



# Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine

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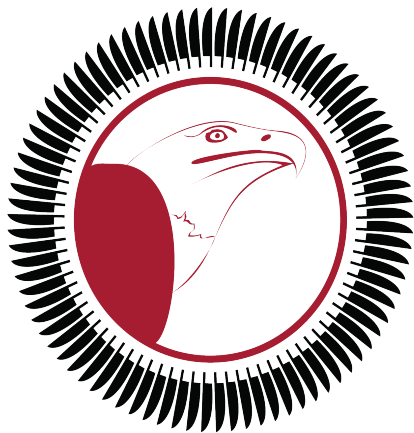
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**Economic and Social  
Impacts of Restrictions  
on the Applicability of  
Federal Indian Policies  
to the Wabanaki Nations  
in Maine**



**THE HARVARD PROJECT ON  
AMERICAN INDIAN ECONOMIC DEVELOPMENT**

**HARVARD KENNEDY SCHOOL • HARVARD UNIVERSITY  
ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION**

*Research Report  
by  
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Jonathan B. Taylor*

**December 2022**

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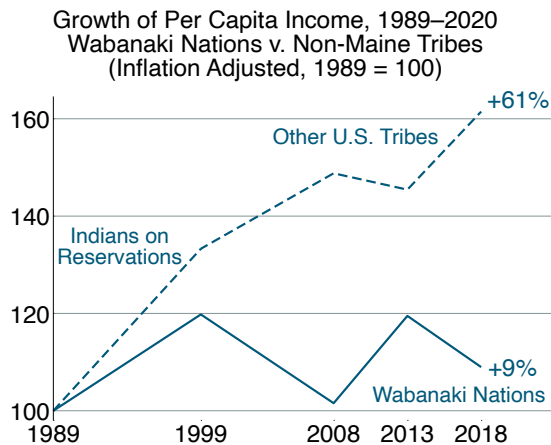
# Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine

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## Executive Summary

For at least the last several decades, federal Indian policy in the US has supported tribal self-determination through tribal self-government. The results have been (1) remarkable economic growth across most of Indian Country, and (2) concomitant expansions of the responsibilities and capacities of tribal governments. Hundreds of tribes across the other Lower 48 states now routinely serve their citizens with the full array of governmental functions and services that we expect from non-Indian state and local governments in the US, and increasing numbers of tribes are the economic engines of their regions.



Unique to Maine, the federal Maine Indian Claims Settlement Act of 1980 (MICSA) empowers the state government to block the applicability of federal Indian policy in Maine. As a result, the development of the Wabanaki Nations’ economies and governmental capacities have been stunted. Today, all four of the tribes in Maine—Maliseet, Mi’kmaq, Passamaquoddy, and Penobscot—are stark economic underperformers relative to the other tribes in the Lower 48 states.

The subjugation of the Wabanaki Nation’s self-governing capacities is blocking economic development to the detriment of both tribal *and non-tribal* citizens, alike. For the tribal citizens of Maine

held down by MICSA’s restrictions, loosening or removing those restrictions offers them little in the way of downside risks and but much in the way of upside payoffs.

Importantly, we find in this study that “nowhere to go but up” also applies to the Maine state government and Maine’s non-tribal citizens. From case after case, the pattern that has emerged under federal policies of tribal self-determination through self-government is one in which tribal economic development spills over positively into neighboring non-tribal communities and improves the abilities of state and local governments to serve their citizens. As is the case with any neighboring governments, conflicts can arise between tribal and non-tribal governments. The overall experience outside of Maine in this regard has been that increasingly capable tribal governments improve state-tribal relations by enabling both parties to come to the table with mature capacities to cooperate. Against these upside prospects is a status quo in which all sides leave economic opportunities on the table and ongoing cycles of intergovernmental conflict, litigation, recrimination, and mistrust continue.



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Joseph P. Kalt, Amy Besaw Medford, and Jonathan B. Taylor<sup>1</sup>

December 2022

## I. Should the Wabanaki Nations Be Brought Under Federal Policy?

### A. Maine stands out for its insulation of its tribes from federal Indian policy

The federally recognized American Indian tribes of Maine—the Mi'kmaq Nation, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation—together constitute the Wabanaki Confederacy (Wabanaki Nations, see Figure 1).<sup>2</sup> The Wabanaki Nations are unique among the 574 federally recognized tribes in the United States due to particular provisions of the Maine Indian Claims Settlement Act of 1980 (MICSA, P.L. 96-420). Specifically, MICSA provides that any federal law enacted for the benefit of Indian tribes which would affect the application of Maine state law does not apply in Maine and to the Wabanaki Nations unless the US Congress explicitly makes that law applicable in Maine.

The key MICSA clauses are referred to as “6(h)” and “16(b)”. They read:

§6(h) Except as other wise [*sic*] provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, *except that no law or regulation of the United States* (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian

<sup>1</sup>Professor Joseph P. Kalt is Co-Director, and Amy Besaw Medford and Jonathan B. Taylor are Research Affiliates of the Harvard Project on American Indian Economic Development (“the Harvard Project” or HPAIED). Thank you to the Wabanaki Alliance, a 501(c)(4) organization of the Wabanaki Nation’s governments, for financially supporting the Harvard Project and its research. The findings and views expressed here are those of the authors and do not necessarily represent those of the authors’ employers, the John F. Kennedy School of Government, Harvard University, or the Wabanaki Nations.

<sup>2</sup>These four tribes are as named in the most recent Bureau of Indian Affairs list of federally recognized tribes (BIA, 2022). The Passamaquoddy Tribe consists of two political subdivisions—Pleasant Point and Indian Township, each of which has its own tribal council. These combine to form the Passamaquoddy Tribe’s overall council when it is necessary to address pan-Passamaquoddy policy issues such as the development of Passamaquoddy land or hunting, fishing, trapping, and gathering rights. The Passamaquoddy Tribal Court has jurisdiction over matters arising in the two communities. NOTE: material herein not otherwise cited or credited was provided by one or more of the five Wabanaki governments.



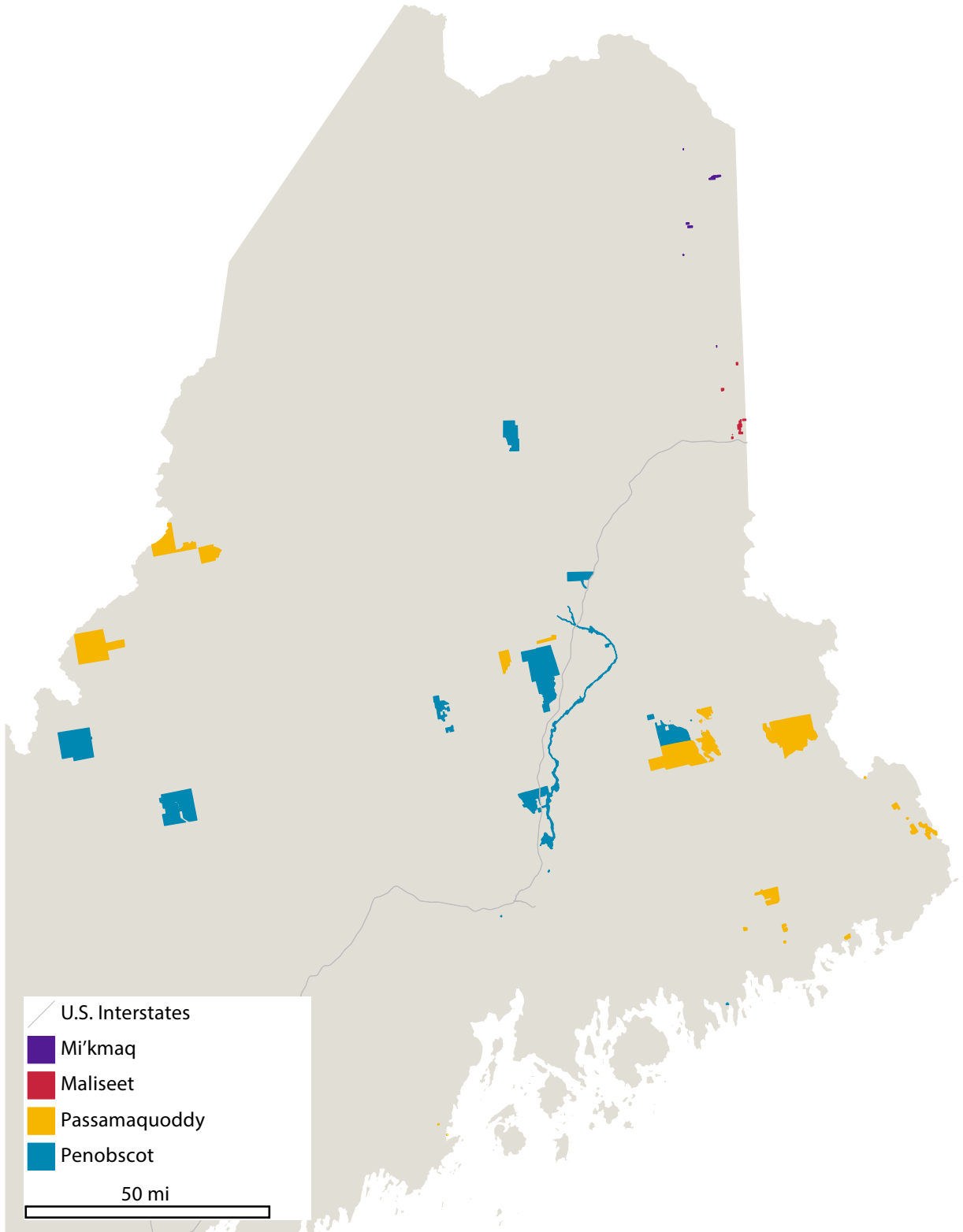
country, Indian territory or land held in trust for Indians, and also (2) *which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine*, including, without limitation, laws of the State relating to land use or environmental matters, *shall apply within the State*. (P.L. 96-420 §6(h), 94 Stat. 1794, emphases added)

and

§16(b) The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, *unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine*. (P.L. 96-420 §16(b), 94 Stat. at 1797, emphasis added)



Figure 1: The Wabanaki Nations in Maine



(Census, 2022)





To investigate the impacts of MICSA’s pre-emption of federal Indian policy on the Wabanaki Nations, the Maine Legislature established a Task Force on Changes to the Maine Indian Claims Settlement Implementing Act (Task Force). This Task Force commissioned a study of federal laws passed since MICSA’s signing. The study found that 151 federal laws governing Indians and tribes have been passed since MICSA, covering the wide range of topics summarized in Figure 2.

Figure 2: Principal Subject Matter of 151 Federal Indian Laws, 1980–2019.



*Social welfare* here includes the categories “criminal,” “alcohol/substance abuse prevention,” and “welfare.” *Economic development* here includes “business” and “finance/funding.” Some overlap in categories may exist in the federal bills (Friederichs, 2019, 2022).

The period encompassing federal Indian policy since at least the mid-1970s is widely referred to as the Self-Determination Era—and with good reason. Over the period, federal policy has quite consistently, if not invariably, sought to expand and fund the scope of tribes’ self-governing rights, responsibilities, and opportunities (HPAIED, 2008; SGCETC, 2022). Not surprisingly, then, much of the federal legislation implicated by MICSA has been policy adopted “for the benefit of” (per MICSA, §16(b)) Indian tribes. Among the 151 measures identified by the Task Force-commissioned study, Acts readily considered seminal for federal Indian policy include:

- The American Indian Religious Freedom Act
- The Clean Water Act Amendments of 1987
- The Esther Martinez Native American Languages Preservation Act
- The Indian Civil Rights Act

- The Indian Gaming Regulatory Act
- The Indian Health Care Improvement Act
- The Indian Self-Determination Act Amendments of 1988 and 1994
- The Indian Tribal Economic Development and Contract Encouragement Act
- The Indian Trust Asset Reform Act
- The Native American Graves Protection and Repatriation Act
- The Native American Housing Assistance and Self-Determination Act
- The Safe Drinking Water Act Amendments of 1986 and 1996
- The Stafford Act
- The Tribal Law and Order Act
- The Tribal Self-Governance Act of 2000
- The Violence Against Women Act

According to the principal author of the Task Force-commissioned study, Suffolk University Law School Practitioner-in-Residence Nicole Friederichs, not one of the 151 laws contains explicit mention of applicability to Maine. Only the 2022 reauthorization of the Violence Against Women Act (VAWA), which was passed after she completed her study, did so (Friederichs, 2022).

The Maine Task Force also found:

Given the broad nature of these provisions [the two sections of MICSA quoted above], any law for the benefit of Indian country that in any way “affects” Maine law may be rendered inapplicable in Maine. For example, it is theoretically possible that provisions within *each* of the laws enumerated in the report submitted by the Suffolk University Law School Clinic to the Task Force...may be rendered inapplicable in Maine if those provisions conflict with state law to some degree. (e.g., Carpenter et al., 2020, 56, emphasis added)

MICSA does not define or delineate what it means for a federal law benefiting Indians to “affect” or “preempt” Maine state law. In practice, this has meant that costly burdens of proving to the contrary fall upon the tribes. As the Head of State of the Penobscot Nation, Chief Kirk Francis of the Penobscot Nation, observed to Congress, “There is no definition for the term ‘affects’ in the Settlement Act, and the general definition of the term is incredibly broad.” (Francis, 2022, 3)

Unsurprisingly, interpreting the meaning of *affects* or *preempts* produces considerable uncertainty, litigation, and delay whenever Wabanaki governments tread too controversially in the direction of state interest groups’ prerogatives. This has a chilling effect on tribal policy implementation. As Chief Clarissa Sabattis of the Houlton Band of Maliseet Indians reported to Congress,



There are scores of federal statutes that recognize a key role for tribal governments in administering federal programs, including in the health care, law enforcement and public safety, and environmental arenas. But we cannot confidently pursue, invest in, and staff these programs because we don't know whether—or when—the State may challenge our authority to administer the programs due to some effect on state jurisdiction. (Sabattis, 2022, 3)

Thus, unlike virtually all other tribes in the lower forty-eight states,<sup>3</sup> the Wabanaki governments have extreme difficulty making use of core features of federal policies which articulate and fund tribal nation self-determination in the United States. In this study, we seek to assess the economic and social impacts MICSA's limitations on the applicability of federal Indian policy to the Wabanaki Nations have had and are having on the State of Maine and the Wabanaki Nations.

## **B. Proposals to loosen or eliminate MICSA's limitations on the applicability of federal Indian policy in Maine**

Currently, Congress is considering H.R. 6707: *Advancing Equality for Wabanaki Nations Act* (AEWNA) (House of Representatives, 2022). In overall effect, the bill would soften MICSA's restrictions on the application of federal law to the Wabanaki Nations. With respect to beneficial federal Indian laws enacted by Congress in the future, by entirely striking the second quoted MICSA passage above (§16(b)), AEWNA would eliminate the requirement that future legislation specifically mention Maine for federal laws to apply to the Wabanaki Nations. With respect to laws existing as of the AEWNA's passage, the bill would modify the first quoted section (§6(h)) with the following strikeouts and additions:

~~Except as otherwise provided in this Act, the~~ The laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for or enacted for the benefit of Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) that is in effect as of the date of the enactment of the Advancing Equality for Wabanaki Nations Act, (2) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and ~~also (2) also~~ (3) which affects or preempts the civil, criminal, or regulatory jurisdiction

<sup>3</sup>In this report we focus on the Lower 48 because the *sui generis* policy, geography, jurisdiction, and economies of Alaska Natives and Native Hawai'ians render them analytically distinctive for our analyses. For example, though Alaska Natives comprise a large fraction the total state population, there is only one Alaska reservation (the Annette Island Reserve) analogous to the Wabanaki reservations. Conversely, Maine has no equivalent to the Alaska Native Regional Corporations or Alaska Native Village Corporations created under the Alaska Native Claims Settlement Act (43 U.S.C. §1601 *et seq.*).



of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State, unless Federal law or the State laws of Maine provide for the application of such Federal law or regulation. (H.R. 6707 §2(a)(2)(B)(v))

We understand that the last underlined addition here would effectively open the door for Maine to approve the application of federal Indian laws in Maine. And indeed, the Maine Legislature’s Task Force, charged with consideration of the overall public interests of Maine’s Native and non-Native citizens, concluded its work as of January 2020 by calling for the elimination of MICSA’s restrictions. This Task Force recommendation applied to both future federal actions as well as *retrospectively* to virtually every area of federal policy. Legislation to implement the Tasks Force’s recommendations has been introduced in the Maine Legislature but has not yet been enacted. As noted above, AEWNA would advance these recommendations by its re-writing of §6(h) to provide that MICSA’s restrictions regarding federal laws would apply “unless Federal law *or the State laws of Maine* provide for the application of such Federal law or regulation” (emphasis added).

