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Rolling the Dice on Tribal Sovereignty

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INTRODUCTION

In 2021, tribal gaming accounted for "44 percent of all annual gaming revenue in the United States."[1] As of 2023, tribal gaming states have supported 676,428 jobs and generated 15.26 billion dollars in tribal revenue sharing.[2] Although tribes and states have long been pitted against each other because of the tribes' sovereign status, the national success of tribal gaming operations has been achieved primarily through the construction of strong tribal-state relationships. Fortunately, tribal-state interests in the gaming industry are naturally aligned through a common motive: profit.

Through a federally outlined agreement process known as tribal-state compacting, tribes and states have enjoyed mutual economic success in tribal gaming. In fact, tribal gaming has provided the means to achieve a central aim of Federal Indian Law—tribal self-sufficiency and economic independence.[3] The glitz and glamour of today's gaming operations, however, have come a long way from early reservation bingo halls. Correspondingly, the legal landscape around gaming regulation has developed significantly, providing risks and rewards to tribes and states alike.

This paper thus explores the unique tripartite relationship between the tribes, the federal government, and the states in the context of the lucrative tribal gaming industry and investigates the political utility of tribal sovereignty therein. Part I provides background on Federal Indian Law and explores the federal government's hostile land control policies that relegated tribes into dependence, thereby contextualizing the extent of tribal exclusivity in gaming operations. Part II outlines the intersection and development of Federal Indian Gaming Law with particular emphasis on sports betting through statutes and caselaw. Part III uses Florida and the Seminole Tribe as a

[1] Tribal Gaming, A Vital Sector Supporting Tribes and Local Communities, American Gaming, (last visited Mar. 31, 2024) https://www.americangaming.org/policies/tribal-gaming/.
[2] State of Play, American Gaming Association (Dec. 31, 2023) https://www.americangaming.org/state-of-play/.
[3] *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

case study to discuss how tribal sovereignty is a double-edged sword, with benefits and detriments shared by both the State and the Tribe. Part IV concludes.

I. FEDERAL INDIAN LAW

Contrary to popular belief, the United States has not two but three types of sovereign entities: the federal government, the states, and the Indian tribes.[4] The tribes' inherent sovereignty, that which predates the United States' existence, is recognized in both early American Indian caselaw and the United States Constitution.[5]

Beginning with the Constitution, tribal sovereignty is explicitly recognized in the Indian Commerce Clause and implicitly recognized in the federal Treaty Power.[6] The Indian Commerce Clause expressly delegates to Congress the authority to regulate trade between the United States and the Tribes.[7] More implicitly, the federal Treaty Power provides for the way the federal government should formally engage with the Tribes.[8]

In the 1820s and 30s, Chief Justice Marshall laid the foundation of American Indian law in three cases—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*—known collectively as the Marshall Trilogy.[9] Taken together, the trilogy stands for the proposition that although the Indian tribes are sovereign entities, they are nevertheless dependent on the United

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[4] Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997); MATTHEW FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 1 (2017).
[5] *See* MATTHEW FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 1 (2017); Worcester v. Georgia, 31 U.S. 515, 559 (1832) (Chief Justice Marshall using words like "always" and "already" to denote the Indian tribes' retention of their inherent sovereignty despite the United States latent founding); United States v. Wheeler, 435 U.S. 313, 328 (1978) (noting that federal enabling legislation for the tribes did not *"create[]* the Indians' power to govern themselves . . ." because the recognized tribes have "primeval sovereignty, [which] has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.").
[6] U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2.
[7] U.S. CONST. art. I, § 8 ("The Congress shall have power to . . . regulate commerce with foreign nations, among several states, and with the Indian tribes . . .").
[8] FLETCHER, *supra* note 5, at 1.
[9] *Id.* at 2; *see generally* Johnson v. M'Intosh 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

States and thus more accurately characterized as quasi-sovereign.[10] The trilogy also concurrently affirms Congress's plenary authority over the Indian tribes, which operates to the exclusion of the states.[11] Correspondingly, judicial deference for Congres's role in shaping tribal sovereignty developed in later cases which helped to strengthen tribes' self-determination and standing within the federal governments' framework.[12]

But to understand how and why the tribes are considered, paradoxically, both dependent and sovereign, it is necessary to contextualize the Court's decisions by examining the early eras of federal Indian law. Namely, the Treaty Era, the Removal Era, the Reservation Era, and the Termination Era.[13]

A. Early Indian Law Eras & Sovereignty: Establishment to Dilution and Relegation

The Treaty Era began in the 1770s and lasted until 1871.[14] During the Treaty Era, the United States contracted with the tribes by treaty to outline their respective rights, roles, and responsibilities.[15] The Supreme Court in *M'Intosh*, however, found that these treaties were contracts for something much deeper. Specifically, the Court found that these treaties represented Native American relinquishment of their "supposed right" to Indian land because the doctrine of discovery superseded "all proprietary rights in the natives."[16] Consequently, the Court found that Native Americans at-large only have a possessory right in the land they inhabit and therefore they

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[10] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 16–18 (1831) (observing that Indian tribes are like "domestic dependent nations," finding that the Court did not have jurisdiction over the case).
[11] Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 507 (2020); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789 (2014) (quoting Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) ("[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'").
[12] *See id.* at 803.
[13] *See* FLETCHER, *supra* note 5, at 7–15.
[14] *Id.* at 7. *But see* Arthur Spirling, U.*S. Treaty Making with American Indians: Institutional Change and Relative Power*, 1784–1911, 56 AM. J. OF POL. SCI. 84, 85 (2012) (noting that the treaty making ended in 1868).
[15] *See* Treaties, Research Guides, American Indian Law: A Beginner's Guide, Library of Congress https://guides.loc.gov/american-indian-law/Treaties (last visited Mar. 19, 2024); *see also* Spirling, *supra* note 15, at 86 (explaining that the Supreme Court interprets treaties "as commitments wholly separate to legislation.").
[16] *See* Johnson v. M'Intosh, 21 U.S. 543, 567 (1823).

could not legally convey title to Mr. Johnson.[17] The treaties therefore evidenced the tribes' "dependent condition," a principle that has constantly been reinforced through federal Indian law jurisprudence.[18]

