

Fall 2011

## Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective

Gavin Clarkson

Jim Sebenius

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# Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective

Gavin Clarkson\*

Jim Sebenius\*\*

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\* Associate Professor, University of Houston Law Center.

\*\* Gordon Donaldson Professor of Business Administration, Harvard Business School. David Kotchen, Trond Jacobsen, and Brian McClatchey provided valuable research assistance.

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## I. INTRODUCTION

For Indian tribes throughout most of U.S. history, “the people of the states where they are found are often their deadliest enemies.”<sup>1</sup> Recently, however, tribes and states have been able to find sufficient common ground in order to work cooperatively in certain areas, particularly as state budget deficits continue to worsen.<sup>2</sup> In some instances, Congress has mandated such cooperation.<sup>3</sup> In other instances, the cooperative activity has arisen between the parties themselves as a practical matter.<sup>4</sup> In either situation, tribes and states often find themselves at the bargaining table.

The negotiation dynamics of tribal-state compacting, however, may be challenging. The parties have experienced centuries of animosity. The “shadow of the law” relevant to the substance of the negotiation is ill-defined or easily misunderstood, as is often the case with Indian law. Questions about the boundaries of Indian Country<sup>5</sup> may be unsettled and subject to litigation. Finally, significant cultural differences obscure common ground that may facilitate a successful negotiation.

While the range of tribal-state compacts is large,<sup>6</sup> Indian gaming has generated the greatest amount of attention in recent years.<sup>7</sup> Although Indian

1. United States v. Kagama, 118 U.S. 375, 384 (1886).

2. See, e.g., *infra* Part VI.A.

3. See *infra* notes 91-95 and accompanying text.

4. See *infra* notes 96-104 and accompanying text.

5. 18 U.S.C. § 1151 defines “Indian [C]ountry” as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

6. In addition to gaming compacts, tribes and states have negotiated compacts covering such areas as law enforcement, child protection, environmental management, hunting and fishing, and taxation. See *infra* Part II.C.

7. See NAT’L INDIAN GAMING ASS’N, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2005, at 22 (2005), available at [http://www.indiangaming.org/NIGA\\_econ\\_impact\\_2005.pdf](http://www.indiangaming.org/NIGA_econ_impact_2005.pdf) [hereinafter INDIAN GAMING IN 2005]; see also NAT’L GAMBLING IMPACT STUDY COMM’N, NATIONAL GAMBLING IMPACT STUDY

tribes have conducted gaming operations since the 1970s, the advent of large-scale tribal casinos dramatically increased the economic impact of Indian gaming.<sup>8</sup> Most of the tribes that launched successful casinos had a common rags-to-riches story, but the story of the Mashantucket Pequots is unique. Having been nearly annihilated more than 350 years earlier,<sup>9</sup> the Pequots opened their Foxwoods casino in 1992<sup>10</sup> and negotiated a compact with the State of Connecticut that allowed the tribe to install slot machines in return for a share of the slot proceeds.<sup>11</sup> With the increased revenue from slots, Foxwoods now generates more than \$1 billion annually, with the state receiving significant revenues from the tribe.<sup>12</sup>

Over the last two decades, the immense success of the Pequot gaming operation and the substantial revenue shared with the State of Connecticut have become almost mythical in nature, with other states often misunderstanding the lessons of the Foxwoods story. When state budgets faced unprecedented fiscal woes, many state officials erroneously assumed that the revenue sharing provisions of the Pequot compact were a tax that the state was entitled to impose; officials then sought to obtain “Connecticut deals” for their respective states.<sup>13</sup> Other states mistakenly saw Foxwoods as a natural consequence of the Indian Gaming Regulatory Act (IGRA).<sup>14</sup> The true story behind the Pequot gaming compact, however, is one of strategic negotiation and the leveraging of tribal sovereignty into economic opportunity. Not included in the “myth” is the fact that the tribe only agreed to share revenues with the state in return for a valuable de facto monopoly: the exclusive right

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COMMISSION REPORT 2-10 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf>.

8. See INDIAN GAMING IN 2005, *supra* note 7, at 27-28.

9. See KIM ISAAC EISLER, REVENGE OF THE PEQUOTS 30-36 (2001).

10. *Id.* at 17.

11. See *infra* Part VI.

12. See, e.g., *Foxwoods Reports October 2011 Slot Revenue*, CASINOMAN.NET, <http://www.marketwatch.com/story/foxwoods-reports-october-2011-slot-revenue-2011-11-15> (Connecticut has received more than \$3 billion from the tribe.).

13. See, e.g., Michael DeArmond & Michael Fisher, *Gaming Fight Far from Over; Casinos: Ballot Losses Spur Tribes, Card Clubs and Horse Tracks to Consider Other Options*, PRESS – ENTERPRISE (Riverside, Cal.), Nov. 5, 2004, at A1 (discussing Gov. Schwarzenegger’s efforts to obtain gaming revenue from tribes after claiming the “Indians are ripping us off” during his electoral campaign); Editorial, *Big Chief Pataki*, WALL ST. J., Mar. 1, 2002, at A14 (discussing legislation allowing Gov. Pataki to negotiate gaming compacts with New York tribes); Susannah Rosenblatt, *Tribes with Casino Profits Averse to Aiding Strapped States*, L.A. TIMES, July 10, 2003, <http://articles.latimes.com/2003/jul/10/nation/na-gamble10> (discussing tribal negotiations with Gov. Gray Davis in California and profit sharing by the Pojoaque in New Mexico); see also Lolita C. Baldor, *Tribes Complain States Getting Greedy over Gambling Revenue*, LAS VEGAS SUN, July 10, 2003, <http://www.lasvegassun.com/news/2003/jul/10/tribes-complain-states-getting-greedy-over-gamblin/>.

14. See *infra* Part III.E for a discussion of IGRA.

to operate slot machines in Connecticut, which in turn satisfied the state's desire to limit the expansion of gaming.<sup>15</sup>

The other danger of over-elevating the "myth" of the Foxwoods negotiations is to overlook the need for compacts outside the gaming context. Thus, in order to appreciate the lessons of Foxwoods, those negotiations must be placed in the context of Indian law. The very existence of the Indian gaming phenomenon arose out of a core tenet of Indian law: Indian tribes are sovereign governmental entities.<sup>16</sup> In the case of Foxwoods, the revenue sharing provision was not a tax but was instead a voluntary, negotiated transfer between sovereigns.<sup>17</sup>

Part II of this Article discusses the sovereign nature of tribal governments and reviews the history of tribal sovereignty, concluding with an examination of tribal-state compacting outside of the gaming context. Part III examines the origins of Indian gaming, focusing on the development of the legal framework which governs tribal gaming activities and necessitates the negotiation of tribal-state gaming compacts. Given the need for tribal-state negotiations, Part IV presents a framework for structuring and analyzing negotiations. Part V applies that framework in the retelling of the first part of the Foxwoods story, the negotiations regarding the original gaming compact. The story of Foxwoods, however, has a second chapter involving the subsequent negotiations over installing slot machines at the casino, and Part VI uses the same analytic framework.

Part VII evaluates the change in the negotiation landscape in response to the Foxwoods negotiations and assesses the impact of technological changes on Indian gaming. Part VIII concludes by arguing that, although the relative tribal-state positions may have changed, much of the fundamental negotiation dynamic remains the same, and thus many of the lessons of Foxwoods are applicable today.

## II. A BRIEF HISTORY OF INDIAN LAW AND POLICY

While each tribe has its own separate history, the struggle to maintain a separate, sovereign existence is common to most tribes, and while Pequot history has many unique elements, their struggle and ultimate triumph similarly demonstrate that the "first key to economic development is sovereignty."<sup>18</sup> Although the status of tribes as separate sovereigns has not always been clear, the concept has still played a vital part in tribal and U. S. history.

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15. *See infra* Part VI.B.

16. *See infra* Part II.B.

17. *See infra* Part V.

18. Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT (FED. RES. BANK OF KANSAS CITY) 5, 5 (1997).

### A. Early Pequot History

The Pequots were once one of the most powerful Indian nations in New England, but the English almost annihilated them during the Pequot War of 1637.<sup>19</sup> Thirty years later, as a compensatory measure, the Pequots obtained a reservation of approximately 2000 acres at Mashantucket,<sup>20</sup> which would eventually become Ledyard, Connecticut.

Colonial settlers, however, gradually encroached upon the Pequots' land. In 1761, after settlers had appropriated half the Pequots' territory, a judge deeded that half to the settlers.<sup>21</sup> In 1855, a county court expropriated and sold 800 of the remaining 1000 acres of Pequot land to neighboring property owners.<sup>22</sup>

The population on the 200-acre Pequot reservation dwindled. By the 1950s, Elizabeth George, grandmother of eventual tribal chairman Richard Hayward, was the only Pequot living on the reservation, and her resolve earned her the nickname "Iron Lady."<sup>23</sup> She led a successful campaign against a Connecticut plan to turn the reservation into a state park.<sup>24</sup> In time, George's half-sister joined her, and until the mid-1970s, the two remained the only residents on the reservation.<sup>25</sup> In 1975 Richard Hayward was elected tribal chairman.<sup>26</sup> He left his job as a pipe fitter at the nearby Electric Boat shipyard, moved onto tribal land, and set about rebuilding the reservation's Pequot population.<sup>27</sup> Hayward managed to entice some tribe members back by offering used mobile homes to those who settled on Pequot land, using homes the tribe had acquired from the federal government for \$1000 to \$1500 each.<sup>28</sup> By 1979, with twenty-three year-round residents on the reservation

19. See EISLER, *supra* note 9, at 31-36.

20. *Id.* at 42 (characterizing the land as the "worst, most snake-infested, rock-ledge, swamp-filled, uninhabitable land in the whole [area]"). The name Mashantuxet, as the area was referred to at the time, means "much-wooded land." *Id.*

21. See *Mashantucket Pequot Tribal Nation Timeline*, MASHANTUCKET PEQUOT MUSEUM & RES. CENTER, <http://www.pequotmuseum.org/TribalHistory/TribalHistoryOverview/TimelineofEvents.htm> (last visited Sept. 17, 2011) [hereinafter *Timeline*].

22. Tracie Rozhon, *Connecticut Tribes Seek Land and Identity*, N.Y. TIMES, July 12, 1981, § 11, at 1.

23. BRUCE E. JOHANSEN, *NATIVE AMERICANS TODAY: A BIOGRAPHICAL DICTIONARY* 125 (2010).

24. See *Hold on to the Land*, MASHANTUCKET PEQUOT MUSEUM & RES. CENTER, <http://www.pequotmuseum.org/ExhibitGalleries/LifeontheReservationII/HoldontotheLand.htm> (last visited Sept. 17, 2011).

25. EISLER, *supra* note 9, at 53.

26. *Timeline*, *supra* note 21.

27. See DONALD LEE FIXICO, *AMERICAN INDIANS IN A MODERN WORLD* 193 (2006).

28. William G. Flanagan & James Samuelson, *The New Buffalo – but Who Got the Meat?*, FORBES, Sept. 8, 1997, at 148, available at <http://www.forbes.com/forbes/1997/0908/6005148a.html> [hereinafter *New Buffalo*]; Hilary Waldman, *With*

and many other people visiting and helping with development efforts, the tribe received a \$1 million loan from the Department of Housing and Urban Development to build new homes.<sup>29</sup>

As tribe members returned, the Pequots sought to reclaim lost land. In 1976 the tribe sued the State of Connecticut, claiming that the sale of 2000 acres of Pequot land by the State of Connecticut violated Federal law.<sup>30</sup> In particular, the Pequots argued that Connecticut failed to follow a 1790 law requiring the federal government to approve all sales of Indian land, and that the 1855 sale of Pequot land violated that law.<sup>31</sup>

Seven years later, urged by the Connecticut Congressional delegation to settle the suit, President Ronald Reagan signed the 1983 Connecticut Settlement Act.<sup>32</sup> The Act provided the Pequots with \$900,000 in federal funds for a combination of land purchases and economic development projects.<sup>33</sup> In 1984, using funds from the settlement, the Pequots purchased 650 acres of land that previously had been part of the reservation.<sup>34</sup> They also bought a pizza restaurant and started a gravel business and a maple sugar production enterprise.<sup>35</sup>

Land expansion and the tribe's handful of new businesses attracted scattered Pequots back to the reservation. Those who could demonstrate ancestry of at least one-sixteenth Mashantucket Pequot were admitted to the tribe and could establish residency on tribal lands.<sup>36</sup> By 1985, roughly thirty Pequots lived on the reservation.<sup>37</sup> With mixed marriages and families of intermarried couples, the reservation's total population was approximately seventy-five.<sup>38</sup>

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*Wealth Comes Return to Heritage*, HARTFORD COURANT, Dec. 22, 1991, at A1, available at [http://articles.courant.com/1991-12-22/news/0000207975\\_1\\_mashantucket-pequots-tribe-drum](http://articles.courant.com/1991-12-22/news/0000207975_1_mashantucket-pequots-tribe-drum) [hereinafter Waldman, *Return to Heritage*].

29. See Waldman, *Return to Heritage*, *supra* note 28.

30. See EISLER, *supra* note 9, at 81-82.

31. Peggy McCarthy, *Pequot Indians Planning Bingo on Reservation*, N.Y. TIMES, Feb. 17, 1985, § 23, at 1.

32. *Tribal History*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <http://www.mashantucket.com/tribalhistory.aspx> (last visited Sept. 17, 2011).

33. See 25 U.S.C. § 1754 (2006).

34. See *650 Acres Regained by Indians*, N.Y. TIMES, Sept. 2, 1984, § 1, at 55.

35. DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 437 (2006).

36. See Nick Ravo, *Business Sense and Bingo: An Indian Tribe Prospers*, N.Y. TIMES, Dec. 3, 1987, § B, at 1, available at <http://www.nytimes.com/1987/12/03/nyregion/talk-pequot-reservation-business-sense-bingo-indian-tribe-prospers.html?pagewanted=all&src=pm>.

37. McCarthy, *supra* note 31.

38. *Id.*

### B. Tribes as Separate Sovereigns<sup>39</sup>

Although the immense success of Foxwoods was years away, the tribe's land claim and its recognition as a tribe laid the foundation upon which Foxwoods would be built. The question then arises, how could a tribe like the Pequots engineer such a return from the brink of extinction? The partial answer lies in the concept of tribes as separate sovereigns whose existence extends beyond the lifetimes of the individual members of a tribe at any given point in time. A tribe continues to exist as a sovereign entity so long as one member remains. The forces that could cause a tribe to dwindle down to one member, however, have been present since the formation of this nation.

As the newly formed United States began its inexorable march westward, it developed an insatiable appetite for more land. Unfortunately,<sup>40</sup> the Indians occupied the desired land. To satisfy western expansion goals, the Indian lands usually were not taken by force but were instead ceded<sup>41</sup> to the United States by treaty in return for, among other things, the establishment of a trust relationship.<sup>42</sup> The federal government thus assumed a guardian-ward

39. Portions of this Part draw heavily from two articles previously published by the lead author in the *Michigan Journal of Race and Law* and the *North Carolina Law Review*. See Gavin Clarkson, *Not Because They Are Brown, but Because of Ea\**: *Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317 (2002) [hereinafter Clarkson, *Not Because They Are Brown*]; Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007) [hereinafter Clarkson, *Tribal Bonds*].

40. That is, unfortunately for the Indians.

41. Tribes in the East were more likely to be removed to Oklahoma, whereas tribes in the West tended to have their land holdings reduced to smaller reservations. Compare Treaty of Dancing Rabbit Creek, U.S. – Choctaw Nation, Sept. 27, 1830, reprinted in 1 INDIAN AFFAIRS: LAWS AND TREATIES 310-11 (Charles J. Kappler ed., 1904) (signed by Choctaw leaders at *bok chukfi ahithac* – “the little creek where the rabbits dance” – providing for the removal from their ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma), with Fort Laramie Treaty, U.S. – Sioux Nation, Apr. 29, 1868, 15 Stat. 635, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 109 (Francis Paul Prucha ed., 3d ed. 2000) [hereinafter Fort Laramie Treaty] (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation).

42. The scope of the trust relationship is multi-faceted. “Many treaties explicitly provided for protection by the United States.” 1 FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.03[1] (2005). See, e.g., Treaty with the Kaskaskia, U.S. – Kaskaskia Nation, art. II, Aug. 13, 1803, 7 Stat. 78, reprinted in 1 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 41, at 67 [hereinafter Treaty with the Kaskaskia]; Treaty with the Creeks, U.S. – Creek Nation, art. II, Aug. 7, 1790, 7 Stat. 35, reprinted in 1 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 41, at 25 [hereinafter Treaty with the Creeks]; see also *United States v. Kagama*, 118 U.S. 375 (1886).



relationship with the Indians. This relationship was assumed not only because of prevailing racist notions of Indian societal inferiority,<sup>43</sup> but also because the trust relationship often was consideration for the Indians' relinquishment of land.<sup>44</sup> Notably, the Indians and the federal government entered into these treaties as government-to-government relationships among collective political entities.<sup>45</sup> From the beginning of its political existence, the United States "recognized a measure of autonomy in the Indian bands and

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These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, – dependent largely for their daily food; dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the [E]xecutive, and by [C]ongress, and by this court, whenever the question has arisen.

*Id.* at 383-84.

Other treaties provided the means for subsistence. *See, e.g.*, Fort Laramie Treaty, *supra* note 41, at 112 (providing for subsistence rations for the Sioux); Treaty with the Western Cherokees, U.S. – Cherokee Nation, Art. 8, May 6, 1828, 7 Stat. 313, *reprinted in* 1 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 41, at 290 [hereinafter Treaty with the Western Cherokee] (“[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also a just compensation for the property he may abandon . . . .”); 1 COHEN, *supra*, § 1.03[3].

43. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 588 (1832) (“The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling . . . .”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (“[Indians] are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.”); *Johnson v. McIntosh*, 21 U.S. 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . .”). These three cases, often referred to as the “Marshall Trilogy,” form much of the foundation for federal Indian law, Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627-28 (2006), particularly the notion of the guardian-ward relationship and the concept of Indian tribes as “domestic dependent nations.” *Cherokee Nation*, 30 U.S. at 2.

44. *See, e.g.*, Fort Laramie Treaty, *supra* note 41, at 110; Treaty with the Western Cherokees, *supra* note 42, at 288; Treaty with the Kaskaskia, *supra* note 42, at 67; Treaty with the Creeks, *supra* note 42, at 26-27.

45. *See, e.g.*, Fort Laramie Treaty, U.S. – Sioux Nation, Sept. 17, 1851, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 41, at 84 (referring to the United States and the Sioux collectively as “the aforesaid nations”); Treaty of Fort McIntosh, Jan. 21, 1785, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 41, at 5; Treaty with the Six Nations, U.S.-Six Nations, Oct. 22, 1784, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 41, at 4.

tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept."<sup>46</sup>

While the formal existence of the United States began at a point in time when the prevailing policy of treaty-making recognized tribal sovereignty, such an orientation was not permanent. In the 1870s, Congress ceased making treaties with the Indians<sup>47</sup> and instead developed a policy<sup>48</sup> that was characterized as a "mighty pulverizing engine,"<sup>49</sup> a policy that would destroy tribalism and force Indians to assimilate into dominant society as individuals.<sup>50</sup> The policy devastated the tribes, and its consequences remain highly problematic.<sup>51</sup>

The United States changed its policies toward tribal government structures again in 1928. In response to a report documenting the failure of federal Indian policy,<sup>52</sup> Congress passed the Indian Reorganization Act of 1934

46. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 2 (1994).

47. Treaty making with the Indians was ended by Congress in 1871: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . ." Abolition of Treaty Making, 16 Stat. 544, 566 (1871) (codified as amended at 25 U.S.C. § 71 (2006)), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 41, at 135.

48. *See* General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (2006)). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. *See* Harjo v. Kleppe, 420 F. Supp. 1110, 1121 (D.D.C. 1976), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978). While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. *See* ROBERT WINSTON MARDOCK, *THE REFORMERS AND THE AMERICAN INDIANS* 212 (1971).

49. 35 CONG. REC. 81, 90 (1901). In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty *pulverizing engine* to break up the tribal mass [acting] directly upon the family and the individual.

*Id.* (emphasis added).

50. DAVID GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW*, 141-42 (4th ed. 1998).

51. *See* Cobell v. Norton, 392 F.3d 461, 463-65 (D.C. Cir. 2004); *see also* Class Action Settlement Agreement at 2-6, Cobell v. Salazar, No. 1:96CV01285-JR (D.D.C. Dec. 10, 2010), *available at* [http://www.indiantrust.com/docs/sa\\_1\\_19\\_11.pdf](http://www.indiantrust.com/docs/sa_1_19_11.pdf) (class action settlement agreement for the *Cobell* case).

52. *See generally* INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (Lewis Meriam et al. eds., 1928). The primary thrust of this report was to document the failure of federal Indian policy during the allotment period. 1 COHEN, *supra* note 42, § 1.05.

(IRA).<sup>53</sup> In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt constitutions and to reestablish structures for governance.<sup>54</sup> Congress also passed specific acts<sup>55</sup> to reverse the effects of previous policies established with the intention of destroying the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma.<sup>56</sup> Congressional policy had once again reversed itself – instead of destroying tribal sovereignty, the federal government was now encouraging it.<sup>57</sup> As a result, many tribes began to thrive economically.<sup>58</sup> The IRA “provided a powerful stimulus to tribal governmental organization and in many cases so strengthened that organization as to enable continued development despite fluctuations in administrative policy.”<sup>59</sup>

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53. See Indian Reorganization Act (Wheeler-Howard Act) of 1934, Pub. L. No. 73-383, 48 Stat. 984, (codified as amended at 25 U.S.C. §§ 461-94 (2006)).