While it is unknown what steps the Maine Legislature may take or what future federal Indian legislation will be, the general pattern of Congress supporting Indian self-government has enjoyed bipartisan support that has enabled tribal self-determination through self-government to persist and expand for decades. It seems likely to continue. The fact that several hundred tribes across the United States have been operating for nearly fifty years under federal policies recognizing and supporting tribal self-determination and economic self-sufficiency provides extensive evidence regarding what might be expected going forward if MICSA’s limitations are loosened or eliminated in Wabanaki territory. We draw heavily on that evidence here.

### C. Summary of findings

There is a large body of research, produced by us at the Harvard Project on American Indian Economic Development (“the Harvard Project”) and many others, regarding the overall effects of federal policy in the Self-Determination Era. The clear thrust of the findings of this research is that tribal self-determination through self-government has resulted in a quite remarkable economic, social, and political resurgence in Indian Country. While there are some exceptions to this resurgence and the process of reversing the effects of policies that had contributed over centuries to making American Indians on reservations the poorest identifiable group in the United States by the 1970s is not complete, average incomes in Indian Country over the last thirty years have been growing five times faster than the incomes of the average American (although Indian Country incomes continue to lag well below the average American income). Similar trends are seen in other determinants of well-being, including housing, health, and education.



The strengthening of tribal economies and concomitant improvement in economy-dependent social conditions has had spillover effects on the non-tribal jurisdictions that tribes abut and/or are embedded in. Consistent with the expectation that one is not made poorer if one's neighbor pulls him or herself out of poverty, surrounding off-reservation economies and communities have quite consistently, if not absolutely always, experienced net benefits as tribes have taken the reins of self-government and conditions have improved on reservations under Self-Determination.

As we report below, we find that the foregoing patterns found across the rest of at least the Lower 48 states do not appear, or at least have been severely attenuated, in Maine. In Section II below, we examine the conditions of the Wabanaki Nations relative to Maine as a whole. We find that the Wabanaki Nations are significantly underdeveloped economically and in several social dimensions compared to the rest of Maine. In Section III, we examine the progress—or lack thereof—of the Wabanaki Nations relative to the other tribes in the Lower 48 in the Self-Determination Era, and we unpack the lessons being learned regarding the impacts of the expansive federal policies of self-determination through self-government in other parts of the US.

Based on these lessons, in Sections IV and V we investigate the applicability of those lessons to Maine and the Wabanaki Nations. The kinds of success in self-government and direct spillover development we see elsewhere are not *guaranteed* outcomes of loosening MICSA's restrictions on the applicability of federal policy to the Wabanaki Nations. Such policy change would carry risks and opportunities for reward for the Wabanaki Nations and the State of Maine. As we report in Section IV, however, we do not find bases for concluding that the Wabanaki Nations confront inherent or immovable obstacles that would impede their abilities to realize the kinds of outcomes realized by many other tribes that operate under conditions of size, location, access to resources, education, and the like similar to those faced by the Wabanaki Nations. What we can say is that, without the loosening of MICSA's restrictions, both the Nations and the state should expect continued relative depression of the tribes' economic fortunes and capacities to generate beneficial spillovers for their neighbors.

In Section V, we find that it would be improper to cast the prospect of extending federal Indian policies that support Wabanaki self-determination and self-government as carrying negative consequences for non-Native neighbors. Based on the evidence generated by experiences in other states (where federal policies are more completely applied), real and imagined problems of, for example, state government/tribal government conflict, contradictory laws or regulations, adverse budgetary impacts on the state and non-tribal local governments, and the like are either already present under the MICSA status quo, or are the kinds of issues that neighboring and overlapping governments—tribal and non-tribal—routinely work out through cooperation, collaboration, and



intergovernmental agreement. On the other hand, the likely outcome of sticking with the *status quo* is the *status quo*—i.e., economic benefits for Maine’s non-tribal and tribal citizens “left on the table” and continued rounds of MICSA-driven conflict, litigation, and acrimony between the state government and the tribes.

## II. The Economic and Political Condition of the Wabanaki Nations Under MICSA

### A. Economic conditions: Maine’s Wabanaki citizens lag behind the rest of the state’s citizens

Let us now examine the conditions of the Wabanaki Nations relative to Maine as a whole and relative to other tribes that operate more completely under the federal government’s policies of tribal self-determination through self-government. Table 1 shows US Census data from the 2019 American Community Survey (five-year average). The Wabanaki Nations lag behind in a variety of key socioeconomic indicators. For example, Wabanaki per capita income for individuals identified in the Census as American Indian Alaska Native (AIAN) Alone<sup>4</sup> is markedly lower than the annual per capita income of all people in Maine.<sup>5</sup> Maliseet and Mi’kmaq are the lowest with \$11,320 and \$11,431, respectively. Passamaquoddy’s two areas, Indian Township and Pleasant Point, are \$14,435 and \$13,741. Penobscot’s per capita income for AIAN—the highest for the Wabanaki Nations—is \$18,809. Yet Maine’s per capita income is nearly double that at \$34,593.

When we examine poverty rates in the Wabanaki Nations relative to those for Maine as a whole, the implications of lower incomes in the former are particularly stark. Focusing, for example, on child poverty (children under 18 in households with incomes below the poverty level) the US Census data indicate five-year average poverty rates for 2019 ranging from a low of 40.2% at Passamaquoddy’s Indian Township to a high of 76.9% at Mi’kmaq. By comparison, Maine’s child poverty rate for the same period is reported as 15.1%.

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<sup>4</sup>“Alone” signifies single-race identity.

<sup>5</sup>Unless denoted by *nominal* or with a year (as in, 1998 dollars), all the dollar figures in this report are denominated in 2021 dollars adjusted for inflation using the consumer price index for urban consumers, CPI-U (FRED, 2022). When referring to Indian data derived from the US Census, this report uses the Census’s evolving nomenclature, particularly “Indian,” “American Indian and Alaska Native,” and “American Indian and Alaska Native Alone.” Respondents to the census questioner or questionnaire self-identify.

Table 1: Socioeconomic Indicators:  
Maine v. the Wabanaki Nations (2016-2020 averages)

	Passamaquoddy, Indian Township	Passamaquoddy, Pleasant Point	Penobscot	Maliseet	Mi'kmaq	Maine
Population - AIAN Alone	604	574	531	239	197	
Population - All People	773	683	770	348	280	1,335,492
Per capita income - AIAN Alone	\$14,435	\$13,741	\$18,809	\$11,320	\$11,431	
Per capita income - All People						\$34,593
Child Poverty Rate - All People	40.2%	58.3%	45.7%	61.2%	76.9%	15.1%
Overcrowded Households - All People	3.3%	1.6%	2.4%	8.9%	3.7%	1.5%
College Graduates or Higher - AIAN Alone	7.1%	18.2%	21.1%	8.2%	8.5%	
College Graduates or Higher - All People						20.0%
Unemployment Rate - AIAN Alone	6.5%	8.7%	5.7%	5.8%	7.5%	
Unemployment Rate - All People						4.1%

Per capita income reported in 2021 dollars. (Census, 2019)

As with the rates of children living in poverty, the Wabanaki Nations generally show worse conditions than Maine as a whole regarding housing. Maine's rate of crowded housing (defined by the US Census as housing units with more than one person per room) is 1.5%. Passamaquoddy's Pleasant Point reservation is close to this at 1.6%. The other reservations' rates of crowded housing range from 2.4% at Passamaquoddy's Pleasant Point reservation up to 8.9% at Maliseet.

The education attainment rates for Mainers and Wabanakis are a bit more mixed. The percentage of all people 25 years and older with a college degree or higher in Maine is 20%. The corresponding figure for Penobscot is 21.1%. At 18.2%, Passamaquoddy's Pleasant Point's attainment rate is fairly close to Maine's, but the Mi'kmaq rate (8.5%) and the Maliseet rate (8.2%) are sharply lower.

Wabanaki unemployment rates are consistently higher than for Maine as a whole and in one instance, more than double. Maine's unemployment rate for all people is 4.1%. Penobscot's and Maliseet's AIAN Alone populations have similar unemployment rates at 5.7% and 5.8%, respectively. Passamaquoddy Indian Township's AIAN unemployment rate is 6.5%. Mi'kmaq's AIAN unemployment rate is a percentage point higher than Indian Township at 7.5%. And Passamaquoddy Pleasant Point has an AIAN unemployment rate of 8.7%, more than twice that of Maine.<sup>6</sup>

<sup>6</sup>The data in Table 1 pertain to the socioeconomic status of persons who: a) reside on Wabanaki territories, b) self-identify as American Indian or Alaska Native (AIAN) Alone (i.e., not in combination with other races or ethnicities), and c) respond to the US Census. In connection with distribution of federal COVID relief funds, the Wabanaki Nations certified to the US Treasury that, in 2019, they collectively had 9,546 citizens (Henson et al., 2021). This is many more than are reported in the top row of the Table 1. The citizens not counted in the table may have self-identified as AIAN in combination with another race or ethnicity; or may live adjacent to (but not on) Wabanaki Territories, further afield in Maine, elsewhere in the US, or overseas; or may not have been counted by the Census Bureau. The persons reflected in the table are those most likely to access Wabanaki Nations' employment opportunities and social programs.



The overall picture is clear. The Wabanaki Nations are quite systematically economically underdeveloped relative to the rest of Maine. This is certainly felt as relative deprivations in the reservation communities in which many of Maine's tribal citizens live and work. It would also be expected that the condition of the Wabanaki Nations and its tribal citizens redounds to the detriment of the state of Maine and its non-tribal citizens. Poverty and attendant social strains in the reservation communities not only burden state budgets and social services but the state's economy as well. The unemployed, but employable, worker and underdeveloped local government—tribal in this case—would be spending more in Maine's local markets if that worker were able to find work and that government were able to increase service provision to its citizens. We now turn to the question of the sources of the Wabanaki Nations' relative economic underdevelopment.

## **B. Political conditions: Maine is an outlier in its policies and relations with the state's tribes**

The consequence of MICSA's blocking federal Indian legislation of general applicability is tribal governments that are strikingly underfunded and jurisdictionally constrained relative to their tribal counterparts elsewhere in Indian Country. A few examples make the limitations clear.

Consider, for example, disaster and emergency declarations. Tribes elsewhere have the power to appeal directly to the federal government for disaster relief funds under the 2012 Stafford Act amendments and respond quickly to on-reservation emergencies. Resulting funding typically benefits the receiving tribe but also has spillover benefits to the non-tribal neighbors of the tribe. MICSA's restrictions have blocked the Wabanaki Nations' abilities to directly secure federal funding. Instead, Wabanaki emergency response must enter the state's queue with attendant delays and even the possibility of gubernatorial rejection. Presumably, in a general emergency, Maine would benefit from its quite reasonable prioritization of population clusters of Portland, Lewiston, and Bangor *and*, all else equal, from additional emergency funds flowing to Mi'kmaq, Maliseet, Penobscot, and Passamaquoddy communities (Francis, 2022).

A similar story applies to the Wabanaki Nations' efforts to protect their citizens from non-Indian abusers. The Penobscot Tribe was an advocate for passage of the federal *Safety for Indian Women* title of the 2013 amendments to the Violence Against Women Act (VAWA). Upon passage of the amendments, the Tribe sought federal funding under a Department of Justice program for the Penobscot Court to be an implementation pilot for better processes for non-Indian offenders who commit domestic violence, dating violence, or protective order violations. Maine's invocation of §16(b) of MICSA ended the effort. Millions in federal inflows to Penobscot (and therefore Maine) went elsewhere, to say nothing of the consequences for the people needing protection from abusers.





After that rejection, Penobscot pushed for Congress to explicitly include Maine in VAWA. After great expense and nine years of pressure and waiting, the 2022 VAWA amendments were made applicable to the Wabanaki Nations (Francis, 2022). While the effort was successful, Penobscot (and the other Wabanaki Nations) face barriers to access that most other tribes simply do not.

Likewise, the old school at Pleasant Point (*Sipayik*) had to prohibit its students from drinking from water fountains because the water supply was so toxic. A new school was built on reservation lands in 2021 using federal Bureau of Indian Education (BIE) funds and needed a better water supply. The tribe dug a well on the reservation to provide water for the drinking fountains and kitchen, only to have the State Attorney General's office intervene to say that the tribe and the school would need state approval before using the well. A memorandum of understanding had to be negotiated and signed with the state to do what, in most other Indian school construction projects, would be a matter of local tribal self-government.

The most notable consequence of federal policy in the Self-Determination Era has been to give tribes the opportunity to—and the responsibility for—providing services to their citizens. Improved economic conditions under self-determination (see below) have resulted in tribes heavily augmenting their governmental budgets with their own funds (typically from resource revenues, enterprise earnings, and in a growing number of cases, tribal taxes).

Today, especially where economic development has progressed sufficiently, tribal governments commonly supply (or pay neighboring governments to supply) the full range of services and functions that are expected of any competent state and local system. This means everything from fire departments, police officers, courts, and incarceration facilities to trash collection, water and sewer, roads, parks, housing, education, environmental protection, resource stewardship, substance abuse and violence prevention, and myriad other services. Tribes such as the Confederated Salish and Kootenai Tribes of the Flathead Reservation, for example, were the first tribe to become a 100% self-governance tribe (i.e., entirely eschewing service provision by federal agencies (HPAIED, 2003b)).

In a growing number of instances, tribes' own revenue sources now dwarf federal sources in their tribal government budgets. For example, in Washington State, 23 tribes collectively derived more than three-quarters of tribal government funding in 2019 from enterprise distributions, tribal taxes, leases, stumpage, and other tribally controlled or owned sources. Only 18 percent came from federal grants and contracts and 4 percent came from Washington-funded grants or contracts (Taylor, 2022, 22). And tribes no longer look to the federal government for approval of every major decision they wish to make. The result of this is that self-governing tribes can often streamline decision-making and respond to community needs faster and more efficiently than the federal government or state and local neighbors.



Scores of such cases across hundreds of tribes have been well documented (HPAIED, 2022). While oft-noted tensions between the Wabanaki Nations and the state tell us that the governments of the Wabanaki Nation aspire to perform well for the benefit of their citizens, the process has been attenuated in Maine by the hurdles MICSA erected for the tribes.

Finally, as we discuss in detail below, in addition to improved governmental performance, one of the critical payoffs to tribes (and their neighbors) of Congress’s Indian legislation in the years since MICSA has been strong and steady economic development and tribal government growth. As we have seen, however, the Wabanaki Nations are notable for their absolute and relative economic underdevelopment. Thus, it is appropriate to inquire as to whether the State and the tribes might be better off by ending the anomalies introduced by MICSA and bringing Maine’s policies vis-à-vis the Wabanaki Nations into line with the policies governing the American Indian nations in the other 47 of the Lower 48 states.

### III. Lessons From Tribes in the Other Forty-Eight States

#### A. Indian Country has experienced extraordinary economic growth in the Self-Determination Era

While there are exceptions, the overall pattern that has emerged outside of Maine for most tribes and Indian citizens on reservations in the Lower 48 states under the federal framework of tribal self-determination through local self-government is one in which that framework has produced sustained economic development. The Self-Determination Era has brought sustained economic growth across large numbers of communities that struggled for a hundred years or more to get *any* development.

To see these trends, we can look to US Census data on income per person. Per capita income is certainly not the be-all, end-all measure of Native economic success. As with societies worldwide, matters such as family integrity, flourishing arts, health, safe and clean environments, long lives, and a host of other values combine to determine the quality of life. Nevertheless, per capita income does matter and provides a good approximation for “gross reservation product”—a foundational contributor to quality of life.<sup>7</sup>

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<sup>7</sup>Gross product is the sum of all value added in an economy, and we use *gross reservation product* to refer to the sum of all value added in Indian Country economies. In large, diversified economies such as the United States’, personal income is the lion’s share of gross product. Variation arises in smaller economies to the extent that other sources of value-added, such as proprietor income (e.g., profits and rents) and natural resource revenues, diverge from national patterns for idiosyncratic reasons. US national income accounts do not record gross reservation product statistics for Indian Country.



Though the start of the Self-Determination Era is commonly demarcated by the 1975 passage of the Indian Self-Determination and Educational Assistance Act (P.L. 93-638), the economic effect of the federal change in stance from tribal termination policy (an approach that prevailed from WWII until then) to self-determination did not immediately register in Indian community life. As a preliminary matter, that initial legislation only meant that tribal governments could only start to take over another government's (i.e., the federal government's) programs. This was to be done by contracting with the federal government to become the mere administrators of functions long performed on reservations by federal agencies (such as the Bureau of Indian Affairs)—but still operating under the federal government's priorities, procedures, and systems. The idea was that tribes could contract and receive roughly the same dollars as the federal provider for the same work, often by the same people.

Unfortunately for tribes, this “step-into-the-federal-shoes” approach was limited by a fiscal retreat that saw federal budgets cut for tribal functions, whether performed by tribes who did contract to provide those functions or by federal agencies in their historic pre-self-determination roles. Federal budgets directed toward Indian matters peaked in the Carter Administration, and reductions in federal funding were accelerated under President Reagan (Walke, 2000, 236). The budget declines in the second half of the 1970s and the Reagan years in the 1980s occurred when Indian reservation payrolls and expenditures were still dominated by federal agencies and programs (Trosper, 1996). The result was an actual decline in the real (i.e., inflation-adjusted) per capita incomes of Indians living on reservations between the 1980 US Census and the 1990 US Census (see, Taylor and Kalt, 2005). Economic and social progress had to wait for true tribal *self-government*—as opposed to mere administration of federal programs—to take hold.

