NATIVE AMERICANS – SOVEREIGN IMMUNITY: DETERMINING WHETHER THE INDIAN GAMING REGULATORY ACT ABROGATES TRIBAL SOVEREIGN IMMUNITY FOR LAWSUITS ARISING OUTSIDE OF INDIAN COUNTRY

Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014)

ABSTRACT

In *Michigan v. Bay Mills Indian Community*, the United States Supreme Court held that the Indian Gaming Regulatory Act ("IGRA") did not implicitly or explicitly abrogate the common law doctrine of tribal sovereign immunity so as to allow a state to file a federal suit against an Indian tribe for illegal gambling activity taking place outside of Indian country. The Court reasoned that neither the text nor the legislative history of IGRA indicated a desire on the part of Congress to abrogate tribal immunity to allow for such suits; the fact that IGRA specifically addresses activities occurring *inside* of Indian country was dispositive to the Court that Congress chose to leave traditional state-law remedies in place when illegal gaming activity occurs *outside* of Indian country. The Court was also unwilling to overrule its previous decision of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, which expanded the doctrine of tribal sovereign immunity to cover suits arising from contracting disputes with non-Indian businesses off-reservation. The Court's holding in *Bay Mills* clarifies the doctrine of tribal sovereign immunity within the controversial context of Indian gaming. However, this will not result in any expansion of Indian gaming beyond Indian country. On the contrary, the Court's decision makes clear that states will continue to have a number of remedies available to them to prevent Indian gaming off-reservation, just not the sort of federal suit at issue in this case.

I. FACTS

The Bay Mills Indian Community ("Bay Mills") is a federally recognized Indian tribe located in Northern Michigan.[1] In 1993, it entered into a gaming compact with the State of Michigan ("Michigan") to open up a Class III gaming facility on its reservation,[2] which would include casino-style gambling, such as electronic gaming terminals and table games.[3] A provision of the compact expressly stated that neither Michigan nor Bay Mills had waived their sovereign immunity from suit,[4] as the

1. Brief for Respondent at 9, Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) (No. 12-515) ("The Bay Mills Indian Community has lived in what is now the State of Michigan for centuries. Continuously acknowledged since the earliest European contacts with the area, Bay Mills has been federally recognized in its current form since 1936. The tribe has approximately 2,000 registered members, the majority of whom reside on or near the Bay Mills Reservation in Michigan's Upper Peninsula.").
2. *Id*. at 11-13.
3. *Id*. at 12.
4. *Id*.

compact set out its own dispute resolution procedures to govern any disagreements.[5] Pursuant to the compact, Bay Mills drafted its own gaming ordinance, which the National Indian Gaming Commission ("NIGC") subsequently approved.[6] The Bay Mills Gaming Commission ("Gaming Commission") was established thereafter to administer the Tribe's gaming ordinance according to the terms of the compact.[7]

In 2010, Bay Mills purchased property in the town of Vanderbilt, Michigan with proceeds it had earned from a land settlement with the federal government.[8] Bay Mills sought to open another Class III gaming facility on the Vanderbilt property ("the Vanderbilt Casino"). The Gaming Commission issued a license to authorize the opening of the Vanderbilt Casino. Michigan subsequently sued Bay Mills in federal district court under IGRA,[9] seeking a preliminary injunction against the opening of the Vanderbilt Casino.[10] It claimed that the opening of the Vanderbilt Casino violated the terms of the Tribal-State gaming compact and thus constituted illegal gambling activity under IGRA.[11] In its defense, Bay Mills cited the language of the MILCSA[12] and claimed that since the Vanderbilt property had been purchased with monies from its Land Trust, it ought to be considered "Indian lands" per the language of IGRA.[13] However, the Department of the Interior issued a memorandum declaring that the

5. *Id*.

6. *Id*.

7. *Id*.

8. *Id*. Bay Mills was part of the Michigan Land Claims Settlement Act of 1997 ("MLCSA"), 111 Stat. 2652, which consolidated the land claims of several federally recognized tribes including the Sault St. Marie Chippewa Tribe and the Little Traverse Bay Tribe. 111 Stat. 2658. The MLCSA provided that a certain percentage of Bay Mills' settlement was to be paid into a "Land Trust," the proceeds of which would be used to purchase and improve property for the Tribe. *Id*. The text of the MLCSA stated that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id*. Bay Mills purchased the Vanderbilt property with interest generated from the Land Trust. Brief for Respondent, *supra* note 1, at 12.

9. Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2029 (2014). Michigan sued Bay Mills pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii), which reads in relevant part: "The United States district courts shall have jurisdiction over—(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into . . . that is in effect . . . ." 25 U.S.C. § 2710(d)(7)(A)(ii) (2006).

10. *Bay Mills*, 134 S.Ct. at 2029.

11. Brief for Petitioner at 13, *Bay Mills*, 134 S.Ct. 2024 (2014) (No. 12-515) ("On December 16, 2010, Michigan's Attorney General sent a letter to Bay Mills ordering it to immediately close the Vanderbilt casino because it violated state and federal gaming laws. Bay Mills refused, so the State filed this lawsuit seeking to enjoin any further operation of the casino.").

12. *See* discussion *supra* note 8.

