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Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective

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I. Introduction

For Indian tribes throughout most of US history, “the people of the States where they are found are often their deadliest enemies.”¹ Recently, however, tribes and states have been able to find sufficient common ground in order to work cooperatively in certain areas, particularly as

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state budget deficits continue to worsen. In some instances, Congress has mandated such cooperation, and at other times the cooperative activity has arisen between the parties themselves as a matter of pragmatism. In either instance tribes and states often find themselves at the bargaining table.

The negotiation dynamics of tribal-state compacting, however, can be incredibly challenging. The parties may have experienced centuries of animosity. The “shadow of the law” relevant to the substance of the negotiation may be ill-defined or easily misunderstood (as is often the case with Indian law). Finally, significant cultural differences may obscure common ground that could facilitate a successful negotiation.

While the range of tribal-state compacts is quite large, Indian gaming has probably generated the greatest amount of activity in recent years. Although Indian tribes have conducted gaming operations since the 1970s, the advent of large-scale tribal casinos dramatically increased the economic impact of Indian gaming. Most of the tribes that launched successful casinos had a common rags-to-riches story, but the story of the Mashantucket Pequots is quite unique. Having been nearly annihilated more than 350 years earlier, the Pequots opened their Foxwoods casino in 1991 and then 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. With the increased revenue from slots, Foxwoods was quickly generating more than $1B annually, with the state receiving significant revenues from the tribe.

Over the last decade, the immense success of the Pequot gaming operation and the substantial revenue shared with the state of Connecticut have become almost mythical in nature,

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2 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 Part II.c infra.
3 The National Gaming Impact Study Commission reported that as of November 24, 1998, there were 196 gaming compacts (with 76 amendments/addenda) covering 157 tribes and 24 states. The report is available at http://govinfo.library.unt.edu/ngisc/reports/a8.pdf
with other states often misunderstanding the lessons of the Foxwoods story. As state budgets faced unprecedented fiscal woes in the next decade, state officials erroneously assumed that the revenue sharing provisions of the Pequot compact were a tax that the state was entitled to impose and then sought to obtain “Connecticut deals” for their respective states.\(^4\) Others mistakenly saw Foxwoods as a natural consequence of the Indian Gaming Regulatory Act.\(^5\) The true story behind the Pequot gaming compact, however, is a story of strategic negotiation and the leveraging of tribal sovereignty into economic opportunity. When fact is separated from fiction, it is clear that the tribe only agreed to share revenues with the state in return for a valuable de facto monopoly, the exclusive right to operate slot machines in Connecticut, which in turn satisfied the state’s desire to limit the expansion of gaming.

The other danger of over-elevating the “myth” of the Foxwoods negotiations is that the need for compacts outside the gaming context is often overlooked. Thus, in order to fully appreciate the lessons of Foxwoods, it is necessary to place those negotiations in the context of Indian law, as the very existence of the Indian gaming phenomenon arose out of a core tenet of Indian law: Indian tribes are sovereign governmental entities. In the case of Foxwoods, the revenue sharing provision was not a tax but was instead a voluntary, negotiated transfer between sovereigns. 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,


\(^5\) See Part III.e. *infra* for a discussion of IGRA.
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. But the story of Foxwoods has a second chapter involving the subsequent negotiations over installing slot machines at the casino, which Part VI presents using the same analytic framework.

The subsequent applicability of the lessons learned during the Foxwoods negotiations became less clear after *Seminole Tribe v. Florida*, a case in which the Supreme Court dealt tribal interests a severe blow and shifted the negotiation dynamic dramatically in favor of the states. Part VII evaluates this change in the negotiation landscape and assesses the impact of particular technological changes in the gaming industry of particular relevance to Indian gaming. Part VIII concludes by arguing that although the relative positions may have changed, however, much of the fundamental negotiation dynamic potentially remains the same, and thus many of the lessons of Foxwoods are still 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. While the history of the Pequots has many unique elements, their struggle and ultimate triumph clearly demonstrate that the “first key to economic development is sovereignty.” Although the status of tribes as separate sovereigns has not always been so clear, the concept has almost always played a part in both tribal history as well as the history of the United States itself.

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A. Early Pequot History

The Pequots, once one of the most powerful Indian nations in New England, were almost annihilated by the English during the Pequot War of 1637. Thirty years later, as a recompensatory measure, a colonial court deeded the Pequots approximately 2,000 acres at Mashantucket—meaning “much wooded land”—near Ledyard’s Cedar Swamp, an area that eventually would 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. Nearly a century later, in 1855, a county court expropriated and sold 800 of the remaining 1,000 acres of Pequot land to neighboring property owners.\(^8\)

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.” She led a successful campaign against a Connecticut plan to turn the reservation into a state park. In time, Elizabeth George was joined by her half-sister but until the mid-1970s the two remained the only residents on the reservation. In 1975 Richard Hayward was elected tribal chairman. 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. Hayward managed to lure 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 $1,000 to $1,500 each. Four years later, with 23 year-round residents on the reservation and scores of others visiting and pitching in to help with development efforts, the tribe received a $1 million loan from the federal office of Housing and Urban Development to build new homes.

As tribe members returned, the Pequots sought to reclaim lost land. In 1976 the tribe sued the federal government, claiming that the 1855 sale of 800 acres of Pequot land by the state of Connecticut was unjustified. Following the lead of other Eastern tribes, the Pequots argued that a 1790 law requiring the federal government to approve all sales of Indian land did not apply exclusively to Western tribes and that the 1855 sale of Pequot land violated the law.

Seven years later, urged by the Connecticut Congressional delegation to settle the suit, President Ronald Reagan signed the 1983 Connecticut Settlement Act, which provided the Pequots with $900,000 in federal funds, of which $700,000 was to be used for the repurchase of woodland from private owners and $200,000 was to be applied to economic development projects.

In 1984, using funds from the settlement, the Pequots purchased 800 acres of land that previously had been part of the reservation. They also bought a pizza restaurant and started both a gravel business and a maple sugar production enterprise.

Land expansion and the tribe’s handful of profitable new businesses attracted scattered Pequots back to the reservation. Anyone who could prove ancestry of at least one-sixteenth Mashantucket Pequot could be admitted to the tribe and establish residency on tribal lands. By 1985 some 30 Pequots lived on the reservation, but with mixed marriages and families of intermarried couples, the reservation’s total population was about 75.

B. Tribes as Separate Sovereigns

Although the immense success of Foxwoods was still years away, the tribe’s successful land claim and their recognition as a tribe laid the foundation upon which Foxwoods would

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9 Wampanoags, Narragansetts, Oneidas, Senecas, etc.
ultimately be built. The question then arises, how could a tribe such as 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. It appears that so long as there is still even one member left, the tribe as a sovereign entity continues to exist. But where did such a notion of tribes as separate sovereigns come from? An examination of history reveals the answer.

As the newly-formed United States began its inexorable march westward, it developed a nearly insatiable appetite for more land. Unfortunately, the Indians already occupied the desired land. To satisfy western expansion goals, the Indian lands usually were not taken by force but were instead ceded to the United States by treaty in return for, among other things, the establishment of a trust relationship. The federal government thus assumed a guardian-ward relationship with the Indians, not only because of prevailing racist notions of Indian societal

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13 That is, unfortunately for the Indians.

14 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, Sept. 1830, reprinted in 2 Charles J. Kappler, Indian Affairs, Laws and Treaties 310 (1904) (signed by Choctaw leaders at bok chukfi ahițhac—“the little creek where the rabbits dance”—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma), with Fort Laramie Treaty, April 29, 1868, 15 Stat. 635, reprinted in Francis Prucha, Documents of United States Indian Policy 109 (2000) (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation) [hereinafter “Fort Laramie Treaty”].


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 Executive, and by Congress, and by this court, whenever the question has arisen.

Id. at 383–384.

Other treaties provided the means for subsistence. See, e.g., Fort Laramie Treaty, supra note 14 (providing for subsistence rations for the Sioux.); 1828 Treaty with the Western Cherokees, Art. 8, 7 Stat. at 313, reprinted in Kappler, supra note 14, at 290 [hereinafter “Treaty with the Western Cherokees”]; Cohen, supra note 10, at 81 (“[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,) . . . a just compensation for the property he may abandon.”).
inferiority\footnote{See, e.g., Johnson v. McIntosh, 21 U.S. 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 . . ."); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); Worcester v. Georgia, 31 U.S. 515, 588 (1832) (discussing the "humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling"). These three cases, often referred to as the "Marshall Trilogy," form much of the foundation for federal Indian law, particularly the notion of the guardian-ward relationship and the concept of Indian tribes as "domestic dependent nations."\textit{Cherokee Nation}, 30 U.S. at 17.} but also because the trust relationship was often consideration for the Indians’ relinquishment of land.\footnote{See, e.g., Treaty with the Creeks, supra note 15; Treaty with the Kaskaskia, supra note 15; Treaty with the Western Cherokees, supra note 15; Fort Laramie Treaty, supra note 14.} It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.\footnote{See, e.g., Treaty with the Six Nations of October 22, 1784, \textit{reprinted in} Prucha supra note 14, at 4; Treaty of Fort McIntosh of January 21, 1785, \textit{reprinted in} Prucha supra note 14, at 5; Fort Laramie Treaty of September 17, 1851, \textit{reprinted in} Prucha supra note 14, at 84 (referring to the United States and the Sioux collectively as "the aforesaid nations").} From the beginning of its political existence, the United States “recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept.”\footnote{Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 2 (1994).}

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\footnote{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, or power with whom the United States may contract by treaty . . .” \textit{Abolition of Treaty Making}, 16 Stat. 544, 566 (1871), \textit{reprinted in} Prucha, supra note 14, at 135.} and instead developed a policy\footnote{General Allotment Act of 1887, 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. 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. \textit{See} Robert Winston Mardock, The Reformers and the American Indians 212 (1971).} that was characterized as a “mighty pulverizing engine”\footnote{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 \textit{pulverizing engine} to break up the tribal mass [acting] directly upon the family and the individual . . . .} that would
destroy tribalism and force Indians to assimilate into dominant society as individuals.\textsuperscript{23} The damage inflicted on tribes by that policy was devastating and is still highly problematic even today.\textsuperscript{24}

By 1928 it was clear that the United States needed to change its policies towards tribal government structures. In response to the \textit{Merriam Report}\textsuperscript{25} Congress passed the Indian Reorganization Act of 1934 (IRA).\textsuperscript{26} In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt constitutions and to reestablish structures for governance. Congress also passed specific acts\textsuperscript{27} to reverse the effects of previous policies that were established with the intention of destroying the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma.\textsuperscript{28} Congressional policy had completely reversed itself—tribal sovereignty was now to be encouraged rather than destroyed. Many tribes began to thrive economically as a result. The IRA “provided a powerful stimulus to tribal governmental organization and in many

\footnotesize{\begin{enumerate}
\item David Getches et al., Federal Indian Law, 141 (4th ed. 1998).
\item The \textit{Merriam Report}, documenting the failure of federal Indian policy during the allotment period, was issued in 1928. The report’s official title was Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration.
\item The Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495, and the Five Tribes Act, Act of April 26, 1906, ch. 1876, 34 Stat. 137, were both designed to destroy tribal cohesiveness among the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations. The Five Tribes Act was particularly brutal in its dismantling of any sense of political autonomy:

\begin{verbatim}
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 the 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.
\end{verbatim}
\end{enumerate}
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cases so strengthened that organization as to enable continued development despite fluctuations in administrative policy.”