54. Clarkson, *Tribal Bonds*, *supra* note 39, at 1027.

55. The Oklahoma Indian Welfare Act of 1936 (OIWA), Pub. L. No. 74-816, 49 Stat. 1967 (codified as amended at 25 U.S.C. § 503 (2006)), “permitted Oklahoma Indians to take advantage of most of the provisions of the 1934 Wheeler-Howard Act, which ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds.” *Morris v. Watt*, 640 F.2d 404, 409 n.11 (D.C. Cir. 1981).

56. The Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495, and the Five Tribes Act, Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137, were both designed to destroy tribal cohesiveness among the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations. See *Harjo v. Kleppe*, 420 F. Supp. 1110, 1133 (D.D.C. 1976), *aff’d sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); Kirke Kickingbird, “*Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!*” from “*Oklahoma Hills*” by Woody Guthrie, 29 TULSA L.J. 303, 306, 319, 322 (1993). The Five Tribes Act was particularly brutal in its dismantling of any sense of political autonomy:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions for adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

*Harjo*, 420 F. Supp. at 1129.

57. Clarkson, *Tribal Bonds*, *supra* note 39, at 1027.

58. See GETCHES ET AL., *supra* note 50, at 197.

59. *Id.*

Federal Indian policies would oscillate through one more cycle in the next half-century.<sup>60</sup> A 1949 Report on Indian Affairs by the Hoover Commission recommended “‘complete integration’ of Indians [as a federal policy] goal so that Indians would move ‘into the mass of the population as full . . . citizens.’”<sup>61</sup> As a result, in 1953 the official congressional policy changed to one of ending the Indians “status as wards of the United States.”<sup>62</sup> For the tribes that were “terminated” under this policy, the results were disastrous.<sup>63</sup>

Just as Congress had reversed itself when it repudiated allotment and passed the IRA, the policy of termination also was short-lived.<sup>64</sup> Ironically, termination had the opposite effect in its attempt to detribalize.<sup>65</sup> Indians finally recognized that federal policy too often was directed at destroying tribalism.<sup>66</sup> From that perspective, they concluded “that only tribal control of Indian policy and lasting guarantees of sovereignty could assure tribal survival in the United States.”<sup>67</sup> With the Kennedy and Johnson administrations’ abandonment of the termination policy, “programs such as the Economic Opportunity Act [were passed, which] recognized the permanency of Indian tribes and the importance of social investment in reservation communities.”<sup>68</sup>

President Richard Nixon was arguably the most ardent supporter of Indian sovereignty, and he issued a landmark statement calling for a new federal policy of “self-determination” for Indian nations.<sup>69</sup> Perhaps the greatest of Nixon’s contributions to Indian tribal sovereignty was Public Law 638, the Indian Self-Determination and Education Assistance Act of 1975, which authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services.<sup>70</sup> Acting at times pursuant to federal court

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60. Clarkson, *Tribal Bonds*, *supra* note 39, at 1027.

61. GETCHES ET AL., *supra* note 50, at 204 (quoting Commission on the Organization of the Executive Branch of Government. Indian Affairs: A Report to Congress (Mar. 1949)).

62. H.R. Con. Res. 108, 83rd Cong. (1953).

63. *See* 1 COHEN, *supra* note 42, § 1.06.

64. Clarkson, *Not Because They Are Brown*, *supra* note 39, at 331.

65. *See* GETCHES ET AL., *supra* note 50, at 224.

66. *Id.*

67. *Id.*

68. *Id.* at 226.

69. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970). *See also* Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451-1453 (2006)).

70. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-450n (2006)).

orders,<sup>71</sup> the Bureau of Indian Affairs (BIA)<sup>72</sup> assisted tribes in reconstituting their governmental structures.

During this period, the U.S. Supreme Court handed down *Morton v. Mancari*,<sup>73</sup> one of the most important Indian cases of the modern era. The Court held that tribal Indians were “members of quasi-sovereign tribal entities”<sup>74</sup> and that Indian status was thus “political rather than racial in nature.”<sup>75</sup> *Mancari* involved the BIA’s hiring preference for Indians, but the Court extended its holding to other areas of Indian policy as “long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” and the policy “is reasonable and rationally designed to further Indian self-government.”<sup>76</sup>

Thus, through acts of Congress and Supreme Court rulings, tribes are ensconced within the federalism framework. In the words of Justice Sandra Day O’Connor, “Today, in the United States, we have three types of sovereign entities – [T]he Federal government, the states, and the Indian tribes. Each of the[se] sovereigns . . . plays an important role . . . in this country.”<sup>77</sup>

### C. Self Determination and Tribal-State Compacting

In addition to the reaffirmation of a government-to-government relationship between tribes and the federal government, states began to realize that tribes were not going away and that in the federalist system there were three separate sovereigns. In part because of this recognition of a federalist triumvirate, a delicate but vital spirit of cooperation between tribes and states has grown across the nation. For example, the Western Governors’ Association has determined that, especially in rural areas, tribes and states face many of

71. See, e.g., *Morris v. Watt*, 640 F.2d 404, 416 (D.C. Cir. 1981); *Harjo v. Kleppe*, 420 F. Supp. 1110, 1147 (D.D.C. 1976), *aff’d sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). In both instances, the court order reinstated tribal constitutions from the 19th century. *Morris*, 640 F.2d at 414-16; *Harjo*, 420 F. Supp. at 144-46. The BIA subsequently assisted the tribes in redrafting modern constitutions. See Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 487-89 (2002).

72. The BIA is part of the Department of the Interior and is the primary agency responsible for managing Indian affairs, although other agencies such as the Department of Justice and Health and Human Services also have specialized departments for interaction with Indian tribes. See *Indian Affairs*, U.S. DEPARTMENT INTERIOR, <http://www.bia.gov/WhoWeAre/index.htm> (last visited Sept. 13, 2011).

73. 417 U.S. 535 (1974).

74. *Id.* at 554.

75. *Id.* at 553 n.24.

76. *Id.* at 555; see, e.g., *United States v. Antelope*, 430 U.S. 641, 646 (1977); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480 (1976); *Fisher v. Dist. Court*, 424 U.S. 382, 390-91 (1976) (per curiam).

77. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

the same problems,<sup>78</sup> and the Association has begun projects among state governors, tribal chairmen, and interested groups to promote these mutual concerns.<sup>79</sup> In addition, the Conference of State Chief Justices has recognized the jurisdictional confusion that inevitably arises between a tribe and a state. Accordingly, the Conference has begun implementing strategies to promote communication, cooperation, and comity between state and tribal courts.<sup>80</sup> Emphasizing the need for mutual respect between the two courts and their common interest in serving all of the people within their jurisdictions, the Conference reiterated that effective enforcement is needed to create an orderly environment and that tribal and state authorities should be full participants in justice.<sup>81</sup> One of their specific recommendations is to “make intergovernmental agreements that provide for cross-utilization of facilities, programs, and personnel by state and tribal court systems.”<sup>82</sup>

Certain states have developed actual frameworks for entering into intergovernmental agreements with tribes.<sup>83</sup> For example, South Dakota has enacted a statute that states, “It is the policy of the state to consult with a tribal government regarding the conduct of state government programs [that] have the potential of affecting tribal members on the reservation.”<sup>84</sup> South Dakota also recognizes tribal court orders and judgments.<sup>85</sup> In Wisconsin, an executive order provides that state agencies “recognize the unique government-to-government relationship between the State of Wisconsin and Indian Tribes” and “accord Tribal governments the same respect accorded other governments.”<sup>86</sup>

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78. FRANK POMMERSHEIM, *BRAID OF FEATHERS* 160 n.98 (1995) (citing 1990 ANNUAL REPORT TO THE WESTERN GOVERNORS' ASSOCIATION, *A NEW ERA FOR STATE-TRIBAL RELATIONS* 14 (1990)).

79. *Id.* (citing 1990 ANNUAL REPORT TO THE WESTERN GOVERNORS' ASSOCIATION, *A NEW ERA FOR STATE-TRIBAL RELATIONS* 15-18).

80. *See, e.g.*, Conference of Chief Justices, *Resolution 5: To Encourage Greater Collaboration Between State Courts and Tribal Courts to Protect Native American Children*, INDIGENOUS PEOPLES ISSUES AND RESOURCES (Jan. 26, 2011), available at <http://indigenouspeoplesissues.com/attachments/article/8875/CCJ-COSCA-Resolution2011.pdf>.

81. Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 156 (1995).

82. *Id.* at 156; *see also* Dennis Gibb, Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 927, 929-30 (1999).

83. *See, e.g.*, S.D. CODIFIED LAWS § 10-12A-4.1 (Westlaw through 2011 Exec. Order 11-1 and Sup. Ct. R. 11-17).

84. *Id.* § 1-54-5.

85. *Id.* § 1-1-25.

86. Wis. Exec. Order No. 39 (Feb. 27, 2004), available at [http://www.ncai.org/ncai/resource/agreements/wi\\_sovereignty\\_executive\\_order.pdf](http://www.ncai.org/ncai/resource/agreements/wi_sovereignty_executive_order.pdf).

Even Nevada, which fought a contentious battle against tribal jurisdiction in *Nevada v. Hicks*,<sup>87</sup> has entered into a number of tribal-state cooperative agreements and has experienced amicable relationships with tribes. The Nevada Attorney General described the relationship as follows: “[the current atmosphere] allows the state and the tribes to approach each other (warily certainly, but not from the narrow vantage point of absolute mistrust of motive and ultimate intent) on a government-to-government basis.”<sup>88</sup> Also in Nevada, the Attorney General has issued a number of opinions delineating tribal-state cooperation,<sup>89</sup> and the legislature has passed a number of statutes regarding tribal-state cooperation.<sup>90</sup>

Some of the tribal-state cooperation has been a result of congressional mandate. For example, the Indian Child Welfare Act (ICWA)<sup>91</sup> identifies the Tribal Courts as the vehicle for the implementation of federal policy. ICWA mandates that tribes have exclusive jurisdiction over certain Indian child custody proceedings and requires their transfer from state to tribal court.<sup>92</sup> Under ICWA, states shall give full faith and credit to any Indian tribe proceeding applicable to Indian child custody.<sup>93</sup> ICWA also authorizes states and tribes “to enter into agreements with each other respecting care and custody of Indi-

87. 533 U.S. 353 (2001).

88. Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 268 n.202 (1991).

89. *See, e.g.*, Indians; Jurisdiction; Criminal Law; Arrest, Nev. Op. Att’y Gen. No. 19 (1994) (“Tribal authorities are authorized by [state statute] NRS 171.1255 to arrest certain non-Indians who violate state law in Indian country. There is no requirement for an agreement between the affected tribe and any other political entity before such authority may be exercised.”); Indians; Gaming; Liquor, Nev. Op. Att’y Gen. No. 3 (1991) (suggesting that the county enter into a cooperative agreement with the Fort Mojave Tribe to identify rights and obligations between the State and Tribal Law enforcement); *see also* Nevada Highway Patrol Jurisdiction on Indian Reservations, Nev. Op. Att’y Gen. No. 42 (1980) (“[T]he State . . . would be interfering with the right of Indians to govern themselves if the State were allowed to exercise jurisdiction over tribal Indians committing traffic violations on state highways within the exterior bounds of the Indian reservation.”) A Nevada Highway Patrol officer cannot cite/arrest a tribal Indian in Indian country, he only has the power over non-Indians. *Id.*

90. *See, e.g.*, NEV. REV. STAT. § 41.430 (West, Westlaw through 2009 75th Regular Session and 2010 26th Special Sess.) (Jurisdiction over Proceedings in which Indians are Parties) (stating that Nevada assumes jurisdiction over offenses and civil action by or against Indians in Indian country under PL 280 unless the tribe did not consent to the state’s jurisdiction); *id.* § 233A.020 (setting up an Indian Commission); *see also id.* § 171.1255 (authorizing tribal police to make arrests outside reservation boundaries when the tribal officer is in fresh pursuit of a person who committed a crime on the reservation); *id.* § 233A.130 (stating that jurisdiction of administrative agencies is not extended over Indian country without consent).

91. 25 U.S.C §§ 1901-63 (2006 & Supp. IV 2010).

92. *Id.* § 1911(a)-(b).

93. *Id.* § 1911(d).

an children and jurisdiction over child custody proceedings.”<sup>94</sup> Congressional requirements of state-tribal cooperation extend outside the arena of child welfare as well.<sup>95</sup>

In addition to mandated federal policy, tribes and states also have initiated cooperative activity on their own. Formal and informal agreements between state or local governments and tribes cover a wide range of issues. These legal instruments take many forms, including memoranda of understanding, memoranda of agreement, inter-governmental agreements, compacts, and collaboration agreements.<sup>96</sup> Professor Frank Pommersheim’s 1991 law review article<sup>97</sup> detailed eighty-seven such agreements,<sup>98</sup> including agreements on jurisdiction,<sup>99</sup> the environment,<sup>100</sup> hunting and fishing,<sup>101</sup> health and welfare programs,<sup>102</sup> and Indian burial sites.<sup>103</sup>

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94. *Id.* § 1919.

95. *See, e.g.*, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010)); Safe Homes for Woman Act of 1994, Pub. L. No. 103-322, § 40221(a), 108 Stat. 1796, 1927 (codified as amended at 18 U.S.C. § 2265 (2006)) (providing full faith and credit accorded to all protection orders from other jurisdictions, including tribal courts); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450 (2006 & Supp. IV 2010)); Johnson O’Malley Act of 1934, Pub. L. No. 167, 48 Stat. 596 (codified as reenacted and amended at 25 U.S.C. §§ 452-57 (2006)); Tribally Controlled Schools Act of 1988, Pub. L. No. 100-297, 102 Stat. 385 (codified as amended at 25 U.S.C. §§ 2501-11 (2006)) (stating that tribes can operate schools formerly run by BIA); Indian Child Protection and Family Violence Prevention Act of 1990, Pub. L. No. 101-630, 104 Stat. 4544 (codified as amended at 25 U.S.C. §§ 3201-11 (2006 & Supp. IV 2010)) (authorizing the exchange of child abuse information between Indian Nations and state governments and dictating that Tribal governments shall be treated the same as other federal government entities).

96. *See, e.g.*, Jerry Gardner, *Improving the Relationship Between Indian Nations, the Federal Government, and State Governments*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/articles/mou.html> (last visited Sept. 15, 2011).

97. *See* Pommersheim, *supra* note 88.

98. *Id.* at 266. Professor Pommersheim’s tally was as follows:

Jurisdiction or PL 280 Agreements	5
Environmental Agreements	13
Hunting and Fishing	18
Health and Welfare Programs	17
Water Agreements	11
Indian Burial Sites	4
Law Enforcement	7
Economic or Taxing Agreements	10
Education Agreements or Awareness Projects	2

*Id.*

99. *Id.* Pursuant to Public Law 280,

Congress mandated that certain states accept jurisdiction on reservations, while permitting other states to assume jurisdiction on reservations, if cer-



States have numerous and powerful interests in creating agreements with tribes,<sup>104</sup> as evidenced by the fact that the states have negotiated hundreds, if not thousands, of such agreements since the 1980s. An empirical examination of this activity indicates that, as he suspected, Professor Pommersheim barely scratched the surface in terms of assessing the level of tribal-state compacting activity.

### 1. Education

The National Congress of American Indians estimates that as many as 450,000 Indian children are in elementary and secondary schools in the United States.<sup>105</sup> Only 10% of these children attend BIA schools on reservations,

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tain conditions were met (Both Nebraska and Wisconsin have entered into limited Public Law 280 jurisdiction with two tribes.). For example, the Omaha and Winnebago tribes have retroceded their jurisdiction and, in conjunction with this retrocession, have entered into cross-deputization agreements between tribal law enforcement and state patrol. Meanwhile, Maine has a special jurisdiction arrangement with tribes pursuant to the Maine Indian Claims Settlement Act which eliminated litigation between the states and tribes.

*Id.* at 266 n.184 (internal citations omitted). Pommersheim also identified at least seven law enforcement agreements. *Id.* at 265-66.

100. *Id.* Pommersheim found seven general environmental agreements in Wisconsin, two in Montana, one in Idaho, two in Minnesota. *Id.* at 266 n.186. He also found a statute in New Mexico concerning wastewater. *Id.* His article also identified eleven separate water rights agreements. *Id.* at 265-66. If hunting and fishing agreements are included, he found that eight states have this type of agreement. *Id.* at 266 n.187.

101. *Id.* at 265-66. "Eight states have this type of agreement. Wisconsin has at least 10 agreements in this area, while South Dakota has agreements with at least two separate tribes." *Id.* at 266 n.187.

102. *Id.* at 265-66.

Montana has eight agreements with tribes dealing with health and welfare programs. Minnesota has one dealing with child custody. Wisconsin has a Division of Economic Support with a Tribal Affairs Unit from which tribes may solicit state money for federal projects such as day care, substance abuse shelters, and job programs.

*Id.* at 266 n.188.

103. *Id.* at 265-66. "These are more statutory in nature but would undoubtedly require tribal lobbying of a state legislature to pass the state law. *See* OR. REV. STAT. § 97.740, § 390.235 (1989)." *Id.* at 266 n.189.

104. *See generally* 1 COHEN, *supra* note 42, § 6.05 (Tribal-State Cooperative Agreements).

105. NATIVE AM. RIGHTS FUND, TRIBAL-STATE PARTNERSHIPS: COOPERATING TO IMPROVE INDIAN EDUCATION 1 (2000), available at <http://www.narf.org/pubs/misc/copyncap.htm> [hereinafter TRIBAL-STATE PARTNERSHIPS].

with the remainder mostly attending public schools, half of which are off-reservation.<sup>106</sup>

The number of agreements relating to education that tribes and other sovereigns consummated is difficult to measure, in part because some agreements involve broad state-level directions to local school districts to cooperate as a general matter with area tribes. While Professor Pommersheim reported only two such agreements in 1991, the number of such agreements has grown substantially in the past two decades to include a broad array of specific educational issues.

Education-related agreements address funding,<sup>107</sup> sharing of student data,<sup>108</sup> the provision of culture-specific educational services,<sup>109</sup> truancy,<sup>110</sup> incorporation of tribes into local school boards for contracting and governance,<sup>111</sup> disbursement of Impact Aid funds,<sup>112</sup> programs to increase educational achievement,<sup>113</sup> special education funding and services,<sup>114</sup> transportation,<sup>115</sup> and even tribal sponsorship of sports teams in North Dakota.<sup>116</sup>

106. U.S. DEP'T OF EDUC., INDIAN NATIONS AT RISK: AN EDUCATIONAL STRATEGY FOR ACTION 2 (1991).

107. The Mandan, Hidatsa, and Arikara Nations in North Dakota, for example, concluded an agreement with the state in which they operate three tribal schools as public school districts and receive state funds. TRIBAL-STATE PARTNERSHIPS, *supra* note 105, at 5.

108. The Rosebud Sioux Tribe and the Navajo Nation, for example, have concluded agreements with their surrounding states to ensure tribal access to data about tribal members who are students in state and local public schools. *See id.* at 3.

109. One example of a cultural-specific education service is language instruction. *See* RJS & ASSOCS., EXTERNAL EVALUATION FINAL REPORT, ROSEBUD SIOUX TRIBAL EDUCATION DEPARTMENT & TRIBAL EDUCATION CODE 8 (1999), available at <http://eric.ed.gov/PDFS/ED463910.pdf>. The Rosebud Sioux Tribe, for example, concluded agreements with the Todd County School District and the state Tribal Education Department and Sinte Giske University to cooperatively develop a Lakota Studies curriculum for K-12 schools. *See id.* at 11.

110. The Bowler School District in Wisconsin and the Stockbridge-Munsee Community Band of Mohican Indians have an arrangement that addresses truancy problems. TRIBAL-STATE PARTNERSHIPS, *supra* note 105, at 3.

111. In 2000, Florida authorized the Seminole and Miccosukee Tribes to establish governance over educational matters relating to special improvement districts under state law. *See id.* at 5 (citing FLA. STAT. § 285.18 (2000)). Minnesota conferred to White Earth Tribal Council governance over the Pine Point public school located on the reservation. *Id.* (citing MINN. STAT. § 128B.011 (2000)). Agreements next door in North Dakota direct state funding to operate tribal grant schools as public school districts under state law. *Id.*

112. Cherokee Central Schools concluded an agreement with the local Swain County School District, for example, in which Impact Aid funds are used by the district to provide such services as driver's education and test scoring, while the tribe provides language instructors for the district and their Indian students. *Id.* at 3.

113. The Skokomish Tribe, for example, has partnered with the Hood Canal School District and the Superintendent of Public Instruction for Washington so that

In at least one instance, a state has elevated cooperation with its tribes to the level of a constitutional mandate. Montana's Constitution recognizes the "unique cultural heritage of the American Indians" and declares a commitment to "the preservation of their cultural integrity."<sup>117</sup> This objective is reflected in a bill passed in 1999 requiring each school district to work "cooperatively with Montana tribes," or others nearby, "when providing instruction or when implementing an educational goal or adopting a rule related to the education of each Montana citizen, to include information specific to the cultural heritage and contemporary contributions of American Indians, with particular emphasis on Montana Indian tribal groups and governments."<sup>118</sup>

The Native American Rights Fund reviews a number of cooperative agreements relating to the education of Indian children and provides access to the text of these agreements.<sup>119</sup> Examples include an agreement between a reservation boarding school and the local school district in the *Cheyenne-Eagle Butte School Cooperative School Agreement*, which touches on funding, personnel, curriculum, transportation, and the rights of students.<sup>120</sup>

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the tribe is involved in boosting the educational achievement of tribal members through curricular changes and increased family participation. *Id.*

114. An inter-agency Agreement between the Turtle Mountain Special Education Department and the Turtle Mountain Agency Schools provides for the pooling of special education resources available at the BIA school under tribal grants and control. NATIVE AM. RIGHTS FUND, INDIAN EDUCATION LEGAL SUPPORT PROJECT: COOPERATIVE AGREEMENTS IN INDIAN EDUCATION 91 (1998), *available at* <http://www.narf.org/pubs/edu/green.pdf> [hereinafter COOPERATIVE AGREEMENTS].

