Winning Appelate Brief in the First Annual Native American Law Student Association Moot Court Competition

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Questions Presented for Review

1. Whether Congress used unmistakably clear language in the Indian Gaming Regulatory Act (IGRA) to abrogate State's Eleventh Amendment immunity by permitting only a tribe to sue a state, only in a federal court?
2. Whether Congress has the power to abrogate State's Eleventh Amendment immunity pursuant to its Indian legislation powers?
3. Whether the IGRA compels the states to negotiate or compels them to compact with Indian tribes?
4. Whether Congress overstepped the limits of the federal power by compelling states to negotiate with Indian tribes?
5. Whether the IGRA is rationally related to promoting tribal sovereignty and its economic development?

Opinion Below

The Western District Court of Native Land ruled that the plaintiff's cause of action against the state of Native Land was dismissed on the basis that Congress did not have the power to abrogate State's Eleventh Amendment sovereign immunity under the Indian Commerce Clause, and that Congress exceeded its power when it coerced the states to enter into compact with tribes for Class III games under the IGRA.

Jurisdiction

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to hear this appeal on order granting motion for leave to appeal pursuant to 28 U.S.C. § 1291 (1988).

Statement of Facts

Plaintiff, the Sycamore Tribe, requested the State of Native Land to enter into negotiations so that they may conduct Class III gaming,
in accordance with the IGRA. The State’s negotiator, Clint Custer, did not negotiate in good faith, in violation of the IGRA. As the IGRA requires, the Sycamore Tribe waited more than 180 days before bringing this cause of action to enforce the good faith negotiation provisions of the IGRA.

**Summary of the Argument**

The district court erred when it dismissed the Tribe’s suit against the State because Congress does have the constitutional power to abrogate State’s Eleventh Amendment immunity. The statute must use clear language to abrogate and Congress must use a power that is at least equal to that of the Fourteenth Amendment. The IGRA should be upheld because it uses clear language to allow tribes to sue states in federal court. Congress has the power to abrogate because when it legislates for Indian affairs, its powers are so potent that it overrides legislation enacted pursuant to the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. If the clauses requiring state involvement are found unconstitutional, they should be severed, which would allow Indian gaming to be regulated under a tribal-federal agreement.

**Argument**

**I. The District Court Erred in Granting State’s Motion toDismiss Because the Indian Gaming Regulatory Act (IGRA) Constitutionally Abrogates State’s Immunity**

Congress may override a state’s constitutional immunity from suits initiated in federal courts by using *unmistakably clear language* in statutes enacted pursuant to the Commerce Clause power. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 15 (1988). The *Union Gas* dissent, combined with a series of previous erratic decisions, are causing considerable confusion within the federal district courts now deciding the IGRA cases. The dissent, which is now the majority, would have found that only the Fourteenth Amendment grants Congress the power to abrogate the State’s Eleventh Amendment immunity. In light of that dissent and the district court’s holding in the present case, this brief will first clarify the abrogation doctrine. Next, this brief will establish that Congress abrogated State’s immunity when it enacted the IGRA because the statute uses clear language and it was enacted with authority that exceeds even that of the Fourteenth Amendment.

**A. Congress Can Abrogate State’s Eleventh Amendment Immunity by Using Unmistakable Clear Language in a Statute**

The IGRA provides tribes a cause of action against states in clear language. Generally, the Eleventh Amendment protects states from
private cause of actions against them in federal court. This includes suits brought by Indian tribes. However, this immunity can be abrogated by a statute’s unmistakable clear language creating a private cause of action against a state in federal.

The Eleventh Amendment has been interpreted to mean that the judicial power of federal courts cannot decide suits against nonconsenting states brought by anyone except sister states or the United States. *Monaco v. Mississippi*, 292 U.S. 313, 322 (1933). A recent Supreme Court decision includes Indian tribes among those citizens barred by the Eleventh Amendment. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991).

A series of Supreme Court decisions from 1964 to 1984 created the current Eleventh Amendment doctrine. During this period, the Supreme Court was often split on what was required to abrogate a state’s constitutional immunity. It all began in 1964, when injured employees of a state owned railroad sued Alabama in federal court for damages. *Parden v. Terminal Railway*, 377 U.S. 184 (1964). The court found that the state’s immunity was abrogated because the statute expressly applied to *every* interstate railroad with no exemption for state railroads. *Id.* at 190. The Court also held that the state had consented: it was implied by operating a railroad subject to federal regulation. *Id.* at 192-96.