Responding to expressions of frustration over constraints on their abilities to adapt programs to local needs by tribal governments who were trying or wanted to try to contract to run federal functions and encouraged by the success of some pilot efforts allowing greater scope for tribal government decision-making, Congress significantly amended the 1975 Self-Determination Act in 1988 (P.L. 100-472, 102 Stat. 2285). Congress mandated more cooperation and aggression on the part of federal authorities in assisting tribes in taking over federal functions, and the Amendments mandated a pilot program of self-governance. This marked the start of a shift away from the exclusive dependence of tribes on the contracting model to the eventual use of “compacts” between tribes and the federal government, with negotiated compacts providing tribal governments with expanded leeway for determining priorities, designing programs, and allocating budgets.



Reflecting successes in the pilot efforts, self-governance and self-governance compacts became a wave—sustained through today—with the passage in 1994 of another set of major amendments to the 1975 Self-Determination Act (P.L. 104-413, 108 Stat. 4250). This wave has only been pushed onward over the years by scores of Congressional, presidential, and agency actions which have bolstered the powers of tribes to make their own decisions of their own affairs.<sup>8</sup> It is now *de rigueur*, for example, that federal legislation affecting states via allocations of monies and authorities provide blanket treatment of “tribes as states” (or TAS)—i.e., allocating funds and delegating federal powers to tribes equivalent to those enjoyed by the states. Of course, unless explicit mention is made of Maine, such Congressional provisions of TAS status are generally inapplicable to the Wabanaki Nations of Maine if they affect state jurisdiction in any way, as a result of §6(h) and §16(b).

By the end of the 1980s, economic development in Indian Country began to take root as tribes built enterprises in, for example, ski tourism, light Defense Department manufacturing, forestry and wildlife management, livestock and crop agriculture, and gaming. And, to be sure, in one of the most apparent and economically potent examples of expanded tribal self-government and of Congress treating tribes akin to states in terms of governmental powers, the passage of the Indian Gaming Regulatory Act (IGRA 25 U.S.C. §2701, *et seq.*) in 1989 freed tribal governments—like their state counterparts with their state lotteries—to (substantially) control the decision whether gaming enterprises would be allowed to operate within tribal nations.

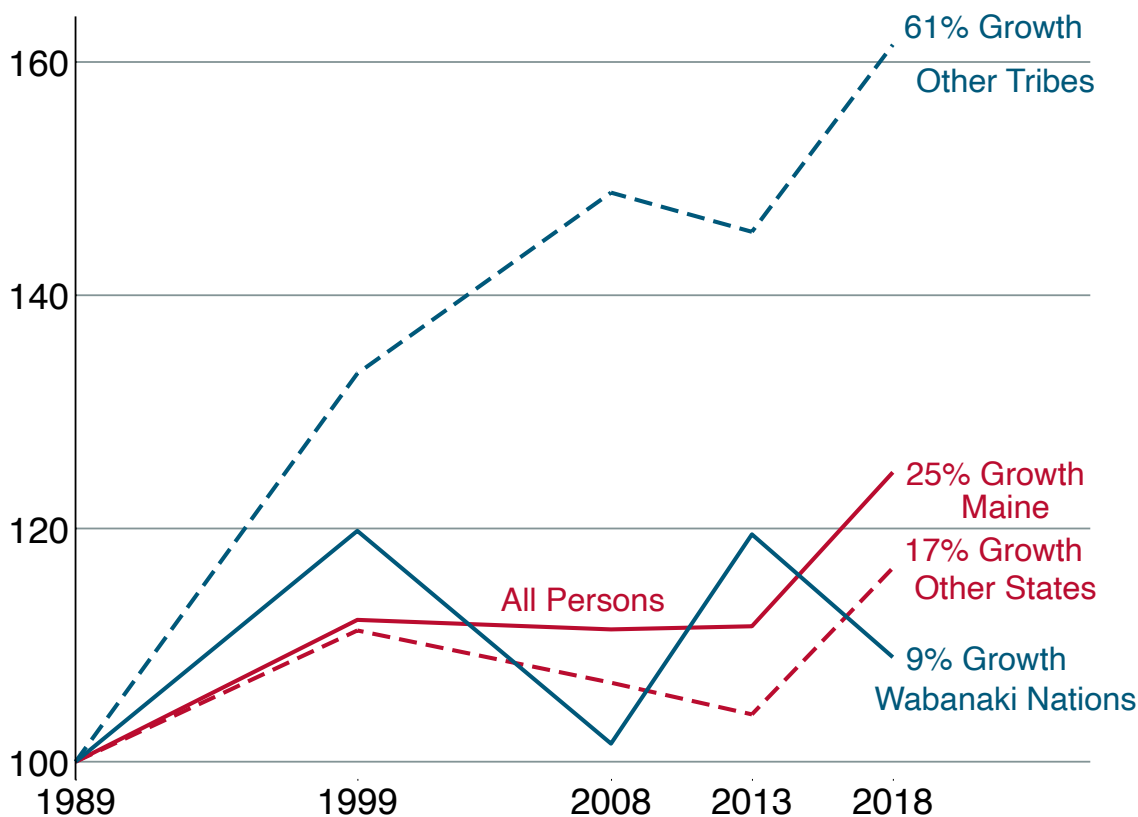
With contracting and compacting providing training grounds for tribal officials and administrators, with improved performance and legitimacy created by shifting accountability from masters located in the federal government to tribal citizens in the local community, and with doors opened to opportunities in the economic arena, a remarkable period of sustained economic development took hold in Indian Country in the late 1980s (Cornell and Kalt, 2010). This economic development can be seen in Figure 3, which allows a comparison of the growth in per capita income of AIAN residents of reservations in the Lower 48 states (except Maine) from 1989 to the present to the growth in per capita income of average citizens across the United States.<sup>9</sup>

<sup>8</sup>The aforementioned study commissioned by the Task Force provides summaries of many of these actions (see also, House of Representatives, 2022).

<sup>9</sup>In Figure 3 as in several upcoming figures reliant on data from the US Census Bureau, the bulk of the experience of the tribes of Oklahoma is not reflected. At least until the US Supreme Court’s decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the citizens of most Oklahoma Indian tribes were categorized as residing in what the Census calls Oklahoma Tribal Statistical Areas (OTSA) rather than being categorized as residing on reservations (the Osage Nation being a prominent exception). OTSAs encompass the majority of the land areas of the state, including the historic reservations of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations in eastern Oklahoma, which includes downtown Tulsa. As Taylor and Kalt observed, “Oklahoma tribes’ governmental powers and the socioeconomic conditions in the “Indian areas” of Oklahoma often bear a closer resemblance to, say, downtown Duluth (in the case of Indians living in Tulsa) or rural Missouri (a state with no reservations) than they do to the more prototypical Crow, Gila River, or Pine Ridge reservations” (Taylor and Kalt, 2005, x).



Figure 3: Relative Growth Since 1989



Real (i.e., inflation-adjusted) population-weighted Indians on reservations per capita income (1989 = 100) for Wabanaki reservations and other reservations in the lower forty-eight states. ACS 5-year averages are plotted at their middle years (2008, 2013, 2018). (FRED, 2022; Taylor and Kalt, 2005; Census, 2010, 2015, 2020a)

As indicated in Figure 3, since 1989, the real (inflation-adjusted) income of the average US resident (excluding Maine) has increased by 17%. The comparable measure for Mainers is 25%. Meanwhile, since 1989, the real income of the average AIAN resident of Lower 48 reservations (excluding Maine) has increased by more than 61%. As we discuss further below, it is telling that the Wabanaki Nations, constrained to operate without full access to federal policies and funding of other tribes in the Self-Determination Era, have seen a 9% increase in real per capita incomes while other tribes—on average—have been booming economically.

## **B. Is it all about casinos?**

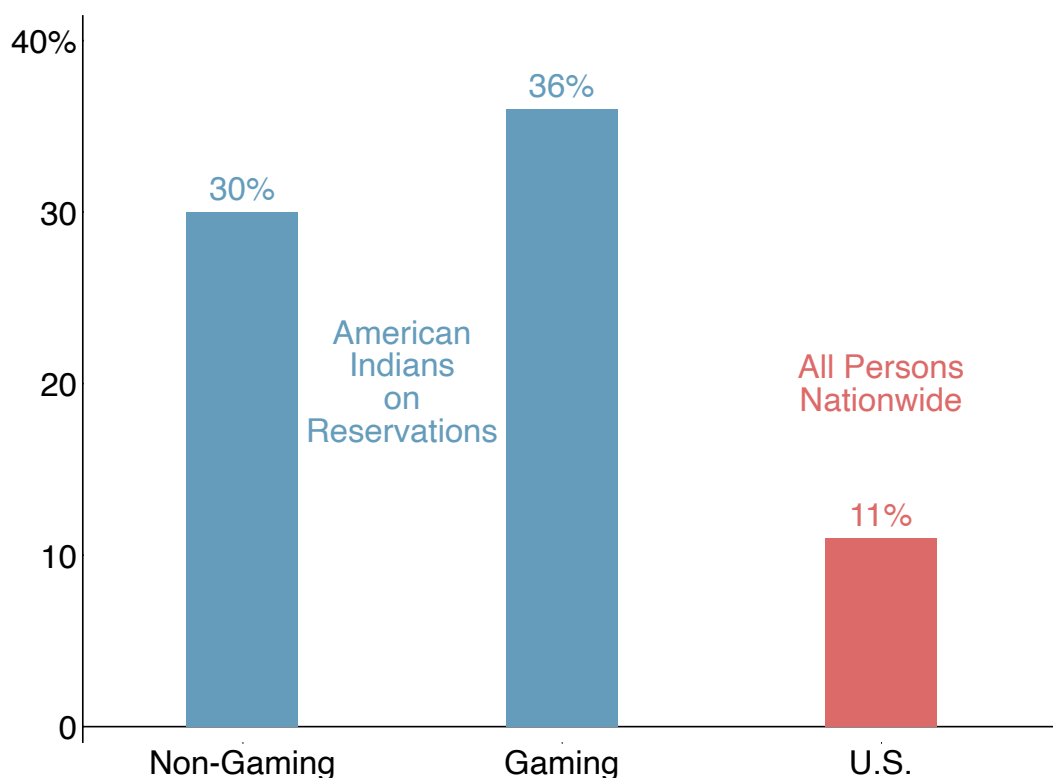
It might seem sensible to conjecture that the expansion of the tribal gaming industry since 1989 explains the quite strong growth trajectory of tribes outside of Maine that we see in Figure 3. And it might be conjectured that Maine's lack of Indian casinos explains the difference in growth rates between the Wabanaki Nations and other tribes in the Lower 48. Neither conjecture is accurate.

It is undoubtedly true that the expansion of the tribal gaming industry has contributed substantially to improving the economic conditions experienced on hundreds of reservations (not to mention those experienced in neighboring non-Indian communities). The hypothesis that the growth of tribes' incomes seen since 1989 is simply the result of the appearance and growth of the tribal gaming industry overlooks two key factors: the experience of non-gaming tribes and the economic growth occurring in non-gaming sectors of tribal economies.

Concerning tribes lacking gaming enterprises, the decade of the 1990s provides a natural experiment by which to assess the contribution of gaming to tribes' economic development. The bookends of 1990 and 2000 US Censuses (administered in 1989 and 1999, respectively) provide pertinent data. While gaming was expanding across Indian Country in the 1990s, by 1999, 47 percent of Native Americans residing on reservations lived on reservations whose tribe did not own and operate a casino (Taylor and Kalt 2005, 3). Nonetheless, as Figure 4 indicates, those reservations experienced inflation-adjusted per capita income growth nearly three-fold greater than the US did as a whole, compared to the slightly greater than three times performance of tribes with casinos.



Figure 4: Percent Change in Per Capita Income: 1990–2000



Lower 48 reservations outside Oklahoma. (Taylor and Kalt, 2005, 11)

As Taylor and Kalt observed regarding Indian socioeconomic change in the 1990s, measured across per capita income, median income, and a dozen other indicators:

...the progress [relative to the United States] evident among non-gaming tribes in the 1990s suggests that it is not so much gaming that is driving the socioeconomic changes evident across Indian America as it is a broader policy of Indian self-government. Jurisdiction over the gaming choice is part, but hardly the entirety, of that policy. (Taylor and Kalt, 2005, xi)

The lesson is that gaming was but one manifestation of enhanced powers and opportunities for tribal self-government in the 1990s. As self-governance took root in the late 1980s, tribes fairly exploded with expansions of both their governmental and non-governmental (i.e., business) sectors—and the incomes and employment created by those sectors (see, e.g., HPAIED, 2008,

Section 2). The growth of these sectors was not due to some rekindled largess on the part of the federal government. Over 1990-2000, for example, the federal Bureau of Indian Affairs' budget declined by 3% in real, inflation-adjusted dollars.<sup>10</sup> By comparison, federal grants to state and local governments have been steadily and rapidly expanding since the 1970s (Lawhorn, 2019).

More generally, the federal government's Commission on Civil Rights 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, "documented the federal government's historic failure to carry out its promises and trust obligations [to tribes]. These failures included longstanding and continuing disregard for tribes' infrastructure, self-governance, housing, education, health, and economic development" (Berry et al., 2003, 6). Overall, federal spending per person on Native American US citizens was only two-thirds of the spending on the average US citizen. In health, the comparable figure was 50%; in education, tribal funding was only 50%-60% of the federal total spent on mainstream education. In the criminal justice arena, federal expenditures on law enforcement in Indian Country were only 80% of the level devoted to demographically comparable non-Indian communities. In the Commission on Civil Rights' update of its 2003 report in 2018, the Commission found that:

Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power. (Lhamon et al., 2018, 4)

Today, the vast majority of tribes have opted to operate gaming enterprises. Even after 2000, however, the growth trajectory in Figure 4 cannot be adequately seen as a gaming phenomenon alone. If anything, reports of gaming markets being saturated, coupled with very rapid growth of non-gaming businesses in Indian Country, reiterate that it has been self-determination through self-government that has turned around the discouraging results of earlier decades—i.e., decades in which someone else (usually the federal government) was "in the driver's seat" when it came to running reservation affairs. Indeed, Indian Country today is increasingly diversified away from dependence on gaming, with numerous tribes operating tribal manufacturing, tourism, agricultural, extractive, retail, financial, construction, communications, and transportation enterprises that more than hold their own in competitive markets (see, e.g., HPAIED, 2008).

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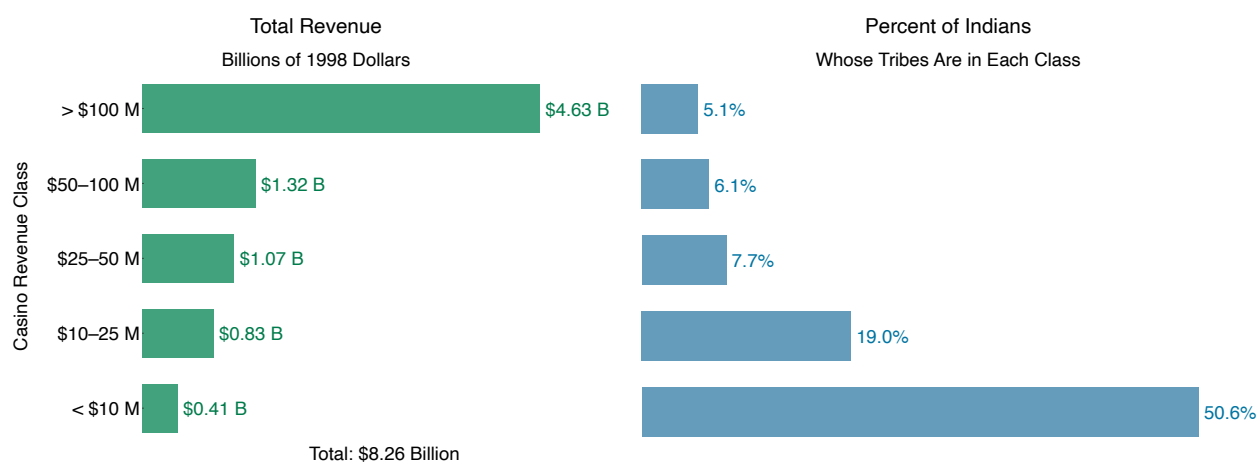
<sup>10</sup>The Bureau's budget in 2000 was \$2.1 billion (Bureau of Indian Affairs, 2000), compared to \$1.499 billion in 1990 (Bureau of Indian Affairs, 1990). Over the period from Q1 1990 to Q1 2000, the GNPP Deflator rose 23.4% (FRED, 2022, GNPP).