After having comfortably relegated the tribes to dependence, the United States entered the Removal Era in the 1830s, where it focused its attention on tribal land diminishment or outright tribal displacement.[19] Broadly speaking, after the war of 1812 the United States began hostilely chipping away at tribal boundaries as well as at its relationship with and commitment to the tribes as outlined in the treaties.[20]

Unsurprisingly, some states in which tribes resided began adopting a similar attitude towards the tribes.[21] Georgia was one such state, as exemplified by its attempt to force the Cherokee Nation to leave their territory via state legislation in *Cherokee Nation v. Georgia*.[22] There, the Cherokee Nation petitioned the Supreme Court for an injunction against Georgia's application of its laws, arguing that the application would violate the tribe's treaty with the United States, and that the Supreme Court had jurisdiction over the matter because the tribes were considered "foreign nations."[23] Like in *M'Intosh*, the Court reaffirmed the principle that tribes are dependent on the

[17] *Id.* at 603–04.
[18] *Id.* at 568; *see also, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831); Worcester v. Georgia, 31 U.S. 515, 559 (1832).
[19] Fletcher, *supra* note 5, at 7.
[20] *Id.* at 8; *see* Indian Treaties and the Removal Act of 1830, Office of the Historian, Foreign Service Institute, United States Department of State (last visited Mar. 19, 2024) https://history.state.gov/milestones/1830-1860/indian-treaties (reporting that Major General Andrew Jackson's success at the Battle of Horse Shoe Bend forced the Creek Indians to surrender about twenty-million acres of their land, and later, aiding in nine of eleven treaties to remove Indians).
[21] *See generally* Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831) (Chief Justice Marshall describing the Cherokee Nation's allegations against Georgia, in that its laws and their application "go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.").
[22] *See id.* at 10.
[23] *Id.* at 10–11.

United States, they are not "foreign" nations, and consequently, the Court did not have jurisdiction.[24]

Conversely, the Court revisited the question of state law applicability to Indian lands the very next year in *Worcester v. Georgia*.[25] There, the Court held that Congress has exclusive authority over Indian affairs and therefore state laws have no force on Indian land unless Congress explicitly acts.[26] Importantly, Chief Justice Marshall belabored tribal sovereignty in *dicta*, noting that Indians nations "had always been considered as distinct, independent political communities."[27] The Marshall Trilogy thus established the paradoxical role that the federal government and the judiciary relegated the tribes to--that of dependent sovereigns.

B. Land Use: The Self-fulfilling Prophecy of Dependence

After the Removal Era, the United States focused its efforts on controlling tribes via land use policy in the Reservation Era and the Allotment Era.[28] Overarchingly, Congress began sequestering tribes on reservations away from their homeland and then reduced tribal agency over economic development on Indian land through *de facto* and *de jure* diminishment of reservation boundaries.[29]

During the beginning of the Reservation Era in the mid-nineteenth century, Congress and the tribes negotiated treaties guaranteeing that designated lands reserved to the tribes would forever remain that way.[30] Gradually, however, the federal government began destabilizing tribes by unilaterally abrogating treaties.[31] One illustrative example of this is detailed in *United States v.*

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[24] *Id.* at 12–13.
[25] Worcester v. Georgia, 31 U.S. 515 (1832).
[26] *See id.* at 559, 561.
[27] *See id.* at 559 (1832); *see also id.* at 561.
[28] *See* FLETCHER, supra note 5, at 9–12.
[29] *See, e.g.*, *id.*; Indian General Allotment Act, 25 U.S.C. § 331 (1887) (repealed 2000); Sioux Tribe of Indians v. United States, 315 U.S. 317, 331 (1942).
[30] *See* FLETCHER, *supra* note 5, at 9; United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).
[31] FLETCHER, *supra* note 5, at 9; Maggie Blackhawk, Foreword: The Constitution of American Colonialism, 137 HARV. L. REV. 2, 45, 110 (2023).

Sioux Nation of Indians.[32] There, the United States began reneging on its responsibilities to prevent encroachment on tribal land under the Fort Laramie Treaty with the Sioux Nation after it was speculated that the Black Hills, land reserved to the Sioux Nation under the Fort Laramie Treaty, contained gold and silver.[33] After confirming the land's richness and viability, "the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory."[34] This not only allowed settlers to encroach on the Black Hills territory, but also prompted the United States to initiate negotiations with the Sioux to allow United States citizens to mine for gold in the Black Hills.[35] Further, the United States' hostile attitude towards the Sioux who were hunting in unceded territory reserved to them under the Treaty led to the battle of Little Big Horn.[36]

Despite Sitting Bull's victory, the Native Americans who surrendered "were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the government."[37] Simultaneously, after noting the Sioux Nation's failure to become self-sufficient on the reservation, Congress enacted an appropriations bill conditioning any further federal aid on the Sioux's relinquishment (1) of their right to hunting outside the reservation, and (2) the Black Hills to the United States.[38]

Although the Supreme Court found that this constituted a taking, *Sioux Nation* is illustrative of the process by which the United States introduced barriers to tribal self-sufficiency and later exacted punishments for it. The United States' approach to Indian relations at this time was ironic because land was a means for tribes to achieve economic prosperity and self-sufficiency, and by

[32] *See* Sioux Tribe of Indians v. United States, 315 U.S. 317 (1942).
[33] *See id.* at 374–77.
[34] *See id.* at 377–78.
[35] *See id.* at 378–79.
[36] *See id.*
[37] *See id.* at 379–80.
[38] *See id.* at 380.

enacting laws and adopting policies that curtailed Indian land rights established through treaties, the United States forced tribal dependence on the federal government. In effect, the United States created a self-fulfilling prophecy: the tribes would never be able to become truly self-sufficient (or sovereign) so long as the federal government continued weaponizing its trustee role over Indian land use and ownership. Thus, because the federal government eliminated land as an avenue to economic prosperity for tribes, revenue generation had to be sourced from somewhere else.[39]

C. Termination Era & Pub. Law. 280

To add insult to injury, Congress began terminating social safety nets for tribes during the mid-twentieth century.[40] Hence the name Termination Era. In addition to singling out and terminating specific tribes, Congress also passed a significant jurisdictional statute that would permanently alter state and tribal relationships.