115. The Keams Canyon Boarding School and the Hopi Junior/Senior High School have concluded an MOA to optimize use of school buses. *Id.* at 37.

116. By agreement, a process was put in place to enable tribes to apply to the North Dakota High School Activities Association to sponsor junior and high school teams. *Id.* at 7.

117. MONT. CONST. art. 10, § 1.

118. MONT. CODE ANN. § 20-1-501 (West, Westlaw through July 1, 2011, and all 2010 ballot measures).

119. COOPERATIVE AGREEMENTS, *supra* note 114, at 5-7.

120. *Id.* at 11-22. Other agreements include two between Turtle Mountain Band of Chippewa and the Dunseith Public School District and with the Belcourt School District, and between the Lummi Tribe and the Ferndale School District. *Id.* at 5-7. Other tribes that have concluded agreements with state or county governments include the Rosebud Sioux, the Navajo Nation, the Chippewa-Cree Tribe of the Rocky Boy's Reservation in Montana, and the Confederated Tribes of the Grand Ronde Reservation in Oregon, which "work with their states, school districts, tribal colleges, and state universities in areas of teacher training, school accreditation, youth leadership programs, and parental, family, and community involvement programs." TRIBAL-STATE PARTNERSHIPS, *supra* note 105, at 5.

## 2. Law Enforcement

States and tribes frequently use intergovernmental agreements to strengthen law enforcement and public safety for Indian and non-Indian communities. Unfortunately, high rates of criminal victimization in Indian Country, often of Indians by non-Indians, are frequently coupled with the reluctance of non-Indians to prosecute.<sup>121</sup> These realities have encouraged the negotiation of a broad range of law enforcement intergovernmental agreements. Now numbering more than 150 separate agreements involving twenty-two states, their subsidiary jurisdictions, and more than seventy-five tribes,<sup>122</sup> these agreements exist to clarify the complex jurisdictional questions relating to law enforcement in Indian Country and to achieve greater efficiencies in the use of law enforcement personnel and resources.<sup>123</sup>

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121. See Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-Oliphant Guardian and the Dual-Edged Nature of Parens Patriae*, 2010 U. ILL. L. REV. 1119, 1119-20 (2010).

122. See, e.g., *Law Enforcement Agreements*, NAT'L CONGRESS AM. INDIANS, <http://www.ncai.org/Law-Enforcement-Agreements.100.0.html> (last visited Mar. 12, 2012).

123. Such Tribal-state compacts relating to law enforcement can include mutual aid agreements, see, for example, Grand Traverse Band, Leelanau County Sheriff's Log (Feb. 23, 2003), available at [http://www.ncai.org/ncai/resource/agreements/Grand Traverse Band Leelanau County Sheriff's Log.pdf](http://www.ncai.org/ncai/resource/agreements/Grand%20Traverse%20Band%20Leelanau%20County%20Sheriff's%20Log.pdf) (documenting the types of activities in which the Grand Traverse Band Tribal Police Department and the Leelanau County Sheriff provide mutual assistance for many illegal activities). Others cover extradition (see, e.g., NAVAJO NATION CODE ANN. tit. 17 § 1951 (2009)) and the gathering and use of evidence. See, e.g., Mashantucket Pequot Tribal Nation, Connecticut State Police and Mashantucket Pequot Gaming Enterprise Video/Audio Tape Evidence Protocol (2002), available at <http://www.ncai.org/ncai/resource/agreements/Mashantucket%20Pequot%20Video-Audio%20Evidence%20Protocol.pdf>. Additional compacts relating to law enforcement have been made in the area of interagency drug interdiction and enforcement. See, e.g., Paul Bunyan Narcotics Task Force, Inter-agency Agreement (Dec. 2001), available at [http://www.ncai.org/ncai/resource/agreements/mn\\_law\\_paul\\_bunyan\\_narcotics\\_task\\_force\\_interagency\\_agreement\\_between\\_leech\\_lake\\_band\\_of\\_ojibwe\\_indians\\_counties\\_december\\_2001.pdf](http://www.ncai.org/ncai/resource/agreements/mn_law_paul_bunyan_narcotics_task_force_interagency_agreement_between_leech_lake_band_of_ojibwe_indians_counties_december_2001.pdf) (comprising five northern Minnesota counties, the city of Bemidji, their associated law enforcement agencies, and the Leech Lake Band of Ojibwe Indians).

Cross-deputization is the single most common form of intergovernmental law enforcement agreement, at least one is in effect in most of the twenty-two states with some type of law enforcement agreement. See *Law Enforcement Agreements*, *supra* note 122. The Choctaws in Oklahoma, for example, have concluded that dozens of cross-deputization agreements have been executed between the state, counties, and towns, and more than 150 such agreements exist in Oklahoma alone. See *Compacts, Contracts, and Agreements*, OKLAHOMA INDIAN AFF. COMMISSION, [http://www.ok.gov/oiaac/Compacts, Contracts, and Agreements](http://www.ok.gov/oiaac/Compacts,_Contracts,_and_Agreements) (last visited Sept. 16, 2011) [hereinafter OKLAHOMA *Compacts*].

### 3. Taxation

A number of tribes and states have reached intergovernmental agreements related to taxation.<sup>124</sup> Tribes enjoy an exemption from state taxes,<sup>125</sup> which provide many substantial economic opportunities not available to the other sovereigns within the American federalist structure. Many states, however, fear revenue loss as tribal enterprises begin to compete with non-Indian enterprises subject to state taxation.<sup>126</sup> Thus, states resist the expansion of tax-exempt tribal enterprises when they can.<sup>127</sup> Sometimes both parties perceive gain in reaching a negotiated resolution.<sup>128</sup>

The State of Michigan and several tribes signed a broad taxation agreement that covers use taxes, fuel taxes, income taxes, tobacco taxes, and the Single Business Tax.<sup>129</sup> This agreement provides for a standardization of tax collection understandings about the disbursement of a portion of tax monies back to the tribes and includes, under certain conditions, the waiver of sovereign immunity in tax matters for the tribes and the state.<sup>130</sup>

Inter-jurisdictional management of parolees, enforcement of state law related to criminal activities and gaming, as well as the release of tribal employee records have also been regulated by compact. *See, e.g.*, Memorandum of Understanding Concerning Investigation and Prosecution of Violations of Certain State Laws on Santa Ana Pueblo Lands (Mar. 9, 2000), *available at* <http://www.ncai.org/ncai/resource/agreements/MOU - Pueblo of Santa Ana.pdf>; *see also Excerpt from Ordinance of Tulalip Tribes, Human Resources Ordinance*, NAT'L CONGRESS AM. INDIANS, *available at* <http://www.ncai.org/ncai/resource/agreements/TulalipTribesOrdinance Re Employee Records.pdf> (last visited Sept. 16, 2011).

124. *See Tax Agreements*, NAT'L CONGRESS AM. INDIANS, *available at* <http://www.ncai.org/Tax-Agreements.97.0.html> (last visited Sept. 16, 2011).

125. 1 COHEN, *supra* note 42, § 8.03[1][b].

126. *See* Judy Zelio, *Piecing Together the State-Tribal Tax Puzzle*, NAT'L CONF. ST. LEGISLATURES (Apr. 2005), <http://www.ncsl.org/default.aspx?tabid=12662>.

127. *Id.*

128. *Id.*

129. Tax Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan, 2 (Dec. 20, 2002), *available at* [http://www.michigan.gov/documents/SaultSteFinalTaxAgreement\\_61197\\_7.pdf](http://www.michigan.gov/documents/SaultSteFinalTaxAgreement_61197_7.pdf) [hereinafter Michigan-Chippewa Tax Agreement]. The State of Michigan concluded in 2002 a series of nearly identical tax agreements with Bay Mills Indian Community, Hannahville Indian Community, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of Potawatomi Indians, Pokagon Band of Potawatomi Indians, and the Sault Ste. Marie Tribe of Chippewa Indians. *See, e.g., id.* Apart from an appendix precisely defining the territory in which the agreement would be in effect, each of these agreements are identical. *See State/Tribal Tax Agreements and Amendments*, ST. MICH. DEP'T TREASURY, [http://www.michigan.gov/taxes/0,1607,7-238-43513\\_43517---,00.html](http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html) (follow hyperlinks to access tax agreements for each community) (last visited Sept. 16, 2011).

130. *See* Michigan-Chippewa Tax Agreement, *supra* note 129, at 4, 11.

In January 2002, the State of Nebraska and the Winnebago Tribe signed a taxation agreement governing the tribal sale of reformulated gasoline and other petroleum products, in which the tribe collects the state tax but receives 75% back from the state.<sup>131</sup> In Oklahoma, more than thirty tribes have entered into agreements with the state governing the taxation of motor fuels in the wake of a similar act by the state legislature.<sup>132</sup>

Tribal sales of tobacco often provide an attractive economic opportunity because, under most circumstances, tribes do not have the burden of state tobacco taxes.<sup>133</sup> Many tribes and states, however, share concerns relating to the health consequences of tobacco and prevention of youth smoking. States are concerned about revenue loss as consumers shift from vendors subject to state taxes to the tribal providers.<sup>134</sup> The State of Washington and its tribes have made several compacts relating to sharing revenues and managing the sale of cigarettes.<sup>135</sup> In Oklahoma, the Choctaw, Chickasaw, and Seminole Nations also compacted with the State of Oklahoma regarding tribal sale of tobacco products.<sup>136</sup> Per the agreements, the state receives tribal tax revenues but guarantees the tribes' taxation rates<sup>137</sup> and contributions to certain programs, such as education and health care.<sup>138</sup>

#### 4. Hunting and Fishing

Habitat co-management plans for wildlife and fishery resources are attractive to the federal government, state governments, and some tribes in or-

131. Zelio, *supra* note 126.

132. See *Motor Fuels Contracts*, OKLA. INDIAN AFF. COMMISSION, [http://www.ok.gov/oiaac/Compacts,\\_Contracts,\\_and\\_Agreements/index.html#motorfuels](http://www.ok.gov/oiaac/Compacts,_Contracts,_and_Agreements/index.html#motorfuels) (last visited Sept. 16, 2011).

133. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976) (stating that states lack jurisdiction to impose cigarette sales taxes on Indians within reservation boundaries).

134. Such a dispute is currently ongoing between tribes in New York and the State of New York. See *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 234-35 (N.Y. 2010), *cert. denied*, 131 S. Ct. 353 (2010).

135. See, e.g., *Cigarette Tax Contract Between the Jamestown S'Klallam Indian Tribe and the State of Washington* (2002), available at [http://www.ncai.org/ncai/resource/agreements/jamestown\\_cigarette\\_tax\\_agreement.pdf](http://www.ncai.org/ncai/resource/agreements/jamestown_cigarette_tax_agreement.pdf).

136. *Tobacco Compacts*, OKLA. INDIAN AFF. COMMISSION, [http://www.ok.gov/oiaac/Compacts,\\_Contracts,\\_and\\_Agreements/index.html#tobacco](http://www.ok.gov/oiaac/Compacts,_Contracts,_and_Agreements/index.html#tobacco) (last visited Sept. 16, 2011).

137. For example, the current compact between the State of Oklahoma and the Cherokee Nation puts forth a flat rate of \$6.65 total tax per carton of cigarettes. *Council Approves Tobacco Compact*, CHEROKEE NATION (Nov. 10, 2008), [http://cherokee.org/PressRoom/23805/Press\\_Article.aspx](http://cherokee.org/PressRoom/23805/Press_Article.aspx).

138. Press Release, Andrews Davis, P.C., *Seminole Nation Agrees to Tobacco Compact, Gov. Henry Says More to Follow* (Oct. 2, 2003), [http://web.archive.org/web/20040211045833/http://www.andrewsdavis.com/press\\_releases/10.02.2003.asp](http://web.archive.org/web/20040211045833/http://www.andrewsdavis.com/press_releases/10.02.2003.asp).

der to better protect the animal resources Indians and non-Indians enjoy.<sup>139</sup> These agreements pose certain risks to both parties and raise nettlesome issues for tribes.<sup>140</sup> In many cases, intergovernmental agreements can cut through the knot of confusing jurisdictions and reduce waste in the management of game and fish resources for the benefit of all parties.<sup>141</sup> Intergovernmental agreements also can provide tribal members with better access to traditional hunting and fishing areas, including off-reservation sites, and can help tribes protect reservation areas from non-Indian sportsmen. Given the ongoing debate regarding which entity has management authority over wildlife resources, state-tribal agreements may best meet the needs and rights of multiple user groups. This trend will accelerate as the successes of recent cooperative efforts become more apparent to stakeholders.

The most comprehensive compact relating to fisheries resources is the Columbia River Compact, developed in the wake of the *Boldt* decisions,<sup>142</sup> comprising the Oregon Fish and Wildlife Commission, the Washington Fish and Wildlife Commission, and the various tribes that have developed substantial fisheries.<sup>143</sup> This compact ensures tribal participation in decisions that may affect their fisheries while providing an institutional mechanism for the coordination of recovery and resource management plans and the sharing of tribal expertise.<sup>144</sup>

Promoted by Governor Gary Locke through the Office of Indian Affairs, the State of Washington signed a series of agreements with tribes relating to both subsistence hunting and fishing as well as recreational fishing and hunt-

139. See generally Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Eco-Systems, and Tribal Co-Management*, 20 J. LAND RESOURCES & ENVTL. L. 185 (2000).

140. Shelly D. Stokes, *Eco-System Co-Management Plans: A Sound Approach or a Threat to Tribal Rights?*, 27 VT. L. REV. 421, 421-22 (2003).

141. See Marren Sanders, *Eco-System Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty*, 15 BUFF. ENVTL. L.J. 97, 105-07 (2007).

142. See *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980) (Phase II), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Phase I), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

143. The Washington Department of Fish and Wildlife maintains an online digital depository of actions and deliberations by the commission. See *Columbia River Compact*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/fishing/crc/> (last visited Sept. 16, 2011).

144. See OR. FISH & WILDLIFE & WASH. DEP'T OF FISH & WILDLIFE, ACTION NOTICE: COLUMBIA RIVER COMPACT/JOINT STATE HEARING (2011), available at <http://wdfw.wa.gov/fishing/crc/2011/crc21jul11action.pdf> (regulating Treaty Indian Summer Chinook commercial fishery activities).

ing licenses.<sup>145</sup> The agreements were a product of the 1999 Centennial Accords implementation plan that institutionalized a government-to-government relationship between tribes and the state.<sup>146</sup> The parties to the agreements include the Departments of Ecology, Fish and Wildlife, and various tribes across the state.<sup>147</sup>

An Oregon Department of Fish and Wildlife report describes cooperative agreements and efforts ranging from hydropower licensing to access to game for ceremonial purposes, with many other cooperative efforts in between.<sup>148</sup> Arizona has signed seventeen separate agreements with eight tribes relating to game and fisheries management, ranging from hunting permits to turkey capture and relocation programs, and from predator management to wildlife law enforcement.<sup>149</sup>

#### D. Rationale for Compacting

At its most basic level, the availability of tribal-state cooperative agreements allows the states freedom to create contracts that meet the needs of their constituents. Without these agreements, states and their non-Indian citizens would have no access to Indian land for non-criminal matters that affect both groups, matters ranging from minor contractual issues such as auto repossession to land development and zoning issues. States would also be unable to enforce child-support agreements or have state court rulings enforced in Indian Country. In addition to decreasing the likelihood of reaching mutually satisfactory solutions to disputes, the absence of intergovernmental agreements would also contribute to a possible escalation to violence.<sup>150</sup>

145. See generally DRAFT: WASH. DEP'T FISH & WILDLIFE, CENTENNIAL ACCORD IMPLEMENTATION PLAN (2001), available at [http://web.archive.org/web/20100519230746/http://www.goia.wa.gov/govtogov/pdf/fish and wildlife.pdf](http://web.archive.org/web/20100519230746/http://www.goia.wa.gov/govtogov/pdf/fish%20and%20wildlife.pdf).

146. *Id.* at 4. The agreements also covered employment placement in resource management agencies, enforcement actions, formalized consultations, and dispute resolution mechanisms. *Id.* at 2-3, 5. For the most recent version of the Centennial Accord Implementation Plan, see WASH. DEP'T FISH & WILDLIFE, CENTENNIAL ACCORD IMPLEMENTATION PLAN (2010), available at <http://www.goia.wa.gov/govtogov/pdf/DepartmentOfFishAndWildlife.pdf>.

147. See WASH. ST. DEP'T ECOLOGY, CENTENNIAL ACCORD IMPLEMENTATION PLAN 1 (2001), available at [http://www.goia.wa.gov/govtogov/pdf/department of ecology.pdf](http://www.goia.wa.gov/govtogov/pdf/department%20of%20ecology.pdf) (last visited Oct. 1, 2011).

148. OR. DEP'T FISH & WILDLIFE, ODFW AND TRIBAL PARTNERSHIPS IN 2009, 1-2 (2009), available at [http://www.leg.state.or.us/cis/gov\\_to\\_gov/2009AnnualReports/ODFW - Gov to Gov 2009 FINAL.pdf](http://www.leg.state.or.us/cis/gov_to_gov/2009AnnualReports/ODFW-Gov%20to%20Gov%202009%20FINAL.pdf) [hereinafter ODFW PARTNERSHIPS].

149. See *Game & Fish*, ARIZ. COMM'N INDIAN AFFAIRS, <http://web.archive.org/web/20070810102843/http://www.indianaffairs.state.az.us/agreements/gamefish.html> (last visited Sept. 17, 2011).

150. This is particularly true in cases such as repossession. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983) ("A repossession without the



One example of the need for amicable negotiation between tribes and states occurred when the Rhode Island State Police staged an armed invasion of the Narragansett reservation to forcibly shut down a tribal tobacco store that was selling tobacco products without charging state sales taxes.<sup>151</sup> Fortunately, such violent confrontations are now the exception, and as tribes and states have found ways to work together, the areas of cooperation have expanded. In many instances, any political subdivision of a state can enter into cooperative agreements with tribes in pursuit of mutual interests.<sup>152</sup> For example, states and tribes have used inter-jurisdictional agreements to integrate their respective judicial systems so that the two remain separate and distinct, supporting rather than contradicting each other.<sup>153</sup> States also have found these agreements helpful in clarifying and simplifying the application of social policies, aiding the resolution of domestic disputes, and in dealing with

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consent of the trib[al] member also may escalate into violence, particularly if others join [in.]”).

151. See Gavin Clarkson, *Bull Connor Would Have Been Proud*, HARTFORD COURANT, July 20, 2003, at C3, available at [http://articles.courant.com/2003-07-20/news/0307200622\\_1\\_indian-tribes-indian-country-today-tribal](http://articles.courant.com/2003-07-20/news/0307200622_1_indian-tribes-indian-country-today-tribal).

152. In Oklahoma, the governor or a governing board of any political subdivision is authorized to negotiate and enter into intergovernmental cooperative agreements with tribal governments within the state to address issues of mutual interest. OKLA. STAT. tit. 74, § 1221 (Westlaw through 1st Reg. Sess. of 53rd Legis. 2011). Oregon law likewise authorizes local governments and state agencies to cooperate and enter into agreements with tribes. OR. REV. STAT. § 190.110 (West, Westlaw through Ch. 733 of the 2011 Reg. Sess.).

153. Agreements in this area include cross recognition of judgments, full faith and credit, comity, mutual enforcement of traffic laws, and the sharing of records, information, reports and resources, as well as administrative issues. South Dakota’s “joint exercise of governmental powers” statute” incorporates cooperation with Indian tribes by including them within the definition of “public agency” for the purposes of the statute. S.D. CODIFIED LAWS § 1-24-1(2) (West, Westlaw through 2011 Exec. Order 11-1 and Sup. Ct. R. 11-17). In Arizona, counties may enter into intergovernmental agreements with any tribal government for joint development of land and infrastructure and improvements to public facilities. ARIZ. REV. STAT. § 9-461.12 (Westlaw through the 1st Reg. Sess. and 3d Special Sess. of the 50th Leg. (2011)). Idaho authorizes local governments and state and public agencies to enter into agreements with tribes for the concurrent exercise of powers and transfer of real and personal property, and also exempts on-reservation sale of tangible property by a tribe from state taxation. IDAHO CODE ANN. §§ 63-602, 67-4002 (Lexis current through 2011 Reg. Sess.). Tribes in Oklahoma have also entered into agreements with the state to address mutual interests. OKLAHOMA *Compacts*, *supra* note 123. As of October 1999, they had jointly created thirty-one tobacco regulation compacts, eleven compacts regarding gaming, twenty-four contracts regarding motor fuel, and one agreement regarding the Temporary Assistance to Needy Families (TANF) program. See *id.*

issues surrounding religious practice.<sup>154</sup> In some states, this cooperation even extends to issues of mental health.<sup>155</sup>

Although the breadth of tribal-state compacting is extensive, gaming compacts have been the most prominent. More than twenty states have reached gaming agreements with more than 200 tribes that the Secretary of the Interior has approved and that operate under the oversight of the National Indian Gaming Commission.<sup>156</sup> The fact that a compact exists, however, does not indicate that a casino is in operation, let alone profitable.<sup>157</sup> As discussed in Part IV.B, however, tribes can also offer limited forms gaming even in the absence of a compact.<sup>158</sup> In order to understand the nuances of tribal gaming compacts, the origins of Indian gaming must be understood.

