

Prediction Markets:

The Developing Intertribal Governance and Cross-Jurisdictional Alliances Needed to Respond

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Legal Basics, Citations & Links

- *“Federal Indian law”* → federal government has “plenary” power over Indian/tribal affairs (purportedly to protect them from states and locals)
- Power is rooted in the *“Indian Commerce Clause”* [Constitution Art. I, Section 8, Clause 3 – *“The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”*]
- *Relevant legal authority:*
 - [Marshall Trilogy \[Johnson v. McIntosh, Cherokee Nation v. Georgia\] - Worcester v. Georgia \(21 U.S. \(8 Wheat.\) 543 \(1823\) - state laws do not apply in Indian Country](#)
 - <https://supreme.justia.com/cases/federal/us/480/202/#tab-opinion-1956991>
 - [Public Law 280 - officially known as Public Law 83-280 \(67 Stat. 588\) \(1953\), granted 6 states including California criminal jurisdiction in Indian Country over crimes by/against Indians and allowed civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts, but did not subject tribes to state civil laws or regulations.](#)
 - https://www.tribal-institute.org/lists/pl_280.htm
 - [California v. Cabazon Band of Mission Indians, 480 U.S. 202 \(1987\) - California state gambling laws were civil\(regulatory\), not criminal \(prohibitory\), and therefore did not apply in the state's Indian Country](#)
 - <https://supreme.justia.com/cases/federal/us/480/202/#tab-opinion-1956991>
 - [Indian Gaming Regulatory Act \(IGRA\), 25 U.S.C. §§ 2701, et seq. \(1988\)](#)
 - <https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act>

California v. Cabazon Band of Mission Indians (1987)

Court Syllabus for background (modified):

- Appellee Indian Tribes (the Cabazon and Morongo Bands of Mission Indians) located on reservations in Riverside County, CA.
- Each Band, pursuant to its federally approved ordinance, conducts on its reservation bingo games that are open to the public. The Cabazon Band also operates a card club for playing draw poker and other card games.
- California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games.
- The Tribes instituted an action for declaratory relief in Federal District Court, which entered summary judgment for the Tribes, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Ninth Circuit Court of Appeals affirmed.

California v. Cabazon Band of Mission Indians (1987)

➤ U.S. Supreme Court holdings:

- 1) State law can apply to tribes on reservations if Congress expressly says so, but it had not done so here under P.L. 280.
 - P.L. 280 gave certain specified states broad jurisdiction over criminal offenses committed by or against Indians within Indian country but only limited, nonregulatory civil jurisdiction (i.e., private civil litigation in state court)
 - **BIG CABAZON TAKE-WAY** - For a state to exercise its P.L. 280 criminal jurisdiction and enforce its laws on reservations, it must be determined whether the law to be applied is criminal or civil in nature:
 - Criminal/prohibitory – does not allow anyone to conduct the activity (state law can be applied on-reservation)
 - Civil/regulatory – allows at least some people to conduct the activity, subject to regulation (cannot be applied)
 - Because CA state law allowed others to conduct bingo and card games, subject to regulation, the state/local laws are civil and cannot be applied to tribes in Indian Country

California v. Cabazon Band of Mission Indians (1987)

➤ U.S. Supreme Court holdings:

2) Even though not expressly authorized by Congress, state and local laws may be applied to on-reservation activities of tribes and tribal members under certain circumstances.

- Depends on whether state authority is preempted by the operation of federal law.
- State jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.
- Federal/tribal interests in tribal self-government and governmental revenue (strong) vs. purported state interest in prohibiting on-reservation tribal gaming to keep out organized crime while allowing others off-reservation to game (weak)
 - What happened to Marshall Trilogy's *Worcester v. Georgia* (1832) holding that the federal government has exclusive jurisdiction over tribes and state laws do not apply in Indian country?
 - Weighing of interests = uncertainty
- OTHER BIG CABAZON TAKE-AWAY → resulted in IGRA (1988)

Indian Gaming Regulatory Act (1988)

- Created 3 classes of gaming: class I (traditional), class II (bingo/poker), class III (all other forms of gaming)
- Gaming must be conducted (at least partially) on “Indian lands” (~Indian Country in or prior to 1988, unless an exception applies) under a federally approved tribal gaming ordinance in a state that allows that class of gaming to be conducted (i.e., permitted in some form under state law)
 - *In 2000, California voters passed Proposition 1A to amend the state Constitution to allow tribes to operate class III slot machines, lotteries, and banked card games while giving the Governor authority to negotiate tribal gaming compacts*
- If class III, then also requires a tribe to negotiate a compact with the state for matters directly related to the operation of the games, including allocation of jurisdictional matters between the tribe and state
 - *Federal government transferring its plenary power to the state to deal with local effects of tribal gaming (i.e., akin to P.L.-280)*
- W. Flagler Assocs., Ltd. v. Haaland, 71 F. 4th 1059 (D.C. Cir. 2023) – upheld Seminole Tribe of Florida compact with State of Florida allowing for online sports wagering by patrons anywhere within the state, where servers were located on Tribe’s Indian lands, state law legalized such gaming for the Tribe, and the compact authorized its play only on the Tribe’s Indian lands while allocating jurisdiction among the Tribe and State for various regulatory elements of the gaming as is permitted by IGRA.
- *After 30+ years of brick & mortar gaming operations, tribes started exploring and operating online sports wagering, but then came prediction markets... [see handout for more background on these]*

Prediction Markets

➤ Tribal and Other Push Back on Prediction Markets/Sports-Event Contracts during the Current Administration

1) Hurdles In Front

- Alignment with the current Administration's crypto push
- New CFTC Chairman Selig's pro-DCM stance
 - Withdrawal of 2024 Proposed Rule regarding event contracts and 2025 Staff Advisory memorandum on sports event contracts, with CFTC moving towards proposal of new regulations for event contracts
 - Encouraging more aggressive involvement as agency amicus in DCM litigation

2) Partnerships (and Strange Bedfellows???) with Tribes

- American Gaming Association (AGA) – commercial gaming trade organization with whom tribes have had a fraught relationship in the past (e.g., tribes in California who fought back the opposition of AGA-member casinos from Las Vegas in the 1990s and early 2000s) now has a potentially existential need to cooperate with tribes and vice versa
- States and their Attorneys General – the historical jurisdictional and other disputes with tribes are joined by a need to advance the role of tribal and state gaming regulators
- Federal overreach vs. states' rights and tribal sovereignty

3) Vehicles for Moving Forward

- Federal legislation introduction to clarify intent of CEA and the CFTC's role/jurisdiction
- Federal court litigation
 - Tribal amicus briefing in DCM v. state regulator litigation
 - Tribal affirmative litigation
- State court litigation – the Massachusetts regulators' example

Conclusion with Q & A

Thank you!