In stark contrast to *Worcester*, Congress passed Public Law 83-280 ("PL 280") in 1953, which mandated specific states exercise criminal and civil jurisdiction over Native Americans on reservations.[41] Other states not explicitly named could also exercise jurisdiction by passing enabling legislation.[42] In 1961, Florida opted in.[43] Although PL 280's forward reach was curtailed with the passage of the Indian Civil Rights Act in 1968, the damage was already done for most tribes.[44]

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[39] *C.f.* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 786 (2014) (explaining Bay Mills' property purchase was made with the interest accrued from a federal appropriation that Congress made to compensate the tribe for takings of ancestral lands).
[40] *See* FLETCHER, *supra* note 5, at 13–14.
[41] *See id.* at 14; Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162); *see also* § 1162(a) (mandating Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin exercise jurisdiction over offenses "committed by or against Indians"); Bryan v. Itasca County, 426 U.S. 373, 379 (1976) (noting that the impetus for enacting PL 280 was the "lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.").
[42] *See* Pub. L. No. 83–281, 67 Stat. 590.
[43] FLA. STAT. § 285.16 (2023).
[44] *See* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under PL 280*, 47 AM. U. L. REV. 1627, 1633 (1998) (noting that the six explicitly named states contained "359 of the over 550 federally recognized tribes" at the time).

The Supreme Court outlined the civil implications for PL 280 in *Bryan v. Itasca County*.[45] There, Itasca County attempted to assess a tax on a Chippewa Tribe member's property on the reservation.[46] The Court found that although PL 280 conferred civil jurisdiction to Minnesota to the extent that it would permit state courts hear civil cases originating on reservations, that authorization did not mean Congress likewise conferred state civil regulatory control over reservations.[47] In fact, the Court belabored the tribes' retained sovereignty in spite of PL 280, noting that there was an absence of "any conferral of state jurisdiction over tribes themselves . . ." and as such, "contemplates the continuing vitality of tribal government."[48]

The *Bryan* Court therefore severely limited the scope of PL 280 states' civil jurisdiction over tribes and established the foundation for determining whether state law would apply to a reservation.[49] This ruling would prove pivotal in the ensuing decades as gaming and the question over whom had the authority to regulate it began to drive a deeper wedge between tribes and states.

II. GAMING

Commercial tribal gaming began in the 1970s.[50] Far from the glamour and complexity of gaming operations today, back then tribes operated bingo halls for the sake of self-sufficiency.[51] Economically, the games' generated revenue that funded the tribal government's operation and its services to members--a critical achievement that the United States spent decades trying to facilitate.[52]

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[45] *See* Bryan v. Itasca County, 426 U.S. 373, 383–84 (1976).
[46] *Id.* at 375.
[47] *See id.* at 383–85.
[48] *See id.* at 388–89.
[49] *See id.*; *see also* California v. Cabazon, 480 U.S. 202, 208 (1987) (expounding on *Bryan's* civil/regulatory versus criminal/prohibitory framework).
[50] National Indian Gaming Commission, History, (last visited Mar. 13, 2024) https://www.nigc.gov/commission/history.
[51] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 204, 205, 218 (1987).
[52] *Id.* at 218; *see id.* (noting that gaming operations were also a major source of employment for tribal members).

A. Coming to Terms with the State of Tribal Self-Sufficiency in *Cabazon*

After states attempted to regulate tribal gaming under state law, the Supreme Court finally reckoned with the tribes' reliance on a newfound stream of income caused by the United States' divisive and self-fulfilling land control policies in the 1987 case *California v. Cabazon Band of Mission Indians*.[53] In *Cabazon*, California and Riverside County sought to enforce both regulatory and prohibitory gambling laws on the Cabazon and Morongo tribes' operation of bingo and card games on the reservation.[54] After acknowledging that tribal sovereignty is generally subordinate to the federal government unless Congress expressly delegates such authority to the states, the Court held that PL 280 did not extend state regulatory jurisdiction over Indian gaming operations on reservations.[55]

Justice White explained that a PL 280 state's jurisdictional reach depended on whether the law sought to be enforced is either (1) criminal or prohibitory, or (2) civil or regulatory.[56] A state seeking to enforce a criminal or prohibitory law falls within the ambit of PL 280's grant of criminal jurisdiction and is therefore applicable to the reservation.[57] A state seeking to enforce a civil or regulatory law, however, is beyond the scope of PL 280 and consequently unenforceable on an Indian reservation.[58]

After clarifying the criminal versus civil test that originated in *Bryan v. Itasca County*, the *Cabazon* Court discussed the issue of preemption and contextualized the tribes' necessary reliance on gaming revenue.[59] The Court's employed a balancing test that analyzed the importance of

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[53] *See* 480 U.S. 202 (1987).
[54] California v. Cabazon Band of Mission Indians, 480 U.S. 204, 205–06 (1987).
[55] *Id.* at 207–212.
[56] *Id.* at 208–09; *see also id.* at 211 (clarifying that just because a regulatory law "is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of [Public Law 280].").
[57] *Id.* at 208–09.
[58] *Id.*
[59] *See id.* at 216, 218–19.

California's interests, organized crime prevention, against federal and tribal interests, namely, sovereignty and the "'overriding goal' of encouraging tribal self-sufficiency and economic development."[60] In contextualizing the tribes' economic position, the Court observed that the tribes' reservation had no natural resources to capitalize on, and consequently, gaming operations were the tribes' sole revenue stream to fund the tribal government and its provision of services.[61]

Unsurprisingly, the Court held that the state's interests were insufficient to overcome the federal and tribal interests, meaning *Cabazon* effectively signaled to 280 states that they could not regulate gaming on reservations.[62] In rendering this decision, Justice White appeared keenly aware of the submissive position that the federal government had relegated itself and the states into regarding their ability to regulate tribal gaming: "Self-determination and economic development are not within reach if the Tribes cannot raise revenue and provide employment for their members."[63]

B. IGRA: The Codification of *Cabazon*

Cabazon's holding ignited the legislative ambition to codify it.[64] The next year, Congress passed the Indian Gaming Regulatory Act (IGRA).[65] Through its enactment, Congress aspired to "promote tribal economic development, tribal self-sufficiency, and strong tribal government" by providing a statutory basis for operating licensed gaming activities on Indian land.[66] To effectuate those aims, the IGRA provides tribes with the exclusive regulatory authority over its own gaming

