

# There Are No Pequots on the Plains: Assessing the Success of Indian Gaming

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## INTRODUCTION

“We had tried poverty for 200 years, so we decided to try something else.”<sup>1</sup> Ray Halbritter was referring to his own tribe, the Oneida Indian Nation of New York, but the sentiment might have applied to each of the nearly 150 tribes that decided to pursue casino-style gaming during the 1990s as a means of tribal economic development. For the last decade, gaming tribes across the country have lauded the financial and social successes of their casinos. The tribes’ accounts largely have been corroborated by empirical research. In 1999, the National Gambling Impact Study Commission (NGISC) reported that Indian gaming has allowed tribes “to take unprecedented steps to begin to address the economic as well as social problems on their own.”<sup>2</sup> In addition, a study conducted by the Harvard Project on American Indian Economic Development concluded in 2000 that both surrounding localities and tribes benefit substantially from tribal casinos, particularly in the poorest areas of the country.<sup>3</sup> Indeed, leading tribal gaming researchers recently concluded “the idea that the consequences of Indian gaming are largely negative, either for In-

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<sup>1</sup> Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 568 (1994) (quoting Ray Halbritter, Nation Representative, Oneida Indian Nation of New York).

<sup>2</sup> NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT, at 6-6 (1999), available at <http://govinfo.library.unt.edu/ngisc/index.html> [hereinafter NGISC FINAL REPORT].

<sup>3</sup> Jonathan B. Taylor et al., *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* 29-30 (April 2000) (unpublished manuscript, on file with Chapman Law Review).

dians or non-Indians, is misguided and unacquainted with the facts.”<sup>4</sup>

If the previous reports are true, one might ask why the *Boston Globe* reported in late 2000 that Indian gaming has resulted in “[u]ntold riches for a few, smaller tribes . . . and continued poverty for the vast majority of Indians spread out across rural America.”<sup>5</sup> Furthermore, why did some federal policymakers respond by calling for legislation that would, in effect, make it more difficult for many tribes to pursue gaming?<sup>6</sup>

Even as Indian gaming provides vital public revenue for many tribes, allowing them to begin to address the collective plight of the poorest ethnic group in the country,<sup>7</sup> many policymakers appear eager to further remove gaming from tribal control. Indian gaming has been controversial since its advent, raising a myriad of concerns, both substantiable and otherwise. In the decade following Congress’s enactment of the Indian Gaming Regulatory Act,<sup>8</sup> politics has proven as great a force as law in shaping the practicalities of tribal gaming.<sup>9</sup> In the past several years, concerns appear to have shifted from whether tribal gaming enterprises comply with applicable law to whether tribal gaming itself—legal or not—is a desirable *political* outcome.

Most recently, Indian gaming has been faulted as a failed policy experiment, a criticism that has wielded a great deal of influence in the public discourse. Tribal gaming, critics charge, does not work: it has failed to solve the “Indian problem,”<sup>10</sup> as evidenced by continuing poverty, unemployment, and other social ills on reservations. Accompanying this fundamental criticism is a host of related concerns: that tribes, inexperienced in running successful economic enterprises, may be taken advantage of by non-Indian investors; that gaming is contrary to “Indian” values, suggesting that “casino Indians”<sup>11</sup> are not really Indian at all; that

4 STEPHEN CORNELL ET AL., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 77 (1998).

5 Michael Rezendes, *Few Tribes Share in Casino Windfall*, BOSTON GLOBE, Dec. 11, 2000, at A1, available at 2000 WL 3354974 [hereinafter Rezendes, *Casino Windfall*].

6 See, e.g., H.R. 2244, 107th Cong. (2001); *infra* notes 66-77.

7 U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2000 7 tbl.B (2000), available at <http://www.census.gov/prod/2001pubs/p60-214.pdf>.

8 25 U.S.C. §§ 2701-21 (2001).

9 See Kathryn R.L. Rand, *At Odds? Perspectives on the Law and Politics of Indian Gaming*, GAMING L. REV. vol. 5 No. 4, at 297 (2001) (introducing special issue on Indian gaming).

10 “Indian problem” is an old term from federal Indian policy, and it is used generally to refer to Indian poverty and other social ills.

11 See, e.g., Chris Powell, Editorial, *Pequot Museum May Feed Mistaken Guilt*, PROVIDENCE J., Jan. 2, 2001, at B4, available at 2001 WL 5370897 (“Many other aspiring casino Indians are coming out of the woodwork.”).

casinos breed organized crime; and that some tribes' casinos are too successful.<sup>12</sup>

Current law plays a limited role in the debate; instead, the focus is on reforming the law to address these and other policy concerns. Recent debate has focused on the handful of highly successful gaming tribes—particularly the Mashantucket Pequots of Connecticut—feeding concerns that simply do not apply to a large number of tribes, particularly in middle America. I explore this focus on a few successful, relatively small, and often relatively recently organized tribes through what I call the “Pequot Model.”<sup>13</sup> At the forefront of popular debate, the Pequot Model, I argue, threatens to unduly influence policymakers by fueling assumptions that most gaming tribes resemble the Pequots.

Missing from the almost frenetic level of public debate concerning the Pequots in the popular media is a meaningful discussion of the interrelationship between tribal gaming and tribal sovereignty. In a discourse rife with economic bottom lines and challenges to authenticity, there appears to be little concern for preserving tribal sovereignty from any camp other than the tribes themselves. To the extent sovereignty is mentioned, most news accounts are simplistically critical of tribes' exercise of sovereignty in the context of gaming.<sup>14</sup> Policymakers, too, seem inclined to gloss over tribal sovereignty concerns, choosing to focus on the problems perceived by their non-Indian constituents.

Yet, I argue that sovereignty, rather than net profits, provides the necessary foundation for assessing whether tribal gaming is successful. Research conducted by the Harvard Project on American Indian Economic Development shows that tribal sovereignty precedes reservation economic development; without strong tribal government, tribes are unlikely to successfully pursue economic enterprises.<sup>15</sup> The Harvard Project research plainly indicates that self-determination is a desirable federal Indian policy, but I argue that policymakers also should use sovereignty as an assessment tool. If Indian gaming strengthens tribal governments, then even modest economic success may be expected to result in healthier reservation communities, and an increased likelihood that tribes

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<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> Although I base this model on criticism levied at the Mashantucket Pequots in particular, the model might also encompass the heightened public debate over Indian gaming in California following the passage of Proposition 1A. See *infra* note 128.

<sup>14</sup> Following the *Boston Globe* series, editorials decried exercises of tribal sovereignty, called for increased federal and state oversight, and warned that “casino Indians” would breed corruption and crime. See, e.g., Editorial, *The Big Gamble*, ARIZ. DAILY STAR, Mar. 17, 2001, at B6, available at 2001 WL 10337361; Editorial, *No Tribal Casino Is an Island*, CHRISTIAN SCI. MONITOR, Jan. 8, 2001, at 8, available at 2001 WL 3732863; Editorial, *Regulating Tribal Casinos*, BOSTON GLOBE, May 21, 2001, at A10, available at 2001 WL 3934250; Powell, *supra* note 11; see also *infra* note 147.

<sup>15</sup> CORNELL ET AL., *supra* note 4, at 5-8.

will be able to pursue avenues of economic development outside of gaming.

This is particularly true for tribes whose casino profits are unlikely ever to approach those of the Pequots, even those tribes that, as described by the *Boston Globe*, experience “continued poverty for the vast majority of Indians spread out across rural America.”<sup>16</sup> To illuminate and assess the success of these tribes, I offer a different model of Indian gaming in contrast to the Pequot Model: the “Plains Model.” The Plains Model is based on the experiences of large, land-based “treaty tribes”<sup>17</sup> in North Dakota, and is an alternative lens through which to assess the impacts of tribal gaming. The Plains Model, I posit, reveals the notable success of many gaming tribes in terms of preserving tribal sovereignty and strengthening tribal government, which, in turn, allows those tribes to begin to rectify persisting social ills on the reservation. Law and policy adopted in response to the Pequot Model of tribal gaming, I argue, risks undermining the small, and not-so-small, gains in the quality of reservation life made by tribes like those in North Dakota and across the Great Plains.

Part I, provides a brief overview of the history of Indian gaming and the enactment of the Indian Gaming Regulatory Act, as well as a short account of gaming’s effects on reservation economic development. Part II recounts recent criticism of tribal gaming in the national media and its influence on policymakers, particularly at the federal level. In Parts III and IV, I set forth the Pequot Model and the Plains Model, respectively. I then turn, in Part V, to the policy implications of the models, arguing that lawmakers should consider the Plains Model both in assessing the success of tribal gaming and in weighing the effects of further limiting tribal gaming and diminishing tribal sovereignty. I conclude by asserting that even well-meaning criticisms of Indian gaming that characterize the important successes of gaming tribes like those in North Dakota as failures, run the risk of further compromising tribes’ abilities to address often dire social conditions on reservations throughout the United States.

## I. INDIAN GAMING

### A. The Indian Gaming Regulatory Act

In the late 1970s, spurred by the federal government’s policy of tribal self-determination, several Native American tribes ex-

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<sup>16</sup> Rezendes, *Casino Windfall*, *supra* note 5.

<sup>17</sup> The term “treaty tribes” refers to those Native American tribes that entered into treaties, many still existing, with the United States in the eighteenth and nineteenth centuries.

plored various tools of reservation economic development.<sup>18</sup> Casinos and bingo halls soon proved profitable, and tribes expanded their gaming outfits by offering bigger prizes and longer hours.<sup>19</sup> The Cabazon and Morongo Bands of Mission Indians in California offered high-stakes bingo on their reservations, in contravention of state regulations limiting jackpot amounts.<sup>20</sup> California asserted the application of its gambling laws on the reservations, but in *California v. Cabazon Band of Mission Indians*, the Supreme Court held that states could not regulate reservation gaming enterprises.<sup>21</sup> Using the prohibitory-regulatory doctrine to analyze California's statute, the Court reasoned that if a state did not prohibit a specific type of gambling altogether, the state could not regulate that type of gambling on an Indian reservation.<sup>22</sup> At the heart of the Court's decision was a balancing of competing interests: tribal and federal interests in tribal self-sufficiency and reservation economic development, weighed against the state's interest in regulating gambling to prevent the infiltration of organized crime.<sup>23</sup> The Court concluded that California's interest was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case."<sup>24</sup>

The *Cabazon* decision was an unexpected victory for tribes, but as Congress already had identified Indian gaming as a potential regulatory problem, the victory came late in the game. Shortly after the Court issued its decision in *Cabazon*, Congress passed the Indian Gaming Regulatory Act (IGRA).<sup>25</sup> One of IGRA's express congressional purposes was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."<sup>26</sup>

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<sup>18</sup> CORNELL ET AL., *supra* note 4, at 9.

<sup>19</sup> *Id.*

<sup>20</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987).

<sup>21</sup> *Id.* at 221-22.

<sup>22</sup> *Id.* at 208-12.

<sup>23</sup> *Id.* at 216-22.

<sup>24</sup> *Id.* at 221.

<sup>25</sup> 25 U.S.C. §§ 2701-21 (2001). For discussions of the events preceding IGRA's enactment, see W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 53-64 (2000), and Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 398-400 (1997) [hereinafter Rand & Light, *Virtue or Vice*].

<sup>26</sup> 25 U.S.C. § 2702. The other stated purposes of IGRA are:

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are

Widely regarded as a political compromise, IGRA increased the states' role in regulating Indian gaming beyond that mandated by *Cabazon*. Under IGRA's now-familiar framework, the type of gambling determines the regulatory jurisdiction. Tribes have exclusive authority to regulate "Class I" gaming, consisting of social games and traditional tribal gambling.<sup>27</sup> With federal oversight, tribes also have authority to regulate bingo and non-banking card games, or "Class II" gaming.<sup>28</sup> However, "Class III" gaming, or casino-style gambling, requires tribes to successfully negotiate an agreement with the state—a "Tribal-State compact"—governing the specifics of the tribal casino.<sup>29</sup>

As written, IGRA attempted to level the tribal-state negotiation table by creating a cause of action for tribes to sue states that declined to negotiate a Tribal-State compact in good faith.<sup>30</sup> In *Seminole Tribe v. Florida*, however, the Supreme Court held that Congress did not have the power to authorize such an action against a state.<sup>31</sup> Thus, the Court altered IGRA's balance of power between states and tribes. Subsequently, some states have refused to negotiate compacts, effectively precluding tribal casino-style gaming within their borders.<sup>32</sup>

Many tribes successfully negotiated compacts prior to *Seminole Tribe*. In 1998, roughly a decade after IGRA's enactment, 146 tribes operated Class III casinos under nearly two hundred Tribal-State compacts.<sup>33</sup> Many tribes, of course, have decided not to pursue Class III gaming or, in some cases, any form of gaming. Of the 554 tribes in the United States recognized by the federal government, only a third or so conduct Class III gaming on their reserva-

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necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

*Id.*

<sup>27</sup> *Id.* §§ 2703(6), 2710(a)(1).

<sup>28</sup> *Id.* §§ 2703(7)(A), 2710(b). A tribe may conduct Class II gaming only if it "is located within a State that permits such gaming for any purpose by any person" and it is not prohibited by federal law. *Id.* § 2710(b)(1)(A).

<sup>29</sup> *Id.* §§ 2703(8), 2710(d). Class III gaming consists of "all forms of gaming that are not class I gaming or class II gaming," particularly banking card games, electronic facsimiles of games, and slot machines. *Id.* §§ 2703(8), 2703(7)(B).

<sup>30</sup> *Id.* § 2710(d)(7).

<sup>31</sup> 517 U.S. 44, 76 (1996). For discussions of potential post-*Seminole Tribe* procedures under IGRA, see Alex Tallchief Skibine, *Scope of Gaming, Good Faith Negotiations and the Secretary of Interior's Class III Gaming Procedures: Is I.G.R.A. Still a Workable Framework After Seminole?*, GAMING L. REV. vol. 5 No. 4, at 401 (2001), and Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121 (1997).

<sup>32</sup> See Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 430 (2001).