Federal policies would oscillate through one more cycle in the next half century. A 1949 “Report on Indian Affairs” by the Hoover Commission recommended “an about-face in federal policy: ‘complete integration’ of the Indians should be the goal so that Indians [will] move ‘into the mass of the population as full . . . citizens.’” The official congressional policy in 1953 was “to end [the Indians’] status as wards of the United States.” For the tribes that were “terminated” under this policy, the results were disastrous.

Just as Congress had reversed itself when it repudiated allotment and passed the IRA, however, the policy of termination was also short-lived. Ironically, termination had the opposite effect in its attempt to detribalize. Indians finally recognized that federal policy too often was directed at destroying tribalism. 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 . . . .” 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.”

President 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

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29 Getches, supra note 23, at 197.
30 Getches, supra note 23, at 204.
33 See Getches, supra note 23, at 224.
34 Id.
35 Id. at 226.
nations. 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 expressly 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. Acting at times pursuant to federal court orders, the Bureau of Indian Affairs (BIA) even assisted tribes in reconstituting their tribal governance structures.

During this period the Supreme Court handed down Morton v. Mancari, one of the most important Indian cases of the modern era. The opinion held that tribal Indians were “members of quasi-sovereign tribal entities” and that Indian status was thus “political rather than racial in nature.” Mancari involved the BIA’s hiring preference for Indians, but the Court has 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.”

Thus, through both acts of Congress and rulings from the Supreme Court, tribes are ensconced within the federalism framework. In the words of Justice O’Connor, “Today, in the

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39 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.
41 Id. at 554.
42 Id. at 553 n.24.
United States, we have three types of sovereign entities – The Federal government, the states, and the Indian tribes. Each of these sovereigns … plays an important role … in this country.”

**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 in fact 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 to extend all across the nation. For example, the Western Governors’ Association has determined that, especially in rural areas, tribes and states face many of the same problems, and the Association has begun projects between state governors, tribal chairmen, and interested groups to promote these mutual concerns. In addition, the Conference of State Chief Justices has recognized the jurisdictional confusion that almost inevitably arises between a tribe and state and has set to work implementing strategies to promote communication, cooperation, and comity between state and tribal courts. Emphasizing both 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 both be full participants in justice. 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.”

Certain states have developed actual frameworks for entering into intergovernmental agreements

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45 1990 ANNUAL REPORT TO THE WESTERN GOVERNORS’ ASSOCIATION, A NEW ERA FOR STATE-TRIBAL RELATIONS 14 (July 1990).
46 Id. at 15-18.
with tribes.\textsuperscript{49} South Dakota’s statute, for example, 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.”\textsuperscript{50} South Dakota also recognizes tribal court orders and judgments without limitations.\textsuperscript{51} In Wisconsin an executive order provides that state agencies and secretaries cooperate with tribes and seek a “mutual atmosphere of education, understanding and trust” and that state agencies recognize “tribal judicial systems and their decisions.”\textsuperscript{52}

Even Nevada, which fought a contentious battle against tribal jurisdiction in \textit{Nevada v. Hicks},\textsuperscript{53} has entered into a number of tribal-state cooperative agreements and has generally 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.”\textsuperscript{54} The Nevada Attorney General has also issued a number of opinions delineating tribal-state cooperation;\textsuperscript{55} the Nevada legislature has

\textsuperscript{49} \textit{See e.g.} S.D.C.L. sec 10-12A-4.1 (1989)

\textsuperscript{50} S.D.C.L. sec 1-4-26 (Supp. 1990)

\textsuperscript{51} S.D.C.L. sec 1-1-25

\textsuperscript{52} Wis. Exec.Order No. 31 (October 13, 1983)

\textsuperscript{53} 533 U.S. 353 (2001).

\textsuperscript{54} Pommersheim, n. 202.

\textsuperscript{55} \textit{See e.g.} 1994 Nev. Op. Atty. Gen. No. 19, Indians; Jurisdiction: Criminal Law; Arrest: Tribal Authorities are authorized by state statute NRS 171.1255 to arrest 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; 1991 Nev. Op. Atty. Gen. No. 3, Indians; Gaming; Liquor: Suggestion 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; 1980 Nev. Op. Atty. Gen. No. 42, Nevada Highway Patrol Jurisdiction on Indian Reservations: 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; only has the power over non-Indians.
passed a number of statutes regarding tribal-state cooperation; and Nevada state agencies have entered into cooperative agreements with tribes. Some of the cooperative activity between tribes and states has been a result of congressional mandate. Under the Indian Child Welfare Act (ICWA), 25 U.S.C §§ 1901-1963, the Tribal Courts are identified 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. Under ICWA states shall give full faith and credit to proceedings of any Indian tribe applicable to Indian child custody. ICWA also authorizes states and tribes to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings. Several other federal statutes require state-tribal cooperation. Additionally, states and tribes currently cooperate on environmental issues under EPA regulations or the Clean Water Act.

Apart from the cooperation that has arisen to implement federal policy, tribes and states have also initiated cooperative activities on their own. Agreements between state or local governments and tribes, both formal and informal, cover an amazingly wide range of issues.

56 See e.g. NRS 41.430 Jurisdiction over Proceedings in which Indians are Parties (Under this statute, Nevada assumes jurisdiction over offenses and civil action by or against Indians in Indian country under PL 280; unless the tribe did not consented to the state’s jurisdiction); NRS 233A.010 (Sets up an Indian Commission); NRS 233A.130 (Rights of Indians: Jurisdiction of administrative agencies not extended over Indian country without consent); 1985 Nev. Stat. Ch. 115 sec 3 (Authorizes 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.)

57 See Interlocal Contract, Goshute Tribe Wildlife Management Plan, where State of Nevada Department of Wildlife entered into a contract with the Goshute Indian Reservation to run from Feb. 1, 1987, through May 31, 1992. In the contract, the state is to use its resources to help develop a wildlife management plan for the reservation for a fee

These legal instruments take many forms, including memoranda of understanding (MOU), memoranda of agreement (MOA), inter-governmental agreements, compacts, and collaboration agreements. Such agreements have covered issues of contract, tort and property laws, land rights, development and zoning, repossessions, taxation, economic development and infrastructure development, environmental issues, hunting and fishing regulations, and water rights. Professor Pommersheim’s 1991 law review article detailed eighty-seven such agreements, including agreements on jurisdiction, the environment, hunting and fishing, health and welfare programs, and Indian burial sites.

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61 Professor Pommersheim’s tally was as follows:

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<th>Category</th>
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<tr>
<td>Jurisdiction or PL 280 Agreements</td>
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<tr>
<td>Environmental Agreements</td>
<td>13</td>
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<td>Hunting and Fishing</td>
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<td>Health and Welfare Programs</td>
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<td>Water Agreements</td>
<td>11</td>
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<tr>
<td>Indian Burial Sites</td>
<td>4</td>
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<tr>
<td>Economic or Taxing Agreements</td>
<td>10</td>
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<td>Education Agreements or Awareness Projects</td>
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62 Pursuant to Public Law 280, Congress mandated that certain states accept jurisdiction on reservations, while permitting other states to assume jurisdiction on reservations, if certain 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 that eliminated litigation between the states and tribes. 25 U.S.C. § 1721 (1983). Pommersheim also identified at least seven law enforcement agreements.

63 Pommersheim found seven general environmental agreements in Wisconsin, two in Montana, one in Idaho, two in Minnesota. He also found a statute in New Mexico concerning wastewater. His article also identified eleven separate water rights agreements. If hunting and fishing agreements are included, he found that eight states have this type of agreement, with Wisconsin having at least 10 such agreements, while South Dakota had agreements with at least two separate tribes.

64 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.

65 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.

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).
States have numerous and powerful interests in creating agreements with tribes, as evidenced by the fact that hundreds, if not thousands, of such agreements have been negotiated since the 1980s. Our 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 there are as many as 450,000 Indian children in elementary and secondary schools in the United States. Only 10% are educated in BIA schools on reservations, with the remainder mostly attending public schools, half of which are off reservation.

It is difficult to measure precisely the number of agreements relating to education consummated by Tribes and other sovereigns, in part because some involve broad State-level directions to local school districts to cooperate as a general matter with areas Tribes. It is clear, however, that the number of such agreements has grown considerably in the past decade, to include a broad array of educational issues. While Professor Pommersheim reported two such agreements in 1991, there exist no less than 41 specific agreements today.

Education related agreements address funding, sharing of student data, the provision of culture-specific educational services such as language instruction, truancy, as well as

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69 The Mandan, Hidatsa, and Arika 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
70 Rosebud Sioux Tribe and the Navajo Nation, for example, have concluded agreements with South Dakota and Arizona to ensure tribal access to data about Tribal members who are students in state and local public schools. NCAI, Tribal-State Partnerships, supra note 67.
71 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
incorporation of Tribes as local school boards for contracting and governance,\textsuperscript{73} disbursement of Impact Aid funds,\textsuperscript{74} programs to increase educational achievement, special education funding and services,\textsuperscript{75} transportation,\textsuperscript{76} and even Tribal sponsorship of sports teams in South Dakota.\textsuperscript{77}

The Skokomish Tribe, for example, has partnered with the Hood Canal School District and the Superintendent of Public Instruction for Washington so that the tribe is involved in boosting the educational achievement of tribal members through curricular changes and increased family participation.\textsuperscript{78}

The Constitution of Montana, in Article X § 1(2), recognizes the “unique cultural heritage of the American Indians” and declares a commitment to “the preservation of their cultural integrity.”\textsuperscript{79} 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

\textsuperscript{72} The Stockbridge
\textsuperscript{73} In 2000, Florida authorized the Seminole and Miccosukee Tribes to establish governance over educational matters relating to special improvement districts under state law (Fla. Stat, Ch 285.18 (2000). Minnesota (Minn Stat § 128B.011 (2000) conferred to White Earth Tribal Council governance over the Pine Point public school located on the reservation. Agreements next door in South Dakota direct state funding to operate tribal grants schools as public school districts under state law.
\textsuperscript{74} 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., test scoring while the Tribe provides language instructors for the District and their Indian students.
\textsuperscript{75} 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. Text available: http://www.narf.org/nill/resources/education/GREEN/i.htm [22 Oct 2004]
\textsuperscript{76} The Keams Canyon Boarding School and the Hopi Junior/Senior High School have concluded an MOA to optimize use of school buses.
\textsuperscript{77} 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.
contemporary contributions of American Indians, with particular emphasis on Montana Indian tribal groups and governments.  