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[60] *See id.* at 216–17, 220.
[61] *Id.* at 218–19.
[62] *See id.* at 207–10 (noting that state laws may apply on reservations only where Congress has "expressly so provided" and that the test for determining whether a state's law will apply depends on whether the conduct is considered prohibitory, which allows for state law application, as opposed to regulatory, which does not).
[63] *Id.* at 219.
[64] Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 976 (2007); Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 163 (2010).
[65] Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21; *see id.* § 2703(4) (defining "Indian lands" as all land within an Indian reservation's boundaries and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.").
[66] *Id.* § 2701(1)–(4); § 2702(1).

operations where such gaming is not federally prohibited and where the State does not criminalize or prohibit such activity.[67]

Operationally, the IGRA regulates three classes of gaming: Class I, Class II, and Class III.[68] Class I gaming consists of social games with low-value prizes or Indian gaming played pursuant to tribal ceremonies or celebrations;[69] Class II gaming includes chance games, such as bingo, as well as card games that are expressly authorized by the State;[70] and Class III gaming is defined as any games not belonging to Class I or Class II.[71]

Classes I and II are generally under tribal jurisdiction.[72] Although Class II has more procedural hurdles than Class I, Classes I and II are generally free of material state and federal oversight.[73] Class III, however, is somewhat indirectly subject to state oversight through IGRA's mandatory process of tribal-state compacting.[74]

Congress allegedly mandated this tribal-state dynamic because Class III gaming consists of stereotypical casino and "hard core" games and thus needed to either be regulated by the states or otherwise federally prohibited.[75] This "collaborative" scheme, however, belies the more probable reason that this process was created: Congressional representatives wanted to provide their states with a means to share in the extensive revenue that Class III gaming operations would generate.[76]

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[67] *Id.* § 2701(5).
[68] *Id.* § 2703(6)–(8).
[69] *Id.* § 2703(6).
[70] *See id.* § 2703(7)(A).
[71] *Id.* § 2703(8).
[72] *See id.* § 2710.
[73] *See* Ducheneaux, *supra* note 65, at 176.
[74] *See id.*
[75] *See id.*
[76] *See id.* at 177–78 ("[S]tates have regularly hijacked gaming revenues by insisting upon revenue sharing that has no relation to its direct costs arising from the compact."); *see also* Esteban Leonardo Santis, *Revenue from New Gaming Compact Could Bolster Florida's Long-Term Recovery*, FLA. POL'Y INST., (May 19, 2021) https://www.floridapolicy.org/posts/revenue-from-new-gaming-compact-could-bolster-floridas-long-term-recovery (noting that the 2021 Florida-Seminole Tribe Compact will guarantee Florida a minimum of 2.5 billion dollars during the five years).

Consequently, Congress predicated a tribe's ability to offer Class III gaming on reaching a tribal-state compact.

i. Compacting

Compacting is the process by which a State and tribe must cooperate to provide Class III gaming.[77] Tribes must request the State in which the tribe's lands are located within to enter a Tribal-State compact ("compact") because without it Class III gaming is illegal on Indian land.[78] Thus, to preempt hostile states from capitalizing on what was essentially a veto power, Congress included a corresponding cause of action allowing tribes to sue states for refusing to negotiate or negotiating in bad faith.[79] In other words, the IGRA essentially imposed a duty of good faith negotiation on states.

This well-intentioned good faith requirement did not last long, unfortunately. Eight years after IGRA's enactment, the Supreme Court eviscerated states' duty of good faith negotiation in *Seminole Tribe v. Florida*.[80] There, the Seminole Tribe sued the State of Florida and its Governor, alleging they had violated the good faith negotiation requirement by refusing to discuss including certain additional gaming operations in their proposed tribal-state compact.[81] To this end, the Seminole Tribe argued that the Court should enforce the good faith negotiation requirement under the Eleventh Amendment, or alternatively, under the doctrine of *Ex parte Young*.[82]

In a decision written by Chief Justice Rehnquist, the Court held that neither authority could be used to enforce the good faith negotiation requirement.[83] Principally, the Court rejected the tribe's

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[77] *See* 25 U.S.C. § 2710(d)(3)(A)
[78] *See id.*; § 2710(d)(1)(C).
[79] *Id.*
[80] 517 U.S. 44 (1996).
[81] *Id.* at 51–52.
[82] *See id.* at 51–54; *see also id.* at 74 (explaining the judicial remedy of *Ex parte Young* may provide relief where a court finds it necessary to lift the Eleventh Amendment bar to prevent a "continuing violation of federal law" through a prospective injunction).
[83] *Id.* at 47.

Eleventh Amendment argument, holding that the Indian Commerce Clause did not authorize Congress to abrogate state sovereign immunity and, consequently, that the Eleventh Amendment similarly precluded Congress from allowing a State to be sued in federal court.[84]

Secondarily, the Court further held that relief under *Ex parte Young* was also unavailable to the tribe.[85] The Court explained that it is improper to apply *Ex parte Young* where Congress has created a comprehensive remedial scheme to hold a State accountable for the violation of a statutorily created right.[86] Accordingly, it reasoned that its application would be inappropriate because § 2710(d)(7) was specifically designed to enforce a State's duty to negotiate in good faith.[87] Despite being granted what is effectively a veto power over compact negotiations, states are still likely to reach an agreement with tribes because the states' enhanced bargaining position allows them to dictate the compact's terms—especially those concerning revenue.

ii. Assessments

On the topic of revenue, one aspect that may nevertheless entice states to negotiate "in good faith" is the IGRA's assessment clause. That provision allows a state to collect an assessment from the tribe "to defray the costs of regulat[ion]."[88] Although the IGRA explicitly prohibits states from classifying or otherwise considering the assessment as a "tax, fee, [or] charge," there is no enforcement mechanism to ensure that.[89]

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[84] *See id.* at 54–73; *see also id.* at 72 (adding insult to injury by alluding to tribes as "private parties" rather than sovereign entities: "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").
[85] *Id.* at 75–76.
[86] *See id.* at 74.
[87] *Id.* at 76; *see also id.* at 50, 57 (outlining remedial scheme for a state's violation of the good faith negotiation requirement by providing United States district courts with jurisdiction to order the State to submit to mediation, among other means).
[88] *See* 25 U.S.C. § 2710(d)(3)(C)(iii).
[89] *See id.* § 2710(d)(4); Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996).

