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**Mashantucket Pequot Tribe v. Town of Ledyard: The Preemption of State Taxes under Bracker, the Indian Trader Statutes, and the Indian Gaming Regulatory Act Comment**

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## Comment

### *MASHANTUCKET PEQUOT TRIBE V. TOWN OF LEDYARD:* THE PREEMPTION OF STATE TAXES UNDER *BRACKER*, THE INDIAN TRADER STATUTES, AND THE INDIAN GAMING REGULATORY ACT

EDWARD A. LOWE

*The Indian Tribes of the United States occupy an often ambiguous place in our legal system, and nowhere is that ambiguity more pronounced than in the realm of state taxation. States are, for the most part, preempted from taxing the Indian Tribes, but something unique happens when the state attempts to levy a tax on non-Indian vendors employed by a Tribe for work on a reservation. The state certainly has a significant justification for imposing its tax on non-Indians, but at what point does the non-Indian vendor's relationship with the Tribe impede the state's right to tax? What happens when the taxed activity is a sale to the Tribe? And what does it mean when the taxed activity has connections to Indian Gaming?*

*This Comment explores three preemption standards as they were interpreted by the Second Circuit Court of Appeals in a case between the State of Connecticut and the Mashantucket Pequot Tribe. In deciding whether preemption was the legally required outcome, the Court looked to and applied the landmark preemption analysis case *White Mountain Apache Tribe v. Bracker*, the Indian Trader Statutes, and the Indian Gaming Regulatory Act. While more than one legally correct outcome exists in this case, this Comment endorses and argues in favor of preemption based on the application of the Indian Gaming Regulatory Act and the preemption analysis required by *Bracker*.*

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GAMING REGULATORY ACT

EDWARD A. LOWE\*

I. INTRODUCTION

The federal government has the power to regulate commerce with the Indian Tribes,<sup>1</sup> and throughout most of the nineteenth century, Congress participated in that exclusive relationship as one nation would with any other sovereign entity—through the signing and ratification of treaties. These treaties, despite being disproportionately in favor of the United States,<sup>2</sup> formed the basis for the treatment of the Indian Tribes as “domestic dependent nations”<sup>3</sup> for almost a hundred years.<sup>4</sup>

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\* Eastern Connecticut State University, B.S. 2010; University of Connecticut School of Law, J.D. Candidate 2015. I would like to thank Professors Richard Pomp and Betsy Conway for suggesting this Comment topic to me and offering their insights and advice, the editors of the Connecticut Law Review for their thoughtful editing, and, most of all, my beautiful wife, Beverly, who inspires me every day. All errors contained herein are mine alone.

<sup>1</sup> U.S. CONST. art. 1, § 8, cl. 3. Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.* This assignment of power is collectively known as the Commerce Clause, and as the Foreign Commerce Clause, Interstate Commerce Clause, and Indian Commerce Clause individually.

<sup>2</sup> *See, e.g.*, A Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Nation, Sept. 27, 1830, 7 Stat. 333 [hereinafter the Treaty of Dancing Rabbit Creek]. The Treaty of Dancing Rabbit Creek required the Choctaw to cede their lands east of the Mississippi River to the United States, and remove themselves to what is now Oklahoma. *Id.* This was one of the treaties that initiated the forced removal of Indian Tribes mandated by the Indian Removal Act, the Act responsible for the Trail of Tears. Act of May 28, 1830, ch. 148, 4 Stat. 411 (“[F]or an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi.”).

<sup>3</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”) (emphasis added).

<sup>4</sup> Congress ended its policy of regulating the Indian Tribes through treaties in 1871. *See* Indian Apportionment Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2012)) (“[H]ereafter no Indian nation or tribe within the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”).

Ever since Congress chose to end its policy of making treaties with the Indian Tribes, states have been permitted to exercise increased authority in the taxation of non-Indian activity within Indian country.<sup>5</sup> Nevertheless, the authority of a state to impose a tax in Indian country is narrow, and for the most part, states lack the authority to tax Tribe members in Indian country without either the authorization of Congress or the permission of the Tribe. Of course, as this Comment will demonstrate, the ability of a state to tax even non-Indian activity within Indian country can be, and frequently is, preempted by the existence of federal law that specifically targets that activity.

Federal laws restrict the states from engaging in several different interactions with Indian Tribes. One such federal restriction, formed by a series of laws collectively known as the Indian Trader Statutes,<sup>6</sup> has been interpreted to forbid the imposition of state sales taxes on certain transactions involving reservation Indians. The Supreme Court of the United States determined as much in *Warren Trading Post v. Arizona State Tax Commission*,<sup>7</sup> which asserted that the Indian Trader Statutes were “sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.”<sup>8</sup> As the interpretation of these statutes evolved, it was concluded that the simple existence of the Indian Trader Statutes “pre-empts the field of transactions with Indians occurring on reservations,” even in cases not involving federally licensed Indian traders.<sup>9</sup>

Indian Tribes that are fortunate enough to participate in an Indian

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<sup>5</sup> See *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (“State sovereignty does not end at a reservation’s border. Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that ‘the laws of a State can have no force’ within reservation boundaries.”) (citations omitted).

<sup>6</sup> 25 U.S.C. §§ 261–64 (2012). Popularly referred to as the “Indian Trader Statutes,” these laws were enacted to “protect Indians from becoming victims of fraud in dealings with persons selling goods.” *Cent. Mach. Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160, 165 (1980). The Indian Trader Statutes have been rightly described as

paternalistic and resented by many Indians and their supporters as reflecting the “guardian/ward relationship which places the federal government in the role of protector and the tribal members in a subordinated position requiring protection. By contrast, an analysis that includes considerations of tribal sovereignty places needed emphasis on the simple fact that a tribe is a government within the federal system and that its governmental integrity is worthy of consideration and encouragement.”

Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 1009 n.434 (2010) (quoting Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, 2007 MICH. ST. L. REV. 841, 862 (2007)).

<sup>7</sup> 380 U.S. 685 (1965).

<sup>8</sup> *Id.* at 690.

<sup>9</sup> *Cent. Mach. Co.*, 448 U.S. at 165.

gaming industry on their reservations have additional cause to challenge any state taxes that target their gaming operations. The federal government has a clear interest in regulating the gaming operations and economic development of the Indian Tribes. It was from this interest that the Indian Gaming Regulatory Act<sup>10</sup> (IGRA) was born. In addition to regulating Indian gaming, the IGRA prohibits the states from levying taxes on Indian gaming operations in Indian country without Tribal consent.<sup>11</sup>

Looming over every modern controversy concerning the exertion of state authority over non-Indian activity in Indian country is the preemption analysis laid out in *White Mountain Apache Tribe v. Bracker*,<sup>12</sup> which calls for the relevant federal, state, municipal, and Tribal interests at issue to be evaluated to determine whose interest is strongest, and therefore valid.<sup>13</sup> The preemption of a state tax imposed on a non-Indian contractor can only be realized through a *Bracker* test. The Indian Trader Statutes and IGRA weigh heavily in favor of the federal interest in their applicable cases.

In Connecticut, a state that has often sought to exercise varying levels of authority over the Tribes within its borders,<sup>14</sup> each municipality is responsible for collecting a property tax levied on the non-exempt tangible property within its jurisdiction.<sup>15</sup> Leased property is included in the town's assessment, with the tax burden falling on the owner of the property.<sup>16</sup> The Mashantucket Pequot Tribe owns and operates the Foxwoods Resort

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<sup>10</sup> 25 U.S.C. §§ 2701–21 (2012).

<sup>11</sup> See 25 U.S.C. § 2710(d)(3)(A) (2012) (“Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.”).

<sup>12</sup> 448 U.S. 136 (1980).

<sup>13</sup>

We have . . . rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. At the same time any applicable regulatory interest of the State must be given weight, and “automatic exemptions ‘as a matter of constitutional law’” are unusual. . . . This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

*Id.* at 144–45 (citations omitted).

<sup>14</sup> See *infra* Part II.A (concerning cases involving the Mashantucket Pequot Tribe and Connecticut).

<sup>15</sup> CONN. GEN. STAT. §§ 12-40–12-121z (2014).

<sup>16</sup> CONN. GEN. STAT. § 12-57a(a) (2014) (“Any personal property subject to a contract of lease . . . which property is in the possession of the lessee on any assessment day in the municipality in which the lessee resides, shall, *for information purposes only*, be included in the personal property declaration of the lessee . . . . [T]he lessee shall be required to include the name and address of the owner of such property and the term of the lease applicable thereto.”) (emphasis added).

Casino on the Mashantucket Pequot Reservation near the town of Ledyard, Connecticut.<sup>17</sup> The casino hosts several games of chance, including over five thousand slot machines;<sup>18</sup> many of which are leased from a handful of non-Indian gaming companies.<sup>19</sup> Connecticut's generally applied property tax would ordinarily be levied on these slot machines and be paid by the lessors, but the Mashantucket Pequot Tribe argues that the exclusive use of the leased slot machines for Indian gaming on their Reservation preempts the state's property tax.<sup>20</sup>

The preemptive power of the Indian Trader Statutes, the IGRA, and the *Bracker* analysis were put to the test in the case that is the subject of this Comment: *Mashantucket Pequot Tribe v. Town of Ledyard*.<sup>21</sup> The Second Circuit Court of Appeals was unmoved by the Tribe's preemption argument, holding that the state and municipal interest in enforcing the property tax outweighed any Tribal or federal interest.<sup>22</sup> This was a notable divergence from the United States District Court for the District of Connecticut's ruling, which found the tax to be preempted under the *Bracker* analysis, the IGRA, and the Indian Trader Statutes.<sup>23</sup> It seems at first blush that there is a reasonable justification for both rulings. After all, both courts are presided over by some of the most intelligent legal minds of our time, but did either court get it right in the end? Does precedent

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<sup>17</sup> The location of the Reservation is usually referred to as either *near* or *in* Ledyard. The Second Circuit Court of Appeals has previously described Foxwoods Resort Casino as being in Ledyard, CT. *E.g.*, *Connecticut v. Dep't. of Interior*, 228 F.3d 82, 85 (2d Cir. 2000). For their part, the Tribe advertises the Foxwoods Resort Casino address as Mashantucket, CT. *See Getting Here*, FOXWOODS, <http://www.foxwoods.com/gettinghere.aspx> (last visited Sept. 24, 2014). Of course, the uncertainty of Connecticut's authority to tax non-Indian property on the Reservation attests to the idea that the Reservation is not only separate from the town of Ledyard, but from the state of Connecticut as well.