After *Parden*, employees of state institutions sued a state under a federal statute that allowed any employer to be sued in *any* court. *Employees v. Missouri Public Health and Welfare of Missouri*, 411 U.S. 279, 283 (1972). The court held that without clear language in the statute, or the legislative history, allowing states to be sued in federal court, they would not infer it. *Id.* at 285.

After *Employees*, a recipient of federal funds, dispensed by states, sued a state in federal court for violation of federal guidelines. *Edelman v. Jordan*, 415 U.S. 651 (1974). The court held that the state could not be sued because the statute contained no provision for any suits against anyone; nor did the state’s participation in a federal program constitute consent. *Id.* at 671-74.

After *Edelman*, state employees sued state officials in federal court for discrimination in their retirement plan benefits. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975). This action was brought under the Equal Employment Opportunity Act of 1972, enacted pursuant to the Fourteenth Amendment, which defined potentially liable persons as including governments. *Id.* at 449. The statute also expressly permitted state employees to sue in federal court. *Id.* at 449. In *Fitzpatrick*, the court found what the previous cases lacked: statutory language of clear congressional authorization for a private action against a state in federal court. The court unanimously held that the unmistakable clear language in the statute abrogated the state’s immunity. *Id.* at 457. The
court based its holding on the belief that the fourteenth Amendment, by its own terms, specifically allowed Congress to limit state actions by legislation. \textit{Id.} at 453-54.

After \textit{Fitzpatrick}, an employment applicant sued a state hospital in federal court for violation of a federal statute. \textit{Atascadero State Hospital v. Scanlon}, 473 U.S. 234 (1984). The court held that the statute did not contain unmistakably clear language that the plaintiff was included in the \textit{any} of those authorized to sue a state in federal court. \textit{Id.} at 245-47. Since the statute failed the clear language test, the court looked further to determine if the state had waived its immunity by consent. \textit{Id.} at 240-41. The court held that the state’s constitution permitting the state to be sued “in such courts as shall be directed by law” was not an \textit{unequivocal waiver} to be sued in federal court. \textit{Id.} at 241.

After \textit{Atascadero}, two important decisions defined the scope of the unmistakably clear language test. In \textit{Welch v. Texas Highways and Public Transportation}, 483 U.S. 468 (1986), an injured state dock worker sued the state under a federal statute. He argued that even if the statute’s broad provisions failed the clear language test, it met the \textit{Parden} test because the state was operating a dock under federal regulation, like the state railroad in \textit{Parden}. \textit{Id.} at 476-77. The court specifically overruled this part of its holding in \textit{Parden} and replaced it with the unmistakably clear language in the statute test. \textit{Id.} at 478.

After \textit{Welch}, the Court granted certiorari in \textit{Dellmuth v. Muth}, 491 U.S. 223, 225 (1988), to resolve conflicts in the circuit courts as to how to apply the clear language test. A Court of Appeals had found that the language of a statute combined with evidence in the legislative history that states were liable, met the clear language test. \textit{Id.} at 228. The Supreme Court reversed, stating that the test was to be applied only to the language in the statute, legislative history was irrelevant. \textit{Id.} at 230.

Decided on the same day as \textit{Dellmuth}, the Supreme Court, in \textit{Pennsylvania v. Union Gas}, 491 U.S. at 8-10, applied the clear language test to a statute which specifically included states within the definition of persons who could be sued in federal court by private parties. \textit{Id.} at 7. The court held that this language met the clear language test to abrogate. \textit{Id.} at 13. The dissent agreed on the clear language, but argued that only the Fourteenth Amendment granted the power to abrogate as they had held in \textit{Fitzpatrick}. \textit{Id.} at 41-42. This dissent has now become the majority.

In summary, the Supreme Court will use only one test to determine if Congress has abrogated state’s constitutional immunity to be sued in federal court by a private party. The test is certain: a statute must create a private cause of action against a state in federal court by using unmistakable clear language. In addition, a state can consent if
it expresses an unequivocal waiver to be sued in federal court. The Supreme Court requires that only one of the tests be satisfied.