The combination of the *Seminole Tribe* decision and the assessment authorization clause thus all but ensures that states retain the superior bargaining position in compact negotiations for two reasons. First, *Seminole Tribe* stands for the proposition that states effectively possess a veto power over compacting. Second, the IGRA assessment authorization clause similarly benefits states over tribes because, in addition to their veto power, states also possess the statutory authority to extract substantial gaming revenue from the tribes.

Beginning with *Seminole Tribe*, this decision ensured that tribes have no substantive enforcement mechanism to hold states accountable for their duty to negotiate in good faith, besides what is available under the IGRA. Consequently, states now have the upper hand in compact negotiations. For example, states can leverage their impunity by pretextually rejecting the compact so long as it is prepared to submit to IGRA's remedial scheme. Otherwise, and more commonly, states may pragmatically utilize their dominant position to require increased revenue sharing by virtue of their superior bargaining position whereby the tribe has no meaningful recourse through the judicial process to enforce compliance with the good faith negotiation requirement.[90]

Worse yet, the absence of an enforcement mechanism—such as a body designated for oversight and compliance monitoring or mandatory reporting—effectively transforms well-meaning assessments into bribes. This is because there is no upper limit or even a framework for states and tribes to use during the negotiation process, thereby allowing states to capitalize not only on their veto power conferred by *Seminole Tribe*, but also on their enhanced bargaining power vested by the IGRA's assessment authorization clause.

iii. Decision

[90] *See* Ducheneaux, *supra* note 65, at 177–78.

When an agreement is reached, the compact is submitted to the Secretary of the Interior ("Secretary") for review.[91] The Secretary then has three options: (1) reject the compact, (2) approve the compact, or (3) make no decision and have the compact automatically approved after forty-five days.[92] When the Secretary takes no action the compact is thereby approved to the extent that it complies with the IGRA.[93]

C. Strengthening and Clarifying Tribal Sovereignty Under IGRA

Contrasting its approach in *Seminole Tribe*, the Supreme Court switched gears in 2014. In *Michigan v. Bay Mills Indian Community*, the Court fortified tribal sovereignty within the gaming industry.[94] There, the State of Michigan sued to enjoin the Bay Mills Indian Community ("Bay Mills") from operating Class III gaming activities off Indian land after the tribe purchased and began operating a casino located about 125 miles away from its reservation.[95] In an opinion written by Justice Kagan, the Court held that tribal sovereign immunity barred Michigan's suit because § 2710(d)(7)(A)(ii) of the IGRA only permits a state to initiate an injunction action against a tribe for class III *gaming* activity *on* Indian lands.[96] The Court explained that Bay Mills' operation of the off-reservation casino from its reservation was an administrative function and thus did not constitute the sort of gaming activity contemplated by IGRA.[97]

The *Bay Mills* decision clarified two important principles in federal Indian gaming law. First, it determined a tribe's off-reservation casino that is "authorized, licensed, and operated" from

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[91] *See* 25 U.S.C. § 2710(d)(3)(B).
[92] *See id.* § 2710(d)(8)(A)–(C).
[93] *Id.* § 2710(d)(8)(C).
[94] *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 791–93 (2014).
[95] *See id.* at 785–86 (explaining that Bay Mills bought the new property with interest that accrued from a federal appropriation to compensate it for "19th-century takings of its ancestral lands," but adopting the Department of Interior's view that using land trust earnings did not convert the property into Indian land).
[96] *See id.* at 787–88.
[97] *See id.* at 792 (noting "that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority").

within the reservation is outside of IGRA's reach.[98] This means states cannot use the IGRA to enjoin a tribe's gaming activity occurring outside of the reservation's boundaries. Second, and more broadly, the Court emphasized that tribal immunity extends not just to gaming operations on Indian land, but also to commercial activities on reservations in general.[99]

i. State Preemption Under IGRA

In tandem with *Bay Mills*, *White Mountain Apache Tribe v. Bracke* may be read to strengthen tribal sovereignty in the context of IGRA. [100] There, the State of Arizona attempted to impose taxes on the White Mountain Apache Tribe's logging operations, an industry that comprised "over 90% of the Tribe's annual profits" and was heavily federally regulated.[101] After the Court adopted a balancing test under which state, federal, and tribal interests are analyzed to determine whether the application of state authority over a tribe would violate federal law, it found that Arizona's tax assessment on the tribe was impermissible.[102]

In the opinion written by Justice Marshall, the Court first observed that the federal regulatory scheme was sufficiently comprehensive enough to preempt the State's authority, "even though Congress ha[d] offered no explicit statement on the subject."[103] Moreover, the Court found the state's interest in revenue generation was insufficient to overcome the federal and tribal interest in protecting tribal economic self-sufficiency.[104]

Thus, the Court held that a state's authority is impermissible where it fails to justify its imposition when measured against not only federal and tribal interests, but also against the

[98] *See id.* at 791–93.
[99] *See id.* at 798–99.
[100] White Mountain Apache v. Bracker, 448 U.S. 136, 144 (1980).
[101] *Id.* at 138, 145.
[102] *See id.* at 145, 151.
[103] *Id.* at 145–50.
[104] *Id.* at 149–50; *see id.* (weighing the economic and operational burdens that the taxation scheme would have on the tribe and the Secretary of Interior).

comprehensive regulatory scheme already promulgated by the federal government.[105] As applied to tribal gaming, *Bracker* may likewise be utilized to prevent the application of state law over tribal gaming operations when measured against IGRA's comprehensive regulatory scheme.

D. Sports Betting and the Chance to Diminish Tribal Economic Independence (Again)

The legalization and subsequent ascendance of sports betting has further complicated the legal landscape and the three sovereigns' relationship with each other over gaming regulation. When the Supreme Court legalized sports betting in *Murphy v. National Collegiate Athletic Association*[106] by declaring the Professional Sports Protection Act unconstitutional, it opened the door to both states *and* tribes to regulate sports betting in their jurisdictions.[107] Contrasting the IGRA's compacting dynamic, which implicitly sought to foster a collaborative relationship between states and tribes, *Murphy* transformed the compacting process by converting would-be state-partners into potential competitors.