<sup>33</sup> NGISC FINAL REPORT, *supra* note 2, at 6-2. There are more compacts than compacting tribes because some tribes have separate compacts for separate gaming facilities. *Id.* at 6-2 n.8.

tions.<sup>34</sup> However, of the 225 or so tribes in the forty-eight contiguous, states nearly eighty-five percent conduct gaming.<sup>35</sup>

## B. Indian Gaming and Reservation Life

As has been discussed extensively elsewhere, in the late 1980s and early 1990s, as throughout the twentieth century, reservations were places of extraordinary poverty. In terms of social health, Native American communities exemplified the worst living conditions in the United States. Many Native Americans, particularly those residing on reservations, were poor, unemployed, and living in overcrowded and inadequate housing in communities with minimal government services. In some areas, reservation unemployment topped eighty percent, even as non-Indian communities experienced historically low unemployment rates.<sup>36</sup> Native Americans were more likely to suffer from diabetes, alcoholism, and fetal alcohol syndrome than other Americans.<sup>37</sup> Indian children and young adults were two to three times more likely than the national average to commit suicide.<sup>38</sup> Native Americans were also twice as likely to be victims of violent crime than other ethnic groups; for example, Native American women were nearly three times as likely to suffer violent crime at the hands of their intimate partners than white women.<sup>39</sup>

A decade later, conditions on many reservations are still lagging significantly behind those of other ethnic groups in the United States. Yet there have been marked improvements for many Native American communities, largely due to gaming revenue. The NGISC concluded, “As was IGRA’s intention, gambling revenues have proven to be a very important source of funding for many tribal governments, providing much-needed improvements in the health, education, and welfare of Native Americans on res-

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<sup>34</sup> *Id.* at 6-2. Of course, not all tribal casinos are successful. Some operate at a loss, while many others break even or make only modest profits. *Id.* at 6-3.

<sup>35</sup> CORNELL ET AL., *supra* note 4, at 11-12.

<sup>36</sup> Kathryn R.L. Rand & Steven A. Light, *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota*, GAMING L. REV. vol. 5 No. 4, at 329, 334 (2001) [hereinafter Rand & Light, *Raising the Stakes*]; see also NGISC FINAL REPORT, *supra* note 2, at 6-5 to 6-6 (testimony of Sen. John McCain).

<sup>37</sup> CORNELL ET AL., *supra* note 4, at 24-26 (citing U.S. Census Bureau and Department of Health and Human Services figures); see also Rand & Light, *Virtue or Vice*, *supra* note 25, at 394.

<sup>38</sup> CORNELL ET AL., *supra* note 4, at 25 (citing 141 CONG. REC. S11881 (Aug. 8, 1995) (testimony of Sen. John McCain)).

<sup>39</sup> Press Release, U.S. Dep’t of Justice Bureau of Justice Statistics, Differences in Rates of Violent Crime Experienced by Whites and Blacks Narrow (Mar. 18, 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/press/vvr98pr.htm> (describing the results of the BJS study, Violent Victimization and Race, 1993-98). Although white offenders primarily choose white victims, Native Americans are more likely to be victimized by non-Indians. *Id.*

ervations across the United States.”<sup>40</sup> Additionally, research conducted by the Harvard Project on American Indian Economic Development “repeatedly finds that tribal gaming enterprises yield positive economic and social benefits to those tribes that exercise their sovereignty and choose to enter the game.”<sup>41</sup>

Numerous tribes credit casinos with improving, sometimes vastly, reservation living conditions. The Oneida Indian Nation of New York operates the Turning Stone Casino Resort, one of the most successful tribal gaming enterprises in the country. With revenue from the casino, the Nation provides housing, health care, education, employment, and other essential government services to its members. Gaming revenue reinforces tribal sovereignty, according to one tribal official, “giv[ing] us the tools we need to bridge the gap between merely surviving and thriving.”<sup>42</sup>

Half a continent away, the Oneida Nation of Wisconsin enjoys similar gaming success, as extolled by a report issued by the Wisconsin Policy Research Institute, “The Oneida Tribe . . . is enjoying its first generation of prosperity in more than two centuries. For the Oneidas, the gaming franchise has been more successful than all previous anti-poverty programs in providing jobs, self-esteem, and a bright future.”<sup>43</sup> In neighboring Minnesota, the Prairie Island Indian Community credits its Treasure Island Resort and Casino with improving the lives of tribal members by providing funds for government services, including constructing housing, a government administration building, a community center, and a waste water treatment facility. The tribe also uses casino revenue to provide health care and education to its members.<sup>44</sup> For the Tohono O’odham Nation in southern Arizona, gaming revenue has paid for a new community college and nursing home, as well as for health care, fire protection, and youth recreation centers.<sup>45</sup> In California, the Viejas Band of Kumeyaay Indians uses gaming revenue to provide government services for its members, including law enforcement,

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<sup>40</sup> NGISC FINAL REPORT, *supra* note 2, at 6-2.

<sup>41</sup> Joseph P. Kalt, Statement Before the National Gambling Impact Study Commission 2 (Mar. 16, 1998) (transcript on file with Chapman Law Review).

<sup>42</sup> Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, GAMING L. REV. vol. 5 No. 4, at 311, 323 (2001) (quoting Nation Representative Ray Halbritter, Oneida Nation Annual Report 2000, Sec. I).

<sup>43</sup> Daniel J. Alesch, *The Impact of Indian Casino Gambling on Metropolitan Green Bay*, WIS. POL’Y RES. INST. REP., Sept. 1997, at 1, available at <http://www.wpri.org/Reports/Volume10/Vol10no6.pdf>.

<sup>44</sup> NGISC FINAL REPORT, *supra* note 2, at 6-15 (quoting Carrel Campbell, Secretary of the Prairie Island Indian Community).

<sup>45</sup> *Indian Gaming: Oversight Hearing on the Indian Gaming Regulatory Act Before the S. Comm. on Indian Affairs* (July 25, 2001) (statement of David LaSarte), available at 2001 WL 21757800.



road maintenance, and waste removal.<sup>46</sup> As Ernest Stevens, Chairman of the National Indian Gaming Association, said:

Perhaps the most important point is that Indian gaming has served to build strong tribal governments, and promote tribal economic self-sufficiency. Tribes now have schools, health clinics, water systems, and roads that exist only because of Indian gaming. Tribes have a long way to go because too many of our people continue to live with disease and poverty, but Indian gaming offers hope for the future.<sup>47</sup>

Nevertheless, despite these and other successes, casino-style gaming on reservations continues to be controversial, sparking heated public debate.

## II. RECENT CRITICISM OF INDIAN GAMING

In December 2000, the *Boston Globe* ran a four-part series titled, "Tribal Gamble: The Lure and Peril of Indian Gambling."<sup>48</sup> The first article in the series asserted, "Born partly of a desire to apply the '80s faith in free enterprise to the nation's poorest ethnic group, the story of Indian gaming is now one of congressional intentions gone awry."<sup>49</sup> Alluding to the fact that only about one-third of the approximately 550 federally recognized tribes have chosen to pursue gaming, the article stated that "two-thirds of Indians get nothing at all" from tribal gaming enterprises.<sup>50</sup> As further proof of Indian gaming's failures, the article cited "widespread skepticism" about the authenticity of tribes and their members; the "virulent disputes" between gaming tribes and surrounding communities; limited non-tribal government oversight of casinos, "already allegedly infiltrated in some places by underworld figures"; and decreased federal spending on programs benefiting Native Americans.<sup>51</sup>

These criticisms were expanded in the series's other articles. The second article decried the poverty of many Native Americans in the face of the "mind-boggling wealth" of a few gaming tribes: "[Twelve] years after the federal government made gambling a

<sup>46</sup> NGISC FINAL REPORT, *supra* note 2, at 6-15 (quoting Anthony R. Pico, Chairman of the Viejas Band of Kumeyaay Indians).

<sup>47</sup> *Indian Gaming: Oversight Hearing on the Indian Gaming Regulatory Act Before the S. Comm. on Indian Affairs* (July 25, 2001) (statement of Ernest Stevens, Jr.), available at 2001 WL 21757798 [hereinafter 2001 *Indian Gaming Hearing*].

<sup>48</sup> Sean Murphy, *A Big Roll at Mohegan Sun*, BOSTON GLOBE, Dec. 10, 2000, at A1, available at 2000 WL 3355062 [hereinafter Murphy, *Mohegan Sun*]; Rezendes, *Casino Windfall*, *supra* note 5; Ellen Barry, *A War of Genealogies Rages*, BOSTON GLOBE, Dec. 12, 2000, at A1, available at 2000 WL 3355302 [hereinafter Barry, *Genealogies*]; Michael Rezendes, *Tribal Casino Operations Make Easy Criminal Targets*, BOSTON GLOBE, Dec. 13, 2000, available at 2000 WL 30570536 [hereinafter Rezendes, *Tribal Casino Operations*].

<sup>49</sup> Murphy, *Mohegan Sun*, *supra* note 48.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

staple of its Indian policy, the overall portrait of America's most impoverished racial group continues to be dominated by disease, unemployment, infant mortality, and school drop-out rates that are among the highest in the nation."<sup>52</sup> Indeed, the article called tribal gaming "simply the latest in a century-and-a-half of unfulfilled promises by whites who control the federal government."<sup>53</sup>

The *Globe* series next turned its attention to the federal recognition process, describing "the Indian killer," an avocational genealogist who works to undermine tribes' applications for federal recognition.<sup>54</sup> The article contended that recognition is "the key to enormous fortunes" in gaming.<sup>55</sup> The headline of the final article in the series asserted, "Tribal casino operations make easy criminal targets."<sup>56</sup> Despite the dearth of evidence indicating criminal infiltration of tribal casinos,<sup>57</sup> the article cited "gaming analysts'" opinion that "inadequate oversight of Indian casinos and increasingly vociferous sovereignty claims could open the door to a new wave of criminal activity."<sup>58</sup>

The *Boston Globe* series came on the heels of an Associated Press (AP) analysis of federal unemployment, poverty, and public assistance records, which showed that although tribal gaming operations experienced varied success, the unemployment rates on many reservations remained far above the national average.<sup>59</sup> "[F]or many of the 130 tribes with Las Vegas-style casinos . . . gambling revenue pays for casino operations and debt service, with little left to upgrade the quality of life."<sup>60</sup> At the same time, however, the AP analysis indicated that Indian gaming had slowed growth in the number of tribal members receiving public

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<sup>52</sup> Rezendes, *Casino Windfall*, *supra* note 5.

<sup>53</sup> *Id.*

<sup>54</sup> Barry, *Genealogies*, *supra* note 48.

<sup>55</sup> *Id.*

<sup>56</sup> Rezendes, *Tribal Casino Operations*, *supra* note 48.

<sup>57</sup> Indeed, the article itself noted that "[t]o be sure, tribal gaming authorities and federal law enforcement officials insist there is no evidence of widespread infiltration of Indian gambling by organized crime." *Id.*

<sup>58</sup> *Id.* Such "vociferous sovereignty claims," according to the article, included tribal attempts to "claim the right to act as the primary overseers of their own casinos, and to hide financial information about gambling operations that is routinely disclosed by commercial gambling houses." *Id.* The year before the *Globe* series, Donald Trump had been criticized for secretly financing advertisements seeking to undermine a proposed tribal casino in the Catskills. The advertisements warned that the casino would attract crime, featuring pictures of cocaine and needles and asking, "Are these the new neighbors we want?" Neil Swidey, *Trump Plays Both Sides in Casino Bids*, BOSTON GLOBE, Dec. 13, 2000, at A1, available at 2000 WL 3355505.

<sup>59</sup> David Pace, *Casino Revenue Does Little to Improve Lives of Many Indians*, *Study Shows*, MILWAUKEE J. SENTINEL, Sept. 1, 2000, at 8A. For example, the Seminole tribe's Hollywood Gaming Center near Miami generates one hundred million dollars per year, but reservation unemployment was still forty-five percent in 1997. Associated Press, *Snake Eyes for Tribes: Indians See Little From \$8 Billion in Gambling Revenue*, ABC NEWS.COM, Aug. 31, 2000, at <http://abcnews.go.com/sections/us/DailyNews/casinos000831.html>.

<sup>60</sup> Pace, *supra* note 59.

assistance.<sup>61</sup> Yet researchers warned that change on many reservations would be relatively slow and difficult to measure, as tribal investment of gaming revenue likely eventually will increase educational levels, health, and family integrity for tribal members.<sup>62</sup>

The *Globe* series, particularly its spin on Indian gaming as failing to help all Native Americans, particularly the poorest, commanded attention from the media, public, and policymakers. The *Wall Street Journal*, reporting on the debate spurred by the *Globe* series, stated that Indian gaming, “often viewed as an economic self-sufficiency program for exploited Native Americans, is now shadowed by controversy.”<sup>63</sup> An editorial in the *Christian Science Monitor* called for increased regulation of Indian gaming, citing the hundreds of tribes seeking federal recognition and the ill effects of gambling generally.<sup>64</sup> The editorial concluded, “To allow Indian gaming to simply explode with minimum oversight would only compound the historical injustices visited on [N]ative Americans.”<sup>65</sup>

But the critical media analysis, particularly the *Boston Globe* reports, perhaps garnered the most attention in policymaking arenas. Immediately following the *Boston Globe* series, U.S. Representative Frank Wolf (R-Virginia) opined, “The whole thing looks completely and totally out of control.”<sup>66</sup> A few days later, Representative Wolf stated at a press conference that the *Globe* articles “illustrate the unforeseen inequities of the Indian Gaming Regulatory Act, which has resulted in a tainted recognition process, massive revenue windfalls for the gambling industry and a few well-connected individuals, and worst of all, continuing poverty for most Native Americans.”<sup>67</sup> A few months later, Representative Wolf, joined by Representative Robert Simmons (R-Connecticut),

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61 *Id.* (“Participation in the Agriculture Department’s Food Distribution Program on Indian Reservations increased 8.2% from 1990 to 1997 among tribes with casinos, compared with 57.3% among tribes without them.”).

62 *Id.* (quoting Jonathan Taylor, a research fellow at the Harvard University Project on American Indian Economic Development).

63 Micah Morrison, *El Dorado at Last: The Casino Boom*, WALL ST. J., July 18, 2001, at A18, available at 2001 WL-WSJ 2869838.

64 *No Tribal Casino Is an Island*, *supra* note 14.

65 *Id.*

66 Sean P. Murphy, *Congressmen Seeking Probe of Indian Casinos*, BOSTON GLOBE, Dec. 16, 2000, at A1, available at 2000 WL 3356244 (internal quotation omitted) [hereinafter Murphy, *Probe of Indian Casinos*].