### III. A BRIEF HISTORY OF INDIAN GAMING

While commercial Indian gaming operations have sprung up only in the past quarter century, many tribes have longstanding traditions involving games of chance.<sup>159</sup> Blackfeet tradition recounts “how Na’pi (Old Man)

154. See, e.g., ODFW PARTNERSHIPS, *supra* note 148, at 1 (discussing agreements regarding wildlife management in support of tribal ceremonies and celebrations).

155. In Arizona, an involuntary commitment order from a tribal court is recognized as enforceable by any court of record in the state, and the Arizona Supreme Court is free to adopt rules regarding recognition of those tribal court orders. ARIZ. REV. STAT. § 12-136.

156. The NIGC website lists compacts with 246 tribes. See *Compacts*, NAT’L INDIAN GAMING COMMISSION, [http://www.nigc.gov/Reading\\_Room/Compacts.aspx](http://www.nigc.gov/Reading_Room/Compacts.aspx) (last visited Feb. 5 2012); see also *Gaming Compacts*, NAT’L CONGRESS AM. INDIANS, <http://www.ncai.org/Gaming-Compacts.103.0.html> (last visited Sept. 17, 2011). Note, however, that some of the compacts listed were not negotiated but were rather imposed by Secretarial Procedures. See, e.g., Class III Gaming Procedures for the Northern Arapaho Nation (Sept. 21, 2005), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Arapaho%20Tribe%20of%20the%20Wind%20River%20Reservation/arapahotribe092105.pdf>; see also *infra* Part V.B. discussing how the Pequots casino operation was also pursuant to Secretarial Procedures.

157. The Narragansett Tribe, for example, signed a compact with the State of Rhode Island but was subsequently ambushed by the late Senator John Chafee, Chafee attached a “midnight rider” to an omnibus appropriations bill, Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 330, 110 Stat. 3009 (1996) (codified as amended at 25 U.S.C. § 1708 (2006)), that made the Narragansetts the only tribe not covered by IGRA. See Matthew Thomas, Editorial, *Narragansetts Victimized*, PROVIDENCE J.-BULL., July 4, 1998, at A11.

158. The Poarch Band of Creek Indians, for example, operate a gaming facility yet they have neither a compact nor Secretarial Procedures, Part VII.B *infra* discusses these forms of Class II casinos.

159. Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the “Governor’s Veto” for Gaming on “After-Acquired Lands”*, 37 U. MICH. J.L. REFORM 1227, 1239 (2004).

brought the tribe the hoop and arrow game. . . . [And how] Blackfeet continue to play traditional betting games.”<sup>160</sup> The Blackfeet are not alone, as many tribes have such traditional games.<sup>161</sup> Thus Indian gaming is, in many respects, a new expression of an ancient cultural practice.<sup>162</sup>

### A. *The Early Years*

Legend has it that commercial gaming on Indian reservations in the United States began as a response to a fire that destroyed two trailers on the Oneida Indian reservation in Verona, New York, in 1975.<sup>163</sup> The reservation had neither a fire department nor firefighting equipment, and two Oneidas perished in the blaze.<sup>164</sup> To prevent such tragedies in the future, the Oneidas decided “to raise money for [their] own fire department . . . the way all the fire departments raise money . . . [through b]ingo.”<sup>165</sup> The Oneidas launched a bingo game in a double-wide trailer, offering prizes in excess of the limits permitted by New York law.<sup>166</sup> The Oneidas maintained that, because they were an Indian nation, they were not bound by state bingo regulations.<sup>167</sup> Tribe members claimed that their right of sovereignty entitled them to run their own game and to offer a jackpot large “enough to draw non-Indians – and their money – to a place they otherwise might never visit.”<sup>168</sup>

Subsequently, according to one Oneida tribal member, “the Seminoles got wind of it”<sup>169</sup> and began their own high-stakes bingo game in Hollywood, Florida, in 1979.<sup>170</sup> The Seminole tribe contracted with a non-Indian organization to build and manage its bingo hall.<sup>171</sup> The agreement called for the managers to receive 45% of the profits after repayment of a \$1 million con-

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160. Brad Jolly, Note & Comment, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 274 (1997).

161. Traditional games are denoted in IGRA as Class I gaming, which is completely beyond the reach of federal or state law. See 25 U.S.C. §§ 2703(6), 2710(a)(1) (2006).

162. McClatchey, *supra* note 159, at 1239.

163. Dennis McAuliffe, Jr., *Casinos Deal Indians a Winning Hand: Billions in Revenue Ease Tribes' Dependence on Federal Funds*, WASH. POST, Mar. 5, 1996, at A1. Other accounts suggest that Florida was the birthplace of Indian gaming. See William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 HASTINGS CONST. L.Q. 71, 72 (1993).

164. McAuliffe, *supra* note 163.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (internal quotation marks omitted).

170. *Id.*

171. *Seminole Tribe v. Butterworth*, 658 F.2d 310, 311 (5th Cir. 1981).

struction loan.<sup>172</sup> The enterprise was a success, and the Seminoles repaid the loan in less than six months.<sup>173</sup>

As tribal bingo operations grew more successful, states demanded a cut.<sup>174</sup> States unsuccessfully “sought to extend their laws over [tribal] lands to . . . prohibit, regulate, and/or tax tribal bingo operations.”<sup>175</sup> Whereas the district attorney in Madison County, New York, successfully shut down the Oneidas’ game, the Seminoles fought the state in the courts when Florida authorities tried to close the Seminoles’ bingo hall in 1981.<sup>176</sup> The Seminoles argued that Florida did not have the authority to prohibit gaming on their reservation, and the Fifth Circuit agreed,<sup>177</sup> relying upon *Bryan v. Itasca County*, in which the Supreme Court held that if a state regulates but does not prohibit an activity, it may not prohibit that same activity in Indian Country under P.L. 280.<sup>178</sup> Thus, the Seminoles secured the right to run their game and pay out unrestricted prizes.

### B. Gambling in Connecticut

In 1971, Connecticut legalized gambling when, during a fiscal crisis, the state government passed legislation sanctioning a state lottery, off-track betting, and horse racing.<sup>179</sup> In 1976, the state legislature authorized betting on greyhound racing as well as jai alai,<sup>180</sup> and created a state-run, off-track betting system.<sup>181</sup>

Despite the state’s efforts to regulate gambling, Connecticut-based greyhound racing and jai alai operations soon were enmeshed in scandal, and

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172. See WILLIAM N. THOMPSON, *NATIVE AMERICAN ISSUES: A REFERENCE HANDBOOK* 28 (2d ed. 2005).

173. RENÉE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT* 86 (2005).

174. See *id.* at 86-87.

175. McClatchey, *supra* note 159, at 1240; see CRAMER, *supra* note 173, at 86.

176. McAuliffe, *supra* note 163.

177. See *Seminole Tribe v. Butterworth*, 658 F.2d 310, 313 (5th Cir. 1981) (holding that Florida had no regulatory jurisdiction over the tribe, and therefore could not prohibit Indian gaming).

178. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 378-81 (1976).

179. *Agency History*, CONN. DEP’T CONSUMER PROTECTION: GAMING DIVISION (July 1, 2011), <http://www.ct.gov/dosr/cwp/view.asp?a=3&q=290518>.

180. *Id.* Jai alai is defined as “a court game somewhat like handball played usually by two or four players using a ball and a long curved basket strapped to the wrist.” *Definition of “Jai Alai”*, MERRIAM-WEBSTER, [http://www.merriam-webster.com/dictionary/jai alai](http://www.merriam-webster.com/dictionary/jai%20alai) (last visited Sept. 17, 2011).

181. *Agency History*, *supra* note 179.

reports of misconduct surfaced frequently.<sup>182</sup> In 1976, in response to widespread corruption, the state legislature imposed a one-year moratorium on the provision of new gambling licenses.<sup>183</sup>

Nonetheless, illegal activity continued to plague Connecticut gambling. In 1979, the government appointed a grand jury to investigate betting irregularities at the state's three jai alai frontons.<sup>184</sup> The probe led to the first arrests and convictions of players and bettors for fixing games in the forty-five-year history of jai alai in the United States.<sup>185</sup> In May 1979, the legislature "impose[d] a two-year moratorium on [any] new racing, jai alai and off-track betting facilities"<sup>186</sup> and repeatedly extended the moratorium during the 1980s.<sup>187</sup>

Despite corruption, legal gambling became a popular activity for consumers and a lucrative revenue source for the state. In the fiscal year ending June 30, 1992, gamblers wagered \$1 billion in Connecticut on state-sanctioned games.<sup>188</sup> *Gaming and Wagering Business* magazine ranked the state sixth in the nation in per capita wagering.<sup>189</sup>

### C. *Gambling on the Pequot Reservation*

A Pequot tribal council first raised the prospect of gambling on the tribe's reservation at a tribal council meeting in 1984 when several members proposed the establishment of a high-stakes bingo game.<sup>190</sup> According to tribal chairman Richard Hayward, however, the council rejected the proposal out of concern for the "elements" that gambling might attract.<sup>191</sup> The following year, though, the tribal council decided to support a bingo operation.<sup>192</sup> As Hayward pointed out, "[C]onsidering the fact that the federal government supports these activities on Indian reservations to raise money to support oth-

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182. Lyn Bixby, *25 Years of Gambling in Connecticut*, HARTFORD COURANT, Feb. 24, 1997, at A1, available at [http://articles.courant.com/1997-02-24/news/9702240064\\_1\\_compulsive-gambling-gambling-venue-gambling-spread](http://articles.courant.com/1997-02-24/news/9702240064_1_compulsive-gambling-gambling-venue-gambling-spread).

183. *Id.*

184. *Id.*

185. See Robert Boyle & Nancy Williamson, *The Spreading Scandal in Jai Alai*, SPORTS ILLUSTRATED, June 11, 1979, at 28, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1095023/index.htm>.

186. Bixby, *supra* note 182.

187. *Id.*

188. George Judson, *For Connecticut, the Stakes Are Not Just on the Tables*, N.Y. TIMES, Dec. 25, 1992, at B4, available at <http://www.nytimes.com/1992/12/25/nyregion/for-connecticut-the-stakes-are-not-just-on-the-tables.html>.

189. *Id.*

190. McCarthy, *supra* note 31.

191. *Id.* (internal quotation marks omitted).

192. *Id.*

er businesses, we decided to go for it.”<sup>193</sup> Bingo, he remarked, was “a rapid way to raise capital.”<sup>194</sup>

Connecticut law, however, limited total daily prizes awarded by a bingo hall to \$500.<sup>195</sup> In 1985, the Pequots filed suit in federal court challenging the state limit on bingo prizes.<sup>196</sup> The court ruled that state laws governing bingo were regulatory, not criminal, and as such were unenforceable on Indian reservations.<sup>197</sup> Additionally, the court held that the state could not deny Indians the right to profit from gambling when the state was doing so.<sup>198</sup> Over the next six months, the tribe spent \$4.5 million to build a high-stakes bingo hall, which opened on July 5, 1986.<sup>199</sup> Running the game five nights per week and paying out more than \$10,000 in nightly prizes, the Pequots attracted capacity crowds of nearly 1700 people.<sup>200</sup> Participation was not limited to local residents; many bingo players arrived in buses from all over New England.<sup>201</sup>

Wary of their lack of experience in operating a bingo game, the Pequots contracted with the Penobscot Tribe of Maine to run the game for three years.<sup>202</sup> The Penobscots, who had run a high-stakes game on their own reservation near Bangor, contracted for a share of the proceeds.<sup>203</sup>

In December 1987, the Pequots’ bingo game was generating revenue of approximately \$10 million per year, and the Pequots’ share of bingo profits amounted to about \$2 million, half the tribe’s annual income.<sup>204</sup> Bingo earnings allowed the Pequots to reacquire land adjoining the reservation<sup>205</sup> that had been lost over time.<sup>206</sup> By late 1991, 165 tribe members lived on the reservation in thirty-five houses and two small apartment buildings on a small corner of the 1800-acre reservation.<sup>207</sup>

193. *Id.* (internal quotation marks omitted).

194. *Id.* (internal quotation marks omitted).

195. CONN. GEN. STAT. § 7-169(i) (1974), *invalidated by* Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986).

196. *See Mashantucket*, 626 F. Supp. 245.

197. *Id.* at 249.

198. *Id.*

199. Robert A. Hamilton, *Tribe's Bingo Lures Eager Crowds*, N.Y. TIMES, July 20, 1986, § 11CN, at 1.

200. Dirk Johnson, *Tribe's Latest Enterprise: Bingo*, N.Y. TIMES, July 12, 1986, § 1, at 29, *available at* <http://www.nytimes.com/1986/07/12/nyregion/tribe-s-latest-enterprise-bingo.html>.

201. *See id.*

202. *See id.*

203. *Indian Bingo Plan Stymies Officials*, N.Y. TIMES, Nov. 4, 1984, § 1, at 70.

204. Ravo, *supra* note 36.

205. Waldman, *Return to Heritage*, *supra* note 28.

206. *See supra* Part II.A. for a discussion of the loss of Pequot lands.

207. *See Waldman, Return to Heritage*, *supra* note 28.

## D. California v. Cabazon Band of Mission Indians

The Oneida reservation in New York may have been Indian gaming's modern birthplace, but the first case to reach the U.S. Supreme Court came from California. The Court held that states cannot ban or regulate the conduct of Indian gaming operations on reservations without explicit congressional consent.<sup>208</sup> In applying the holding of its earlier decision in *Bryan v. Itasca County*,<sup>209</sup> the Court found that although Public Law 280<sup>210</sup> granted certain states<sup>211</sup> civil and criminal jurisdiction over Indian lands, Public Law 280 did not grant total civil jurisdiction.<sup>212</sup> Instead, it granted jurisdiction to adjudicate civil disputes in Indian Country.<sup>213</sup> The crucial test in *Bryan* was whether the regulation at issue was civil and regulatory or criminal and prohibitory.<sup>214</sup> In applying this test, the Court held that because California allowed some forms of gambling, extending that state's laws over the gaming operations of the Cabazon and Morongo Bands of Mission Indians would amount to an exercise of power that was civil and regulatory, rather than criminal and prohibitory.<sup>215</sup> As such, California's bingo laws were not applicable to the gaming operations on Indian lands in California.<sup>216</sup>

Although California had an interest in preventing unscrupulous persons from participating in gambling, the federal and tribal interests in tribal self-determination and economic self-sufficiency were stronger: "Self-

208. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-16 (1987).

209. *Id.* at 207-08 (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976)).

210. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 28 U.S.C. § 1360(a) (2006)).

Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .*

*Id.* (emphasis added). The Supreme Court, upon examining the legislative history of Public Law 280, found that the intent of Congress was to apply the state rules of decision in Indian Country, not to confer total jurisdiction over Indian lands. *See Bryan*, 426 U.S. at 383-85.

211. The states that 'opted into' Public Law 83-280 were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 28 U.S.C. § 1360(a). Alaska was added in 1958. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (amending 28 U.S.C. § 1360 by adding Alaska).

212. *Cabazon*, 480 U.S. at 208.

213. *Id.*

214. *See Bryan*, 426 U.S. at 380-81.

215. *See Cabazon*, 480 U.S. at 221-22.

216. *Id.* at 210-11.

determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests."<sup>217</sup> The tribes have long needed a method of economic development, and gaming provided it. Faced with the alignment of the interests of the tribes and the federal government, the state's interests had to give way.

### *E. The Indian Gaming Regulatory Act (IGRA)*

Congress was not content to sit still as the Indian gaming phenomenon took shape, particularly after *Cabazon*. During the 1980s, declining federal financial assistance had motivated many tribes to pursue new revenue sources that they could control, and high-stakes bingo was an obvious choice for tribes after the *Seminole Tribe v. Butterworth* decision.<sup>218</sup> By 1988, tribes were sponsoring over 100 gaming operations generating in excess of \$100 million annually.<sup>219</sup> In 1986, the House of Representatives passed a bill in an attempt to control some types of gambling on reservations.<sup>220</sup> The bill died in the Senate, but congressional efforts to regulate Indian gaming continued.<sup>221</sup> The two primary legislative approaches illustrated the split between the Department of the Interior, favoring gaming as an engine of economic development, and the Department of Justice, favoring those states hoping to subject tribal gaming to their authority.

Following *Cabazon*, many states, as well as non-Indian gaming interests, feared a rapid expansion of Indian gaming.<sup>222</sup> Therefore they applied pressure on Congress to impose additional regulatory control over Indian gaming.<sup>223</sup> States that relied on gaming for revenue feared competitors that did not have to pay state taxes.<sup>224</sup> Other states feared that Indian gaming operations, free of the requirements faced by non-Indian concerns, enjoyed too great a competitive advantage.<sup>225</sup> States that prohibited gaming altogether feared the social consequences of widespread gaming. Indian Country lobbied to protect this important economic development opportunity for tribes and to protect Indian gaming from state regulation and taxation.<sup>226</sup> Several pressures, including the immediate response of the states to *Cabazon*, com-

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217. *Id.*

218. *Seminole Tribe v. Butterworth*, 658 F.2d 310, 316-17 (5th Cir. 1981).

219. Martha Angle, *High-Stakes Bingo to Continue: Congress Clears Legislation To Regulate Indian Gambling*, CQ WEEKLY REP., Oct. 1, 1988, at 2730.

220. *Id.*

221. *Id.*

222. See EISLER, *supra* note 9, at 116-17.

223. *Id.*

224. *See id.*

225. *See id.* at 117.

226. *See id.* at 116-18.



bined to maneuver Congress toward a legislative compromise in the form of the Indian Gaming Regulatory Act of 1988 (IGRA).<sup>227</sup>

Today, IGRA regulates all Indian gaming and provides the framework for the agreements that tribes and states negotiate to facilitate gaming.<sup>228</sup> Meant to achieve “a principal goal of Federal Indian policy [which] is to promote tribal economic development, tribal self-sufficiency, and strong tribal government,”<sup>229</sup> IGRA mirrors the Supreme Court’s holding in *Cabazon* that “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, as a matter of criminal law and public policy, prohibit such gaming activity.”<sup>230</sup>

Created under Congress’ Indian Commerce Clause<sup>231</sup> power, IGRA preempts state prohibition or regulation of Indian gaming on Indian land<sup>232</sup> and was held constitutional in *Red Lake Band of Chippewa Indians v. Swimmer*.<sup>233</sup> Although IGRA seems to have settled many matters, states, tribes, and the federal government often still disagree over its application.<sup>234</sup>

227. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (2006)). In fact, S. 555, which became the IGRA, was under discussion at the same time that the Supreme Court was hearing *Cabazon*. McClatchey, *supra* note 159, at 1242. “It seems clear that Congress’ speedy action on IGRA was motivated, at least in part, by the potential willingness of the Court to support a regime of tribal gaming nearly unfettered by state [government] regulation.” *Id.*

228. “Referred to in [the Act] as ‘tribal-state gaming compacts,’ presumably the terminology is meant to provide an analogue to contract law. Individuals and entities enter into contracts (legally enforceable agreements); states enter into compacts (agreements between sovereigns).” *Id.*

229. 25 U.S.C. § 2701(4).

230. *Id.* § 2701(5).

231. U.S. CONST. art. I, § 8, cl. 3. See *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992) (stating that, unlike Congressional legislation under the Interstate Commerce Clause, Congress may not abrogate state immunity from suit under the Eleventh Amendment by legislating under the Indian Commerce Clause).

232. See *Missouri ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999); see also *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). But see *Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 764-65 (7th Cir. 1991); see also S. Rep. No. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076 (stating that the Act is to be construed to completely preempt the field of Indian gaming).

233. 740 F. Supp. 9, 15 (D.D.C. 1990).

234. See *State v. Ysleta del sur Pueblo*, 220 F. Supp. 2d 668, 693-94 (W.D. Tex. 2001) (holding essentially that Texas law, rather than IGRA, governs Indian gambling questions, since the tribe’s government is based on the Restoration Act, which was passed prior to IGRA), modified by 220 F. Supp. 2d 668, 698-709 (W.D. Tex. 2002). But see *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1239-49 (9th Cir. 1996) (affirming the notion in *Cabazon* that state regulation having a substantial effect on

The Act's purpose was to provide the framework for gaming on Indian reservations, to regulate Indian gaming, and to allay concerns that organized crime would find a haven on Indian reservations, which some viewed as lawless enclaves.<sup>235</sup> Importantly, Congress has recognized that gaming is "an economic activity that Indian tribes can develop and that [the tribes] should be the primary beneficiary of their efforts."<sup>236</sup>

IGRA's "Declaration of Policy" reflects the three major concerns behind its adoption.<sup>237</sup> First, Congress wished to relieve the federal government of some of its financial obligations to tribes by promoting economic development and self-sufficiency through gaming revenues.<sup>238</sup> Second, Congress believed federal regulation of Indian gaming was required to "shield it from organized crime" and to ensure that tribal members were the primary beneficiaries of gaming revenue.<sup>239</sup> Third, Congress desired to establish an independent regulatory agency, the National Indian Gaming Commission,<sup>240</sup> with oversight authority to define and enforce national standards. Part of that standardization involved the classification of gaming operations:

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the tribal government's ability to provide for itself is a factor to be used in considering whether a state government may impose its regulations on transactions in Indian Country).