B. The IGRA Properly Abrogates State's Eleventh Amendment Immunity Because It Uses Unmistakably Clear Language

The district court erred by dismissing the Sycamore Tribe's suit against the State because the IGRA, in unmistakeably clear language, permits a tribe to sue a state in federal court. Section 2710 (d)(7)(A) provides that: "The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A). It is highly significant here, that only a state may be sued, only a tribe is authorized to sue, and a federal court is the only court authorized. By targeting states as the only entity that tribes may sue, the IGRA is more specific than the statute in *Union Gas*, which passed the test for only including states as one of many persons who may be found liable by the broad category of private parties. Similarly, by specifying that tribes may sue only states, the IGRA is more specific than the language of the statute in *Fitzpatrick*, which passed the test for only including governments among the many who could be liable. Because section 2710 authorizes that only a tribe may sue only a state in federal court, this unmistakeably clear language abrogates State's Eleventh Amendment immunity.

C. When Congress Enacts Indian Legislation, Its Powers Exceed Other Constitutional Powers that Lawfully Abrogate State's Immunity

The conflict in the district courts over whether Congress has the power to abrogate State's immunity under the IGRA has not been decided by a higher court. *Poarch Band of Creek Indians v. Alabama*, 784 F. Supp. 1549 (1992) (Congress does not have the power to abrogate); accord *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (1991); *Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655 (1992) (Congress does have the power to abrogate). This conflict is resolved by comparing congressional power when legislating with respect to Indian affairs with its Fourteenth Amendment powers. Recall that the Supreme Court held that the power of Congress acting pursuant to the Fourteenth Amendment lawfully abrogates State's immunity. *Fitzpatrick v. Bitzer*, 427 U.S. at 456. It follows that a congressional power greater than its Fourteenth Amendment power would also abrogate a state's immunity. The Supreme Court has held that Congressional power when legislating for Indian affairs overrode both a statute enacted pursuant to the Fourteenth Amendment powers,

The conflicting federal district courts assumed Congress was acting pursuant to the Indian Commerce Clause power alone but the IGRA is silent on that issue. The courts are wrong. When Congress legislates for Indian affairs, its power is not based solely on the Indian Commerce Clause. As the Supreme Court explained it in *Morton v. Mancari*, 417 U.S. at 551-55, the power of Congress when legislating Indian affairs is plenary: it derives explicitly from the Constitution and implicitly from tribal political status, the trust responsibility of the federal government to the Indians, and treaty promises. As early as 1885, the broad congressional power to legislate for Indian affairs was recognized by the Supreme Court in *United States v. Kagama*, 118 U.S. 375 (1885), as going beyond that authorized by the Constitution. *Id.* at 383-84. By 1903, the Supreme Court began calling this broad authority, congressional plenary power. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).


Another element of the plenary power doctrine is a tribe’s own sovereign status, recognized by the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1979), as the tribal pre-constitutional and inherent right of self-government. Tribal sovereignty has been recognized by the Supreme Court in *Williams v. Lee*, 358 U.S. 217, 220 (1959), as powerful enough standing alone, to prohibit states from interfering with a tribe’s right to “make their own laws and be ruled by them.” *Id.* at 220. When the tribe’s sovereign status is combined with other congressional Indian powers, the resultant legislation is so potent that the Supreme Court held that it overrode both the Equal Employment Opportunity Act of 1972, and the Due Process Clause of the Fifth Amendment. *Morton v. Mancari*, 417 U.S. at 551-55. The court explained that its holding was based upon the plenary power of Congress which included the explicit authority granted by the Constitution combined with the trust responsibility and tribal
sovereignty. *Id.* at 552-54. Further, the statute in *Morton*, like the IGRA, was enacted to promote tribal sovereignty and economic development. *Id.* at 542.

Recall that the Equal Employment Opportunity Act of 1972 was the same statute in *Fitzpatrick* that was unanimously held to abrogate a state’s immunity. Since Indian legislation overrides Fourteenth Amendment legislation and the Due Process Clause, it logically follows that congressional power acting pursuant to Indian legislation is greater than its Fourteenth Amendment powers. Because Congress has the power to abrogate a state’s immunity under the Fourteenth Amendment, it certainly has the power to abrogate under its Indian powers.

