

AMERICAN GIVERS: HOW THE RENEGING OF THE FEDERAL TRUST
RESPONSIBILITY IMPACTS INDIAN GAMING AND CONTINUES
AMERICA'S APATHETIC OPPRESSION OF NATIVE AMERICANS

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I. INTRODUCTION

Initially, this paper sought to answer why wealth inequality exists between tribal casinos and reservation life. Through research into the subject, this paper now offers a comprehensive overview of the many contradictions plaguing modern Native American society, explanations of why they persist, and potential ways they can be fixed.

Section II of this paper begins by looking at the Indian Gaming Regulatory Act's (IGRA) initial policy goals and its current progress toward those goals. Section III will analyze the many cracks in the federal trust responsibility. Section IV features a discussion about three major pillars of modern-day America—patriotism, capitalism, and racism—and how they impact the American public's thoughts on Native Americans in general. Section V will merge everything together and show how the interplay between several competing ideologies has resulted in consistent apathy toward Native Americans. Section VI will propose several practical solutions that can be implemented as initial steps toward reconciling these issues. Section VII concludes this paper by summarizing the main point: the dismantling of the federal trust responsibility and the emergence of tribal gaming have helped produce modern-day attitudes that contribute to the destitute conditions of reservation life.

II. INDIAN GAMING REGULATORY ACT

A. Policy Goals

Since Congress passed the Indian Gaming Regulatory Act (IGRA) after the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*,

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the federal government's public policy concerning Native Americans has been geared toward promoting strong tribal governments through self-sufficiency and economic development.¹

Congress's findings can be found in § 2701 of IGRA. This paper highlights four of the five major findings:

- (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
- (2)
- (3) existing Federal law does not provide clear standards or regulation for the conduct of gaming on Indian lands;
- (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
- (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not . . . prohibit such gaming activity.²

In Subsection 1 of § 2702, IGRA's Declaration of Policy states the purpose of the Act is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."³ Subsection 2 explains IGRA is designed to keep tribal gaming free of any corruption or organized crime.⁴ Finally, Subsection 3 imposes independent federal regulatory authority and standards upon tribal gaming and creates the National Indian Gaming Commission (NIGC), whose job it is to "protect such gaming as a means of generating tribal revenue."⁵

B. Policy Results

In 1995, the NIGC found total tribal gaming revenue to be \$5.46 billion.⁶ Ten years later, in 2005, revenue had increased to \$22.63 billion.⁷ Another

¹ Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2702(1).

² Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701.

³ *Id.* § 2702(1).

⁴ *Id.* § 2702(2).

⁵ *Id.* § 2702(3).

⁶ NAT'L INDIAN GAMING COMM'N, GROWTH OF TRIBAL GAMING REVENUES 1995 TO 2005, <https://www.nigc.gov/images/uploads/reports/growthinindiangaminggraph1995to2005.pdf> (last visited Jan. 19, 2023).

⁷ *Id.*

decade later, in 2015, revenue had increased to \$29.9 billion.⁸ In 2019, before the COVID-19 pandemic decreased the 2020 total revenue figures, total tribal gaming revenue reached \$34.6 billion, an all-time high.⁹

From 1996 to 2016, the number of tribal operators increased by over 108%.¹⁰ However, the increases were not equally distributed. The number of tribes that generated over \$100 million in a year increased by 600%, the number that generated between \$50 and \$100 million increased by 185%, the number that generated between \$25 and \$50 million increased by 179%, the number that generated between \$10 and \$25 million increased by 57%, the number that generated between \$3 and \$10 million increased by 102%, and the number that generated under \$3 million increased by 30%.¹¹ The important takeaway: over a 20-year span, the rich, in true capitalist fashion, got richer.

IGRA has seemingly been a resounding success over the years. However, while some tribes are generating substantial gaming revenue, the benefits have yet to trickle down into reservation life.¹² According to the 2003 U.S. Commission on Civil Rights' ("the Commission") report, *A Quiet Crisis*, "Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness" than

⁸ NAT'L INDIAN GAMING COMM'N, GROSS GAMING REVENUE TRENDING, https://www.nigc.gov/images/uploads/reports/2015_Gross_Gaming_Revenue_Trending.pdf (last visited Jan. 19, 2023).

⁹ *Id.*

¹⁰ NAT'L INDIAN GAMING COMM'N, GAMING REVENUES FROM 1996 TO 2000 (2001), <https://www.nigc.gov/images/uploads/reports/GamingRevenuesfrom1996to2000.pdf> (last visited Jan. 12, 2023); NAT'L INDIAN GAMING COMM'N, GAMING REVENUES CHART 2006-2010 (2011), <https://www.nigc.gov/images/uploads/reports/Gaming%20Revenues%20Chart%202010-2006.pdf> (last visited Jan. 12, 2023); NAT'L INDIAN GAMING COMM'N, 2016 GAMING REVENUES BY RANGE CHART (2017), <https://www.nigc.gov/images/uploads/reports/2016GamingRevenuesbyRangeChart.pdf> (last visited Jan. 12, 2023).

¹¹ Compare NAT'L INDIAN GAMING COMM'N, GROSS GAMING REVENUES 1996-2000 (2001), <https://www.nigc.gov/images/uploads/reports/GamingRevenuesfrom1996to2000.pdf> (last visited Jan. 12, 2023), and NAT'L INDIAN GAMING COMM'N, GROSS GAMING REVENUES 2006-2010 (2011), <https://www.nigc.gov/images/uploads/reports/Gaming%20Revenues%20Chart%202010-2006.pdf> (last visited Jan. 12, 2023), with NAT'L INDIAN GAMING COMM'N, GROSS GAMING REVENUES 2012-2016 (2017), <https://www.nigc.gov/images/uploads/reports/2016GamingRevenuesbyRangeChart.pdf> (last visited Jan. 12, 2023).

¹² See *Living Conditions*, NATIVE AM. AID, http://www.nativepartnership.org/site/PageServer?pagename=naa_livingconditions (last visited Mar. 12, 2023).

the rest of the American population.¹³ The report also found that Native Americans “continue to rank at or near the bottom of nearly every social, health, and economic indicator.”¹⁴ Specifically, around 13% of Native Americans die before reaching their 25th birthday—a rate 3 times higher than the American average.¹⁵ Tribal youth “are more than twice as likely to commit suicide,” with 70% of suicides involving alcohol.¹⁶ Further, “Native Americans are 670% more likely to die from alcoholism, 650[%] more likely to die from tuberculosis, 318[%] more likely to die from diabetes, and 204[%] more likely to suffer accidental death when compared with other groups.”¹⁷

The 2003 report offered several recommendations to fix these issues, including increasing tribal participation in federal programs, involving the public and private sectors in the fight to improve reservation life, and increasing coordination among federal agencies to ensure that reservations continue getting proper funding.¹⁸

In 2018, Congress requested an update to this report, which came in the form of the Commission’s report, *Broken Promises*.¹⁹ The report established its main conclusion in the Executive Summary:

Federal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide. Native American programs budgets generally remain a barely perceptible and decreasing percentage of agency budgets. Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power.²⁰

The report also states:

Native Americans are more likely to live in poverty, be unemployed, experience rape or abuse, and be killed by police

¹³ U.S. COMM’N ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* ix (2003), <https://www.usccr.gov/files/pubs/na0703/na0204.pdf> [hereinafter *A QUIET CRISIS*].

¹⁴ *Id.*

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 34.

¹⁷ *Id.* at 34–35.

¹⁸ *Id.* at 116.

¹⁹ U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 1–2 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf> [hereinafter *BROKEN PROMISES*].

²⁰ *Id.* at 4.

than any other ethnic or racial group. Native Americans have 1.6 times the infant mortality rate of non-Hispanic whites, and the life expectancy for Native Americans is 5.5 years less than the national average. Native American students have the lowest high school graduation rates in the nation. The broken treaties have left many reservations without adequate access to clean water, plumbing, electricity, internet, cellular service, roads, public transportation, housing, hospitals, and schools.²¹

While IGRA succeeded in paving the way for tribal economic development, it appears to have utterly failed to foster tribal self-sufficiency and strong tribal governments.²² Enter Contradiction Number One: How can tribal casinos generate so much revenue, yet so many Native Americans still live in such abysmal conditions? The 2018 *Broken Promises* report provides an answer:

Although the gaming industry has unquestionably spurred critical economic development, the gaming industry in Indian Country is not viable for all tribes given their locations and lack of infrastructure. Others caution gaming perpetuates the harmful myth that Native Americans collect government benefits while getting rich off of casinos, which reinforces negative Native American stereotypes. Efforts to pursue gaming sometimes involve complexities associated with the acknowledgment of tribes that were historically not acknowledged and the passing of Indian land back into trust.²³

III. THE FEDERAL TRUST RESPONSIBILITY

A 1977 Senate report from the American Indian Policy Review Commission defined the federal trust responsibility as follows:

The purpose behind the trust [doctrine] is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and

²¹ *Id.* at 1.

²² See Scott Elliot, *Tribal Communities Strive to Regain Food Sovereignty*, U.S. DEP'T AGRIC., <https://www.usda.gov/media/blog/2015/11/17/tribal-communities-strive-regain-food-sovereignty>.

²³ *BROKEN PROMISES*, *supra* note 19, at 212.

social well-being of the Indian people to a level comparable to the non-Indian society.²⁴

It is this paper's contention that the different eras of federal policy toward Native Americans can be best understood as a battle between Justice John Marshall and President Andrew Jackson. The following analysis of the federal trust responsibility will be framed as a pendulum perpetually swinging between the philosophies of these two men.