Further evidence that the initial 1980s' economic growth and the sustained growth since in Indian Country is a product of self-governance generally—rather than self-governance-manifested-through-gaming—is found in the distribution of Native reservation citizens across tribes with gaming operations. Data from 1998 collated by the Associated Press revealed that tribal populations and revenues of gaming operations were skewed in opposite directions (Figure 5)—meaning that large gaming operations were found in tribes with small populations and vice versa.

Figure 5: Distribution of Indian Gaming Revenues and Associated Tribal Populations, 1998

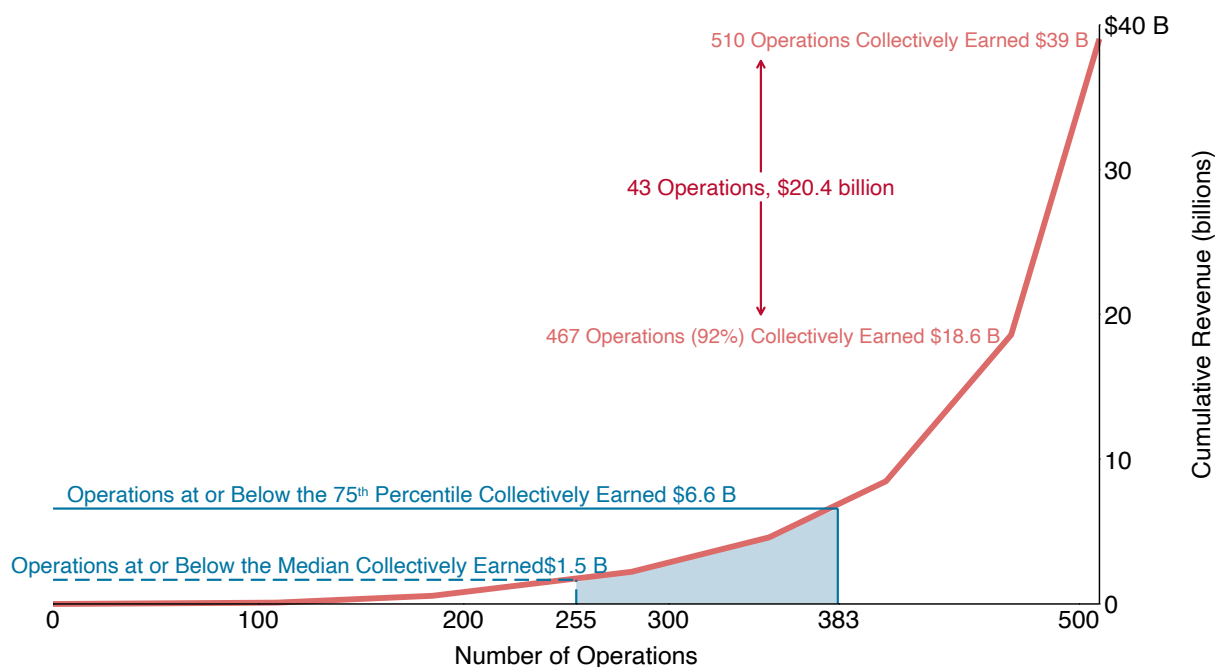


“Percentages do not sum to 100 percent because some tribes have gaming operations in more than one category.” HPAIED (2008b) citing the Associated Press (2000).

As Figure 5 indicates, 56 percent of the revenues (\$4.63B) were earned by tribes accounting for only 5.1% of Indian Country’s citizens, and 5 percent of the revenues (\$0.41B) were earned by casinos of tribes that accounted for more than half the tribal citizen population. In addition, “Approximately 32 percent of Indians are members of tribes that do not have any gaming operations” (HPAIED, 2008, 150). With the majority of tribal citizens being on reservations with little or no gaming revenues, the growth in the average tribal citizen’s income we see in the 1990s cannot be attributed to gaming.

The pattern of concentration seen in 1998 continues to hold today. Figure 6 shows the gaming revenue distribution reported by the National Indian Gaming Commission (NIGC) in 2021. The top 43 facilities (8%) collectively earned more revenue (\$20.4 billion) than the other 467 combined. The smallest three-quarters of facilities collectively earned \$6.6 billion, and the smallest half of facilities earned \$1.5 billion collectively. Figure 6 below displays the evolution of this quartile—the blue shaded region between the 50<sup>th</sup> (median) and 75<sup>th</sup> percentiles.

Figure 6: Cumulative Gaming Revenue Distribution, 2021



The cumulative revenues for the percentiles are estimated from the adjacent data by log-linear interpolation. (NIGC, 2021)

This concentration of gaming revenues undermines the hypothesis that gaming is driving the overall growth of the income of the average reservation Native citizen. The per capita income reported for Indians living on reservations in Figures 3 and 4 is the population-weighted average of per capita Indian income. As such, it reports how much income the average Indian living on a reservation earned. All else equal, if a small tribe located in the top tier in Figure 5 or 6 experienced a vast increase in per capita income, it would not move the Indian Country average much because much larger on-reservation Native populations per the Census (such as those of the White Mountain Apache Tribe, pop. 15,000; the Oglala Sioux Tribe, 17,000; or the Navajo Nation, 166,000) would tend to dominate the weighted average (Census, 2020a). In other words, the good fortunes of a small number of tribes cannot explain the growth trajectory in Figure 3.

### C. Diversification and the growth of non-gaming economic activity

As suggested above, a further reason that the “it’s-all-gaming” hypothesis misses the mark in explaining three decades of economic growth in Indian Country is that it overlooks evidence of reservation economies’ non-gaming business and governmental activity. For decades, Indian tribes have earned revenues from coal, oil, gas, timber, hydropower, and other natural resources. As tribes grow in sophistication, their economies diversify—not just from a gaming starting point (e.g.,

casino-adjacent restaurants, hotels, spas, entertainment venues, and golf courses are all part of diversification), but also in industries unrelated to gaming (e.g., healthcare, distilleries, fish processing, and home construction). Prominent among these non-gaming businesses are tribal companies selling goods and services to the federal government under the terms of Section 8(a) Business Development program of the Small Business Act (15 U.S.C. §631 *et seq.*). Federal procurement data shows tribal 8(a) contracting revenues to be about \$560 million in 2005. By 2011, these had grown to about \$2.88 billion (Taylor, 2007, 2012).<sup>11</sup>

Figure 7 picks up from Figure 6, extending the blue-shaded third quartile (between the median and the 75<sup>th</sup> percentile) back through time to show the total revenues collectively earned by facilities at or below those demarcations. Consistent with the growth in the number, size, and amenities of Indian casinos in the late 1990s and early 2000s, the blue region expands in that period. Casino closures due to the COVID pandemic in 2020 are visible in the revenue drop on the right, and the overall pattern suggests that tribal gaming revenues may have peaked around 2008. Overlaid on the gaming data are the two point estimates of tribal 8(a) revenues (in green, plotted on the left axis). By 2011, tribal 8(a) revenue had grown to be larger than the revenues collectively earned by the gaming facilities below the median—i.e., larger than the combined revenues of the smallest 50% of all tribal gaming facilities. 8(a) has probably grown since then.<sup>12</sup>

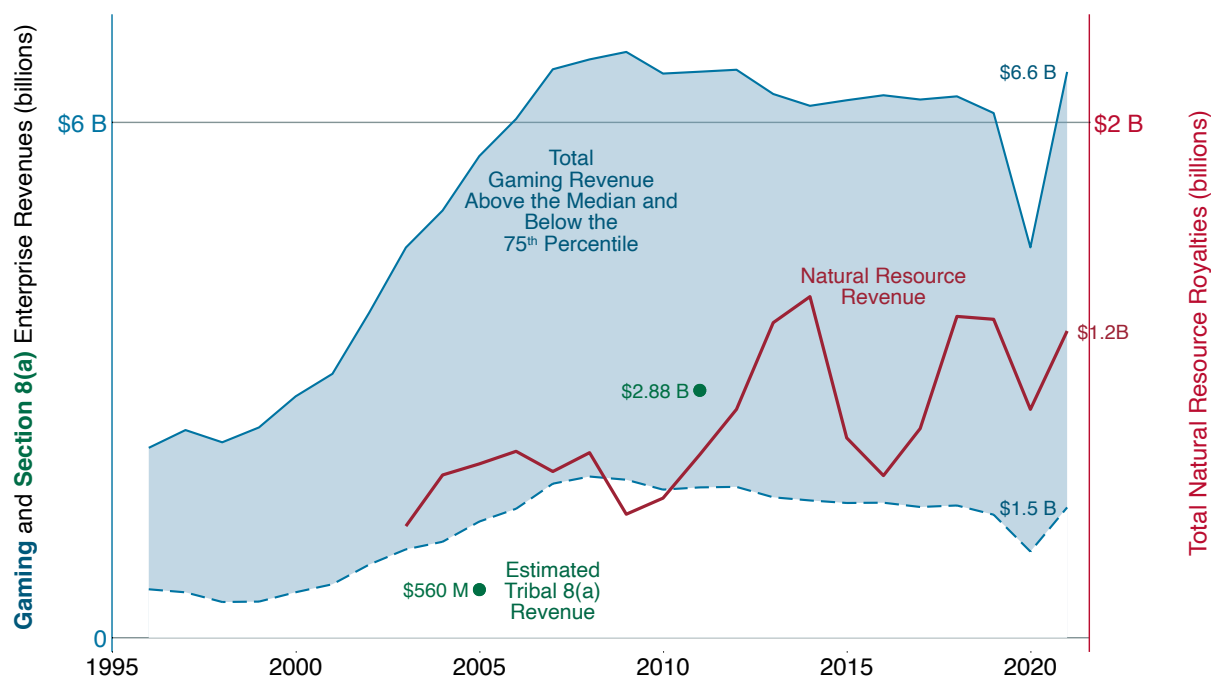
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<sup>11</sup> *Tribal* 8(a) contracting revenues here exclude the revenues of Alaska Native Corporations, many of which are dominant players in Section 8(a) procurement. Some Native Hawaiian Organization and Alaska Native Village Corporation 8(a) revenue may be included in the *Tribal* totals, but their shares were very small in the indicated years.

<sup>12</sup> Forthcoming data from the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis promise to extend and improve these 8(a) revenue snapshots into a comprehensive time series. Chances are good that it will show more recent 8(a) revenues to be comfortably in the blue shaded region.



Figure 7: Gaming and Section 8(a) Revenues and Natural Resource Royalties



NOTE: Right scale magnified 3x. (Taylor, 2007, 2012; DoI, 2021)

Also overlaid in Figure 7 above are the natural resource revenues from Indian trust lands held by the United States on behalf of tribes and individual Indian allottees. These revenues predominantly reflect royalties, rents, and bonuses paid by fossil fuel production companies to the tribal and individual Indian owners of mineral rights. The vast bulk of this revenue is properly considered bottom-line net income—value added in reservation economies—rather than top-line revenue (as measured on the left axis). Accordingly, it is plotted on its own axis, and the right axis is magnified by a factor of three to make it roughly comparable to the top-line revenues of the left axis.<sup>13</sup> The position of the red line shows that natural resources are a driving force of reservation economies. They are as big as 8(a) contracting and more influential than all the casinos below the median. Energy prices are famously volatile, but natural resources earn tribes more bottom-line revenue than all the casinos smaller than the median facility.

<sup>13</sup>Tribes are protective of competitively sensitive information related to the margins of their gaming and 8(a) businesses. That said, anecdotal information suggests that casino margins may be in the vicinity of 35%—lower in regions of heavy competition and higher where economic geography permits drawing from a large population that is not well served by other casinos. Thus, a three-to-one ratio of top-line to bottom-line figures offers rough comparability in Figure 7.

Of course, Section 8(a) procurement revenues and mineral royalties display concentration, too. For example, the Section 8(a) subsidiaries of the Winnebago Tribe of Nebraska's Ho-Chunk, Inc. make it a Lower 48 procurement powerhouse. The Southern Ute economy benefits from sizable San Juan Basin oil and gas royalties and its successful Red Willow (energy) Production Company payroll and profits. Until recently, the Crow, Hopi, and Navajo economies have benefitted from substantial royalties, taxes, and tribal employment in coal mining.

Under self-determination, economic diversification takes on many flavors. For example, the Tulalip Tribes' upscale outlet shopping mall and "big box" stores at their Quil Ceda Village north of Seattle generate large (relative to tribal population) lease and tax revenues, as well as provide tribal and non-tribal employment in the municipal departments that support the retail operations (HPAIED, 2003a). The Hualapai Tribe's Grand Canyon West venture hosts more than one million sightseeing tourists annually at its famous Skywalk attraction overlooking the Grand Canyon (Kalt, 2017c). Fort Belknap's Island Mountain Development Group's six for-profit construction and financial services companies generate combined annual revenues well into nine figures and support close to 500 jobs (IMDG, 2021). The Salish and Kootenai Tribes of the Flathead reservation own and operate at least eleven companies in the electronics, aerospace, and defense contracting sectors, supporting hundreds of direct and indirect jobs in rural Montana—where it is commonly thought that economic development is nearly impossible (S&KT, 2022).

Examples like these, and many others simply did not exist before tribes took the self-determination reins. Instead, before self-determination, development efforts tended to follow a so-called "standard model" in which tribes chased—sometimes desperately—whatever the federal government was funding in a particular budget cycle. Moreover, project management was typically vested in the tribal councils by federal authorities, who usually seemed unable to imagine tribes being able to create their own business laws and businesses. In the same vein, federally funded development projects were often undertaken upon meeting bureaucratic criteria rather than through consideration of underlying economic feasibility or management and staffing capacities. Research finds that tribal economic enterprises built on the "standard model" have been about five times more likely to fail than when they are founded on tribes' adopting modern models that provide insulation from politics and performance measures (Cornell and Kalt, 2007).

The point of Figure 7 is not to fully characterize the variation and diversity of tribal economic sectors, but rather to highlight that—once we exclude the juggernaut casinos—national data make clear that gaming is not the only driver of reservation economies. Tribal economies are further bolstered by sectors for which national data do not exist. Health clinics not only use federal and tribal government funding to meet tribal citizen healthcare needs but also routinely end up serving non-Indian clients



and become profit centers in their own right via third-party billing, especially in underserved rural areas. Tribal convenience stores, malls, liquor stores, and other retail businesses earn profits and pay wages. And, of course, the net income of all tribally owned businesses goes to support the payrolls and expenditures of what had been, before the Self-Determination Era, chronically underfunded tribal governments (Berry et al., 2003; Lhamon et al., 2018).

Federal policies of self-determination through self-government have themselves, directly spurred reservation economic development. As discussed above, the 1988 and 1994 amendments to the Self-Determination Act of 1975 permit tribes to go beyond merely *contracting* on-reservation federal functions and instead *compact* multiple federal programs in a quasi-block-granting arrangement. This directly supports employment and wages and is augmented by including federal regional and national overhead budgets in the compacts with the tribes. All told, these amount to substantial impulses to gross reservation product. A pre-pandemic survey of 23 Washington tribes sheds light on the shares of gaming, non-gaming, and governmental economic activity. In that state, those 23 tribes reported 16,735 gaming employees, 3,606 employees in non-gaming businesses, and 7,152 tribal government employees (Taylor, 2022).

In addition, as tribal nation economies become more diversified, growth tends to build its own momentum. For example, Indian Country growth is starting to loosen tribal liquidity constraints, thanks to enterprise profits and royalties. For example, gaming cashflows helped lower the Squaxin Island Tribe's cost of borrowing from many points above prime to one point above prime (Taylor, 2006). Early in the self-determination process, Citizen Potawatomi took control of its financial assets and increased the return earned on those assets by more than 300% (GAO, 2019). Reductions in financing costs and improved asset returns of these types can turn the net present values of marginal investment opportunities from negative to positive, making even more economic development attractive.

Human capital accumulation also adds momentum to reservation economies. If a tribe builds a La Quinta Inn and its citizen-employees learn from the franchisor how to manage staff, manage procurement, and conduct the night audits, that experience can later be redeployed in the tribe's 8(a) defense manufacturing company or the tribal government's roads department. Such virtuous cycles encompass tribal governments as well. The Winnebago Tribe's Ho-Chunk, Inc., for example, not only pays a dividend to its owner-government and pays tribal taxes; critically for the reservation economy, it also makes downpayment assistance available to middle-class families who want to own a house on the reservation and work in tribal enterprise or government (Goss and Strain, 2019). Fort Belknap's



tribal council's wise creation of a politically independent corporate board to govern its Island Mountain Development Group laid the groundwork for not only highly successful economic development, but also created the organizational and human capital needed for the tribal takeover and major expansion of reservation health services and the jobs that those services support.

Conversely, restrictions on tribes' abilities to govern their own local affairs historically generated vicious cycles. These lay at the heart of why pre-Self-Determination Era policies led to American Indians on reservations becoming the poorest group in the nation: Severely limited self-governing powers thwarted and distorted efforts at economic development; lack of economic wherewithal emaciated tribes' meager governing capacities; economic conditions deteriorated further; and so on downward. MICSA's restrictions have locked the Wabanaki Nations in a struggle against this cycle.

