emphasis supplied).

352 Apparently the court was not concerned with any option that might exist to disengage networked connections or with the possibility that all machines at a given facility might not be linked simultaneously. Either of these possibilities could result in a *decrease* of the "broadened participation" afforded by the technology. The court simply said that even if the electronic version of a game did not change the essential characteristics of the game and did, in fact, broaden participation, Congress may have had other reasons, unenumerated in the statute and not expressed in the legislative history, for classifying electronic games as Class III facsimiles.

353 The Pick Six game is not merely an electronic aid to enhance the participation of more than one person in the Tribe's Class II gaming activities. In Pick Six, a single player picks six numbers and tries to match them against numbers picked by a computer. The player can participate in the game whether or not anyone else is playing at the same time.

Spokane, 972 F.2d at 1093. *See supra* note 340.

The court in *Sycuan* was a little more sensitive to the questions raised by networking, but nonetheless held that the games did not broaden participation.

> [T]he Band argues [that] the player plays not against the machine using random odds, but against other players in closed board. The Band's argument is not without force . . . . The pull-tab machines have [the effect of broadening participation] over time, perhaps, but any given player is faced with a self-contained machine into which he or she places money and loses it or receives winning tickets after the electronic operations are conducted. In that sense, the gambler plays "with the machine" even though not against it.

Sycuan, 38 F.3d at 410.

354 *See supra* notes 30-35 and accompanying text.

(presumably involving some imposition of state interests) was largely artificial. The distinction was incorporated as a means of distinguishing games that were more or less attractive to consumers, and thus more likely to produce greater revenue, and not for any credible reasons of law enforcement, which was the primary justification proffered by the states in their lobby for the creation of a classification scheme.[355]

Even if one concedes that Class III games are inherently different from Class II games in some fundamental fashion which inevitably results in greater incidence of related social and legal problems, it is hard to see how the exclusion from Class II of true electronic versions of Class II games can be justified on any grounds other than those of political compromise. True electronic versions of Class II games are devices that retain the essential characteristics of the game and do not alter elements like the interaction of multiple players, the frequency of "shuffles," and the role of skill. It is not surprising that the borderlines of such an arbitrary categorization have become inundated with controversy.

The NIGC attempted to clarify this issue as well in its Final Rule. Its answer was to rule explicitly that the Johnson Act, the federal statute controlling use of gambling devices on Indian land, was not superseded by IGRA, except with respect to Class III gaming conducted pursuant to a compact.[356] The effect of this regula-

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355 *See supra* notes 84-88 and accompanying text. The Oneida Tribe of New York State has recently installed fifty "Superball Keno" video machines at its Turning Stone Casino in Verona, New York. The machines are networked together. A central computer randomly chooses twenty numbers every ten seconds. Players select two to ten numbers and the machines make payouts by crediting a plastic card that the player has inserted. The computer picks the same twenty numbers for every person playing Superball Keno at that moment. "If no one was in the entire casino, the computer would still be running games every ten seconds." Frank Riolo, Vice President of the Turning Stone Casino, *quoted in* James Dao, *Tribe's No-arm Bandits Called a Dodge*, N.Y. TIMES, Mar. 11, 1995, at A28. Members of the New York State legislature have challenged the state Racing and Wagering Board's classification of these machines as non-slot machines. *Id.*

356 25 C.F.R. § 502.8. *See* Preamble to the Final Rule, § G—Machine and Technology Issues. The relevant portions of the "Johnson Act," 15 U.S.C. § 1171(a), read:

> (a) The term "gambling device" means—
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> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and
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> (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or
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> (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
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> (2) any other machine or mechanical device (including, but not limited to roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and
>
> (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or
>
> (B) by the operation of which a person may become entitled to receive, as

tion is to restrict, under the *Chevron* standard of limited judicial review, the scope of the Senate committee's relevant comments on electronic aids for Class II gaming activities. "[The relevant section of the Senate committee's report] states the Committee's view that the Johnson Act does not prohibit bingo blowers. . . . Congress' intent that tribes have maximum flexibility in conducting class II gaming applies [only] to satellite linked bingo."[357]

Senate Bill 2230 sought a similar clarification of the division between electronic aids and facsimiles. Section 4(9) of that bill would have added an expanded definition of electronic aids.

> The term "electronic, computer, or other technologic aid" means a device, such as a computer, telephone, cable, television, satellite, or bingo blower, which, when used—(A) is not a game of chance, a gambling device, or a slot machine; (B) merely assists a player or the playing of a game; and (C) is operated according to applicable Federal communications law.[358]

The entire section seems to grow out of both the NIGC Final Rule and the discussion of machine gaming delineated in its preamble. The Final Rule expresses the same position as the enumeration of several types of "aids" and the exclusion of gaming activities that are independently defined elsewhere in section 4(9) of Senate Bill 2230.[359] Thus, "aids," as the term is employed in the

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the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

357 57 Fed. Reg. 12,386 (1992). The Commission reserved judgment on the interesting new phenomenon of "telephone bingo," gaming conducted through use of intrastate telecommunications. "Although the Commission does not have specific facts before it, it notes that the protection of the IGRA under § 2711(b)(1) is only available to gaming conducted 'on Indian lands within [a] tribe's jurisdiction.' The Commission intends to address this issue further when it has specific facts before it." *Id.* at 12,388.