Modern federal Indian law stems from a trio of Supreme Court cases decided in the 1820s and '30s called "the Marshall Trilogy."²⁵ In 1823, the Court held in *Johnson v. M'Intosh* that private citizens could not purchase lands from Native Americans.²⁶ In the 1831 case *Cherokee Nation v. Georgia*, the Court held that the Cherokee Nation was not a "foreign state" within the meaning of Article III of the Constitution, and therefore the Court did not have jurisdiction.²⁷ This holding firmly placed Native Americans under the jurisdiction of the other branches of the federal government.²⁸ Closing out the trilogy in 1832, the Court held in *Worcester v. Georgia* that the federal government alone had authoritative power when dealing with Native American affairs.²⁹

On a macro scale, these three cases bolstered federal supremacy over Native Americans.³⁰ *M'Intosh's* Discovery Doctrine legitimized the U.S. as the true owner of all previously held British land.³¹ *Worcester* invented tribal sovereignty as Marshall established the relationship between the states, tribes, and federal government.³² In *Worcester*, Marshall wrote that regulation of the relations "established between the United States and the Cherokee . . . are committed *exclusively* to the government of the union."³³

In *Cherokee Nation*, Marshall wrote that the "Indians . . . may more correctly perhaps be denominated domestic dependent nations[.]" explaining that the relationship between the tribes and the federal government is like a "ward to

²⁴ AM. INDIAN POL'Y REV. COMM'N, FINAL REPORT 130 (1977), <https://files.eric.ed.gov/fulltext/ED164229.pdf>.

²⁵ *Marshall Trilogy*, UNIV. OF ALASKA, <https://uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php> (last visited Mar. 12, 2023).

²⁶ *Johnson v. M'Intosh*, 21 U.S. 543, 563 (1823).

²⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 1 (1831).

²⁸ Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.

²⁹ *Worcester v. Georgia*, 31 U.S. 515, 586 (1832).

³⁰ KATHRYN R.L. RAND & STEVEN A. LIGHT, *INDIAN GAMING LAW: CASES AND MATERIALS* 1, 40 (Carolina Academic Press, 2nd ed. 2019).

³¹ *M'Intosh*, 21 U.S. at 573.

³² *Worcester*, 31 U.S. at 561.

³³ *Id.* (emphasis added).

his guardian.”³⁴ This characterization comes from Marshall’s belief that Native American tribes “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.”³⁵

The power came from Andrew Jackson; it is still unclear when the kindness will be offered. President Jackson’s infamous (attributed) response to the *Worcester* decision was succinct: “John Marshall has made his decision, now let him enforce it.”³⁶ Jackson’s animosity toward Native Americans dated back to the War of 1812³⁷ and the ensuing First Seminole War.³⁸

Jackson reigned as the “great father” of Native Americans from 1829 through 1837.³⁹ Their father, however, wanted them to move out of the house. On May 28, 1830, Jackson signed the Indian Removal Act into law.⁴⁰ The Act granted land west of the Mississippi River to the tribes in exchange for their “lands that existed within existing state borders.”⁴¹ This turned into an act of genocide: 4,000 Cherokees died on the Trail of Tears as the federal government forced them to march through the winter.⁴²

This action cleared the way for the completion of Manifest Destiny—the idea that it was the U.S.’s God-given right to expand westward.⁴³ This belief helped justify the Indian Removal Act as well as the atrocities that accompanied it.⁴⁴ To the U.S., the land was wasted by Native Americans.⁴⁵ In Jackson’s 1830 State of the Union address, he asked:

What good man would prefer a country covered with forests
and ranged by a few thousand savages to our extensive
Republic, studded with cities, towns, and prosperous farms

³⁴ Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

³⁵ *Id.*

³⁶ Jeffrey Rosen, *The First Hundred Years*, THIRTEEN: SUP. CT. HIST. (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/antebellum/history.html>.

³⁷ *The War of 1812 and Indian Wars 1812-1821*, LIBR. CONG., <https://www.loc.gov/collections/andrew-jackson-papers/articles-and-essays/andrew-jackson-timeline-1767-1845/the-war-of-1812-and-indian-wars-1812-1821/> (last visited Mar. 12, 2023).

³⁸ Patricia Bauer, *First Seminole War*, ENCY. BRITANNICA (2018), <https://www.britannica.com/event/First-Seminole-War>.

³⁹ See Harold Whitman Bradley, *Andrew Jackson*, ENCY. BRITANNICA (Mar. 11, 2023), <https://www.britannica.com/biography/Andrew-Jackson>.

⁴⁰ *Indian Removal Act: Primary Documents in American History*, LIBR. CONG., <https://guides.loc.gov/indian-removal-act> (last visited Mar. 12, 2023).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Manifest Destiny and Indian Removal*, SMITHSONIAN AMER. ART MUSEUM, <https://americanexperience.si.edu/wp-content/uploads/2015/02/Manifest-Destiny-and-Indian-Removal.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization and religion?⁴⁶

Earlier in the speech, Jackson had argued that Indian removal benefitted the tribes, positing that, “through the influence of good counsels, [the tribes could eventually] cast off their savage habits and become an interesting, civilized, and Christian community.”⁴⁷

Jackson’s beliefs were a reflection of European colonization.⁴⁸ Both European and American imperialists rationalized their actions in much the same way: they were bringing Christianity and civilization to the tribes.⁴⁹ They were not conquering the tribes, but instead liberating them from the bonds of their own savageness. The U.S. called it Manifest Destiny; Europe was motivated by Gold, God, and Glory.⁵⁰

Enter Contradiction Number Two. On the one hand, there is Marshall, who saw the U.S. as a paternal figure. On the other hand, there is Jackson, whose actions were that of a ruthless invader. The only way for these two attitudes to coexist is to admit that the U.S. is an abusive father. Anything short of that would require the conflicting attitudes to be balanced somehow; when the pendulum swings one way, it must eventually swing back.

The pendulum swung toward Jackson’s doctrine with the passage of the Dawes Act of 1887, which authorized the government to divide existing tribal lands with the goal of assimilating Native Americans into American society.⁵¹ Essentially, the U.S. stole Native American lands, making their return contingent upon enrollment in the Office of Indian Affairs (now the Bureau of Indian Affairs (BIA)).⁵² Before the Dawes Act was passed, Native Americans controlled over 150 million acres of land.⁵³ Of this land, over 90 million acres were seized by the federal government, which gave the tribes scant payment, if any, in return.⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Donald M. Scott, *The Religious Origins of Manifest Destiny*, NAT’L HUMANITIES CENTER., <http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/mandestiny.htm> (last visited Mar. 12, 2023).

⁴⁹ See *Motivation for European Conquest of the New World*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/us-history/precontact-and-early-colonial-era/old-and-new-worlds-collide/a/motivations-for-conquest-of-the-new-world> (last visited Jan. 14, 2023).

⁵⁰ See *id.*

⁵¹ *The Dawes Act*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/dawes-act.htm> (July 9, 2021) [hereinafter *Dawes Act*].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Native Americans who did receive payment soon lost it, as they were unfamiliar with the concept of saving money.⁵⁵

With the Dawes Act, the U.S. strived to divide the tribes by sowing discord and disunity, while also pushing Native Americans to farm as if they were American citizens.⁵⁶ Assimilation was now the goal; the pendulum had swung.⁵⁷

However, an overcorrection was necessary to achieve balance. With the passage of the 1934 Indian Reorganization Act (IRA), the pendulum swung toward Marshall.⁵⁸ Officially labeled as a response to the bravery shown by Native American soldiers during World War I,⁵⁹ Congress issued the Meriam Survey in 1924 to examine the quality of reservation life.⁶⁰ Published in 1928, the Survey revealed that the U.S.'s policy of assimilation had failed: forced reservation life had led to both micro and macro failures, illustrated by the poor medical, economic, and educational measurements of Native Americans compared to the rest of American society.⁶¹

The direness of the report's findings spurred Congress to pass the IRA, which codified many of the report's recommendations.⁶² The IRA's goal was to increase Native American self-government and self-responsibility by decreasing federal control over reservations.⁶³ Congress hoped to accomplish this by returning surplus lands acquired under the Dawes Act to the tribes and assisting in the construction of tribal governments.⁶⁴ Under the IRA, the Interior Secretary was authorized to take land into trust for the tribes without a state's consent.⁶⁵

After World War II, during the 1950s economic boom, the U.S. returned to a policy of termination.⁶⁶ Congress instituted relocation programs, which

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *Dawes Act*, *supra* note 51.

⁵⁸ *See Indian Reorganization Act (1934)*, LIVING NEW DEAL (Nov. 18, 2016), <https://livingnewdeal.org/glossary/indian-reorganization-act-1934/>.

⁵⁹ It is my belief—and something a future note could explore—that the passage of the IRA had more to do with the U.S. falling into an economic depression than any other factor. Congress waited six years after the Meriam Survey to act, and once the U.S.'s economy began booming in the 1950s, the federal government once again swiftly sought total control over the tribes.

⁶⁰ *Indian Reorganization Act*, ENCY. BRITANNICA (May 19, 2020), <https://www.britannica.com/topic/Indian-Reorganization-Act>.

⁶¹ LEWIS MERIAM & HUBERT WORK, *THE PROBLEM OF INDIAN ADMINISTRATION* 3–4, 9 (1928).

⁶² *See Indian Reorganization Act*, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Indian Reorganization Act*, 25 U.S.C. § 5108 (1934).