The Native American Rights Fund reviews a number cooperative agreements relating to the education of Indian children and provides access to the text of these agreements. Examples include an agreement between a reservation boarding school and the local school district in the *Cheyenne-Eagle Butte School Cooperative School Agreement* (1997) touching on funding, personnel, curriculum, transportations, and the rights of students. 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 for funding and meeting the special needs of at-risk Indian students.

Other Tribes that have concluded agreements with State or County governments include The Chippewa-Cree Tribe of the Rocky Boy’s Reservation (Montana), the Confederated Tribes of the Grande Ronde (Oregon), and the Navajo Nation (Arizona) relating to “teacher training, accreditation, youth leadership programs” among others.

**2. Law Enforcement**

Intergovernmental agreements are frequently used to strengthen law enforcement and public safety for both 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. These realities have encouraged the negotiation of a broad range of intergovernmental agreements related to law enforcement. Now numbering in

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84 NCAI, *Tribal-State Partnerships, supra* note 67.
excess of 200 separate agreements involving 22 states, their subsidiary jurisdictions, and more than 75 Tribes, these agreements are usually designed to clarify the often confusing jurisdictional questions relating to law enforcement in Indian Country and to achieve greater efficiencies in the use of law enforcement personnel and resources.

Tribal-State compacts relating to law enforcement include mutual aid agreements, extradition, the gathering and use of evidence, inter-agency drug interdiction and enforcement, cross-deputization of law enforcement officers, inter-jurisdictional management of parolees, enforcement of state law related to criminal activities and gaming, the release of Tribal employee records, juvenile justice services, service of process in both criminal and civil cases, and the pooling of limited resources in remote areas, for example sharing detention facilities and dispatch services.

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88 See, e.g., Paul Bunyan Narcotics Task Force Interagency Agreement (December 2001) comprising five northern Minnesota counties, the city of Bemidji, their associated law enforcement agencies, and the *Leech Lake Band of Ojibwe Indians*.

89 Cross deputization is the single most common form of intergovernmental law enforcement agreements one at least one is in effect in most of the 22 states with some type of law enforcement agreement. See: NCAI, *Law Enforcement Agreements*, no date. Available: [http://www.state.ok.us/~oiac/StateTribal.htm](http://www.state.ok.us/~oiac/StateTribal.htm)

90 See, for example, *MOU Concerning Investigation and Prosecution of Violations of Certain State Laws on Santa Ana Pueblo Lands*, March, 2000.

3. Taxation

A number of Tribes and states have concluded intergovernmental agreements related to taxation. The advantage Tribes enjoy relating to exemption from state taxes as a third sovereign within the American federalist structure provides many substantial economic opportunities. Many states, however, fear a perceived loss of revenue as Tribal enterprises begin to compete with non-Indians enterprises subject to state taxation and resist the expansion of tax-exempt Tribal enterprises when they can. Sometimes both parties perceive gain in reaching a negotiated resolution.

A particularly broad taxation agreement was signed by the State of Michigan and several Tribes and covers use taxes, fuel taxes, income taxes, tobacco taxes, and the Single Business Tax.92 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 both the Tribes and the state.

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% of this revenue back from the state for use by the Tribe.93 In Oklahoma, more than 30 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.94

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Tribal sales of tobacco often provide one an attractive economic opportunity because under most circumstances Tribes are free of the burden of state tobacco taxes. Many Tribes and states, however, share concerns relating to the health consequences of tobacco, prevention of youth smoking. The states share concerns of a potential loss of revenue as consumers shift from those vendors subject to state takes to the tribal providers. Several compacts have been concluded relating to sharing revenues and managing the sale of cigarettes by Tribes, including agreements signed in 2002 between the State of Washington and the Jamestown S'klallam Tribe, the Squaxin Island Tribe, the Tulalip Tribes, and the Upper Skagit Tribe. In 2003 each of the Choctaw, Chickasaw, and Seminole Nation (OK), for example, concluded agreements with the State of Oklahoma regarding tribal sale of tobacco products in which the State receives tax revenues collected by the Tribes but provides State guarantees relating to taxation rates and contributions to certain programs for the benefit of Tribal members.

4. Hunting and Fishing

Habitat co-management plans for wildlife and fisheries resources are increasingly attractive to the Federal government, state governments, and some Tribes in order to better protect the animal resources both Indians and non-Indians enjoy. These agreements pose

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certain risks to both parties, and frequently raise particularly nettlesome issues for Tribes. 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. Intergovernmental agreements are used to 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 devolution of management authority over wildlife resources, State-Tribal agreements may often best meet the needs and rights of multiple users groups. This trend will accelerate as the successes of recent cooperative efforts become more apparent to stakeholders.

Easily the most comprehensive compact relating to fisheries resources is the Columbia River Compact, developed in the wake of the Boldt decisions and comprising the Oregon Fish and Wildlife Commission, the Washington Fish and Wildlife Commission, and the various tribes that have developed substantial fisheries. 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.

Under the direction of the Governor's Office of Indian Affairs, the State of Washington has signed a series of agreements with Tribes relating to subsistence hunting, fishing, recreational fishing and hunting licenses; employment placement in resource management agencies; enforcement actions; formalized consultations; and dispute resolution mechanisms under the 1999 Centennial Accords implementation plan promoted by Gov. Locke (D)

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institutionalizing a government-to-governmental relationship between Tribes and the state.\textsuperscript{105} The agreements include the Departments of Ecology and Fish and Wildlife and various Tribes across the state.

An Oregon Department of Fish and Wildlife document from 2003 describes cooperative agreements and efforts related to hunter education, hydropower licensing, access to game for ceremonial purposes, the promotion of scientific knowledge about various fish species, among many other cooperative efforts.\textsuperscript{106} Arizona has signed 17 separate agreements relating to the game and fisheries management with eight different tribes, ranging from hunting permits to turkey capture and relocation programs, and from predator management to wildlife law enforcement.\textsuperscript{107}

\textbf{D. Rationale for Compacting}

At its most basic level the availability of tribal-state cooperative agreements is an issue of the states’ freedom to create contracts that permit them to 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, ranging from minor contractual issues such as auto repossession to land development and zoning issues. Without such agreements, states would be unable to enforce child-support agreements or even have state court rulings enforced in Indian Country. The absence of intergovernmental agreements, in addition to significantly decreasing the likelihood of reaching mutually satisfactory solutions to disputes, would

contribute to the possible escalation to violence, particularly in cases such as repossession.  

The need for amicable negotiation was clearly evidenced 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.  

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.  

For example, inter-jurisdictional agreements have been used to integrate state and tribal judicial systems so that the two remain separate and distinct but support rather than contradict each other. 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. States have also found these agreements helpful in clarifying and simplifying the application of social policies and in aiding

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108 Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 593 (9th Cir. Ariz. 1983) (“A repossession without the consent of the trib[al] member also may escalate into violence, particularly if others join [in].”)


110 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. See OK St. T. 74 sec 1221. Indian Tribes; Oregon law likewise authorizes local governments and state agencies to cooperate and enter into agreements with tribes. See 1985 Or. Laws ch. 267.

111 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. See S.D.C.L. sec 1-24-1(1); In Arizona, counties may enter into intergovernmental agreements with any tribal government for joint development of land and infrastructure and improvements to public facilities. See ARS sec 9-461; 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. See 1984 Idaho Sess. Laws ch. 72 and 119(aa) respectively; Tribes in Oklahoma have also entered into agreements with the state to address mutual interests. 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 Oklahoma Indian Affairs commission, http://www.state.ok.us/~oiac/cca.html.
the resolution of domestic disputes and issues surrounding religious practice. In some states this cooperation even extends to issues of mental health.\footnote{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. \textit{See ARS} sec 12-136}

Although the breadth of tribal state compacting is obviously quite extensive, gaming compacts have clearly been the most prominent. Many states have concluded gaming agreements with area Tribes that have been approved by the Secretary of the Interior and that operate under the oversight of the National Indian Gaming Commission (see Table 1 below). The fact a compact has been negotiated, however, does not indicate that a casino is in operation, let alone profitable.

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>STATE</td>
<td>Number of compacts &amp; amendments</td>
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<tr>
<td>Alaska</td>
<td>2</td>
</tr>
<tr>
<td>Arizona</td>
<td>14</td>
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<tr>
<td>California</td>
<td>60</td>
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<tr>
<td>Colorado</td>
<td>3</td>
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<tr>
<td>Connecticut</td>
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<tr>
<td>Florida</td>
<td>2</td>
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<tr>
<td>Idaho</td>
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<td>Iowa</td>
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<td>12</td>
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<tr>
<td>Michigan</td>
<td>13</td>
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<td>3</td>
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<tr>
<td>Missouri</td>
<td>1</td>
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<td>12</td>
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<td>Nebraska</td>
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<td>Nevada</td>
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<td>New Mexico</td>
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<td>South Dakota</td>
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<tr>
<td>Texas</td>
<td>1</td>
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</tbody>
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In order to understand how these compacts came to exist, it is necessary to understand the origins of Indian gaming itself.

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. Blackfeet tradition recounts “how Na’pi (Old Man) brought the tribe the hoop and arrow game. . . . Blackfeet continue to play traditional betting games.”\(^\text{114}\) The Blackfeet are not alone, as many tribes have such traditional games.\(^\text{115}\) Indian gaming is, then, in some respects, a new manifestation of an ancient cultural practice.

A. The early years

Legend has it that commercial gaming on Indian reservations in the United States began modestly as a response to a fire that destroyed two trailers on the Oneida Indian reservation in Verona, New York in 1975.\(^\text{116}\) The reservation had neither a fire department nor fire-fighting equipment, and two Oneidas perished in the blaze. To prevent such tragedies in the future, reported a tribal representative, the Oneidas decided “to raise money for [their] own fire department… the way all fire departments raise money: through bingo.”\(^\text{117}\) The Oneidas launched a bingo game in an oversized trailer, offering prizes in excess of the limits permitted by


\(^{115}\) Traditional games are denoted in IGRA as Class I gaming, which is completely beyond the reach of federal or state law. (see infra note __)


\(^{117}\) McAuliffe, p. A1
New York law. The Oneidas maintained that because they were an Indian nation, they were not bound by state bingo regulations. 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.

Subsequently, related an Oneida tribe member, “the Seminoles got wind of it”\(^{118}\) and began their own high-stakes bingo game in Hollywood, Florida in 1979. The Seminole tribe contracted with a non-Indian organization to build and manage its bingo hall. The agreement called for the managers to receive 45% of the profits after repayment of a $1 million construction loan. The enterprise was a success, and the Seminoles repaid the loan in less than six months.