13. Brief for Respondent, *supra* note 1, at 12-13.

Vanderbilt property could not be considered Indian country.[14] As a result, the district court granted Michigan's motion for a preliminary injunction.[15] On appeal, the Sixth Circuit reversed and ordered the injunction be dissolved, holding that the doctrine of tribal sovereign immunity barred Michigan's suit.[16] Michigan appealed, and the Supreme Court granted certiorari to determine whether the IGRA abrogated tribal sovereign immunity to the extent that Michigan was alleging.

II. LEGAL BACKGROUND

Within the framework of American constitutional law, Native American tribes occupy a unique position.[17] They are considered to be "domestic dependent nations,"[18] political units that retain their inherent sovereignty but are nonetheless subject to certain limitations on the exercise of such sovereignty. The exact boundaries of tribal sovereignty have expanded and contracted throughout history as a result of complex, overlapping factors, including treaties, federal legislation, executive orders, and judicial interpretations thereof.[19] It is foundational principle of federal Indian law that Native American tribes are subject to the plenary power of Congress.[20] This essentially means that Congress has the final word as to the scope of tribal sovereignty and the powers that Tribes are able to exercise.[21] One exception to this general rule is the doctrine of tribal sovereign immunity. Tribal sovereign immunity is part of federal common

14. Briefs for Petitioner and Respondent, joint app. at 83, Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2029 (2014) (No. 12-515) ("Even if the Tribe had used its Land Trust earnings to purchase land in an area that could be said to consolidate and enhance tribal landholdings, I do not believe that the MILCSA would operate as a matter of law to transform that land purchase into *Indian lands* under IGRA.") (emphasis in original).

15. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 410 (6th Cir. 2012) ("The district court entered a preliminary injunction ordering Bay Mills to stop gaming (a euphemism often unavoidable for our purposes here) at the Vanderbilt casino.").

16. *Id*. at 416-17.

17. Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) ("The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence.").

18. *Id*. at 17.

19. *See generally* 41 AM. JUR. 2D *Indians* § 7 (2014).

20. United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'").

21. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes . . . incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.") (citation omitted).

law; it was not created by any statute or act of Congress.[22] Rather, the Supreme Court first identified it, and its exact boundaries have been further defined through a substantial body of federal case law.[23]

A. THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

The Supreme Court first acknowledged tribal sovereign immunity in *Turner v. United States*,[24] in which a non-Indian lessee was barred from suing an Indian tribe for alleged damage done to his property.[25] The Court stated that it is the "general law" that "[l]ike other governments, municipal as well as state, [tribes are] free from liability for injuries to persons or property . . . ."[26] In *United States v. United States Fidelity & Guaranty Co.*,[27] the Supreme Court reiterated that Indian tribes are immune from suit when it voided a monetary judgment from a previous proceeding against the Choctaw and Chickasaw Nations.[28] It stated that tribes do not waive their

22. *See* Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 THE ADVOC. 19, 19 (2007).

23. *Id*.

24. 28 U.S. 354 (1919).

25. *Id*. at 357. The dispute in *Turner* concerned the efforts of a non-Indian rancher (Turner) to secure grazing land from members of the Creek Nation (now more commonly known as the Muscogee Nation). *Id*. at 355. Turner leased approximately 256,000 acres from approximately one hundred Creek Indians. *Id*. at 355-56. Turner secured, by judicial order, the right to build a fence around the leased land and undertook construction of such a fence. *Id*. However, a mob of Creek Indians destroyed the fence, causing damage to the tune of $10,000. *Id*. Turner sued the Creek Nation and the federal government in its trustee capacity. *Id*. at 357. In an opinion authored by Justice Brandeis, the Court held that "[w]ithout authorization from Congress, the [Creek] Nation could not then have been sued in any court; at least without its consent." *Id*. at 358.

26. *Id*. at 357-58.

27. 309 U.S. 506 (1940).

28. *Id*. at 513. *United States Fidelity* involved a complex dispute over coal leasing royalties. The federal government leased land held in trust for the Choctaw and Chickasaw Nations ("the Tribes") to a coal mining company, with a bond in place securing royalty payments for the Tribes. *Id*. at 510. The United States Fidelity & Guaranty Co. ("US Fidelity") served as a surety to the royalty bond. *Id*. The coal lease would be assigned several times, with US Fidelity remaining as the surety on record. *Id*. Ultimately, the lease was assigned to the Central Coal & Coke Company ("Central Coal"), which eventually went into receivership. *Id*. As part of Central Coal's bankruptcy proceedings, the United States filed a claim on behalf of the Tribes for unpaid royalties. *Id*. In a separate action, the United States filed a claim against US Fidelity for the same royalties at issue in the Central Coal dispute. *Id*. Central Coal cross-claimed for credits apparently owed to it by the Tribe. *Id*. The federal district court administering the bankruptcy awarded a judgment against the Tribes in favor of Central Coal. *Id*. This judgment occurred while the dispute against US Fidelity was still ongoing. *Id*. In light of the judgment against the Tribes, US Fidelity claimed that the United States was estopped from asserting its claims under the doctrine of *res judicata*. *Id*. at 511. The Supreme Court held that Central Coal's cross-claim should have been barred by the Tribes' immunity from suit; thus, the monetary judgment against the Tribes was void and the United States' suit against US Fidelity was allowed to proceed. *Id*. at 512.