⁶⁶ *Termination Era, the 1950s, Public Law 280*, UNIV. OF ALASKA, <https://uaf.edu/tribal/academics/112/unit-2/terminationeratethe1950spubliclaw280.php> (last visited Jan. 9, 2023).

resulted in the removal of over 33,000 Native Americans.⁶⁷ Congress also passed HCR 108, which terminated the tribal status of over 100 tribes while also removing over a million acres of tribal land from trust status.⁶⁸ Finally, Congress passed Public Law 280 (“PL 280”), which transferred federal authority over criminal and civil tribal matters to six states—California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (and later to others, including Florida).⁶⁹

PL 280 marked the end of the exclusivity between the federal government and the tribes that had been established in *Worcester*.⁷⁰ The federal government’s transfer of some jurisdictional power to the states was the first true crack in the federal trust responsibility.⁷¹ Every aforementioned government action had been taken by the federal government. For the first time in the history of the U.S.’s Native American policy, the states had entered the fray.

The debut of state authority over the tribes under PL 280 led to a new trio of cases—the Bingo Trilogy. The first case was *Seminole Tribe v. Butterworth* in 1981, in which the Fifth Circuit explored the distinction between civil/regulatory state action and criminal/prohibitory action.⁷² In *Butterworth*, Florida sought to shut down the Seminole Tribe’s bingo halls.⁷³ However, Florida laws independently regulated bingo, and thus did not fall under PL 280’s criminal jurisdiction.⁷⁴

The second case was *Barona Group v. Duffy* in 1982.⁷⁵ The Barona Group was offering high-stakes bingo, which San Diego County was threatening to shut down.⁷⁶ However, California, and specifically San Diego County, permitted charitable bingo.⁷⁷ The Indian Canons of Construction (ICC), a guidebook crafted by the Supreme Court that advised the lower courts to “liberally” interpret statutes in favor of Native Americans, led the Ninth Circuit to interpret this ambiguity in favor of the Barona Group.⁷⁸

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* See also *American Indians and Alaska Natives*, ADMIN. FOR CHILD. AND FAMS.: ADMIN. FOR NATIVE AMS., <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-public-law-280-tribes> (last visited Mar. 12, 2023).

⁷⁰ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

⁷¹ Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States* (1998), <https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf>.

⁷² *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

⁷³ *Id.* at 311.

⁷⁴ *Id.* at 316.

⁷⁵ *Barona Grp. of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982).

⁷⁶ See *id.* at 1187.

⁷⁷ *Id.*

⁷⁸ See Brief for Indian Law Professors as Amici Curiae in Support of Petitioner at 4–5, *Herrera v. Wyoming*, No. 17-532, slip op. (2018); Alexander Tallchief Skibine,

The final chapter of the trilogy, *California v. Cabazon Band of Mission Indians*, was decided in 1987.⁷⁹ At issue in *Cabazon Band of Mission Indians* was the state law controlling maximum bingo limits; California required charitable bingo to have a \$250 limit.⁸⁰ However, the Court held that unless a state fully prohibits gaming, it cannot criminalize tribal gaming under PL 280.⁸¹ The effect of this ruling was monumental: by narrowing the scope of PL 280, the ruling effectively limited a state's ability to regulate tribal gaming on tribal land.⁸²

Once again, the pendulum had swung back and forth: from the Jacksonian approach of the Dawes Act to the Marshallian approach of the IRA. The pendulum swung back toward Jackson as PL 280 fractured the federal trust responsibility, until finally, Native Americans found a way to generate revenue of their own through gaming.⁸³ Through tribal gaming, it was finally possible for the goals of the IRA to come to fruition.⁸⁴ Gaming provided a tangible way for the tribes to maintain a sense of identity, responsibility, and government independent of their "liberating" oppressors.⁸⁵

The *Cabazon Band of Mission Indians* ruling increased the pressure on Congress to act.⁸⁶ The states pressured Congress to legislatively overturn *Cabazon*; the charitable bingo halls wished for competitive balance, as they could not compete with the high stakes the tribes offered; and the tribes wished for zero oversight but would prefer the uniformity of federal regulation to state.⁸⁷

In other words, Congress was tasked with pausing the pendulum, instead replacing it with a lasting balance. They sought to do this with IGRA, a comprehensive federal law that had the same policy goals as the IRA: to promote strong tribal governments through self-sufficiency and economic development.⁸⁸

The dismantling of the federal trust responsibility did not pause forever, and the pendulum slowly began to swing again toward Jackson. The first

Textualism and the Indian Canons of Statutory Construction, 55 U. MICH. J. L. REFORM 267, 269–70 (2022).

⁷⁹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁸⁰ *Id.* at 205.

⁸¹ *Id.* at 212.

⁸² *Id.* at 221–22.

⁸³ See NAT'L INDIAN GAMING COMM'N, GROWTH OF TRIBAL GAMING REVENUES 1995 TO 2005, <https://www.nigc.gov/images/uploads/reports/growthinindiangaminggraph1995to2005.pdf> (last visited Mar. 12, 2023).

⁸⁴ See *Indian Reorganization Act*, ENCY. BRITANNICA, <https://www.britannica.com/topic/Indian-Reorganization-Act> (last updated May 19, 2020).

⁸⁵ Eve Daria-Smith, *Indian Gaming*, ENCY. BRITANNICA, <https://www.britannica.com/topic/Indian-gaming> (last updated May 22, 2016).

⁸⁶ Roger Gros, *The Birth of IGRA*, TRIBAL GOV'T GAMING (2013), <https://tribalgovernmentgaming.com/article/the-birth-of-igra/>.

⁸⁷ RAND & LIGHT, *supra* note 30, at 40.

⁸⁸ *Id.* at 110.

overcorrection related to IGRA occurred in *Seminole Tribe v. Florida*.⁸⁹ Enter Contradiction Number Three, as *Seminole Tribe*'s ruling rendered the concept of tribal sovereignty nothing more than a whisper in the wind, as tribes suddenly found they can no longer enforce their own sovereignty.

In this case, the Seminole Tribe requested a Class III⁹⁰ tribal-state compact negotiation.⁹¹ The Florida Governor refused, triggering a good-faith lawsuit as set forth in IGRA.⁹² The suit was filed using the *Ex Parte Young* exception,⁹³ which allows a party to sue a government official if their actions are unconstitutional or violate federal law.⁹⁴ However, the state of Florida responded by asserting its Eleventh Amendment right of sovereign immunity, which establishes that a state or state official (acting in an official capacity) cannot be sued without the state's consent.⁹⁵

Another exception to sovereign immunity is the Fourteenth Amendment's abrogation process.⁹⁶ The Court found that Congress intended to abrogate sovereign immunity when it passed IGRA.⁹⁷ This finding was consistent with the Court's position in *Pennsylvania v. Union Gas*,⁹⁸ where it held that Congress has this abrogation power under the Interstate Commerce Clause.⁹⁹ However, the *Seminole Tribe* Court overruled *Union Gas*, holding that its ruling departed "from our established understanding of the Eleventh Amendment and undermine[d] the accepted function of Article III."¹⁰⁰ The Court also ruled that the *Ex Parte Young* exception was not applicable either because it conflicted with IGRA's limited cause of action.¹⁰¹

The Court's granting of sovereign immunity tied Congress's hands, making it unclear when it could authorize any lawsuits by the tribes against the states.¹⁰² The ruling gutted IGRA's enforcement ability, throwing the "rebalancing" of the states and tribes off-kilter and establishing a new power

⁸⁹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁹⁰ Class I gaming consists of traditional Native American games. They are social games with little to no prizes involved. Class II gaming consists of bingo and is non-house banked. Class III gaming is better known as casino-style gaming and is house banked. Jon Friedl, *Getting to Know Legal Gaming Classifications*, PROFESSOR SLOTS (Apr. 22, 2022), <https://professorslots.com/gaming-classifications/>.

⁹¹ *Seminole Tribe*, 517 U.S. at 75.

⁹² *Id.* at 49.

⁹³ *See Ex parte Young*, 209 U.S. 123, 128 (1908).

⁹⁴ *Seminole Tribe*, 517 U.S. at 45.

⁹⁵ *Id.* at 44.

⁹⁶ *See* Gene R. Nichol Jr, *An Examination of Congressional Powers Under Section 5 of the 14th Amendment*, 52 Notre Dame L. Rev. 175, 181 (1976).

⁹⁷ *Seminole Tribe*, 517 U.S. at 56.

⁹⁸ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

⁹⁹ *Id.* at 23.

¹⁰⁰ *Seminole Tribe*, 517 U.S. at 66.

¹⁰¹ *Id.* at 76.

¹⁰² Laura M. Herpers, *State Sovereign Immunity: Myth or Reality After Seminole Tribe of Florida v. Florida?*, 46 CATH. U. L. REV. 1005, 1051 (1997).

dynamic that favored the states.¹⁰³ Compact negotiations under IGRA became politicized and unfair, with the tribes at the mercy of whether the states would waive their sovereign immunity—something only California has done.¹⁰⁴ This has left most tribes in the position of only being able to offer Class II gaming.¹⁰⁵

Section IV of this paper will further explore the practical effect of *Seminole Tribe*'s ruling on tribal gaming. For the purposes of this paper, the most important takeaway is that this ruling strengthened PL 280's fracture of the exclusivity relationship between the tribes and the federal government.¹⁰⁶

Section IV will also discuss the effect of the Supreme Court's decision in the 1974 case *Morton v. Mancari* on the tribes' status as a political race.¹⁰⁷ However, for the purposes of this section, it is important to note that the majority's opinion was based on the fact that overturning the BIA's hiring practice as set forth in the IRA would make "an entire Title of United States Code . . . effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."¹⁰⁸

The Supreme Court's holding in the 2009 case *Carcieri v. Salazar* completely undermined both *Morton* and the ICC.¹⁰⁹ Justice Thomas's abhorrent decision rests upon a bitterly textualist argument that the phrase "now under Federal jurisdiction" in the IRA "unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted."¹¹⁰ *Carcieri*'s ruling upended seventy-five years of precedent by terminating land trust status for every tribe federally recognized after the IRA passed.¹¹¹ The decision was also disastrously and needlessly wrong when both previous case law and federal policy is considered. *Morton* clearly established a doctrine of caution when faced with the possibility of upending such long-standing precedent, and—as previously mentioned—the ICC unambiguously states that ambiguous laws should be interpreted in favor of Native Americans.¹¹² While Justice Thomas states that the use of the word "now" in this case is unambiguous, the literal definition of "now" disagrees.¹¹³ Merriam-Webster offers several

¹⁰³ See RAND & LIGHT, *supra* note 30, at 223.