#### **D. Summary**

Federal policies of tribal self-determination through self-government took hold with force in the late 1980s. The overall result has been an unprecedented surge in economic development and tribal government capacity building. Much publicized exercises of self-determination in the form of tribal expansions into the gaming industry are important parts of this story, but far from the only parts. Economic development in non-gaming sectors has also surged. Along with economic development, in a virtuous cycle of support, tribal governments have made huge leaps forward in the size, scope, and quality of their services.

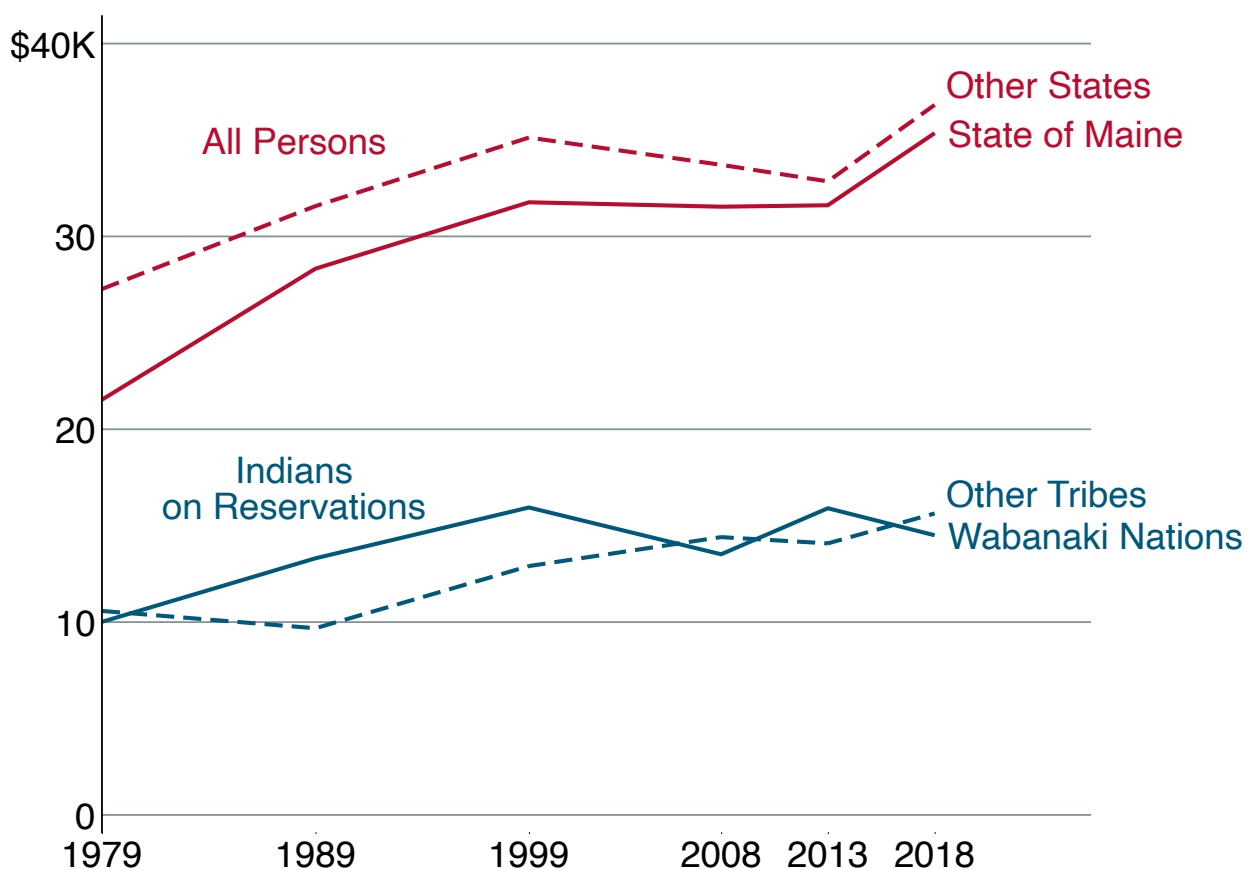
Notwithstanding these very positive overall trends, pockets of poverty and underdevelopment remain in Indian Country. The Wabanaki Nations are one of these pockets. The evidence indicates that this is largely the result of the restrictions of the Maine Indian Claims Settlement Act on the Wabanaki Nations' abilities and capacities to exercise self-governance over their own affairs. At the very least, these restrictions have limited the ability of the Wabanaki Nations to at least get on paths to keeping pace with the overall trends we see among other tribes in the Lower 48 states.

Lastly, it should be pointed out that, despite the extraordinary pace of economic development in Indian Country in the Self-Determination Era, the need for economic development remains acute. Decades and centuries of deprivation and dispossession put Indian Country at a very low starting point as self-determination took hold. Notwithstanding the impressive 60+% growth we see in Figure 3 above, Figure 8 shows the income per person of Indian Country today to still be only one-half that of the United States and Maine. Indian Country started from such a low base that it will take decades for the income gap to close, even if Indian Country maintains its strong pace. It would be poor public policy



for the federal government to waver or retreat in its support for tribal self-determination through self-government and American Indian economic self-sufficiency. As discussed in the following section, we find that this conclusion applies across Indian Country—and especially in Maine, where the growth “gaps” to be overcome are so pronounced.

Figure 8: Real Per Capita Income, 1979–2018



Real (i.e., inflation-adjusted, 2021 dollars) population-weighted per capita income for Wabanaki reservations and other reservations in the lower forty-eight states. ACS 5-year averages are plotted at their middle years (2008, 2013, 2018). (FRED, 2022; Taylor and Kalt, 2005; Census, 2010, 2015, 2020a)





## IV. Risks v. Opportunities for Maine's *Tribal* Citizens

### A. The Wabanaki Nations have much to gain from lifting MICSA's restrictions

As noted above, the Wabanaki Nations are low performers in many vital dimensions. It is implausible that this poor performance is something inherent in the Wabanaki Nations or Maine themselves. The patterns of improvement across tribes in the other Lower 48 states are found in large tribes and small tribes, rural tribes and urban tribes, and in economically poor states and better-off states. The discussion above supports the hypothesis that what has been missing in Maine is full access by its tribes to the powers of local self-government and the related federal self-determination programs and funding that the tribes in other states have enjoyed.

As tribal leaders described to the Task Force, MICSA has severely hampered the ability of the tribes in Maine to exercise powers of self-government by:

1. Limiting the provision of essential governmental services to tribal and non-tribal Maine citizens;
2. Blocking economic development in tribal communities and the communities around them;
3. Restricting the eligibility of the tribes, their citizens, and surrounding communities for federal programs and funding; and
4. Increasing costly and protracted litigation over the extent of tribal and state jurisdiction, to the detriment of all Maine citizens. (Carpenter et al., 2020)

The practical effect of MICSA's restrictions shows up in the economic performance of the Wabanaki Nations relative to similarly situated tribes in the rest of the US. Consider, for example, the relative Wabanaki employment data shown in Figure 9 below. Here, we make use of publicly available data on full-time equivalent employees (FTEs) of the US tribes immediately before the onset of the COVID pandemic. These data were provided and certified by the nation's federally recognized tribes in the process of the US Treasury Department's allocation of COVID relief funds under the American Rescue Plan Act of 2021 (Henson et al., 2021). In the figure, we plot the Wabanaki Nations' total number of full-time equivalent (FTE) employees against comparable measures for the tribes in the "Lower 46" (i.e., the states other than Oklahoma, Maine, Alaska, and Hawaii).<sup>14</sup>

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<sup>14</sup>Hawaii has no federally recognized tribes; tribes in Alaska (with its corporatized approach), Oklahoma (with the predominance of Indian "areas"), and Maine (with MICSA) operate under policy frameworks that are distinctly different from federal policy governing the tribes in the "Lower 46".



Research indicates that, after accounting for internal factors (such as a tribe’s constitution and governing structure), external factors such as a tribe’s location relative to substantial urban markets can affect a tribe’s economic fortunes and, hence, the number of jobs—FTEs—the tribe supports (Cornell and Kalt, 2000). Then, too, after accounting for the influence of other factors, a tribe’s size might also be expected to affect the number of jobs it supports: A tribe with a small population near or in a major market might be expected to support a large number of jobs via a tribal casino or retail enterprises (e.g., as do, for example, a number of California tribes located in major metropolitan areas, albeit with small numbers of citizens), but a similarly located tribe with a large number of citizens would be expected to support even more FTEs (as the tribe not only operates businesses, but also staffs larger tribal government operations to serve those citizens).

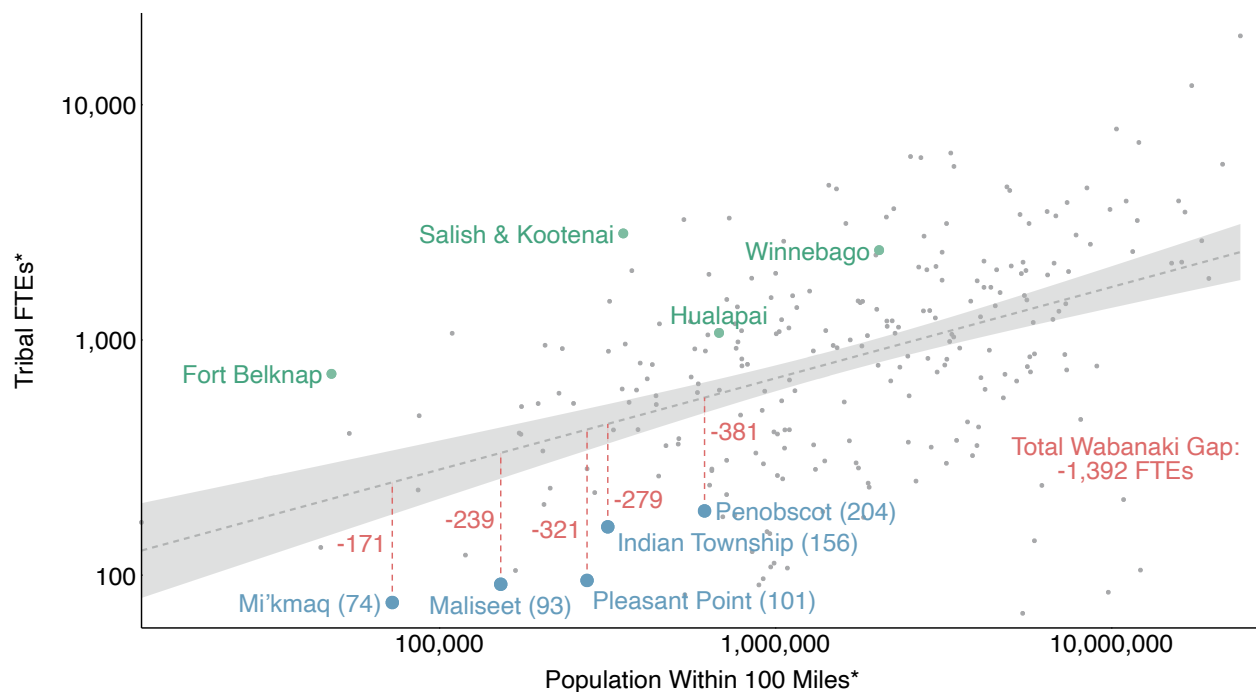
To reflect the foregoing factors and be able to compare the Wabanaki Nations to other tribes that are similarly situated vis-à-vis citizen enrollment and location, Figure 9 is structured to account for those other tribes’ distances from major population bases and their number of citizens.<sup>15</sup> The horizontal axis in the figure displays the population within 100 miles of a tribe’s reservation—i.e., the customers and workers a tribe can readily access. The vertical axis then shows the tribe’s full-time equivalent (FTE) employment. The grey dots depict the many tribes’ positions on these dimensions. The grey dotted line represents the average expected FTEs of tribes in the Lower 46 at a given amount of surrounding population within 100 miles (after taking into account the tribe’s enrollment). The shaded region above and below that line indicates the 95 percent confidence interval of its location. The upward slope of the line shows the expected fact that tribal FTEs rise with the size of the economic opportunity near them.

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<sup>15</sup>Figure 9 is a *residualized* scatterplot conditional on enrollment. The graph is the second stage of a two-stage analysis, the first of which conditions each variable (pop100 and FTEs) on tribal enrollment. In other words, the x and y data in the figure are the residuals of regressions of those variables against enrollment, re-centered on their means. Both axes present the data on proportional scales. In contrast to normal scales where intervals are additive (e.g., 5, 10, 15, 20), the intervals of a proportional scale are multiplicative (e.g., 10, 100, 1,000, 10,000). Proportional scales undo the working of exponentiation and are appropriate for displaying phenomena characterized by compound growth, like populations and economies.



Figure 9: Wabanaki Nations Employ Fewer Than Average

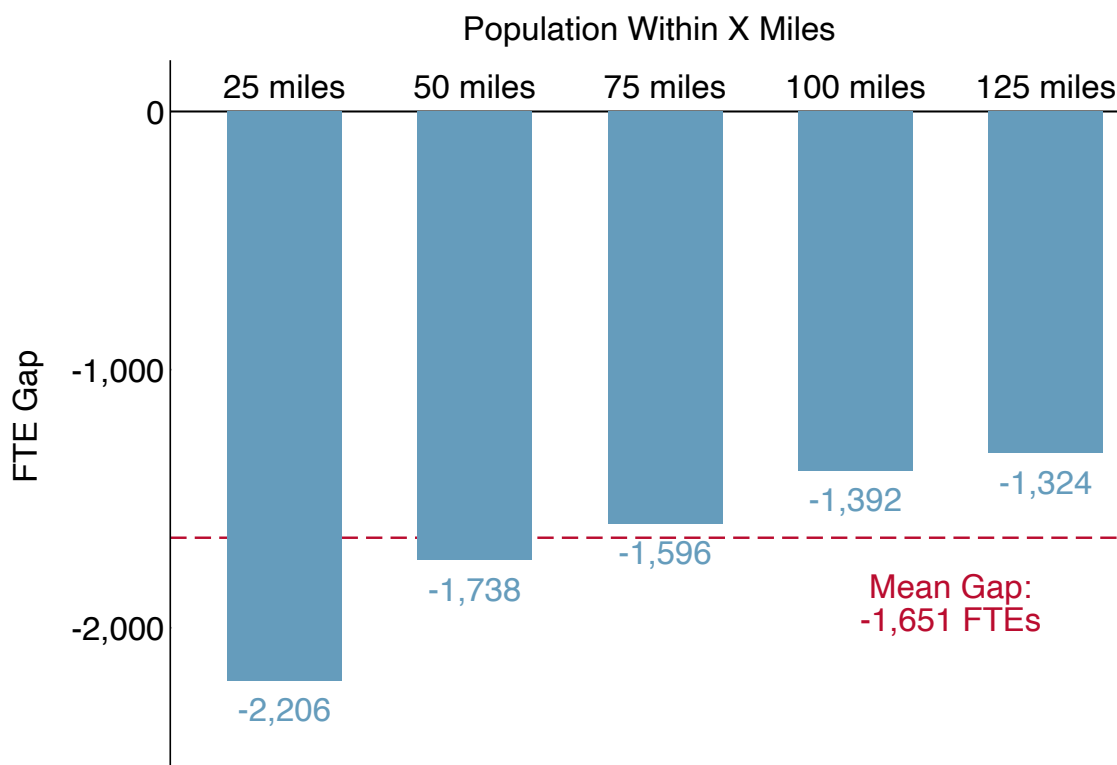


\* After conditioning on tribal enrollment. “Lower 46” tribes with greater than 68 FTEs per US Treasury in Henson et al.. Arrows representing a given number of FTEs are shorter, the higher they are located on the proportionally scaled y-axis. (Henson et al., 2021; Census, 2020b)

A number of the tribes discussed in other sections of this report are indicated in green for reference. Their positions above the confidence interval justify calling them “breakaway” tribes—they are ahead of their respective packs. On the other hand, the telling result regarding the Wabanaki Nations is that all five Wabanaki Nations employ far fewer than is reasonable to expect from their size and access to workers and customers. The Wabanaki Nations’ position well outside the shaded region means their FTE gaps are not just statistical accidents. Relative to their current size, the indicated Wabanaki employment gaps are large. If Penobscot, for example, were to move up to the average of “Lower 46” tribes with similar numbers of citizens and similar locations vis-à-vis population centers by adding 381 FTEs, the number of jobs at Penobscot would more than double. As discussed below, the economic implications of this added employment for surrounding communities and Maine as a whole, are significant also. Overall, the sum of the Wabanaki employment gaps relative to the average for similarly situated tribes totals 1,392 FTEs. This is 120% higher than current tribal employment levels.

The analysis presented in Figure 9 portrays the market opportunity within 100 miles of reservations, but we can also examine results in cases where we focus at closer (or farther) distances. Figure 10 shows that varying the radius of analysis does not flip the result.<sup>16</sup> Indeed, 100 miles (the fourth bar) appears at the point where changes in the gap estimate start to level off for each additional 25 miles. What is clear is that, when it comes to supporting employment, the Wabanaki Nations are markedly underperforming their similarly situated peers.