Under IGRA, sports betting is not explicitly included in Class I or II games.[108] Accordingly, it is technically a Class III game and therefore subject to whatever compact terms the tribe and state agree upon.[109] In areas with little to no statutory direction, tribal state compacts thus operate similarly to settlement agreements whereby the contract terms dictate the parties' conduct.

Given that many compacts include tribal market exclusivity,[110] the nationwide legalization of sports betting is reminiscent of United States' land control policies during the early Indian law eras. Tribal exclusivity and agency over a lucrative resource like gaming revenue are once again

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[105] *See id.* at 151–52.
[106] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[107] *See id.* at 1484–85; *see id.* at 1484 ("Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.").
[108] *See* 25 U.S.C. § 2703.
[109] *See id.* § 2703(8) ("The term 'class III gaming' means all forms of gaming that are not class I or class II gaming.").
[110] *See* KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY, 159–60 (2d ed. 2014).

being weakened, except instead of preserving the traditional sovereign hierarchy with the federal government at the top, now tribes would effectively be relegated to the bottom of the pyramid because of their necessary reliance on states to effectuate gaming compacts.

i. Florida's 2021 Compact

Following the *Murphy* ruling, many states rushed to capitalize on the new revenue opportunity. Florida voters, however, mobilized in a different direction and amended the State constitution to make themselves the sole arbiters of expanding casino gambling.[111] The amendment, known as Amendment 3, conditioned that any new "casino gambling" in the State be authorized by citizens' initiative vote.[112] Amendment 3's definition of casino gambling relies on the IGRA's classification of Class III gaming as well as "any of the types of games typically found in casinos."[113]

Notably, the amendment carved out an exception for Indian tribes to continue negotiating compacts with the State pursuant to the IGRA.[114] Thus, on April 23, 2021, Florida Governor Ron DeSantis and Chairman of the Tribal Council of the Seminole Tribe Marcellus W. Osceola, Jr. signed a compact ("Compact").[115] The Compact granted the Seminole Tribe the exclusive right to provide sports betting throughout Florida for the foreseeable future.[116]

More significantly than the tribe's exclusivity, however, is the Compact's deeming clause.[117] The deeming clause considers mobile bets placed outside of Indian lands to be received at the servers' location: "such wagers made using a mobile device or online shall be deemed to take place

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[111] Adam Liptak, *Supreme Court Allows Mobile Sports Bets at Florida Indian Casinos*, NYTIMES (Oct. 25, 2023) https://www.nytimes.com/2023/10/25/us/politics/supreme-court-florida-gambling.html?searchResultPosition=1; F.L. CONST. art. X, § 30.
[112] F.L. CONST. art. X, § 30; *see also* art. XI, § 3 (requiring citizens' initiative petition to be approved by sixty percent of voters).
[113] *Id.* art. X, § 30(b).
[114] *Id.* art. X, § 30(c).
[115] Compact, Part XIX.
[116] *Id.* Part XII.
[117] *Id.* Part XVIII(A).

exclusively where received at the location of the servers or other devices used to conduct such wagering activity at a Facility on Indian Lands."[118] This means that anyone in the State of Florida can legally place a mobile sports bet from anywhere in the state on the Seminole Tribe's sports betting platform and it will nevertheless be viewed as if it occurred on Seminole lands.

Unsurprisingly, the Compact's approval process did not take a straightforward route. Instead of outright approval or rejection, the Secretary took no action for forty-five days, meaning that the Compact was automatically approved to the extent it was consistent with the IGRA.[119] Accordingly, the Compact was effectuated as soon as it was published on the Federal Register.[120]

In response, brick-and-mortar casinos promptly filed suit in the Federal District Court in Washington and at the Supreme Court of Florida.[121] In their suit against Secretary Haaland, the casinos took issue with the deeming clause, arguing that it exceeded the scope of IGRA and violated the Unlawful Internet Gambling Enforcement Act as well as Fifth Amendment equal protection.[122] They claimed their injury stemmed from the compact's allocation of a race-based sports betting monopoly to the Seminole Tribe.[123]

The District Court set aside the Secretary of the Interior's compact approval on November 22, 2021. Two days later, it correspondingly denied the Seminole Tribe's motion to stay the compact's

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[118] *Id.*
[119] Letter from Bryan Newland, Principal Deputy Assistant Secretary, Indian Affairs, to Marcellus Osceola, Jr., Chairman of the Tribal Council, Seminole Tribe of Florida, Response to Compact, dated Aug. 6, 2021; 25 U.S.C. § 2701(d)(8).
[120] 25 U.S.C. § 2701(d)(3)(B).
[121] *See* Complaint, at 1, West Flagler Assocs., Ltd. v. Haaland, No. 1:21-cv-02192, 2021 WL 3666502 (D.D.C. Aug. 16, 2021); Petition for Writ of Quo Warranto, at 1, West Flagler Assocs., Ltd. v. DeSantis, SC2023-1333 (Fla. Sept. 26, 2023).
[122] Complaint, at 1–2, West Flagler Assocs., Ltd. v. Haaland, No. 1:21-cv-02192, 2021 WL 3666502 (D.D.C. Aug. 16, 2021).
[123] *See id.* at 2, 4, 12, 19, 41.

rejection pending appeal.[124] The Appeals Court vacated the District Court's judgment and directed it to enter a judgment for the Secretary.[125]

Petitioners appealed to the Supreme Court on an application for stay. The Court denied the application and had little to say about its reasoning. Justice Kavanaugh, however, included a statement noting that the Florida enabling statute allowing the Seminole Tribe to operate gaming outside of its reservation based on the deeming clause "raises serious equal protection issues," citing both *Students for Fair Admissions* and *Adarand Constructors, Inc.*[126]

The casinos similarly alleged that Governor DeSantis exceeded his authority by entering the Compact and, again, for giving the Seminole Tribe a monopoly over mobile sports betting throughout the state.[127] Their argument in the Florida Supreme Court was premised on the allegation that the Compact was a way to circumvent Amendment 3's requirement that Florida voters alone can authorize the expansion of casino gambling.[128] Rather than deciding the case on the merits, however, the Florida Supreme Court denied West Flager's petition for *quo warranto*, because that writ was inappropriate to provide West Flagler with the relief they truly wanted—a declaration that the Compact's enabling statute is unconstitutional.[129] Thus, the current dynamic is here to stay, at least for now.