67 Sean P. Murphy, *Indian Gaming Act Revision Sought*, BOSTON GLOBE, Dec. 20, 2000, at A8, available at 2000 WL 3356457 (internal quotations omitted) [hereinafter Murphy, *Revision Sought*]. Reiterating the series conclusion almost verbatim, Representative Wolf stated, “The overall picture is one of untold riches for a few smaller tribes and continued poverty for the vast majority of Indians spread across rural America.” *Id.* (internal quotation omitted). *Cf.* Rezendes, *Casino Windfall*, *supra* note 5 (“The result: Untold riches for a few, smaller tribes, annual revenues of \$100 million or more for a couple of dozen additional tribes near major urban centers, and continued poverty for the vast majority of Indians spread out across rural America.”).

called for an investigation of the Bureau of Indian Affairs (BIA) and the federal recognition process.<sup>68</sup> Representative Christopher Shays (R-Connecticut) commented on the possible impropriety of recent BIA recognition decisions and said, "Having a casino is like having a license to print money . . . . The money is so significant that it can corrupt very quickly."<sup>69</sup> In a letter addressed to President Clinton, Representatives Shays and Wolf wrote that the "influence of organized crime on Indian gambling is alarming. Tribal leaders often find themselves forced into affiliations with members of organized crime rings."<sup>70</sup>

In June 2001, Representatives Wolf, Shays, and Riley (R-Alabama), introduced a bill titled "Tribal and Local Communities Relationship Improvement Act."<sup>71</sup> At a press conference attended by a number of anti-gambling groups, Representative Wolf quoted the *Boston Globe* series, concluding that IGRA "has failed to broadly improve the living conditions of most Native Americans."<sup>72</sup> He continued:

The intent behind IGRA was that it would allow Native Americans to lift themselves out of poverty through self reliance, but the law has not worked as it was intended . . . . If we continue to rely on gambling for the future welfare of Native Americans then most will continue to live in serious poverty[, while] . . . the victims of the gambling industry will continue to mount. . . . Gambling has ruined countless lives and increasing its prevalence will only increase the number of victims . . . . The level of crime, suicide and bankruptcy in a community invariably rises when a casino opens its doors.<sup>73</sup>

The proposed legislation would expand a state's role in approving casino-style tribal gaming by requiring approval of all Tribal-State compacts by the state's governor and legislature.<sup>74</sup> At the press conference, Representative Wolf added, "This legislation

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<sup>68</sup> Sean P. Murphy, *Probe of Tribe Designation Sought*, BOSTON GLOBE, Mar. 28, 2001, at A16, available at 2001 WL 3926416.

<sup>69</sup> Sean P. Murphy, *Decisions on Status of Tribes Draw Fire Bush Administration Reviews Parting Actions by Clinton Appointee*, BOSTON GLOBE, Mar. 27, 2001, at A2, available at 2001 WL 3926281 (internal quotation omitted); see also Sean P. Murphy, *Indians Given a Parting Boost Clinton Aides Grant 3 Groups Rights to Casinos*, BOSTON GLOBE, Mar. 25, 2001, at A1, available at 2001 WL 3925789.

<sup>70</sup> Morrison, *supra* note 63.

<sup>71</sup> H.R. 2244, 107th Cong. (2001).

<sup>72</sup> Press Release, U.S. Rep. Frank R. Wolf, Wolf Measure Would Allow State Legislatures to Have Voice in Creation of Gambling Operation on Indian Reservations (June 19, 2001), available at <http://www.house.gov/wolf/2001619wolfindianleg.htm> [hereinafter Wolf Press Release].

<sup>73</sup> *Id.*

<sup>74</sup> H.R. 2244. The proposed legislation also would prohibit tribes from offering Class III gaming on more than one parcel of tribal land, and would establish the "Commission on Native American Policy" to complete a study of reservation living standards, including health, infrastructure, economic development, educational opportunities, and housing. *Id.* The Commission would consist of representatives from the National Governors Association,

goes a long way in giving local communities a voice on whether or not large scale tribal gambling should be allowed in their communities.”<sup>75</sup> Senator Chris Dodd (D-Connecticut) also called for legislative reform, saying, “This is out of hand . . . . This is all about casinos now.”<sup>76</sup>

State and federal policymakers long have been concerned about the potential negative effects of reservation-based Indian gaming on surrounding communities, the possible infiltration of organized crime into tribal casino operations, and the varied social ills commonly associated with gambling generally.<sup>77</sup> Nevertheless, three aspects of the recent criticism levied at Indian gaming, as exemplified by the *Globe* series and Representative Wolf’s actions, are of note. First, the few highly successful gaming tribes draw disproportionate public criticism, based largely on the simple fact of their economic success, coupled with the perception that the resulting wealth is somehow undeserved. Second, critics allege that Indian gaming is a policy failure, citing the fact that many Native Americans continue to live in extreme poverty while a few tribes amass extraordinary wealth. Third, despite the two diametric poles of tribes created by such assertions, these two primary criticisms take a monolithic, pan-Indian approach, reflecting a lack of recognition of the enormous tribal variation between the two poles.

By failing to adequately take into account the varying circumstances, experiences, and goals of tribes, critics are able to conclude that tribes are either too poor or too rich, and thus Indian gaming works for no tribe. Yet, as the Pequot and the Plains Models demonstrate, such simplistic assessments of tribal gaming define success too narrowly, overlooking the experiences of many, if not most, gaming tribes across the country. The Pequot Model stems from the experiences of the most intensely scrutinized and highly criticized tribe in the nation, Connecticut’s Mashantucket Pequots, and its hugely successful Foxwoods Resort Casino. The history of the Pequots fundamentally informs questions of the tribe’s “authenticity,” as well as its present-day status as gaming titan.

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the National Association of Attorneys General, the National Indian Gaming Commission, local governments, small businesses, gaming tribes, and non-gaming tribes. *Id.*

<sup>75</sup> Wolf Press Release, *supra* note 72.

<sup>76</sup> Morrison, *supra* note 63.

<sup>77</sup> For a discussion of other recent challenges to Indian gaming, see MASON, *supra* note 25, at 253-58.

## III. THE PEQUOT MODEL

## A. History

At one time, the Mashantucket Pequots were one of the most powerful presences on the present-day eastern seaboard.<sup>78</sup> In the mid-seventeenth century, however, English settlers emigrating from the Massachusetts Bay Colony ignited a war with the tribe<sup>79</sup> that nearly eradicated the Pequots.<sup>80</sup> The victors split the few surviving Pequots into small groups controlled by rival tribes.<sup>81</sup> In 1666, the Colony of Connecticut created a two thousand-acre reservation for the remaining Pequots in what is now Ledyard, Connecticut.<sup>82</sup> Due to the envy of white settlers, the General Assembly of Connecticut reduced the reservation by more than half, to 989, acres in 1761.<sup>83</sup> The tribe owned the 989-acre parcel until 1855, when the Connecticut General Assembly authorized the sale of almost eight hundred acres of the Pequots' land.<sup>84</sup>

The Pequots' land was sold at public auction on January 1, 1856, and proceeds were deposited in an account used to fund the tribe's basic needs including food, medical care, housing, and funerals, into the early 1900s.<sup>85</sup> The initial decades of the twentieth century saw the Pequots' condition worsen as these funds dwindled.<sup>86</sup> Housing on the reservation fell into disrepair and the population accordingly declined.<sup>87</sup> Following World War II, only two people of Pequot descent lived on the reservation: Elizabeth George Plouffe and her half-sister, Martha Langevin Ellal.<sup>88</sup>

Elizabeth George and her half-sister protested Connecticut's treatment of the Pequots and the state's attempts to enforce its

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<sup>78</sup> H.R. REP. NO. 98-43, at 2 (1983). For a brief and easily accessible history of the tribe, see Mashantucket Pequots, *Tribal Nation History*, [http://www.foxwoods.com/pequots/mptn\\_history.html](http://www.foxwoods.com/pequots/mptn_history.html) (last visited Mar. 9, 2002) [hereinafter *Tribal Nation History*].

<sup>79</sup> See Laurence M. Hauptman, *The Pequot War and Its Legacies*, in THE PEQUOTS IN SOUTHERN NEW ENGLAND 69, 71-73 (Laurence M. Hauptman & James D. Wherry eds., 1990). The Pequot War lasted from 1634 to 1637. *Id.* It consisted of a series of skirmishes between the settlers and the Pequots, culminating in a final battle on May 26, 1637, in which English soldiers and their Native American allies attacked a Pequot fort while many of the Pequot warriors were away. *Id.* The infamous final battle resulted in a massacre of between three hundred and seven hundred children, women, and elderly. *Id.* at 73.

<sup>80</sup> H.R. REP. NO. 98-43, at 2.

<sup>81</sup> *Id.*; Hauptman, *supra* note 79, at 76. As a result of this split, the Pequots became known as members of either the Eastern Pequots or the Western Pequots, depending upon the location of their captor tribes. H.R. REP. NO. 98-43, at 2.

<sup>82</sup> H.R. REP. NO. 98-43, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Jack Campisi, *The Emergence of the Mashantucket Pequot Tribe, 1637-1975*, in THE PEQUOTS IN SOUTHERN NEW ENGLAND 117, 132-33 (Laurence M. Hauptman & James D. Wherry eds., 1990). The Pequots' land sold for \$8,091.17. *Id.* at 132.

<sup>86</sup> *Id.* at 133.

<sup>87</sup> *Id.* In 1935, a state survey reported nine tribal members living on the Ledyard reservation, and another thirty-three tribal members living off the reservation. *Id.*

<sup>88</sup> *Id.* at 135.

laws on the reservation.<sup>89</sup> The two jealously guarded what remained of the Pequot reservation and fought for improved housing conditions.<sup>90</sup> In 1973, however, Elizabeth George died.<sup>91</sup> To preserve the tribe, several of her relatives considered returning to live on the reservation.<sup>92</sup> Concerned with the lack of adequate housing, the relatively few remaining Pequots decided to establish a more formal tribal structure to better seek outside help.<sup>93</sup> During this restructuring, Elizabeth George's grandson, Richard "Skip" Hayward, was elected president of the tribe.<sup>94</sup> Hayward promised to improve reservation housing and to achieve economic independence for the tribe.<sup>95</sup>

Hayward's grandmother often told him that the state had stolen the Pequots' land.<sup>96</sup> Encouraged by research supporting these accounts, tribal members paid careful attention to several lawsuits instituted by the Native American Rights Fund (NARF) on behalf of tribes claiming that their lands had been sold unlawfully.<sup>97</sup> In 1976, NARF filed a similar suit on behalf of the Pequots, seeking the return of Pequot lands sold by Connecticut in 1856.<sup>98</sup> NARF's legal theory for the suits was based on the Non-Intercourse Act of 1790,<sup>99</sup> which prohibited the sale of tribal lands without prior federal approval.<sup>100</sup> Because Connecticut had not obtained federal approval for the 1856 sale, NARF argued that the lands rightly belonged to the Pequots.<sup>101</sup> This novel legal theory garnered enough attention and success to allow NARF to negotiate a settlement with the State.<sup>102</sup>

The settlement included federal funds for the Pequots to purchase replacement land for that which was sold in 1856, as well as federal tribal recognition.<sup>103</sup> After reaching the settlement with the State, NARF similarly had to convince Congress to codify the proposed settlement.<sup>104</sup> In 1983, President Reagan signed into

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<sup>89</sup> *Id.* at 137-38.

<sup>90</sup> *Id.*

<sup>91</sup> Micah Morrison, *Casino Royale: The Foxwoods Story*, WALL ST. J., Aug. 21, 2001, at A18, available at 2001 WL-WSJ 2873256 [hereinafter Morrison, *Casino Royale*].

<sup>92</sup> KIM ISAAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD'S MOST PROFITABLE CASINO 58 (2001).

<sup>93</sup> Campisi, *supra* note 85, at 138.

<sup>94</sup> *Id.*; Morrison, *Casino Royale*, *supra* note 91.

<sup>95</sup> See Campisi, *supra* note 85, at 139.

<sup>96</sup> *Id.* at 140.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 132, 140; see also *Tribal Nation History*, *supra* note 78.

<sup>99</sup> Campisi, *supra* note 85, at 140 n.65; 25 U.S.C. § 177 (2001).

<sup>100</sup> 25 U.S.C. § 177; Morrison, *Casino Royale*, *supra* note 91; Campisi, *supra* note 85, at 140. The federal approval must come in the form of treaty or convention entered into pursuant to the Constitution. 25 U.S.C. § 177.

<sup>101</sup> See Campisi, *supra* note 85, at 132, 140.

<sup>102</sup> Morrison, *Casino Royale*, *supra* note 91.

<sup>103</sup> *Id.*

<sup>104</sup> EISLER, *supra* note 92, at 85-87.

law a bill that extinguished the Pequots' claims to hundreds of acres of land,<sup>105</sup> provided nine hundred thousand dollars to the Pequots to entice landowners to sell their property to the tribe for more than its actual value,<sup>106</sup> and gave federal recognition<sup>107</sup> to the Pequots.<sup>108</sup>

## B. Gaming at Foxwoods

### 1. If You Build It, They Will Come

With the return of a significant portion of their original reservation,<sup>109</sup> the Pequots turned to other issues, particularly economic development. By the mid-1980s, the tribe had secured loans to establish a successful bingo hall that generated annual gross revenues of twenty million dollars, while attracting one thousand visitors per day.<sup>110</sup> After Congress passed IGRA, the Pequots sought to expand their gambling enterprises to include casino-style gaming, despite opposition from state and local governments. In 1990, the tribe successfully argued in federal court that because Connecticut allowed limited casino-style gambling for charitable purposes, such gambling did not violate state public policy, and thus, the tribe could open a casino on their reservation.<sup>111</sup> Although the court decision paved the way for a Tribal-State compact under IGRA, the types of Class III gaming the tribe could offer remained controversial because the state's laws allowing charitable gambling did not permit slot machines.<sup>112</sup> Aware that slot machines typically generate about two-thirds of a casino's revenue, the tribe aggressively pursued state authorization,<sup>113</sup> negotiating a deal with the State for the exclusive right to operate slot machines in exchange for a twenty-five percent state cut of the slot revenues.<sup>114</sup>

Local lenders declined to finance the Pequots' new, Las Vegas-style casino.<sup>115</sup> In 1991, the tribe, under Hayward's leadership, found a willing financier in a Malaysian construction mag-

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<sup>105</sup> 25 U.S.C. § 1753.

<sup>106</sup> *Id.* § 1754.

<sup>107</sup> *Id.* § 1758; see also H.R. REP. NO. 98-43, at 11 (1983) (noting that extension of federal recognition to a tribe through a statute was unusual, but desirable when settling claims such as the Pequots').

<sup>108</sup> 25 U.S.C. §§ 1751-60; see also EISLER, *supra* note 92, at 87.

<sup>109</sup> See Michael Taylor, *Keeping Tabs on Gaming: World's Largest Casino Mob-Free*, SAN FRANCISCO CHRON., May 30, 2000, at A1, available at 2000 WL 6483374. By 2000, the Pequots had managed to buy about two thousand acres in the area. *Id.*

<sup>110</sup> EISLER, *supra* note 92, at 108-10.

<sup>111</sup> *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990).

<sup>112</sup> EISLER, *supra* note 92, at 130, 178-80.