<sup>18</sup> *Slots*, FOXWOODS, <http://www.foxwoods.com/slots.aspx> (last visited Sept. 24, 2014).

<sup>19</sup> The Tribe could more likely than not avoid a property tax completely by buying the slot machines, but many of the most popular "themed" slot machines are available by lease only. *See* Brief for the Mashantucket Pequot Tribe at 12, *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) (Nos. 12-1727, 12-1735).

<sup>20</sup> *See infra* Part II.B (describing the background of the Tribe's complaint and their argument).

<sup>21</sup> 722 F.3d 457 (2d Cir. 2013) [hereinafter *Pequot III*]. The state appealed from *Mashantucket Pequot Tribe v. Town of Ledyard*, No. 3:06cv10-12, 2012 WL 1069342 (D. Conn. Mar. 27, 2012) (Eginton, J.) [hereinafter *Pequot II*]. An additional action between the Tribe and the State, *Mashantucket Pequot Tribe v. Town of Ledyard*, No. 3:06cv10-12, 2007 WL 1238338 (D. Conn. Apr. 25, 2007) (Eginton, J.) [hereinafter *Pequot I*], in which the district court denied the State's motion to dismiss the case on comity and Tax Injunction Act grounds, is referred to as *Pequot I* in the *Pequot III* opinion. For the sake of uniformity, the shortened names given to the cases in *Pequot III* are identical in this Comment.

<sup>22</sup> *Pequot III*, 722 F.3d at 477 ("[T]he district court erred in determining that Connecticut's generally-applicable personal property tax was barred by the Indian Trader Statutes, by IGRA, and pursuant to the *Bracker* test.").

<sup>23</sup> *Pequot II*, 2012 WL 1069342 at \*12 ("The motion for summary judgment will be granted in favor of the Tribe. The motions for summary judgment filed by the State and the Town will be denied.").

dictate a single correct outcome to this controversy? Wuyepuyôq,<sup>24</sup> and welcome to that nebulous area where state taxation, the Indian Tribes, and federal preemption intersect.

This Comment will analyze the decisions made in both the District Court and the Second Circuit Court of Appeals and the courts' applications of the Indian Trader Statutes, the IGRA, and the *Bracker* preemption analysis. In Part II, this Comment discusses the recent history of the Mashantucket Pequot Tribe, the creation of the Foxwoods Resort Casino, and the series of events that led to the Tribe's initial challenge. In Part III, this Comment summarizes the background, modern interpretation, and application of the three major preemption standards at issue in *Pequot II* and *Pequot III*.

## II. BACKGROUND

### A. *The Mashantucket Pequot Tribe's Modern History*

The Mashantucket Pequot Tribe was recognized by the federal government in 1983<sup>25</sup> and is currently one of two federally recognized Tribes in Connecticut.<sup>26</sup> With their recognition, the Tribe was also granted

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<sup>24</sup> The phrase, pronounced "wee-ee-PEE-on-kwa" and meaning "come in a good way," was the salutation of the Pequot Tribe, the historical predecessors of the modern Mashantucket Pequot Tribe. THE MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <http://www.mashantucket.com> (last visited Sept. 24, 2014).

<sup>25</sup> Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) [hereinafter the Settlement Act] (codified as amended at 25 U.S.C. §§ 1751-60 (2012)).

<sup>26</sup> The Mohegan Tribe is the other federally recognized tribe in the state. Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, 108 Stat. 3501 (codified as amended at 25 U.S.C. §§ 1775-75h (2012)). During the Pequot War, fought between 1634 and 1638, the Mohegan allied with Connecticut colonists against the Pequot. The war ended with what was essentially the destruction of the Pequot Tribe. Most of the Pequot were killed, and the survivors were either taken in by local tribes or enslaved. 15 BRUCE G. TRIGGER, HANDBOOK OF NORTH AMERICAN INDIANS, Northeast at 172-73 (8th ed., 1978). The current Chairman of the Mashantucket Pequot Tribe, Rodney Butler, reported that "[t]here's still some bad blood over [the Mohegan alliance with the colonists], a little animosity, but mostly, we recognize them as our cousins, and we work well together." Michael Sokolove, *A Big Bet Gone Bad*, N.Y. TIMES, Mar. 18, 2012, at MM36. Today, the two tribes continue their rivalry on friendlier terms as competitors in the gaming industry. The Mashantucket Pequot and Mohegan Tribes own and operate Foxwoods Resort Casino and Mohegan Sun respectively, the two largest casinos in the Western hemisphere. *Id.* The slot machine lessors to the Mohegan Tribe, which include AC Coin and WMS, consistently pay the Connecticut property tax levied on slot machines leased to the Mohegan Tribe. Brief for the Town of Ledyard, Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013) (No. 12-1727), 2012 WL 3548136, at \*7 ("ACC and WMS pay Montville taxes assessed on slot machines that they lease to the Mohegan Sun Casino, but at the urging of the Mashantucket Pequot Tribe, resist paying taxes to Ledyard on slot machines they lease to the Gaming Enterprise for use at Foxwoods.").

Two additional Connecticut Tribes had previously enjoyed federal recognition, albeit very briefly as their recognition was successfully challenged by the state of Connecticut at a time when gambling expansion in the state was a major political issue. The Schaghticoke Tribe was granted federal recognition in 2004, only to have that recognition reconsidered and rescinded a year later after

a settlement fund to purchase more than eight-hundred acres from landowners within a defined area around the Reservation to be taken in trust by the United States on behalf of the Tribe.<sup>27</sup> As a newly recognized sovereign entity, the Tribe quickly created a system of governance, which included its own post office, fire department, police department, and the Mashantucket Pequot Tribal Court.<sup>28</sup> Shortly after achieving federal recognition, the Tribe opened a bingo hall on the Reservation without first seeking regulatory approval from the state.<sup>29</sup> Connecticut objected,

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Connecticut successfully argued that the Schaghticoke Tribe did not meet the criteria for administrative recognition. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 421–22 (D. Conn. 2008) (Dorsey, J.) (holding that the “Reconsidered Final Determination” of the Department of the Interior was not arbitrary or the result of political influence by the state of Connecticut). The Eastern Pequot Tribe, which, similar to the Mashantucket Pequot Tribe, traces its heritage back to the historic Pequot Tribe, was granted federal recognition in 2002 only to have recognition similarly rescinded in 2005 after Connecticut again successfully argued that the Tribe failed to meet the requirements for an administrative recognition. The Interior Board of Indian Appeals determined that the Eastern Pequot Tribe did not meet the federal guidelines for recognition because the Tribe divided “into two groups in the early 1980s. . . . [and as such] are not the same community that existed before that time” and because “there was insufficient evidence of political authority or influence for the period 1913–1973.” Press Release, Department of the Interior, The Department of the Interior Issued Reconsidered Final Determination to Decline Federal Acknowledgment of the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut (Oct. 12, 2005) *available at* [http://www.doi.gov/news/archive/05\\_News\\_Releases/051012.htm](http://www.doi.gov/news/archive/05_News_Releases/051012.htm). The Mashantucket Pequot Tribe achieved its recognition through the political, rather than administrative, process by appealing to Congress directly for recognition. Even the political process of recognition proved difficult, and resulted in a Presidential Veto in its initial attempt. Mashantucket Pequot Indian Claims Settlement Bill, Veto Message, 19 WEEKLY COMP. PRES. DOC. 503-04 at 1–2 (Apr. 5, 1983) (“[T]he Tribe may not meet the standard requirements for Federal recognition or services that are required of other tribes. The Federal Government has never entered into treaties with this Tribe, and the Bureau of Indian Affairs has never provided services to them or exercised jurisdiction over any Indian lands in Connecticut. . . . Extending Federal recognition to the Tribe would bypass the Department of the Interior’s administrative procedures that apply a consistent set of eligibility standards in determining whether or not Federal recognition should be extended to Indian groups.”).

<sup>27</sup> 25 U.S.C. § 1754 (2012).

<sup>28</sup> *The History of the Mashantucket Pequot Tribal Court*, THE MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <http://www.mashantucket.com/mptntchistory.aspx> (last visited Sept. 24, 2014). The first opinion rendered by the court, *Lefevre v. Mashantucket Pequot Tribe*, 1 Mash. Rep. 1, 23 Ind. L. Rep. 6018 (Mashantucket Pequot Tribal Ct. 1992), involved a slip and fall injury that occurred in the Reservation’s bingo hall in 1988, several years before the creation of the Tribal Court system. The case was previously dismissed from both the Connecticut state and federal district courts for lack of jurisdiction, and while the decision by the federal district court essentially deprived the plaintiffs of a venue at a time when the Tribal Court did not exist, “the court’s decision, as harsh as it appears, is grounded in solid precedent and is consistent with federal policy that intrusions by federal courts upon tribal sovereignty be limited.” Edmond F. Leedham, III, *The Indian Gaming Controversy in Connecticut: Forging a Balance Between Tribal Sovereignty and State Interests*, Note, 13 BRIDGEPORT L. REV. 649, 681 (1993). Unfortunately for the plaintiffs, the Mashantucket Pequot Tribal Court also dismissed the case for lack of jurisdiction because the injury occurred before the creation of the court. *Lefevre*, 1 Mash. Rep. at 5. Apparently, there was simply no venue for the plaintiffs in this unfortunate case.

<sup>29</sup> Leedham, *supra* note 28, at 670 (“In February 1985, the Mashantucket Pequot Tribal Council opened a high stakes bingo hall on its reservation in Ledyard. Relying upon its status as a federally

contending that the Tribe was not excluded from the State regulation of bingo operations, and the Tribe took the initiative to enjoin the state from enforcing its bingo statutes on the Reservation.<sup>30</sup> The federal court agreed with the Tribe, marking the Mashantucket Pequot Tribe's first win in a series of cases asserting Tribal sovereignty over their on-Reservation activities.<sup>31</sup>

In 1988, Congress passed the IGRA.<sup>32</sup> The IGRA granted recognized Indian Tribes the ability to operate high-stake "Class III" gaming activities<sup>33</sup> on the Reservation as long as the games were permitted by the State for non-Indian entities.<sup>34</sup> Relying on Connecticut's "Las Vegas Nights" statute,<sup>35</sup> the Tribe attempted to enter into negotiations with the

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recognized Indian tribe, the tribal council declined to seek approval for its bingo operation from the State of Connecticut. Moreover, the tribal council, which enacted its own Bingo Control Ordinance, showed no intention of conforming to Connecticut law regarding the conduct of bingo games within the state.").