¹⁰⁴ Katie McShane, *FFF Sovereign Immunity Series*, NATL. L. REV. (Sept. 30, 2022).

¹⁰⁵ *The Importance of Class II Gaming*, GAMING AMERICA (May 5, 2020), <https://gamingamerica.com/magazine/514/the-importance-of-class-ii-gaming>.

¹⁰⁶ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

¹⁰⁷ *Morton v. Mancari*, 417 U.S. 535 (1974).

¹⁰⁸ *Id.* at 552.

¹⁰⁹ M. Maureen Murphy, *Carcieri v. Salazar: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934*, CONG. RSCH. SERV. (Aug. 23, 2016), <https://sgp.fas.org/crs/misc/RL34521.pdf>.

¹¹⁰ *Carcieri v. Salazar*, 555 U.S. 379, 380 (2009).

¹¹¹ Murphy, *supra* note 109.

¹¹² *Id.*

¹¹³ *Carcieri*, 555 U.S. at 395.

definitions of the word “now.”¹¹⁴ Under Definition 1(a), “now” means “at the present time or moment.”¹¹⁵ However, under Definition 1(c), “now” means “in the time immediately to follow.”¹¹⁶ According to the ICC, such a coin flip should always fall on the side of the tribes.¹¹⁷ Thomas, instead, flipped the coin, saw it land on heads, and yet still declared it tails.

In the 2022 term, the Supreme Court decided *Oklahoma v. Castro-Huerta*,¹¹⁸ a case that will almost certainly usher in a new era of Indian law.¹¹⁹ In *Castro-Huerta*, the Court ruled that states have concurrent jurisdiction with the federal government to prosecute crimes committed by non-Native Americans against Native Americans in tribal country,¹²⁰ firmly placing tribal sovereignty on life support. Justice Kavanaugh's majority opinion is the encapsulation of everything that has destroyed the federal trust responsibility.¹²¹ As Justice Gorsuch writes in his dissent, the “old paternalist overtones are hard to ignore.”¹²² In *Castro-Huerta*, the Supreme Court finally embraces the middle ground between Jackson and Marshall, and steps into its role as the tribes' abusive father.

It is important to note that the paternalism approach is preferable when the alternative is Jackson's ruthlessness. However, the real-world results of Marshall's approach represent a cautionary tale about what happens when the powerful and self-aggrandizing write their own myth.

“First, the Court suggests that its balance is designed to ‘help’ Native Americans. . . . So, the argument goes, five unelected judges in Washington must now make the ‘right’ choice for the Tribe.”¹²³ The issue with Marshall's paternalism is that it unjustly allows the federal government to claim the moral high ground. They purport to be helping, not hurting—helping Native Americans escape from the bonds of their own “second-class” status.¹²⁴ Through this viewpoint, the Court can hide behind plausible deniability as tribal sovereignty's plug is pulled under the guise of prescribing medicine.

¹¹⁴ *Now*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987).

¹¹⁸ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

¹¹⁹ *NARF/NCAI Joint Statement on Scotus Ruling on Castro-Huerta v. Oklahoma*, NATIVE AM. RTS. FUND (July 7, 2022), <https://narf.org/castro-huerta-v-oklahoma-scotus-ruling/>.

¹²⁰ *Castro-Huerta*, 142 S. Ct. at 2504.

¹²¹ See Theodora Simon, *Tribal Sovereignty Under Attack in Recent Supreme Court Ruling*, ACLU NORCAL (July 12, 2022), <https://www.aclunc.org/blog/tribal-sovereignty-under-attack-recent-supreme-court-ruling>.

¹²² *Castro-Huerta*, 142 S. Ct. at 2522 (Gorsuch, J., dissenting).

¹²³ *Id.*

¹²⁴ *Id.*

This ruling “makes a mockery of all of Congress’s work from 1834 to 1968. . . Unknown to anyone until today, state law applied all along.”¹²⁵ The dissent continues:

Really, though, this case has less to do with where Mr. Castro-Huerta serves his time and much more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on tribal lands. To succeed, Oklahoma must disavow adverse rulings from its own courts; disregard its 1991 recognition that it lacks legal authority to try cases of this sort; and ignore fundamental principles of tribal sovereignty, a treaty, the Oklahoma Enabling Act, its own state constitution, and Public Law 280. Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court.¹²⁶

The Court is Oklahoma’s willing accomplice in this governmental power grab. On an individual level, the practical result of this ruling is that Castro-Huerta will serve a sentence that is twenty-eight years longer than if he had stayed under federal jurisdiction.¹²⁷ On a macro level, the practical result of this ruling is that states now have more power over the tribes than at any other point in American history.¹²⁸ Frustratingly, this outcome occurred because the Court ignored every other point in American history.

Where paternalism and ruthlessness intersect lies the pathway to atrocity.¹²⁹ *Castro-Huerta* represents the true pause of the pendulum, as the Court expects gratitude and deference for eviscerating the federal trust responsibility. This is a ruling made without the Court’s typical pretextual show of decency. It is dripping with the familiar historical overtones of paternalism, which are neither needed nor appreciated. It is the Court cutting law out of whole cloth, running roughshod over the history and meaning of the statute it claims to interpret. It is the Court reconciling the U.S.’s two conflicting attitudes toward the tribes, finally accepting its abusive, paternalistic tendencies; finally liberating itself from the pretense of support while never seeming to shed the label of savior. It is the Court at its most brazenly ruthless, while playing its most dumb.

¹²⁵ *Id.* at 2517.

¹²⁶ *Id.* at 2510.

¹²⁷ *Id.* at 2492.

¹²⁸ Graham Lee Brewer, *The Supreme Court Gave States More Power Over Tribal Land. Tribes Say That Undermines Their Autonomy*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/news/us-news/supreme-court-oklahoma-castro-huerta-decision-tribal-sovereignty-rcna35872>.

¹²⁹ See *Trail of Tears*, HISTORY, <https://www.history.com/topics/native-american-history/trail-of-tears> (last updated June 28, 2022).

IV. THE U.S.'S TRIUMVIRATE

A. Patriotism

In 1908, Israel Zangwill, a Jewish immigrant from England, produced a Broadway play entitled *The Melting Pot*.¹³⁰ In an interesting spiritual update to both Gold, God, and Glory and Manifest Destiny, Zangwill's play centered on the belief that the U.S. was a land chosen by God where the old European hatreds melted away into a place free of prejudices.¹³¹ This message was previously embodied by these famous words from Emma Lazarus's 1903 sonnet *The New Colossus*, now immortalized on the bottom of the Statue of Liberty: "Give me your tired, your poor, / Your huddled masses yearning to breathe free."¹³²

Only sixteen years after the debut of Zangwill's play, the Meriam Report detailed the extent to which assimilation had failed Native Americans.¹³³ It is quite astounding how much the myth of Americana does not embody the experience of those originally native to the land. The U.S. has a short memory, and it appears its citizens have overwhelmingly bought into the melting pot myth to the detriment of those who challenge the perceptions comprising it.

Another way to describe the ideology behind the melting pot myth is one familiar to Native Americans: assimilation—the idea that all cultures can exist and thrive inside one "American" umbrella.¹³⁴ Perhaps the greatest uphill battle facing the tribes is the average non-Native American's perception of assimilation as an embodiment of the melting pot: "Among non-Natives, 'assimilation' is not a bad word and the mythology of the American 'melting pot' is strong. Among other communities of color, assimilation does not carry the same threat of cultural extinction and so is not [always] perceived to be negative."¹³⁵ In contrast, Native Americans see the melting pot as "an existential threat to their cultures and to tribal sovereignty."¹³⁶

¹³⁰ *The Melting Pot*, PBS, <https://www.pbs.org/fmc/timeline/emeltpot.htm> (last visited Jan. 14, 2023).

¹³¹ *See id.*

¹³² *Emma Lazarus: American Poet*, ENCY. BRITANNICA, <https://www.britannica.com/biography/Emma-Lazarus#ref137327> (last visited Jan. 1, 2023).

¹³³ *See* HUBERT WORK & LEWIS MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 3–21 (1928) (known as "The Meriam Report").

¹³⁴ *See* Ashley Crossman, *What Is the 'American Melting Pot'?*, THOUGHT CO. (Feb. 16, 2021), <https://www.thoughtco.com/melting-pot-definition-3026408>.

¹³⁵ RECLAIMING NATIVE TRUTH, RESEARCH FINDINGS: COMPILATION OF ALL RESEARCH 10 (Mark Trahant 2018), <https://www.firstnations.org/wp-content/uploads/2018/12/FullFindingsReport-screen.pdf>.

¹³⁶ *Id.* at 21.