235. What remains to be shown is how Indian reservations can remain such "enclaves of lawlessness" when both the state (in Public Law 280 states and states with cross-deputization and other law enforcement agreements with tribes) and federal (under the Assimilative Crimes Act, General Crimes Act, and the Major Crimes Act) governments, in addition to the tribal governments, have criminal jurisdiction over Indian Country. McClatchey, *supra* note 159, at 1243-44. "One would think that organized crime would want to operate anywhere *but* an Indian reservation," since reservations have three, instead of two, sovereigns on guard. *Id.* at 1274. "Nevertheless, the notion . . . that organized crime will take over Indian gaming [lives on]." *Id.* at 1274. Given the specter of organized crime hanging over Indian gaming, however, opponents who invoke it have never been able to cite to a proven instance of infiltration. *Indian Casinos Draw Scrutiny; Congress: Regulations Needed to Stem Organized Crime*, TULSA WORLD, Oct. 31, 1997, at E8. Speaking about the threat organized crime posed to casinos, Sen. John McCain said, "The absence of federal standards has allowed a void to develop which will become more and more attractive to criminal elements." *Id.* (internal citations omitted).

236. *Indian Gaming Regulatory Act; Role and Functioning of the National Indian Gaming Commission, Hearing Before the S. Comm. On Indian Affairs*, 108th Cong. 1 (2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

237. *See* 25 U.S.C. § 2702 (2006).

238. *Id.* § 2702(1).

239. *Id.* § 2702(2).

240. *Id.* § 2702(3).

- Class I gaming encompasses traditional games used in ceremonial and social settings<sup>241</sup> that are outside the scope of any but tribal regulation and control.<sup>242</sup>
- Class II gaming includes “the game of chance commonly known as bingo . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.”<sup>243</sup> Importantly, such games may still be defined as Class II even if they are played using a computer, an electronic device, or other technologic aid.<sup>244</sup> Also included in Class II are card games “not explicitly prohibited” by the state, provided they are otherwise in conformity with all state laws and regulations.<sup>245</sup> Excluded from Class II are “banking card games” (e.g. baccarat, blackjack) and “electronic . . . facsimiles of any game of chance or slot machines of any kind.”<sup>246</sup>
- Class III gaming consists of all gaming that is not class I or II.<sup>247</sup> This class is the area of most contention since it is the most profitable class of gaming.<sup>248</sup> This class includes so-called “Vegas-style” games, such as house-banked card games,<sup>249</sup> roulette, slot machines, and the like.<sup>250</sup>

Under IGRA, Class III gaming operations also must be “conducted in conformance with a Tribal-State compact.”<sup>251</sup> IGRA notes that such compacts may provide for “the assessment by the state of such activities in such

241. *Id.* § 2703(6).

242. *Id.* § 2710(a)(1).

243. *Id.* § 2703(7)(A)(i).

244. *Id.*

245. *See id.* § 2703(7)(A)(ii)(II).

246. *Id.* § 2703(7)(B)(i)-(ii).

247. *Id.* § 2703(8).

248. According to the information reported by the National Indian Gaming Commission in 1996, the median revenue for class II operations was \$4.6 million, while the median revenue for class III operations was \$14.4 million. Letter from Natwar M. Gandhi, Assoc. Dir., U.S. Gen. Accounting Office, to Bill Archer, Chairman, Committee on Ways and Means (Aug. 20, 1996), <http://archive.gao.gov/paprpdf/1/157511.pdf>.

249. In house-banked games, players can win money from the house; by contrast, player-banked games only allow players to win from each other. WILLIAM N. THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 188, 292-93 (2001).

250. *See* 25 U.S.C. § 2703(7)-(8); *Frequently Asked Questions*, NAT'L INDIAN GAMING COMMISSION, [http://www.nigc.gov/About\\_US/Frequently\\_Asked\\_Questions.aspx](http://www.nigc.gov/About_US/Frequently_Asked_Questions.aspx) (last visited Sept. 17, 2011).

251. 25 U.S.C. § 2710(d)(1)(C).

amounts as are necessary to defray the costs of regulating such activity.”<sup>252</sup>  
However,

nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III [gaming] activity.<sup>253</sup>

Further, “[n]o State may refuse to enter into the negotiations [for a gaming compact] based upon the lack of authority . . . to impose such a tax, fee, charge, or other assessment.”<sup>254</sup>

The tribe initiates the compacting process by requesting that the state in which the casino is to be located negotiate a tribal-state compact outlining the terms of such gaming.<sup>255</sup> If the state agrees to negotiate, the parties have sixty days to come to an agreement.<sup>256</sup> The compact is then submitted to the Secretary of the Interior for approval.<sup>257</sup> If the parties cannot reach an agreement, mechanisms exist for developing procedures to regulate gaming operations on a given reservation, even in the absence of a compact.<sup>258</sup> As originally enacted, IGRA required that the states bargain in good faith regarding the content of gaming compacts<sup>259</sup> and gave tribes a federal cause of action to compel negotiation once 180 days had passed from the original request.<sup>260</sup>

252. *Id.* § 2710(d)(3)(C)(iii).

253. *Id.* § 2710(d)(4).

254. *Id.*

255. *Id.* § 2710(d)(3)(A).

256. *Id.* § 2710(d)(7)(B)(iii), *invalidated by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

257. *Id.* § 2710(d)(3)(B).

258. If the parties cannot reach agreement, they are to forward their “last best” offers to a mediator, who will choose the best proposal of the two, and present it to the parties for consideration. 25 C.F.R. § 291.10 (2011). Sixty days after the mediator’s presentation of the proposal, if the parties still do not agree, the mediator is to notify the Secretary of the Interior. 25 U.S.C. § 2710(d)(7)(B)(vii), *invalidated by* Seminole Tribe v. Florida, 517 U.S. 44 (1996). The Secretary will request from the tribe specific information regarding its proposal, and will promulgate a procedure for the tribe to operate class III gaming on the tribe’s lands. *Id.* § 2710(d)(7)(B)(vii)(I)-(II).

259. 25 U.S.C. § 2710 (d)(3)(A) (“[T]he State shall negotiate with the Indian tribe in good faith to enter into such a compact.”).

260. *Id.* § 2710(d)(7)(A)-(B), *invalidated by* Seminole Tribe v. Florida, 517 U.S. 44 (1996). However, the Supreme Court substantially altered this provision in *Seminole Tribe v. Florida* holding as unconstitutional § 2710(d)(7)’s authorization to bring suit against a state in federal court for failing to bargain in good faith. *See infra* Part VII.

## IV. A FRAMEWORK FOR ANALYZING TRIBAL STATE NEGOTIATIONS

Whenever a tribe's success depends on the decisions and actions of other governmental parties who have different interests, negotiation or negotiation-like processes may be inevitable. Although gaming compacts, such as the agreement between Connecticut and the Pequots, garner most of the headlines, negotiated agreements between tribes and states that resolve jurisdictional or substantive disputes and recognize each entity's sovereignty can cover a wide range of issues. The processes of interaction range from formal to informal and from explicit to tacit. The goal of the processes may be reaching a legally binding compact or arriving at a temporary mutual understanding subject to renegotiation.

Broadly speaking, negotiation is a process of potentially opportunistic interaction aimed at advancing the full set of one's interests by jointly decided action. To be effective at negotiating, the tribe must persuade the state to say "yes" to a proposal that also meets all of the tribe's real interests and mean it. Of course, the state is trying to accomplish the same objective. Basically, each side is trying to solve its "Basic Negotiation Problem," which is how best to advance one's full interests, either by improving and accepting the available deal or opting for its best no-deal alternative.

Three core elements make up each side's Basic Negotiation Problem: (1) the importance of underlying interests as the raw material for negotiation; (2) the implication that negotiation is a means for advancing interests, rather than an end in itself, implying that other non-cooperative means compete with negotiated possibilities; and (3) the fact that negotiation seeks jointly-decided action and thus inherently is a process of joint problem-solving. Essentially, to advance the tribe's real interests, tribal negotiators must assess what "yes" they want from the state and why the state might say it rather than opt for no deal. Thus, the tribe's approach should influence how the state sees its Basic Negotiation Problem such that what the state chooses – for the tribe's reasons – is precisely what serves the tribe's interests. The fundamental principle of effective negotiation, paraphrasing the words of an Italian diplomat, is "the art of letting them have *your way*" for reasons that they perceive to be their own.<sup>261</sup>

#### *A. Interests: The Raw Material for Negotiation*

The concept of "interests" is foundational to effective negotiation. Tribal interests in a negotiation are whatever the tribe cares about that is at stake in the process. Socrates' admonition to "know thyself" lies at the core of effective deal making, along with its worthy twin to "know thy counterpart." Since negotiation requires at least two parties to say "yes" for a deal, the tribe must probe the full set of the other parties' interests and also examine its own,

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261. WILLIAM URY, GETTING PAST NO 3 (1993) (quoting Daniele Vare).

in addition to examining tribal interests. The best negotiators are clear on their ultimate interests and other side's interests. They also know their possible trade-offs among lesser interests and are flexible and creative on the means.

Interests visible at the surface may hide deeper interests that could be critical to a successful negotiation, so good negotiators also probe negotiating positions to identify and understand those deeper interests. *Issues* are on the table for explicit agreement. *Positions* are each party's stands on the issues. *Interests* are the underlying concerns that resolution ultimately affects.

Consider an example involving a power company that proposed building a significant dam to bring electricity at lower rates to the area's consumers and to demonstrate to the financial community that it could get large projects completed despite having been repeatedly stymied in these efforts. Predictably, environmentalists opposed this plan, claiming that it would damage the downstream habitat of the endangered whooping crane. Farm groups also lined up against the project, fearing that the dam would reduce water flow in the area, yet the power company needed results and a greener image. The issue was the dam; positions on that issue were "absolutely yes" and "no way." Yet, incompatible positions masked compatible interests. Although years of negotiations among these groups focused on their conflicting positions, the parties ultimately reached an agreement for a smaller dam, stream-flow guarantees, and a trust fund for preserving the downstream and other endangered habitats of the whooping crane. Rather than a convergence of positions, this agreement represented a reconciliation of interests.

While neglecting to think through the perspective of the other side is an error, a related problem is to assume that one side's interests are the opposite of the other side's interests. Psychologists who have studied negotiating behavior have discovered this assumption to be a pervasive tendency and dub it the "mythical fixed pie."<sup>262</sup> Yet, in looking for a richer set of interests of all sides behind their incompatible positions, the differences of interest point the way to mutual advantage, thereby expanding the pie.

In a simple example, two siblings quarrel over where to cut an orange (the issue), with each demanding three-quarters of it (their incompatible positions). Yet, if one turns out to be hungry while the other sibling needs flavoring for a recipe (their underlying interests), the siblings can devise a creative solution that meets both interests: the orange can be peeled with the fruit going to the hungry one and the rind to the cook. By discovering that one sibling was hungry while the other sibling needed flavoring, both siblings can be made better off because of the difference in their underlying interests.

In short, interests constitute the raw material for negotiation. Tribal negotiators should assess and attach priorities to the full set of tribal interests, not a narrow subset. Similarly, they should not only assess tribal interests but

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262. See, e.g., MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 16-22 (1992).

also the full set of the other side's interests, including relevant internal parties. Further, the underlying interests of each side must be distinguished from the issues on the table for negotiation and the positions, the parties take on those issues. Rather than asking, "What's your position?" and asserting, "Here's our position," negotiators should instead seek directly and indirectly to understand what real interests lie behind those positions. Finally, the parties should not stop with shared interests but instead seek complementary *differences* that can be dovetailed into joint gains.

### B. *Negotiation as a Means of Advancing Interests*

Apart from what different tactics and approaches may yield at the bargaining table, a crucial question involves what Fisher and Ury have dubbed each side's BATNA, or Best Alternative To Negotiated Agreement.<sup>263</sup> The BATNA, or no-agreement alternative, reflects the course of action a party would take if the proposed deal were not possible. Depending on the situation, one party's BATNA may involve walking away without any agreement or going to court rather than settling. It also may involve forming a different coalition or alliance, going on strike, and any number of other contextual alternatives to negotiation. If asked to agree to a particular deal, assessing the BATNA sharpens the decision by asking "as compared to what?"

The value of the BATNA to the tribe sets the threshold of the full set of its interests that any acceptable agreement must exceed. Similarly, the state will have its own BATNA. Doing "better" in terms of each party's interests compared to the BATNA is a necessary condition for an agreement. As such, BATNAs imply the existence or absence of a Zone Of Possible Agreement (ZOPA) and determine its location.<sup>264</sup> Of course, each side knows only its own limits and must assess and update its assessment of the other side's BATNA. And, in practice, many negotiators have a hazy sense of their own BATNAs.

Improving one's own BATNA or worsening the other side's BATNA often influences the outcome of the negotiation. The better one side's BATNA appears to it and the other party, the more credible the threat is to walk away unless the deal is improved. Instead of further refining tactics at the table, parties sometimes should act away from the table to improve their BATNA. Thus, an analysis of BATNAs furnishes an important guide to the potential role for negotiation as well as the extent to which each side should spend scarce resources at the table trying to improve a potential deal or away from the table seeking a better one.

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263. ROGER FISHER & WILLIAM URY, *GETTING TO YES* 102 (3d ed. 2011).

264. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 19 (2000).

### C. Negotiation as a Joint Problem-Solving Process

Many problems are single decision-maker situations where the judgments or actions of others should not affect an individual's judgments or actions. Yet, negotiation distinguishes itself from such problems by the parties' interdependence. The actions of each side leading to agreement have the potential to affect the outcome; thus their interaction leads to a joint decision-making process.

Each side faces the same basic negotiation problem: given the choice of agreement or no agreement, how can one best advance the full set of his or her own interests relative to the best no-agreement alternative. The other party's problem is a mirror image: by the choice of agreement or no agreement, how can they best advance the full set of their interests relative to their BATNA? Since they will say yes for their reasons and not for their counterpart's reasons, agreement means joint problem-solving, addressing their problem as a means to solving one's own. In these terms, the essential task is getting the state to see the basic elements of their problem such that the tribe's preferred agreement is what the state chooses for its own reasons. In this sense, negotiation is a form of "selfish altruism," or using the solution to the state's problem as the route to solving the tribe's problem.

Remembering that negotiation is the "art of letting them have your way,"<sup>265</sup> the challenge is to try to shape how the other side sees their problem such that they choose what you want. To change the other side's mind, it is important to know where their mind is now. Then it is possible to build what classic Chinese strategist Sun Tzu calls a "golden bridge" from where they now are to where you want them to be.<sup>266</sup>

In sum, the fact that negotiation is inherently a joint problem-solving exercise should ensure that solving one side's problem – as they see it or can be induced to see it – is a part of solving the problem of the other side. Having assessed the full set of each side's interests, as distinct from their positions, and having estimated their BATNAs, the Fundamental Principle of effective negotiation points to the essential strategy: shape how the other parties see their Basic Problem such that, for their reasons, they choose what your side wants.

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265. See *supra* note 261 and accompanying text.

266. Actually, in *The Art of War*, Sun Tzu suggested to show your opponent there is a road to safety, although the "golden bridge" concept is often attributed to him. See SUN TZU, *THE ILLUSTRATED ART OF WAR* 168 (Samuel B. Griffith trans., Oxford University Press 2005) (n.d.). ("Show him there is a road to safety, and so create in his mind the idea that there is an alternative to death."). Some people identify the concept as "Scipio's Maxim," attributing its origin to Scipio Africanus. See PETER G. TSOURAS, *WARRIOR'S WORDS: A QUOTATION BOOK* 194 (1992). Napoleon is apparently the first general, however, to actually use the term "golden bridge," albeit in French. See *id.*



### *D. Developing a Negotiation Strategy*

The core concepts – interests, BATNAs, and joint problem solving – play roles within a larger framework of negotiation analysis. Solving the joint problem requires both creating and claiming value on a sustainable basis. “Creating value” means “expanding the pie” or increasing the worth of the agreement to each side beyond what was otherwise available. “Claiming value” means distributing or apportioning that value among the parties. By being “on a sustainable basis,” an agreement is more valuable to the extent it endures and remains healthy. Moreover, the bargaining techniques employed should not damage the party’s reputation and undercut its capacity to negotiate in the future.

To facilitate this goal, Lax and Sebenius have developed a “3-D negotiating strategy,” which involves acting in a mutually reinforcing way among three core dimensions of the joint problem: (1) during the interpersonal process “at the table,” (2) with respect to the substance of value creation, and (3) “away from the table” to change the game so it is most likely to yield optimum results.<sup>267</sup> This strategy is not a recipe or a sequential approach whose “dimensions” are independent of one another.<sup>268</sup> Instead, the approach involves cycling through these factors on a provisional basis to determine the most relevant and promising.<sup>269</sup> Then, as analysis deepens and the process unfolds, the negotiator needs to update their assessments and overall negotiating approach.<sup>270</sup> A framework leading to an effective 3-D strategy starts with an overview of the relevant context and then assesses both the opportunities for and barriers to creating and claiming value.<sup>271</sup> Barriers and opportunities arise as a function of the structural, personal, and ordered aspects of the situation.

### *E. Using the Framework for Analysis*

Although the Lax and Sebenius framework gives prescriptive advice for approaching a negotiation, it also provides useful tools for analyzing a concluded negotiation. The next two Parts will apply their framework to the negotiations between the Pequots and the State of Connecticut. In Part V, the negotiations retell the first part of the Foxwoods story regarding the original gaming compact, and Part VI examines the subsequent negotiations over installing slot machines at the casino.

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267. See DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION 37-44 (2006).

268. See *id.* at 37-38.

269. See *id.* at 49.

270. See *id.*

271. See *id.* at 18, 49.

V. ROUND 1: THE INITIAL CASINO NEGOTIATIONS<sup>272</sup>

In early 1989, after the passage of IGRA, the Pequots announced that they intended to build a casino alongside their bingo hall.<sup>273</sup> The tribe sought to negotiate a compact with the State of Connecticut, but officials declined.<sup>274</sup> The attorney general took the position that Connecticut law did not allow casino gambling, and thus the state could not grant the tribe's request for a compact.<sup>275</sup> Connecticut law, however, did allow "Las Vegas nights," fundraisers run by non-profit or charitable organizations that featured casino games such as blackjack and roulette.<sup>276</sup> At "Las Vegas nights," participants gambled with play money and used their winnings to bid for prizes.<sup>277</sup> The Pequots argued that, if the state permitted other organizations to run casino-type games, the tribe had the legal right under the IGRA to do so.<sup>278</sup> To force the state government to the negotiating table, the Pequots filed suit against Connecticut on November 3, 1989.<sup>279</sup> The stage was set for the first battle for the Foxwoods casino.

A. *Context of the Initial Negotiations*

When approaching a negotiation, the parties must address its relevant context. A non-exclusive list of contextual factors includes economic, competitive, historical, political, institutional, and organizational matters. A good assessment of the setting is neither complete nor exhaustive but gives a useful sense of the involved and potentially involved parties, perceptions of their interests, and the nature of the process by which they are interacting. In short, assessing a negotiation's relevant context entails looking at the setting to see its implications for structure and psychology as well as the elements available for efforts to change the game.

The Mashantucket Pequots and the State of Connecticut were primary stakeholders in the litigation, but other significant parties played a role in the outcome. Spearheading the Pequots' legal effort was Tureen & Margolin, a

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272. Although much of this story is known throughout Indian Country, many of the details are not widely known. Many of those details were discussed in a telephone interview on February 11, 2004 with Michael Brown. See Telephone Interview with Michael Brown, former CEO, Foxwoods Resorts (Feb. 11, 2004).

273. *Mashantucket Pequot Tribe v. State*, 737 F. Supp. 169, 170 (D. Conn. 1989), *aff'd*, 913 F.2d 1024 (2d Cir. 1990).

274. *Id.*

275. See EISLER, *supra* note 9, at 127-128.

276. Don Noel, Editorial, *Charity Games Aren't Worth the Price*, HARTFORD COURANT, Apr. 5, 1993, at C9.

277. *Id.*

278. *Mashantucket*, 737 F. Supp. at 171.

279. *Id.*

six-member law firm in Portland, Maine, that specialized in Indian affairs.<sup>280</sup> Thomas Tureen and Barry Margolin founded the firm in 1981, shortly after the pair, legal aid attorneys in their thirties, won a historic \$81.5 million settlement for two Maine Indian tribes in a land-claim case.<sup>281</sup> Afterwards, the two lawyers, who earned no fees in the case, decided to establish a private practice.<sup>282</sup> Their firm soon became general counsel not only to the two tribes Tureen and Margolin had represented in Maine but also to the Mashantucket Pequots.<sup>283</sup>

Tureen & Margolin had ample experience representing American Indians but none in the casino business.<sup>284</sup> One of the firm's associates, however, had worked for former New Jersey Attorney General John Degnan, who had extensive experience in casino regulation.<sup>285</sup> This associate, Robert Gips, recommended that the Pequots hire his former boss to help negotiate a compact with the state.<sup>286</sup> Degnan advised, however, that if the Pequots were to move forward with their casino project, the tribe needed someone with even more experience in casino regulation and operations, and he suggested Michael Brown.<sup>287</sup>

Having successfully prosecuted key members of New Jersey's Genovese crime family, Brown served as director of New Jersey's Division of Gaming Enforcement from 1980 until 1982.<sup>288</sup> During his tenure, Brown oversaw the opening of seven casinos and supervised the initial licensing hearings for five others.<sup>289</sup>

As a gaming regulator, Brown learned that modern casinos were not the corrupt, mob-run operations reminiscent of the early gambling days in Nevada.<sup>290</sup> Brown said, "Some of the companies, I started to realize, had developed a corporate attitude toward gaming . . . . They were run by people with MBAs, not broken noses."<sup>291</sup>

280. *Id.* at 169.

281. Kathleen Bird, *Indian Tribe Turns to NJ Lawyers for Casino Help*, N.J. L.J., June 13, 1991, at 468.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Nathan Cobb, *Betting on the Future: For the Mashantucket Pequots of Southeastern Connecticut, the Foxwoods Casino Is a Way to Bring Jobs and Better Housing to the Tribe and to Restore Its Role as an Economic Power. It Is a Way to Survive*, BOS. GLOBE, Mar. 1, 1992, at 14.