Figure 10: Estimates of the Wabanaki Jobs Gap



Wabanaki Nations compared to the average of other similarly situated tribes based on population within X miles (per Figure 9).

It is revealing that, across the entire sample of hundreds of tribes captured in the data of Figure 9, very few non-Maine tribes show the depressed state of development of the Wabanaki Nations, and this holds across *all four* of the tribes in Maine (and all five of the Maine reservations). The tribes in Maine are consistently near the bottom of all US “Lower 46” in terms of the number of jobs their economies are supporting.

<sup>16</sup>In all cases, all the Wabanaki Nations fall well below the 95 percent confidence interval for the line of best fit.

We can find nothing fundamental about the Wabanaki Nations, themselves, that would lead us to expect that they would be so economically underdeveloped relative to other tribes. In fact, while it is statistically possible that one or more of the Wabanaki Nations would have ended up far below or far above the line of averages in Figure 9, the available information would lead us to the statistical expectation that they would have landed on the line. In particular, there is no inherent reason to believe that they *all* would have inherently underperformed the bulk of tribes in the “Lower 46.” Of course, there is one factor that all four of the tribes in Maine do share in common: For the last four decades, they have all been restricted by *Maine’s* decisions under the Maine Indian Claims Settlement Act from partaking in the full range of federal policies and programs of self-determination that other tribes have enjoyed.

## **B. Challenges to success: Tribal government structures**

Clearly, the opportunities are large and the stakes are high for Maine’s tribal citizens. More than doubling the size of a tribe’s economy could do nothing but improve economic conditions within tribal communities. And the “virtuous cycle” discussed above would be expected to work for the Wabanaki Nations as it has for other tribes: The increased enterprise and governmental sector activity underlying job growth would mean more income, accumulation of more work experience, improvement and expansion of community services and infrastructure, greater attractiveness to entrepreneurs, and improved capacity to tap into market and public sector opportunities.

But success under self-determination through self-government is not guaranteed. This is true not only for tribes, but for self-governing societies everywhere. Not all states are high performers, and not all nations around the world are high performers. In the case of self-governing Indigenous nations, the root causes of persistent economic underdevelopment and attendant social strains do not generally appear to be external factors often thought to hinder tribal development—i.e., factors such as geographic size or isolation, access to natural resources, the size or spatial density of the tribal population, or even education (Cornell and Kalt, 2000). While attributes such as being closer to markets, better resource endowments, and more education can help a tribe, for each such ostensible obstacle there are numerous instances of tribes that have broken the backs of long-standing problems of poverty and social stress in the era of self-determination despite (at least initially) poor access to markets, weak natural resource bases, low educational attainment. To cite just a few:

- The Mississippi Choctaw Tribe pulled itself up from the least likely of conditions in central Mississippi to become a major manufacturing center employing thousands of Indian and non-Indian workers (Cornell and Kalt, 2007).



- The Hualapai Tribe, mentioned above and with approximately 2400 citizens, was seemingly forever trapped in very rural, desolate Arizona and in economic desperation until it adopted self-governing policies and structures that have allowed it to now become the second largest employer in Mohave County, Arizona (after the County, itself) (Kalt, 2017a).
- A similar story is told by Fort Belknap (see above), which has proceeded with economic development and concomitant improvement in social services in a setting of extreme geographic isolation, only modest natural resources, and historically weak educational attainment.
- The Winnebago Tribe's Ho-Chunk, Inc., a very successful conglomerate manufacturing-construction-financial-distribution-consulting company, emerged out of the cornfields of rural Nebraska from being virtually nothing in the late 1980s (HPAIED, 2000).

Where we do see some examples of stark underperformance of tribes otherwise able to exercise broad powers of self-government under current federal policies of self-determination, the root cause most often emanates from underperforming institutions of self-government (Cornell and Kalt, 2000). Like states trying to serve their citizens' local needs, sovereign tribes have responsibilities to build their own capacities to govern, prioritize the needs of their citizens, and fund and efficiently deliver services. Meeting these responsibilities requires leadership, organizational capacity, and resources. But these steps require firm foundations.

For many tribes in the Self-Determination Era, the laying of their governmental foundations started with constitutional reform. Simply continuing to operate under federally-drafted constitutions of the type effectively imposed on or adopted by hundreds of tribes as a result of the Indian Reorganization Act (IRA) of 1934 (P.L. 73-383) has not suited most tribes. These "boilerplate" systems were marked by a structure consisting of: (i) a one-house legislature; (ii) no separation of powers between the tribal chief executive and the tribal council; (iii) no provisions for stable court systems; and (iv) little anticipation of Self-Determination Era powers of taxation, law enforcement, enterprise ownership, and other core governmental functions (Kalt, 2007).

Upon finding their initial efforts at self-governance floundering (or worse) under constitutions that were not of their own making, many tribes ended up pursuing constitutional reform. Research on tribal constitutions finds that tribal economic success (and even positive governmental program performance) is strongly related to constitutional structures. Systems marked by separations of legislative and executive powers, independent court or dispute resolution systems, and staggered and longer terms for elected officials, for example, are associated with tribal economic growth and high-performing tribal government programs (Kalt, 2007; Cornell and Kalt, 2000).



Lest quintessentially Western terms such as “separations of powers” and “independent court system” suggest the solution to good governance for tribes is to Westernize their governments, Indian Country is teaching the world that sound governance, indeed, requires the noted attributes but does not have to look Western. Decidedly non-Western, even theocratic, structures with the noted characteristics of independent dispute resolution, separations of powers, etc. are undergirding thriving Native communities. What is required is that such structures be in place and consonant with and legitimate in the context of each tribe’s own cultural norms regarding the proper use of power and authority (Cornell and Kalt, 1997; Kalt, 2007).

The Wabanaki Nations vary in their constitutional structures and evolution, as well as their business development institutions:

- Each of the Passamaquoddy Tribe’s subdivisions (Pleasant Point and Indian Township) operates under a constitution that provides for six-member councils and a Sakom (Governor) and Leptanet (Lieutenant governor), and these officers form an overall Joint Tribal Council. Council Members serve four-year, staggered terms of office as members of the tribal legislature (council). The Tribe also operates a joint tribal court protected by the need for unanimous council consent to remove tribal judges, supported by strong limitations on the ability of a council to de-fund the courts, and layered trial and appeals mechanisms (Sipayik, 1990; Motahkomikuk, 1993). In its business dealings the Tribe has already adopted structures consistent with best practices by, for example, chartering its Passamaquoddy Wild Blueberry Company as wholly owned by the Tribe but governed by a politically independent board (Bureau of Indian Affairs, 2011).
- With its late recognition by the federal government, Mi’kmaq continues to develop its government. Nine council members, including a chief and vice-chief, serve four-year staggered terms (Mi’kmaq Nation, 2022). Although the Tribe has pursued development of a tribal court, its efforts have been stymied by the MICSA limitations on Mi’kmaq’s jurisdiction and operation. Thus, a tribal court is not yet operating.
- The Penobscot Nation is governed by a 12-member tribal council, with council members serving staggered, four-year terms (noted by the Nation as intended to provide stability to tribal government) (Penobscot Nation, 2021). The Nation established a Tribal Court in 1979, providing for a trial court, and a three-member appellate court. The Nation’s Penobscot Indian Nation Enterprises (PINE) is a federally chartered corporation with its own board of directors.
- At the Houlton Band of Maliseet Indians, the tribal governing body consists of six council members elected for staggered, four-year terms and a tribal chief elected for four years. The court system is nascent, with the Tribe utilizing the Penobscot and Passamaquoddy courts. Leaving tribal justice matters to be ruled upon by these other tribes suggests an area for further development for Maliseet, but the arrangement does create a level of judicial independence from political affairs within Maliseet while it develops its own court system (Houlton Band of Maliseet Indians, 2022). The Tribe has also chartered its wholly-owned local business enterprises, Wilderness Pines Campground and Maliseet Rollerama, as separate corporate entities.





These tribal governing systems can be expected to be put to heightened stress tests if MICSA's restrictions are loosened or removed. Tribal leadership, in particular, will be under pressure to ensure sound governance. The lessons from the experiences of hundreds of other tribes are that success in this effort is more likely than not, and the parties in the best position to design governmental structures suitable to a world of full self-determination through self-government are the respective tribal communities themselves. They are in the best position to recognize their own needs, and the best position to devise competent and legitimate structures to meet those needs (Begay et al., 2007).

### **C. Challenges to success: Tribal governmental capacity**

While the State of Maine has a long history of working to meet its responsibilities to its citizens, the particularities and oddities of MICSA have meant that the Wabanaki Nations have had only stunted opportunities and experience to develop their capacities for self-government. The loosening or removal of MICSA's would be expected to expand the responsibilities and opportunities of Wabanaki Nations' governments. Developing and deploying leadership, increased organizational capacity, and more resources will tax the personal skills and knowledge of community leaders and decision-makers. Greater powers of self-determination through self-government will require costly investments in people and administrative capacity, and it will force tribes into new relationships—i.e., as more equal local government peers—with neighboring cities, counties, and the state.

These challenges are challenges born of expanded opportunity; they are growing pains. The tribes will bear the risk of failure, or at least stumbling, in meeting these challenges. In the process, not only tribes, but their neighbors might be adversely impacted. The evidence from tribes in the other Lower 48 states strongly suggests that the growing pains are worth bearing, as their economic development in case after case has been accompanied and supported by improvements in tribal government performance (as discussed in Section III (HPAIED, 2022)). In many cases, the challenges of expanded self-governance have had to be addressed by tribes in starting positions much weaker than those of the Wabanaki Nations. The latter have had relations (albeit, handcuffed) with federal programs and funding. Moreover, as evidenced by their repeated challenges to MICSA-derived restrictions, Wabanaki tribal leadership is sharply focused and aware of the role that enhanced self-government can play in their communities.





While optimism is well-founded in light of the “laboratory” of the experiences of hundreds of other tribes, located outside of Maine, it is reasonable to ask, where will the financial and human resources come from to expand the Wabanaki Nations’ capacities to engage the wide range of governmental functions—from increased roles in environmental protection and health care provision to stepped-up law enforcement and housing programs? Again, evidence comes from other tribes who are not constrained by MICSA.

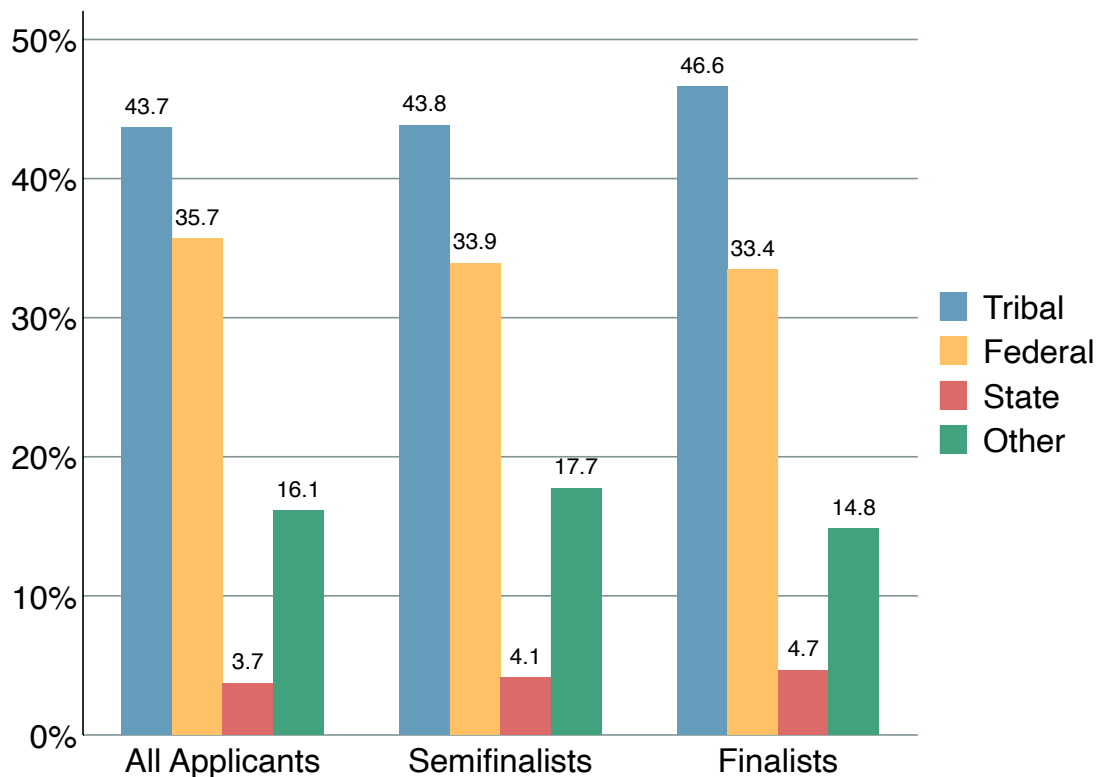
Figure 11 shows the sources of funding for a select group of tribal programs from across the United States.<sup>17</sup> Specifically, the figure shows the average shares of funding provided by tribal government, federal government, state government, and ‘other’ (including private and user fee sources) for the 925 applicant programs reviewed by the Harvard Project on American Indian Economic Development’s *Honoring Nations* awards program recognizing best practices and outstanding performance by American Indian tribal governments over 1999-2018. This program seeks to identify, document, and disseminate the stories of excellence in tribal self-government through a competitive process of nomination and review. A process involving reports by site visitors, applicant presentations, and ultimately review and voting by a panel of more than a dozen independent experts who are leaders in Native affairs narrows applicants down to semifinalists and then finalists. The panel’s selection criteria include “significance to sovereignty, effectiveness, cultural relevance, transferability, and sustainability” (HPAIED, 2022).

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<sup>17</sup>Data are from forthcoming research by, and have been graciously provided by, Dr. Laura Davidoff Taylor. Dr. Taylor is a postdoctoral research scholar in the Division of Humanities and Social Sciences at the California Institute of Technology and a Research Fellow of the Harvard Project.



Figure 11: The Funding of Excellence in Tribal Governance  
*Honoring Nations* Programs, 1999-2018



The Harvard Project on American Indian Economic Development, Honoring Nations Program, 925 applications representing tribal government programs from 215 federally recognized tribes (HPAIED, 2022).

Applicants to *Honoring Nations* submit their funding profiles with their applications. Fully 215 tribal nations are represented in the data of Figure 11 (HPAIED, 2022). There is likely to be some overweighting of the data in Figure 11 toward high-performing tribal governments, because the applicants to the *Honoring Nations* program would be expected to self-select based on reasonable expectations of being awarded—and publicly recognized—for their achievements when and if becoming program finalists. Certainly, the processes of finding and soliciting applicant programs, as well as the review panel’s criteria of selection, tilt the semifinalist and finalist applications toward the high-achieving tribal programs. Indeed, some of these tribal operations are high achieving by any measure. Thus, for example:

- The Tohono O’odham Nation’s Archie Hendricks Skilled Nursing and Hospice Facility put in place state of the art technology *and local culture* to become the first five-star Medicaid nursing facility in the state of Arizona (HPAIED, 2008a). The 60-bed center has received awards for merit from not only *Honoring Nations* in 2008, but also from McKnight’s Excellence in Technology Awards (Newman, 2014), the Wall Street Journal’s Small Business Awards program, and the National Indian Health Board (Hansen, 2018).

- 2007 *Honoring Nations* awardee, the Muscogee (Creek) Nation Reintegration Program (RIP) was established by the Muscogee (Creek) Nation in Oklahoma to combat the challenges of reintegrating its citizens into mainstream community life and work upon their release from prison. The Reintegration Program cut the criminal recidivism rate among its clients to 10%, compared to the 30% rate experienced by the state of Oklahoma as a whole. In response to this performance by RIP, the state of Oklahoma undertook to share jurisdiction and programming for corrections with the Muscogee (Creek) Nation (HPAIED, 2008c).

What we can say from Figure 11 is that high-performing tribal government programs in the era of Self-Determination derive the largest portions of their budgets from their tribal governments—i.e., tribes are self-funding at levels averaging approximately 45%. The noted tribal operations do make substantial use of federal funding, generally in the range of approximately 35% or somewhat less. This reflects the enduring trust responsibility of the federal government to tribes (Bureau of Indian Affairs, 2017). For comparison, the Tax Foundation reports that approximately federal aid made up 34.3% of Maine’s state general revenue in 2020 (Fritts, 2020). In other words, high performing tribal programs are about as dependent on federal dollars as the state of Maine.

While there is no available data comparable to the *Honoring Nations* data for tribes and tribal programs that did not apply to *Honoring Nations*, anecdotal evidence from the authors’ extensive fieldwork suggests that markedly underdeveloped tribes are markedly dependent on federal funding. The default mode for tribes who lack substantial self-governing capacity is to fall back on federal services and federal funding. In any case, *state* government funding of tribes across the country is quite insignificant: For the high-performing programs represented in Figure 11, for example, state funding is generally less than 5% of program budgets (a level similar to the previously mentioned Washington tribes’ 4% state funding).