<sup>113</sup> *Id.* at 179-80.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 148.



nate turned casino operator, Lim Goh Tong.<sup>116</sup> Lim recognized the potential economic success of the Pequots' venture and readily financed a \$58 million construction loan and a \$175 million line of credit to the tribe.<sup>117</sup> In addition to interest on the two loans, Lim would receive approximately ten percent of the casino's adjusted gross income until 2016.<sup>118</sup>

The Pequots' Foxwoods Resort Casino opened its doors in 1992, and enjoyed immediate success. Located only 110 miles from Boston and 130 miles from New York, Foxwoods attracts over forty thousand visitors each day.<sup>119</sup> Foxwoods is one of the largest casinos in the world, boasting more than 5800 slot machines, a 3200-seat high stakes bingo hall, and over 300 gaming tables, including blackjack, roulette, craps, baccarat, keno, and poker.<sup>120</sup> The casino's estimated gross revenue was \$1.3 billion dollars in 1999, and the tribe paid Connecticut close to \$175 million under the terms of its Tribal-State compact.<sup>121</sup>

Using casino revenue, the tribe offers a vast array of services to its approximately three hundred members, as well as per capita payments. Each tribal member receives a payment of at least fifty thousand dollars per year, and some members are provided with free homes, medical care, and day care.<sup>122</sup> Tribal members also receive retirement payments and educational scholarships.<sup>123</sup>

Off the reservation, Foxwoods has revitalized Connecticut's economy, which had suffered severely following defense cut-backs.<sup>124</sup> Most casino patrons travel to Foxwoods from other states, spurring a boom in construction of nearby hotels and res-

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<sup>116</sup> *Id.* at 149-55.

<sup>117</sup> See Morrison, *Casino Royale*, *supra* note 91.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; FRED CARSTENSEN ET AL., CONN. CTR. FOR ECON. ANALYSIS, *THE ECONOMIC IMPACT OF THE MASHANTUCKET PEQUOT TRIBAL NATION OPERATIONS ON CONNECTICUT 1* (2000). In 2000, the combined revenue of Foxwoods and the Mohegan Sun, Connecticut's second tribal casino, was about \$1.9 billion. See, e.g., Rick Green, *With Dollars Comes Change*, HARTFORD COURANT, Sept. 23, 2001, at B1, available at 2001 WL 25323147. In September 2001, both casinos reported increased slot revenue over that of the previous year. *Terrorists Fail to Inhibit Gamblers*, PROVIDENCE J., Oct. 16, 2001, at A4, available at 2001 WL 22633250.

<sup>122</sup> Jules Wagman, *Indian Tribe Strikes Gold in Casino World*, MILWAUKEE J. SENTINEL, Feb. 25, 2001, at 6E, available at 2001 WL 9341261.

<sup>123</sup> See EISLER, *supra* note 92, at 199. On the Foxwoods web site, a young tribal member is quoted as saying, "[The tribal elders] said, 'Just pursue your education, and you'll have a career already set up for you.' I'm going straight through college to get every kind of degree I can. And I want to be a lawyer." Mashantucket Pequots, *Tribal Members Reflect on the Dream*, at [http://www.foxwoods.com/pequots/mptn\\_history\\_dream.html](http://www.foxwoods.com/pequots/mptn_history_dream.html) (last visited Jan. 5, 2002) (alteration in original).

<sup>124</sup> See CARSTENSEN ET AL., *supra* note 121, at i ("With its diverse business enterprises and reinvestments of capital in Connecticut, the Mashantucket Pequot Tribal Nation has become an economic growth marvel for the State and the immediate region.").

taurants.<sup>125</sup> Visitors also flock to the tribe's Mashantucket Pequot Museum and Indian Research Center, which attracts more than 250,000 people each year.<sup>126</sup> The Pequots' success has resulted in over forty thousand new jobs in Connecticut and an impact on the state's economy measured in billions of dollars.<sup>127</sup>

## 2. The Pequots Scrutinized

Along with casino patrons, the Pequots' nearly unrivaled success also has attracted criticism. Formerly sleepy New England communities surrounding the reservation have fought hard against the expansion of gaming, complaining of increased traffic, pollution, crime, and bankruptcies.<sup>128</sup> The State of Connecticut, along with three towns near the Pequots' reservation, filed suit in federal court to block the tribe from acquiring more land in trust<sup>129</sup> and, having failed that, sought congressional intervention.<sup>130</sup> Perhaps predictably, much of the criticism attacked the Pequots

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<sup>125</sup> *Id.* at 2. Nearly three-quarters of Foxwoods's patrons come from outside of Connecticut. *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 4. State revenue, received in the form of direct payments from the Pequots' and the Mohegans' casinos, has made money raised from legalized gambling the third-largest source of revenue in Connecticut's budget. Lyn Bixby, *Gambling Now State's 3rd-Best Bet*, HARTFORD COURANT, Mar. 11, 2001, at A1, available at 2001 WL 4554705.

<sup>128</sup> Similar disputes are escalating in California following voter approval of Proposition 1A in March 2000, legalizing the forty or so tribal casinos that were operating at the time. See Roger Dunstan, *The Evolution and Impact of Indian Gaming in California*, GAMING L. REV. vol. 5 No. 4, at 373 (2001). Currently, sixty-two tribes have entered into compacts with the State. Commentators have called tribal gaming in California potentially "the biggest, richest gambling industry in the world." James P. Sweeney, *High Stakes Showdown*, SAN DIEGO UNION-TRIB., July 22, 2001, at A1, available at 2001 WL 6478770. California is home to over one hundred federally recognized tribes, and another fifty tribes have applied for recognition. James P. Sweeney, *Casino Cross Fire*, SAN DIEGO UNION-TRIB., Sept. 9, 2001, at G1, available at 2001 WL 27288042. Residents in non-Indian communities near rapidly expanding casinos have expressed concern about increased traffic and pollution, and decreased water supplies. On the Barona Indian Reservation, east of San Diego, the tribe has planned a \$225 million expansion of its casino operation, including an 18-hole golf course, a 390-room hotel, and a 300,000 square foot casino. The tribe's neighbors have complained about dry wells, plans to widen the road to accommodate more traffic, and the tribe's noncompliance with state and local environmental regulations. *Id.*; Fred Dickey, *Reversal of Fortunes*, L.A. TIMES, Sept. 23, 2001, at E1, available at 2001 WL 2520109. One reporter called the dispute "a classic settler-Indian battle with a role reversal that spins history into dizziness." *Id.* Public attention paid to one California tribe, the Augustine Band of Cahuilla Mission Indians, may soon rival that of the Pequots. The Augustine Band, which has a single adult member, recently signed a casino development deal with a Las Vegas company. Mark Henry, *Tribe Plans to Open Casino*, PRESS-ENTERPRISE (Riverside, CA), Sept. 2, 2001, at B1, available at 2001 WL 27535668.

<sup>129</sup> Although the plaintiffs were successful in district court, they lost on appeal. *Connecticut v. United States Dep't of Interior*, 228 F.3d 82, 94 (2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001). The plaintiffs argued that if the land were placed in trust, and thus, out of the reach of state and local taxation, they would lose tens of the thousands of dollars in tax revenues. *Id.* at 85.

<sup>130</sup> Joel Lang, *Reading Jeff Benedict: Should You Believe His Revelations About the Pequots and the Making of the World's Largest Casino?*, HARTFORD COURANT, Dec. 3, 2000, at 5, available at 2000 WL 30577605.

themselves: the tribe was *too* successful, and many of its members did not fit popular conceptions of Native Americans. Donald Trump expressed the judgment of many when he stated that the Pequots “don’t look like Indians to me and they don’t look like Indians to Indians.”<sup>131</sup>

As the first decade of the Foxwoods’s operation neared a close, two book-length exposés of the tribe and its casino purported to use investigative journalism to debunk the Pequots’ status as a tribe. In *Without Reservation*,<sup>132</sup> then-law student, Jeff Benedict, attacked the tribe, reaching the conclusion that tribal members were not Pequots at all; instead, he asserted, many of them were descendants of other tribes or African Americans.<sup>133</sup> Indeed, Benedict said that while writing the book, “I didn’t believe I was writing about Indians. I was writing about imposters.”<sup>134</sup> The Pequots, as Benedict tells it, were able to hoodwink lawyers and politicians to falsely obtain tribal recognition for the sole purpose of exploiting laws allowing Indian gaming.<sup>135</sup> In *Without Reservation*’s epilogue, Benedict called for Congress to reinvestigate the tribe’s authenticity based on the information presented in the book.<sup>136</sup> Some reviewers criticized Benedict’s journalism, but it nevertheless “won instant credibility.”<sup>137</sup> Benedict’s book made him a hero in non-Indian communities in Connecticut, reported the *Boston Globe*.<sup>138</sup> *Without Reservation* was included on a Ledyard High School reading list,<sup>139</sup> and some area residents said Benedict should run for President.<sup>140</sup>

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131 Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 521 (1994) (quoting *Federal Officials Refute Trump Allegations*, PR NEWSWIRE, Oct. 5, 1993); see also EISLER, *supra* note 92, at 207.

132 JEFF BENEDICT, *WITHOUT RESERVATION: THE MAKING OF AMERICA’S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD’S LARGEST CASINO* (2000). Benedict’s book reportedly has been optioned for a Hollywood film. Lang, *supra* note 130.

133 BENEDICT, *supra* note 132, at 144-50. Benedict’s book opens with the story of future Pequot tribal chair Skip Hayward filing for a marriage license in 1969 and choosing to identify himself as “white” rather than “Indian.” *Id.* at 1-4.

134 Lang, *supra* note 130.

135 BENEDICT, *supra* note 132, at 109-17.

136 *Id.* at 353; see also Jeff Benedict, *This Land Is Not Your Land*, HARTFORD COURANT, Dec. 10, 2000, at 4, available at 2000 WL 30579027.

137 Lang, *supra* note 130. For example, Lang noted Benedict’s conceit of recreating past events in unlikely detail.

Most incredibly, he claimed in the book’s bibliography to have done some 650 interviews and obtained 50,000 pages of documents from town halls, libraries, archives and courts. He had begun his research in June 1998 and finished writing his 358-page book 21 months later. He had done all this work while enrolled in the New England School of Law . . . .

*Id.*

138 Ellen Barry, *Lineage Questions Linger as Gaming Wealth Grows*, BOSTON GLOBE, Dec. 12, 2000, at A19, available at 2000 WL 3355289 [hereinafter Barry, *Lineage*].

139 Barry, *Geneologies*, *supra* note 48.

140 Barry, *Lineage*, *supra* note 138.

Kim Isaac Eisler's *Revenge of the Pequots*<sup>141</sup> expressed similar doubts about the Pequots' legitimacy, although couched in perhaps slightly milder rhetoric.<sup>142</sup> Eisler's story similarly focused on the Pequots' success using federal law and procedure to their financial advantage; yet as the book's title indicates, Eisler suggested that turnabout may be fair play for a group nearly wiped out by colonization.<sup>143</sup> Nevertheless, in explaining his motivation for writing the book, Eisler stated that he had heard "that the whole thing was a giant scam and that Chief 'Skip' Hayward and his band were nothing but imposters."<sup>144</sup> Eisler concluded that the Pequots had unfairly used laws meant to benefit "real" tribes, "creat[ing] a new modern-day paradigm that changed the face of the country—not Native American, but Casino-American."<sup>145</sup> In an article accompanying the release of *Revenge of the Pequots*, Eisler implied that the answer to the problem of the Pequots may be a return to forced assimilation.<sup>146</sup>

The comments of local residents, fueled by Benedict's and Eisler's books, and the national media attention they generated,<sup>147</sup>

141 EISLER, *supra* note 92.

142 As one reviewer put it, Eisler's book "lacks some of the gratuitous detail (and the sensationalism) of [Benedict's book] . . . Mr. Eisler retains a healthy skepticism about the Mashantucket quest for tribal recognition, while sympathizing with the desire of a group of perennial have-nots to strike it rich when the law gave them an opening." Philip Burnham, *The Enterprising Pequots and How Their Casinos Enraged*, *Grew*, WASH. TIMES, Feb. 11, 2001, at B8 (book review), available at 2001 WL 4146689. The *Washington Post* called Eisler "a thorough reporter." Jonathan Yardley, *A Game of Three-Card Monte?*, WASH. POST, Feb. 8, 2001, at C2 (book review), available at 2001 WL 2542126. Additionally, the *Boston Globe* proclaimed Eisler's book "free of such dirt . . . Unlike the case with Benedict's work, one need not ponder the sources or veracity of material contained in Eisler's work." Sean P. Murphy, *Well-Told Tale of a Battle Against the Odds*, BOSTON GLOBE, Mar. 12, 2001, at B8 (book review), available at 2001 WL 3923559.

143 Kim Isaac Eisler, *Why I Wrote a Book About a Tribe that Hit the Jackpot*, HARTFORD COURANT, Feb. 25, 2001, at C1, available at 2001 WL 4552543. Eisler refers to the Pequots as a "tribe"—in quotation marks—explaining that "whether or not you accept their genealogy, the 'tribe' had been lost." *Id.*

144 *Id.* To Eisler himself, it seemed "slightly unlikely" that there were Native Americans in Connecticut at the turn of the twenty-first century. *Id.*

145 EISLER, *supra* note 92, at 242.

146 Eisler, *supra* note 143. Eisler explained:

Gale Norton, the new secretary of the interior, is a protégé and disciple of James Watt. It was Watt who successfully urged President Reagan to veto the Pequot recognition bill in 1983. Watt not only believed that no new federal reservations should be created, he would have been delighted to close down the existing ones and to integrate American Indians into mainstream American society. I suspect Norton shares that view.

*Id.*

147 A *Wall Street Journal* review of Eisler's *Revenge of the Pequots* concluded, "Bet by bet, the Indians are scalping customers for millions." Allan T. Demaree, *Betting on a Casino, and Winning Big*, WALL ST. J., Feb. 8, 2001, at A20 (book review), available at 2001 WL-WSJ 2853644. An editorial in the *Providence Journal* asserted that the Mashantucket Pequot Tribe "is essentially a creation of the casino, rather than the other way around, insofar as the tribe had only a few active members until it hit the political lottery with its casino privilege." Powell, *supra* note 11; see also Bill Bell, *Against All Odds: How Conn.'s Pequot Tribe Hit the Jackpot*, N.Y. DAILY NEWS, Feb. 11, 2001, at 20 (book review), availa-

revealed the economic underpinnings of the “authenticity” question.<sup>148</sup> One resident referred to the Pequots as “a shake-and-bake and fabricated tribe,”<sup>149</sup> while another explained that “it’s hard for people like us, who are working our butts off . . . . They never had a pot to pee in, and all of a sudden they’re driving in \$40,000 cars.”<sup>150</sup> An attorney for Upstate Citizens for Equality, a grassroots organization of non-Indian homeowners in New York, called the Pequots “an emblem of what’s wrong with the whole operation . . . . In the 1980s, if someone said ‘Indian,’ people would think of a picture of a guy with a tear running down his face, caring for the environment. If you say Indians now they think of casinos.”<sup>151</sup> Benedict himself recalled his impression upon first visiting the Pequot reservation in 1998: “I saw \$40,000 vehicles, but I didn’t see an Indian tribe.”<sup>152</sup> Eisler, too, noted that “the amount of money being tossed around on the reservation is obscene,” concluding that “[i]f the Pequots and Foxwoods have been victimized by negative public attitudes, it is in part their own gaudy success that is the culprit.”<sup>153</sup>

If one end of the spectrum is defined by the perceived intersections of tribal authenticity and newfound wealth in the Pequot Model of tribal gaming, then the Plains Model lies at the other end of the spectrum on both counts; tribal authenticity is not likely open to serious challenge, while relative wealth is a virtual non-issue in the rural confines of North Dakota. As is the case with the genesis of the Pequot Model, the histories of North Dakota’s tribes provide the foundation for the Plains Model of tribal gaming.