287. *Id.* See EISLER, *supra* note 9, at 144.

288. See Bird, *supra* note 281; Hilary Waldman, *Casino Appoints Former Skeptic on Gaming*, HARTFORD COURANT, Jan. 10, 1993, at B1.

289. Waldman, *supra* note 288.

290. *Id.*

291. *Id.* (internal quotation marks omitted).

After speaking with Gips, Brown agreed to join the Pequots' effort to open a casino.<sup>292</sup> By the time Brown joined the Pequot team, a legal battle between the Pequots and the State of Connecticut was well under way. In March 1989 the Pequots requested that state officials negotiate a gambling compact with them.<sup>293</sup> Because Connecticut permitted gambling, albeit not-for-profit, pursuant to IGRA the state was required to entertain the Pequots' request and negotiate a compact.<sup>294</sup> Connecticut officials refused to negotiate, however, claiming that Connecticut laws prohibited gambling covered by IGRA.<sup>295</sup>

Subsequently, in November 1989, Gips and partner Barry Margolin sued the state in U.S. District Court in Hartford on behalf of the Pequots.<sup>296</sup> They claimed that the state had failed to negotiate in good faith with the tribe.<sup>297</sup> They argued before U.S. district court judge Peter Dorsey that Indian gambling was permissible because the state allowed charitable organizations to run casino games at "Las Vegas night" fund-raisers.<sup>298</sup> In May 1990, Dorsey ruled in the Pequots' favor and ordered the state to negotiate a compact with the tribe within sixty days.<sup>299</sup> Connecticut officials appealed the ruling to the Second U.S. Circuit Court of Appeals in New York, but lost again.<sup>300</sup> Bound by Judge Dorsey's ruling, state officials began to negotiate a compact with the Pequots, who by this time had hired Michael Brown as their chief negotiator.<sup>301</sup>

When the court ordered Connecticut to negotiate a compact with the Pequots, the governor instructed his attorney general and the state police department to locate an expert on gambling regulation.<sup>302</sup> The attorney general approached his counterpart in New Jersey, while the Connecticut state police contacted New Jersey's police headquarters.<sup>303</sup> Ironically, New Jersey's attorney general and the state's police force recommended Michael Brown, because he had over ten years of experience in the industry, would never do

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292. Cobb, *supra* note 286.

293. Mashantucket Pequot Tribe v. State, 737 F. Supp. 169, 170 (D. Conn. 1989), *aff'd*, 913 F.2d 1024 (2d Cir. 1990).

294. *See id.* at 176.

295. *Id.* at 170, 172-73.

296. *Id.* at 169, 171.

297. *Id.* at 171.

298. *Id.* at 173.

299. *Id.* at 170.

300. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *aff'g* 737 F. Supp. 169 (D. Conn. 1989).

301. Waldman, *supra* note 288; *see EISLER, supra* note 9, at 147-48, 153.

302. Telephone Interview with Michael Brown, *supra* note 272. Note that the Governor at this point was Governor O'Neill. Governor Weicker and Attorney General Blumenthal were both elected in November, 1990, six months after Judge Dorsey's ruling. *See EISLER, supra* note 9, at 130-31.

303. Telephone Interview with Michael Brown, *supra* note 272.

anything to tarnish the gambling business or undermine the state, and was trustworthy.<sup>304</sup> Soon, the governor and his staff discovered that the Pequots had already retained Brown.<sup>305</sup> Nonetheless, the state often turned to Brown for advice in structuring regulatory proposals for the casino.<sup>306</sup>

Outside gaming interests, particularly from Nevada and Atlantic City, also were lurking in the background, fearful that a Pequot victory would open the floodgates for Indian casinos in other parts of the country.<sup>307</sup> Further, the local towns near the reservation, bitter over being “blindsided” by the initial Pequot land claims litigation, were hostile toward tribal interests.<sup>308</sup> They argued that allowing the tribe to expand its gaming operations beyond bingo by opening a casino would negatively impact them, regardless of whether that casino included slot machines.<sup>309</sup>

While the Pequots wanted to expand their gaming operations, they also wanted to ensure that the State of Connecticut respected them as a separate sovereign.<sup>310</sup> Another goal was to prevent the state from taxing their gaming revenues.<sup>311</sup> While the tribe’s sovereignty meant that it could control liquor-use policies, the degree of state police presence, and any procedures for licensing casino employees on the reservation, those interests were subordinate to the primary objective of running a casino that was as profitable as possible.

### *B. Opportunities and Barriers of the Initial Negotiations*

Similar to the example of peeling the orange,<sup>312</sup> Brown saw an opportunity to create and claim value by focusing on differences. The state’s top priority was to prevent crime from infiltrating the casino and the Ledyard area, while the Pequots’ primary objective was to run a successful casino. Brown, as lead negotiator for the Pequots, decided he could offer the state the authority to regulate drug and alcohol use and implement crime-control measures at the Ledyard casino.<sup>313</sup> In exchange, he demanded that the Pe-

304. *Id.*

305. *Id.*

306. *Id.*

307. *See* EISLER, *supra* note 9, at 116-17.

308. *See id.* at 162.

309. *See id.*

310. Telephone Interview with Michael Brown, *supra* note 272.

311. *Id.*

312. *See supra* Part IV.A.

313. *See* Edmund Mahony, *Who Will Police the Casino? Layoffs Cloud Plans to Regulate Legal Gambling, State Ponders Policing of Casino*, HARTFORD COURANT, Nov. 10, 1991, at A1; *see also* Telephone Interview with Michael Brown, *supra* note 272. Normally a tribe would be quite reluctant to cede such jurisdiction to state law enforcement. The Pequots, however, had established a good working relationship with the state’s “resident trooper” and felt comfortable allowing the state police to provide a law enforcement presence at the casino. Telephone Interview with Michael

quots have control over the casino's business aspects, unrestricted by limits on the number of gaming tables, square footage of floor space, or operating hours.<sup>314</sup>

Brown opened the negotiations by suggesting that, in running the casino the Pequots would comply voluntarily with all state liquor laws.<sup>315</sup> He made it clear that the tribe would be willing to make additional concessions if the state would yield on regulating the casino's business operations.<sup>316</sup> State negotiators agreed to an unlimited number of gaming tables, unconstrained floor space, and unrestricted operating hours.<sup>317</sup> In return, Brown and the Pequots agreed to allow state police to patrol the casino and to require that all employees be approved and licensed by the State Department of Special Revenue.<sup>318</sup> The Pequots, whose income was not subject to taxation,<sup>319</sup> would retain all casino profits after reimbursing the state for money spent on regulation.<sup>320</sup>

Although a number of issues had been resolved, state negotiators seemed to be dragging their feet, and the two sides failed to complete an agreement by Judge Dorsey's August 6 deadline.<sup>321</sup> Dorsey brought in a federal mediator, retired state superior court Judge Henry J. Naruk, to oversee the negotiations and expedite the process of drafting a compact.<sup>322</sup>

Throughout the negotiations, the state and the Pequot tribe maintained separate versions of the compact. As a result of Michael Brown's experience, the Pequots' version borrowed heavily from New Jersey's casino regulatory scheme with some concepts taken from Nevada and the Bahamas.<sup>323</sup> Judge Naruk, the federal mediator, had decided that in October 1990, he would se-

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Brown, *supra* note 272. Additionally, the tribe did not have a system in place to conduct criminal background checks, so allowing the state police to conduct such checks not only allowed the tribe to give a concession to the state but also allowed the tribe to leverage off the existing capabilities of the state police and avoid having to develop such capabilities themselves. *See id.*

314. Telephone Interview with Michael Brown, *supra* note 272.

315. *Id.* *See also* Proposal of the State of Connecticut for a Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Connecticut at 44-45 (Apr. 10, 1991), available at [http://www.nigc.gov/Portals/0/NIGC Uploads/readingroom/compacts/Mashantucket Pequot Indian Tribe/mashantucketcomp041091.pdf](http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Mashantucket%20Pequot%20Indian%20Tribe/mashantucketcomp041091.pdf) [hereinafter Tribal-State Compact]. As discussed *infra*, the tribe ultimately agreed to the state's version.

316. *See* Telephone Interview with Michael Brown, *supra* note 272.

317. *Id.*

318. *Id.* *See also* Tribal-State Compact, *supra* note 315, at 14-18.

319. *See* Rev. Rul. 67-284, 1967-2 C.B. 55 (noting that Indian tribes are not taxable entities).

320. Constance L. Hays, *For Fortunate Few, Tribal Casino Promises Jobs*, N.Y. TIMES, Dec. 13, 1991, at B1.

321. *Id.*

322. *Id.*

323. Telephone Interview with Michael Brown, *supra* note 272.

lect one of the two versions of the compact to be the casino's governing document.<sup>324</sup>

By October, as negotiations neared an end, the two versions were quite similar, differing on only one major issue. The Pequots wanted to operate slot machines, which often were a casino's most lucrative revenue source.<sup>325</sup> In Atlantic City, for example, slot machines accounted for approximately 60% of annual gambling proceeds.<sup>326</sup> The state negotiators, on the other hand, were opposed to slot machines.<sup>327</sup> The state claimed that the tribe could not operate slots because state law prohibited slot machines.<sup>328</sup> The tribe countered that the various types of Class III games state laws permitted were sufficient to give the Pequots the right under IGRA to run slot machines.<sup>329</sup> The state resisted the inclusion of any provisions for slot machines, even if the provisions would not take effect unless the state deemed slots legal.<sup>330</sup>

As an interim measure, Brown successfully pressed to negotiate a 100-page appendix to the compact – approximately one-third of the entire agreement – which addressed future regulation of slot machines.<sup>331</sup> The appendix called for a payout of 91.5% to slot machine bettors, and Foxwoods would take an “expected win” of 8.5% of the total “slot drop.”<sup>332</sup> The appendix, which even pre-structured settlement of potential lawsuits, would become operative if the state were ever to permit slot machines. But, for the foreseeable future, the Pequots and the state agreed to a moratorium on the use of slot machines at the casino.<sup>333</sup> The moratorium could be lifted only if one of several triggering events occurred, including an agreement between the state and the tribe that under existing laws, the Pequots did have the right to operate slots, a court order to the same effect, or a change in state law permitting the use of video facsimile machines in the state.<sup>334</sup>

In mid-October, after the state and the Pequots added the slot machine appendix to their versions of the compact, Michael Brown and Pequot lawyer Barry Margolin suggested to Judge Naruk that he accept the state's version of

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324. *Id.*

325. *That's So Wicked We'll Do It Ourselves*, ECONOMIST, Apr. 11, 1992, at 21; see also BRETT DUVAL FROMSON, HITTING THE JACKPOT 132 (2003).

326. *That's So Wicked We'll Do It Ourselves*, *supra* note 325.

327. EISLER, *supra* note 9, at 174.

328. Telephone Interview with Michael Brown, *supra* note 272.

329. *See id.*

330. *Id.*

331. *Id.*

332. *Id.* By comparison, Nevada and New Jersey slot machines paid out approximately 93%, allowing casinos to retain 7% of the drop. *Id.*

333. *See Tribal-State Compact*, *supra* note 315, at 45-46.

334. *Id.*

the compact.<sup>335</sup> The state, meanwhile, had appealed Dorsey's decision to allow gambling on the reservation to the U.S. Supreme Court.<sup>336</sup> With its appeal pending, Connecticut refused to sign the compact it had submitted to Judge Naruk.<sup>337</sup> Naruk delivered the unsigned compact to Manuel Lujan, Jr., secretary of the Department of the Interior.<sup>338</sup>

After making several minor changes,<sup>339</sup> Secretary Lujan approved the agreement that the Pequots and Connecticut had negotiated and that Judge Naruk had delivered.<sup>340</sup> Because Connecticut had refused to sign the document, it did not qualify as a tribal-state compact. Instead, Lujan promulgated it as a federal procedure governing the operation of a casino on the Ledyard reservation.<sup>341</sup> Thus, the state and Pequots had no compact; gambling on the reservation was governed exclusively by the procedures of the agreement.

The Supreme Court refused to hear Connecticut's appeal,<sup>342</sup> and Judge Dorsey's decision stood. The state would have to endorse a compact with the Pequots or accept gambling regulations for the Pequot reservation that Interior Secretary Lujan created. Connecticut had taken its legal battle as far as it could and lost. Almost immediately, the tribe broke ground for its 46,000-square-foot casino.<sup>343</sup>

### C. Strategic Activities of the Initial Negotiations

In this first round, each side chose its BATNA instead of reaching an agreement. As a result, the Pequots could initiate gaming operations but could not install slot machines, which would be the most lucrative component to a gaming operation. Both sides realized, however, that more rounds were

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335. Telephone Interview with Michael Brown, *supra* note 272. Technically the tribe withdrew its version of the compact so that Connecticut could claim that its version was imposed on the tribe rather than having the tribal version imposed on the state. *See id.* While this distinction provided political cover for state officials, the two versions were so similar as to be substantively identical. *See id.*

336. *See Connecticut v. Mashantucket Pequot Tribe*, 498 U.S. 1022 (1991) (denying certiorari on Apr. 2, 1991).

337. Under the IGRA, the state was given the option of "consenting" to the draft compact it had submitted to the mediator. 25 U.S.C. § 2710 (2006). Connecticut's negotiators chose not to do so. *See Opportunity to Comment on Mashantucket Pequot Gaming Procedures*, 56 Fed. Reg. 15,746 (Apr. 17, 1991).

338. *See Opportunity to Comment on Mashantucket Pequot Gaming Procedures*, 56 Fed. Reg. 15,746.

339. *See Notice of Final Mashantucket Pequot Gaming Procedures* 56 Fed. Reg. 24,996 (May 31, 1991).

340. *See id.*

341. *See id.*

342. *Connecticut v. Mashantucket Pequot Tribe*, 498 U.S. 1022 (1991).

343. *See Wayne King, Atlantic City Shivers at Indians' Casinos to Come*, N.Y. TIMES, May 28, 1991, § B, at 4.



to come, and each party took steps away from the table to improve its own BATNA while attempting to weaken the other side's BATNA.

After Judge Naruk submitted the compact to Secretary Lujan, but before the casino opened, the general election in Connecticut changed the players at the table. Now sitting across the table from the Pequots, Governor Weicker was opposed to gambling in general and slots in particular.<sup>344</sup> Although Weicker inherited the Pequot situation late in the process, he made it clear that his top priority, given the sordid history of Connecticut gaming, was to prevent crime from infiltrating the casino and the surrounding area.<sup>345</sup> State Attorney General Richard Blumenthal, also elected in November, 1990, was also on Weicker's side, as his office was handling the defense of the Pequot lawsuit.<sup>346</sup>

Governor Weicker's first effort to thwart the Pequots' casino involved moving the fight against reservation gambling from the federal court system to the state legislature. In early 1991, shortly after he took office, he drafted a bill calling for the repeal of the state law permitting "Las Vegas night" fund-raising events by charities.<sup>347</sup> If passed, the bill would strip the Pequots of the legal basis for their casino.<sup>348</sup> To galvanize opposition to the bill, the Pequots retained Hartford-based lobbying firm Robinson & Cole.<sup>349</sup> The Hartford firm's employees worked the corridors of the state Senate and House of Representatives to create support for the tribe among lawmakers.<sup>350</sup> Also siding with the Pequots and speaking out against the measure were civic groups, parochial schools, and charities, which together raised over \$80,000 through "Las Vegas night" events in 1990.<sup>351</sup> Additionally, business leaders in southern Connecticut opposed Governor Weicker's proposal, arguing that a Pequot casino would provide a welcome boost to the regional economy that was reeling from defense-industry cutbacks and a national recession.<sup>352</sup> In a University of Connecticut survey of state residents, 68% of those polled supported the Pequots' right to open a casino on their Ledyard reservation.<sup>353</sup>

Out-of-state gambling interests that feared that Indian casinos might expand beyond Connecticut deployed powerful lobbyists of their own to support Governor Weicker's bill. In May 1991, the state Senate approved the meas-

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344. See EISLER, *supra* note 9, at 130-31, 149.

345. See *id.* at 131-32.

346. See *id.* at 131.

347. See John Larrabee, *Connecticut Tribe Is on a Roll*, USA TODAY, May 9, 1991, at 9A.

348. See *id.*

349. See Jonathan Rabinovitz, *For Pequots' Point Man, No Task Is Too Small*, N.Y. TIMES, NOV. 17, 1995, § B, at 1.

350. See *id.*

351. Larrabee, *supra* note 347.

352. *Id.*

353. Jon Lender, *Most Residents Support Pequots on Casino*, HARTFORD COURANT, June 6, 1991, at D1.

ure in an eighteen to seventeen vote.<sup>354</sup> Soon after the Senate vote, the House voted eighty-four to sixty-two to reject the governor's proposal.<sup>355</sup> Without the support of a majority in both the Senate and the House, the bill was dead.<sup>356</sup> The margin of victory was narrow, but the Pequots, once again, had won.

During all of the legislative maneuvering, the Pequots enhanced their position by building their casino and hiring and training employees. Foxwoods opened for business in February 1992 with 2300 employees.<sup>357</sup> The bingo section, which could seat 2400 players, doubled as a nightclub for entertainers such as Kenny Rogers, who played at Foxwoods' opening celebration.<sup>358</sup> At its grand opening, a medicine man dedicated the casino.<sup>359</sup> The fifty-one poker tables were kept busy with out-of-town visitors because Foxwoods was the only casino in the eastern United States that accommodated poker players.<sup>360</sup> Conspicuously absent, however, were the seductive flash and vibrant clamor of slot machines.<sup>361</sup>

Ten months later, the casino had not yet spent a single hour closed; customers were gambling twenty-four hours a day.<sup>362</sup> Each day, approximately 13,000 people flocked to Foxwoods to play blackjack, craps, roulette, baccarat, bingo, poker, and to place off-track bets.<sup>363</sup> Foxwoods was often so crowded that patrons had to wait hours for a seat at the gaming tables.<sup>364</sup> To service the crush of eager gamblers, the Pequot tribe had to augment its casino workforce. Within ten months, the casino had ballooned to 3500 employees, constituting a \$60 million payroll.<sup>365</sup> In its first year in operation, the booming casino was on its way to generating significantly more than the \$100 million in gross revenue that had been projected.<sup>366</sup> Demand was so great

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354. Bird, *supra* note 281.

355. *Id.*

356. *See id.*

357. *See* Lois Weiss, *High Rollin' Comes to New England*, REAL EST. WEEKLY, Mar. 25, 1992, at 12A; *Careers*, FOXWOODS RESORT CASINO, <http://www.foxwoods.com/Careers.aspx> (last visited Sept. 18, 2011).

358. Weiss, *supra* note 357.

359. *See* EISLER, *supra* note 9, at 163; FROMSON, *supra* note 325, at 131.

360. Hilary Waldman, *Night Passes Quickly in Casino's Eternal Day*, HARTFORD COURANT, May 26, 1992, at A1.

361. *See* Weiss, *supra* note 357.

362. *Id.*

363. *Id.*

364. *Id.*

365. Doug Bailey, *States Race to Grab Gaming Dollars*, BOS. GLOBE, Jan. 3, 1993, at 1.

366. *Id.* Gross revenue for a casino is the difference between the total amount wagered by customers and the amount returned to customers as winnings.

that in July, only five months after Foxwoods opened, the Pequots embarked on a \$142 million expansion of the complex.<sup>367</sup>

The expansion included a large hotel, a new casino, a five-story parking garage, three high-tech theaters, an entertainment and shopping mall, and a transportation system featuring trolleys and an outdoor monorail.<sup>368</sup> Work on the addition, which was more than five times as large as the existing building, was to be completed by the fall of 1993.<sup>369</sup> Casino officials said the new facilities would double daily attendance at Foxwoods.<sup>370</sup>

## VI. ROUND 2: NEGOTIATING SLOTS AT FOXWOODS

### A. Context of Negotiating Slots at Foxwoods

When Governor Weicker took office in early 1991, the state was in the throes of a financial crisis. Projections indicated that for the 1990-91 fiscal year ending June 30 Connecticut would incur a deficit between \$800 million and \$1 billion.<sup>371</sup> After the state had enjoyed nearly a decade of operating surpluses in the 1980s, Connecticut was facing its fourth consecutive year of deficits.<sup>372</sup> Furthermore, revenue and spending estimates for the 1991-92 fiscal year suggested that unless the state took corrective action, Connecticut would face a deficit of approximately \$2.7 billion in its \$7.8 billion budget; proportionately, this deficit would be the largest shortfall for any state in the country.<sup>373</sup>

In large measure, a deep national recession caused significant fiscal woes for Connecticut. Historically, the state had derived over half its revenue from an eight percent sales tax and taxes on corporate income. The slow-down in economic activity, however, led to a sharp decline in corporate-generated tax revenue.<sup>374</sup> To make up for this decline in revenue, Governor Weicker – after one month in office – proposed a personal income tax, which was enacted into law.<sup>375</sup>

Although the state expected the personal income tax would eliminate much of the budget shortfall, it was still an unproven source of revenue, and estimates of the amount it would generate varied. Most agreed, though, that

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367. Bill Keveney, *Pequots Plan to Parlay Success into Entertainment Complex*, HARTFORD COURANT, July 16, 1992, at A1.