The lessons learned are that, *notwithstanding the history of demonstrably low absolute levels of federal allocations to tribes*, federal policies of self-determination have provided sufficient funding for tribes to at least support basic governmental functions; and, perhaps more importantly for generating excellence in performance, these federal policies have spurred the economic development that has enabled tribes to plough their own revenues back into their communities. The implication for the matters under consideration here is that we would not expect the state of Maine’s budgets to be burdened by removing MICSA’s restrictions on the Wabanaki Nations’ abilities to access the full range of the federal government’s policies, programs, and funding of tribal self-determination through tribal self-government. If anything, the expectation runs in the opposite direction. As we detail in Section V, the evidence from across Indian Country is that the expansion of the powers of tribes to govern themselves over the last several decades has, overall, inured to the benefit of state governments and their non-tribal citizens.



## V. Risks v. Opportunities for Maine’s *Non-Tribal* Citizens

### A. What are the stakes?

To be sure, loosening or removing MICSA’s restrictions on the applicability of the federal government’s Self-Determination policies, programs, and funding to the Wabanaki Nations in Maine could bring substantial change for the State of Maine and Maine’s Wabanaki citizens. What are the implications for Maine’s *non-tribal* citizens?

Public and legislative discussion in the State of Maine highlights areas of attention and possible concern. In broad form, prominent among these are the prospective economic effects of bringing the Wabanaki Nations in Maine more, or even fully, under the federal government’s Self-Determination Era policies, programs, and funding, and the likely impacts of doing so on environmental affairs, the gaming industry, and state-tribal relations in Maine. Let us turn first, to the economic stakes for Maine’s non-tribal citizens.

Prior research on the size of tribal economies consistently reports results that make it clear that, across the U.S., Indian Country overall is supporting tens of billions of dollars of total economic output and GDP (i.e., value added), billions of dollars of federal, state and local, and tribal government revenues, and more than a million jobs held by Indians and non-Indians, alike.<sup>18</sup> Indeed, these studies find that on the order of 70%-90% of the jobs supported by Indian Country are held by non-Indians.

While large, these economic impacts of tribes are not surprising in light of the remarkable economic growth of Indian Country in the Self-Determination Era. Numerous tribes’ economies are now the “anchors” of whole regional economies with their states, and many tribes are at the stage of having to hire numerous non-Indians to meet their needs for workers in both tribal government and tribal enterprise operations. Those workers (Native and non-Native), their employers (tribal and non-tribal), and those employers’ Native and non-Native clients and customers spend their incomes in local reservations and neighboring non-tribal economies. As these cycles of spending work their way through the economy, they provide indirect support for regional employers and their workers, and result in direct and indirect sales, property, income, and other tax revenues for tribal and non-tribal state, local, and federal governments.

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<sup>18</sup>See, for example: Taylor (2022, 2015); Akee et al. (2020); Dean (2019); National Indian Gaming Association (2019); Meister (2017).



The foregoing carries direct lessons for Maine and its non-tribal citizens. To the extent that MICSA’s restrictions have left tribal economic development “on the table” for the reasons discussed in Section IV above, closing tribal development “gaps” by loosening or removing MICSA’s restrictions would be expected to have unambiguously positive overall impact on the level of economic activity and associated employment, income, and state, local and federal tax revenues generated in Maine.

To assess the potential magnitudes of these effects, we begin with a statewide economic impact model based on detailed revenue, employment, and employee compensation data on immediate pre-pandemic gaming, non-gaming enterprise, and tribal government operations provided by 23 of the 29 tribes in Washington (Taylor, 2022). We then adapt that model to key parameters for the state of Maine. While there are certainly differences between the economies of Washington and Maine, our modeling here focuses on the kinds of economic activity, employment, and purchasing that tribal economies commonly exhibit—e.g., tribal government services, gaming and related industries, Section 8(a) contracting, and other non-gaming enterprise operations. This permits us to sketch the economic impacts Maine would likely see if the employment gaps measured in Figure 9 were closed. In other words, the adapted modeling permits us to roughly assess what impacts are reasonable to expect if removing or eliminating MICSA’s restrictions on Maine’s tribes participation in the federal Self-Determination Era resulted in economic development of those tribes up to the averages of their peers? The results are shown in Table 2.

**Table 2: What’s at Stake for Maine?**  
Impact of Closing the Wabanaki Nations’ Jobs Gaps  
with Similarly Situated Non-Wabanaki Nations

<b>Maine GDP</b>	\$330 million/year
<b>Tribal Jobs Gap + Spillover Jobs</b>	2,743
Indian Jobs	456
Non-Indian Jobs	2,287
<b>Tribal Gov’t Revenue</b>	\$68 million/year
<b>Federal Taxes</b>	\$51 million/year
<b>State &amp; Local Taxes</b>	\$39 million/year

See note 19.



The results shown in Table 2 should be taken as rough approximations. Adapting modeling from another state’s setting to Maine’s has required the use of “rule-of-thumb” ratios and parameters.<sup>19</sup> Moreover, as we have pointed out, even if the statistical expectation is that the tribes in Maine would perform over time at the averages of their peers in Figure 9 (i.e., they would move up to the sloped line in the figure), one or more of the Wabanaki Nations might do better or might do worse than that. With these caveats in mind, Table 2 shows that “closing the gaps” between the Wabanaki Nations in Maine and their peers elsewhere in the “Lower 46” could be expected to support hundreds of millions of dollars of gross state product and thousands of spillover jobs, with the preponderance of these jobs being held by non-Indian workers. This economic activity would also support tens of millions of dollars of government revenue at tribal, state and local, and federal levels.

The “stakes” projected for Maine citizens in Table 2 are concentrated locally around the several tribes in Maine. To provide a sense of this local importance, Table 3 shows the most recently available data on the rankings of employers by size in Aroostook County, Penobscot County, and Washington County, Maine. These counties are, respectively, where the Wabanaki Nations have reservations. Table 3 indicates that, in Aroostook County, Maliseet and Mi’kmaq Tribes are the forty-second and forty-third largest employers. If these two tribes were to perform at the average level of their peers in Figure 9, they would be the 6<sup>th</sup> largest and 9<sup>th</sup> largest employers in Aroostook County. Penobscot would jump to 7<sup>th</sup> largest employer in its eponymous county. Passamaquoddy Indian Township and Pleasant Point would rise to 1<sup>st</sup> and 2<sup>nd</sup> places, respectively in Washington County.

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<sup>19</sup>Our adapting of the Washington-level modeling to Maine’s setting entails applying ratios from the one context to the other. For example, we take the *ratio* of the measured tribal jobs to total supported jobs in Washington as an approximation for Maine, and use that ratio to estimate total supported jobs in Maine (i.e., 2,743 in Table 2) based on the Maine tribal jobs “gap” of 1,392 reported in Figure 9. Given Federal Reserve Bank figures for Maine’s GDP (FRED, 2022, MENGSP) and total worker employment in Maine (FRED, 2022, EMPLOYME), yields GDP per worker in Maine. Applying this to the total jobs “gap” in Table 2 (2,743) allows a measure of Maine’s overall GDP “gap”—i.e., \$330 million in Table 2. Similarly, we use tribal government revenues per dollar of GDP from (Taylor, 2022) to arrive at the estimate of the tribal revenue “gap” (\$68 million) in Table 2. We use similar approaches based on data at the level of state and local tax revenues (Urban Institute, 2022) and federal tax collections (Wikipedia, 2022) in Maine to arrive at the state, local and federal revenue “gaps” in Table 2. To estimate the Indian/non-Indian makeup of supported jobs, we employ data from (Taylor, 2022) and from the US Census (Census, 2021) for the Indian/non-Indian proportions in the general Maine population to arrive at the makeup of the tribal jobs and spillover jobs “gaps,” respectively.



Table 3: Wabanaki Nations v. Top Employers in Maine Counties

Top Employers in Aroostook County				Top Employers in Penobscot County				Top Employers in Washington County			
rank	entity	# employees	rank	entity	# employees	rank	entity	# employees	rank	entity	# employees
1	Army National Guard	7,000	1	Northern Light Health	8,000	1	C & D Corp	400			
2	Northern Light AR Gould Hosp	895	2	Northern Light Eastern ME Med	3,544	2	Woodland Pulp LLC	300			
3	Mccain Foods USA Inc	800	3	University Of Maine	2,500	3	Worcester Wreath Co	300			
4	Cary Medical Ctr	434	4	Bangor Bancorp MHC	907	4	Machias Bancorp MHC	293			
5	Houlton Regional Hospital	348	5	Community Health & Counseling	875	5	Down East Community Hospital	272			
6	University Of Me-Presque Isle	270	6	Bangor Savings Bank	700	6	Calais Community Hospital	240			
7	Maine Mutual Fire Insurance Co	260	7	Rape Response Svc	550	7	Dore's Evergreen	200			
8	Twin Rivers Paper Co LLC	230	8	GE Power	500	8	Dorr Lobster Co Inc	200			
9	Army National Guard	200	9	Northern Light Acadia Hospital	457	9	Sunrise County Evergreens	175			
10	Madigan Estates Nursing Home	200	10	Weekly	400	10	Passamaquoddy Tribe At Indian Township	156			
11	Northern Maine General	200	11	Cross Insurance	400	11	Regional Medical Ctr At Lubec	120			
12	Aroostook County Action PRGRM	180	12	Dorothea Dix Psychiatric Ctr	380	12	Walmart Supercenter	120			
13	Overhead Door	178	13	Central Maine & Quebec Railway	350	13	Passamaquoddy Tribe At Pleasant Point	101			
14	Katahdin Bankshares Corp	178	14	Penobscot Valley Hospital	309	14	Bells IGA	100			
15	LP Houlton OSB	175	15	Bangor Savings Bank	300	15	Calais Day Treatment Program	100			
16	Smith & Wesson Corp	160	16	Advanced Structures-Composites	265	16	Primerica	100			
17	Irving Forest Products	160	17	Quirk Mitsubishi	250	17	Calais Childrens Project	100			
18	Walmart	156	18	Johnson Outdoors Watercraft	250						
19	Northern ME Cmnty Ctg Bkstr	150	19	Walmart Supercenter	250						
20	Presque Isle Rehab & Nursing	145	20	Maine Veterans Homes	250						
21	Lowe's Home Improvement	140	21	Cyr Northstar Tours	250						
22	Caribou Rehab & Nursing Ctr	140	22	Versant Power	240						
23	Irving Woodlands LLC	140	23	Penobscot County Treasurer	230						
24	MMG Insurance Co	135	24	Voith Hydro Inc	230						
...			25	Cooperative Extension Svc	220						
42	Houlton Band of Maliseet Indians	93	26	Penobscot Nation	204						
43	Aroostook Band of Micmacs	74									

(Data Axle, 2022)





Finally, the noted linkages that tie other tribes' economic development and tribal government performance together in the virtuous cycle of improvement would be expected to apply in Maine, as well. Locally, this would show up, as it has in so many other locales, as improved capacity of the tribes to serve the needs of their own citizens and concomitant reductions in burdens on the state and local non-tribal governments. At the same time, tribal governments cannot be expected to be uniformly outstanding in their performance. No government can properly be held to such a standard.

What can be said from the cases and evidence discussed above is that enhanced local control by tribal citizens of their governments generally improves the prospects of stronger governmental performance. This is borne out by both extensive systematic data and anecdotal evidence. Thus, for example:

- Statistical analysis of scores of tribes who have taken over management of their forest products industries from the federal Bureau of Indian Affairs finds that putting tribal governments in control improves both the financial and the ecological productivity of tribes' resources (Krepps and Caves, 1994). And this is especially the case when self-governing tribes have sound governing institutions, such as independent court systems, in place (Jorgensen, 2000).
- Tribal citizens report greater satisfaction when law enforcement and emergency response are performed by their own governments—response times go down and community satisfaction goes up (Wakeling et al., 2000; Taylor et al., 1999).
- Exhibiting innovative and nimble adaptation increasingly seen among self-governing tribes coming to light in the *Honoring Nations* program, the Northwest Indian Treatment Center, a substance-abuse recovery facility of the Squaxin Island Tribe, is ranked in the top 3% of programs nationwide. It not only serves Native people from well beyond the environs of the tribe with, e.g., sweat lodges and mask-making treatment modalities, but it also accepts non-Native patients and offers Shaker and Pentecostal services that contribute to its “overwhelming success rate of nearly 60 percent” (NWITC, 2022).

More generally, the improvement in economic conditions on reservations is showing up as improvements in the everyday quality of life, as tribes invest in long-neglected infrastructure, improve their wildlife management systems, take care of streets, roads, and parks, and produce other public goods, services, and amenities that, in the process, benefit the non-tribal public, as well as tribal citizens. Exemplary cases make the point:

- The Kalispel Tribe's Camas Center for Community Wellness contains a medical and dental clinic, daycare, fitness center, basketball gymnasium, pool, rock climbing wall, and business meeting rooms. The Camas Center opens its doors not just to Kalispel citizens but to members of the surrounding community as well (Kalispel, 2022).





- The attractive wages, benefits, organizational culture, and career ladders of the Prairie Band Potawatomi Nation cause it to routinely rank high in the *Topeka Capital-Journal's* lists of “Best Employer” to work for. The Band’s casino revenues help it underwrite a full-time emergency response system serving remote northeast Kansas well beyond its reservation borders—a relative rarity in rural Kansas.
- The Citizen Potawatomi Nation handles overnight 911 dispatch in the Shawnee, OK region and is the primary water service provider to predominantly non-Indian neighboring towns (Kalt, 2016).
- The Tulalip Tribes north of Seattle are regional providers of broadband services and have helped orchestrate—and pay for—upgrades to two highway interchanges on Interstate 5 which give access not only to its reservation, but also to non-tribal communities (Kalt, 2017b).

## B. Impacts of potential tribal government gaming on non-tribal citizens

One dimension of tribal economic development in the Self-Determination Era warrants particular attention, if only for its “glitz and glamour”. For many tribes, the gaming industry—and Vegas-style casinos, in particular—have been the centerpieces of their development. For the Wabanaki Nations, however, MICSA’s provisions have been employed by the state to block any of the Wabanaki Nations from availing themselves of the provisions of the Indian Gaming Regulatory Act of 1988 (IGRA) (which effectively require states to enter into gaming compacts that launch tribal gaming operations).

The forward-acting nature of AEWNA would not, by default, apply IGRA to the tribes of Maine. As noted in Section I, however, additional legislation could bring the tribes in Maine under IGRA. The result could then be self-governing Wabanaki tribal governments going into the gaming industry, just as Maine and a number of its state neighbors have done by operating their own gaming businesses (the state lotteries) and/or permitting casinos. Accordingly, let us ask what the state of Maine and its non-tribal citizens could expect from casinos, starting with what is known about the economic and community effects of non-tribal casinos

In the early decades of US casino liberalization, a view prevailed that whatever private benefits accrued to casino owners and workers, they were a *Bad Bet* for the public.<sup>20</sup> The first part of that view has been born out—many studies confirm economic benefits.<sup>21</sup> As for the “Bad Bet,” gambling was seen as inherently dangerous—an otherwise “unproductive” [*sic*] leisure activity that brought organized crime pressure, disordered gambling, substance abuse, suicide, bankruptcies, and other problems.

<sup>20</sup>This was the name of a representative book with this stance: *Bad bet: The inside story of the glamour, glitz, and danger of America's gambling industry* (O'Brien, 1998).

<sup>21</sup>As was shown, for example, in economic research conducted under the direction of the National Gambling Impact Study Commission (Rose, 1998).



While there have been myriad bottom-up studies of particular costs and benefits—especially by casino opponents and proponents—top-down examinations of the *net* effects of casinos can cut through the dueling studies. One of the best of these is a study by the University of Chicago’s National Opinion Research Center (Johnson, 1999). The National Gambling Impact Study Commission—itself a Congressionally chartered body comprising gaming opponents and proponents—funded the research. NORC’s study examined a 16-year period of casino openings using a randomly selected group of 100 US communities, about half of which experienced a casino opening within fifty miles. It found casinos brought:

- A 17% decline in income from unemployment insurance
- A 12% decrease in the unemployment rate (about one point)
- A 13% decline in income from income maintenance programs
- A 3% decline in income from transfer payments
- Varied gains and losses in earnings by sector
- No discernible changes in bankruptcy, crimes affecting public safety and property, or infant mortality (Johnson, 1999, Table 22)

As the study observed about its social cost findings regarding social costs:

This is not to say that there is no casino-related crime or the like; rather, these effects are either small enough as not to be noticeable in the general wash of the statistics, or whatever problems that are created along these lines when a casino is built may be countered by other effects. (Johnson, 1999, 70)<sup>22</sup>

Casino social costs may get lost in the “general wash of the statistics” because gambling-driven social consequences are relatively small. Bankruptcy arising from injury, illness, and medical expense is one order of magnitude more prevalent than from gambling: about 50% of surveyed bankruptcy filers attribute medical costs versus 1.2% for “uncontrolled gambling” (Himmelstein et al., 2005).<sup>23</sup> The nationwide cost of disordered alcohol use is two orders of magnitude larger: \$166.5 billion for alcohol against an estimated \$5 billion for the national annual cost of problem and pathological gambling (per Gerstein et al., 1999, 53).