sovereign immunity when they fail to object to cross-claims in litigation.[29] In *Puyallup Tribe, Inc. v. Department of Game of State of Washington*,[30] the Court held that a state could not sue a tribe to enforce its fishing regulations in Indian country "[a]bsent an effective waiver or consent" from either the Tribe or the United States.[31] However, the Court refused to extend this immunity to individual officials or representatives of the Tribe.[32]

In *Santa Clara Pueblo v. Martinez*,[33] the Court expanded *Puyallup*'s holding by stating that any waiver of tribal immunity "'must be unequivocally expressed.'"[34] In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,[35] the Court rejected a contention that was nearly identical to the one it had addressed in *United States Fidelity* over a half-century prior, further solidifying the status of tribal immunity as black letter law.[36] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[37] the Supreme Court, for the first time, declared that Native American tribes were immune from suit for activities engaged in outside of Indian country. Specifically, the Court declared: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a

29. *Id*. at 512-13 ("These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.").

30. 433 U.S. 165 (1977).

31. *Id*. at 172.

32. *Id*. at 173 ("[T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction.").

33. 436 U.S. 49 (1978). *Santa Clara Pueblo* concerned the applicability of the Indian Civil Rights Act (ICRA). Even though ICRA was meant to provide substantive individual rights to Indians within Indian country (where the Constitution is largely inapplicable), the Supreme Court nonetheless held that tribes were immune from suit under the ICRA, even when sued by their own members. *Id*. at 58.

34. *Id*. (*quoting* United States v. Testan, 424 U.S. 392, 399 (1976)).

35. 498 U.S. 505 (1991).

36. *Id*. at 509. *Potawatomi* concerned the untaxed sale of cigarettes in Indian country to non-Indians and non-member Indians. The Potawatomi Tribe sold cigarettes without state tax stamps not only to members of the Tribe (which was perfectly legal), but also to non-Indians. *Id*. at 507. Oklahoma claimed it had the right to tax any sales made to non-Indians, including those that took place on the Potawatomi's reservation. *Id*. The Tribe sued Oklahoma for injunctive relief, and Oklahoma cross-claimed for the alleged outstanding cigarette taxes. *Id*. at 507-08. The Supreme Court granted certiorari in *Potawatomi* because the *United States Fidelity* decision was issued prior to the creation of the Federal Rules of Civil Procedure. *Id*. at 509-10. However, the Court held that even though counter-claims are "mandatory" under Rule 13(a), Oklahoma's claim against the Tribe was nonetheless barred. *Id*. at 510.

37. 523 U.S. 751 (1998).

reservation."[38] The Court did express some hesitation in reaching this decision, stating that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine [of tribal immunity]."[39] "[T]ribal immunity extends beyond what is needed to safeguard tribal self-governance," the Court stated, and this "consideration[] might suggest a need to abrogate tribal immunity . . . ."[40] However, because Congress had not specifically abrogated tribal immunity in the context of the case, the Court "decline[d] to revisit [its] case law and [chose] to defer to Congress."[41]

B. THE INDIAN GAMING REGULATORY ACT

Congress developed IGRA to remedy a regulatory gap in Indian country.[42] The Supreme Court has often been the forum by which these regulatory gaps in Indian country have been identified. Take, for example, the seminal federal Indian law case of *Ex Parte Crow Dog*.[43] In 1883, the Supreme Court declared that the federal government had no criminal jurisdiction over crimes that occurred between Indians in Indian country.[44] Two years later, Congress passed the Major Crimes Act,[45] which empowered the federal government to assert exactly the sort of criminal jurisdiction in Indian country that *Ex Parte Crow Dog* denied.[46] Similarly, in the landmark case of *Worcester v. Georgia*,[47] the Supreme Court held that the states could not have criminal or regulatory authority inside Indian country.[48] That is, until Congress passed Public Law 280 in 1953, which automatically granted six states unlimited criminal jurisdiction inside Indian

38. *Id*. at 760.

39. *Id.* at 758.

40. *Id*.

41. *Id*. at 760.

42. 25 U.S.C. § 2701(3) (1988) ("The Congress finds that . . . existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands . . . .").

43. 109 U.S. 556 (1883).

44. *Id*. at 572 ("the first district court of Dakota was without jurisdiction to find or try the indictment against the prisoner; that the conviction and sentence are void, and that his imprisonment is illegal.").

45. 18 U.S.C. § 1153 (1885).

46. The Major Crimes Act, in its original form, granted the federal government jurisdiction over "seven major crimes" if they were committed by an Indian, against another Indian, and the locus of the crime was within Indian country. These crimes were murder, manslaughter, burglary, rape, larceny, arson, and assault with intent to commit murder. Since 1885, the Major Crimes Act has been amended a number of times to add new crimes over which the federal government will have jurisdiction, including incest, kidnapping, and sexual assault of a minor. *Id*.

47. 31 U.S. 515 (1832).