368. *Id.*

369. *Id.*

370. *Id.*

371. See Joel Lang, *Accounting for the Tax*, HARTFORD COURANT, Dec. 8, 1991, at 12.

372. See Telephone Interview with Michael Brown, *supra* note 272.

373. Tom Curry, *Weicker Goes His Own Way*, TIME (N.Y.), July 15, 1991, at 24.

374. *Id.*

375. *Id.*

the new tax alone would not be enough to close the gap in Connecticut's finances.<sup>376</sup> To balance the budget, the state would have to make deep and unpopular cuts in government expenditures.<sup>377</sup> Indeed, the governor fought with the state legislature to trim outlays to the limits of what was politically feasible.<sup>378</sup>

This combination of a new income tax and severe spending cuts enabled Connecticut to achieve a budget surplus in 1991-92 for the first time in five years.<sup>379</sup> Feeling optimistic and sensing that the public was weary of sacrifice, Governor Weicker promised legislators in the spring of 1992 that he would not raise taxes for the remainder of his term.<sup>380</sup>

Despite the 1992 budget surplus, however, economic conditions in Connecticut continued to deteriorate. Rooted in the defense industry, Connecticut's economy suffered severe setbacks as military contracts were canceled in the post-Cold War environment.<sup>381</sup> In January 1992, Connecticut's unemployment rate reached 7.5%, the highest it had been in a decade.<sup>382</sup> In the spring of 1992, General Dynamics' Electric Boat shipyard in Groton, the largest private-sector employer in southern Connecticut, announced that it would lay off half of its 17,000 workers over the next five to six years.<sup>383</sup> In December 1992, Hartford-based Pratt & Whitney, which surpassed Electric Boat as the state's largest private-sector employer, planned to lay off 5000 members of its Connecticut workforce.<sup>384</sup> This decision would be the third round of major layoffs at the jet-engine manufacturer in less than twelve months.<sup>385</sup> Furthermore, the layoffs would result in thousands of additional job losses at the Connecticut companies that supplied materials to Pratt. Pratt's announcement prompted *The Hartford Courant* to write, "It's fair to say Connecticut is going through the darkest economic period since the Depression."<sup>386</sup>

As layoffs continued unabated around the state, Connecticut budget officials pared back their tax-revenue forecasts. Estimates of tax collections fell so sharply that by December 1992, the legislature's Office of Fiscal Analysis was projecting a shortfall of \$424 million for the 1993-94 fiscal year on a

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376. *Id.*

377. *Id.*

378. *Id.*

379. See Larry Williams, *Budget in Place, but Red Ink Colors Rosy Projections*, HARTFORD COURANT, May 10, 1992, at A1.

380. See *id.*

381. See EISLER, *supra* note 9, at 174.

382. W. Joseph Campbell, *State Gains Jobs, but Report Lists Region's Woes*, HARTFORD COURANT, Sept. 2, 1992, at D7.

383. Lyn Bixby & Brant Houston, *Defense Firms Try to Regroup*, HARTFORD COURANT, Nov. 3, 1991, at A1.

384. *A Blow to Connecticut*, HARTFORD COURANT, Jan. 28, 1993, at C12.

385. *Id.*

386. *Id.*

budget of approximately \$8 billion, assuming existing programs were maintained and expenditures were adjusted only for inflation.<sup>387</sup> Having promised not to raise taxes and aware that lawmakers had little appetite for further spending cuts, Governor Weicker found himself in a predicament that afforded little maneuvering room.<sup>388</sup> Yet, if Governor Weicker and the General Assembly did not act soon to prevent the budget shortfall, a financial crisis would engulf the state. There seemed to be no give: the governor and legislature had to produce a balanced budget for the 1993-94 fiscal year.

In the southeast corner of the state, meanwhile, the Pequots were building a casino that looked as if it would become a gold mine. Unfortunately for Governor Weicker and Connecticut legislators, the state could not tax profits the casino earned. For all the excitement the Pequots' casino generated, the state would not share in the spoils, but the Pequots' success quickly attracted other gambling interests to the state.

By the fall of 1992, Governor Weicker, who remained opposed to legalized gambling, faced mounting political pressure kindled by commercial gambling heavyweights. Trump, Bally, Harrah's, and Mirage lobbied state legislators to secure licenses for non-Indian casinos.<sup>389</sup> Mirage owner Stephen Wynn made particularly aggressive overtures to the state, promising to create jobs and provide attractive tax benefits.<sup>390</sup> Wynn and his big-league gambling compatriots pointed out that the state treasury was missing out on the gambling boom at Foxwoods because the Pequots were not required to pay taxes on their casino's profits or their personal earnings.<sup>391</sup> At best, in the case of Foxwoods, the state was receiving an incidental benefit of state income tax paid by non-Indian employees.<sup>392</sup> Why, asked Wynn, if casino-style gambling was introduced within state boundaries, should the state's taxpayers be denied the chance to share in casino earnings?<sup>393</sup> He spent several million dollars lobbying state legislators and sponsoring other pro-gambling activities such as casino job fairs.<sup>394</sup>

387. Kirk Johnson, *Taxes and Gambling Top Lawmakers' List*, N.Y. TIMES, Jan. 3, 1993, § 13CN, at 1.

388. See Williams, *supra* note 379.

389. See Telephone Interview with Michael Brown, *supra* note 272.

390. See EISLER, *supra* note 9, at 173-74.

391. See *id.* By contrast, Nevada and New Jersey casinos were paying state taxes of between 6 and 8% of gross revenue. Telephone Interview with Michael Brown, *supra* note 272.

392. The state also benefited from a sales tax on meals and an excise tax on liquor, but these payments amounted to less than income taxes paid by non-Indian employees.

393. See EISLER, *supra* note 9, at 173-74.

394. See Hilary Waldman, *Mirage Stages Media Blitz*, HARTFORD COURANT, Apr. 25, 1993, at B1; see also *For the Record*, HARTFORD COURANT, Dec. 22, 1995, at A3 (discussing money spent by Wynn in attempting to get approval for a Connecticut casino).

In March 1992, Wynn treated four Connecticut lawmakers to an all-expenses-paid weekend at his opulent Mirage resort and casino in Las Vegas, flying them out on his private jet.<sup>395</sup> There he unveiled an architectural blueprint for the \$350 million casino he hoped to open in Hartford, and he discussed the possibility of opening a second casino in Bridgeport.<sup>396</sup> Harrah's and other gambling concerns followed suit, revealing their own plans for Connecticut casinos.<sup>397</sup>

The movement to legalize casino gambling in Connecticut was gathering steam. In the spring of 1992, the state legislature commissioned an eighteen-member task force to study the gambling issue and to make a recommendation to the General Assembly by January 1993 about whether Connecticut should permit non-Indian casinos.<sup>398</sup> A poll conducted in September 1992 showed that 56% of respondents approved of the state's raising revenue through legalized gambling while only 37% disapproved.<sup>399</sup> In November 1992, the Connecticut state Senate elected William A. DiBella, a Hartford Democrat and friend of Stephen Wynn, to become the body's majority leader when its next legislative session began in January 1993.<sup>400</sup> DiBella was the Senate's most outspoken advocate for casinos in Hartford and Bridgeport and of video slot machines at existing pari-mutuel facilities. With many Connecticut residents supportive of casinos and with DiBella leading the Senate, introduction of a bill during the upcoming legislative session that would permit expanded gambling in the state seemed almost certain.<sup>401</sup> To Governor Weicker, gambling on the Pequot reservation no longer posed the greatest threat to a healthy social environment in Connecticut.<sup>402</sup> Foxwoods, after all, had not given rise to drugs, prostitution, or other crime problems in Le-

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395. Hilary Waldman, *Lawmakers See Life in the Glitter Lane*, HARTFORD COURANT, Mar. 22, 1992, at A1.

396. *See id.*; Elizabeth Ross, *Connecticut Links Casino Proposal to State Revenues, Job Creation*, CHRISTIAN SCI. MONITOR, Jan. 26, 1993, at 9.

397. Hilary Waldman, *Harrah's Unveils Plan for Bridgeport Casino*, HARTFORD COURANT, Nov. 19, 1992, at B1.

398. *See* EISLER, *supra* note 9, at 178; Hilary Waldman, *The Unraveling of Casino Proposal*, HARTFORD COURANT, May 23, 1993, at A1 [hereinafter Waldman, *Unraveling*].

399. Don Noel, *Will DiBella Goad Weicker to Run in 1994?*, HARTFORD COURANT, Nov. 20, 1992, at C15. The poll was conducted by the Institute for Social Inquiry at the University of Connecticut. *Id.*

400. *See* EISLER, *supra* note 9, at 175; Hilary Waldman, Anita M. Seline & Mike Swift, *In Casino War, You Can't Tell the Players Without a Scorecard*, HARTFORD COURANT, Dec. 21, 1992, at A1.

401. Telephone Interview with Michael Brown, *supra* note 272.

402. *Id.*

dyard.<sup>403</sup> The real threat, in the governor's view, was the corporate-sponsored movement to legalize casinos throughout the state.<sup>404</sup>

But circumstances were combining to make life even harder for Connecticut's governor. By January 1993, Governor Weicker, who had risked political suicide by spearheading the income tax and making unprecedented cuts in expenditures, again faced a looming deficit, projected to be at least \$424 million.<sup>405</sup> He also faced broad legislative support for statewide legalization of gambling.<sup>406</sup>

Meanwhile, casino operators from Las Vegas and Atlantic City continued to woo state and local officials, hoping to win the right to build gambling and entertainment complexes in Hartford and Bridgeport.<sup>407</sup> They promised jobs and revenue for Connecticut and its two largest cities.<sup>408</sup> The state's legal jai alai frontons and dog track, which were struggling financially, also lobbied for slot machines.<sup>409</sup> A specially assembled State Casino Gambling Task Force scheduled a vote in early January 1993 on whether to recommend that the legislature legalize casino gambling.<sup>410</sup>

During that same time, Brown had gotten to know Robert Werner, a key aide to Governor Weicker, who in the fall of 1992 had been appointed director of the State Division of Special Revenue.<sup>411</sup> The division oversaw legalized gambling in the state and was responsible for regulating the Foxwoods casino.<sup>412</sup> In the months since Werner had been named director, Brown and Werner had met a number of times to discuss road improvements and other issues at Foxwoods.<sup>413</sup> Now, Brown reasoned that he might be able to get slot machines on the governor's agenda by working through Werner. By going first to Werner, Brown hoped to win the support of a key member of the governor's inner circle.<sup>414</sup> If Werner was enthusiastic, Governor Weicker might be more willing to consider a plan permitting Foxwoods to operate slot machines.

403. *Id.*

404. *Id.*

405. See Mark Pazniokas & Larry Williams, *Weicker May Propose Sales Tax Expansion*, HARTFORD COURANT, Jan. 8, 1993, at A1.

406. See *supra* notes 354-56 and accompanying text.

407. Peggy McCarthy, *Boom or Bust: State Weighs Legalizing Casinos*, N.Y. TIMES, Dec. 27, 1992, § 13CN, at 1.

408. *Id.*

409. *Id.*

410. *Id.*

411. See Mark Pazniokas, *Weicker Reassigns Gaming Official*, HARTFORD COURANT, Sept. 2, 1992, at B1 [hereinafter Pazniokas, *Weicker Reassigns Gaming Official*]; Telephone Interview with Michael Brown, *supra* note 272.

412. See Pazniokas, *Weicker Reassigns Gaming Official*, *supra* note 411.

413. Telephone Interview with Michael Brown, *supra* note 272.

414. *Id.*

*B. Opportunities and Barriers of Negotiating  
Slots at Foxwoods<sup>415</sup>*

In late 1992, Brown learned from Werner that Connecticut was facing a \$424 million budget shortfall for the 1993-94 fiscal year.<sup>416</sup> The governor and the legislature were required to agree on a balanced budget by July 1, 1993. In response, Brown and Werner discussed the possibility of having the Pequots help the state make up the budgetary shortfall in exchange for the right to operate slot machines at Foxwoods. Encouraged by his conversations with Werner, Brown met with the Pequots' seven-member tribal council and proposed that the tribe offer to make voluntary payments to Connecticut. Brown, however, suggested an intriguing twist on this basic idea: the Pequot payments would be conditional on tribal exclusivity for the operation of slot machines in the state. He estimated that the tribe could earn \$400-\$500 million in annual slot machine revenue. The tribal council supported Brown's proposal.

On a Friday evening in December, Brown and Werner met at a coffee shop where Brown made a case for slot machines at Foxwoods. He pointed out that the casino had flourished, providing thousands of jobs without attracting the drugs, prostitution, and organized crime that its detractors feared. To build on Foxwoods' success, he added, the Pequots would like to operate slot machines. Brown emphasized two looming threats facing the Weicker administration. First, Mirage Resorts and Harrah's Entertainment had stepped up their efforts to build casinos in Connecticut, and their supporters had introduced a proposal for non-Indian gambling in the legislature. Governor Weicker was opposed to new casinos, and the legislative proposal could undermine his anti-gambling stance. Second, the state faced a \$424 million budget shortfall for the 1993-94 fiscal year. By granting the Pequots exclusive slot machine operation in Connecticut in exchange for voluntary payments from the tribe to the state, noted Brown, the governor would be able to contain the spread of gambling and, at the same time, sharply and relatively painlessly reduce the budget gap. After hearing Brown out, Werner left the table and made a phone call to the governor's mansion. When he returned, he told Brown that the governor would meet him the following morning.

At that meeting, Michael Brown and Pequot legal advisors Barry Margolin and Robert Gips met Governor Weicker at his home. Brown outlined the slot machine proposal he had described to Werner. The governor was intrigued. He was unwilling, however, to sign a state budget partially funded by a percentage of the projected and "therefore uncertain" revenues of a casino; he insisted that the Pequots guarantee a minimum annual payment.

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415. The following paragraphs detailing the interactions between Brown, Werner, Weicker, and the tribe are all based on the Telephone Interview with Michael Brown, *supra* note 272.

416. *See* Johnson, *supra* note 387.



Brown proposed that, each year, the Pequots pay the state twenty-five percent of annual slot machine revenues or \$100 million, whichever was greater. Brown stipulated, however, that the Pequots must be permitted to terminate voluntary payments “while retaining the right to operate slot machines” if slot machines were ever legalized anywhere in Connecticut other than Foxwoods.

While Governor Weicker liked the \$100 million guarantee, he had two concerns. First, he feared slot machines might not be legal in Connecticut, and second, he was not convinced that he had the authority to commit the state to a slot machine deal with the Pequots without legislative approval. Hesitant to endorse such an arrangement behind closed doors without the consent of Attorney General Richard Blumenthal, he suggested bringing Blumenthal into the negotiations.

Immediately, the Pequots’ representatives made it clear that they would withdraw their offer if Blumenthal became involved. Brown and his associates pointed out that in court cases in Minnesota, Wisconsin, and Arizona, judges had ruled that vendors could legally operate arcade games such as “Space Invaders” that reward high-scoring players with free games.<sup>417</sup> They argued that these rulings provided sufficient precedent to justify the operation of video slot machines at Foxwoods. The legality of slot machines, they claimed, was not an issue.

More subtle, said Brown, was the legal reasoning which assured that the governor had the authority to enter a binding slot machine agreement with the Pequots without the involvement of the legislature. Brown pointed out that the state’s compact with the Pequots listed video slot machines among the games permitted on the reservation. The compact also placed a moratorium on the operation of slot machines at Foxwoods, however, until a dispute between the Pequots and the state was resolved.<sup>418</sup> The dispute arose when the parties formulated the compact. Negotiators for the Pequots claimed slot machines were legal under state law; negotiators for the state claimed they were not. As a compromise, the two sides made provisions for the operation of slot machines on the Pequot reservation with the understanding that the provisions were inoperable until the legal dispute was settled. At the governor’s mansion, Brown argued that Governor Weicker could end the dispute by contending that, based on the precedent established in the Minnesota, Wisconsin, and Arizona cases, the operation of slot machines was in fact permissible under Connecticut law. Brown argued that Governor Weicker had the authority to do so because he would not be creating new law but interpreting and adhering to existing law; while the former would require legislative approval, the latter did not. Under the circumstances, said Brown, the governor had absolute authority to enter into a slot machine agreement with the Pequots on behalf of the state.

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417. *Why the Slots Are at Foxwoods*, HARTFORD COURANT, Jan. 17, 1993, at B7.

418. *Id.*

Brown, Margolin, and Gips managed to placate Governor Weicker's concerns, and the governor agreed to the Pequots' proposal. Over the next few weeks, the Pequots' legal counsel and the governor's office drew up a seven-page memorandum of understanding which would permit the Pequots to operate slot machines exclusively in exchange for guaranteed payments to the state. Later, Brown would acknowledge that secret, independent action on the part of Governor Weicker was critical to consummating the deal. According to Brown, if knowledge of the pending arrangement had become public before the parties finalized the deal, Stephen Wynn and other gambling interests would have launched powerful lobbying efforts to turn public sentiment against the Pequots' bid to secure the exclusive right to operate slot machines in the state. "Furthermore," Brown would point out, "if Weicker had sought an opinion [from the attorney general], the agreement would have fallen apart. The legislature would have gotten wind of the deal and would have prevented it."

On January 5th, the eighteen-member State Casino Gambling Task Force voted twelve to six in favor of recommending that the state legislature approve casinos in Hartford and Bridgeport.<sup>419</sup> The task force also recommended that the state legalize video slot machines at casinos, jai alai frontons, dog tracks, and off-track betting parlors.<sup>420</sup>

On January 13th, Governor Weicker invited the media to a press conference to witness the signing of the memorandum of understanding he had negotiated with the Pequots.<sup>421</sup> The agreement was a surprise to the public.<sup>422</sup> Many legislators were stunned by the governor's unilateral action that preempted pro-corporate gambling measures they were about to undertake.<sup>423</sup>

The agreement permitted the Pequot tribe to install an unlimited number of video slot machines at the Foxwoods casino.<sup>424</sup> In return, the Pequots would pay the state \$30 million by the end of Connecticut's fiscal year on June 30, 1993.<sup>425</sup> In the following fiscal year, the Pequots would contribute \$100 million to the state.<sup>426</sup> In subsequent years, the tribe would pay the state \$100 million or twenty-five percent of slot machine revenues, whichever was greater.<sup>427</sup> If the state ever permitted any other organization to operate slot

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419. See *Two More Casinos?*, HARTFORD COURANT, Feb. 7, 1993, at C2; Waldman, *Unraveling*, *supra* note 398.

420. See *Two More Casinos?*, *supra* note 419.

421. FROMSON, *supra* note 325, at 140.

422. See Mark Pazniokas, *Governor Playing Good Odds*, HARTFORD COURANT, Jan. 14, 1993, at A6.

423. See *id.*

424. See *id.*

425. See *id.*

426. *Id.*

427. See FROMSON, *supra* note 325, at 140.

machines in Connecticut, however, the Pequots would no longer be required to make payments to the state.<sup>428</sup>

Governor Weicker announced that his office had drawn up a plan, subject to legislative approval, under which the state would distribute the Pequots' payments to Connecticut's 169 cities and towns.<sup>429</sup> Sixty percent of the money (\$60 million in 1993-94) would go to the state's poorest communities, including Hartford and Bridgeport.<sup>430</sup> Municipalities that housed large tracts of tax-exempt property, such as colleges, hospitals, and state prisons would share the rest.<sup>431</sup> "No town in the state would [receive] less than \$5000."<sup>432</sup> Most city leaders, including Hartford Mayor Carrie Saxon Perry, were enthusiastic about Governor Weicker's disbursement plan, called PILOT for "payments in lieu of taxes."<sup>433</sup>

With the agreement in place, legalization of slot machines anywhere in Connecticut other than Foxwoods would cause the state to lose at least \$100 million in guaranteed annual revenue, and even more if Foxwoods' slot machine revenue projections proved accurate.<sup>434</sup> As Carl J. Schiessl, a Democratic state representative from Windsor, pointed out, "The governor has proven once again that he is an exquisite strategist . . . . He has added \$100 million to the anti-casino arsenal. Casino proponents will have to overcome that."<sup>435</sup> Any non-Indian casino facility would not only have to pay tax on its own operations (likely 6-8% based on Nevada and New Jersey rates at that time),<sup>436</sup> but also likely would have to compensate Connecticut for the loss of the Pequot's voluntary payments. This added requirement would be a painful hurdle for a non-Indian casino to surmount.

On January 16th, the Pequots installed the first 100 video slot machines at Foxwoods.<sup>437</sup> Michael Brown reported that the casino hoped to have 1260 slot machines in operation by March 1st.<sup>438</sup> The new slot machines would

428. See Kirk Johnson, *Slot Machines Are Delayed; Weicker's Deal Is Hailed*, N.Y. TIMES, Jan. 16, 1993, at 27.

429. See Hilary Waldman, *Slot Money Would Boost Poor Cities*, HARTFORD COURANT, Feb. 4, 1993, at A1 [hereinafter Waldman, *Slot Money Would Boost Poor Cities*].

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. Pazniokas, *supra* note 422.

435. *Id.*

436. See Telephone Interview with Michael Brown, *supra* note 272. Rates have since increased. See Andy Vuong, *Colorado has 4th Lowest Casino Tax Rate*, THE BALANCE SHEET (Aug. 30, 2011, 9:40 AM), <http://blogs.denverpost.com/thebalance-sheet/2011/08/02/colorados-has-4th-lowest-casino-tax-rate/18/>.

437. See Hilary Waldman, *Debut of Slot Machines Delayed*, HARTFORD COURANT, Jan. 16, 1993, at D1.

438. *Id.*

offer a variety of games, including video poker, draw poker, and video blackjack.<sup>439</sup> Over half, however, would “resemble the traditional one-armed bandits on which players [win by matching] fruits or other symbols.”<sup>440</sup> Brown believed that the casino eventually could operate as many as 3000 slot machines.<sup>441</sup> In the first week that slot machines were operational at Foxwoods, casino attendance increased by 60%.<sup>442</sup>

### C. Strategic Activities of Negotiating Slots at Foxwoods

Having built Governor Weicker a “golden bridge,” the Pequots enticed the governor to join their side of the table. Implementation of the agreement was far from certain, and the newly realigned sides continued efforts to improve their respective BATNAs while weakening those of their opponents.