As tribal bingo operations grew more successful, states inevitably demanded a cut. States unsuccessfully sought to extend their laws over reservation lands to regulate, prohibit, and/or tax tribal bingo operations. Whereas the district attorney in Madison County, New York, promptly 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. The tribe argued that Florida did not have the authority to prohibit gaming on the Seminole reservation. Ultimately, the Fifth Circuit agreed,\(^ {119}\) relying upon the Supreme Court’s holding in \textit{Bryan} that if a state regulates, but does not prohibit, an activity, it may not prohibit, under P.L. 280, that same activity in Indian Country. Thus the Seminoles secured the right to run their game and pay out unrestricted prizes.

\textbf{B. Gambling in Connecticut}

Gambling was legalized in Connecticut in 1971 when, during a fiscal crisis, the state government passed legislation sanctioning a state lottery, off-track betting, and horse racing.

\(^{118}\) \textit{Id.}  \\
\(^{119}\) See \textit{Seminole Tribe of Florida v. Butterworth}, 658 F.2d 310 (5th Cir. 1981) (applying the Supreme Court’s decision in \textit{Bryan v. Itasca County} to Florida’s bingo law, holding that Florida had no regulatory jurisdiction over the tribe, and therefore could not prohibit Indian gaming).
The following year, the state legislature authorized betting on greyhound racing as well as jai alai, and, in 1976 Connecticut created a state-run, off-track betting system.

Despite the state’s efforts to regulate gambling, Connecticut-based greyhound racing and jai alai operations were soon enmeshed in scandal. Reports of misconduct surfaced frequently. Illicit activity included the payment of bribes by greyhound racing and jai alai promoters wishing to secure licenses, profit skimming by gambling institutions, participation by organized crime rings, and the mob-style murders of several prominent owners of jai alai frontons. In 1976, in response to widespread corruption, the state legislature imposed a one-year moratorium on the provision of new gambling licenses.\(^{120}\)

Nonetheless, illegal activity continued to plague Connecticut gambling. In 1979 a grand jury was appointed to investigate betting irregularities at the state’s three jai alai frontons. The probe led to the first arrests and convictions of players and bettors for fixing games in the 45-year history of jai alai in the United States. In May, 1979, the state legislature imposed a two-year moratorium on new racing, jai alai, and off-track betting facilities. The moratorium was extended repeatedly during the 1980s.\(^{121}\)

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. *Gaming and Wagering Business* magazine ranked the state sixth in the nation in per capita wagering.\(^{122}\)

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\(^{121}\) *Id.*

C. Gambling on the Pequot Reservation

The prospect of gambling on the Pequot reservation was first raised at a tribal council meeting in 1984 when several members proposed the establishment of a high-stakes bingo game. According to tribal chairman Richard Hayward, however, the council initially rejected the proposal out of concern for the “unsavory elements” which gambling might attract. The following year, though, the tribal council reversed itself and decided to support a bingo operation. As Hayward pointed out, “Considering the fact that the federal government supports these activities on Indian reservations to raise money to support other businesses, we decided to go for it.” Bingo, he remarked, was “a rapid way to raise capital.”

Connecticut law, however, limited total daily prizes awarded by a bingo hall to $500. In 1985 the Pequots filed suit in federal court challenging the state limit on bingo prizes. The judge in the case ruled that state laws governing bingo were regulatory, not criminal, and as such could not be enforced on Indian reservations. Additionally, the judge said, the state could not deny Indians the right to profit from gambling when the state was doing so itself. The Pequots won the suit in January 1986. Over the next six months, the tribe spent $4.2 million to build a high-stakes bingo hall, which was opened on July 5. Running the game five nights per week and paying out more than $10,000 in nightly prizes, the Pequots consistently attracted capacity crowds of nearly 1,700. Participation was not limited to local residents; many bingo players arrived in chartered buses from as far away as New York and Maine.

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. The Penobschts, who had

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123 Id.
previously run a high-stakes game on their own reservation near Bangor, were contractually entitled to 20% of the Pequots’ bingo profits.

In December, 1987, *The New York Times* reported that the Pequots’ bingo game was generating revenue of approximately $10 million per year, and the Pequots’ 80% share of bingo profits amounted to about $2 million, half the tribe’s annual income.\(^\text{126}\) Bingo earnings allowed the Pequots to buy back much of the land adjoining the reservation. By late 1991, 165 tribe members lived on the reservation in 35 houses and two small apartment buildings on three wide streets that occupied only a corner of the 1,800-acre reservation.\(^\text{127}\)

**D. California v. Cabazon of Mission Indians**

The Oneida reservation in New York may or may not 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.\(^\text{128}\) In applying the holding of its earlier decision in *Bryan v. Itasca County*,\(^\text{129}\) the Court found that although Public Law 280\(^\text{130}\) granted certain states\(^\text{131}\) civil and criminal jurisdiction over Indian lands, it was not a grant of total civil jurisdiction, but was rather a grant of jurisdiction to adjudicate civil disputes in Indian Country.\(^\text{132}\) The crucial test in *Bryan* was whether the regulation at issue was civil/regulatory or criminal/prohibitory. In

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\(^\text{130}\) See *P.L. 83-280, 6 Stat. 588 (1953)*, codified at 28 U.S.C. § 1360(a): “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 . . .” (emphasis added). The Supreme Court, upon examining the legislative history of P.L. 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 v. Itasca County*, *supra* note ___.

\(^\text{131}\) The states which ‘opted into’ P.L. 83-280 were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added in 1958.

\(^\text{132}\) 480 U.S. at 208.
applying this test, the Court held that since California already 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 civil and regulatory, rather than criminal and prohibitory, power. As such, California’s bingo laws were not applicable to the gaming operations on Indian lands in California.\(^{133}\)

Although California had an interest in preventing the operation of gambling by unscrupulous persons, the twinned federal and tribal interests in tribal self-determination and economic self-sufficiency were stronger: “[s]elf-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.”\(^{134}\) 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 on the sidelines 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 more and more tribes after the *Seminole v. Butterworth* decision. By 1986 more than 100 tribes were operating gaming operations generating in excess of $100 million annually.\(^{135}\) That year the House passed a bill to permit bingo but prohibit other types of gambling on reservation. That bill died in the Senate, but congressional efforts to regulate Indian gaming continued. The two primary legislative approaches were reflected in the

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\(^{133}\) *Id.* at 210.

\(^{134}\) *Id.* at 221.

split between the Department of the Interior, generally favoring gaming as an engine of economic development, and the Department of Justice favoring the 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, and therefore applied pressure on Congress to impose additional regulatory control over Indian gaming. States that relied on gaming for revenue feared competitors beyond the scope of State taxes. Others feared that Indian gaming operations, free of the requirements faced by non-Indian concerns, enjoyed too great a competitive advantage. States that disallowed gaming altogether feared the social consequences of widespread gaming. Other forces lobbied to protect this important economic development opportunity for Tribes and to protect it from State regulation and taxation. Several pressures, including the immediate response of the states to *Cabazon*, combined to maneuver Congress towards a legislative compromise in the form of the Indian Gaming Regulatory Act of 1988 (IGRA).\(^{136}\)

IGRA regulates all Indian gaming today and provides the framework for the agreements\(^ {137}\) that tribes and states negotiate to facilitate gaming. Meant to achieve “a principal goal of Federal Indian policy [which] is to promote tribal economic development, tribal self-sufficiency, and strong tribal government,”\(^ {138}\) the IGRA mirrors the Supreme Court’s holding in *Cabazon* that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands

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\(^{136}\) PL 100-497, 25 U.S.C. § 2701 *et seq*. In fact, S. 555, which became the IGRA, was under discussion at the same time that the Supreme Court was hearing *Cabazon*. It seems clear that Congress’ speedy action on IGRA was motivated, at least in part, by the potential of the Court to support a regime of tribal gaming nearly unfettered by state governments.

\(^{137}\) 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).

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.\textsuperscript{139}

Created under Congress’ Indian Commerce Clause\textsuperscript{140} power, IGRA completely preempts
state prohibition or regulation of Indian gaming on Indian land\textsuperscript{141} and was held constitutional in
\textit{Red Lake Band of Chippewa Indians v. Swimmer}.\textsuperscript{142} Although IGRA seems to have settled many
matters, the application of the Act is still hotly contested.\textsuperscript{143}

The intention of the Act 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 commonly seen as lawless enclaves.\textsuperscript{144} Yet despite the continued specter of
organized crime hanging over any mention of Indian gaming, those who invoke it have never
been able to cite to a single proven instance of such infiltration.\textsuperscript{145} Recently, it has been

\begin{footnotesize}
\begin{enumerate}
\item[139] 25 U.S.C. § 2701(5).
\textit{(appeal dismissed)} (W.D. Mich. 1992) (Unlike Congressional legislation under the Interstate Commerce Clause,
Congress may not abrogate state immunity from suit under the 11\textsuperscript{th} Amendment by legislating under the Indian
Commerce Clause.).
\item[141] See State ex rel Nixon v. Coeur D’Alene Tribe, 164 F.3d 1102 (8\textsuperscript{th} Cir. 1999) (holding). See also Gaming Corp.
of American v. Dorsey & Whitney, 88 F.3d 536 (8\textsuperscript{th} Cir. 1996) (holding). \textit{But see} Oneida Tribe of Indians of
Wisconsin v. State of Wisconsin, 951 F.2d 757 (7\textsuperscript{th} Cir. 1991) (holding); \textit{see also} legislative history of S. 555, which
states that the Act is to be construed to completely preempt the field of Indian gaming.
modified (May 17, 2002), reconsideration denied (Jun 24, 2002) (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); \textit{but see} Gila River Indian Community v. Waddell, 91 F.3d 1232, 96 Cal. Daily Op. Serv.
that state regulation having a substantial effect on the tribal government’s ability to provide for itself is a factor to be
used in considering the whether a state government may impose its regulations on transactions in Indian Country).
\item[144] What remains to be shown is how Indian reservations can remain such enclaves of lawlessness when both the
state (in P.L. 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. One would think that organized
crime would want to operate anywhere \textit{but} an Indian reservation, since reservations have three, instead of two,
sovereigns on guard. Nevertheless, the notion that organized crime will take over Indian gaming lives on.
\item[145] “Indian Casinos Draw Scrutiny//Congress: Regulations Needed to Stem Organized Crime,” \textit{Tulsa World}, October
31, 1997: 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.”).
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recognized that “Congress views gaming as an economic activity that Indian tribes can develop, and that [the tribes] should be the primary beneficiary of their efforts.”

The three major concerns driving adoption of IGRA are reflected in IGRAs “Declaration of Policy.” 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. 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. Third, Congress desired to establish an independent regulatory agency, the National Indian Gaming Commission, with oversight authority to define and enforce national standards. Part of that standardization involved the classification of gaming operations:

- Class I gaming encompasses traditional games used in ceremonial and social settings that are completely outside the scope of any but tribal regulation and control.