48. *Id*. at 520 ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .").

country and gave remaining states the option to assume criminal jurisdiction in Indian country if they so wished.[49]

In 1987, the Supreme Court decided the case of *California v. Cabazon Band of Mission Indians*,[50] which concerned both the lawfulness of gambling within Indian country and Public Law 280. The Cabazon Band owned a bingo hall and a card club on its reservation in Northern California.[51] Non-Indians from surrounding communities were the primary customers of the bingo hall and card club.[52] California was (and continues to be) a Public Law 280 state, and California attempted to enforce its gaming regulations over the Band's bingo hall under color of its criminal jurisdiction, which would have forced the hall to become a charitable, non-profit operation.[53] Riverside County also attempted to enforce its gaming regulations on the Band's reservation, which would have resulted in the closure of the card club.[54] The Band sued both California and Riverside County in federal district court, claiming that neither entity had any authority to enforce their gaming laws inside Indian country.[55] The district court granted the Band's motion for summary judgment, and the Ninth Circuit Court of Appeals affirmed.[56]

At the Supreme Court, California argued that Public Law 280 abrogated tribal sovereignty to the extent that it was entitled to enforce its gaming regulations over the Band.[57] The Court disagreed. It held that in the absence of any clear authorization from either Congress or the Tribes, states and municipalities could not impose and enforce their own laws in Indian country.[58] Public Law 280, the Court reasoned, was passed by Congress to remedy the problem of lawlessness in Indian country.[59] The gaming regulations at issue were not criminal or prohibitive in nature, but rather were civil and regulatory. Therefore, California had no basis to assert juris diction.[60]

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49. 28 U.S.C. § 1360 (1953). The six mandatory states are Alaska, Nebraska, California, Minnesota, Oregon, and Wisconsin. *Id*.
50. 480 U.S. 202 (1987).
51. *Id*. at 204-05.
52. *Id*. at 205.
53. *Id*.
54. *Id*. at 205-06.
55. *Id*. at 206.
56. *Id*.
57. *Id*. at 207.
58. *Id*. at 221-22.
59. *Id*. at 208.
60. *Id*. at 212.

In response to the *Cabazon* decision, Congress passed IGRA in 1988.[61] IGRA provides a complex and detailed framework for the regulation of gambling and gaming activities within Indian country. It led to the establishment of the National Indian Gaming Committee ("NIGC"), the agency mandated by the IGRA to administer its provisions.[62] The IGRA divided gaming activities into three different classes. "Class I gaming" is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[63] Class I gaming is subject only to the regulatory authority of the Tribe and does not fall within the tenets of the IGRA.[64] "Class II gaming" includes bingo and other games similar to bingo, such as pull-tabs.[65] Class II gaming also includes card games not prohibited by state law.[66] Tribes generally retain exclusive regulatory power over Class II gaming activities, subject to certain qualifications.[67] First, the gaming activity in question must be approved by the NIGC.[68] Second, if a card game is not prohibited by state law, but is nonetheless regulated, the Tribe must conform to the applicable state regulations if it wishes to offer such a card game.[69]

"Class III gaming" includes all other forms of gaming not covered by Class I or II.[70] This includes most forms of casino-style gaming, including: (a) multiplayer table and card games, such as roulette, blackjack, poker, and craps; (b) video lottery terminals and slot machines; and (c) virtual betting or wagering on real-time events, such as sports.[71] Unsurprisingly, Class III gaming is the most heavily regulated under IGRA. In order for a Tribe to

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61. 25 U.S.C. § 2701 (2014).

62. 25 U.S.C. § 2704(a) (2014).

63. 25 U.S.C. § 2703(6) (2014).

64. 25 U.S.C. § 2710(a)(1) (2014).

65. 25 U.S.C. § 2703(7)(A)(i)(I)-(III) (2014).

66. 25 U.S.C. § 2703(7)(A)(ii)(I)-(II). Note that if a particular game is prohibited under state law, a Tribe cannot offer such a game within its territory. Similarly, if a state prohibits gambling altogether, a Tribe is completely barred from offering either Class II or Class III gaming activities. For example, Utah has a blanket prohibition on gambling, so tribes like the Utah Navajo Nation cannot enjoy the benefits of gaming or the protections of the IGRA. *See* Randy Harward, *Navajo Bingo No-Go*, SALT LAKE CITY WEEKLY, April 14, 2010, http://www.cityweekly net/utah/navajo-bingo-no-go/Content?oid=2144973.

67. 25 U.S.C. § 2710(b) (2014).

68. 25 U.S.C. § 2710(b)(1)(B) (2014).

69. 25 U.S.C. § 2710(b)(4)(A) (2014).

70. 25 U.S.C. § 2703(8) (2014).