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*ble* at 2001 WL 4676962 (calling Eisler’s book “a terrific story, with dramatic twists, political intrigues, hints of major mischief, shadowy manipulators, an unlikely rescuer and barrels and barrels of tax-free cash”); Bob Dowling, *The Making of a Casino Nation*, BUS. WK., Mar. 12, 2001, at 22E4 (book review), *available at* 2001 WL 2205813; Wagman, *supra* note 122 (“[T]he impoverished, nearly extinct Pequots became a tribe that can stand up, dollar for dollar, to any Arab oil shiekhdom.”); Jonathan Yardley, *Success Story or a Scam?*, CHI. SUN-TIMES, Feb. 18, 2001, at 15 (book review), *available at* 2001 WL 7218816.

<sup>148</sup> In their briefs accompanying a federal lawsuit, the State of Connecticut and the towns of Ledyard, North Stonington, and Preston similarly juxtaposed the Pequots’ wealth with their “Indianness” in arguing that the tribe should be barred from acquiring further trust lands. *See generally* Connecticut v. United States Dep’t of Interior, 228 F.3d 82 (2d Cir. 2000). As the Second Circuit explained, “The Connecticut plaintiffs contend that the Indian canon of construction has no application in this case—not to *these* Indians—because of the Mashantucket Pequots’ tremendous wealth.” *Id.* at 92. The court went on to reject the argument, reasoning that tribal disadvantage was not a prerequisite to application of familiar doctrines of federal Indian law and, even if it were, the Pequots were sufficiently disadvantaged at the time the statute in question was enacted. *Id.* at 92-93.

<sup>149</sup> Barry, *Lineage*, *supra* note 138.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Lang, *supra* note 130. Indeed, Benedict characterized the tribe as a “Goliath,” with the nearby towns and Connecticut being “David.” *Id.* “They all were inferior in terms of power and ability to the Mashantucket tribe . . . .” *Id.*

<sup>153</sup> Eisler, *supra* note 143.

IV. THE PLAINS MODEL<sup>154</sup>

## A. History

Upon arriving in the Great Plains of middle America, European explorers dubbed the area “the Great American Desert,” believing that the Plains could not sustain human life.<sup>155</sup> They were wrong, of course. Archaeological evidence indicates that humans inhabited the Great Plains as early as twelve thousand years ago.<sup>156</sup> Several different Native American tribes have resided in what is now North Dakota, including the Assiniboin, Chippewa, Mandan, Hidatsa, Arikara, Cheyenne, Yanktonai, Cree, Dakota, and Lakota.<sup>157</sup>

Today, North Dakota’s five reservations encompass nearly five million acres<sup>158</sup> and are home to approximately thirty thousand tribal members of the Standing Rock Sioux, the Spirit Lake Nation Sioux, the Sisseton-Wahpeton Sioux, the Three Affiliated Tribes, and the Turtle Mountain Band of Chippewa. Each of the state’s five tribes operates a casino on reservation lands in North Dakota.

## 1. The Great Sioux Nation

The Sioux, who called themselves Dakota,<sup>159</sup> were a confederation of seven tribes: the Mdewakanton, Wahpeton, Wapekute, Sisseton, Yankton, Yanktonai, and the Teton (also known as Lakota).<sup>160</sup> As early colonists achieved military dominance over tribes in the East, including the Pequots, the Great Sioux Nation strengthened its own intertribal government and developed an

<sup>154</sup> The development and discussion of the “Plains Model” is based on the model introduced by Rand and Light. Rand & Light, *Raising the Stakes*, *supra* note 36, at 336-39.

<sup>155</sup> MARY JANE SCHNEIDER, NORTH DAKOTA INDIANS: AN INTRODUCTION 55 (1994).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 69.

<sup>158</sup> Although North Dakota has five reservations within the state’s borders, technically there are only four North Dakota tribes: the Spirit Lake Nation Sioux, Standing Rock Sioux, Three Affiliated Tribes, and Turtle Mountain Band of Chippewa. The fifth reservation, that of the Sisseton-Wahpeton Sioux, straddles the North Dakota-South Dakota border, but the tribe is considered a South Dakota tribe because its tribal government offices are located in that state. *Id.* at 137. I include the Sisseton-Wahpeton Sioux Tribe because it operates a casino in North Dakota.

<sup>159</sup> Although tribes occupying three of North Dakota’s five reservations are commonly referred to as Sioux, this is something of a misnomer. The “Seven Council Fires” tribes—the Dakota, Lakota, and Yankton-Yanktonai (sometimes referred to as Nakota)—made up the Great Dakota Nation. *Id.* at 78-79. The tribes called themselves “kota” or allies. *Id.*; Clair Jacobson, *A History of the Yanktonai and Hunkpatina Sioux*, 47 N.D. HISTORY, Winter 1980, at 4 n.5. “Sioux” is a French derivation of a Chippewa word used to refer to the Dakota, “Natowesiwok,” which means “enemies” or “snakes.” *Id.* The French, who encountered the Chippewa before the Dakota, heard the word as “Nadouessioux,” which they shortened to “Sioux.” *Id.*

<sup>160</sup> CONRAD W. LEIFUR, OUR STATE NORTH DAKOTA 139-40 (1953); ENCYCLOPEDIA OF NORTH DAKOTA INDIANS: TRIBES, NATIONS, TREATIES OF THE PLAINS AND WEST 96 (2001) [hereinafter ENCYCLOPEDIA].

economy based largely on buffalo hunting.<sup>161</sup> Western explorers encountered Sioux in the Devil's Lake region of north central North Dakota around 1738.<sup>162</sup>

By the early 1800s, the Sioux dominated a large part of the Midwest, including what is now North and South Dakota.<sup>163</sup> The latter half of the nineteenth century brought the invasion of white settlers into Sioux lands and marked a turning point for the Great Sioux Nation. In 1868, the Sioux, under the leadership of Red Cloud, entered into a treaty with the United States, in which the federal government promised that settlers would enter Sioux territory only with tribal consent in exchange for the Nation's promise to cease raiding American forts.<sup>164</sup> Under the terms of the treaty, the Sioux retained a large portion of land, equivalent to the size of present-day South Dakota, just west of the Missouri River.<sup>165</sup> In the 1870s, however, gold was discovered in the Black Hills, prompting the federal government to breach the terms of the treaty, and leading to an all-out war between the Sioux Nation and the United States.<sup>166</sup> Although the Sioux won the infamous Battle of Little Big Horn against Colonel George Custer, the federal government succeeded in exhausting the tribes' resources.<sup>167</sup> In 1876, the Sioux surrendered the Black Hills and forcibly were relocated onto reservations established by the federal government.<sup>168</sup>

Currently, the Spirit Lake Sioux Nation, formerly known as the Devils Lake Sioux, is located on a reservation in northeastern North Dakota, between Devils Lake to the north, and the Cheyenne River to the south. Just fifteen miles south of the City of Devils Lake, the Spirit Lake reservation is nearer to an urban area than any other reservation in North Dakota.<sup>169</sup> The reservation is approximately 405 square miles, and home to many of the tribe's over five thousand enrolled members.<sup>170</sup> Located in the south-central part of the state, the Standing Rock reservation

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<sup>161</sup> See EDWARD H. SPICER, *A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES* 82-84 (1969).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 84.

<sup>164</sup> *Id.* at 85.

<sup>165</sup> ELWYN B. ROBINSON, *HISTORY OF NORTH DAKOTA* 104 (1966).

<sup>166</sup> SPICER, *supra* note 161, at 85.

<sup>167</sup> ROBINSON, *supra* note 165, at 178.

<sup>168</sup> *Id.*

<sup>169</sup> SCHNEIDER, *supra* note 155, at 139. For a brief description of the tribe's reservation, see Mni Sose Intertribal Water Rights Coalition, Inc., *Spirit Lake Tribe Community Environmental Profile*, at <http://www.mnisose.org/profiles/splake.htm> (last visited Jan. 7, 2002).

<sup>170</sup> Spirit Lake Nation, at <http://www.spiritlakenation.com/about.htm> (last updated Aug. 27, 2001). The tribe owns 26,283 acres; allotted trust lands comprise 34,026 acres; fee land comprises 184,451 acres; and 375 acres are owned by either the state or federal government. *Id.*

straddles the North Dakota-South Dakota border. The reservation is about forty miles south of Bismarck, the nearest urban area and North Dakota's state capital.<sup>171</sup> The Standing Rock Sioux Tribe has an enrolled membership of over ten thousand,<sup>172</sup> and its reservation covers a total area of 2.3 million acres, approximately half of which is owned by the tribe.<sup>173</sup> The Sisseton-Wahpeton Sioux Tribe is located on the Lake Traverse reservation in southeastern North Dakota. The reservation spans five counties in South Dakota and two counties in North Dakota, covering 250,000 acres, with about one-tenth of the acreage tribally owned.<sup>174</sup> The tribe has over ten thousand enrolled tribal members.<sup>175</sup>

## 2. Three Affiliated Tribes

The Three Affiliated Tribes are the Mandan, Hidatsa, and Arikara Tribes. When encountered by European explorers in 1738,<sup>176</sup> the Mandan had a population of about fifteen thousand living in "six large, well-fortified villages along the Missouri River."<sup>177</sup> According to anthropologists, the Mandan may have come to what is now North Dakota as early as the fourteenth century when they moved west from the Mississippi Valley, and then up along the Missouri.<sup>178</sup> The Hidatsa became close allies with the Mandan in the seventeenth century when they moved from the Red River Valley to the Missouri River, near the Mandan villages.<sup>179</sup> The Sioux pushed the Arikara northward to the Dakotas during the 1700s,<sup>180</sup> and the tribe eventually settled in a village abandoned by the Mandan after a smallpox epidemic in the 1830s.<sup>181</sup> In 1850, the Arikara joined the Mandan and Hidatsa at Fort Berthold.<sup>182</sup> The Three Affiliated Tribes' reservation originally was established by the 1851 Treaty of Fort Laramie, which granted the tribes over twelve million acres; it was reduced by

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171 SCHNEIDER, *supra* note 155, at 147. For a brief description of the tribe, its history, and its reservation, see Mni Sose Intertribal Water Rights Coalition, Inc., *Standing Rock Sioux Tribe Community Environmental Profile*, at <http://www.mnisose.org/profiles/strock.htm> (last visited Jan. 7, 2002) [hereinafter, *Sioux Tribe Environmental Profile*].

172 *Sioux Tribe Environmental Profile*, *supra* note 171.

173 *Id.*

174 Mni Sose Intertribal Water Rights Coalition, Inc., *Sisseton-Wahpeton Sioux Tribe Community Environmental Profile*, at <http://www.mnisose.org/profiles/sisseton.htm> (last visited Jan. 7, 2002).

175 *Id.*

176 Pierre Verendrye (1665-1749), a French-Canadian fur trader, arrived in North Dakota in 1738, and was the first known white man to visit the area. LEIFUR, *supra* note 160, at 147.

177 *Id.* at 111; ENCYCLOPEDIA, *supra* note 160, at 6.

178 ROBINSON, *supra* note 165, at 20.

179 *Id.* at 23.

180 LEIFUR, *supra* note 160, at 133.

181 *Id.*

182 *Id.*



1870 and 1880 executive orders to less than three million acres, and then again through allotment.<sup>183</sup>

Currently, the Three Affiliated Tribes are located on the Fort Berthold reservation, along the Missouri River in west-central North Dakota. The creation of Lake Sakakawea by the damming of the Missouri River permanently flooded over 150,000 acres on the reservation.<sup>184</sup> Along with the inundated land, the tribes lost natural resources, long-established population centers, and farms and ranches located along the fertile Missouri River bottomlands.<sup>185</sup> Presently, the reservation consists of 981,215 acres,<sup>186</sup> and is located about seventy-five miles from Minot. The tribal government is headquartered in New Town, North Dakota, and the tribes' combined membership is about 8400.<sup>187</sup>

### 3. Turtle Mountain Band of Chippewa

The Chippewa Tribe, also called the Ojibway, was one of the largest tribes north of Mexico in the seventeenth century.<sup>188</sup> Originally from the area that is now Wisconsin, the Chippewa were forced westward to Minnesota by white settlement.<sup>189</sup> French Jesuits visited the Chippewa in 1642, when they resided on the shores of both Lake Huron and Lake Superior.<sup>190</sup> At the beginning of the eighteenth century, some Chippewa moved further west into what is now North Dakota, establishing hunting grounds along the Red River and just west of the Turtle Mountains.<sup>191</sup> The Chippewa fought against the United States in the Plains Indian Wars until the conflict was resolved through a treaty with the federal government in 1815.<sup>192</sup> The treaty set aside reservations for the Chippewa in Michigan, Wisconsin, Minnesota, and North Dakota.<sup>193</sup> The 1861 federal law establishing the Dakota Territory also set aside ten million acres for Chippewa tribes as well as the Metis in northeastern North Dakota. Although other Chippewa tribes negotiated smaller reservations with the federal govern-

<sup>183</sup> SCHNEIDER, *supra* note 155, at 142.

<sup>184</sup> MHA Nation, *Garrison Dam*, at [http://www.mhanation.com/history/garrison\\_dam.shtml](http://www.mhanation.com/history/garrison_dam.shtml) (last visited Mar. 19, 2002) [hereinafter *Garrison Dam*]. For a recent discussion of the legal issues raised by the building of the Garrison Dam, see Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 962-80 (2000).

<sup>185</sup> SCHNEIDER, *supra* note 155, at 143; see also *Garrison Dam*, *supra* note 184.

<sup>186</sup> SCHNEIDER, *supra* note 155, at 142-43.