- Class II games 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.” 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. Also included in Class II are card games “not explicitly prohibited” by the State, provided they are otherwise in conformity with all other State laws and regulations. Excluded from Class II are “banking card games” (e.g. baccarat, blackjack) and “electronic facsimiles of any game of change or slot machines of any kind.”

152 Id.
• Class III gaming consists of all gaming that is not class I or II.\textsuperscript{155} This is the area of most contention since it is the most profitable class of gaming.\textsuperscript{156} This class includes so-called ‘Vegas-style’ games, such as house-banked card games,\textsuperscript{157} roulette, slot machines, and the like.

Class III gaming operations also must be “conducted in conformance with a Tribal-State compact.”\textsuperscript{158} IGRA notes that such compacts may provide for “the assessment by the state of such activities in such amounts as are necessary to defray the costs of regulating such activity;”\textsuperscript{159} however,

Nothing in this section shall be interpreted as conferring upon a State 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.\textsuperscript{160}

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.”\textsuperscript{161}

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.\textsuperscript{162} If the state agrees to negotiate, the parties have 60 days to come to an agreement.\textsuperscript{163} The compact is then submitted to the Secretary of the Interior for approval.\textsuperscript{164} If the parties cannot reach an agreement, additional mechanisms exist for developing procedures to regulate gaming operations on a given reservation, even in the absence of a compact.\textsuperscript{165} As originally enacted, IGRA

\textsuperscript{155} 25 U.S.C. 2703 §(8). The line between class II and class III gaming is not very distinct, though there has been some sharpening in recent years by courts.
\textsuperscript{156} <Cite to some figures for slot machine 'net win' (granted, they’re only estimates> 
\textsuperscript{157} In house-banked games, players can win money from the house; by contrast, player-banked games only allow players to win from each other. <see a definition of this in a gambling encyclopedia or something> 
\textsuperscript{158} 25 U.S.C.A. § 2710(d)(1)(C) 
\textsuperscript{160} 25 U.S.C. § 2710(d)(4). 
\textsuperscript{161} Id. 
\textsuperscript{163} cite to IGRA 
\textsuperscript{165} If the parties could not reach agreement, they were 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. Sixty days after the mediator’s
required that the states must bargain in good faith regarding the content of gaming compacts\textsuperscript{166} and gave tribes a federal cause of action to compel negotiation\textsuperscript{167} once 180 days had passed from the original request.

\section*{IV. A Framework for Analyzing Tribal State Negotiations}

Whenever a tribe’s success depends in part on the decisions and actions of other governmental or private parties who have at least some different interests and viewpoints, 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 widely: from formal to informal and from explicit to tacit. The processes may be aimed at reaching a legally binding compact or merely arriving at a temporary mutual understanding subject to renegotiation.

Broadly speaking, negotiation is best understood as 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”: how best

\footnote{\textsuperscript{166} See 25 U.S.C. § 1710 (d)(7)(A)(i) (“The United State district courts shall have jurisdiction over – (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.”)}

\footnote{\textsuperscript{167} Cite to IGRA. As discussed in Part VII \textit{infra}, however, the Supreme Court substantially altered this provision in \textit{Seminole Tribe v. Florida}.}
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 precisely 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.168

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 dealmaking along with its worthy twin, to “know thy counterpart.” Since negotiation requires at least two parties to say “yes” for a deal, it is critical to probe the full set of the other parties’ interests in addition to examining tribal interests. The very best negotiators are clear on their ultimate interests and those of the other side. They also know their trade-offs among lesser interests and are remarkably flexible and creative on the means.

Interests visible at the surface may hide deeper interests that may 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 would be affected by resolution.

Consider an example involving a power company that proposed to build a significant dam to bring electricity at lower rates to the area’s consumers and demonstrate to the financial community that it could actually get large projects completed (something on which it had been repeatedly stymied). 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, while 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, an agreement was ultimately reached 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 clearly an error, a related problem is simply to assume that one side’s interests simply are the opposite of the other side’s interests. Psychologists who have extensively studied negotiating behavior have discovered this to be a pervasive tendency and dub it the “mythical fixed pie.” Yet in looking

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169 See, for example, Chapter 3 of Max Bazerman and Margaret Neale, Negotiating Rationally, New York: Free Press, 1992.
for a richer set of interests of all sides behind their incompatible positions, it is precisely the differences of interest that point the way to mutual advantage, thereby expanding the pie.

In a simple example, two siblings may 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 needs flavoring for a recipe (their underlying interests), a creative solution can be devised 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 needed flavoring, both could be made better off, precisely because of the difference in their underlying interests.

When Egypt and Israel were negotiating over the Sinai in a seemingly intractable dispute, their positions were wholly incompatible. Deeply probing behind those positions, however, negotiators exploited a vital difference of underlying interest: the Israelis cared more about security, while the Egyptians were more concerned about their sovereignty over territory. The solution was to establish a demilitarized buffer zone under the Egyptian flag, which “gave” to each side more of the (different) interest that it valued most: security to the Israelis, sovereignty to the Egyptians.

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 also the full set of the interests of the other side(s), including relevant internal parties. Further, it is critical to distinguish underlying interests of each side from the issues on the table for negotiation and the positions, pro and con, the parties take on those issues. Rather than asking, “What’s your position?” and assert “Here’s our position,” negotiators should instead seek, directly and indirectly, to understand what real interests lie
behind those positions. And the search should not stop with shared interests but actively 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. 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 simply walking away and doing without any agreement, going to court rather than settling, forming a different coalition or alliance, taking a strike, invading Kuwait, or bombing Serbia. If asked to agree to a particular deal, assessing the BATNA sharpens the decision by asking “as compared to what?”

The value of the tribal BATNA to the tribe itself sets the threshold of the full set of its interests that any acceptable agreement must exceed, and the state will similarly 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. Of course, each side typically knows only its own limits and must continually assess and update its assessment of the other side’s BATNA. (And many negotiators have only a hazy sense of their own BATNAs.)

Improving one’s BATNA or worsening that of the other side often greatly influences the outcome of the negotiation. The better one side’s BATNA appears both to it and to the other party, the more credible the threat generally is to walk away unless the deal is improved. Instead of further refining tactics at the table, parties should sometimes 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 scarce resources should be spent at the table trying to improve a potential deal or away from the table seeking a better one.

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

Many problems are best understood as single decision-maker situations where an individual’s choice need not be affected by the judgments or actions of others. Yet negotiation distinguishes itself from such problems by the *interdependence* of the parties. The actions of each side leading to agreement have the potential at least 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 one’s own interests relative to the best no-agreement alternative (BATNA)? 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,” the challenge is to try to shape how they see their problem such that they choose what you want. To change the other side’s mind, it is important to know “where their mind now is.” 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. This venerable principle was illustrated by the comment of a pope
about the Abby de Polignac, “This young man always seems to be of my opinion and at the end
of the conversation I find that I am of his.”^170

In sum, the fact that negotiation is inherently a joint problem-solving exercise should
always ensure that solving one side’s problem—as they see it or can be induced to see it—is very
much 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 first parties see
their Basic Problem such that, for their reasons, they choose what the other party wants.

**D. Developing a Negotiation Strategy**

The core concepts—interests, BATNAs, and joint problem-solving—play roles within a
larger framework for 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 “on a
sustainable basis,” an agreement is normally more valuable to the extent it is endures and
remains healthy over time. 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 itself so it is most likely to
yield optimum results. This strategy is not a recipe or a sequential approach whose
“dimensions” are independent of one another. Instead, the approach involves cycling through

these factors on a provisional basis to determine the most relevant and promising. Then as analysis deepens and the process unfolds, assessments and negotiating approach need to be updated. 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. Barriers and opportunities arise as a function of the structural, people, and process 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 sections 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.

V. Round 1: The Initial Casino Negotiations

In early 1989, after passage of the IGRA, the Pequots announced that they intended to build a casino alongside their bingo hall. The tribe sought to negotiate a compact with the state, but Connecticut officials declined. A spokesman for the state attorney general claimed, “Our laws do not allow casino gambling, and we can’t grant something our laws do not allow.”

Connecticut law did, however, allow “Las Vegas nights,” fund-raisers run by non-profit or charitable organizations that featured casino games such as blackjack and roulette. At “Las Vegas night” events, participants gambled with play money and used their winnings to bid for

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171 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 an interview on February 11, 2004 with Michael Brown.
prizes. The Pequots argued that if other organizations in the state were permitted to run casino-type games, the tribe had the legal right under the IGRA to do so as well. To force the state government to the negotiating table, the Pequots filed suit against Connecticut on November 3, 1989. The stage was now set for the first battle for the Foxwoods casino.

A. Context

When approaching a negotiation, it is important to assess its relevant context: economic, competitive, historical, political, institutional, organizational, etc. 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, and so on. In short, assessing a negotiation’s relevant context entails a look at the setting to see its implications for structure and psychology as well as the elements potentially available for efforts to change the game.

Obviously the Mashantucket Pequots and the state of Connecticut were primary stakeholders in the litigation, but other significant players, while not at the table, would potentially play a significant role in the outcome. Spearheading the Pequots’ legal effort was Tureen & Margolin, a six-member law firm in Portland, Maine, that specialized in Indian affairs. Thomas Tureen and Barry Margolin founded the firm in 1981 shortly after the pair, legal aid attorneys in their 30s, won a historic $81.5 million settlement for two Maine Indian tribes in a land-claim case. Shortly afterwards, the two lawyers, who earned no fees in the case, decided to establish a private practice. 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.

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Tureen & Margolin had ample experience representing American Indians but none in the casino business. One of the firm’s associates, however, had previously worked for former New Jersey attorney general John Degnan who had extensive experience in casino regulation. This associate, Robert Gips, recommended that the Pequots hire his former boss to help negotiate a compact with the state.\textsuperscript{176} Having left public service, Degnan joined the Pequots’ legal team, bringing with him casino expertise and important contacts. Degnan in turn advised 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.\textsuperscript{177}

Having successfully prosecuted several key members of New Jersey’s Genovese crime family who had been brought to trial for overseeing a number of illegal activities, Brown subsequently had served as director of New Jersey’s Division of Gaming Enforcement from 1980 until 1982. During his tenure Brown oversaw the opening of seven casinos and supervised the initial licensing hearings for five.\textsuperscript{178}

As a gaming regulator, Brown learned that by and large, modern casinos were not the corrupt, mob-run operations reminiscent of the early gambling days in Nevada. “Some of the companies, I started to realize, had developed a corporate attitude toward gaming,” Brown said. “They were run by people with MBAs, not broken noses.”\textsuperscript{179}

After speaking with Gips, Degnan, and several leading Pequots, Brown agreed to join the Pequots’ effort to open a casino. 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

\textsuperscript{176} 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,” \textit{Boston Globe Magazine: City Edition}, March 1, 1992: 14.
\textsuperscript{177} \textit{Id.}
\textsuperscript{179} \textit{Id.}
Pequots had requested that state officials negotiate a gambling compact with them. Under the IGRA, since gambling, albeit not-for-profit, was permitted in Connecticut, the state was required to entertain the Pequots’ request and negotiate a compact. Connecticut officials refused to negotiate, however, claiming that Connecticut laws prohibited gambling covered by the IGRA. Subsequently, in November, 1989, Gips and partner Barry Margolin sued the state in U.S. District Court in Hartford on behalf of the Pequots. They charged that the state had failed to negotiate in good faith with the tribe. They argued before U.S. district judge Peter Dorsey that Indian gambling was permissible because the state allowed charitable organizations to run casino games at “Las Vegas night” fund-raisers. In May 1990, Dorsey ruled in the Pequots’ favor and ordered the state to negotiate a compact with the tribe within sixty days.\[180\] Connecticut officials appealed the ruling to the Second U.S. Circuit Court of Appeals in New York but lost again.\[181\] Bound by Judge Dorsey’s ruling, state officials began to negotiate a compact with the Pequots who by this time had already hired Michael Brown as their chief negotiator.