<sup>30</sup> Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986) (Dorsey, J.).

<sup>31</sup> The Tribe began its bingo operations in February 1985, and at that time the Tribe stated that it did not "intend to conduct its bingo games either pursuant or subject to the requirements of Connecticut law." *Id.* at 246. The case hinged on deciding "whether the tribe's conduct of bingo games remain[ed] solely within its sovereignty or [was] subject to the regulation and control of the State of Connecticut by reason of its bingo laws." *Id.* The court agreed with the Tribe, deciding that "the dominant character of the nature and purpose of Connecticut's bingo laws is regulatory and the single penal statute included therein . . . [is] found not to be enforceable under a grant of jurisdiction over criminal law." *Id.* at 249. The Tribe's motion for declaratory judgment was granted, and Connecticut was permanently enjoined from enforcing any of its bingo laws on the Reservation. *Id.* at 249–50.

<sup>32</sup> The IGRA was popularly known to have been the Congressional response to the Supreme Court of the United States' decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that Indian Tribes could offer, on their Reservations, any gaming activity allowed by the state. *Id.* at 211 ("In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."). Congress, eager to bolster the economic development and quasi-independence of the Indian Tribes, "codified the *Cabazon Band* holding [as the IGRA], giving congressional consent to high-stakes bingo operations conducted for tribal government purposes on tribal lands and under tribal regulations." Matthew L.M. Fletcher, *California v. Cabazon Band: A Quarter-Century of Complex, Litigious Self-Determination*, 59 FED. LAW., Apr. 2012, at 50, 51.

<sup>33</sup> Under the IGRA, Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) (2012). Class II gaming, the gaming that was central to the *Cabazon Band* ruling, includes "bingo" and "card games that are explicitly authorized by the laws of the State." *Id.* § 2703(7) (2012). Class III gaming "means all forms of gaming that are not class I gaming or class II gaming," which would include slot machines. *Id.* § 2703(8) (2012).

<sup>34</sup> 25 U.S.C. § 2710(d)(1) (2012) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity, and conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.").

<sup>35</sup> CONN. GEN. STAT. §§ 7-186a–186l (repealed effective Jan. 7, 2003). One of the considered effects of the repeal of the Las Vegas Nights statute was the possible prevention of any future federally recognized Tribes, such as the shortly recognized Eastern Pequot Tribe, from claiming a right to operate a casino on their Reservation. See Letter from Richard Blumenthal, Conn. Attorney Gen., to

State to allow Class III gaming on the Reservation. Connecticut refused to negotiate, and the Tribe brought the State to court to compel negotiations under the IGRA.<sup>36</sup> The negotiations that followed failed to produce a compact, and the State and Tribe submitted final proposals to a mediator tasked with selecting the proposal that best adhered to the tenets of the IGRA.<sup>37</sup> The mediator chose the State's proposal, but the State refused to accept the compact.<sup>38</sup> As a result, the Secretary of the Interior was obligated under the IGRA to select a set of procedures that would permit the Tribe to operate Class III gaming on their Reservation.<sup>39</sup> A slightly modified version of the State's proposal was adopted by the Secretary of the Interior.<sup>40</sup> With these Gaming Procedures in place, the Tribe began construction of what was at that time the largest casino in the world: Foxwoods Resort Casino.<sup>41</sup> The use of slot machines was never condoned in the State's Las Vegas Nights statute, which meant that the Tribe was unable to offer the popular gaming activity in their new casino. Rather than lobbying for the inclusion of slot machine gaming in the Las Vegas Nights statute, a revenue sharing plan, in which the state would be paid one-fourth of the "hold"<sup>42</sup> from slot machine operations, was implemented in the Memorandum of Understanding between the Mashantucket Pequot Tribe

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Conn. Senator Kevin B. Sullivan and Conn. Representative Moira K. Lyons (Dec. 20, 2002), available at <http://www.ct.gov/ag/lib/ag/indian/lasvegasnights.pdf> ("Thus, repeal of the Las Vegas Nights statute prior to the conclusion of the [Bureau of Indian Affairs' Interior Board of Indian Appeals] review [of the Eastern Pequot Tribe's federal recognition determination] should not provide a legal basis for the Eastern Pequots to claim a right to casino gaming based on a law no longer in effect. A federal district court has ruled that even federally recognized tribes cannot claim a right to casino gaming if a state repeals permitted gaming prior to the recognized tribes entering into a compact with the state.").

<sup>36</sup> *Mashantucket Pequot Tribe v. Connecticut*, 737 F. Supp. 169 (D. Conn. 1990) (Dorsey, J.). The section of the IGRA that allowed the Tribe to compel negotiations, 25 U.S.C. § 2710(d)(7) (2012), was ultimately held unconstitutional as a violation of the Eleventh Amendment. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 (1996) ("[W]e have found that Congress does not have authority under the Constitution to make the State suable in federal court . . .").

<sup>37</sup> Notice of Opportunity to Comment on Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 15,746 (Apr. 17, 1991).

<sup>38</sup> *Id.* ("The State . . . declined to accept the mediator's chosen compact, *i.e.*, the State's proposal.").

<sup>39</sup> *Id.* It is important to note that the State and Tribe follow the Gaming Procedures instead of a compact, though the Gaming Procedures serve an identical purpose.

<sup>40</sup> Notice of Final Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24,996 (May 31, 1991). The State proposal adopted by the Secretary to serve as the Gaming Procedures was altered only to add an amendment for patron tort remedies and temporary licensing by the State. Proposal of the State of Conn. For a Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Conn. at 1-2, *Mashantucket v. Connecticut*, Civil Action No. H89-717 (D. Conn. Apr. 17, 1991) [hereinafter the Gaming Procedures].

<sup>41</sup> The casino opened February 15, 1992. Originally, there were planned closing and opening times, but after the first day, several hundred patrons were still inside at closing time. The casino has remained open since that day. Sokolove, *supra* note 26.

<sup>42</sup> The "hold" is equal to the total amount paid into the slot machines decreased by the total amount paid out as winnings. *Id.*

and Connecticut.<sup>43</sup>

Since then, the Tribe has received the lion's share of its revenue through its casino operations,<sup>44</sup> though Foxwoods Resort Casino is far from the Tribe's only business enterprise. Outside of the Reservation, the Tribe owns and operates several businesses, including the Lake of Isles private golf club and the Spa at the Norwich Inn.<sup>45</sup> The most impressive enterprise owned by the Tribe remains its casino, which has grown significantly since it was opened in 1992. In May 2008, the Tribe opened the most recent expansion to its casino operations: the MGM Grand at Foxwoods Resort Casino.<sup>46</sup> This contemporary hotel and casino, though bearing the popular MGM brand, is owned and operated by the Tribe. Recently, MGM and the Tribe agreed to end the licensing agreement that allowed Foxwoods Resort Casino to use the MGM brand.<sup>47</sup> The MGM Grand at Foxwoods Resort Casino was renamed The Fox Tower to better reflect its Tribal ownership, while MGM remains hopeful that its brand can be put to a more profitable use once their ongoing bid to open their own casino in neighboring Massachusetts succeeds.<sup>48</sup> The Mashantucket Pequot Tribe is considering a similar expansion of its operations into Massachusetts, although a recent

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<sup>43</sup> MEMORANDUM OF UNDERSTANDING, CONN. AND THE MASHANTUCKET PEQUOT TRIBE (Jan. 13, 1993), *available at* [http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum\\_of\\_understanding\\_foxwoods%5B1%5D.pdf](http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum_of_understanding_foxwoods%5B1%5D.pdf) ("The Tribe agrees that, so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimiles or other commercial casino games, the Tribe will contribute to the State a sum [the "Contribution"] equal to twenty-five per cent (25%) of gross operating revenues of video facsimile games operated by the Tribe.")

<sup>44</sup> *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342, at \*1 (D. Conn. Mar. 27, 2012) ("Gaming is the Tribe's principal source of revenue and provides the funds to support government services and the general welfare of the Tribe and its members. The Tribe does have other revenue sources including a sales tax, a hotel occupancy tax, and an admissions tax for on Reservation transactions.")

<sup>45</sup> *Tribal Enterprises*, THE MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <http://www.mashantucket.com/enterprises.aspx> (last visited Sept. 24, 2014).

<sup>46</sup> Brian Hallenbeck, *Foxwoods, MGM Announce End to Licensing Agreement*, THE DAY (Oct. 25, 2013, 5:00 PM), <http://www.theday.com/article/20131025/BIZ02/131029789/1017>.

<sup>47</sup> *Id.* ("With MGM working toward a significant presence on the East Coast, it was the opportune time to review our relationship (with Foxwoods) and dissolve the licensing agreement, [MGM spokesman Clark] Dumont said. At this point, he added, the relationship involved only the licensing of the MGM Grand name and 'no operating revenues.'")

<sup>48</sup> See Matthew Sturdevant, *MGM Grand at Foxwoods Renamed The Fox Tower*, HARTFORD COURANT (Apr. 3, 2014), [http://articles.courant.com/2014-04-03/business/hc-foxwoods-mgm-grand-20140403\\_1\\_grand-pequot-tower-mashantucket-pequots-mgm-grand](http://articles.courant.com/2014-04-03/business/hc-foxwoods-mgm-grand-20140403_1_grand-pequot-tower-mashantucket-pequots-mgm-grand). While the Massachusetts Gaming Commission awarded MGM a license to build a casino and entertainment resort in Springfield, the ultimate outcome will be determined in November, when Massachusetts voters decide whether or not to repeal the law allowing casinos to be built in the state. Jon Camp, *Massachusetts Voters to Decide on Casino Law in November*, WALL ST. J. ONLINE (June 24, 2014, 3:21 PM), <http://online.wsj.com/articles/massachusetts-court-allows-ballot-measure-on-casino-law-repeal-1403621174>.

voter referendum may have halted that plan altogether.<sup>49</sup>

The Foxwoods Resort Casino and the Mashantucket Pequot Tribe were not immune to the economic damage brought about by the Great Recession.<sup>50</sup> Foxwoods Resort Casino, which has about \$2.3 billion in debt at the time of this writing, is in negotiations with its creditors to reduce that debt by about \$600 million.<sup>51</sup> While there are fewer people who feel financially secure enough to gamble, there are signs of a modest increase in casino patronage as the national economy recovers.<sup>52</sup> Whether this recovery will be maintained, especially considering future potential competition in Massachusetts, only time will tell.