To white Americans, the melting pot serves as a message of inclusivity to which they can eagerly ascribe.¹³⁷ However, many minorities, including members of the African and Asian-American communities, see it as a “pressure to lose your culture, to keep certain things at home, to not be your authentic self.”¹³⁸

Enter Contradiction Number Four: Many Americans perceive Native Americans as a monolith “without an understanding of Native Americans as citizens of hundreds of nations with different languages, customs, traditions and laws.”¹³⁹ This idea feeds into the melting pot myth, as one focus group participant in the Reclaiming Native Truth Project (RNT) stated, “melting pot [implies] that we become the same.”¹⁴⁰

B. Capitalism

Seminole Tribe’s destruction of IGRA’s enforcement mechanism opened the door for states to run rampant over tribal rights under the guise of competition. The pendulum continues to swing as states realize the tribes can offer little to no resistance to this overwhelming onslaught.

For example, New Mexico’s Legislature has proposed a gambling expansion that tribes in the state say would violate their monopoly on casino gaming and threaten the revenue-sharing deals that the tribes and state had already agreed upon.¹⁴¹ The tribes have called the proposal “a renewed challenge to our economic security.”¹⁴² Most of New Mexico’s tribes signed compacts with the state in 2015, providing each of them with an agreed-upon share of gaming revenue.¹⁴³ New Mexico wants to take its existing “racinos”—which blur the line between horse racing and slot machines by using an internal system based on pari-mutuel wagering—and expand them, a move that is projected to generate at least an additional \$62 million in tax revenues, and as much as \$75 million if online gaming is added.¹⁴⁴

In a similar move, the Oregon Racing Commission (ORC) approved the use of a racino without consulting the Oregon tribes, even though it was legally

¹³⁷ *See Me, My Race, and I*, PBS (2003), https://www.pbs.org/race/005_MeMyRaceAndI/005_01-transcripts-04.htm.

¹³⁸ RECLAIMING NATIVE TRUTH, *supra* note 135, at 61.

¹³⁹ *Id.* at 10.

¹⁴⁰ *Id.* at 61 (alteration in original).

¹⁴¹ Philip Conneller, *New Mexico Tribal Operators Denounce ‘Reckless’ Racetrack Expansion Plans*, CASINO.ORG, <https://www.casino.org/news/new-mexico-tribal-operators-denounce-racetrack-gambling-plans/> (Oct. 20, 2020).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

obligated to do so.¹⁴⁵ If racinos spread throughout Oregon, “the tribes would lose up to \$31 million, jeopardizing their financial self-sufficiency.”¹⁴⁶

Mike Thiessen, president of the proposed Flying Lark Entertainment Venue, was asked about the impact that losing \$31 million would have on the tribes and their ability to govern themselves.¹⁴⁷ His response: “Competition is always good. It should drive us to do our best.”¹⁴⁸ Mike Walters, the Flying Lark’s Director of Marketing, issued a similar statement: “[The ORC is] getting pressure from the Native American casinos and tribes about having competition, which they don’t like, so they’re raising a little bit of a ruckus, which we were expecting.”¹⁴⁹ What Walters sees as a “little bit of a ruckus” is Native Americans’ legally mandated right to government-to-government consultation.¹⁵⁰

In February 2022, the ORC voted to deny the Flying Lark’s gaming machine application after the Oregon Department of Justice issued an opinion stating that such a venture would violate Oregon’s Constitution.¹⁵¹ The Oregon tribes that had resisted the Flying Lark’s push wrote a letter to the ORC in January, stating that “we believe there is a better way to support horse racing than through a private casino that violates state law and redistributes gaming revenue from Tribes and the state lottery to a private business owner.”¹⁵²

While the tribes have dodged a bullet for now, this episode was enough motivation for Oregon’s Legislature to form an eight-member committee to comprehensively review gaming in Oregon—a decision that finally came after multiple requests from the Oregon tribes.¹⁵³ Oregon Senate President Peter Courtney said such a review is overdue, as it has “been 26 years since we last took a real look at gambling in this state.”¹⁵⁴ Anna Richter Taylor, a spokeswoman for the Cow Creek Band of Umpqua Tribes of Indians, called this “a welcome development,” further stating “we hope this committee can put an

¹⁴⁵ Theo Witcomb & B. ‘Toastie’ Oaster, *Tribes Call Out Oregon’s Reckless Gaming Regulation*, HIGH COUNTRY NEWS (Jan. 21, 2022), <https://www.hcn.org/issues/54.2/indigenous-affairs-tribes-call-out-oregons-reckless-gaming-regulation>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Jamie Parfitt, *Oregon Racing Commission Denies the Flying Lark’s Requests for Gaming Machines*, KDRV (Feb. 18, 2022), https://www.kdrv.com/news/local/oregon-racing-commission-denies-the-flying-larks-requests-for-gaming-machines/article_92cf6f2c-903d-11ec-ac95-8bb75cf2d3d9.html.

¹⁵² *Id.*

¹⁵³ See Nigel Jaquiss, *Legislative Leaders Finally Agree to Tribes’ Request to Take a Big Look at Gambling in Oregon*, WILLAMETTE WK. (Apr. 17, 2022, 5:51 AM), <https://www.wweek.com/news/2022/04/17/legislative-leaders-finally-agree-to-tribes-request-to-take-a-big-look-at-gambling-in-oregon/>.

¹⁵⁴ *Id.*

end to partisan conflicts and deliver what Oregonians expect from their government—accountability, transparency, and policies that support economic opportunities while protecting public health and respect[ing] tribal sovereignty.”¹⁵⁵

This paper argues that the trend of private actors and state governments attempting to shut out the tribes will continue. Unless Congress passes an updated version of IGRA that reaffirms the federal government’s exclusive jurisdiction, these attempts will soon prove successful, as states will eventually be allowed to dictate their own rules as state sovereignty replaces federal supremacy.¹⁵⁶

A “nuclear option” for states exists within the current legal structure.¹⁵⁷ The Supreme Court has solidified states’ right of sovereign immunity.¹⁵⁸ Consequently, it is easy to imagine a scenario where, during a tribal-state compact negotiation, a state gives a tribe an ultimatum: either agree to a compact that outrageously favors the state, or the state will either (a) work to independently prohibit all gaming, making the tribe’s gaming industry illegal and thereby limiting its ability to independently generate revenue, or (b) welcome commercial operators into the marketplace.¹⁵⁹ While IGRA § 2710(2)(A) states that a tribe must maintain the sole proprietary interest of “any gaming activity,”¹⁶⁰ there is still an avenue for states to exploit. While states cannot (yet) force tribes to agree to a revenue-sharing provision that violates IGRA’s standard, they can increase the price of substantial exclusivity, a “valuable economic benefit”¹⁶¹ which bars other forms of gaming from occurring within an agreed-upon range (such as a state’s borders).¹⁶²

This scenario would create a staring contest between states and tribes. On the one hand, will a state really ban all gaming if a tribe refuses an

¹⁵⁵ *Id.*

¹⁵⁶ See Charlene Koski, *Supreme Court Expands State Criminal Jurisdiction in Indian Country*, VAN NESS FELDMAN (June 30, 2022) <https://www.vnf.com/supreme-court-expands-state-criminal-jurisdiction-in-indian-country>.

¹⁵⁷ Paul C. Alexander II, *Money is for Nothing: The Inherent Want of Consideration Found in Substantial Exclusivity Terms Within Tribal-State Compacts*, 5 AM. INDIAN. L. J. 167, 192 (2017).

¹⁵⁸ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Carcieri v. Salazar*, 555 U.S. 379, 380 (2009); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

¹⁵⁹ It is my belief that, of the two options, states are more likely to go with the latter.

¹⁶⁰ Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(2)(A).

¹⁶¹ *Oversight Hearing on Indian Gaming Regulatory Act; Role and Funding of the National Indian Gaming Commission: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2003) (statement of Aurene Martin, Acting Sec’y of Indian Affairs, Dep’t of the Interior).

¹⁶² Nat’l Cong. of Am. Indians [NCAI], *Support for Ensuring Tribal Nations Are the Primary Beneficiaries of Tribal Government Gaming and That Governments Comply with the Indian Gaming Regulatory Act*, Resolution #MOH-17-025 (2017).

exploitative price for substantial exclusivity? Or more likely, will the state go the other way, refusing to budge on its price for substantial exclusivity, and instead welcoming an influx of commercial operators with open arms? On the other hand, can the tribe really afford to make this gamble?

This paper's prediction: tribes will be forced to blink first out of necessity, completely placing tribal gaming at the mercy of the states.

C. Racism

As previously mentioned, racism against Native Americans dates back to Europe's Gold, God, and Glory ideology.¹⁶³ Native Americans were considered uncivilized savages who needed saving.¹⁶⁴ They were considered a barbaric threat to the Eurocentric society that formed as a result of colonialism era.¹⁶⁵ Prior to the 1960s, Western movies perpetuated the "Savage vs. Noble Savage" tribal dichotomy.¹⁶⁶ In the early 1990s, two movies—*Dances with Wolves* and *The Last of the Mohicans*—depicted their Native American characters through a binary of good or evil.¹⁶⁷ Disney's 1995 movie *Pocahontas* concludes by depicting Pocahontas's tribe as the "good" kind, freely giving supplies to help the English survive.¹⁶⁸ These three movies, perhaps still the most famous depicting Native Americans made in the last thirty years, all feed into the stereotype that Native Americans are either savages who are out for blood or angels sent to help the Whites when they need it the most.¹⁶⁹

This pervasive binary reinforces the harmful image that Native Americans are always ancillary characters without any complexity of their own. The persistent lack of representation contributes to the perpetuation of this view.¹⁷⁰ Perhaps the most famous Native American television character is Tonto, the sidekick of the titular character in *The Lone Ranger*.¹⁷¹ A movie adaptation

¹⁶³ See *Motivation for European Conquest of the New World*, *supra* note 49.