71. Elizabeth D. Lauzon, Annotation, *Jurisdictional Issues Arising Under the Indian Gaming Regulatory Act* 197 A.L.R. FED. 459 (2004) ("Class III gaming is defined as all forms of gaming that are not Class I gaming or Class II gaming including slot machines, casino games, banking card games, dog racing, and lotteries . . . .").

engage in Class III gaming on its lands, a tribe must satisfy several statutory prerequisites. First, the particular form of gaming sought by the Tribe cannot be prohibited under state law.[72] Second, the Tribe must negotiate a compact with the State, and the Secretary of the Interior must approve this compact.[73] Third, the Tribe must have in place a Tribal gaming ordinance that has been approved by the NIGC.[74]

In 1996, the Supreme Court struck down as unconstitutional a section of IGRA in the case of *Seminole Tribe of Florida v. Florida*.[75] In that case, the Seminole Tribe sued Florida under section 2710(d)(7)(A)(i)[76] of IGRA for failure to negotiate a gaming compact with the Tribe in good faith.[77] Florida claimed that section 2710(d)(7)(A)(i) was unconstitutional because it purported to waive the sovereign immunity of the States without their explicit consent.[78] The Court agreed with Florida, holding that regardless of the fact that the Indian Commerce Clause[79] authorized Congress to pass the IGRA, "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . . ."[80] Therefore, "[t]he Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court."[81] As a result of this decision, very little bargaining power remained with tribes, which negatively affected the tribes' ability to negotiate favorable gaming compacts.[82]

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72. 25 U.S.C. § 2710(d)(1)(A) (2014).

73. 25 U.S.C. § 2710(d)(1)(B) (2014).

74. 25 U.S.C. § 2710(d)(1)(C) (2014).

75. 517 U.S. 44, 47 (1996).

76. This section of the IGRA reads:

> [t]he 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 for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . . .

25 U.S.C. § 2710(d)(7)(A)(i) (2014).

77. *Seminole Tribe of Florida*, 517 U.S. at 52.

78. *Id*.

79. U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

80. *Seminole Tribe of Florida*, 517 U.S. at 47.

81. *Id*. at 76.

82. *See* Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 432 (2009) ("The Court's decision in *Seminole Tribe* left IGRA at the very least crippled, but at the most, completely broken (at least from the tribal prospective). Tribes were left with virtually no negotiating power. After *Seminole Tribe*, it was approximately two years before another class III gaming compact was finalized. States simply refuse to negotiate if they do not want a tribe to conduct class III gaming without sharing revenue or for any other reason.") (explanatory parenthetical appearing in original).

III. ANALYSIS

Justice Kagan delivered the opinion of the majority.[83] It held that IGRA did not abrogate tribal sovereign immunity to allow for federal suits when the locus of the alleged illegal gaming activity is not in Indian country.[84] First, the Court interpreted several provisions of IGRA before ultimately concluding that the plain language of the statute only enables states to sue tribes in federal court when the locus of the illegal "gaming activity" is "on Indian lands," that is, when the actual gambling is taking place within Indian country.[85] The Court refused to rewrite IGRA to create Michigan's desired remedy, particularly in light of the numerous remedies states can exercise over Indian commercial activities on state lands.[86] Next, the Court addressed Michigan's request to overrule *Kiowa*. The Court held that both *stare decisis* and respect for the plenary powers of Congress required it to uphold *Kiowa*.[87] It reasoned that Congress has had numerous opportunities since *Kiowa* to abrogate tribal immunity in the manner that Michigan sought, but refused to disturb the Court's holding in that case.[88]

A. THE MAJORITY OPINION

The Court began its opinion with a recitation of settled law concerning tribal sovereign immunity. It stated that "[a]mong the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit

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83. Justice Kagan was joined by Justices Breyer, Kennedy, Sotomayor, and Chief Justice Roberts. Justice Kagan showed a flair for analogies in her opinion, with a number of droll references to the underlying subject matter of the dispute, at one point stating that one of Michigan's arguments had "come up snake eyes . . . ." Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2032 (2014). On another occasion, Justice Kagan mused that Michigan "need[s] an ace up its sleeve . . . ." *Id.* at 2036.

84. *Id.* at 2039 ("The abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands . . . . Accordingly, Michigan may not sue Bay Mills to enjoin the Vanderbilt casino, but must instead use available alternative means to accomplish that object.").

85. *Id.* at 2032 ("A State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is *outside* Indian lands.") (emphasis in original).

86. *Id.* at 2035 ("[T]he panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under § 2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.").

87. *Id.* at 2027-28 ("Congress has since reflected on *Kiowa* and decided to retain tribal immunity in a case like this. Having held that the issue is up to Congress, the Court cannot reverse itself now simply because some may think Congress's conclusion wrong.").

88. *Id.* at 2038 ("Since [*Kiowa*], Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants.").

traditionally enjoyed by sovereign powers.'"[89] This principle, the Court stated, is modified "only by placing a tribe's immunity, like its other governmental power and attributes, in Congress's hands."[90] Thus, "we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)."[91]

1. Interpreting the Text of IGRA

With this baseline established, the Court then interpreted the text of 25 U.S.C. § 2710(d)(7)(A)(ii), which authorized states to sue tribes for illegal gambling activity taking place "on Indian lands."[92] Because the basis of Michigan's complaint was that the Vanderbilt Casino was operating off of Indian lands, the Court saw no need to interpret the meaning of "on Indian lands."[93] However, Michigan "attempt[ed] to fit [its] suit within § 2710(d)(7)(A)(ii) by relocating the 'class III gaming activity' to which it is objecting."[94] Michigan interpreted "class III gaming activity" to mean the "necessary administrative action" of authorizing and licensing the Vanderbilt Casino, which was done by the Gaming Commission from within Bay Mills' reservation.[95] However, the Court disagreed with this interpretation, holding that "class III gaming activity" could only be "what goes on in a casino—each roll of the dice and spin of the wheel."[96] Therefore, the Court's textual interpretation of IGRA foreclosed Michigan's ability to sustain its federal suit against Bay Mills.