### B. *Leading to Pequot II*

The Tribe advertises that it offers 5,500 slot machines in its casino.<sup>53</sup> A number of these slot machines are leased to the Tribe by several non-Indian, off-Reservation game companies. In 1997 and 1998, the Tribe contracted with Atlantic City Coin & Slot Co. (AC Coin), a New Jersey corporation, and WMS Gaming, Inc. (WMS), a Delaware corporation, to lease slot machines to the Tribe for use in the casino.<sup>54</sup> The contracts with both AC Coin and WMS stipulated that any taxes applicable to the slot machines would be assumed by the Tribe.<sup>55</sup> In 2001, the Tribe met again with AC Coin and WMS to renegotiate the terms of their contract. Specifically, the contracts were amended to state that “(1) the Tribe is not subject to state and local taxes; [and] (2) AC Coin or WMS will not file any declaration or pay any taxes with respect to gaming machines leased to the Tribe . . . .”<sup>56</sup> The Tribe believed that non-Indian property leased to them for gaming on the Reservation could not be taxed by the state. Despite the changes made to the contracts, AC Coin and WMS “continued

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<sup>49</sup> See Matthew Sturdevant, *Massachusetts Voters Reject Foxwoods’ \$1 Billion Casino Plan*, HARTFORD COURANT (Nov. 19, 2013), [http://articles.courant.com/2013-11-19/business/hc-milford-foxwoods-vote-1120-20131119\\_1\\_casino-license-casino-measure-casino-free-milford](http://articles.courant.com/2013-11-19/business/hc-milford-foxwoods-vote-1120-20131119_1_casino-license-casino-measure-casino-free-milford) (reporting that voters rejected the plan).

<sup>50</sup> “The Pequots misjudged the market, borrowed too much and expanded unwisely. Foxwoods’s debt is on a scale befitting the size of the property—\$2.3 billion.” Sokolove, *supra* note 26.

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

<sup>52</sup> *Id.* (“Revenues have continued to fall at Foxwoods, as they have for the last half-dozen years. But lately, the casino’s profits have been increasing. ‘We changed our focus to profitability,’ [Foxwoods Chief Executive Scott] Butera said . . . . [W]hat he meant was that Foxwoods had stopped chasing unproductive customers—table-game players whose perks added up to more than their losses—just to increase traffic.”).

<sup>53</sup> *Slots*, FOXWOODS, <http://www.foxwoods.com/slots.aspx> (last visited Sept. 24, 2014).

<sup>54</sup> *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342, at \*1–2 (D. Conn. Mar. 27, 2012).

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

<sup>56</sup> *Id.* at \*2.

to pay personal property taxes until the Tribe pressured them to stop.”<sup>57</sup>

In 2003, the accounting firm responsible for managing AC Coin’s taxes accidentally filed a property tax declaration with the Town of Ledyard.<sup>58</sup> This declaration included a list of all the slot machines leased to the Tribe.<sup>59</sup> Since receiving this declaration the town has levied a tax on the slot machines leased by AC Coin to the Tribe.<sup>60</sup> Amazingly, the accounting firm retained by WMS made a similar blunder in 2004, when the firm accidentally filed a property tax declaration which included all of the slot machines leased by WMS to the Tribe.<sup>61</sup> AC Coin, against the wishes of the Tribe, complied with all tax assessments from that point on.<sup>62</sup> WMS, on the other hand, paid the property tax assessed on the leased slot machines in 2006 under protest, and, at the behest of the Tribe, has not paid them since.<sup>63</sup>

In 2006, AC Coin filed an appeal with Ledyard’s Board of Assessment Appeals, arguing that the slot machines’ exclusive use on the Reservation for Indian gaming called for the preemption of the state tax. The Board was unconvinced,<sup>64</sup> and AC Coin, along with the Tribe, filed a complaint in the United States District Court for the District of Connecticut to request that Ledyard be enjoined from taxing the slot machines leased to the Tribe. Connecticut intervened as a defendant and filed a motion to dismiss,<sup>65</sup> marking the start of the *Pequot* Trilogy.<sup>66</sup>

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<sup>57</sup> *Pequot III*, 722 F.3d 457, 462 (2d Cir. 2013). The short time between the Tribe’s insistence that the tax no longer be paid and the accidental filing by the vendors’ accounting firms suggests that 2002 was the only successful year for the contract’s tax provision.

<sup>58</sup> *Pequot II*, 2012 WL 1069342, at \*2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*3.

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> Days before the *Pequot III* decision was published, “the Tribe notified the Court that AC Coin would cease operations on June 30, 2013.” *Pequot III*, 722 F.3d 457, 461 n.3 (2d Cir. 2013). WMS still leases slot machines to the Tribe at the time of this writing.

<sup>64</sup> *Id.* at 462.

<sup>65</sup> The State claimed that the District Court lacked subject matter jurisdiction over the controversy, though the Court disagreed. *Pequot I*, 2007 WL 1238338, at \*2 (“Taking the allegations [that the tax causes the Tribe economic harm and impedes self-government] as true, as this Court must on a motion to dismiss, the Tribe advances a claim to enforce its own rights and interests. . . . [In addition,] prior district courts have rejected comity as the basis of dismissal in the context of Indian tribes challenging state regulation.”). The Court similarly rejected the State’s assertion that the Tribe failed to state a relievable claim. *Id.* at \*3 (“Upon review of the complaint, this Court agrees that the Tribe has alleged a cognizable claim that the doctrines of federal preemption and tribal sovereignty preclude the taxation at issue.”).

<sup>66</sup> The Indian Trader Statutes, IRGA, and *Bracker*’s preemptive test may be the crux of *Pequot II* and *Pequot III*, but several incidental arguments were made by the State concerning jurisdiction: (1) the Tribe lacked standing to sue, (2) the action was outside the federal court’s jurisdiction under the Tax Injunction Act, and (3) the doctrine of comity compelled the court to dismiss the case. *Pequot III*, 722 F.3d at 462–66. The courts in *Pequot II* and *Pequot III* agreed with the Tribe on all of the jurisdictional arguments. *Id.* at 463 (“We find that (1) the district court properly reached the merits of the case . . .”).

### III. Preemption Under *Bracker*, the Indian Trader Statutes, and the IGRA

#### A. *The Bracker Preemption Analysis*

Decided in 1980, the Supreme Court of the United States opinion in *Bracker* provides a preemption test to determine the validity of state action when “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.”<sup>67</sup> The White Mountain Apache Tribe operated a logging business on their Arizona Reservation. As a part of that business they hired several non-Indian contractors to perform certain logging activities.<sup>68</sup> One contractor, Pinetop, was hired to fell trees on the Reservation and then transport the timber to the Tribe’s sawmill, which was also located on the Reservation.<sup>69</sup> The state sought to levy its generally applied motor carrier tax<sup>70</sup> and excise fuel tax<sup>71</sup> on Pinetop. Pinetop sued the State and the Tribe, which had previously agreed to bear the economic incidence<sup>72</sup> of any “tax liability incurred [by Pinetop] as a result of its on-reservation business activities,” intervened as a plaintiff after paying the taxes.<sup>73</sup>

The Court made it clear that in cases concerning “on-reservation conduct involving only Indians . . . state law is generally inapplicable, for

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The Tribe had standing because Indian Tribes are permitted to sue in cases where their sovereignty is unconstitutionally infringed by the state. “The injury in this case is neither speculative nor generalized; there is a real tax with measurable interference in the Tribe’s sovereignty on its reservation. The Tribe has standing to vindicate these interests.” *Id.* at 464 (citation omitted). The Tax Injunction Act limits certain state tax cases to the state court system by providing that “district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (2012). “Since we are required to decide whether the state tax at issue conflicts with the federal measures enacted for the Tribe’s protection, we have undoubted jurisdiction—notwithstanding the TIA—to perform that task. Recognizing this requirement, Congress bestowed on the federal courts original jurisdiction over ‘all’ federal claims brought by tribes.” *Pequot III*, 722 F.3d at 465. Finally, the case could not be dismissed due to comity because “there are strong federal interests in determining the contours of the Indian Trader Statutes and IGRA, two federal regulatory regimes that entirely occupy (and preclude state legislation in) fields of indeterminate size” and because “federal courts have regularly entertained Indian tribes’ challenges to state taxes.” *Id.* at 466.

<sup>67</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

<sup>68</sup> *Id.* at 138–39.

<sup>69</sup> *Id.* at 139.

<sup>70</sup> This was a 2.5% tax on gross receipts applied to any “‘contract motor carrier of property’ . . . engaged in ‘the transportation by motor vehicle of property, for compensation, on any public highway.’” *Id.*

<sup>71</sup> This excise tax consisted of a charge of “eight cents per gallon of fuel used ‘in the propulsion of a motor vehicle on any highway within this state.’” *Id.* at 140 (quoting ARIZ. REV. STAT. ANN. § 40-601(A)(1) (1974)).

<sup>72</sup> *Id.* at 151. The majority made it clear that the economic incidence on the Tribe is not what led to preemption, but rather “the pre-emptive effect of the comprehensive federal regulatory scheme.” *Id.* at 151 n.15. The majority’s discussion of economic incidence in the opinion was unexpected, and “would be used against the Indians in subsequent cases.” *Pomp*, *supra* note 6, at 1129.

<sup>73</sup> *Bracker*, 448 U.S. at 140.

the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."<sup>74</sup> The Court could not apply that general rule in this case, which they characterized as "a State assert[ing] authority over the conduct of non-Indians engaging in activity on the reservation."<sup>75</sup> To resolve this, the Court chose to wield "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."<sup>76</sup>

This inquiry, as applied to the facts of the case, yielded a stronger interest for the federal government and the Tribe. The Secretary of the Interior had "broad authority over the sale of timber on the reservation,"<sup>77</sup> and pursuant to that authority developed a series of regulations "to govern the harvesting and sale of tribal timber"<sup>78</sup> and "govern[] the roads developed by the Bureau of Indian Affairs."<sup>79</sup> The Court held that "the federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in this case,"<sup>80</sup> and that the interest inherent in the federal regulations were enhanced by the "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'"<sup>81</sup> This overwhelming federal interest easily outweighed the state's interest in a "general desire to raise revenue,"<sup>82</sup> and as such the Tribal interest went unaddressed. The "particularized" element of the preemption test was underscored in the Court's conclusion.