¹⁶⁴ *Id.*

¹⁶⁵ See *Law of Nations (1758)*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/emmerich-de-vattelthe-law-of-nations-1758> (last visited Mar. 13, 2023).

¹⁶⁶ Virginia McLaurin, *Why the Myth of the "Savage Indian" Persists*, SAPIENS (Feb. 27, 2019), <https://www.sapiens.org/culture/native-american-stereotypes/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ RECLAIMING NATIVE TRUTH, *supra* note 135, at 15.

¹⁷¹ *Tonto: Fictional Character*, ENCY. BRITANNICA, <https://www.britannica.com/topic/Tonto> (Aug. 5, 2020).

of the television series arrived in theaters in 2013.¹⁷² The actor cast to play Tonto was not Native American, but instead Johnny Depp.¹⁷³

It is fascinating to observe the difference between the public outcry over Depp's casting in *The Lone Ranger* and the outcry over Scarlett Johansson's casting in 2017's *Ghost in the Shell*, in which she played an Asian character. A quick Google search is telling: searching "outrage over Scar Jo Asian casting" brings up articles about the casting and subsequent outrage from the most reputable of sources: the *Washington Post*,¹⁷⁴ *The Guardian*,¹⁷⁵ *USA Today*,¹⁷⁶ *TIME*,¹⁷⁷ *The Hollywood Reporter*,¹⁷⁸ and the *LA Times*.¹⁷⁹ These highly-regarded sources serve as an indirect, yet powerful way to legitimize the outrage. Scarlett Johansson was originally cast in April 2016; the *Washington Post* story, the first result on Google, was not published until July 2019.¹⁸⁰

Contrast this reaction with the Google search "outrage over Tonto casting." The websites that result from this search are much less prominent:

¹⁷² *The Lone Ranger* (2013), IMDB, <https://www.imdb.com/title/tt1210819/> (last visited Mar. 13, 2023).

¹⁷³ Jerry Adler, *Is the New Tonto Any Better Than the Old Tonto?*, SMITHSONIAN MAG. (July 2013), <https://www.smithsonianmag.com/history/is-the-new-tonto-any-better-than-the-old-tonto-4833743/>.

¹⁷⁴ See Travis M. Andrews, *Scarlett Johansson, Who Has a History of Casting Controversies, Says, 'I Should Be Allowed to Play Any Person'*, WASH. POST (July 14, 2019, 2:22 PM), <https://www.washingtonpost.com/arts-entertainment/2019/07/14/scarlett-johansson-who-has-history-casting-controversies-says-i-should-be-allowed-play-any-person/>.

¹⁷⁵ See Original *Ghost in the Shell* Director: 'No Basis' for Whitewashing Anger, GUARDIAN (Mar. 24, 2017), <https://www.theguardian.com/film/2017/mar/24/scarlett-johansson-ghost-in-the-shell-director-whitewashing>.

¹⁷⁶ See Hannah Yasharoff, *Scarlett Johansson Defends Casting: 'I Should Be Allowed to Play Any Person, Tree or Animal'*, USA TODAY (July 15, 2019, 9:07 AM), <https://www.usatoday.com/story/entertainment/celebrities/2019/07/14/scarlett-johansson-slammed-controversial-casting-comments/1728444001/>.

¹⁷⁷ See Eliza Berman, *A Comprehensive Guide to the Ghost in the Shell Controversy*, TIME (Mar. 29, 2017, 12:28 PM), <https://time.com/4714367/ghost-in-the-shell-controversy-scarlett-johansson/>.

¹⁷⁸ See Gavin J. Blair, *Scarlett Johansson in 'Ghost in the Shell': Japanese Industry, Fans Surprised by "Whitewashing" Outrage*, HOLLYWOOD REP. (Apr. 19, 2016, 1:31 AM), <https://www.hollywoodreporter.com/news/general-news/scarlett-johansson-ghost-shell-japanese-885462/>.

¹⁷⁹ See Christie D'Zurilla, *Scarlett Johansson Gets Dragged into the Casting Mud yet Again*, LA TIMES (July 15, 2019, 11:39 AM), <https://www.latimes.com/entertainment-arts/movies/story/2019-07-15/scarlett-johansson-clickbait-casting-diversity>.

¹⁸⁰ Andrews, *supra* note 174.

ShadowAndAct,¹⁸¹ *Insider*,¹⁸² *PennLive*,¹⁸³ and *Mic*.¹⁸⁴ The articles are split into two groups: articles published between 2012 and 2013 that address the actual casting of Johnny Depp, and articles from several years later that discuss his casting in a listicle. For example, the article from *Insider*—updated in August 2020—is titled *10 Times Audiences Weren't Happy with Who Was Cast in a Movie Role*.¹⁸⁵ Searches about Johansson's casting also generate just under 19.7 million more results than searches about Depp's casting.¹⁸⁶

A possible reason for the difference in attitudes stems from the Supreme Court's 1974 *Morton* decision, which helped shape the societal uniqueness of Native Americans' racial status.¹⁸⁷ In this case, a class of non-Native American BIA employees sued the BIA.¹⁸⁸ The IRA requires the BIA to grant employment preferences to Native Americans.¹⁸⁹ In 1972, the BIA also granted promotion preferences to Native Americans.¹⁹⁰ The plaintiffs sued, alleging that the Equal Employment Opportunity Act of 1972 repealed the IRA's provision that authorized this preference.¹⁹¹ The *Morton* Court held that Congress did not intend to repeal this preference provision, writing that the "preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government."¹⁹² Expanding upon this holding, the Court wrote that "[t]he preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."¹⁹³

This ruling is inconsistent with how the U.S. generally views Native Americans. Blood quantum laws were initially used as a way to mark members

¹⁸¹ See *Red in the Face – Little Outrage Over 'Lone Ranger's' Native America Non-Casting*, SHADOW AND ACT (July 3, 2013), <https://shadowandact.com/red-in-the-face-little-outrage-over-lone-rangers-native-american-non-casting>.

¹⁸² See Abby Jones, *10 Times Audiences Weren't Happy with Who Was Cast in a Movie Role*, INSIDER, <https://www.insider.com/most-controversial-roles-cast-2019-1> (Aug. 6, 2020, 8:25 AM).

¹⁸³ See Sean Adams, *Racial Controversy in Film – 'Lone Ranger' and Hollywood's Legacy of Questionable Casting*, PENNLIVE, (July 3, 2013, 6:02 PM), https://www.pennlive.com/entertainment/2013/07/lone_ranger_race_in_movies.html.

¹⁸⁴ See Marley Brown, *Tonto Racist: 'Lone Ranger' Johnny Depp Character Understandably Offends Native Americans*, MIC (June 27, 2013), <https://www.mic.com/articles/51443/tonto-racist-lone-ranger-johnny-depp-character-understandably-offends-native-americans>.

¹⁸⁵ Jones, *supra* note 182.

¹⁸⁶ Search results on file with author.

¹⁸⁷ See *Morton v. Mancari*, 417 U.S. 535 (1974).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 537.

¹⁹⁰ *Id.* at 538.

¹⁹¹ *Id.* at 539.

¹⁹² *Id.* at 553–54.

¹⁹³ *Morton*, 417 U.S. at 554.

of tribes.¹⁹⁴ The laws were designed to limit citizenship within tribes.¹⁹⁵ This method of identification is still used among some tribes.¹⁹⁶ For example, “[t]he Navajo Nation requires a minimum of 25[%] ‘Navajo blood’” to become an enrolled member—but if the children of said member have less than 25% Navajo blood, the children cannot enroll.¹⁹⁷

Enter Contradiction Number Five: an individual tribal member is enrolled based upon their race, while a tribe is considered a political entity. Tribes who defend blood quantum measurements as a prerequisite to enrollment “look upon those blood quantum minimums as a way to preserve” their community.¹⁹⁸

In short, the tribes are using a method often employed by their colonial oppressors to stave off modern assimilation.¹⁹⁹

V. UNITED STATES OF APATHY

The RNT’s findings showed contradictory opinions about Native Americans among the American populace.²⁰⁰ 74% of respondents supported increasing federal government funding “to reduce poverty and improve health among Native Americans.”²⁰¹ 53% of respondents believed “that ‘the government gives benefits to Native Americans just for being Native American that are not available to other minority groups.’”²⁰² 64% of respondents outside of Native American lands wanted to increase support for Native Americans, while only 56% of respondents inside Native American lands shared the same view.²⁰³ The RNT also found that both the American public and the judicial system have a tough time conceptualizing tribal sovereignty.²⁰⁴ This “extends to federal judges, who most likely have never taken an Indian law course in law school, yet routinely render major decisions affecting tribal nations and their citizens[,]” as well as to members of Congress, who “do not understand treaty and trust obligations to tribes . . . [but] view sovereignty as a powerful right[.]”²⁰⁵

¹⁹⁴ Kat Chow, *So What Exactly Is ‘Blood Quantum’?*, NPR: CODE SWITCH (Feb. 9, 2018, 6:00 AM), <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Keneisha M. Green, *Who’s Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans*, 31 AM. INDIAN L. REV. 93, 94–95 (2006).

²⁰⁰ See RECLAIMING NATIVE TRUTH, *supra* note 135, at 52–54.

²⁰¹ *Id.* at 52.

²⁰² *Id.* at 53.

²⁰³ *Id.*

²⁰⁴ *See id.* at 10.