Michigan next argued that it did not make sense for IGRA to provide a remedy for illegal gambling that occurs *inside* Indian country, yet provide none for illegal gambling that occurs *outside* of Indian country.[97] The

89. *Id*. at 2030 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

90. *Id*.

91. *Id*. at 2030-31 (quoting Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)) (brackets and parenthetical contained in original).

92. *See* 25 U.S.C. §2710(d)(7)(A)(ii) (2014).

93. *Bay Mills*, 134 S.Ct. at 2032.

94. *Id*.

95. *Id*.

96. *Id*. The Court also stated that the IGRA would "lose all meaning if . . . 'class III gaming activity' refer[red] equally to the off-site licensing or operation of the games." *Id*.

97. *Id*. at 2033 ("'[W]hy,' Michigan queries, 'would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state's own sovereign jurisdiction?' Reply Brief 1.") (citation contained in original).

Court acknowledged this apparent contradiction,[98] but stated that it was not the job of the courts to rewrite Congress's legislation.[99] At this point, the Court made clear that Michigan "has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory," including its criminal law, the ability to sue individual tribal officials, and discretion to deny licenses.[100] More importantly, the Court advised, "if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity."[101] "States have more than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact . . . and cannot sue to enforce a State's duty to negotiate a compact in good faith . . . ."[102]

2. The Validity of Kiowa

The Court next addressed Michigan's argument against the validity of *Kiowa*. Michigan argued that *Kiowa* overextended tribal sovereign immunity because when tribes engage in gaming activities beyond their borders they "operate in [such] capacity less as governments than as private businesses."[103] However, the Court did not reach the merits of this argument because it refused to overrule *Kiowa* for two reasons. First, nowhere in Michigan's case as a whole did the Court find any "special justification" that could overcome its preferred course of honoring *stare decises*.[104] Michigan only brought forth "retreads of assertions we have rejected before [in *Kiowa*]."[105] Second, the Court interpreted Congress's silence in the aftermath of *Kiowa* as being a virtual affirmation of its holding in that case.[106] It reasoned that "rather than confronting, as we did in *Kiowa,* a legislative vacuum as to the precise issue presented, we act today against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one."[107] All of this reasoning

98. *Id*. ("Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment.").

99. *Id*.

100. *Id*. at 2034-35.

101. *Id*. at 2035.

102. *Id*.

103. *Id*. at 2036.

104. *Id*. (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

105. *Id*. at 2037.

106. *Id*. at 2038 ("Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity.") (explanatory parenthetical appearing in original).

107. *Id*. at 2038-39 (explanatory parenthetical appearing in original).

rested on the Court's assertion that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."[108] Thus, finding no grounds to overrule *Kiowa*, the Court affirmed the decision of the Sixth Circuit.[109]

B. JUSTICE THOMAS'S DISSENT

Justices Scalia,[110] Thomas, joined by Justice Alito, and Ginsburg[111] wrote separately, dissenting from the majority's opinion. Justice Thomas, who authored the principle dissent, took a notably different view on tribal sovereignty than the majority. The dissent states that "[d]espite the Indian tribes' *subjection* to the authority and protection of the United States Government, this Court has deemed them 'domestic dependent nations' that retain limited attributes of their historic sovereignty."[112] However, "this notion cannot support a tribe's claim of immunity in the courts of another sovereign—either a State (as in *Kiowa*) or the United States (as here)."[113] In the dissent's view, the immunity of a Tribe from suit, as an incident of their sovereignty, does not arise as a matter of right, but rather as a matter of comity.[114] "In short, to the extent an Indian tribe may claim immunity in federal or state court, it is because federal or state law provides it, not

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108. *Id.* at 2037.

109. *Id.* at 2039.

110. Justice Scalia adopted the reasoning of Justice Thomas' dissent and wrote only to address his seemingly contradictory role in deciding *Kiowa* eighteen years earlier. *Id.* at 2045 (Scalia, J., dissenting). Justice Scalia wrote:

> In *Kiowa* . . . this Court expanded the judge-invented doctrine of tribal immunity to cover off-reservation commercial activities . . . I concurred in that decision. For the reasons given today in Justice Thomas's dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below.

Id.

111. Justice Ginsburg also adopted the reasoning of Justice Thomas, but wrote separately to comment generally about the doctrine of sovereign immunity. Drawing on *Kiowa* as well as *Seminole Tribe of Florida*, she stated: "[f]or the reasons stated in the dissenting opinion . . . by Justice Thomas, this Court's declaration of [a tribal] immunity thus absolute was and remains exorbitant. But I also believe that the Court has carried beyond the pale the immunity possessed by States of the United States." *Id.* at 2055 (Ginsburg, J., dissenting).

112. *Id.* at 2046 (Thomas, J., dissenting) (emphasis added).