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<sup>74</sup> *Id.* at 144.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 145. The *Bracker* analysis is best characterized as an interest balancing test, rather than a traditional preemption analysis. See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101–02 (2005) (describing *Bracker* as putting forth an "interest-balancing test"); Pomp, *supra* note 6, at 1131 ("A classical preemption analysis would determine what Congress intended when it adopted a statute.").

<sup>77</sup> *Bracker*, 448 U.S. at 145.

<sup>78</sup> *Id.* at 146–47.

<sup>79</sup> *Id.* at 147. The roads regulated by the BIA included the roads being used in this case. *Id.* at 147–48.

<sup>80</sup> *Id.* at 148.

<sup>81</sup> *Id.* at 149.

<sup>82</sup> *Id.* at 150.

Arizona made a feeble attempt at asserting its interests by referring to a "general desire to raise revenue," which hardly merited any consideration. The roads used by the logging company were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors." Consequently, Arizona could not claim a quid pro quo to justify its tax. The reality was that Arizona had nothing to do with the logging operations, just the way it had no responsibility for the reservation in *Warren Trading*.

Pomp, *supra* note 6, at 1129 (citations omitted) (quoting *Bracker*, 448 U.S. at 150).

Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.<sup>83</sup>

*Bracker's* preemption rule was applied and reaffirmed in *Ramah Navajo School Board v. Bureau of Revenue*,<sup>84</sup> a decision that was authored by Justice Thurgood Marshall, the Justice who wrote the majority opinion in *Bracker* and introduced the *Bracker* balancing test into the common law.<sup>85</sup> *Ramah*, which had facts very similar to *Bracker*, was brought by a Tribe that employed a non-Indian contractor to build a school on their Reservation.<sup>86</sup> The state imposed its sales tax on the materials purchased by the contractor for the school's construction, and the Tribe, who reimbursed the contractor for these purchases, argued that the sales tax was preempted under *Bracker*.<sup>87</sup>

The Court agreed with the Tribe, holding that the federal government's "regulatory scheme precludes any state tax that 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"<sup>88</sup> Both the services provided by the state and the ultimate bearer of the sales tax were important factors in the Court's analysis.

The only arguably specific interest advanced by the State is that it provides services to [the non-Indian contractor] for its activities *off the reservation*. This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization. Furthermore, although the State may confer substantial benefits on [the non-Indian contractor] as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian

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<sup>83</sup> *Bracker*, 448 U.S. at 151.

<sup>84</sup> 458 U.S. 832 (1982).

<sup>85</sup> See Pomp, *supra* note 6, at 1126 ("Justice Marshall endorsed a 'particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' This language was ambiguous enough to be confused with a balancing test, which is the way some subsequent cases have interpreted it, although nowhere does [*Bracker*] use that phrase.") (citations omitted) (quoting *Bracker*, 448 U.S. at 145).

<sup>86</sup> *Ramah*, 458 U.S. at 835.

<sup>87</sup> *Id.* at 837.

<sup>88</sup> *Id.* at 845.

contracting firm.<sup>89</sup>

The *Bracker* decision represents the modern interpretation of the federal preemption of state taxes imposed on non-Indians doing business with the Tribes.<sup>90</sup> Under *Bracker*, a state tax may be imposed on a non-Indian engaging in an activity with a Tribe so long as the state has an interest strong enough to defeat the Tribal and federal interests at stake.<sup>91</sup> The federal interests are frequently divined by evaluating “the degree of federal regulation involved” in the case.<sup>92</sup> Collective laws like the IGRA and the Indian Trader Statutes are used as evidence of a strong federal interest in regulating Indian gaming and trade with Indians respectively, though the facts of the case must be in line with the type of regulation those federal statutes are written for.<sup>93</sup>

Federal interests receive the most attention in the two decisions, perhaps because the Courts in *Pequot II* and *Pequot III*, despite the opposing weight given to the identified interests, generally agree on the state, municipal, and Tribal interests at stake in the case. The state, as it so often does, has an interest in ensuring the uniform application of its generally applied property tax,<sup>94</sup> the town has an interest in collecting the

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<sup>89</sup> *Id.* at 843–44.

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[*Bracker's*] preemption analysis has come to overshadow the *Williams v. Lee* infringement test, the second of Marshall's two barriers to “the assertion of state regulatory authority over tribal reservations and its members.” . . . [P]reemption has come to encompass a balancing test, weighing the federal and tribal interests against the state's interests, with a backdrop of tribal sovereignty that presumably places a thumb on the scales in favor of the Indians. The preemption test appears to take into account the same values as the infringement test, leading Professor Jensen to conclude that in the tax context “preemption has effectively swallowed infringement.”

Pomp, *supra* note 6, at 1131 (citations omitted) (quoting Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 62 (2008)).

<sup>91</sup> *Ramah*, 458 U.S. at 838 (“The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight. Pre-emption analysis in this area is not controlled by “mechanical or absolute conceptions of state or tribal sovereignty”; it requires a particularized examination of the relevant state, federal, and tribal interests.”) (quoting *White Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

<sup>92</sup> *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008).

<sup>93</sup> See *infra* Part III.B and Part III.C for a discussion of cases evaluating federal interest in the Indian Trader Statutes and the IGRA.

<sup>94</sup> *Pequot III*, 722 F.3d 457, 474–76 (2d Cir. 2013) (“The Town and State have more at stake than the Tribe. The economic effect of the tax on the Tribe is negligible; its economic value to the Town is not. The Tribe's sovereign interest in being able to exercise sole taxing authority over possession of property is insufficient to outweigh the State's interest in the uniform application of its generally-applicable tax, particularly where, as here, there is room for both State and Tribal taxation of the same activity.”); *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342, at \*12 (D. Conn. Mar. 27, 2012) (“In this instance, the State and Town interests in the tax do not vindicate its imposition. The State's regulation of the gaming is funded by the amount the Tribe provides to the State pursuant to the Gaming

revenue needed to provide services to the Tribe,<sup>95</sup> and the Tribe has an interest in economic development and protecting its sovereignty.<sup>96</sup> Of course, *Pequot II* and *Pequot III* weigh these factors in drastically different ways.

In particular, the interest in protecting Tribal sovereignty has been progressively weakened since it was first used to completely insulate the Tribes from a state's exercise of authority in *Worcester v. Georgia*.<sup>97</sup> The

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Procedures. The State and Town's interest in compliance with the property tax on the vendors is diminished by the existence of legal precedent that had previously rendered the tax questionable and this decision finding the tax to be improper.”).

<sup>95</sup> *Pequot III*, 722 F.3d at 474–76 (“In this case, the Town has a cognizable economic interest in imposing the tax. The Supreme Court has recognized ‘the dependency of state budgets on the receipt of local tax revenues’ and ‘appreciate[s] the difficulties encountered by [local governments] should a substantial portion of [their] rightful tax revenue be tied up in’ litigation. The Town’s economic interest therefore exceeds the value of the taxes on slot machines, insofar as a ruling favorable to the Tribe could invite other non-Indian owners of personal property on the reservation to initiate similar actions.”) (citation omitted); *Pequot II*, 2012 WL 1069342, at \*12 (“The Town’s interest in funding the education and bussing of the Tribe’s children is weak because such services have no nexus to the taxed activity of gaming or even leasing gaming equipment. The maintenance of the roads to the Reservation has some connection to the taxed activity because the leased gaming equipment was brought onto the Reservation by way of the roads and the individuals who use the gaming equipment also use the roads to the Reservation.”).

<sup>96</sup> *Pequot III*, 722 F.3d at 473–74 (“The tax implicates two Tribal interests—economic development and sovereignty over the reservation—but the parties dispute the magnitude of the tax’s impact on each. The economic effect of the tax on the Tribe is minimal. . . . [But t]he tax has a moderate effect on tribal sovereignty. . . . The State’s personal property tax, as imposed on the slot machines located entirely on-reservation, overlaps with the Tribe’s ability to set the restrictions to property rights in its sovereign territory. . . . [T]his encroachment into an area of tribal sovereignty, however modest, is a recognized injury that must be considered in a *Bracker* balancing.”); *Pequot II*, 2012 WL 1069342, at \*11 (“[T]he Tribe has a strong interest in its ability to self-govern as facilitated by the economic revenue generated by the gaming activities. . . . [T]he Tribe bears the direct burden of ultimately bearing the cost of the taxes, which infringes upon the revenue generated by the Tribe’s gaming, the Tribe’s chief source of income. Accordingly, the Tribe’s substantial interest weighs against the imposition of the tax.”).

<sup>97</sup> 31 U.S. (6 Pet.) 515, 520 (1832) (“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.”). *Worcester*, and by extension a great deal of any preemptive power held in the Indian sovereignty doctrine, was reduced to a “backdrop” in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171–72 (1973) (“[We do not] say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because *it provides a backdrop against which the applicable treaties and federal statutes must be read*. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”) (emphasis added). At the very least, it is conceded that the Indian sovereignty doctrine can bolster federal, as well as Tribal, interests in a *Bracker* test.

argument that sovereignty is directly affected by the imposition of a tax is a common one, though its effectiveness varies, even when applied to contractors working for the federal government. The Supreme Court of the United States held in *Alabama v. King & Boozer*<sup>98</sup> that a federal contractor could not cloak their purchases in tax immunity merely by doing business with the federal government, even when the cost of the tax was passed on to the federal government.<sup>99</sup> It is tempting to apply the same rationale to *Pequot III*, but the rule is clear that

Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law . . . .<sup>100</sup>

Tribal sovereignty is fundamentally different from state or federal sovereignty. Whether Tribal sovereignty is offended enough to weigh in favor of *Bracker* preemption depends on the facts unique to the case. It is possible, and I would suggest more probable than not, that *Pequot III* would have had a different outcome if the Mashantucket Pequot Tribe was much less financially impressive, or if the property tax had a greater total impact on the Tribe's bottom line.

States generally have an interest in the uniform application of its laws and taxes. *Pequot III* holds this interest in high regard, considering it to be stronger than the federal and Tribal interest in ensuring the Tribe's economic development, and additionally opines that "[t]he Town's economic interest . . . exceeds the value of the taxes on slot machines, insofar as a ruling favorable to the Tribe could invite other non-Indian owners of personal property on the reservation to initiate similar actions."<sup>101</sup> The Second Circuit imagined that a ruling in favor of the Mashantucket Pequot Tribe would make the Reservation an easily accessible tax haven, a concern that has long been the bane of many Tribal

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<sup>98</sup> 314 U.S. 1 (1941).