²⁰⁵ *Id.*

The RNT noted a major challenge to bettering tribal life is the phenomenon of the “invisible Indian,” as it found that 62% of American citizens outside of Native American lands were unacquainted with Native Americans.²⁰⁶ This issue of invisibility is especially harmful to Native Americans as “[i]gnorance, bias, stereotyping, overt racism and outright invisibility fuel attacks on tribes. They limit our ability to protect sovereignty and treaty rights, shape and inform public policy, celebrate cultural identity, access resources, and protect the dignity and humanity of Native peoples.”²⁰⁷

The RNT’s report found that “[a]cross the education curriculum, pop culture entertainment, news media, social media and the judicial system, the voices and stories of contemporary Native Americans are missing. Into this void springs an antiquated or romanticized narrative, ripe with myths and misperceptions.”²⁰⁸

The RNT also made an interesting comparison: while transgender people only account for 0.3% of the American population, they have a far more prominent role in cultural conversations than Native Americans.²⁰⁹

The complete absence of Native American representation in the media is perhaps the largest obstacle to overcome—and the first step in rectifying the problem.

Native Americans would benefit from the public support many other minority groups receive. They need roles in pop culture that enhance the public’s perception of their complexity. Representation in pop culture can change perceptions of a group as well as embolden the individual members of that group to be prouder of their heritage.²¹⁰

However, the relatively low number of Native Americans make it difficult for them to be sufficiently heard. As of 2019, Hispanic individuals accounted for 18.5% of the American population, Black individuals accounted for 12.2%, and Asian individuals accounted for 5.6%, while American Indians/Alaskan Natives only accounted for 0.7%.²¹¹

Native Americans are often viewed as a “homogenous group,” with the average American lacking “an understanding of Native Americans as citizens of hundreds of nations with different languages, customs, traditions and laws.”²¹² The lack of representation in media and pop culture has not only solidified Native Americans as the White Man’s sidekick, but also done nothing to diversify

²⁰⁶ RECLAIMING NATIVE TRUTH, *supra* note 135, at 53.

²⁰⁷ *Id.* at 5.

²⁰⁸ *Id.* at 8.

²⁰⁹ *Id.* at 50.

²¹⁰ See Lina Srivastava, *Representation Matters: South Asians in American Pop Culture Since 9/11*, CONVERSATIONALIST (Mar. 17, 2022), <https://conversationalist.org/2022/03/17/representation-matters-south-asians-in-american-pop-culture-since-9-11/>.

²¹¹ Iman Ghosh, *Visualizing the U.S. Population by Race*, VISUAL CAPITALIST (Dec. 28, 2020), <https://www.visualcapitalist.com/visualizing-u-s-population-by-race/>.

²¹² RECLAIMING NATIVE TRUTH, *supra* note 135, at 10.

Native Americans in the minds of the American public.²¹³ This pervasive cycle establishes the Native American monolith as the image that has persisted throughout pop culture for over fifty years: the noble savage.²¹⁴

However, the noble savage image is complicated by the other predominant representation of Native Americans in media: tribal gaming.²¹⁵

This is where the cognitive dissonance pertaining to the public perception of Native Americans and the stereotypes they are subject to intersect. The U.S.'s most toxic trait is its incessant need to ignore its history. The Woodrow Wilson National Fellowship Foundation conducted a national survey in 2018.²¹⁶ Some of its findings are listed below:

- Only 36% of Americans would pass a citizenship test.²¹⁷
- “Only 13[%] . . . [of respondents] knew when the U.S. Constitution was ratified.”²¹⁸
- 60% “of respondents did not know which countries the United States fought in World War II.”²¹⁹
- “57[%] . . . [of respondents] did not know how many Justices actually serve on the nation’s highest court.”²²⁰
- “72[%] of respondents either incorrectly identified or were unsure of which states were part of the 13 original colonies.”²²¹

Because of this lack of historical knowledge and the absence of change in how Native Americans have been portrayed, it is easy to see how Americans simultaneously ascribe to several competing ideologies when it comes to their general perception of Native Americans:

- Native Americans as the “noble savage”;²²²
- Gambling as a “sin” industry;²²³

²¹³ *Id.* at 15.

²¹⁴ *Id.* at 8.

²¹⁵ See Francisca M. Antman & Brian Duncan, *American Indian Casinos and Native American Self-Identification*, (Jan. 6, 2023), https://spot.colorado.edu/~antmanf/Antman&Duncan_NativeAmericanIdentity&Casinos.pdf.

²¹⁶ *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test*, INST. FOR CITIZENS & SCHOLARS (Oct. 3, 2018), <https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² RECLAIMING NATIVE TRUTH, *supra* note 135, at 20.

²²³ See Will Kenton, *Sin Stock*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sinfulstock.asp> (Apr. 14, 2022).

- Assimilation as the ultimate goal,²²⁴
- Capitalism and competition as core tenets of the U.S.;²²⁵
- The idea that every American can and should pull themselves up by their bootstraps.²²⁶

Americans believe in monoliths; it is easier than comprehending complexity. The U.S. consists of many different groups of people from all over the world. Instead of allowing different customs to thrive within a singular entity, the goal instead is assimilation. Assimilation through the melting pot—the idea that all cultures can mix seamlessly. In reality, the risk these different groups face is that the melting pot is a bottomless pit of Americana where traditions and cultures are forever lost.

The irony of the melting pot is that in a country supposedly built upon individualism, every group is seen as a monolith: White America, Black America, Red America, Blue America—this contradiction delves deep into the core of the country. Contradictions, however, cannot exist within a monolith.

The Noble Savage image is contradicted by the Rich Casino Indian image. The RNT writes that the “most persistent and toxic negative narrative is the myth that many Native Americans receive government benefits just for being Native,”²²⁷ and the “most pervasive dual narratives are that Native Americans live in abject poverty on reservations, yet they are flush with casino money.”²²⁸ Many participants in the RNT’s survey “did not recognize that just a fraction of Native Americans are growing wealthy from casinos[,]” most likely because “casinos represent[] one of the most visible Native American ‘presences’ in American life for participants outside of Indian Country.”²²⁹

Gaming is seen as a “sin” industry, a dirty business with a history that reeks of corruption and the Mafia.²³⁰ The image of Tonto in a backroom card game does not complement itself. Concerns over corruption in gaming were addressed by Congress in IGRA § 2702(2).²³¹

Enter Contradiction Number Six: Native Americans are a victimized, noble, oppressed people who also generate billions of dollars a year engaging in

²²⁴ RECLAIMING NATIVE TRUTH, *supra* note 135, at 14.

²²⁵ See William H. Janeway, *The Evolution of American Capitalism*, PROJECT SYNDICATE (Aug. 27, 2021), <https://www.project-syndicate.org/onpoint/review-ages-of-american-capitalism-by-william-h-janeway-2021-08>.

²²⁶ See Nicholas Kristof, *Pull Yourself Up by Bootstraps? Go Ahead, Try It*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/opinion/economic-mobility.html>.

²²⁷ *Be a Myth Buster*, ILLUMINATIVE (2022), https://illuminative.org/wp-content/uploads/2022/06/Be_A_Myth_Buster.pdf.

²²⁸ RECLAIMING NATIVE TRUTH, *supra* note 135, at 11.

²²⁹ *Id.* at 59.

²³⁰ See Kenton, *supra* note 223.

²³¹ Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2702(2).

a legalized sin. Native Americans, of course, are a monolith, so if some tribes are making money, that means all Native Americans have gotten rich from gaming.

Assimilation inside the melting pot is the U.S.'s ultimate goal, and nothing is more American than the free market. Competition among businesses is what allows the invisible hand of the market to operate freely. This is the United States of America, where anyone can become anyone through a little ingenuity and hard work. Everyone (purportedly) plays by the same rules under American capitalism.

And through assimilation comes the restraints required to be a “true” American—namely, the inability to ask for a handout. Except Native Americans do not satisfy this requirement because they are legally entitled to federal funding.²³² Except Native Americans also generated close to \$35 billion in gaming revenue in 2019.²³³ Except Native Americans’ average quality of life standards are very poor compared to the American average.²³⁴ Except Native Americans are still expected to play by the same competition rules as everyone else because they are Americans.²³⁵

Native Americans face such vast levels of wealth inequality. On the one hand, a multi-billion-dollar-a-year industry; on the other, quality of life standards reminiscent of developing countries.

Interest convergence is the belief that minority groups will achieve civil rights victories only when their interests align with the interests of the majority group.²³⁶ It is nearly impossible for progress in the U.S. to be made without the support of the majority—the white moderate.²³⁷ The true political power lies with them. In his *Letter from Birmingham Jail*, Dr. Martin Luther King, Jr. wrote that he had “almost reached the regrettable conclusion that the Negro’s great stumbling block in the stride toward freedom is . . . the white moderate . . . who *paternalistically* feels that he can set the timetable on another man’s freedom.”²³⁸

²³² A QUIET CRISIS, *supra* note 13, at 116.

²³³ NAT’L INDIAN GAMING COMM’N, GROSS GAMING REVENUE TRENDING https://www.nigc.gov/images/uploads/reports/2015_Gross_Gaming_Revenue_Trending.pdf (last visited Mar. 12, 2023).

²³⁴ A QUIET CRISIS, *supra* note 13, at 113.

²³⁵ See Theo Witcomb & B. ‘Toastie’ Oaster, *supra* note 145.

²³⁶ See David Shih, *A Theory to Better Understand Diversity, And Who Really Benefits*, NPR: CODE SWITCH (Apr. 19, 2017, 11:49 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/523563345/a-theory-to-better-understand-diversity-and-who-really-benefits>.