Specific facts are rapidly coalescing. A recent experiment authorized by the New York State Legislature that allows the New York Racing Association and Off-Track Betting corporations to broadcast racing on local cable channels and accept bets over the telephone points out some of the questions that might be raised by this phenomenon with respect to Indian gaming. What is the locale of the transaction? Under the New York plan, "viewers will have to have opened a special account in one of the city's OTB parlors." *Gambling on the Horse Races on Cable Television? You Bet!*, N.Y. TIMES, Feb. 18, 1995, at A25.

The Coeur d'Alene Indian Tribe of Idaho has announced plans to create a national lottery that would be the first in the country in which buyers could charge tickets by using a toll-free telephone number and a credit card. Michael Janofsky, *Indian Tribe Makes Plans for a Nationwide Lottery*, N.Y. TIMES, Mar. 7, 1995, at A12. Minnesota has already indicated that it does not believe that the proposed lottery complies with IGRA. *Id.* (quoting Alan I. Gilbert, Assistant Minnesota Attorney General).

358 S. 2230, *supra* note 83, § 4(9).

359 Section 4 of S. 2230 contains independent definitions of gambling device (§ 4(11)) and slot machine (§ 4(26)).

Senate Committee's Report, should be confined to bingo blowers and communications technology, excluding all activities qualifying as gambling devices under the Johnson Act.

Subparagraph (B) is a nebulous attempt to further limit the Senate Committee's comment on technologic aids; evidently the term "merely" was intended to impart some sort of exclusivity, since all electronic uses can be seen as assisting in the playing of a game in one way or another. Section 9(C) expresses the position implied by the NIGC's dicta on telephone bingo.[360] Whether or not this scheme would have had the desired effect of clarifying the status of electronic versions of Class II gaming activities is a question left unanswered by the failure of Senate Bill 2230.

Notwithstanding the arbitrary nature of the distinction between Class II and Class III games, it is clear from the uniformity of results in those cases where classification has been an issue, that the courts have determined that the line between the classes is to be seen, if nothing else, as a sharp one. This consistency heightens the importance of Judge O'Scannlain's ruling in *Rumsey II*. If his contention that a different threshold standard for Class II and Class III games is based on the plain meaning of the statutory language in IGRA, reasonable judges may disagree. If, on the other hand, his opinion rests on reading the legislative history to interpret the intent of Congress, the judicial trend represented in the cases that looked at the characteristics and electronics elements of the classification scheme lends great support to the view that Congress might well have intended to distinguish the classes by imposing different threshold tests for each class.[361]

POSTSCRIPTUS

On August 11, 1995, the Ninth Circuit denied the petition for a rehearing and rejected the suggestion for rehearing en banc in *Rumsey III*.[362] Judge Canby was joined by five other justices[363] in a strong dissent to the rejection of the request for a rehearing en banc.

Besides taking issue with the *Rumsey II* panel's different interpretations of the statutory language in subsections 2710(b)(1)(A) (class II games) and 2710(d)(1)(B) (class III games),[364] Judge

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360 *See supra* note 357.
361 *See supra* note 246.
362 64 F.3d 1250.
363 Circuit Judges Pregerson, Reinhardt, and Hawkins joined in the dissent. Senior Circuit Judges Ferguson and Norris noted their agreement in a concurrence without opinion.
364 "[W]e should not read a congressional negative into a committee report's failure to

Canby opined that:

> The Rumsey opinion asked and answered the wrong question . . . [concluding that] the key question [is] whether the word "permits" is ambiguous; it holds that the word is not ambiguous, so the State need not bargain. But the proper question is not what Congress meant by "permits," but what Congress meant by "such gaming." Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming? The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game. The time to argue over particular games is during the negotiation process.[365]

He explicitly noted that the *Rumsey II* panel's holding puts the Ninth Circuit in sharp conflict with the Second Circuit's holding in *Mashantucket*.[366]

Judge Canby felt that "*Rumsey [II]* defeats the congressional plan for Class III gaming by a manifestly flawed interpretation of the statutory language"[367] and that the effect of the court's holding "in a circuit that encompasses a great portion of the nation's Indian country"[368] will be to "close the only route open to many tribes to escape a century of poverty."[369]

William E. Horwitz

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mention [*Cabazon*] in regard to Class III gaming." *Rumsey I*, 1993 WL 360652, at *4 (referring to the *Rumsey* panel's reliance on Senate Report 446, *supra* note 86, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3075-76, which approves the approach of *Cabazon* for Class II gaming but says nothing about its applicability to Class III gaming.).

365 *Rumsey III*, 64 F.3d at 1254.

366 "This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA"), and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language." *Id.* at 1252-53.

367 *Id.* at 1254.

368 *Id.* at 1253.

369 *Id.*