In summary, the Supreme Court said in *Fitzpatrick*, that the Fourteenth Amendment authorized Congress to abrogate State’s immunity because that authority is plenary and the Amendment, by its own terms, “embodied significant limitations on state authority.” *Fitzpatrick* v. *Bitzer*, 427 U.S. at 456. Similarly, the Indian Commerce Clause provides the identical limitations on state authority by granting only Congress the power to legislate Indian affairs. But it is pointless to analyze only the Indian Commerce Clause powers because this clause has never stood alone before the Supreme Court and it should not in this court. It is flanked on each side by the federal trust responsibility toward Indians and the tribe’s own sovereign powers. In combination, those powers have been found to be potent enough to override legislation enacted under Fourteenth Amendment power, which a unanimous Supreme Court held was powerful enough to abrogate the state’s constitutional immunity. Because Congress can override both the Fourteenth and Fifth Amendment when it legislates for Indian affairs, the congressional Indian power exceeds that of the Fourteenth Amendment. Congress abrogated state’s immunity under the IGRA because it used unmistakable clear language in the statute and it was acting pursuant to its Indian powers. Therefore, the district court erred in dismissing the Sycamore Tribe’s suit against the state of Native Land and it must be reversed.

**II. The District Court Erred in Granting State’s Motion to Dismiss Because Congress Did Not Compel States to Regulate**

The district court erred when it granted State’s motion to dismiss on the grounds that Congress exceeded its power because it coerced states to enter into compacts with tribes. If the court had properly interpreted the Act’s language and legislative history, applying the requisite rules of statutory interpretation, it would have found that the IGRA does not compel states to enter into a compact. Rather, the IGRA only compels states to negotiate with tribes in good faith. Compelling states to negotiate is within congressional authority because
it does not overstep the boundary between federal and state constitutional powers. Moreover, the IGRA is a valid exercise of congressional authority because it promotes tribal economic development by authorizing tribes to conduct high stakes gambling activities to raise sorely needed tribal revenues.

A. Using the Proper Rules of Statutory Interpretation Shows that the IGRA Compels States to Negotiate, not to Compact

There are three rules of statutory interpretation that must be applied in this case. First, before a court determines that a federal statute impermissibly exceeds the outer limits of the federal constitutional powers, as the Supreme Court ruled in *New York v. United States*, 112 S.Ct. 2408, 2425 (1992), a court must be certain of Congress' intent by looking at the language and the legislative history of the statute. Second, in deciding cases involving Indian tribes, courts must interpret any ambiguities in a statute in a manner that is most favorable to tribal interests. *Blatchford v. Native of Noatak*, 111 S. Ct. at 2589. Third, a court must interpret the statute to avoid serious constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Id.* at 2425. The IGRA's legislative history establishes that Congress intended that this preferential rule be applied when courts decide IGRA cases. See S. Rep. No. 100-446, 100th Cong., 2d Sess. 15 (1988).

An examination of the language and legislative history of the IGRA reveals that Congress intended to compel states to negotiate in good faith, not to compact. Section 2710(d)(1)(A) specifies that a tribe may conduct Class III gaming activities only after it successfully completes negotiations with a state and develops a tribal-state compact. 25 U.S.C. § 2710(d)(1)(A). The Act requires a three step negotiation procedure. First, a tribe wishing to conduct Class III gaming, "shall request the State . . . to enter into negotiations . . . ." 25 U.S.C. § 2710(d)(3)(A). Second, after a state receives such a request from a tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Third, a state and tribe may enter into a compact after approval of the Secretary of Interior. 25 U.S.C. § 2710(d)(3)(B). This language draws a clear distinction between a directive to negotiate and discretion for states to compact. This interpretation is supported by the statement of Senator Reid during a hearing to implement the Indian Gaming Regulatory Act:

The law seems so clear. It says, any state and any Indian tribe may, may—we selected that language purposely—may. It doesn't say shall, it doesn't say if you do not, you are going to get sued. It just says any State and any Indian Tribe may enter into a compact. I do not know how we
could be more clear than saying may. I do not know of another word we can use. Does anybody else?