²³⁷ See Victor Ray, *The White Moderates MLK Warned Us About*, CNN (Jan. 15, 2022), <https://www.cnn.com/2022/01/15/opinions/mlk-white-moderates-voting-rights-filibuster-ray/index.html>.

²³⁸ Martin Luther King, Jr., *Letter from Birmingham Jail*, ATL. MONTHLY (Aug. 1963), https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf (emphasis added).

It is much easier to progress as a minority group in the U.S. if the group is perceived as a monolith.²³⁹ As MLK found, the issue with the white moderate is that they are slow to demand progress even if the need for justice is clear and unambiguous.²⁴⁰ To the white moderate, MLK fought for civil rights.²⁴¹ Unlike the current characterization of Native Americans, there was not a contradiction within the message.

The difference with Native Americans is that to most Americans, they do not exist outside of this general characterization. In reality, however, they are not a monolith. The U.S. once again finds itself attempting to strike the balance between Jackson's approach and Marshall's, between being abusive and being paternalistic, between treating Native Americans like "sinful" capitalists or treating them like an impoverished community in need of saving.

Are Native Americans billionaire capitalists, or are they a weak, oppressed people who need the government's help just to survive? The answer is both, but nuance does not exist inside the borders of the United States of America, nor does a knowledge of history. All that exists within the U.S. is the present moment, locked inside a vacuum of time and space.

Therefore, Native Americans are rich casino owners fully embracing the free market with the true American spirit. And, as purely assimilated American capitalists, it would be inappropriate for them to ask for the government assistance they are legally entitled to, because to do so would be un-American.

VI. NEXT STEPS

Who is to blame for the current (nonexistent) state of the federal trust responsibility? The guilty party is everyone. There is no one conclusive moment or decision that led to today. The through-line from the Indian Removal Act to the Court's holding in *Castro-Huerta* to what lies ahead in the future remains unbroken.

When a problem is as large as this one, it is easy for apathy to fester. A world where Native Americans are treated with the respect and protection they deserve only manifests with a lot of effort and changes to the current status quo. However, there are a few practical steps that can be taken today that will generate substantial benefits tomorrow.

First, it is imperative that Congress replaces IGRA with a more updated, comprehensive federal bill that rebalances the current power dynamic between the tribes and the states. The goal of this bill should be to stop the states' expansion into tribal gaming now, before it becomes untenable in the future.

An updated IGRA should focus on two things. Number one, it must expand how tribes can use gaming revenue. IGRA § 2710(b)(2)(B) designates

²³⁹ See RECLAIMING NATIVE TRUTH, *supra* note 135 at 18.

²⁴⁰ See *Civil Rights Movement Timeline*, HISTORY, <https://www.history.com/topics/black-history/civil-rights-movement-timeline> (Jan. 19, 2021).

²⁴¹ King, Jr., *supra* note 238.

five ways the tribes can legally use their gaming revenue: “to fund tribal government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies.”²⁴² An update to IGRA should be geared toward allowing tribes to have more freedom when it comes to how they use their money to diversify their business ventures. If Native Americans successfully diversified their business ventures, it would hinder the ability of states to pressure them into outrageous compacts since tribes would now have multiple baskets in which to keep their monetary eggs. If tribes are to be considered true American capitalists, allow them the freedom to operate as such. It is hard to ever consider tribes as self-sufficient when they are not fully monetarily sovereign.

Number two, an updated IGRA must allow tribes to offer mobile betting outside of Native American lands. IGRA currently has a narrow scope that only allows tribes to offer gambling on reservation lands.²⁴³ While this made sense back in 1988, the rapid technological advancements since then have rendered this limited scope obsolete. The main goal of any tribal gaming law should be to guarantee tribes a level playing field. Mobile betting needs to be allowed outside of reservation lands to prevent tribes from falling behind commercial gaming operators.

Second, federal assistance must be increased. Federal funding has decreased significantly, and programs designed to help Native Americans are nearly nonexistent.²⁴⁴ Increased funding, while simultaneously providing more opportunities for tribal members to enroll in federal programs, will help increase quality of life standards on reservations. An important area to start with is fixing and improving tribal infrastructure. Many reservations do not have adequate sewer systems, roads, or medical services.²⁴⁵ This effort would prove to be an important first step in fixing the broader issue of restoring the federal trust responsibility. Even though restoring the federal trust responsibility to its appropriate level would take time, fixing tribal infrastructure and increasing federal assistance to Native Americans would immediately improve day-to-day reservation life—which would help real people right now.

Third, Native Americans need more congressional representation. In 2019, the Cherokee Nation appointed its first delegate to the House of Representatives.²⁴⁶ This right stems from the 1835 Treaty of New Echota, which provides that the Cherokee Nation “shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision

²⁴² 25 U.S.C. § 2710(b)(2)(B).

²⁴³ *Id.* § 2719(a).

²⁴⁴ BROKEN PROMISES, *supra* note 19, at 4.

²⁴⁵ *Id.* at 1.

²⁴⁶ Graham Lee Brewer, *Cherokee Nation Names First Delegate to Congress*, NPR (Sept. 3, 2019, 9:43 AM), <https://www.npr.org/2019/09/03/756048206/ Cherokee-nation-names-first-delegate-to-congress>.

for the same.”²⁴⁷ If confirmed, the Cherokee Nation’s appointed delegate Kim Teehee, who was previously appointed by President Barack Obama to serve as a policy advisor for Native American affairs,²⁴⁸ would act as a non-voting House delegate in much the same way as the delegates from the District of Columbia and other territories do.²⁴⁹ Teehee would be permitted to vote in committee, though not on the House floor, as well as serve as the Cherokee ambassador in the House.²⁵⁰ The story of the Cherokee Nation would no longer be rendered invisible.

This move would also serve the additional purpose of breaking the media’s representation of Native Americans as a monolith. When a hurricane hits Puerto Rico and aid is needed, news outlets know whom to interview: Resident Commissioner Jenniffer González-Colón.²⁵¹ The Resident Commissioner becomes the de facto face of Puerto Rico during times like these, as that is the Resident Commissioner’s job: to be the face and voice of an entire population’s plea for assistance.²⁵² If and when Teehee is approved by Congress, she will become the face and voice of the Cherokee Nation. This serves as a break from the status quo, and a potential restructuring of the general American perception of Native Americans. If appointed, every interview Teehee gives would afford a new opportunity to reshape the image of the Cherokee Nation in the minds of currently dormant potential allies. A news clip could go viral, and emotional pleas could finally be sufficiently heard.

Upon federal recognition, every tribe should be given this right. At the bare minimum, allowing representatives to be the faces and voices of these tribes would foster needed nuance and complexity in the public’s perception of Native Americans and crack the cognitive dissonance that currently functions as a plague on Native American communities. At the most, it could serve as the first step to rallying the allies required to push for real change.

²⁴⁷ INDIAN AFFAIRS: LAWS AND TREATIES 443 (Charles J. Kappler ed. 1904)

²⁴⁸ See Brewer, *supra* note 246.

²⁴⁹ Chuck Hoskin Jr., *Cherokee Nation’s Path to Seating Congressional Delegate*, THE HILL (Mar. 4, 2022, 6:30 PM), <https://thehill.com/blogs/congress-blog/politics/596946-chokeee-nations-path-to-seating-congressional-delegate>.

²⁵⁰ *Id.*

²⁵¹ See *What is a Resident Commissioner?*, U.S. CONGRESSWOMAN JENNIFFER GONZÁLEZ-COLÓN, <https://gonzalez-colon.house.gov/about/what-resident-commissioner> (last visited Jan. 1, 2023); *Congress Oversees Recovery Process from Maria*, U.S. CONGRESSWOMAN JENNIFFER GONZÁLEZ-COLÓN (Sept. 15, 2022) <https://gonzalez-colon.house.gov/media/press-releases/congress-oversees-recovery-process-hurricane-maria>.

²⁵² See Steven Inskeep, *Rep. Jenniffer González-Colón on Puerto Rico’s Fiona Damage, 5 Years After Maria*, NPR (Sept. 21, 2022), <https://www.npr.org/2022/09/21/1124223468/rep-jennifer-gonzalez-colon-on-puerto-ricos-fiona-damage-5-years-after-maria>.

VII. CONCLUSION

Prosperous Native American communities once spanned the entire continent; now most of them have been forcefully consigned to live in incredibly bleak conditions on smaller and smaller patches of this same ancestral land. After the formation of the U.S., the fortunes of Native Americans swung perilously on a perpetual pendulum. Native American populations, traditions, and customs have survived through eras of removal, termination, and assimilation, as well as the shattered promises of the federal trust responsibility.

With the legitimization of tribal gaming, Native Americans have finally found an industry in which they can generate revenue independently. However, while some tribes have become rich from gaming, the majority have not. Most tribes have become poorer and poorer, making the experience of many Native individuals one of poverty. Meanwhile, media representation remains hopelessly stuck in the U.S.'s racist past, continually reaffirming the view that the "noble savages" are mere sidekicks to more complex and interesting white Americans.

This dissonance, along with the contradictions inherent in the newly prominent rich Casino Indian caricature, leads to inconsistent messaging which prevents the mobilization of potential allies. This confusion contributes to an altogether apathetic mindset. However, through increased and improved media representation, an updated IGRA, and real congressional representation, the paradoxical Native American monolith can be broken, forcing Americans to recognize the true poverty of reservation life and allowing allies to rally around them in solidarity by pressuring Congress to restore the promises of the federal trust responsibility. Until then, the Native American monolith will be one of capitalistic enterprise, because accepting the alternative would mean confronting the reasons why Native Americans have been brought so low.