When the courts ordered the state to negotiate a compact with the Pequots in mid-1990, Governor Weicker instructed his attorney general and the state police department to locate an expert on gambling regulation. The attorney general approached his counterpart in New Jersey, while the Connecticut state police contacted New Jersey’s police headquarters. Ironically, New Jersey’s attorney general and the state’s police force both recommended Michael Brown, who, Connecticut officials were told, had over ten years of experience in the industry, would never do anything to tarnish the gambling business or undermine the state, and was eminently trustworthy. Soon enough, however, Governor Weicker and his staff discovered that Brown had already been

retained by the Pequots. Nonetheless, the state often turned to Brown for advice in structuring regulatory proposals for the casino.\footnote{Brown interview, \textit{supra} note Error! Bookmark not defined.}

Sitting across the table from the Pequots, Governor Weicker was fiercely opposed to gambling in general and slots in particular. If any tribal casino were to open, given the sordid history of gaming in Connecticut, his top priority was to prevent crime from infiltrating the casino or the surrounding area. Attorney General Richard Blumenthal was also on Weicker’s side, as his office was handling the defense of the Pequot lawsuit.

Outside gaming interests, particularly from Nevada and Atlantic City, were also lurking in the background, fearful that a Pequot victory would open the floodgates for Indian casinos in other parts of the country. Finally, the local towns near the reservation, still bitter over being “blindsided” by the initial Pequot land claims litigation, were quite hostile towards tribal interests. They argued that they would be impacted significantly if the tribe expanded its gaming operations beyond bingo by opening a casino, whether or not that casino included slot machines. The impact of expanded gaming would, however, have positive effects as expanded gaming would provide increased employment.\footnote{Cobb, \textit{supra} note 176.}

The Pequots wanted to be able to expand their gaming operations beyond high stakes bingo to include a casino with table games and slot machines. At the same time, however, they wanted to ensure that they were respected as a separate sovereign entity in the eyes of the State of Connecticut. Along the same lines, they also wanted to keep tribal revenues from being taxed by the state. While the tribe’s sovereignty meant that it alone could exercise control over liquor-use policies, the degree of state police presence, and the procedures, if any, for licensing casino
employees on the reservation, those interests were subordinate to the primary objective of
erunning casino that was as profitable as possible.

**B. Opportunities and Barriers**

Similar to the example of peeling the orange or the Egypt-Israel negotiations, 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, and the Pequots’ primary objective was to run a casino that was as profitable as possible. 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. In exchange, he demanded that the Pequots have absolute control over the business aspects of the casino, unrestricted by limits on the number of gaming tables, square footage of floor space, or operating hours.

Brown opened the negotiation by suggesting that in running the casino, the Pequots would comply voluntarily with all state liquor laws. He made it clear that the tribe would be willing to make additional concessions of this nature if the state would yield on regulating the casino’s business operations. State negotiators agreed to an unlimited number of gaming tables, unconstrained floor space, and unrestricted operating hours. Brown and the Pequots, in return, agreed to allow state police to patrol the casino and to require that all employees to be approved and licensed by the State Department of Special Revenue. The Pequots, whose income was

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184 See part IV.a supra.
185 See Edmund Mahoney, “Who will police the casino? Layoffs cloud plans to regulate legal gambling, State ponders policing of casino,” *Hartford Courant*, Nov. 10, 1991: A1; see also Brown interview, note 171 supra. 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. 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 to 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.
186 Brown interview, note 171 supra.
187 Id.
not subject to taxation, would retain all casino profits after reimbursing the state for money spent on regulation.\textsuperscript{188}

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

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. Judge Naruk, the federal mediator, had decided that in October, 1990, he would select one of the two versions of the compact to be the casino’s governing document.

By October, as negotiations neared an end, the two versions were quite similar, differing substantively only on one major issue. The Pequots wanted to operate slot machines, which often were a casino’s most lucrative revenue source. In Atlantic City, for example, slot machines accounted for approximately 60\% of annual gambling proceeds.\textsuperscript{189} Governor Weicker and the state negotiators, on the other hand, were profoundly opposed to the installation of slot machines. The state claimed that the tribe could not operate slots because they were not permitted under state law, while the tribe maintained that the various types of Class III games permitted by state laws were sufficient to give the Pequots the right under IGRA to run slot machines as well. Governor Weicker initially resisted the inclusion of any provisions for slot machines, even if the provisions would not take effect unless slots were deemed legal. 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. The appendix called for slot machines to be programmed to have a payout of 91.5% to bettors. If slots were permitted, Foxwoods could take an “expected win” of 8.5% of the total “slot drop.” By comparison, Nevada slot machines paid out approximately 93%, allowing casinos to retain 7% of the drop.\textsuperscript{190} The appendix, which even pre-structured settlement of potential lawsuits, would become operative if the state were ever to decide that the machines should be permitted. But for the foreseeable future, the Pequots and the state agreed to a moratorium on the use of slot machines at the casino. 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, in fact, 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.

In mid-October, after the slot-machine appendix had been added to both the state and the Pequot versions of the compact, Michael Brown and Pequot lawyer Barry Margolin suggested to Judge Naruk that he accept the state’s version of the compact.\textsuperscript{191} The state, meanwhile, still trying to overturn Judge Dorsey’s decision to allow gambling on the reservation, had appealed Dorsey’s decision to the U.S. Supreme Court. With its appeal still pending, Connecticut refused to sign the compact it had submitted to Judge Naruk.\textsuperscript{192} Naruk delivered the unsigned compact to Manuel Lujan, Jr., secretary of the U.S. Department of the Interior, the division of the federal government which oversaw Indian affairs.

\textsuperscript{190} Brown interview, note 171 \textit{supra}.
\textsuperscript{191} \textit{Id}. 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. While this distinction provided political cover for state officials, the two versions were so similar as to be substantively identical.
\textsuperscript{192} Under the IGRA, the state was given the option of “accepting” the draft compact it had submitted to the mediator. Connecticut’s negotiators chose not to do so.
Secretary Lujan, after making several minor changes, gave his approval to the agreement that had been negotiated by the Pequots and Connecticut and then passed on by Judge Naruk. Connecticut representatives refused to sign the document, however, so technically it did not qualify as a tribal-state compact. Instead, Lujan promulgated it as federal Procedures governing the operation of a casino on the Ledyard reservation.\textsuperscript{193} Thus, there was no compact between the Pequots and the state; gambling on the reservation was governed exclusively by the Procedures.

The Supreme Court ultimately refused to hear Connecticut’s appeal, 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 handed down by Interior Secretary Lujan. Connecticut had taken its legal battle as far as it possibly could and lost. Almost immediately, the tribe broke ground for its 46,000-square-foot casino.

\textbf{C. Strategic Activities}

In this first round, each side ultimately chose its BATNA rather than reach 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. But both sides likely realized, however, that there were more rounds to come, and each began to take steps away from the table to improve their own BATNA while attempting to worsen the other sides’ BATNA.

Governor Weicker persisted in his efforts to thwart the Pequots’ casino. He moved 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. If passed, the bill would strip the Pequots of the legal basis for their casino. To galvanize opposition to the bill, the Pequots

retained Hartford-based lobbying firm Robinson & Cole. Employees of the Hartford firm worked the corridors of the state Senate and House of Representatives feverishly to canvas support among lawmakers. Also siding with the Pequots and speaking out strongly against the measure were civic groups, parochial schools, and charities, which together raised over $80,000 through “Las Vegas night” events in 1990. Additionally, business leaders in southern Connecticut rallied to oppose 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. In a survey of state residents conducted by the University of Connecticut, 68% of those polled supported the Pequots’ right to open a casino on their Ledyard reservation.

Out-of-state gambling interests who feared that Indian casinos might expand beyond Connecticut also deployed their own powerful lobbyists to support Governor Weicker’s bill. In May, 1991, the state Senate, in an 18-17 vote, approved the measure; to gain passage, the bill needed only to win the support of a majority of the members of the state’s House of Representatives. Soon after the Senate vote, however, the House voted 84-62 to reject the governor’s proposal. Without the support of a majority in both the Senate and the House, the bill was dead. The margin of victory was narrow, but the Pequots, once again, had won.

During all of the legislative maneuvering, the Pequots were enhancing their position by building their casino. In April, 1991, the Pequots broke ground for the country’s largest casino and began hiring and training employees. Foxwoods High Stakes Bingo & Casino, with 2,300 employees, opened for business in February, 1992. The bingo section, which could seat 2,400 players, doubled as a nightclub for entertainers such as Kenny Rogers, who played at Foxwoods’

opening celebration.\textsuperscript{196} At its grand opening on February 14, the casino was dedicated by a medicine man. The 46,000-square-foot casino featured 75 gaming tables, and it was the only casino in the eastern United States that accommodated poker players.\textsuperscript{197} Conspicuously absent, however, were the seductive flash and vibrant clamor of slot machines.

By mid-December, 1992, the casino had not closed its doors since its grand opening; customers were gambling 24 hours a day. Each day, approximately 12,000 people flocked to Foxwoods to play blackjack, craps, roulette, baccarat, bingo, and poker and to place off-track bets. Foxwoods was often so crowded that patrons had to wait—sometimes hours—for a seat at the gaming tables. To service the crush of eager gamblers, the Pequot tribe had to beef up its casino workforce dramatically. Within ten months the workforce had ballooned to 3,500 employees, constituting a $60 million payroll.\textsuperscript{198} For its first year in operation, the booming casino was well on its way to generating significantly more than $100 million in gross revenue, far above initial projections.\textsuperscript{199} Demand was so great that in July, only five months after Foxwoods opened, the Pequots embarked on a $142-million expansion of the complex.