III. The Double-Edged Sword of Tribal Sovereignty in Gaming

[124] West Flagler Assocs. v. Haaland, No. 21-cv-2192, 2021 WL 9031913, at *1 (D.D.C. Nov. 24, 2021).
[125] West Flagler Assocs. v. Haaland, 71 F.4th 1059, 1072 (D.C. Cir. 2023).
[126] Statement of Kavanaugh, J. on Application for Stay, at 1–2, West Flagler Assocs., Ltd. v. Haaland, 601 U.S. __ (2023); *see* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2173–174 (2023) (declaring admissions programs that consider race in application process a violation of the Equal Protection Clause); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (instituting strict scrutiny standard to analyze propriety of government's use of racial classifications).
[127] Petition for Writ of Quo Warranto, at 1–2, West Flagler Assocs., Ltd. v. DeSantis, SC2023-1333 (Fla. Sept. 26, 2023).
[128] *Id.* at 3–4.
[129] West Flagler Assocs., Ltd. v. DeSantis, No. SC2023-1333, 2024 WL 1201592, at *1, *3 (Fla. Mar. 21, 2024).

Using Florida as a case study in state-tribal relationships, this section illustrates that tribal sovereignty is currently operating as a double-edged sword in Florida's gaming industry. On one hand, Florida is leveraging tribal sovereignty as a shield to circumvent compliance with the law, and as a sword to extract significant amounts of revenue from the Seminole Tribe's gaming operations. On the other hand, the Seminole Tribe is generating substantial income and employment opportunities for its members, ultimately fulfilling one of the principle aims of Federal Indian Law—self-sufficiency.[130]

Historically, Florida and the Seminole Tribe have shared a litigious relationship over gaming.[131] But recently, as evidenced by *West Flagler Associates*, it appears that Florida has taken a more benevolent if not paternalistic view of the tribes. This newfound collaborative dynamic may be due in part to Amendment 3's constraint on Florida's ability to expand non-Indian gaming operations without voter approval. As such, in the post-*Murphy* gaming landscape where states are racing to the sports betting market, Florida likely realized its hands were tied.

Consequently, sports betting became "the tie that binds." For both Florida and the Seminole Tribe, the Compact thus represented not only economic *potential*, but more importantly, functional *necessity*: without the Seminole Tribe, Florida had no way into the sports betting market—and without Florida, neither did the Seminole Tribe.

A. Florida's Shield & Sword

By compacting with the Seminole Tribe, Florida has creatively, legally circumvented its State constitutional requirement that mandates any gaming expansion to be authorized by voters first.

[130] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 204, 205, 216–17, 220 (1987); Bracker v. White Mountain Apache, 448 U.S. 136, 143 (1980).
[131] *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

Equally as significantly is the State's considerable revenue sharing provision. In effect, Florida is using tribal sovereignty as both a shield and a sword.

i. Shield

Beginning with the shield, *West Flagler* is illustrative: Amendment 3 contains a single exception allowing for continued compacting over gaming operations, an exception not afforded in any other circumstance to any other party. In other words, expanding gaming operations in Florida was all but a guaranteed failure but for tribal-state compacts.

Thus, by capitalizing on Amendment 3, Florida can have its cake and eat it too. First, it can allow for expanded gaming operations throughout the entire state while still operating within the bounds of the law. Second, it can easily point to the fact that Amendment 3 originated with Florida voters themselves. Just as Congress is entitled to judicial deference in its statutory construction, presumably so are the Floridians who mobilized over five million voters to pass a state constitutional amendment.[132]

Florida also has advantages in caselaw. For example, *Seminole Tribe* functions as a shield for Florida to not only evade negotiating in good faith, but also to potentially give itself a monopoly over Class III gaming if Amendment 3 is ever repealed.[133] This is because *Seminole Tribe* essentially eviscerated the means for state accountability that could have been effectuated through the judicial process. As a general result, there is no cause of action or enforcement mechanism that would preclude a state from rejecting a compact and instead giving itself market share exclusivity. In Florida's case, it is unlikely that the Compact would have been reached in the first place had

[132] Florida Amendment 3, Voter Approval of Casino Gambling Initiative (2018), Ballotpedia, (last visited Mar. 31, 2024) https://ballotpedia.org/Florida_Amendment_3,_Voter_Approval_of_Casino_Gambling_Initiative_(2018).
[133] *See* RAND, *supra* note 111, at 980.

Amendment 3 not been passed, simply because Florida would have no incentive to allow the Seminole Tribe's to expand its gaming operations.

ii. Sword

Simultaneously, Florida may implicitly be using tribal sovereignty as a sword to prevent the expansion of private, non-Indian gambling operations that provide sports betting options while also extracting more revenue from compacts than would otherwise be available through regular taxation of non-Indian casinos. Negotiating with the Seminole Tribe rather than going through a referendum or simply authorizing the expansion of private gaming gets Florida to the same place—with lots of additional revenue—while also enabling it to politically profit from the optics of doing business with a federally recognized tribe. Given that Florida and the Seminole Tribe already have a specialized relationship that was cultivated through the compacting process, in the future Florida may simply prefer to change the terms of the existing Compact rather than endure the regulatory hurdles associated with establishing or expanding a private casino operation through compliance with Amendment 3.

To reiterate, the Amendment vests voters with the "exclusive right to decide whether to authorize casino gambling" in Florida.[134] It provides one narrow exception, however, for continued compacting with tribes, either for newly planned gaming operations or expanded existing operations.[135] Governor DeSantis and his team of creative lawyers evidently capitalized on this seemingly small exception in the current Compact.

Facially, Amendment 3 broadly protects the compacting process. Its scope is broad, it does not have to be approved by voters, and once established, it governs the state and tribal regulatory relationship. In effect, Amendment 3 protects exactly the kind of deal that Florida orchestrated. As

[134] F.L. CONST. art. X, § 30(c).
[135] *Id.*

such, the Seminole Tribe was granted exclusivity over sports betting in exchange for an agreement to pay at least 2.5 billion dollars during the first five years in operation.[136] This kind of *quid pro quo* exchange cannot be replicated with a non-tribal gaming operation because it would effectively be cast as a bribe. Compared to the flat rates applied to commercial gaming facilities, Florida's compact with the Seminole tribe that utilizes the greater of a percentage or a flat number therefore has a much greater potential to divert excessive funds from the tribe than a commercial gaming facility's flat tax and annual fee.[137]

B. The Seminole Tribe's Gamble

To put Florida's cut into perspective, the Seminole Tribe is predicted to generate at least 650 million dollars in 2024 because of the Compact.[138]As previously mentioned, this income stream will allow the tribe to achieve a core principle of Federal Indian Law and likewise provide critical funding for the operation of its tribal government.