That a state is not compelled to enter into a compact is further supported by Section 2710(d)(7), which authorizes a tribe to bring suit against a state only if it refuses to "enter into negotiations" or does not negotiate in good faith. 25 U.S.C. § 2710(d)(7). There is no similar provision to sue a state who refuses to compact. This interpretation comports with the Act's legislative history which establishes that tribes must give up their legal right to conduct Class III gaming if "they opt for a compact and, for whatever reason, a compact is not successfully negotiated." See S. Rep. No. 100-466, 100th Cong., 2d Sess. 14 (1988). Further, if a tribe does sue a state and the court finds that the state failed to negotiate in good faith, section 2710(d)(7)(B)(iii) authorizes a court to order the state and Indian tribe to conclude a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). If they do not, a mediator picks the most suitable compact of those proposed, submits it to the parties and waits for the state's consent. 25 U.S.C. § 2710(d)(B)(iv), (d)(B)(vi). If a state does not consent, the Secretary of Interior and the tribe finalize the compact without further involvement of the state, 25 U.S.C. § 2710(d)(B)(vii).

The IGRA could plausibly be understood either as a series of procedural steps which may result in a compact or as a mandate to negotiate until at least a proposed compact results. The latter view could be supported because Section 2710(d)(7)(A)(ii) authorizes the Secretary to bring "any cause of action" to enforce the procedures prescribed when a state does not consent after the mediator has submitted the most suitable compact. 25 U.S.C. § 2710(d)(7)(A)(ii). This may only mean that the Secretary is authorized to implement the compact. It is somewhat ambiguous. However, any ambiguity must be interpreted in a manner that is most favorable to tribal interests. Blatchford v. Native Village of Noatak, 111 S. Ct. at 2589. The interpretation most favorable to tribal interests, in this case, is one that agrees with the language of the Act and its legislative history: states are compelled only to negotiate in good faith, not to compact.

That states are not compelled to compact comports with the rule that a statute must be interpreted to avoid serious constitutional problems unless it is contrary to the intent of Congress. The intent of Congress, as shown above, is that states are compelled to negotiate. This interpretation will avoid serious constitutional problems because Congress may constitutionally require a state to negotiate. Moreover, this court should not decide whether states can be compelled to compact because that issue is not ripe since the Sycamore Tribe is presently only enforcing the negotiation clause.
In summary, there is no language in the Act or evidence in its legislative history to indicate that a state is compelled to compact. Thus, Congress did not intend to compel states to compact, but only to negotiate. This conclusion requires an examination of whether Congress may permissible require a state to negotiate.

B. Congress Has not Overstepped Its Constitutional Authority Because Current Doctrine Prohibits It from Compelling States to Regulate, But Not to Negotiate

No court has decided whether Congress can compel a state to negotiate with an Indian tribe. This issue is resolved by application of the recent Supreme Court test to determine the outer limits of federal power with respect to the protection of state sovereignty. This will establish that IGRA does not overstep the Constitutional division between federal and state authorities.

The Constitution gives Congress the authority to regulate in the exercise of its delegated plenary powers, balanced by reserving non-delegated powers to the states under the Tenth Amendment. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). This balance is destroyed when Congress oversteps the outer limits of its authority. *Id*, at 2400. The outer limits of federal authority are overstepped, as explained by the Supreme Court in *New York v. U.S.*, 112 S. Ct. at 2428, by federal actions that order states to regulate for federal purposes, inconsistent with the Constitution’s division of authority. By contrast, it is permissible for Congress to authorize states to implement and enforce federal programs if states agree. *Id*. at 2428-29. Thus, Congress exceeds the outer boundary of federal power only when it *orders states to regulate*.