The expansion would include 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.\textsuperscript{200} Work on the addition, which would be more than five times as large as the existing building, was expected to be completed by the fall of 1993. Casino officials said they expected the new facilities to double daily attendance at Foxwoods.\textsuperscript{201}

\textsuperscript{199} Gross revenue for a casino was the difference between the total amount wagered by customers and the amount returned to customers as winnings.
VI. Round 2: Negotiating Slots at Foxwoods

A. Context

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, which would end June 30, Connecticut would incur a deficit of $800 million to $1 billion. After the state had enjoyed nearly a decade of operating surpluses in the 1980s, Connecticut was facing its fourth consecutive year of deficits. Furthermore, revenue and spending estimates for the 1991-92 fiscal year suggested that unless corrective action were taken, 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.202

Connecticut’s fiscal woes were caused in large measure by a deep national recession. Traditionally, the state had derived over half its revenue from an 8% sales tax and taxes on corporate income. The slowdown in economic activity, however, precipitated a sharp decline in corporate-generated tax revenue. To make up for declining revenue from the corporate sector, Governor Weicker—after one month in office—proposed a personal income tax, which was eventually enacted into law.

Although the personal income tax was expected to eliminate much of the budget shortfall, it was still an unproven source of revenue, and estimates of the amount it would generate varied widely. Most agreed, though, that by itself the new tax would not be enough to close the gap in Connecticut’s finances. To balance the budget, the state would have to make deep and bitterly unpopular cuts in government expenditures. Indeed, the governor had fought with the state legislature to trim outlays to the limits of what was politically feasible.

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The combination of a new income tax and draconian spending cuts enabled Connecticut to achieve a budget surplus in 1991-92 for the first time in five years. It appeared that the state had turned the corner financially. 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.203

Despite the 1992 budget surplus, however, economic conditions in Connecticut continued to deteriorate. Deeply rooted in the defense industry, Connecticut’s economy suffered severe setbacks as military contracts were canceled in the post-Cold War environment. In January, 1992, Connecticut’s unemployment rate reached 7.5%, the highest it had been in a decade.204 In the spring of 1992, General Dynamics’ Electric Boat shipyard in Groton announced that it would lay off half of its 17,000 workers over the next five or six years.205 The shipyard was the largest private-sector employer in southern Connecticut. In December, 1992, Hartford-based Pratt & Whitney, which surpassed Electric Boat as the state’s largest private-sector employer, was planning to lay off 5,000 members of its Connecticut workforce. This decision would be the third round of major layoffs at the jet-engine manufacturer in less than 12 months. Between the beginning of 1992 and the end of 1993, employment at Pratt’s Connecticut operations was expected to fall from 23,100 to 13,700. Furthermore, the layoffs would result in thousands of additional job losses at the Connecticut companies that supplied 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.”206

As layoffs continued unabated around the state, Connecticut budget officials pared back their tax-revenue forecasts substantially. 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 budget of approximately $8 billion, assuming existing programs were maintained and expenditures were adjusted only for inflation. Governor Weicker, having promised not to raise taxes and aware that lawmakers had little appetite for further spending cuts, found himself in a predicament that seemed to afford almost no room for maneuver. Yet, if Governor Weicker and the General Assembly did not act soon to prevent the looming budget shortfall, Connecticut would once again be engulfed in financial crisis. There seemed to be no give: the governor and legislature were mandated 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, profits earned by the casino—an Indian venture on Indian land—could not be taxed. For all the excitement generated by the Pequots’ casino, it appeared as if 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 was still morally opposed to legalized gambling, faced mounting political pressure kindled by commercial gambling heavyweights. Trump, Bally, Harrah’s, and Mirage had begun lobbying state legislators relentlessly in efforts to secure licenses for non-Indian casinos. Mirage owner Stephen Wynn had been making particularly aggressive overtures to the state, promising to create jobs and provide attractive tax benefits. Wynn and his big-league gambling compatriots pointed out that the state treasury was

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being bypassed by the gambling boom at Foxwoods because the Pequots were not required to pay taxes on their casino’s profits or their personal earnings. By contrast New Jersey’s casinos pay state taxes of about 8% gross revenue, while Nevada’s casinos pay the state on a sliding scale that tops out at 6.25% of gross revenue. At best, in the case of Foxwoods, the state was only receiving an incidental benefit in the form of state income tax paid by non-Indian employees.\textsuperscript{208} Why, asked Wynn, if casino-style gambling had already been introduced within state boundaries, should the state’s taxpayers be denied the chance to participate in casino earnings? He spent several million dollars lobbying state legislators and sponsoring other pro-gambling activities such as casino job fairs.\textsuperscript{209}

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. 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.\textsuperscript{210} Harrah’s and other gambling concerns quickly followed suit, revealing their own plans for Connecticut casinos.

The movement to legalize casino gambling in Connecticut was rapidly gathering steam. In the spring of 1992 the state legislature commissioned an 18-member task force to study the gambling issue and to make a recommendation to the General Assembly by January, 1993, about whether non-Indian casinos should be permitted in Connecticut. A poll conducted by the Institute for Social Inquiry at the University of Connecticut in September, 1992, showed that 56% of respondents approved of the State’s raising revenue through legalized gambling while

\textsuperscript{208} 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.
only 37% disapproved.\textsuperscript{211} In November William A. DiBella, a Hartford Democrat and friend of Stephen Wynn, was selected by his colleagues to become majority leader of the state Senate when the next legislative session began in January, 1993. DiBella was the Senate’s most outspoken advocate of 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, it was almost certain that a bill permitting expanded gambling in the state would be introduced during the upcoming legislative session. To Governor Weicker it was no longer gambling on the Pequot reservation that posed the greatest threat to a healthy social environment in Connecticut—Foxwoods, after all, had not given rise to drugs, prostitution, or other crime problems in Ledyard. The real threat, in the governor’s view, was now the corporate-sponsored movement to legalize casinos throughout the state. The governor was determined to block the expansion of gambling in Connecticut.

But circumstances were combining to make life even harder for Connecticut’s steel-backboned governor. By December, 1992, 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, and he was threatened by wide legislative support for statewide legalization of gambling.

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. They promised jobs and revenue for Connecticut and its two largest cities. The state’s legal jai alai frontons and dog track, which were struggling financially, also lobbied fiercely for slot machines. A specially assembled State Casino Gambling Task Force

was scheduled to vote in early January, 1993, on whether to recommend that the legislature legalize casino gambling.\textsuperscript{212}

Over the past few months, 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. The division oversaw legalized gambling in the state and was responsible for regulating the Foxwoods casino. Brown and Werner had met a number of times to discuss road improvements and other issues at Foxwoods in the months since Werner had been named director. 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, instead of directly to Governor Weicker, Brown hoped to win the support of a key member of the governor’s inner circle. If Werner was enthusiastic, Governor Weicker might be more willing to consider a plan permitting Foxwoods to operate slot machines.

\section*{B. Opportunities and Barriers}

In late 1992 Brown learned from Werner that Connecticut was facing a $424 million budget shortfall for the 1993-94 fiscal year. The governor and the legislature were required to agree on a balanced budget by July 1, 1993. 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. Yet Brown suggested an intriguing twist on this basic idea: The Pequot payments would be conditional on tribal exclusivity for the operation of slot machines.

machines in the state. He estimated that the tribe could earn $400-$500 million in annual slot-
machine revenue. The tribal council enthusiastically 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’ early 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 a proposal for non-Indian gambling had been introduced in the
legislature. Governor Weicker was vehemently 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 exclusivity for slot
machines operations 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 8:00.

On Saturday morning, Michael Brown and Pequot legal advisors Barry Margolin and
Robert Gips met Governor Weicker at his home. Brown outlined the slot-machine proposal he
earlier described to Werner, and 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. Brown proposed that each year, the Pequots pay the state 25% of annual slot machine revenues or $100 million, whichever was greater. In effect this arrangement would be a guarantee that the state would receive at least $100 million per year. 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 guarantee of $100 million, he still 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 that Blumenthal be brought 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 it was legal to operate arcade games such as “Space Invaders” that reward high-scoring players with free games. 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 has 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

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on the operation of slot machines at Foxwoods, however, until a dispute between the Pequots and the state was resolved. The dispute arose when the compact was formulated. 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 could not be enacted 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.

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 in exchange for 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 deal was finalized, 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 5, the 18-member State Casino Gambling Task Force voted 12-6 in favor of recommending that the state legislature approve casinos in Hartford and Bridgeport. The task force also recommended that video slot machines be legalized at casinos, jai alai frontons, dog tracks, and off-track betting parlors.

On January 13, Governor Weicker invited the media into his office to witness the signing of the memorandum of understanding he had negotiated with the Pequots. The agreement was a surprise to the public. Many legislators were stunned by the governor’s unilateral action, which significantly pre-empted pro-corporate gambling measures they were about to take.

Under the terms of the agreement, the Pequot tribe was permitted to install an unlimited number of video slot machines at the Foxwoods casino. In return, the Pequots would pay the state $30 million by June 30, 1993 (the end of Connecticut’s fiscal year). In the following fiscal year (1993-94), the Pequots would contribute $100 million to the state. In subsequent years the tribe would pay the state $100 million or 25% of slot machine revenues, whichever was greater. If any other organization were ever permitted to operate slot machines in Connecticut, however, the Pequots would no longer be required to make payments to the state.

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. Sixty percent of the money ($60 million in 1993-94) would go to the state’s

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214 Brown’s comments, as well as the descriptions of his conversation with Robert Werner at a coffee shop and his meeting with Lowell Weicker at the governor’s mansion, are taken from “Pequots vs. Connecticut,” a student paper written in April 1997 by Jose Ferreira, Kathy Keltos, and Karin Kissane-Gaisford for a second-year MBA course at Harvard Business School. Information in the paper was obtained through interviews with Michael Brown.


poorest communities, including Hartford and Bridgeport. Much of the rest would be shared by municipalities which housed large tracts of tax-exempt property, such as colleges, hospitals, and state prisons. No town in the state would receive less than $5,000. 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.”

With the agreement in place legalization of slot machines anywhere in Connecticut other than Foxwoods would cause the state to lose $100 million in guaranteed annual revenue (and even more if Foxwoods’ slot-machine revenue projections proved accurate). 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.” 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), but would also 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 16, the Pequots installed the first 100 video slot machines at Foxwoods. Michael Brown reported that the casino hoped to have 1,260 slot machines in operation by March 1. The new slot machines would offer a variety of games, including video poker, draw poker, and video blackjack, but over half would resemble the traditional one-armed bandits on which players win by matching fruits and other symbols. Brown believed that the casino may eventually operate as many as 3,000 slot machines. In the first week that slot machines were operational at Foxwoods, casino attendance increased by 60%.