Moreover, the Compact's conveyance of sports betting market exclusivity gives the Seminole Tribe a first-mover advantage, whereby it can increase its long-term profitability and even potentially retain its market share when the exclusivity provision expires.[139] Caselaw also operates to the advantage of preserving the Compact's viability, meaning that the Seminole Tribe can defend its market share exclusivity until the Compact expires in 2051.[140]

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[136] Compact, Part XI(C).
[137] Florida Gaming Regulations and Statutory Requirements, American Gaming Association (last visited Mar. 31, 2024) https://www.americangaming.org/wp-content/uploads/2019/07/AGAGamingRegulatoryFactSheet_Florida-2022.pdf.
[138] Dara Kam, *The Seminole Tribe is Resuming Gambling Payments to Florida*, WUSF NPR (Dec. 8, 2023) https://www.wusf.org/economy-business/2023-12-08/seminole-tribe-resuming-gambling-payments-florida.
[139] *C.f.* Fernando F. Suarez and Gianvito Lanzolla, *The Half-Truth of First-Mover Advantage*, HARV. BUS. REV. MAG. (Apr. 2005) https://hbr.org/2005/04/the-half-truth-of-first-mover-advantage#:~:text=A%20first%2Dmover%20advantage%20can,in%20a%20new%20product%20category.
[140] Compact, Part XVI(B).

That said, the tribe does not possess much in the way of a sword due to its inherently inferior bargaining position. In contrast to the State, the Seminole Tribe occupies a much more precarious position and similarly has much more to lose. Thus, while the Seminole Tribe can use its sovereignty as established and affirmed through multitudinous caselaw, its Compact with Florida nevertheless remains somewhat of a gamble.

i. Shield

Unsurprisingly, the Seminole Tribe's shield rests squarely with caselaw that strengthens tribal sovereignty. Accordingly, the tribe can leverage both *Bay Mills* and *Bracker* to preserve the Compact and defend its current market exclusivity from private casinos that also want a cut.

Starting with *Bay Mills*, the Seminole Tribe can use its holding to deflect suits alleging unlawful approval of tribal gaming extending beyond the reservation's boundaries. In fact, *Bay Mills'* facts resembles the current sports betting dynamic in Florida. Just as the Bay Mills Indian Community was operating off-reservation casino gaming from the reservation itself, the Seminole Tribe is also operating off-reservation gaming in the form of mobile sports betting from its reservation. The only distinction between these two cases is the difference in technology. This difference, however, may also work in the Seminole Tribe's favor. While Bay Mills was operating a physical casino, the Seminole Tribe in Florida is merely processing bets through its on-reservation servers—a seemingly far less involved process than what is required to run a fully-fledged casino.

Similarly, the Seminole Tribe may also invoke *Bracker* to demonstrate that IGRA provides a comprehensive regulatory scheme that not only preempts Florida from imposing state law on the tribe's gaming operations, but also preserves the Compact's exclusive sports betting arrangement. Like the logging operations in *Bracker*, both the federal government and the Seminole Tribe have

vested interests in preserving the Seminole Tribe's ability to generate revenue through its gaming operations in Florida. Thus, the Seminole Tribe need only point to the IGRA to shield itself from private parties looking to undermine the Compact's terms.

ii. Gambling with Florida's Compliance

Despite the Compact's obvious and voluminous benefits for the Seminole Tribe, its operation is nevertheless predicated not only on being considered legally sound, but also on Florida's promise to abide by the Compact's terms. In addition to the federal government's lengthy and well-documented history of reneging on its treaties with the tribes, Florida has also previously demonstrated that it will not always abide by a compact's terms.

In 2010, Florida and the Seminole Tribe entered a compact ("2010 Compact").[141] The 2010 Compact, like the 2021 Compact, gave the Tribe exclusivity in offering certain card games.[142] Just one year after the Compact was effectuated, Florida began allowing parimutuel operators to offer the very same games it had promised the Tribe would have exclusivity over.[143] Although the United States District Court for the Northern District of Florida found that Florida's conduct entitled the Seminole Tribe to relief, the harm was already done.[144] A court's finding of liability cannot turn back time and allow a tribe to regain the market share that was lost. And even where damages are awarded, that too is finite relief compared to a consistent income stream.

Exclusivity in a compact is critical for tribes because while the IGRA does not permit states to levy taxes for their regulatory oversight, states nevertheless contract for revenue sharing provisions which essentially operate the same way. To offset the state's (often very large) cut, it is vital for a tribe to negotiate partial or full market exclusivity. Though this position of exclusivity may initially

[141] Seminole Tribe v. Florida, 219 F. Supp. 3d 1177, 1182 (N.D. Fla. 2016).
[142] *See id.* at 1182–186.
[143] *See id.* at 1186, 1188.
[144] *See id.* at 1194–195.

be viewed as a sword, a tribe's inherently inferior bargaining position unfortunately belies that perception and ultimately leaves tribes at the mercy of the state.

IV. Conclusion

In 2022, the Indian gaming industry generated 40.9. billion dollars in gross gaming revenue—the highest ever in the industry's history.[145] Although tribal sovereignty has long complicated the relationship between states and tribes, it is evident that tribal gaming offers a collaborative opportunity for mutual profit and political goodwill.

Tribes that come to the compacting table will likely continue being dealt the inferior hand. The Seminole Tribe's compact with Florida, however, demonstrates that tribes nevertheless retain a few aces up their sleeves to leverage their unique position to capitalize on this new market. Tribes lured into the market by the promise of attaining tribal self-sufficiency, and more importantly, economic independence, may bristle at the powerful position that states wield. But like the saying goes: no risk, no reward.

[145] National Indian Gaming Commission, FY 2022 Gross Gaming Revenue Report, at 5 (July 19, 2023) https://www.nigc.gov/images/uploads/GGRFY22_071923_Final.pdf.