<sup>187</sup> *Id.* For a brief description of the tribe, its history, and its reservation, see Mni Sose Intertribal Water Rights Coalition, Inc., *Three Affiliated Tribes of Fort Berthold Community Environmental Profile*, at <http://www.mnisose.org/profiles/3affl.htm> (last visited Jan. 7, 2002).

<sup>188</sup> ROBINSON, *supra* note 165, at 26.

<sup>189</sup> LEIFUR, *supra* note 160, at 140.

<sup>190</sup> ROBINSON, *supra* note 165, at 26.

<sup>191</sup> ENCYCLOPEDIA, *supra* note 160, at 143.

<sup>192</sup> *Id.* at 144.

<sup>193</sup> *Id.*

ment once the Dakota Territory was opened to white settlement, the Turtle Mountain Band held fast. In 1892, the tribe negotiated an agreement with the federal government in which the tribe received payment for the land taken under the 1861 law.<sup>194</sup>

The Turtle Mountain reservation is located just south of the Canadian border in north-central North Dakota, about 150 miles from Grand Forks. The present reservation consists of about thirty-four thousand acres, most of it individually owned; the tribe has also acquired another thirty-five thousand acres off the reservation.<sup>195</sup> The Turtle Mountain Band is the state's largest tribe, with some twenty-eight thousand members.<sup>196</sup> About seventeen thousand members live on or near the reservation.<sup>197</sup> Belcourt, North Dakota, is home to the tribal government and, with a population of about two thousand, is the state's largest Native American community.<sup>198</sup>

#### 4. Commonalities

The histories of North Dakota's tribes reveal several commonalities that define and shape their contemporary experiences, including those concerning tribal gaming. First, the federal government recognized each of North Dakota's tribes as a sovereign nation during the settlement era of the nineteenth century. Tribes like those in North Dakota are commonly called "treaty tribes," referencing the government-to-government relations of the tribes and United States during this time. This strong tradition of tribal sovereignty continues to shape the tribes' priorities and interactions with state and federal government.<sup>199</sup>

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<sup>194</sup> SCHNEIDER, *supra* note 155, at 151-52. This notorious agreement is sometimes called the "Ten Cent Treaty" because the federal government's payment to the tribe was the equivalent of ten cents per acre of illegally taken land. Federal Emergency Management Agency, *Turtle Mountain Band of Chippewa Indians*, at <http://www.fema.gov/reg-viii/tribal/turtlebg.htm> (last visited Mar. 13, 2002) [hereinafter *Turtle Mountain Band*]. In the 1980s, the federal government formally acknowledged the unfairness of the agreement. *Id.*

<sup>195</sup> See *Turtle Mountain Band*, *supra* note 194.

<sup>196</sup> *Id.*

<sup>197</sup> Robert Lattergrass, Guest Lecture in Indian Gaming Law at the University of North Dakota School of Law (Mar. 20, 2001) (speaker's notes on file with Chapman Law Review).

<sup>198</sup> SCHNEIDER, *supra* note 155, at 154. For a brief description of the tribe's reservation, see Mni Sose Intertribal Water Rights Coalition, Inc., *Turtle Mountain Band of Chippewa Indians Community Environmental Profile*, at <http://www.mnisose.org/profiles/turtlemt.htm> (last visited Jan. 7, 2002).

<sup>199</sup> For example, the Spirit Lake Nation has claimed ownership of a lake and surrounding property in northeastern North Dakota based on an 1867 treaty with the federal government. Jack Sullivan, *Court May Revive Ownership Lawsuit*, GRAND FORKS HERALD, Mar. 25, 2001. The Standing Rock Sioux tribe was party to a nearly half-billion-dollar judgment against the federal government over the ownership of the Black Hills. See, e.g., K. Marie Porterfield, *Fort Peck Sioux Vote to Accept Black Hills Money*, INDIAN COUNTRY TODAY, Dec. 8, 1997, at A1, available at 1997 WL 18363426. Additionally, some North Dakota tribes have refused to comply with federal laws that they believe illegally compromise tribal sovereignty. See *Turtle Mountain Band*, *supra* note 194.

Second, the tribes in North Dakota are land-based, their reservations originally established by treaty. Economic opportunities available to the tribes are governed in large part by the resources, natural or otherwise, located on reservation land. As the histories of North Dakota's tribes indicate, reservations typically were located in areas perceived to be devoid of resources useful to white settlers. Unsurprisingly, then, there has been little or no access to commercial enterprises on the state's reservations, and few opportunities to market goods or services produced on-reservation to non-Native populations.

Third, as is typical of tribal reservations in the Great Plains, North Dakota's reservations consist of mostly small communities removed from urban areas. In the recent past, tribal communities have lacked commercial development much beyond a local grocery store, and some homes have gone without even basic services, such as electricity, running water, or telephone service.<sup>200</sup> Still, each of the state's tribes has a membership numbering in the thousands, many of whom grew up on and continue to reside on the reservation. Yet the scarcity of opportunities in North Dakota's tribal communities have led many tribal members to seek education or employment off the reservation.

As a result of the economic constraints faced by the state's tribes, North Dakota's reservations historically have been among the poorest localities in the nation. In the early 1990s, unemployment rates on the state's reservations were staggering, reaching over eighty percent in some areas,<sup>201</sup> even as the rest of the state experienced low unemployment rates, mirroring the generally robust national economy.<sup>202</sup> As one tribal member said, "[It's h]ard to see these statistics; [it's] harder to live them."<sup>203</sup> Typically, tribal members living on the reservation are "[p]eople who grew up in poverty and just don't have anything at all."<sup>204</sup>

## B. Gaming on the Great Plains

In the early 1990s, tribes in North Dakota turned to casino gaming as a means to alleviate poverty, provide jobs, improve government services, leverage economic development, and entice tribal members to return to the reservation. In 1992, Governor George Sinner signed Tribal-State compacts allowing the state's

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<sup>200</sup> SCHNEIDER, *supra* note 155, at 155.

<sup>201</sup> N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS 3 (2000) [hereinafter 2000 N.D. INDIAN GAMING ASS'N].

<sup>202</sup> In the first half of the 1990s, state unemployment ranged from three to six percent. See Bureau of Labor Statistics, *Local Area Unemployment Statistics, North Dakota*, at <http://data.bls.gov/cgi-bin/survey/most> (last visited Mar. 23, 2002).

<sup>203</sup> Lattergrass, *supra* note 197.

<sup>204</sup> *Id.*

tribes to conduct Class III gaming.<sup>205</sup> Currently, there are five tribal casino developments in North Dakota: the Four Bears Casino and Lodge near New Town,<sup>206</sup> owned by the Three Affiliated Tribes; the Sky Dancer Hotel and Casino in Belcourt,<sup>207</sup> owned by the Turtle Mountain Band of Chippewa Indians; the Spirit Lake Casino and Resort in Spirit Lake,<sup>208</sup> owned by the Spirit Lake Sioux Tribe; the Prairie Knights Casino and Resort in Fort Yates,<sup>209</sup> owned by the Standing Rock Sioux Tribe; and the Dakota Magic Casino and Hotel in Hankinson,<sup>210</sup> owned by the Sisseton-Wahpeton Sioux Tribe.<sup>211</sup> In contrast to the experiences of many tribes, each of the tribal casinos in North Dakota is owned, operated, and controlled by the tribal government.<sup>212</sup>

Each of the tribes considers its casino a success, despite their profits being a far cry from those of the Pequots' Foxwoods.<sup>213</sup> The varied economic success of tribal casinos is not surprising. Even before the spread of Class III gaming following IGRA's enactment, the profits of tribal bingo halls had been determined largely by

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<sup>205</sup> The 1992 compacts were scheduled to expire in 2002, but in 1999, the state's five gaming tribes negotiated uniform ten-year compacts with the state. David Melmer, *North Dakota Tribes Score a Coup with Gaming Compacts*, INDIAN COUNTRY TODAY, Dec. 20, 1999, available at 1999 WL 28719359. Under the terms of the compacts, ten percent of the tribes' Class III gaming revenue is directed toward diversified tribal economic development. *Id.* The new compacts, signed by then-Governor Ed Schafer, take effect in 2002. Under the new compacts, tribes may raise their betting limits and offer roulette and slot machine tournaments. Dale Wetzel, *Tribes Reach Gambling Pact: Feds Must Approve Deal Before It's Final*, GRAND FORKS HERALD, Sept. 4, 1999, at 4. Aside from continuing tribal gaming's positive economic impacts on the state of North Dakota, the impetus behind the negotiation of the new compacts was to allow the tribes to obtain long-term financing necessary to diversify tribal economic enterprises, particularly through tourism. *Id.*; see also Brian Witte, *Tribal Chairmen Say Compacts Helped Casinos*, GRAND FORKS HERALD, Nov. 21, 2000, at 8A.

<sup>206</sup> See Four Bears Casino & Lodge, Location, at <http://www.4bearscasino.com> (last updated Mar. 1, 2002).

<sup>207</sup> See Sky Dancer Hotel and Casino, at <http://www.skydancercasino.com> (last visited Mar. 23, 2002).

<sup>208</sup> See Spirit Lake Casino and Resort, at <http://www.spiritlakecasino.com> (last visited Jan. 7, 2002).

<sup>209</sup> See Prairie Knights Casino and Resort, at <http://www.prairieknights.com> (last visited Mar. 19, 2002).

<sup>210</sup> See Dakota Magic Casino and Hotel, at <http://www.dakotamagic.com> (last visited Mar. 19, 2002).

<sup>211</sup> 2000 N.D. INDIAN GAMING ASS'N, *supra* note 201, at 1.

<sup>212</sup> N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS 3 (1998) [hereinafter 1998 N.D. INDIAN GAMING ASS'N]. Each of the state's gaming tribes belongs to the North Dakota Indian Gaming Association, as well as the regional Great Plains Indian Gaming Association. See generally Great Plains Indian Gaming Association, at <http://gpiga.org/home.htm> (last visited Jan. 17, 2002). Both associations work with the National Indian Gaming Association to influence tribal gaming policy on state and federal levels, as well as to share information and expertise among tribes. See generally National Indian Gaming Association, at <http://www.indiangaming.org> (last visited Jan. 7, 2002).

<sup>213</sup> See generally 1998 N.D. INDIAN GAMING ASS'N, *supra* note 212, at 13.

access to metropolitan markets.<sup>214</sup> Nevertheless, many tribes facing dire socio-economic conditions opted for even the modest increases in employment and revenue accompanying gaming in a rural market. As Mark Fox, a member of the Three Affiliated Tribes and secretary of the National Indian Gaming Association, put it, the success of Indian gaming in North Dakota is reflected in increased reservation employment.<sup>215</sup> For the Three Affiliated Tribes, the casino has helped to slash reservation unemployment from seventy percent to approximately thirty percent.<sup>216</sup> On the Standing Rock Sioux reservation, the tribe's casino created 356 gaming-related jobs for Native Americans, significantly cutting the tribe's nearly ninety percent unemployment rate.<sup>217</sup> Indeed, the tribe's casino is the county's largest employer.<sup>218</sup> Similarly, the Turtle Mountain Band of Chippewa's casino has created 360 new jobs on the reservation.<sup>219</sup> Together, the state's five tribal casinos have directly created more than two thousand jobs,<sup>220</sup> over eighty percent of which are held by Native Americans.<sup>221</sup>

Even relatively modest casino revenue may allow a tribe to diversify economic development. The Standing Rock Sioux, for example, have launched several casino-related businesses, including a hotel, RV park, and marina,<sup>222</sup> while the Three Affiliated Tribes are starting data entry and manufactured homes businesses.<sup>223</sup> The Turtle Mountain Band of Chippewa has used gaming revenue to finance a start-up data entry business, and currently is pursu-

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<sup>214</sup> Eduardo E. Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 205, 234 (Stephen Cornell & Joseph P. Kalt eds., 1993). If the population density surrounding a tribal casino is low, there is little chance that the casino will bring significant "new" income for the tribe. *Id.* The proximity of competing casinos and the regional propensity to gambling also influence casino success. *Id.*

<sup>215</sup> Mark Fox, Guest Lecture in Indian Gaming Law at the University of North Dakota School of Law 4 (Apr. 24, 2001) (transcript on file with Chapman Law Review).

<sup>216</sup> *Id.* Fox explained, "We have young people [for] the first time in their lives learning about work ethic[;] [l]earning . . . what even . . . a basic checking account is all about. We have people [who] are financing homes and cars. For the first time they have been able to do these positive things." *Id.*

<sup>217</sup> CORNELL ET AL., *supra* note 4, at 32-33 (reporting that in 1995, one year after the tribe opened its casino, reservation unemployment dropped to less than thirty percent, but noting that the degree of reduction may have been due in part to different tribal data collection procedures); see also Timothy Egan, *American Indians Restoring Plains Life*, GRAND FORKS HERALD, May 28, 2001, at 1A. The tribe's casino also created another 123 jobs for non-Indians in 1997. CORNELL ET AL., *supra* note 4, at 32.

<sup>218</sup> CORNELL ET AL., *supra* note 4, at 49.

<sup>219</sup> Lattergrass, *supra* note 197.

<sup>220</sup> The Prairie Knights Casino employs 470 full-time workers, while the Four Bears, Sky Dancer and Spirit Lake Casinos each employ 400 full-time workers. Furthermore, the Dakota Magic Casino employs 375 full-time workers. Dorreen Yellow Bird, *Researcher Says Gambling is a Net Plus on Reservations*, GRAND FORKS HERALD, Sept. 3, 2000, at 2C.

<sup>221</sup> 1998 N.D. INDIAN GAMING ASS'N, *supra* note 212, at 5.

<sup>222</sup> CORNELL ET AL., *supra* note 4, at 39.

<sup>223</sup> Fox, *supra* note 215.

ing recycling and construction companies, as well as tourism-related businesses.<sup>224</sup>

In addition, even relatively modest casino revenues and levels of casino employment benefit surrounding non-Indian communities, as well as the state economy. In North Dakota, the five tribal casinos have a total annual payroll exceeding thirty million dollars each year.<sup>225</sup> Many workers employed at the casinos previously were unemployed and receiving public assistance.<sup>226</sup> According to calculations using economic multipliers,<sup>227</sup> the annual economic benefits to the state resulting from the casinos' payroll and purchases totals nearly \$125,000,000, making tribal gaming one of North Dakota's top two economic engines.<sup>228</sup> The cumulative benefits of Indian gaming in the state are striking. Since 1997, North Dakota has accrued nearly five hundred million dollars in economic benefits resulting from Indian gaming.<sup>229</sup>

Revenue can revitalize communities as well as economies. In North Dakota, none of the tribes disburses casino revenue in the form of per capita payments;<sup>230</sup> instead, profits from the tribal casinos allow the state's tribes to provide essential government services to their members.<sup>231</sup> Increasing employment opportunities and available government services has had the almost immediate effect of enticing tribal members to return to the

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<sup>224</sup> Lattergrass, *supra* note 197.