<sup>99</sup> *Id.* at 12 ("[T]he legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the [sales] tax. They were not relieved of the liability to pay the tax either because the contractors, in a loose and general sense, were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.").

<sup>100</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (citation omitted).

<sup>101</sup> *Pequot III*, 722 F.3d at 475.

challenges to state taxation.<sup>102</sup> Tribal interest was defeated because the Court did not want to make it easy for non-Indians to avoid state taxation by engaging in certain types of business with the Tribe. An outcome favorable to the Tribe would be unfavorable to the town, and because of that, the town's interest outweighs the Tribe's. Why not *vice versa*?

*Pequot III*'s evaluation of the town and state interest is particularly precarious when compared to the more cogent assessment presented by *Pequot II*. *Pequot II* chose to give less weight to the state interests at stake, saying that the state's interest in uniform application was diminished by the simple existence of a precedent of allowing non-Indian activity within Indian country to be preempted from state taxation.<sup>103</sup> This seems like a much better view of the underlying purpose of the *Bracker* test than what we see in *Pequot III*. After all, sometimes the just outcome will rightly result in inconsistent state taxation. *Pequot II* additionally determined that the state's interest in financing the regulation of the Tribe's gaming operations through the tax was weakened because that regulation was funded by amounts paid by the Tribe as dictated by the Gaming Procedures.<sup>104</sup> This may be a little off base if taken out of context. Taxation would be quite cumbersome if every tax had to have a corresponding state action justifying that tax, but it is necessary for the tax to have a nexus with the taxed activity. *Pequot II* found that the town's interest in bussing and educating Tribal children had no nexus with the taxation of leased slot machines on the Reservation.<sup>105</sup> This is a significant point, as it is ultimately non-Indian vendors, and not the Tribe, who bear the burden of this tax. A nexus would have to be found in the services provided by the state to the non-Indian vendor. Of course, the delivery and removal of the leased slot machines would not be possible without roads, but even *Pequot III* only meagerly endorses the connection between road maintenance, slot

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<sup>102</sup> See, e.g., *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("It is *painfully apparent* that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.") (citation omitted) (emphasis added). The apparently bleak future described by the *Pequot III* opinion presumes that the activities and property related to gaming are not implicitly brought under federal control by the IGRA, which is discussed in greater detail in Part III.C.

<sup>103</sup> *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342, at \*12 (D. Conn. Mar. 27, 2012).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

machine taxation, and the Tribe.<sup>106</sup> Nexus may exist with services provided to the non-Indian vendor, but is that enough to weigh significantly in favor of the state over the Tribe? It was not in *Ramah*, and as such the answer must be an emphatic “no,” especially against the backdrop of Tribal sovereignty.

*Bracker* cannot provide a perfect or consistent answer, as balancing tests in general are frequently criticized for being “rudderless, affording insufficient guidance to decisionmakers.”<sup>107</sup> The courts disagree on the strength of each interest, which is invariably the outcome when two different people are asked to assign a “weight” to something as incorporeal as an interest. The value of a uniform tax system may mean the difference between order and anarchy to one judge, while a second may believe that a state overreaches when taxing an operation controlled by the federal government. The question of whether a preemption test is the best way to arrive at a just decision based on the unique facts of each case is outside the scope of this Comment. The Tribal and federal interests, weighed against the fairly feeble state interest in this case, is enough to resolve the *Bracker* test in favor of the Tribe. The state’s primary interest in uniformity is inadequate; the state’s nexus with the taxed property is untenable at best, and the federal government has at least two pieces of legislation suggesting that they prefer to engage in this relationship with the Tribe exclusively.

Aside from the *Bracker* balancing test, finding that either the Indian Trader Statutes or the IGRA denotes the exclusive federal regulation of a slot machine lease agreement between a non-Indian vendor and the Tribe would conclude the test in any U.S. jurisdiction, with preemption being the only comprehensible outcome.

#### B. *The Indian Trader Statutes*

The Indian Trader Statutes, created by Congress in 1834 to prevent Indians from being defrauded in their trading activities,<sup>108</sup> do not explicitly take away the states’ power to tax Indian Tribes. They rather, as decided in *Warren Trading Post*, “show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for

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<sup>106</sup> *Pequot III*, 722 F.3d at 475 (“The Town’s economic interest in the generally applicable tax is therefore connected, *in some respect*, to the generally available services that it provides.”) (emphasis added).

<sup>107</sup> *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 124 (2005) (Ginsberg, J. dissenting) (referencing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J. concurring)).

<sup>108</sup> *Cent. Mach. Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160, 165 (1980) (“One of the fundamental purposes of these statutes . . . [is] to protect Indians from becoming victims of fraud in dealings with persons selling goods . . .”).

state laws imposing additional burdens upon traders.”<sup>109</sup> The Court held that the sales tax levied on “sales made to reservation Indians on the reservation”<sup>110</sup> by the federally licensed Indian trader was, as the existence of the Indian Trader Statutes proved, outside of the authority that states have over the Indian Tribes.<sup>111</sup>

*Central Machinery Company v. Arizona Tax Commission*<sup>112</sup> reiterated and modestly extended the Indian Trader Statutes restrictions, but more importantly established that a state tax on sales made to reservation Indians could be preempted simply because the Indian Trader Statutes existed, regardless of the vendor’s licensing status as an Indian trader.<sup>113</sup> *Central Machinery*, an off-Reservation farm tractor retailer, sold several tractors to the federally recognized Gila River Indian Tribe.<sup>114</sup> The complaints and facts of the case were nearly identical to *Warren Trading Post* with two key distinctions: *Central Machinery* was not a federally licensed Indian trader and *Central Machinery* did not have “a permanent place of business on the reservation.”<sup>115</sup> Despite the fact that the Indian Trader Statutes explicitly forbade unlicensed trading with Indians,<sup>116</sup> the Court held that it was the simple “existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.”<sup>117</sup> As the Court chose to ignore the type of unlicensed trading specifically prohibited by the Indian Trader Statutes and instead focused on their preemptive meaning, the text of the Indian Trader Statutes is in effect irrelevant.<sup>118</sup> *Central Machinery* and *Warren Trading*

<sup>109</sup> *Warren Trading Post v. Ariz. State Tax Comm’n*, 380 U.S. 685, 690 (1965).

<sup>110</sup> *Id.* at 691–92. The distinction between Indians and non-Indians, as well as whether the activity occurred on or off-reservation, is extremely important. Sales to non-Indians on a reservation and sales to Indians off reservation are both taxable. Buying from a federally licensed Indian trader became almost entirely meaningless in the Court’s interpretation of the Indian Trader Statutes.

<sup>111</sup> The tax was held to violate the Indian Trader Statutes, not to preempt them. “Justice Black’s opinion reads like a straightforward preemption analysis. The comprehensive, all-inclusive, detailed regulations occupied the field and preempted the State tax. Congress had ‘undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.’” *Pomp*, *supra* note 6, at 1010–11 (quoting *Warren Trading Post Co.*, 380 U.S. at 692 n.18). The true preemptive use of the Indian Trader Statutes would come fifteen years later in *Central Machinery Company*.

<sup>112</sup> 448 U.S. 160 (1980).

<sup>113</sup> *Id.* at 165 (“It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.”).

<sup>114</sup> *Id.* at 161.

<sup>115</sup> *Id.* at 164.

<sup>116</sup> “Any person other than an Indian of the full blood who shall attempt to reside in the Indian country . . . or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of \$500 . . . .” 25 U.S.C. § 264 (2012).

<sup>117</sup> *Cent. Mach. Co.*, 448 U.S. at 165.

<sup>118</sup> The Court suggests that if the matter had been pressed, *Central Machinery* could be considered a de facto federally licensed Indian trader. “Although appellant was not licensed to engage in trading

*Post* began the line of cases adjudicating federal preemption under the Indian Trader Statutes. When used as evidence of a strong federal interest in a *Bracker* test, the Indian Trader Statutes preempt any state sales tax levied on a sale made on a reservation to a reservation Indian.<sup>119</sup>

The Supreme Court of the United States has refused to go any further than *Central Machinery*'s preemptive interpretation of the Indian Trader Statutes. They have declined to extend the preemptive power of the Indian Trader Statutes to taxes imposed on non-Indians making purchases on a reservation<sup>120</sup> and have held that the Indian Trader Statutes do not prevent a state from implementing "quotas" on tax-exempt reservation sales.<sup>121</sup> As interpreted today, preemption under the Indian Trader Statutes almost certainly occurs when the activity constitutes a sale on a reservation to a reservation Indian, though it is important to note that preemption under the Indian Trader Statutes has been limited solely to the imposition of state sales taxes.<sup>122</sup> There is a strong federal interest implicit in the Indian Trader Statutes, and as such, the federal and Tribal interests will almost always outweigh the state interest in imposing a sales tax meeting the criteria above.

The Court in *Pequot II* wanted to interpret the Indian Trader Statutes as something that the Supreme Court of the United States may have intended at one time in *Warren Trading Post*, but has since stepped away from in subsequent rulings. Certainly, the existence of the Indian Trader Statutes is strong evidence of the federal government's interest in

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with Indians, the Bureau of Indian Affairs had approved both the contract of sale for the tractors in question and the tribal budget, which allocated money for the purchase of this machinery." *Id.* at 165 n.4. "Apparently the Bureau either thought no license was required or was indifferent about whether one was. The Brief for the United States as Amicus Curiae states without any citation that 'in practice no "license" is issued for a single transaction.'" Pomp, *supra* note 6, at 1019 n.477 (citation omitted).

<sup>119</sup> State laws are preempted by federal laws when the state law "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). "In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).

<sup>120</sup> *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 155–56 (1980) ("The Indian trader statutes incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe.") (citations omitted).

<sup>121</sup> *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994) ("By imposing a quota on *tax-free* cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price.'" (citation omitted).