Advocates of non-Indian gambling, rallying behind Senate Majority leader DiBella, questioned Governor Weicker’s authority to negotiate a slot machine deal with the Pequots without involving the state legislature.<sup>443</sup> Senate Pro Tem John B. Larson, also a Hartford Democrat, wrote Governor Weicker a letter charging the governor with overstepping his constitutional bounds in signing the slot machine agreement.<sup>444</sup> Larson demanded that the governor submit the memorandum of understanding to the General Assembly for approval.<sup>445</sup> In a three-page reply to Larson, Governor Weicker maintained that he lawfully discharged his duties as governor and asserted that he had no intention of submitting the agreement to the legislature for approval.<sup>446</sup>

Governor Weicker’s adversaries arranged a meeting on January 14th with State Attorney General Richard Blumenthal to demand a ruling on the matter.<sup>447</sup> At the meeting, Blumenthal acknowledged that his office had not been involved in the negotiations between the governor and the Pequots and that he knew nothing of the impending slot machine agreement until the day before it was signed.<sup>448</sup> The attorney general announced that he would deliv-

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439. *Id.*

440. *Id.*

441. *Id.*

442. Hilary Waldman, *Weicker Rejects Request on Slots*, HARTFORD COURANT, Jan. 27, 1993, at D1 [hereinafter Waldman, *Weicker Rejects Request on Slots*].

443. *See id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. Hilary Waldman & Christopher Keating, *Casino Backers Seek to Counter Weicker’s Slot Ploy*, HARTFORD COURANT, Jan. 15, 1993, at A1.

er an official opinion on the legality of the agreement.<sup>449</sup> Governor Weicker and his opponents agreed to accept Blumenthal's legal opinion as binding.<sup>450</sup>

Stephen Wynn, aware that Governor Weicker's deal with the Pequots had jeopardized his plans to build casinos in Connecticut, intensified his lobbying and publicity efforts. He touted the \$350 million "urban entertainment center" that Mirage Resorts, Inc., had proposed for downtown Hartford.<sup>451</sup> The complex was designed to include a casino, "hotel, convention center, six-screen movie theater, ice-skating rink, a 1500-seat performing arts center, retail shops, and restaurants."<sup>452</sup> The company had proposed a similar \$300 million facility for Bridgeport.<sup>453</sup> The situation had escalated into a bidding war with the Pequots. Wynn announced that he would guarantee state and local tax payments of \$140 million per year if the state permitted Mirage Resorts to build casinos in Hartford and Bridgeport.<sup>454</sup> "The governor made a bad deal with the Indians and we make a better one," Wynn said. "I'll guarantee \$140 million. Period."<sup>455</sup>

Despite Wynn's pronouncements, Representative William Dyson, a New Haven Democrat, pointed out that legislators who liked the idea of expanded gambling in the state would be reluctant to sanction new casinos, for doing so would put an end to payments from the Pequots.<sup>456</sup> "Do you take the [sure] money, or do you take a risk?" Dyson asked. "It's the old adage of [a] bird in hand [versus] bird in bush. I'm for bird in hand."<sup>457</sup>

On February 11th, Attorney General Blumenthal delivered an opinion to the speaker of Connecticut's House of Representatives on the legality of the memorandum of understanding.<sup>458</sup> Blumenthal concluded that the agreement did not establish new laws or amend existing ones.<sup>459</sup> Instead, it clarified a matter of dispute that arose in the original tribal state compact, namely, "whether based on existing state law" video slot machine gambling was permitted under the Indian Gaming Regulatory Act.<sup>460</sup> Blumenthal wrote:

It is the Attorney General's opinion that execution of this agreement is fundamentally executive in nature, rather than legislative.

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449. See Waldman, *Weicker Rejects Request on Slots*, *supra* note 442.

450. *Id.*

451. Ross, *supra* note 396.

452. *Id.*

453. *Id.*

454. Hilary Waldman & Michele Jacklin, *Attorney General Rules Slot Machine Pact Is Legal*, HARTFORD COURANT, Feb. 12, 1993, at D1.

455. *Id.*

456. Waldman, *Slot Money Would Boost Poor Cities*, *supra* note 429.

457. *Id.*

458. Office of the Attorney Gen., *Separation of Powers*, 19 CONN. L. TRIB. 7 (1993).

459. *See id.*

460. *Id.*

In executing the Memorandum, the Governor acted as the chief executive as he was interpreting, implementing and executing the law . . . . While there is no specific statute specifically authorizing the Governor to sign this agreement, his power to do so clearly emanates from his Constitutional power to see that the laws be faithfully executed. Section 12 of Article IV of the Connecticut Constitution. . . . In conclusion, there is no legal requirement in support of the contention that the Memorandum should have been submitted to the legislature for approval.<sup>461</sup>

Over the next two months, the Pequots installed more than 1000 slot machines at Foxwoods.<sup>462</sup>

On June 30, 1993, the Pequots delivered \$30 million to Connecticut's Department of Special Revenue, pursuant to the agreement.<sup>463</sup> The tribe's slot machines had been in operation since February and were one of the primary reasons that revenue at Foxwoods grew from \$120 million in the casino's first year to nearly \$1 billion in its second year.

Meanwhile, the state legislature still was haggling over a budget for the 1993-1994 fiscal year. The state constitution required that the legislature submit a balanced budget for the approaching fiscal year by midnight on July 1st. On the morning of July 1st, however, the budget reflected a shortfall of \$13 million, and legislators were no longer willing to compromise on spending. Desperate, the speakers of the House and Senate called Michael Brown, pleading with him to persuade the Pequot tribe to increase its minimum guaranteed payment to the state from \$100 million to \$113 million for the next fiscal year only. In the afternoon, Brown met tribal leaders and convinced them that by voluntarily increasing their guaranteed payment by \$13 million in a time of fiscal crisis, the Pequots could "lock up the support of the legislative branch." In a discussion that lasted "less than five minutes," the tribal council agreed to pledge an additional \$13 million to the state. The legislature prepared a bill documenting this special, one-time arrangement and passed a balanced budget before the midnight deadline. The Pequots demanded nothing in return for the increased payment guarantee.

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461. *Id.*

462. See Hilary Waldman, *Jersey May Feel Pequot Slot Take*, HARTFORD COURANT, Mar. 6, 1993

463. Telephone Interview with Michael Brown, *supra* note 272. This paragraph and the following paragraph are based on that interview.

*D. Prologue*

Over the course of the year, the Pequots undertook massive expansion projects at the newly renamed Foxwoods Resort Casino.<sup>464</sup> In the fall, the tribe completed construction of the Two Trees Inn, a 280-room hotel next to the reservation.<sup>465</sup> On the reservation itself, the Pequots completed a 1.3 million square-foot, eight-story tower that housed a new casino and 312 room luxury hotel called Great Cedar Hotel, complete with a health spa, a fine dining restaurant, and meeting and conference rooms.<sup>466</sup> The casino expansion involved five large gaming areas, including sixty-four additional gaming tables and 1,150 additional slot machines.<sup>467</sup> At the entrance to the concourse was a man-made waterfall with a twelve-foot statue of an Indian on top.<sup>468</sup> The Indian held a bow and arrow in the air and every hour “shot” a teal laser beam towards the sky, setting off a simulated rainstorm.<sup>469</sup> Additional man-made waterfalls and sculptures of Indian warriors were spread throughout the complex. As part of the grand opening celebration for the new tower, the Pequots booked Frank Sinatra as the inaugural performer at the Fox Theater.<sup>470</sup>

The construction bill for the new tower and concourse was \$240 million, which the Pequots paid out of casino profits.<sup>471</sup> The tribe changed the official name of the gambling and entertainment complex from Foxwoods High Stakes Bingo & Casino to Foxwoods Resort & Casino.<sup>472</sup>

By the end of 1993, Foxwoods had 234 table games, 3108 slot machines, and 139,000 square feet of gaming space.<sup>473</sup> By 1995, more than

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464. See *Mashantucket Pequot Gaming Enterprise Inc.*, FUNDINGUNIVERSE.COM, <http://www.fundinguniverse.com/company-histories/Mashantucket-Pequot-Gaming-Enterprise-Inc-Company-History.html> (last visited Mar. 12, 2012).

465. *Id.*

466. *Id.*

467. *Id.*

468. Hilary Waldman, *Expansion Would Make Casino Biggest in Hemisphere*, HARTFORD COURANT, July 5, 1993, at A1 [hereinafter Waldman, *Expansion*].

469. *Id.*

470. Kirk Johnson, *A Casino and a Crooner: They Did It Their Way*, N.Y. TIMES, Nov. 20, 1993, § 1, at 23. Sinatra cost the Pequots \$750,000, but he attracted a full house on each of the five nights he performed. See *id.*

471. See Waldman, *Expansion*, *supra* note 468; *Mashantucket Pequot Gaming Enterprise Inc.*, *supra* note 464.

472. *Mashantucket Pequot Gaming Enterprise Inc.*, *supra* note 464.

473. Mark Chapman, *Out of the Woods; Foxwoods Becomes a Full-Service Gaming Resort - and There's More on the Way*, BOS. HERALD, Dec. 5, 1993, at 55.

30,000 people had visited the casino.<sup>474</sup> It was reported to be the largest and most profitable casino in the world.<sup>475</sup>

## VII. MAJOR SHIFTS IN THE NEGOTIATION LANDSCAPE

Given the enormous success of Foxwoods, tribes from all over the United States began to push for gaming compacts. Sometimes those compacts came easily, and other times the states were obstructionist. Each side also made moves “away from the table” either to improve their position or to worsen the other sides’ BATNA. One portion of IGRA that gained scrutiny and created immediate conflict between states and tribes was the “good faith bargaining” provision. Since that section of IGRA forced states to the negotiating table, altering that requirement was a logical area for a state to focus its strategic efforts.

### A. Seminole Tribe v. Florida:<sup>476</sup> *The States Adjust Their BATNAs*

In September 1991, the Seminole Tribe of Florida sued the State of Florida, alleging “that respondents had ‘refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact,’ thereby violating [IGRA’s] ‘requirement of good faith negotiation’ . . . .”<sup>477</sup> Florida responded by arguing that the suit violated the state’s sovereign immunity from suit in federal court.<sup>478</sup> After procedural battles in the lower courts, the parties appealed the case to the U.S. Supreme Court.<sup>479</sup>

After finding that Congress had abrogated the states’ Eleventh Amendment immunity from suit, the Court held in a five-four decision that Congress acted beyond its Constitutional power when it made states subject to suit for bargaining in bad faith with tribes over gaming compacts.<sup>480</sup> At issue was the interplay in the language of 25 U.S.C. § 2710(d)(3)(A), which requires states to negotiate in good faith with an Indian tribe regarding the formation of a gaming compact, and 25 U.S.C. § 2710(d)(7), which authorizes a tribe to bring suit in federal court against a state to enforce that duty.<sup>481</sup> The Court also held that the doctrine set forth in *Ex parte Young* did not allow tribes to

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474. See *Mashantucket Pequot Gaming Enterprise Inc.*, *supra* note 464.

475. Hilary Waldman, *Pequot Tribe to Aid Special Olympics*, HARTFORD COURANT, Nov. 30, 1993, at C1.

476. 517 U.S. 44 (1996).

477. *Id.* at 51-52.

478. *Id.* at 52.

479. *Id.* at 52-53.

480. *Id.* at 47.

481. *Id.*



sue state officials in their official capacities as a way around the Eleventh Amendment's grant of state immunity from suit.<sup>482</sup>

Commentators have criticized *Seminole Tribe* on a number of theoretical grounds,<sup>483</sup> but from a practical standpoint, the decision disrupted IGRA's compromise, as states were now immune from suit even if they were lacking good faith in the negotiation of gaming compacts. This shift in the negotiation landscape allowed states to demand a large share of tribal gaming proceeds, which was not IGRA's intent. As former NIGC general counsel Kevin Washburn noted,

From a purely legal standpoint, it is difficult to reconcile revenue sharing arrangements with Congress's intentions in IGRA. . . . The compacting process was not intended to give states a veto over such gaming, but rather to give states an opportunity to address legitimate public policy concerns related to the tribes' exercise of the right. In other words, the compacting process was intended to give

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482. *Id.* at 45.

483. *See, e.g.,* Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407, 482 (1999) (The Court essentially "preserve[d] the power to grant itself jurisdiction where Congress is constitutionally barred," by claiming "the institutional right, where private lawsuits challenge state interests, to have not just the last word but the only word on the scope of its own constitutional authority."); David S. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 284-85 (2001) (arguing that *Seminole Tribe* was yet another example of the current Court's efforts to find ways to limit the scope of Indian tribal power). One could also argue that the Court inconsistently read Article I, Section 8, cl. 3 of the U.S. Constitution, which reads "Congress shall have . . . to regulate Commerce . . . among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 1, 3. The Court noted that the: "Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity, [since] the power to regulate interstate commerce would be incomplete without the authority to render States liable in damages." *Seminole Tribe*, 517 U.S. at 59 (citations omitted) (internal quotation marks omitted). Arguably, the instrumentality required to enforce the Indian Commerce Power, itself predicated on the need of the central government to control commerce "with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, very closely resembles that required to control commerce "between the several states." *Id.* The Court appears to believe that five additional words in the Constitution transform the phrase. *Seminole Tribe*, 517 U.S. at 45, 47. In some circumstances, it is an indispensable power to "render states liable in damages," *id.* at 59, in order to accomplish important federal goals. In others, where Indians are involved, the same phrase, albeit with five additional words, when used in much the same way, enables an unconstitutional abrogation of state sovereignty. *Id.* at 44.

states a voice in Indian gaming to address legitimate concerns, not to give states an opportunity to demand a cut of the profits.<sup>484</sup>

Additionally, *Seminole Tribe* defanged the IGRA by removing the only tool tribes possessed to ensure the exercise of their right to conduct gaming on their lands, the ability to force the states to sit at the negotiating table. The economic consequences were obvious.

From a Coasian perspective, the significance of *Seminole* is that it licenses states to act as holdouts over Class III compacts – as players who rationally defect from a process akin to a complex prisoner’s dilemma game. . . . There has been a marked reduction in compacts negotiated since *Seminole*, and states like California, New Mexico, and Wisconsin are taking a much tougher line with ‘their’ tribes.<sup>485</sup>

How the Department of the Interior will handle the actions of these holdout states remains to be seen, but by removing the ability of the tribes to force the states to the negotiating table, the states worsened the tribal BATNA.

### B. Adjustments to Tribal BATNAs

Subsequent attempts have tried to rebalance the situation. In response to *Seminole Tribe v. Florida*, the Secretary of the Interior promulgated regulations permitting tribal gaming in the absence of state agreement.<sup>486</sup> Additionally, the Department of Interior implemented a policy of refusing to approve compacts that incorporate revenue sharing if the state does not provide a substantial level of exclusivity to the tribe.<sup>487</sup> This policy gives the tribes an additional bargaining angle if the state gets too greedy in asking for a percentage of Indian gaming revenues.

Perhaps more influential on the tribal BATNA is the technological progression of gaming machines. Although Class II gaming originally was conceived of as bingo, enterprising tribes and gaming equipment developers worked to simulate the “Class III experience,” but used technology that fell

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484. Kevin K. Washburn, *Indian Gaming: A Primer on the Development of Indian Gaming, the NIGC, and Several Important Unresolved Issues*, A.B.A. Center for Continuing Legal Education National Institute, Criminal Justice Section, Gaming Enforcement, Feb. 7-8, 2002.

485. Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 313 (1999).

486. Class III Gaming Procedures, 64 Fed. Reg. 17,535 (proposed Apr. 12, 1999) (to be codified at 25 C.F.R. pt. 291).

487. See Kevin Gover, Revenue Sharing 367-70 (Apr. 14, 2005) (unpublished manuscript) (on file with author).

within the scope of Class II gaming.<sup>488</sup> The inner workings of such equipment were based on a bingo-style simulation, but the user interface attempted to approximate a slot machine or other video gaming device that ordinarily would fall under Class III.<sup>489</sup> This development was possible because the definition of Class II allowed such games to be played using a computer, an electronic device, or other technological aid.<sup>490</sup> As Class II gaming technology becomes more sophisticated, the distinction between these machines and true Class III machines diminishes. Such machines can be considered “Class II.9” machines, and their profitability approaches that of true Class III machines.<sup>491</sup>

Since Class II gaming does not require a tribal-state compact, a tribe could open a casino with exclusively Class II.9 machines and cut the state out of any revenue share whatsoever if a state refused to negotiate in good faith on Class III machines. Thus, while the relative bargaining strength may have shifted toward the state after *Seminole Tribe v. Florida*, the Code of Federal Regulations and the technological advancement of gaming equipment have caused the pendulum to swing back towards the tribes.

## VIII. CONCLUSION

Although *Seminole* eviscerated IGRA’s mechanism for balancing tribal and state interests, tribes are still able to negotiate gaming compacts that advance tribal interests. The agreement concluded between the Seneca Nation of Indians and the State of New York is an example of a post-*Seminole* agreement where the tribe applied the lessons from Foxwoods.<sup>492</sup> Although a successful outcome may have required a heightened level of strategic negotiation acumen on the part of the tribe, the Senecas were able to negotiate a deal that allowed them to open a casino on the shores of Niagara Falls and were able to convince the state essentially to give them the land upon which to build the casino.

Although much of this Article has focused on the negotiation dynamics surrounding gaming compacts, the strategic lessons from these negotiations are nonetheless applicable beyond the gaming context. For example, the most recent bargaining challenge for the Pequots is not with the State of Con-

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488. See Frank Legato, *Class II: Is It Fair?*, CASINOCENTER.COM, <http://www.casinocenter.com/?p=265> (last visited Mar. 12, 2012) (describing development of Class II machines that approach the functionality of their Class III “slot cousins”).

489. See *id.*

490. See 25 U.S.C. § 2703(7)(i) (2006).

491. See Legato, *supra* note 488 (describing how Class II programmers “figured out the odds of hitting certain patterns on the bingo card [and then taking] those bingo patterns and plug[ging] them right into the payout scheme to replicate any Class III game” (internal quotation marks omitted)).

492. See *NYS Gaming Compact*, SENECA NATION INDIANS, <http://www.sni.org/Government/GamingCompact.aspx> (last visited Mar. 12, 2012).

necticut but instead with the bondholders that have lent money to the tribe's gaming operations.<sup>493</sup> While Foxwoods remains the largest casino in the United States, it was nonetheless hit by the economic downturn in 2008 just like the rest of the gaming industry.<sup>494</sup> As a result, the tribe sought to restructure nearly \$2 billion in debt.<sup>495</sup>

Unlike traditional corporate gaming companies, however, Foxwoods and its bondholders do not have the complete set of restructuring tools at their disposal. Because of their sovereign status of the tribe and the prohibition of non-tribal ownership of tribal casinos, Foxwoods could not do a debt-for-equity swap or raise additional capital by selling off assets on tribal trust land.<sup>496</sup> While corporate gaming creditors may have the option of operating a gaming facility after the gaming operator seeks protection in bankruptcy, tribes are not eligible for relief under the bankruptcy code.<sup>497</sup> Since tribes do not fit into any of the categories of debtor under Section 109 of the bankruptcy code,<sup>498</sup> reorganization under bankruptcy is not an option. Thus the only option is a negotiated restructuring with the various classes of bondholders.

The Peqots and their creditors are not the first to face this challenge; at least three other tribes have defaulted on their obligations as a result of the economic downturn.<sup>499</sup> While the Poaque Pueblo<sup>500</sup> and Little Traverse Bay Band of Odawa Indians<sup>501</sup> have successfully concluded their restructuring negotiations, the Pequot negotiation is still ongoing as this Article goes to press. Although a detailed analysis of the respective BATNAs of the various parties in these restructuring negotiations is beyond the scope of this Article, the underlying negotiation principles remain the same.

493. See Mike Spector, *Foxwoods Debt Talks Test Tribal Bets*, WALL ST. J., July 2, 2010, § C, at 1, available at <http://online.wsj.com/article/SB10001424052748704525704575341310022442270.html>.

494. See *id.*

495. *Id.*

496. See Beth Jinks & Jonathan Keehner, *Foxwoods Casino Owner Said to Seek Debt Restructuring*, BLOOMBERG.COM (Aug. 26, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFW6lpAhuSqU>.

497. IGRA also mandates that the tribe has the "sole proprietary interest and responsibility for the conduct of any gaming activity," thus preventing bondholders from assuming control of an Indian gaming facility. 25 U.S.C. §2710(b)(2)(A) (2006).

498. Section 109 of the code has two categories for debtors, persons and municipalities. See 11 U.S.C. § 109(a) (2006).

499. See Jinks & Keehner, *supra* note 496.

500. See Jessica Dyer, *Buffalo Thunder Debt Will Be Restructured*, ALBUQUERQUE J., Nov 13, 2010, at 1.

501. See Press Release, Little Traverse Bay Bands of Odawa Indians, Little Traverse Bay Bands of Odawa Indians Completes Financial Restructuring (Nov. 30, 2010), [http://www.ltbbodawa-nsn.gov/Announcements/2010/LTBBOI\\_Press\\_Release\\_Financial\\_Restructure.pdf](http://www.ltbbodawa-nsn.gov/Announcements/2010/LTBBOI_Press_Release_Financial_Restructure.pdf).

In fact, in a post-*Seminole* world where tribes cannot force states to the bargaining table, gaming compact negotiations arguably have become more like non-gaming negotiations, where advancing the full set of one's interests requires jointly decided action. The story of Foxwoods provides excellent examples of both types of negotiations.