<sup>225</sup> 2000 N.D. INDIAN GAMING ASS'N, *supra* note 201, at 3.

<sup>226</sup> 1998 N.D. INDIAN GAMING ASS'N, *supra* note 212, at 5. The North Dakota Indian Gaming Association estimates that thirty to forty percent of new hires at the tribal casinos previously were either unemployed or receiving public assistance. Dorreen Yellow Bird, *How Gaming Pays Off*, GRAND FORKS HERALD, Apr. 1, 2001, at 1D (quoting Alan Austad, consultant to the North Dakota Indian Gaming Association). Other states, such as Wisconsin, have experienced similar reductions in public entitlements payments as a direct result of tribal gaming. See *Casinos Cut Welfare Rolls in Some Tribes*, GRAND FORKS HERALD, Sept. 2, 2000, at 3A.

<sup>227</sup> The 2000 North Dakota Indian Gaming Association report categorizes the economic impacts of tribal gaming in the state according to direct and secondary impacts. Direct impacts "are those changes in output, employment, or income that represent the initial or direct effects" of gaming. 2000 N.D. INDIAN GAMING ASS'N, *supra* note 201, at 11. Secondary impacts "result from subsequent rounds of spending and respending within the economy." *Id.* For example, an employee may use a dollar of wages to buy a loaf of bread at a local grocer. The grocer then may use part of that dollar to buy more bread, while the bread supplier may in turn use part of that dollar to purchase wheat, and so on. *Id.*

<sup>228</sup> *Id.* at 7.

<sup>229</sup> *Id.* at 9.

<sup>230</sup> Rand & Light, *Raising the Stakes*, *supra* note 36, at 338. As Mark Fox explains, the Three Affiliated Tribes' annual casino profits of approximately three million dollars would result in a per capita payment for each of the tribe's ten thousand or so members of about three hundred dollars. Thus, the tribe has decided that the casino revenue is best spent providing services to its members. *Id.*

<sup>231</sup> For example, the Three Affiliated Tribes use casino revenue to provide members with day-care services and educational scholarships, as well as to improve the tribe's waste disposal system and other conservation efforts. *Id.*

reservations in North Dakota.<sup>232</sup> As the state struggles to maintain its general population, its Native American population grew by twenty percent during the last decade.<sup>233</sup>

As the *Boston Globe* series indicated, tribes like those in North Dakota, with large memberships and little access to metropolitan markets, are unlikely to experience dramatic economic and social rejuvenation based solely on casino revenues.<sup>234</sup> Two thousand new casino jobs can significantly lessen tribal unemployment, but cannot cure it.<sup>235</sup> For example, the Turtle Mountain Band's casino created 360 jobs on the reservation, but with some twenty-eight thousand members, most of whom live on or near the reservation, the tribe must continue to combat poverty and unemployment.<sup>236</sup>

Nevertheless, the accuracy of the *Globe's* analysis stops there. From the tribes' perspective, casino employment and revenue provide the necessary foundation for tribal strategies to overcome reservation poverty and accompanying social ills.<sup>237</sup> By allowing

<sup>232</sup> *Id.* ("More people are coming back from urban areas partially because of the casinos. There are new job and educational opportunities, better health benefits, and fresh ideas out there [on the reservations].") (quoting Cornelius Grant, executive director of North Dakota's Rural Development Council and a member of the Turtle Mountain Band of Chippewa) (alterations in original).

<sup>233</sup> Discover ND, *Census: Population by Race 1990 & 2000*, at <http://www.state.nd.us/jsnd/Bin/lmidata.pl> (last visited Apr. 12, 2002). During the 1990s, North Dakota's Native American population increased from 25,917 to 31,329, while its white population decreased from 604,142 to 593,181. *Id.* Only six counties in North Dakota gained residents during the 1990s; three of those counties are populated primarily by Native Americans. Timothy Egan, *As Others Abandon Plains, Indians and Bison Come Back*, N.Y. TIMES, May 27, 2001, available at <http://www.nytimes.com/2001/05/27/national/27FRON.html?pagewanted=print>; see also Carson Walker, *Culture, New Wealth Lure Indians Home*, GRAND FORKS HERALD, Apr. 11, 2001, at 3A. Other states, too, have seen Native Americans returning to live on the reservation due in part to increased employment opportunities created by tribal casinos. See, e.g., Mike Johnson, *Casinos, Jobs Lure Indians Back to Better Lives on Reservations*, MILWAUKEE J. SENTINEL, Apr. 30, 2001, at 1A, available at 2001 WL 9353282 (reporting that in Wisconsin, reservation populations increased by over twenty percent between 1990 and 2000).

<sup>234</sup> The reasons for this extend beyond the rural nature of tribal communities, shared by non-Native localities throughout states like North Dakota.

[T]ribal governments cope with two challenges that non-Indian governments do not face. First, they must operate between the institutions of Indian culture and those of the larger society, balancing competing values while being constrained by differing norms. Second, tribal governments contend with staggering social conditions the likes of which are found in few other places in America.

CORNELL ET AL., *supra* note 4, at 3.

<sup>235</sup> See Yellow Bird, *supra* note 220 (explaining that as the tribal population increases, it becomes more difficult for the tribal government to provide adequate employment for tribal members).

<sup>236</sup> Lattergrass, *supra* note 197. The tribe's poverty rate remains high at forty percent, while unemployment continues to exceed fifty percent. *Id.*

<sup>237</sup> See CORNELL ET AL., *supra* note 4, at 53.

For the Standing Rock Sioux Tribe (and other tribes similarly situated), the incremental revenue is certainly helpful, especially given the difficulty it has had developing other enterprises and the limited availability of federal funding. However, the effect of gaming on social conditions will be limited until such tribes can lever gaming business experience into other forms of economic development."

tribal governments to offer their members employment and educational opportunities, along with essential government services such as adequate housing and health care, gaming revenue has demonstrably strengthened tribal governments in North Dakota. This, in turn, has helped to preserve tribal sovereignty, because tribes have the economic wherewithal to implement tribal government decisions and programs. Casino profits also allow tribes to diminish their dependence on state and federal programs, further reinforcing tribal sovereignty.<sup>238</sup>

Like its counterpart, the Pequot Model, the Plains Model of tribal gaming convincingly demonstrates the oversimplification and lacunae in conventional narratives of Indian gaming. Such accounts threaten to set the terms of contemporary political discourse and mediate policy outcomes, creating a lose-lose proposition for tribes from the Pequots to the Plains, and elsewhere.

## V. TOWARD INFORMED POLICYMAKING

### A. Misinformed Policymaking

Despite well-reasoned criticism that application of federal law and policy to tribal gaming is, by definition, an infringement on tribal sovereignty,<sup>239</sup> the political reality remains that Congress, by virtue of the Supreme Court's interpretation of the commerce power,<sup>240</sup> has constitutional authority to regulate Native American tribes in the United States. Congress has misused this power in the past, with dire consequences for tribes. Most recently, however, the federal government has adopted a policy of tribal self-determination, aimed at encouraging reservation economic development and strengthening tribal governments, while decreasing federal aid to Native American communities. Although the federal government's self-determination policy is not above criticism,

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*Id.*

<sup>238</sup> See, e.g., Telephone Interview by Samuel Jandt with J. Kurt Luger, Executive Director, North Dakota Indian Gaming Association (Nov. 23, 2001) (notes on file with Chapman Law Review) [hereinafter Luger Telephone Interview] (stating that North Dakota tribes use casino revenue to fund unmet obligations of the federal government); see also Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at the Bingo Palace*, 29 ARIZ. ST. L.J. 97 (1997) (discussing the complexities of the interrelations between tribal sovereignty and economic independence).

<sup>239</sup> See, e.g., Robert B. Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, GAMING L. REV. vol. 5 No. 4, at 299 (2001) (arguing that gaming tribes assist the dominant society in undermining tribal sovereignty by capitulating to state and federal regulation); see also Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 49 (1997) ("Despite the popular sentiment that the IGRA conferred a gaming 'right' on Indian tribes, it is important to note that the IGRA is not the source of the tribes' right to engage in gaming; rather, the statute places limitation on those sovereign rights.").

<sup>240</sup> U.S. CONST. art. 1, § 8, cl. 3; see also *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (discussing the Indian Commerce Clause).



it appears to be the most viable approach in terms of improving reservation living conditions.<sup>241</sup> As noted above, the advent of widespread Indian gaming coincided with the federal government's policy of encouraging tribal economic development. In fact, IGRA's express purposes include "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."<sup>242</sup>

Despite this stated policy, many policymakers appear ready to diminish tribal sovereignty by increasing federal and state control over tribal governments, particularly in the area of tribal gaming. Some policymakers' apparent willingness to increase state power over Indian gaming is in part a direct response to the Pequots success with Foxwoods.<sup>243</sup> As discussed above, criticism of the Pequots and the tribe's economic success, particularly in the context of widespread continuing reservation poverty facing many other tribes, essentially distills itself to the observation that the federal government should not allow a few tribes to become wealthy through gaming while other tribes continue to struggle. However, this creates a false dichotomy: on the one hand, the fabulously gaming-rich Pequots, and on the other, tribes whose casinos provide such meager benefits that gaming simply is not worth the trouble it causes non-Indians. That dichotomy, of

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<sup>241</sup> As one researcher asserted, studies have not found "a single case in Indian Country where federal planning, programs, and management of the reservation economy has produced sustained economic development and social well-being. The only thing that is working is self-determination—self-government." Kalt, *supra* note 41, at 2. According to the Harvard Project on American Indian Economic Development:

[W]hat really works is true self-governance. Thus, the premise that tribes are and ought to be treated as governments—as opposed to entitled ethnic groups, for-profit corporations, or fraternal associations—is foundational to the examination of Indian gaming policy. Moreover, policies that do not take this premise into account risk undermining the gains made by tribes under [federal] self-determination [policy].

CORNELL ET AL., *supra* note 4, at 8.

<sup>242</sup> 25 U.S.C. § 2702 (2001). Alongside self-determination policy, the federal government has adopted a policy of decentralizing decision-making power by delegation, a political concept referred to as "devolution." Stephen Cornell & Jonathan B. Taylor, *Sovereignty, Devolution, and the Future of Tribal-State Relations*, at 1 (paper presented at the National Congress of American Indians Mid-Year Session, June 2000) (on file with Chapman Law Review). As governmental control and decision-making authority continue to shift from the federal level to state and local governments, tribes may also benefit from reduced federal controls. *Id.* at 1, 2. Given the experience of tribes such as those in North Dakota, it is the diminishment of state and federal authority and the resultant primacy of tribal authority that have made the reservations better places to live. *Id.* at 4-5. "[T]ribal control over tribal affairs is the *only* policy that works for economic development . . . . In short, if states want Indian poverty and its off-reservation consequences to be adequately addressed, they have to stop insisting that their rules apply to the exclusion of tribes' rules." *Id.* at 4. "The fact is that capable and sovereign tribal governments advance state goals as well as tribal goals. No state has an incentive to allow the kind of poverty and economic underdevelopment that has characterized Indian reservations for so long to continue to fester within its borders." *Id.*

<sup>243</sup> See discussion *supra* Parts II. & III.B.2.

course, overlooks the experience of tribes like those in North Dakota, as described in the Plains Model.<sup>244</sup> In fact, tribes with higher poverty and unemployment rates are likely to pursue casino-style gaming as a form of economic development—seventeen of the country's largest and poorest tribes have opened casinos.<sup>245</sup> Increasing the states' ability to dominate the compact negotiations and limit tribal gaming likely will hurt those tribes that most need the revenue a casino can provide.

The media and policymakers have been quick to link gaming and continued reservation poverty, as though tribal gaming somehow has caused, or at least facilitated, current unemployment and poverty rates.<sup>246</sup> A better way to approach the question might be to ask whether, *without tribal gaming*, tribes still would experience continued poverty, widespread unemployment, and relatively minimal tribal economic development. In the absence of Indian gaming, it is likely that most tribes would have had little, if any, economic development activity on their reservations. It is, therefore, logical to assume that those tribes would have experienced continuing poverty during the last decade without even the modest inroads afforded by tribal gaming.<sup>247</sup>

#### B. From the Pequots to the Plains: The Spectrum of Tribal Gaming

How, then, should policymakers determine whether gaming under IGRA should be encouraged as a strategy for tribal economic development? The obvious answer is to place Indian gaming in the broader context of the full range of tribal experiences, including those of large, land-based treaty tribes. Beyond a focus on the Pequots, the success of Indian gaming must be assessed

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<sup>244</sup> See discussion *supra* Part IV.B; see also Kalt, *supra* note 41, at 1-2.

[T]he phenomenal financial success of a tiny handful of tribes—led, of course, by the Mashantucket Pequot Tribe in Connecticut. . . . obscures the facts that . . . for every highly visible, well-run, well-capitalized casino there are many more tribal operations that are modest enterprises providing employment and income in low-volume, rural markets.

*Id.*

<sup>245</sup> CORNELL ET AL., *supra* note 4, at 56.

<sup>246</sup> The *Globe* series reported that “[twelve] years after the federal government made gambling a staple of its Indian policy, the overall portrait of America’s most impoverished racial group continues to be dominated by disease, unemployment, infant mortality, and school drop-out rates that are among the highest in the nation.” Rezendes, *Casino Windfall*, *supra* note 5. Representative Wolf picked up the refrain, stating that the *Globe* articles “illustrate the unforeseen inequities of the Indian Gaming Regulatory Act, which has resulted in a tainted recognition process, massive revenue windfalls for the gambling industry and a few well-connected individuals, and worst of all, continuing poverty for most Native Americans.” Murphy, *Revision Sought*, *supra* note 67; see also Murphy, *Probe of Indian Casinos*, *supra* note 66.

<sup>247</sup> CORNELL ET AL., *supra* note 4, at 29. “What would the level of economic activity have been if the [particular tribal] casino had not been built?” *Id.* The answer they found for most tribes was “simple: there would have been no significant economic activity.” *Id.*

against the background of “long-standing deficits of income, infrastructure, employment, education, and social health that plague Indian Country.”<sup>248</sup> Improvements in the quality of reservation life experienced by tribes like those in North Dakota may seem small to critics, but the tribes’ perception is that gaming has benefited tribal governments and members markedly.<sup>249</sup> As Rick Hill, then-chair of the National Indian Gaming Association, stated:

[I]f we are still facing poverty, unemployment, diabetes and heart disease, suicide and untimely death, you should understand that the United States forced Indian Tribes onto small, arid, unproductive reservations while at the same time stealing our more productive lands. Today, we are using Indian gaming to overcome many of the conditions that the United States has created. . . . Today, Indian gaming helps many of our Nations and Tribes to empower our people.<sup>250</sup>

Indeed, a more careful look at tribes across the country suggests that the 1990s marked a possible beginning of a reversal of reservation unemployment and poverty.<sup>251</sup> Nevertheless, this reversal is only a beginning, and a decade of casino-style gaming has not eradicated (nor should it be expected to eradicate) the extraordinarily high levels of tribal unemployment and poverty.<sup>252</sup>

<sup>248</sup> Kalt, *supra* note 41, at 3.