<sup>122</sup> In *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 32–33 (1885), property taxes levied on non-Indian property within a reservation were held to be valid. The decision has never been overruled, but since the opinion is very old, *Pequot II* does not discuss it and *Pequot III* dismisses it as being out of touch with contemporary law, which now requires a preemption analysis to support a property tax. *Pequot III*, 722 F.3d 457, 472 (2d Cir. 2013).

regulating trade with the Indian Tribes, but *Pequot II*'s analysis ends with *Warren Trading Post* without further deliberating on whether the imposition of a property tax on a leased slot machine is the type of state regulation that the Indian Trader Statutes preempt. *Pequot II* was right to characterize the lease as a sale to the Tribe,<sup>123</sup> but it cannot be said that the Connecticut property tax was levied on that transaction. Indian trading is the focus of preemption under the Indian Trader Statutes, and they have never been held to preempt the imposition of a property tax on property that is temporarily leased to the Tribe.

*Pequot III* followed precedent, and correctly kept the preemptive power of the Indian Trader Statutes limited to sales taxes. The Indian Trader Statutes would not preempt Connecticut's property tax, because the Indian Trader Statutes have the whole of their preemptive power directed toward transactions with the Indians. The analysis could stop there, but *Pequot III* continues, weighing the relevant state, Tribal, and federal interests in a preamble to their *Bracker* discussion.

The ultimate reason the Indian Trader Statutes fail to preempt the tax is because it is not a sales tax. However, it is important to recognize that a property tax on leased property presumably increases the cost passed on by the lessor to the lessee. Should the Indian Trader Statutes preempt a tax that would directly affect the trade price when the lessee is a Tribe? Not according to precedent. Had the tax been a sales or use tax, there would be no question that the strong federal interest in regulating Indian trade, manifested in the Indian Trader Statutes, would defeat any state interest, no matter how compelling. However, the tax was levied on the ownership of property, and as such, *Pequot III* correctly applied the common law rule when it held that "the Indian Trader Statutes do not preempt the personal property tax 'expressly or by plain implication.'"<sup>124</sup> Ruling otherwise would be, rightly or wrongly, a significant expansion of the preemptive power of the Indian Trader Statutes.

### C. *The Indian Gaming Regulatory Act*

The IGRA, drafted in 1988 by the Select Committee on Indian Affairs, was designed with three stated goals:

- (1) to provide a . . . means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
- (2) to . . . shield it from organized crime and other corrupting

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<sup>123</sup> 25 C.F.R. § 140.5(a)(6) (2014) ("*Trading* means buying, selling, bartering, renting, *leasing*, permitting and any other transaction involving the acquisition of property or services.") (emphasis added).

<sup>124</sup> *Pequot III*, 722 F.3d at 469 (quoting *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163, 175–76 (1989)).

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 necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.<sup>125</sup>

The IGRA allows a Tribe to conduct Class III gaming operations on its reservation if the state “permits such gaming for any purpose by any person, organization, or entity”<sup>126</sup> and is “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.”<sup>127</sup> While the Tribal-State compact does give the state the ability to negotiate the imposition of some authority over the gaming operations on a reservation, the IGRA explicitly provides that it cannot be read as “conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.”<sup>128</sup>

The IGRA does not explicitly preempt any state laws, nor does it prevent a state from imposing a tax on gaming operations if the Tribe agrees to it in the Tribal-State compact.<sup>129</sup> However, the federal interest in regulating Indian gaming is so strong, as is evident by the existence and purpose of the IGRA, that the Eighth Circuit decided in *Gaming Corporation of America v. Dorsey & Whitney*<sup>130</sup> that “Congress . . . left states with no regulatory role over gaming except as expressly authorized

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<sup>125</sup> 25 U.S.C. § 2702 (2012). More to the point on the IGRA’s federal regulatory authority over Indian gaming operations, the legislative history of the law suggests that the IGRA was written to provide

a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

S. Rep. No. 100-446, at 5–6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

<sup>126</sup> 25 U.S.C. § 2710(d)(1)(B) (2012).

<sup>127</sup> *Id.* § 2710(d)(1)(C) (2012).

<sup>128</sup> *Id.* § 2710(d)(4) (2012).

<sup>129</sup> *Id.* § 2710(d)(3)(C)(iv) (2012) (“Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to . . . taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . .”).

<sup>130</sup> 88 F.3d 536 (8th Cir. 1996).

by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact.”<sup>131</sup> In a Ninth Circuit case, *Cabazon Band of Mission Indians v. Wilson*,<sup>132</sup> a state fee imposed on all off track gaming operations was held to be preempted by the IGRA when applied to the Indian tribes hosting off track betting on their Reservation.<sup>133</sup> The IGRA made the federal interest so plain that preemption was essentially the only option, especially in *Wilson* where the state was actually making more money from collecting the fee from the Tribe than the Tribe made through its gaming operations.<sup>134</sup> The analysis in *Wilson* yielded a stronger interest for the federal government because the tax was directly imposed on an Indian gaming activity.<sup>135</sup>

Most relevant to *Pequot II* and *Pequot III*, though not binding in either case, was the Ninth Circuit’s decision in *Barona Band of Mission Indians v. Yee*.<sup>136</sup> In *Yee*, the Tribe challenged the imposition of a state sales tax on the materials purchased by the Tribe’s non-Indian contractor for an expansion of the Tribe’s casino.<sup>137</sup> The Court disagreed with the Tribe,

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<sup>131</sup> *Id.* at 546. The Eight Circuit suggested that the drafters of the IGRA “intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.” *Id.* at 544 (emphasis added).

<sup>132</sup> 37 F.3d 430 (9th Cir. 1994).

<sup>133</sup> *Id.* at 435.

<sup>134</sup> *Id.* at 433 (“The federal interests before us are clearly set forth in the language of IGRA itself. Intended to ‘promot[e] tribal economic development, self-sufficiency, and strong tribal governments, IGRA seeks to ‘ensure that the Indian tribe is the primary beneficiary of the gaming operation.’”) (quoting 25 U.S.C. §§ 2701(1)–(2) (2012)).

<sup>135</sup> *Wilson*, 37 F.3d at 433–35. The federal interest was held to be ensuring that the IGRA succeeded in its stated purpose “to ‘promot[e] tribal economic development, self-sufficiency, and strong tribal governments,’ . . . [and thus] to “ensure that the Indian tribe is the primary beneficiary of the gaming operation.” *Id.* at 433 (quoting 25 U.S.C. §§ 2701(1)–(2) (2012)). The federal interest was stymied by the State’s tax, especially when it was determined that the State collected more revenue from the gaming operations than the Tribes did. *Id.* at 433. The Tribal interest was determined to be the “commitment to operation of their gaming operations.” *Id.* at 435 (quoting the lower court’s correct interest assessment in *Cabazon Band of Indians v. California*, 788 F. Supp. 1513, 1521 (E.D. Cal. 1992)). It was determined that whether or not the value of gaming operations occurred on or off the reservation was inconsequential.

[T]he Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary . . . that the entire value of the on-reservation activity come from within the reservation’s borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others.

*Id.* at 435. Finally, the State’s interest was decided to be the uniform regulation of off track gaming operations. *Id.* While valid, the state interest is weakened “because IGRA specifically recognizes such state regulation and establishes a mechanism—the compacts—by which [the Tribes] can reimburse the State for regulatory costs, outside of the State tax structure.” *Id.* “The express objectives of IGRA, when combined with the Bands’ interests, preclude the application of the State’s license fee.” *Id.*

<sup>136</sup> 528 F.3d 1184 (9th Cir. 2008).

<sup>137</sup> *Id.* at 1186.

holding that the

IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct the gaming facilities. IGRA's core objective is to regulate how Indian casinos function so as to "assure the gaming is conducted fairly and honestly by both the operator and players."<sup>138</sup>

The outcomes in *Wilson* and *Yee* demonstrate that the IGRA explicitly preempts state taxes that are directly levied on a Tribe's gaming operations.<sup>139</sup> A Court must decide what constitutes a gaming operation and whether or not the federal interest in the IGRA is targeted toward the activity that the state is attempting to tax.

In this case, it must be decided whether the property tax impacts a gaming operation intended to be exclusively regulated by the federal government under the IGRA. If the answer is yes, then there would be almost no state interest strong enough to defeat the federal interest in regulating Indian gaming operations. *Pequot III*, in deciding that the IGRA was not applicable to the case at hand, conceded this point when they adopted the Eighth Circuit's decision in *Whitney*, agreeing that under the IGRA "the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact."<sup>140</sup> Rather than engage in a lengthy discussion of whether or not the property tax infringes on the federal government's IGRA interest, *Pequot III* states unequivocally that "under IGRA, *mere ownership* of slot machines by the vendors does not qualify as gaming, and taxing such ownership therefore does not interfere

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<sup>138</sup> *Id.* at 1193. Of course, this conveniently leaves out the IGRA's very relevant core objectives of encouraging Tribal economic development and ensuring that the Tribe is the primary beneficiary of the gaming operation.

<sup>139</sup> While *Wilson* is almost certainly correct in its interpretation of the federal interest implicated in the IGRA, there has been some criticism of the decision in *Yee*.

What struck me in the opinion was the anti-tribal tone of the decision. After mentioning that the tribe's "right of territorial autonomy is significantly compromised by the Tribe's invitation to the non-Indian subcontractor to theoretically consummate purchases on its tribal land for the sole purpose of receiving preferential tax treatment," the court added that the tribal interest in economic self-sufficiency was diminished because the commercial activity was "rigged" to trigger a tax exemption, and that such tribal interest "lessens in the specific context of a multi-million casino expansion." Finally the court mentioned that the state did have a strong interest in preventing an Indian casino from "manipulating" its tax laws to shop tax exemptions to local businesses.

Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 FED. LAW., Apr. 2013, at 35, 39. Professor Skibine also compares the dissimilar preemption outcomes of *Yee* and *Pequot II*, albeit very briefly. *Id.*

<sup>140</sup> *Pequot III*, 722 F.3d 457, 470 (2d Cir. 2013) (quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996)).

with the ‘governance of gaming.’”<sup>141</sup> *Pequot II*, with equal confidence, takes the opposite view, stating that the “the instant commercial activity, the leasing of class III gaming equipment, is not peripheral to IGRA’s core objective, the regulation of the functioning of the Tribe’s casino.”<sup>142</sup> Neither court substantially supports their conclusions, though they are certainly right to do so since there is no binding support for either determination. The question of whether the leasing of slot machines from non-Indian vendors qualifies as a gaming operation is one of first impression.