113. *Id.*

114. *Id.* (application of foreign sovereign immunity "is a matter, not of legal right, but of 'grace and comity.'") (citing Republic of Austria v. Altmann, 541 U.S. 677, 711 (2004) (Breyer, J., concurring).

merely because the tribe is sovereign."[115] The majority's ruling in *Bay Mills* "permitting immunity for a tribe's off-reservation acts represents a substantial affront to a different set of sovereigns—the States, whose sovereignty is guaranteed by the Constitution."[116] As such, "granting tribes immunity with respect to their commercial conduct in state territory [does not] serve the practical aim of comity: allaying friction between sovereigns."[117]

The dissent also disagreed with the majority's contention that Congressional silence in the aftermath of *Kiowa* indicated approval of the doctrine of tribal sovereign immunity. "As a practical matter, it is 'impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of' one of this Court's decisions."[118] In addition, despite the majority not addressing such a contention, the dissent nonetheless stated that tribal "immunity for off-reservation commercial acts [is not] necessary to protect tribal self-governance."[119] To support this proposition, the dissent cited a volume of statistics about the proliferation of tribal gaming revenues.[120] To conclude, the dissent stated that the *Kiowa* decision was "mistaken then, and the Court's decision to reaffirm it in the face of the unfairness and conflict it has engendered is doubly so."[121]

C. JUSTICE SOTOMAYOR'S CONCURRENCE

Justice Sotomayor concurred with the opinion of the majority, but wrote separately to address certain disagreements she had with the principle dissent of Justice Thomas.[122] Specifically, she disagreed with Justice Thomas's proposition that tribal sovereign immunity ought to be limited to the immunity afforded to foreign nations.[123] Moreover, Justice Sotomayor

115. *Id*. at 2047.

116. *Id*.

117. *Id*. at 2048.

118. *Id*. at 2052 (quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616. 672 (1987) (Scalia, J., dissenting)).

119. *Id*. at 2048.

120. *Id*. at 2050 ("Combined tribal gaming revenues in 28 States have more than tripled—from $8.5 billion in 1998 to $27.9 billion in 2012.") (internal citation omitted).

121. *Id*. at 2055.

122. *Id*. at 2040 (Sotomayor, J., concurring).

123. *Id*. at 2042 ("As the principal dissent observes, "comity is about one sovereign respecting the dignity of another." Post, at 2047. This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing States for commercial activity on Indian lands. Both States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government.") (quotations and citations contained in original).

took issue with the dissent's characterization of the economic situation in Indian country since the proliferation of Indian gaming. She cited another volume of statistics illustrating the poverty that is still rampant in Indian country[124] before concluding that "even reservations that have gaming continue to experience significant poverty, especially relative to the national average . . . . The same is true of Indian reservations more generally."[125]

IV. IMPACT

In February of 2014, the Turtle Mountain Tribe of North Dakota proposed to open a Class III casino in the city of Grand Forks.[126] It had previously attempted to negotiate with the Grand Forks City Council twice to open such a casino in 2004 and 2009, to no avail.[127] While it appeared that an initial agreement to negotiate had been reached, little progress had been made by June.[128] Following this impasse, the Turtle Mountain Tribe began developing an alternative plan to open a casino in Trenton, deep in the Bakken oil play.[129] This scenario reflects a growing, nation-wide trend of tribes seeking to open casinos beyond the borders of Indian country. In California, for example, the efforts of the North Fork Rancheria of Mono Indians to open an off-reservation casino has led to Proposition 48, a state-wide referendum on the subject of Indian gaming.[130] Thus, the *Bay Mills* decision has arrived at a crucial period in the development of Indian gaming.

A. THE AVAILABILITY OF REMEDIES FOR STATES

Both the Supreme Court and the Sixth Circuit[131] stated in their respective opinions that even after foreclosing the possibility of federal lawsuits as an injunctive remedy, there are still several remedies available

124. *See id*. at 2042-45.

125. *Id*. at 2045.

126. Charly Haley, *Turtle Mountain officials will present casino proposal in GF and on their reservation*, PRAIRIE BUSINESS (Feb. 18, 2014), http://www.prairiebizmag.com/event/article/id/17884/#sthash.RYmUC2eh.dpuf.

127. *Id*.

128. Charly Haley, *GF casino plans on hold; tribe pursuing casino in ND oil patch*, PRAIRIE BUSINESS (June 4, 2014), http://www.prairiebizmag.com/event/article/id/19402/#sthash.2SjkXFhF.dpuf.

129. *Id*.

130. David Olson, *PROP. 48: Casino measure could have wide-ranging effects*, THE PRESS ENTERPRISE (Oct. 12, 2014,), http://www.pe.com/articles/casino-751848-tribes-tribe html.

131. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 416 (6th Cir. 2012) ("Our decision today is not to the exclusion of other remedies that might (or might not) be available to the plaintiffs.").

to States for preventing illegal gambling inside and outside of Indian country. In addition to any applicable State criminal law, several federal criminal statutes that have not been preempted by IGRA can be utilized for such purposes. For example, 18 U.S.C. section 1955 is the federal statute that prohibits illegal gambling operations, wherever they occur.[132] Similarly, 18 U.S.C. section 1166 applies state gambling laws in Indian lands in the absence of any preemptory federal law (including IGRA), but vests prosecutorial jurisdiction in the federal government.[133] In *United States v. E.C. Investments, Inc.*,[134] the Ninth Circuit Court of Appeals held that either sections 1166 or 1955 could be used to prosecute illegal Class III gambling on an Indian reservation.[135]

As part of the compacting process, States can negotiate with Tribes not only for waivers of immunity, but also to shift jurisdiction for any civil disputes that arise on Indian lands to state courts.[136] In *Doe v. Santa Clara Pueblo*,[137] the New Mexico Supreme Court stated that "[n]othing in the language of IGRA prohibits jurisdiction shifting" so as to give effect to a Tribal-State compact that vested jurisdiction over personal injury claims arising at a Class III gaming facility in state court.[138] Furthermore, if tribes do wish to open Class III facilities off-reservation like Bay Mills sought to, the tribe must meet additional burdens.[139] For example, the state governor has veto power over any determination of the NGIC that a Class III facility can be opened off-reservation.[140] In *Lac Courte Oreilles Band of Lake*

132. 18 U.S.C. § 1955(a) (2014) ("Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.").