Because compelling states to negotiate is not an order to regulate, it is not beyond the authority of Congress. To negotiate is defined as, “to conduct communications or conferences with a view to reaching a settlement or agreement.” Black’s Law Dictionary 934 (5th ed. 1979). By contrast, to regulate is defined as, “to direct by rule or restriction.” Black’s Law Dictionary 1156 (5th ed. 1979). The definitions draw a distinction between compelling states to confer with tribes rather than compelling states to enact rules. This distinction is supported by the legislative history which shows that Congress intended that the state may negotiate to implement their own regulatory systems as part of the their compact agreement. See S. Rep. No. 100-466, 100th Cong., 2d Sess. 14 (1988). This view is also established by Section 2710(d)(3)(C), which provides that a compact may include provisions relating to the allocation of enforcement jurisdiction between the state and the Indian tribe. 25 U.S.C. § 2710 (d)(3)(C)(ii). Legislative history shows that the alternative of state regulation was permitted only after states expressed concern that state law enforcement should outweigh tribal sovereign

In summary, Congress is not ordering states to regulate. Instead the IGRA compels states to negotiate. Compelling states to negotiate is not beyond the authority of Congress because it is not an order for states to regulate. Rather, negotiation is designed to allow states and tribes to resolve allocation of regulatory jurisdiction of Class III gambling. Thus, Congress did not overstep the federal power by compelling states to negotiate with tribes.

C. The IGRA is a Valid Exercise of Congressional Authority Because Indian Gaming is Rationally Related to Tribal Sovereignty and its Economic Development

The IGRA must be upheld as constitutional because it is rationally related to Congress' trust responsibility toward Indians. The scope of judicial review when determining if Indian legislation is a valid exercise of congressional authority is limited to a rational basis test.

Federal legislation with respect to Indian affairs that can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" is a valid exercise of congressional authority and must be upheld. Morton v. Mancari, 417 U.S. at 555. This unique obligation towards the Indians is reflected in statutes and the strong federal policy of promoting tribal sovereignty, self-sufficiency and economic development. White Mountain Apache Tribe v. Bracker, 448 U.S. at 143. This obligation is even greater towards the tribes formed under the Indian Reorganization Act (IRA). Id. at 138. This is true because the explicit purpose of the IRA is "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., 6 (1934)).

The purpose of the IGRA is "to provide . . . a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2701(1). The legislative history shows that many tribes such as the Sycamore Tribe, once impoverished from lack of natural resources to develop and decreasing federal funds, have become prosperous from revenues to generated by their gambling enterprises. See S. Rep. No. 99-493, 99th Cong., 2d Sess. 4 (1986). Tribal gambling activities have decreased high unemployment rates and the revenue support tribal government services such as schools and medical clinics. See S. Rep. No. 99-493, 99th Cong., 2d Sess., 4 (1986). Because Indian gaming provides jobs for tribal members and the revenue increases tribal government services, it promotes tribal sovereignty and economic development.
In summary, because the IGRA provides the means for promoting tribal sovereignty and tribal economic development, it rationally fulfills Congress' obligation toward Indians and is a valid exercise of congressional authority. Because the IGRA does not intrude upon state sovereignty and is rationally related to Congress' obligation to Indians, it is constitutional and must be upheld. Further, because the trust responsibility and, therefore, the IGRA, extends to the Sycamore Tribe since they were formed under the Indian Reorganization Act (IRA), they must be allowed to sue the State in federal court to enforce the negotiation clause.

D. Even if Compelling States Is Unconstitutional, the Negotiation and Compact Requirements May Be Severed

Even if the abrogation clause and the negotiation clause are not found to be constitutional, they may be severed. An unconstitutional provision can be severed, as explained in *New York v. U.S.*, 112 S.Ct., at 2434, if what is left is fully operative as a law. The IGRA authorizes severability. 25 U.S.C. § 2721. Because the IGRA was enacted to provide a statutory basis for Indian Gaming to promote tribal economic development, self-sufficiency, and strong tribal government, the state's involvement would be unnecessary to accomplish the purpose of the Act. Further, nothing in the Act prohibits exclusive tribal regulation of Class III gaming except that such regulation cannot be "inconsistent with, or less stringent than the State laws . . . ." 25 U.S.C. § 2710(d)(5). Severing would not interfere with the Act's purpose or the regulation of Class III gaming activities and what is left is fully operative as a law.

Conclusion

The district court's order granting the motion to dismiss the Sycamore Tribe's suit should be reversed. If the negotiation-compact clauses are found unconstitutional, they should be severed. If they are not severed, it would constitute a fundamental injustice because otherwise the Tribe cannot conduct Class III gaming allowed to other State citizens nor does the Act permit them to sue in any other court.