*Pequot III* cites to *Yee* in determining that the tax was not preempted by the IGRA.<sup>143</sup> In holding that the IGRA “does not occupy the field with respect to sales taxes imposed on third-party purchases,”<sup>144</sup> the Ninth Circuit in *Yee* decided that the IGRA was not indicative of a federal interest in preempting a sales tax imposed on a non-Indian party contracted by a Tribe to build a gaming facility.<sup>145</sup> The Tribal-State compact was not evaluated as part of the IGRA preemption analysis in *Yee*, as the court determined the issue was “outside the scope of the compact.”<sup>146</sup> *Yee* quotes *In re Indian Gaming Related Cases*<sup>147</sup> to support this conclusion, saying “[s]tates cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities.”<sup>148</sup> *Yee* relies on *In re* to exclude the compact from consideration altogether, presumably because it is the Ninth Circuit’s view that the taxation of property used to construct a casino on a reservation cannot be related to gaming activities and is therefore not includable in a compact. The reliance on *In re* to exclude the compact is unusual, especially considering that the opinion interpreted direct relationships to gaming activity “broadly.”<sup>149</sup> *In*

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<sup>141</sup> *Pequot III*, 722 F.3d at 470.

<sup>142</sup> *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342 at \*9 (D. Conn. Mar. 27, 2012).

<sup>143</sup> *Pequot III*, 722 F.3d at 470.

<sup>144</sup> *Yee*, 528 F.3d at 1193.

<sup>145</sup> *Id.* (“Extending IGRA to preempt any commercial activity remotely related to Indian gaming—employment contracts, food service contracts, innkeeper codes—stretches the statute beyond its stated purpose.”).

<sup>146</sup> *Id.* at 1193 n.4. In this footnote, the Court reaffirmed its stance that “[t]he question before us is properly framed as a tax levied on a non-Indian tribe.” Presumably, they meant to frame the issue as a tax on a non-Indian contractor.

<sup>147</sup> 147 F. Supp. 2d 1011 (N.D. Cal. 2001).

<sup>148</sup> *Yee*, 528 F.3d at 1193 n.4 (quoting *In re Indian Gaming Related Cases*, 147 F. Supp. 2d at 1018).

<sup>149</sup> *In re Indian Gaming Related Cases*, 147 F. Supp. 2d at 1017–18. (“The Court reads § 2710(d)(3)(C), and specifically § 2710(d)(3)(C)(vii), more broadly than [the Tribal plaintiff] does. The committee report of the Senate Select Committee on Indian Affairs describes the subparts of § 2710(d)(3)(C) as ‘broad areas.’ See S. Rep. No. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084. Consistent with this description, the Court interprets ‘subjects that are directly related to the operation of gaming activities’ to include any subject that is directly connected to the operation of gaming facilities.”).

*re Indian Gaming Related Cases* advocates the position that, while states should not be allowed to insist on provisions indirectly related to gaming, the language of a compact should absolutely be considered in cases where the Tribe agrees with the state on substantial terms related to gaming in a fairly negotiated compact under the IGRA, even in cases where those terms favor the state. *Yee* provided insufficient justification for concluding that casino construction was unrelated to gaming, and *Pequot III*'s IGRA analysis suffers for its reliance on *Yee*.<sup>150</sup>

Assuming the interpretation of a compact is germane to an IGRA preemption consideration, it is important to revisit the Gaming Procedures governing the relationship between Connecticut and the Mashantucket Pequot Tribe. The Gaming Procedures define a gaming operation as “any enterprise operated by the Tribe on its Reservation for the conduct of any form of Class III gaming in any gaming facility.”<sup>151</sup> The Gaming Procedures prohibit the state from taxing a gaming operation, unless explicitly authorized in the section allowing the state to assess and collect the cost of regulatory expenses.<sup>152</sup> It follows from the “gaming operation” definition that slot machines, a necessary tool for Class III gaming, would be considered a part of a gaming operation. The crucial question is whether leasing Class III gaming equipment is part of a gaming operation. If it is, then a property tax on that equipment ought to be preempted under the IGRA.

Ultimately there is no right or wrong answer, at least where controlling precedent is concerned. *Pequot II* was correct in holding that the tax impacted an aspect of the Tribe's gaming operations.<sup>153</sup> After all, the possession of slot machines is the first, most necessary step to participating in a Class III gaming operation permitted under the IGRA. *Pequot III*, meanwhile, is correct in holding that the tax is to be levied on the non-Indian lessors of the slot machines rather than the Tribe, while simultaneously acknowledging that the Gaming Procedures forbid state taxation of a gaming operation not explicitly outlined within the Gaming

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<sup>150</sup> *Pequot III*, 722 F.3d 457, 470 (2d Cir. 2013).

<sup>151</sup> Gaming Procedures, *supra* note 40, at 5. An “enterprise” is defined as “any individual, trust, corporation, partnership, or other legal entity of any kind other than a tribal enterprise wholly owned by the Mashantucket Pequot Tribe.” *Id.* at 4.

<sup>152</sup> *Id.* at 50–51 (“Nothing in this Compact shall be deemed to authorize the State to impose any tax, fee, charge or assessment upon the Tribe or any Tribal gaming operation except for charges expressly authorized pursuant to section 11 of this Compact.”).

<sup>153</sup> *Pequot II*, No. 3:06cv10-12, 2012 WL 1069342 at \*9 (D. Conn. Mar. 27, 2012) (“However, the instant commercial activity, the leasing of class III gaming equipment, is not peripheral to IGRA's core objective, the regulation of the functioning of the Tribe's casino. The fact that the Gaming Procedures afford the State authority to register and investigate vendors of the class III gaming equipment reflects that the leasing of the equipment is within IGRA's protective framework and constitutes engaging in class III gaming.”).

Procedures.<sup>154</sup> Under *Dorsey & Whitney*, this caveat in the Gaming Procedures would support the arguments of the Mashantucket Pequot Tribe, but only if the deciding Court agrees that non-Indian vendor slot machine leasing is connected to the gaming operation.<sup>155</sup> If one were to decide the case with *Yee* as precedent, it can be fairly concluded that the taxation of property owned by non-Indians is always unaffected by the IGRA and could only be preempted under a *Bracker* test, even in cases where that property is involved in a gaming operation. But *Yee* failed to consider the economic purpose of the IGRA or to adequately justify its conclusion that casino construction was outside the scope of the IGRA, and it is reasonable to conclude, even under *Yee's* improperly narrow interpretation, that the possession of the slot machines for a gaming purpose by the Tribe is within the regulatory control of the IGRA.

As a weight in a *Bracker* analysis, it is significant that the IGRA requires a state to participate in the regulation of the Tribe's gaming operation through the negotiation process,<sup>156</sup> whereas other statutes, like the Indian Trader Statutes, give exclusive regulatory responsibility to the federal government.<sup>157</sup> The absence of state participation in the taxed activities in *Bracker* and *Ramah* weighed heavily against the state interest in imposing the tax. Connecticut is not a bystander in the Mashantucket Pequot Tribe's gaming operation, but neither is it uncompensated for its participation.<sup>158</sup> The Gaming Procedures provide procedures for the state to be reimbursed for their services to the Tribe, and clearly forbid any other state taxation on a gaming operation. As the state cannot claim to be levying the tax to recoup on services provided to the Tribe, and because the slot machines are so integral to the existence of the Tribe's Class III gaming operation, the participation of the state in the gaming process is not a significant factor in either the *Bracker* balancing test or the IGRA

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<sup>154</sup> *Pequot III*, 722 F.3d at 470–71 (“While the Gaming Procedures prohibit State taxation of ‘any Tribal gaming operation’ other than those explicitly permitted, Gaming Procedures § 17(f), they are silent as to taxes imposed on a third party’s ownership of slot machines on the Tribe’s land, which, as explained above, is not ‘gaming.’ Absent the Gaming Procedures, IGRA would not preempt the tax. With the Gaming Procedures, which are silent on the question of state taxation of the vendor’s property, the analysis is unchanged.”).

<sup>155</sup> *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) (“Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes.”).

<sup>156</sup> See *supra* notes 31–42 (recounting the IGRA mandated negotiation process between Connecticut and the Mashantucket Pequot Tribe).

<sup>157</sup> See *supra* Part III.B (discussing the Indian Trader Statutes).

<sup>158</sup> *Gaming Procedures*, *supra* note 40, at 37–39 (providing the procedure by which Connecticut will “annually make an assessment sufficient to compensate the State for the reasonable and necessary costs of regulating gaming operations and conducting law enforcement investigations pursuant to this compact”).

preemption analysis.

There is no controlling precedent or bright-line rule for how far the preemptive power of the IGRA goes, so both *Pequot II* and *Pequot III* enjoy the privilege of being technically correct with their interpretations of the interests manifested by the IGRA. The IGRA was not written to protect non-Indian vendors from state taxation, but it was written to protect the economic development of a Tribe's gaming industry.<sup>159</sup> In this case, I believe the economic purpose of the IGRA and the language of the Gaming Procedures is sufficient to preempt Connecticut's property tax without weighing the interests in a *Bracker* analysis.

#### IV. CONCLUSION

The Supreme Court today would almost certainly agree with the opinion in *Pequot III*. After all, the Second Circuit Court of Appeals made an appropriate ruling based on their evaluation of the federal, state, and Tribal interests at stake. While *Pequot III* applied the law in a perfectly reasonable way, *Pequot II* offers what I believe to be the more convincing opinion.

The revitalization of the Indian Tribes is arguably the central motivation behind the IGRA, which was developed to make it especially easy for Tribes to participate in the gaming industry.<sup>160</sup> It follows that the preemption of state taxes affecting that gaming industry, however slightly, would be implicit in the IGRA's goal of economic development. The IGRA's preemptive power is augmented when, as in this case, the negotiated Tribal-State gaming compact explicitly details how the state will be reimbursed for the regulatory costs associated with the Tribe's gaming operation and rejects all other taxation.

Given the increasingly minute importance afforded to Tribal sovereignty, it may simply be the rule that the right of a state to tax an activity with a minimal nexus cannot be defeated by the existence of federal oversight. Of course, future judges may choose to reintroduce and reinvigorate the importance of protecting Tribal sovereignty and reverse the marginalization of what was once an important facet of federal supremacy.

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<sup>159</sup> 25 U.S.C. § 2702 (2012) (stating that the IGRA's purpose included providing the "means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . .").

<sup>160</sup> See *supra* notes 124–27 (discussing the IGRA's purpose and gaming provisions).