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218 Id.
C. Strategic Activities

Having built Governor Weicker a “golden bridge,” the Pequots essentially enticed the governor to join their side of the table. Implementation of the agreement was still 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. Senate Pro Tem John B. Larson, also a Hartford Democrat, wrote Governor Weicker a letter charging that the governor had overstepped his constitutional bounds in signing the slot-machine agreement. Larson demanded that the governor submit the memorandum of understanding to the General Assembly for approval. In a three-page reply to Larson, Governor Weicker maintained that he acted appropriately, lawfully discharging his duties as governor, and asserted that he had no intention of submitting the agreement to the legislature for approval.221 Governor Weicker’s adversaries arranged a meeting on January 14 with State Attorney General Richard Blumenthal to demand a ruling on the matter. 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.222 The attorney general announced that he would deliver an official opinion on the legality of the agreement. Governor Weicker and his opponents agreed to accept Blumenthal’s legal opinion as binding.223

221 Id.
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. The complex was designed to include a casino, hotel, convention center, six-screen movie theater, ice-skating rink, a 1,500-seat performing arts center, retail shops, and restaurants. The company had proposed a similar $300-million facility for Bridgeport. In what 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 Mirage Resorts was permitted to build casinos in Hartford and Bridgeport. “The governor made a bad deal with the Indians and we make a better one,” says Wynn. “I’ll guarantee $140 million. Period.”

Despite Wynn’s optimistic pronouncements, Representative William Dyson, a New Haven Democrat, pointed out that even 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. “Do you take the sure money, or do you take a risk?” Dyson asks. “It’s the old adage of a bird in the hand versus two in the bush. I’m for the bird in the hand.”

On February 11, Attorney General Blumenthal delivered an opinion to the speaker of Connecticut’s House of Representatives on the legality of the memorandum of understanding that Governor Weicker and the Pequots had enacted without legislative approval. Blumenthal concluded that the agreement did not establish new laws or amend existing ones. Instead, it clarified a matter of dispute that arose in the original tribal state compact, namely, whether,

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based on existing state law, video slot machine gambling was permitted under the Indian Gaming Regulatory Act. Blumenthal writes:

> It is the Attorney General’s opinion that execution of this agreement is fundamentally executive in nature, rather than legislative. 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.\(^\text{227}\)

Over the next two months, the Pequots installed more than 1,000 slot machines at Foxwoods.\(^\text{228}\)

On June 30, 1993, the Pequots delivered $30 million to Connecticut’s Department of Special Revenue. It was the first payment the tribe was scheduled to make to the state under the slot-machine agreement approved by Governor Weicker. The tribe’s slot machines had been in operation since February and were one of the primary reasons that revenue at Foxwoods would grow from $120 million in the casino’s first year to between $600 million and $1 billion in its second year.

Meanwhile, the state legislature was still 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 1. On the morning of July 1, however, the budget still 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 “can 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 rapidly 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.²²⁹

**D. Prologue**

Over the course of the year the Pequots undertook massive expansion projects at Foxwoods. In the fall the tribe completed construction of the Two Trees Inn, a 280-room hotel across Route 214 from the reservation. On the reservation itself the Pequots completed a 1.3-million-square-foot, eight-story tower that houses a new casino and a luxury hotel called Foxwoods Resort. The 46,000-square-foot casino boasted twice as many slot machines and 60 more table games than the original gambling area. The 312-room hotel features presidential suites for high rollers on the top floor, the 1,500-seat Fox Theater, a 500-seat ballroom, a pool, and a health spa. The new tower was located at the end of a concourse that connects it to the original casino. At the entrance to the concourse was a man-made waterfall with a 12-foot statue of an Indian on top. 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 rain storm. Additional man-made waterfalls and sculptures of Indian warriors were spread throughout the complex. The concourse contained restaurants and 23 retail shops, which sold everything from authentic Indian goods, such as leather boots and jewelry, to Gucci bags and Ralph Lauren clothing.²³⁰

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²²⁹ Brown Interview, note Error! Bookmark not defined. supra.
As part of the grand opening celebration for the new tower, the Pequots booked Frank Sinatra as the inaugural performer at the Fox Theater. Sinatra costs the Pequots $750,000, but he attracted a full house on each of the five nights he performed.\textsuperscript{231}

The construction bill for the new tower and concourse was $240 million, which the Pequots paid out of casino profits. The tribe changed the official name of the gambling and entertainment complex from Foxwoods High Stakes Bingo & Casino to Foxwoods Resort & Casino.\textsuperscript{232}

By the end of 1993 Foxwoods had 234 table games, 3,108 slot machines, and 139,000 square feet of gaming space. Each day, approximately 15,000 people visit the casino.\textsuperscript{233} It is reported to be the largest and most profitable casino in the world.\textsuperscript{234}

\textbf{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 at other times the states remained as obstructionist as ever. Each side also made moves “away from the table” either to improve their position or to worsen the other sides’ BATNA. One portion of the IGRA that gained immediate scrutiny and formed the basis for nearly immediate conflict between states and tribes was the “good faith bargaining” provision. Since that section of IGRA basically forced the state to the negotiating table, altering that requirement was a logical area for a state to focus its strategic efforts.

\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{234} Hilary Waldman, “Pequot Tribe to Aid Special Olympics,” \textit{Hartford Courant}, November 30, 1993: C1.
A. Seminole Tribe v. Florida: 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. Florida responded by arguing that the suit violated the State’s sovereign immunity from suit in federal court. After procedural battles in the lower courts, the case was appealed to the Supreme Court.

After finding that Congress had clearly and unambiguously abrogated the states’ Eleventh Amendment immunity from suit, the Court held, in a 5-4 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. At issue specifically 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. The Court also held that the doctrine set forth in ex parte Young did not allow tribes to sue state officials in their official capacities as a way around the Eleventh Amendment’s grant of state immunity from suit.

The Seminole Tribe decision has been heavily criticized on a number of theoretical grounds, but from a practical standpoint the compromise struck in the enactment of IGRA was

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237 Id. at 47.
238 See e.g. Laura S. Fitzgerald, “Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe,” 52 VAND. L.REV. 407, 479 (1999). (The Court essentially “preserve[ed] 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 U. Minn. L.REV. 267 (2001) (arguing that Seminole 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 Court’s inconsistently read Article I, Section 8, cl. 3 of the U.S. Constitution, which reads “Congress shall have . . . to regulate commerce between the several states, and with the Indian tribes.” The Court noted: “the Interstate Commerce Clause granted Congress the
disrupted, as states were now immune from suit even if they were clearly 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 part of the intent of IGRA. 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 states a voice in Indian gaming to address legitimate concerns, not to give states an opportunity to demand a cut of the profits.  

Additionally, *Seminole Tribe* defanged the IGRA by removing the only tool they had 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.  

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

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239 Kevin K. Washburn, “Indian Gaming: A Primer on the Development of Indian Gaming, the NIGC, and Several Important Unresolved Issues,” American Bar Association Center for Continuing Legal Education National Institute, Criminal Justice Section, Gaming Enforcement, 2002. (page?).

B. Adjustments to Tribal BATNAs

There have been attempts, however, to rebalance the situation. In response to *Seminole Tribe v. Florida*, the Secretary of the Interior promulgated regulations by which tribal gaming may be conducted even in the absence of state agreement. These regulations have never been implemented, however, and there are still states that refuse to negotiate compacts. Thus the effect of the existence of these new regulations is unclear in terms of the change to the tribal BATNA.

Additionally, the Department of Interior has recently 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.241 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 was originally conceived of as bingo, enterprising tribes and gaming equipment developers worked to simulate the “Class III experience” but used technology that fell within the scope of Class II gaming. 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 would ordinarily fall under Class III. 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.242 As Class II gaming technology becomes more sophisticated, the distinction between these machines and true Class III machines diminishes. Such machines are affectionately referred to as “Class II.9” machines, and their profitability approaches that of true Class III machines.

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241 See March 7, 2002 DOI letter refusing to approve compact between Jena Band of Choctaw and the State of Louisiana.
Since Class II gaming does not require a tribal-state compact, a tribe could open a casino with exclusively Class II.9 machines and effectively 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 towards the state immediately after *Seminole Tribe v. Florida*, the CFR regulations and the technological advancement of gaming equipment has caused the pendulum to swing back towards the tribes.

**C. Economic Exigencies: The Seneca Compact**

The State of New York faced a particularly acute budget situation in 2001, which prompted Governor Pataki to enter into gaming compact negotiations with the Seneca Nation of Indians of Western New York. By the summer of 2001, negotiators for both sides agreed to a “memorandum of understanding” establishing the broad parameters of a deal. The Governor’s Democratic opponents in the Assembly sought to impose labor regulations on the Nation’s gambling operations, sidetracking early agreements. This intrusion on sovereignty was unacceptable to the Seneca, who appealed to the Governor to work for the deal they had struck.

The aftermath of the terrorist attacks on September 11, 2001 significantly worsened the budget situation, and Governor became even more interested in a deal. He needed revenue for his budget and for his popularity he needed economic development in upstate New York. He indicated his belief that he would “need a Connecticut deal” to make it possible to drive a compact through Albany. Leaders and lobbyists for the Nation realized they faced a closing window of opportunity to secure a major gambling compact for western New York.

Asked by the Governor for a substantial revenue share, Seneca negotiators indicated the State would, like any other equity partner, have to contribute something to make the compact

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243 Material for this section comes from two interviews. The first interview was with Barry Brandon, a partner with Akin Gump and attorney for the tribe on The second interview was with Mike Brown on February 11, 2004.
feasible. Seneca negotiators, using language in the Seneca Land Claims Settlement Act authorizing repurchase of land-into-trust, negotiated to get the State sell for $1 the downtown Convention Center and 13 surrounding acres in Niagara Falls, agree to use eminent domain to help secure another 50 acres, support the Nation’s efforts to transfer these lands into trust, establish a 50-mile zone of exclusivity for the life of the compact, and assume in its entirety the burden of satisfying county and municipal governments. Further, tribal negotiators demonstrated that a 25% revenue share would cripple the deal, proposing instead a graduated schedule of increasing revenue share averaging around 17.5% for the life of the compact, with years 8-14 at 25%. The Seneca Nation also has the right, by the terms of the compact, to open and operate two additional Class III gaming operations. Finally, as with Foxwoods, should the exclusivity provisions be breached, all revenue sharing obligations would disappear.

In her letter authorizing the compact, Secretary of the Interior Norton pointed to the substantial financial concessions offered the State as justifying the States substantial share of the revenue. Unlike other compacts negotiated by cash-strapped states the Secretary has barred under IGRA, the provision of real assets by the State helped convince Secretary Norton to permit the relatively high State revenue share. All parties demonstrated their good faith in negotiations and there were substantial economic rewards for both parties to the compact.

**VIII. Conclusion**

Although *Seminole* eviscerated IGRA’s mechanism for balancing tribal and state interests, tribes are still able to negotiate gaming compacts that successfully advance tribal interests. The successful compact negotiated between the New York and the Seneca Nation of Indians proves that *Seminole* may not have eliminate the potential for State-Tribal gaming compacts under IGRA. An 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. 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 to essentially 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 externally generalizable beyond the gaming context. In fact, in a post-*Seminole* world where tribes can not force states to the bargaining table, gaming compact negotiations have arguably become more like non-gaming negotiations where advancing the full set of one’s interests requires jointly decided action.