133. 18 U.S.C. § 1166(a), (d) (2014) ("[F]or purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State . . . The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country . . . .").

134. 77 F.3d 327 (9th Cir. 1996).

135. *Id*. at 331 ("There is no indication that Congress intended to bar the federal government from prosecuting violations of section 1955 on Indian territory. In fact, by opening with "for purposes of Federal law," section 1166's jurisdictional grant is not merely limited to section 1166, but rather applies equally to other federal statutes which could certainly include section 1955.").

136. 25 U.S.C. § 2710(d)(3)(C)(ii) (2014) ("Any Tribal-State compact . . . may include provisions relating to . . . the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations . . . .").

137. 154 P.3d 644 (N.M. 2007).

138. *Id*. at 648.

139. *See generally* 25 U.S.C. § 2719 (2014).

140. 25 U.S.C. § 2719(b)(1)(A) (2014) "([T]he Secretary [of the Interior] . . . determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the

Superior Chippewa Indians of Wisconsin v. United States,[141] a federal court held that the gubernatorial veto power was constitutional,[142] thus placing more regulatory power in the hands of the states. In summary, state remedies for preventing illegal tribal gaming are readily available, even after *Bay Mills*.

B. THE FUTURE OF INDIAN GAMING

The immediate effect of the *Bay Mills* decision was to cut off litigation similar to that at issue in the case. Michigan had previously petitioned for certiorari to review another Sixth Circuit opinion, *Michigan v. Sault St. Marie Band of Chippewa Indians*.[143] That case involved almost identical circumstances to those present in *Bay Mills*, with another tribe in Michigan seeking to open a Class III gaming facility off its reservation.[144] As a result of *Bay Mills*, Michigan quite logically withdrew its petition on June 3, 2014.[145] However, it remains to be seen what sort of long-term effect *Bay Mills* will gave on Indian gaming.

An *amici curiae* brief filed on behalf of several Indian tribes as part of the *Bay Mills* proceedings listed a number of existing Class III gaming compacts that include waivers of tribal immunity.[146] Ironically, one of the included compacts was between the Seminole Tribe and the State of Florida.[147] After two decades of lawsuits between the two, they compacted under IGRA and gave mutual waivers of immunity.[148] This would appear to be the simplest solution to assuage any fears about loss of remedy in any Tribal-State gaming compact negotiation, and *Bay Mills* does nothing to change this. In fact, the decision underscores the importance of mutuality during the compacting process. However, some states may nonetheless interpret *Bay Mills* as a loss of remedy, and such states will probably

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Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.).

141. 259 F. Supp. 2d 783 (W.D. Wis. 2003) *aff'd*, 367 F.3d 650 (7th Cir. 2004).

142. *Id*. at 799 ("The gubernatorial concurrence does not offend the Tenth Amendment or principles of federalism.").

143. 737 F.3d 1075 (6th Cir. 2013).

144. *Id*. at 1076.

145. *See generally* Matthew L.M. Fletcher, *Michigan Withdraws Cert Petition in Michigan v. Sault Tribe*, TURTLE TALK (Sept. 20, 2014), https://turtletalk files.wordpress.com/2014/06/ltr-clerk-withdraw-13-1372.pdf.

146. Brief of Amici Curiae Seminole Tribe of Florida, et al. 12-23, Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) (Docket No. 12-515).

147. *Id*. at 13-15.

148. *Id*.

become wary to negotiate with tribes. Thus, despite it being a positive decision for tribal sovereignty, *Bay Mills* may yet entail negative results for those tribes seeking to engage in Class III gaming. Only time will tell.

V. CONCLUSION

The legacy of the *Bay Mills* decision will rest in its clarification and refinement of the doctrine of tribal sovereign immunity. That said, the decision will likely do little to change the status quo in the world of Indian gaming. In fact, it may result in states seeking greater leverage from Tribes when negotiating gaming compacts. As the Court makes clear in *Bay Mills*, nothing in IGRA prohibits a state from seeking a waiver of immunity from a tribe or from utilizing any other state or federal remedies for preventing illegal gambling. The desirable result of *Bay Mills* would be a greater degree of communication between tribes and states during the compacting process about dispute resolution. However, after *Seminole Tribe*, states still retain the lion's share of bargaining power in compact negotiations. While tribes may be willing to waive sovereign immunity from suit, states may not be willing to reciprocate. *Bay Mills*' legacy will thus ultimately depend on whether it facilitates, or terminates, amicable negotiation.

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