<sup>249</sup> When asked if it was accurate to characterize the success of tribal casinos in North Dakota as “modest,” Kurt Luger, the Executive Director of the North Dakota Indian Gaming Association, emphasized the necessity of considering the tribes’ circumstances prior to opening their casinos. “When you have nothing, and then you have something,” he explained, modest is not the most accurate term. Luger Telephone Interview, *supra* note 238.

<sup>250</sup> Rick Hill, *Some Home Truths About Indian Gaming*, INDIAN COUNTRY TODAY, Dec. 27, 2000, available at <http://www.indiancountry.com/articles/perspective-2000-12-27-02.shtml>.

<sup>251</sup> CORNELL ET AL., *supra* note 4, at 31.

[T]he fundamental point is that because economic conditions were so dire on those reservations that subsequently introduced casino gaming, even small amounts of economic activity have proven a tremendous boon to many gaming tribes. While the backlog of socio-economic deficits left by decades of deprivation remains a daunting challenge, gaming has had a profound economic development impact on many tribes that have introduced it.

*Id.*

<sup>252</sup> *Id.* at 60 (enumerating several factors that limit tribes’ ability to quickly reverse social conditions). Generally speaking, casinos can benefit tribes in two primary ways. Kalt, *supra* note 41, at 2. First, casinos can provide economic benefits by creating jobs, personal income, and government revenue. *Id.* While gaming-based economic development has not proved a silver bullet for reservation poverty, the economic effects of tribal gaming “are making dents in the long-standing problems of poverty and associated social ills in Indian Country.” *Id.* One factor emphasized by North Dakota tribes is the creation of casino jobs on the state’s reservations. See 2000 N. D. INDIAN GAMING ASS’N, *supra* note 201, at 3. Employment opportunities created by tribal casinos are an important source of reservation jobs for many tribes. CORNELL ET AL., *supra* note 4, at 32-35. Increased employment, of course, can lead to positive changes in social health generally.

Unemployment has an adverse effect on mortality, particularly from suicide and lung cancer. It is also associated with higher incidences of suicide attempts, depression, and anxiety. The onset of unemployment is associated with greater tobacco and alcohol use. In addition, a higher proportion of families with

Recently, tribes like those in the Great Plains have worked to publicize issues that are relevant to them, such as tribal sovereignty, government infrastructure, employment, and health care. Yet these issues, so central to many tribes in the United States, get lost in the public debate over a few tribes like the Pequots, which threatens to define policy applicable to all tribes. Kurt Luger, the Executive Director of the North Dakota Indian Gaming Association, speaking with characteristic bluntness, put it this way:

We are not damn gaming tribes, we are treaty tribes. . . . We are getting our a— kicked because of [wealthy, newly organized tribes]. [The Plains] region needs to be highlighted, because our treaties are going to be attacked and they are going to say, “Hell, these aren’t a bunch of Indians, these are a bunch of gaming tribes.”<sup>253</sup>

Critics and policymakers contend that they are concerned about the welfare of all Native Americans, and merely seek to avoid injustice. Yet the proposed responses to the perceived problems associated with tribes like the Pequots are likely to undo the tenuous gains achieved by gaming for many tribes. The *Boston Globe* identified several North Dakota tribes as the embodiment of what it decried as the failed experiment of Indian gaming.<sup>254</sup> The tribes themselves, however, describe their gaming enterprises as successes.

### C. There Are No Pequots on the Plains

One significant shortcoming resulting from the oversimplification of tribal experience by the media and policymakers—dividing tribes into gaming “haves” and “have-nots”—is that it assumes that the issues raised by a few tribes’ casinos apply uniformly to all gaming tribes. In fact, most of the issues raised in the public debate over the Pequots simply do not exist in the context of the Plains Model.

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unemployed adults are reported as having greater risk of domestic violence and divorce.

*Id.* at 57. The second benefit casinos provide is institutional. Kalt, *supra* note 41, at 2. Because gaming revenue enables tribal independence from federal and state programs and bureaucracies, casinos can benefit tribes by strengthening tribal government and preserving tribal sovereignty. *Id.*; see also *supra* text accompanying notes 241-42.

<sup>253</sup> David Melmer, *Great Plains Leaders Flex Muscle, Insist that NCAI Include Their Agenda*, INDIAN COUNTRY TODAY, Nov. 22, 2000, available at <http://www.indiancountry.com/articles/lakota-2000-11-22-01.shtml>.

<sup>254</sup> Rezendes, *Casino Windfall*, *supra* note 5. For example, the *Globe* reported that in contrast to the success of a few tribes like the Pequots, “tribes of the Greater Sioux Nation, with thousands of members in North and South Dakota, run about a dozen gambling halls but generate comparatively little in the way of revenue because of the tribes’ stark isolation.” *Id.*

For example, the Pequots' authenticity has been challenged on numerous fronts. As discussed above, two recent and highly visible exposés contend that current tribal members are not Pequots, and likely are not even "Indians" (at least as the authors understand the term).<sup>255</sup> Regardless of the appropriate weight to be given such loaded accusations, authenticity simply is not an issue for North Dakota's tribes. Long recognized as sovereign by the federal government, the tribes' status as "Indian" is unlikely to be seriously questioned. Nor can there be a plausible suggestion that the Plains tribes exist only to operate casinos. As Mark Fox explains, "Here in the Great Plains, Indian nations fought and died for tribal sovereignty."<sup>256</sup> Yet, as Luger observed, the negative attention paid to tribes like the Pequots requires all tribes to answer similar challenges, however ill founded.<sup>257</sup>

The debate over the Pequots raises a myriad of concerns centered on the negative effects of gambling. At the forefront, perhaps, is the theory that Indian gaming is not subject to sufficient regulation, exposing tribes to criminal infiltration and exploitation by non-Indian management companies. In reality, tribal gaming enterprises are subject to *three* levels of government regulation—federal, state, and tribal—resulting in extensive regulatory schemes,<sup>258</sup> and there is little evidence to support the pervasive specter of organized crime.<sup>259</sup> Moreover, common sense

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<sup>255</sup> BENEDICT, *supra* note 132; EISLER, *supra* note 92.

<sup>256</sup> Rand & Light, *Raising the Stakes*, *supra* note 36, at 337.

<sup>257</sup> A cartoon in North Dakota's *Grand Forks Herald* depicted two sets of Native artifacts: one in the 1800s, including arrowheads, eagle feathers, and a buffalo skin, and one in 2000, a slot machine. GRAND FORKS HERALD, Sept. 10, 2000, at 2B.

<sup>258</sup> Hill, *supra* note 250. In North Dakota, the state's five tribes spend over five million dollars each year and have hired over three hundred employees to regulate their casinos. *Id.* Additionally, the tribes pay the costs of state regulation and oversight of tribal casinos. Luger Telephone Interview, *supra* note 238. A 1998 National Indian Gaming Association survey reported that tribes spent over \$120 million to regulate gaming on their reservations. 2001 *Indian Gaming Hearing*, *supra* note 47. New Jersey spends about fifty-four million dollars and employs seven hundred people to regulate its dozen or so major casinos; gaming tribes in Arizona spend about twenty-one million dollars and employ two hundred people to regulate tribal casinos in the state, and pay another five million dollars for state regulation. *Id.*; see also CORNELL ET AL., *supra* note 4, at 15-23 (describing the regulatory requirements at the federal, state, and tribal levels on Indian gaming and concluding that "the scope of tribal regulations is extensive—it parallels that of New Jersey," the state with the "toughest" gaming regulations). Some have dismissed tribal regulation of tribal casinos as "the fox running the hen coop." Sean P. Murphy, *Indian Casinos Spend to Limit US Oversight*, BOSTON GLOBE, Mar. 12, 2001, at A1, available at 2001 WL 3923615 (quoting former federal gaming regulator Anthony Hope). Kalt, however, points out that as tribal government-owned enterprises, tribal casinos yield public revenues, much the same way state lotteries yield public revenues. Kalt, *supra* note 41, at 2-3. Both states and tribes use such revenues to meet the needs of their citizens (indeed, IGRA expressly limits tribes' use of gaming revenues). *Id.*; see also CORNELL ET AL., *supra* note 4, at 57 ("Just as states dedicate lottery revenues to public purposes . . . so too do tribes.").

<sup>259</sup> The Globe articles "also highlighted the almost complete lack of government oversight of casinos already allegedly infiltrated by organized crime." Murphy, *Probe of Indian Casinos*, *supra* note 66. But the *Globe* article was forced to acknowledge that "tribal gam-

and evidence indicate that in North Dakota, it is unlikely that organized crime will infiltrate only modestly successful tribal casinos far from urban population centers. As for more pedestrian crime, North Dakota's tribal casinos appear to have had little, if any, effect on the state's consistently low crime rate.<sup>260</sup> Indeed, one might expect that the gains made in reservation employment would reduce crime in those areas.<sup>261</sup> Further, each of the tribal casinos in North Dakota is owned and operated by the tribal government rather than an outside management company.<sup>262</sup> In North Dakota, then, such concerns likely should be outweighed by the fact that Indian gaming is one of the top economic engines in North Dakota, providing economic benefits to Indian and non-Indian communities alike throughout the state.<sup>263</sup>

How do the Pequot and Plains Models assist policymakers? These models demonstrate that a pan-Indian approach to formulating or interpreting law or public policy affecting all tribal gaming will have detrimental and (presumably) unintended effects on those tribes that appear to be benefiting from gaming as Congress envisioned under IGRA. The Plains Model suggests that the perceived negative impacts of tribal gaming, as exemplified by public reaction to the Pequots' success, are inappropriate bases for policymaking that would affect all tribes. As the contrast between the Pequot Model and the Plains Model demonstrates, tribes are not monolithic.

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ing authorities and federal law enforcement officials insist there is no evidence of widespread infiltration of Indian gambling by organized crime." Rezendes, *Tribal Casino Operations*, *supra* note 48. Additionally, although one of the "financial analysts" quoted by the *Globe* stated that organized crime has been linked to casinos historically, the analyst also said, "We're not seeing that with Indian gaming right now." *Id.*; see also CORNELL ET AL., *supra* note 4, at 23 n.39 ("In hearings before a House of Representatives subcommittee in late 1993, officials from the FBI testified that they had no evidence of widespread organized crime within Indian gaming.") (citing Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 521 (1994)).

<sup>260</sup> E-mail from Jan Morley, Tribal Liason for the U.S. Attorney's Office, District of North Dakota, to Kathryn R.L. Rand, Assistant Professor, University of North Dakota School of Law (Dec. 6, 2001, 15:43:33 CST) (on file with Chapman Law Review); see also Luger Telephone Interview, *supra* note 238; Taylor et al., *supra* note 3, at 26-27 (statistics show a "substantial" decline in auto theft and robbery, and that introducing casinos into depressed regions "would reduce the existing propensity to commit crime").

<sup>261</sup> Luger reported anecdotal evidence that juvenile offenses such as truancy were reduced on the reservations as a result of increased parental employment. Luger Telephone Interview, *supra* note 238. "While it is typically assumed as a matter of course that any demonstrated linkage between gaming and crime will show crime increasing following the introduction of gaming, contrary evidence from Indian Country suggests that there are exceptions to that common presumption." CORNELL ET AL., *supra* note 4, at 28-29 (pointing to a 1996 Wisconsin study indicating that tribal casinos had not resulted in increased crime but rather may have reduced crime caused by unemployment).

<sup>262</sup> See *supra* text accompanying note 212. Tribes' relations with non-Indian investors and management companies have drawn criticism. See, e.g., Murphy, *Mohegan Sun*, *supra* note 48.

<sup>263</sup> See *supra* notes 225-29 and accompanying text.

The realities of Indian gaming are more complex than the current spate of criticism allows. First, when measured by strengthened tribal government and improved quality of reservation life, North Dakota's tribal casinos are successful. Their successes are deserving of recognition and continued facilitation at the state and federal levels. Second, to the extent that one sees the Pequots' casino as highlighting inadequacies in current Indian gaming law and policy, one must be careful not to assume that those inadequacies exist in all states, or apply to all tribal casinos. Public policy that seeks to correct problems that do not exist in many areas of the country plainly runs the risk of hamstringing effective tribal efforts to improve reservation life through the exercise of tribal sovereignty. Misguided public policy, rather than Indian gaming itself, runs a substantial risk of perpetuating poverty and unemployment for Native Americans.<sup>264</sup> Treating all tribes alike will not benefit any tribe. Only by recognizing the full spectrum of tribal interests and experience, from the Pequots to the Plains, will policymakers adequately be able to address issues arising from tribal gaming.

#### CONCLUSION

From one perspective, the criticism directed at tribal gaming makes sense: although some tribes are wealthy and healthy, many more continue to suffer from significant social and economic ills. This view, albeit overly—I argue fatally—simplistic, tempts policymakers and public opinion with the corresponding simplicity of its implicit solution: if gaming isn't solving the "Indian problem," then why not regulate and restrict it even further? Such a solution, however, necessarily diminishes tribal sovereignty, and thus likely will exacerbate the very problem it purports to solve.

Such perspectives and solutions, I suggest, are the direct result of undue focus on the Pequot Model of tribal gaming. Policymaking in response to the Pequot Model will, in the short and long run, harm the far greater number of tribes that are beginning to reverse the effects of extreme poverty and unemployment for their members through gaming. Will gaming create prosperity for all Native Americans? Plainly not, but gaming is one of the few economic development strategies making inroads toward prosper-

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<sup>264</sup> Observers note the across-the-board negative implications.

It will be a remarkable irony—and another tragedy in a long line of Indian policy failures—if the United States were now to turn its back on the only policy that has shown any promise of lifting reservation populations out of poverty and despair. Such a rejection of tribal sovereignty will have costs not only to tribes but to states, the federal government, and taxpayers generally as Indian nations continue to languish in poverty. In backing away from meaningful self-determination, everybody loses.

Cornell & Taylor, *supra* note 242, at 7.

ity for many tribes. Well-meaning criticisms of Indian gaming that characterize the important successes of gaming tribes, like those in North Dakota, as failures risk further compromising tribes' abilities to address often dire social conditions on reservations throughout the United States. Betting that further restricting Indian gaming would improve the lives of all Native Americans is surely not worth the gamble.