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<sup>22</sup>In addition to being randomized (which permits a degree of causal inference not just an assessment of correlation), the NORC study’s multilevel regression structure produces a simultaneous examination of treatment versus control *and* before versus after casino opening.

<sup>23</sup>While controversy attends the estimation of the role of medical costs in bankruptcy (see, e.g., Dobkin et al., 2018; Himmelstein et al., 2019), that controversy does not overturn the basic observation that medical bankruptcy is an order of magnitude more prevalent than gambling bankruptcy. Indeed, because it is so small, gambling’s role is infrequently isolated as a cause of bankruptcy in top-down reviews of filings, and if it is mentioned, it is routinely lumped in as an “other” category (e.g., Austin, 2014, 21).



Social costs may also get lost in the “general wash of the statistics” if policies governing gaming work as intended or if experience makes customers more familiar with and skillful in attending to its risks. For example, problem gambling awareness programs in advertising and on the walls of casinos themselves can help vulnerable customers stave off trouble. In either case, a comprehensive review of the literature summarized by noting:

Concerns that the expansion of gambling opportunities automatically leads to significant increases in the rates of gambling involvement and the prevalence of disordered gamblers are not supported by research. It appears that after the novelty of initial exposure, people gradually adapt to the potential risks and harms associated with gambling (Shaffer et al., 2019, 104).

And, of course, the citizens of Maine have already been exposed to gambling. In addition to the relatively new, privately owned, Maine-licensed casinos in Bangor and Oxford County, 2020 marked the Maine Lottery’s 46<sup>th</sup> year. It collected \$79.6 million in revenue that year (Census, 2020). In 2021, gross gaming revenue from casinos in Maine was \$146.9 million (AGA, 2022). Maine also has horse tracks, fantasy sports betting, and charitable gaming (see, e.g., Mills et al., 2021).

The foregoing speaks to the effects of gaming generally, but Indian gaming may have distinctive impacts on non-Indian neighbors. The contention that Indian casinos are economically bad for states—or at least damaging to state tax collections—is not a mere strawman. The idea has been put forward by consulting economists (e.g., Anderson et al., 2003). A public policy nonprofit made a similar claim (WRC, 2002). And at least one peer-reviewed economics journal article purports to have found empirical support for it (Anders et al., 1998). On the other hand, statewide surveys of tribal governments rank their collective total employment (in governments, casinos, and other businesses) among the top ten employers of, e.g., Arizona and Washington (Taylor, 2015, 2022). Regional anecdotes tell of Indian tribes becoming top local employers (e.g., in Payson, AZ, Chelan, WA, and Wayland, MI) and even engines of real estate appreciation (e.g., in Thurston County, WA).<sup>24</sup>

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<sup>24</sup>Croman and Taylor (2016) (2016) give the full stories and citations (pp. 16–17).



So, should Maine expect harms from *Indian* casinos? The Indian Gaming Regulatory Act aims to minimize the burdens non-Indians bear. To take advantage of existing state regulatory expertise, IGRA requires tribes that want Las-Vegas-style (Class III) casinos to sign a tribal-state compact that articulates the scope and regulation of gaming. Under virtually all such compacts, three sets of regulators—tribal, state, and federal gaming commissions—oversee the fairness of games, internal financial controls, and the licensing of key personnel.<sup>25</sup> IGRA also permits (and most compacts require) tribes with casinos to reimburse the states for their Indian regulation.

Tribal contributions to charities and other governments are also permitted uses of Indian casino profits. Indian gaming compacts regularly contain explicit tribal commitments to transfer revenues to other governments (effectively as payments in lieu of taxes) to offset costs impacts on the state and occasionally in exchange for state contributions of value.<sup>26</sup> In 2016 tribal payments to federal, state, and local governments were estimated to total \$15.3 billion (Meister, 2017). Compacts also routinely commit tribes to contribute to responsible nonprofit organizations that provide hotlines, counseling, and other services to customers struggling to control their gambling. Tribes also routinely make charitable contributions and provide in-kind benefits to non-Indian organizations and individuals.

Top-down analyses in the spirit of NORC's national study, but focused on Indian casinos, find positive off-reservation effects. The NORC data includes information on both tribal and non-tribal casinos. The 16 communities in the data that witnessed the opening of a nearby *Indian* casino introduction experienced more pronounced economic improvements and no social costs—the former probably arising from their relatively lower socioeconomic starting points (Taylor et al., 2000). In California, two differences-in-differences analyses showed that people in census tracts near Indian casinos saw income gains relative to those in tracts further away (Martin et al., 2006; Akee et al., 2014). National-scope econometric analyses show that counties near Indian casino openings experience employment gains (Baxandall and Sacerdote, 2005; Baxandall et al., 2005; Evans and Topoleski, 2002).

These results should be unsurprising. Tribal economies are generally small and must turn to surrounding markets for goods, services, and labor. Expenditure data from four tribes in Washington confirms that the preponderance of vendor outlays—more than 94%—go to off-reservation zip codes (Taylor, 2006). Tribal economies do not self-supply the police cruisers, electricity, accounting services, poker chips, asphalt, light posts, or myriad other inputs that are necessary to accomplish the work of tribal governments and businesses.

<sup>25</sup>Michigan compacts require only that Indian casinos display a notice announcing that Michigan does not regulate Indian gaming (GAO, 1998, 42–43).

<sup>26</sup>Often state contributions in compacts take the form of statewide or regional zones of exclusivity but have even included the sale of a convention center for \$1 in the Seneca-New York compact.



Contrary to the “siphon” theory holding that Indian casino customers’ money departs from state economies soon after appearing on the casinos’ books never to return, such patron spending becomes state-taxable, off-reservation purchases of goods, services, and labor.<sup>27</sup> In significant measure, this is due to the fact that tribal employment commonly entails high proportions of non-Indian workers. As we saw above, as much as 90% of tribal-generated employment nationally is non-Indian employment. In the same vein, data from 23 of Washington’s 29 tribes indicate a total tribal workforce that is more than two-thirds non-Indian and a casino workforce that is four-fifths non-Indian. (Taylor, 2022).

In addition, Indian casino net income tends to remain in-state because it accrues to in-state governments. In contrast to privately held casinos which distribute their earnings to owners and shareholders wherever in the global capital markets they may reside, tribal governments generally spend profits where those tribes’ citizens are. Except in currently rare (and always transitional) circumstances where a tribe hires a management company to operate its casino, all Indian casino net income is in-state, tribal government revenue. Tribes buy police cruisers, playground equipment, and community centers while paying policemen, schoolteachers, and youth directors—all in-state. Tribal governments’ production of public goods, services, and amenities funded by casino earnings, by their nature, tend to also benefit the communities around them.

In sum, the evidence indicates that, if the Wabanaki Nations were brought under IGRA and the other components of the Self-Determination Era’s self-governance policies, programs, and funding, non-tribal citizens of Maine could expect to be made better off on the whole when and if one or more of the Wabanaki Nations decided to authorize tribal gaming. This expectation would turn out to be especially true if any Wabanaki tribal casinos were to attract customers from high-income locales to places experiencing relative economic underdevelopment and high unemployment.

To the extent that costs or disadvantages for the state might arise, they are likely to be encountered as costs of adjusting to economic growth—i.e., as growing pains. Routinely around Indian Country, tribal economic growth has required new highway off-ramps, new streetlights, greater emergency response capacity, expanded wastewater treatment, and other public goods and services. But as we have seen above, it is also routine around Indian Country that tribes on paths of economic growth increase their own public services provision and work with municipalities, counties, states, and even the federal government to ease the burdens of growth. As we discuss in more detail in Section V.D.

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<sup>27</sup>The purported empirical finding that casino openings depress non-Indian tax collections noted above (Anders et al., 1998) mistakes revenue declines coincident with tribe-state *compacting* not with casino *openings*. By that study’s own data, the actual openings left the revenues under examination—Maricopa County (AZ) sales tax collections—unperturbed (as explained in Taylor, 2005, 36–7). In a similar vein, an econometric analysis of 268 Washington State tax districts over thirteen years found no statistically discernible change in taxable sales or taxable property associated with Indian casino openings nearby (Taylor, 2005).



below, this commonly takes the form of intergovernmental agreements and cost-sharing. Even though constrained by MICSA-engendered economic underdevelopment, the Wabanaki Nations have already shown themselves willing and capable of engaging in such types of productive intergovernmental relations.

### **C. Impacts on environmental and related amenities that affect the quality of life in Maine**

Easing or removing the restrictions of MICSA could enhance the Wabanaki Nations' governments' regulatory powers over Wabanaki natural resources and related public amenities. This has led to concerns that tribal government management of tribal fisheries, wildlife, forests, and the like might subject non-Native persons and companies to additional and stricter environmental regulation or, alternatively, might result in the degradation of the health or value of those resources.

Again because no government—tribal or non-tribal—is “perfect”, it is not possible to generate an unassailable answer in one direction or the other regarding concerns of these types. However, we can again turn to the experience seen in other states where tribes already exercise extensive jurisdiction over natural resources and the environment. There, the available evidence and experience supports the conclusion that tribal communities do place high value on the protection of their lands and resources. Shortcomings in such protection by tribal governments are rarely the result of a lack of commitment, but rather arise due to deficiencies in human and technical resources and capacity. As we have discussed above, the best antidote to those impediments to governmental performance across Indian Country has been economic development.

In the environmental arena, the economic development spurred by tribal self-government has repeatedly resulted in tribes being willing and able to devote greater resources to environmental and resource management. Illustrative of this are cases including:

- The Confederated Tribes of the Warm Springs Reservation in northeast Oregon jointly owns and operates—through its company, Warm Springs Power Enterprises—three hydroelectric dams with Portland General Electric. The Tribes' position as owner-operator has permitted it to implement selective water withdrawal towers behind the dams so as to allow salmon to return to the Upper Deschutes River basin for the first time in four decades. This has been accomplished at no loss in electricity production (PGE and WSPE, 2022).
- The wildlife biologists of the Nez Perce Tribe played an indispensable role in the reintroduction of the gray wolf to federal land in Oregon, Idaho, and Montana, earning the Tribe accolades for responsiveness and professionalism—even from ranchers whose livestock were victims of wolf predation (HPAIED, 1999).





- The Jamestown S’Klallam Tribe on the Olympic Peninsula of Washington marshaled the resources and professionals of federal, state, and local governments to un-straighten Jimmycomelately Creek and broaden its entrance—a restoration that brought wild salmon populations back not just from the brink of elimination but to levels not seen in more than 30 years (Taylor, 2006).
- More than forty years ago, the White Mountain Apache Tribe took over game and fish management on its reservation from the state of Arizona and subsequently struck a cooperative agreement with the federal government for tribal implementation of endangered species laws. Where the state’s policies had led to mediocre, at best, hunting and fishing opportunities, the Tribe built and still runs award-winning eco-tourism enterprises that are widely respected as world-class for both their economic and ecological performance (HPAIED, 2000).
- In 1997, the members of the Red Lake Fisheries Association (RLFA), a cooperative established by commercial fishermen from the Red Lake Nation, voted to discontinue all of their commercial gillnet fishing on Red Lake. At the tail end of a long decline of walleye stocks under the state of Minnesota’s regulations, the Red Lake Nation asserted its jurisdiction to first enforce the ban and then intensively manage the fishery. Through joint management of the state-tribal boundary-spanning Red Lake and extensive cooperation with the state, the walleye stocks fully recovered. Fishing resumed by 2006, to the benefit of both tribal and non-tribal commercial operations (HPAIED, 2006).

The Wabanaki Nations’ own history of stewardship of natural resources has struggled through jurisdictional conflicts with Maine. Yet, the Wabanaki Nations continue to work to find common ground. Some recent collaborations include:

- The Houlton Band of Maliseet Indians and the Town of Houlton worked together to address the deteriorated Morningstar Road culvert on Moose Brook. The failing culvert would hang above the brook during low flow, cutting off fish passage in the river. Its shifting caused cracks in the road above, threatening access to a major local employer. In the end, the two governments secured funding and assistance from multiple sources, including the US Fish and Wildlife Service, Federal Emergency Management Agency (FEMA), Environmental Protection Agency, US Army Corps of Engineers, and the State of Maine’s Departments of Environmental Protection and Inland Fisheries and Wildlife, to name a few (Wheatley, 2022). Maliseet’s 2020 award from FEMA alone was \$585,000 (MacDougall, 2020). Instead of installing a new culvert, the partners built a bridge. Reconnecting Moose Brook to the Meduxnekeag River restores the fish passage, the bridge rebuilds the roadway, and the successful effort renews the relationships between the local governments.
- In 2022, the Passamaquoddy Tribe signed an intergovernmental statement of cooperation to restore water quality and wildlife habitat in the St. Croix River Watershed with the Wabanaki Nations, the Peskotomuhkati Nation at Skutik (in New Brunswick), the State of Maine, the United States, and Canada. The St. Croix River is 62 miles long and the largest stretch of freshwater along the border between the US and Canada but is interrupted by a number of dams. The watershed has been a continued source of sustenance for the Passamaquoddy



people (Bassett, 2015); Blueback Herring and Alewife play an important role not only as a direct food source for people and animals but also in providing nutrients for the riverbed. The agreement allows the parties to better explore and implement solutions for reconnecting the river and improving fishways around dams.

- After years of negotiating, the Passamaquoddy Tribe and the State of Maine came to an agreement to improve water quality on the Sipayik (Pleasant Point) Reservation. Maine LD 906 passed the State Legislature with bipartisan support and was signed by the governor in April 2022 (Popp, 2022). The Tribe now controls its groundwater source on Passamaquoddy Indian territory and will be able to install a new water treatment system that will benefit the people of Sipayik and the nearby Town of Eastport (Office of Governor, 2022).

To be sure, it has not been uncommon for the kinds of progress seen nationally in tribal-state relations in the arena of the environment and natural resources to have grown out of relations that were initially conflictual. In the era of federal policies of tribal self-determination through tribal self-government, however, the rapid growth and maturation of tribal governmental capacities has held down contentious disputes and litigation. Instead of facing off against each other, tribes and their state and local counterparts have found solutions through the mechanisms and instruments that states are familiar with when dealing with each other on potential state-state conflicts: They have turned to processes of intergovernmental cooperation, MOUs, joint management structures, shared jurisdiction, and the like. With this in mind, let us turn to concerns regarding the possible scope and frequency of state-tribal conflicts and confusion in a setting in which MICSA's restrictions are relaxed or removed.

#### **D. Prospects for intergovernmental conflict or confusion**

At first blush, it seems reasonable to worry that amplifying Wabanaki governance with more of the powers tribal governments wield elsewhere could result in increased litigation, conflict, confusion, and/or dysfunction (see, e.g., Frey, 2020). Yet a moment's reflection reveals that the absence of tribal sovereign powers in Maine has itself been fraught with conflict and even costly, producing seemingly never-ending litigation between Maine and the tribes. MICSA has been a source of sustained conflict between the state government (and local subsidiaries) and the governments of the Wabanaki Nations. The expense, upset and uncertainty, and animosities created by this are not in the interests of the state's tribal or non-tribal citizens.

Notwithstanding MICSA, the urge for self-government in local communities—tribal and non-tribal—is hard to extinguish. This is particularly true of the Wabanaki Nations, who can see in their counterparts across Indian Country the promise of local self-government. As for the State of Maine, if numerous governments abutting and even overlapping each other is cause for irresolvable conflicts and confusion, the state is ripe for such problems. In fact, the state tacitly embraces a multiplicity of abutting and often-overlapping governments. By the US Census's count in 2017,





Maine then had sixteen counties, 23 municipal governments, 465 township governments, 98 independent school districts, and 232 special purpose districts. The Census's special district category included 82 single-function water districts, 41 single-function sewerage districts, 30 housing and community development districts, 22 multiple-function water and sewerage districts, and numerous other districts governing utilities, soil and water conservation, cemeteries, health, and more (Census, 2017).

Strengthening (not adding) five governments among Maine's 504 others—or as many as 834, depending where one draws the line in the Census's special districts category—would not produce a quantum leap in intergovernmental conflict or confusion. This is especially true considering that self-governing tribes routinely enter into compacts, contracts, memoranda of understanding, and other similar agreements with the governments around them. In this, tribal governments mirror the conduct of responsible governments—federal, state, provincial, local—everywhere. Tribes in the other Lower 48 states routinely enter into tax compacts, police cross-deputization agreements, payments-in-lieu-of-taxes agreements, impact mitigation agreements, comity agreements, resource rental and cost-sharing arrangements, and more with state and local governments (Johnson et al., 2009).

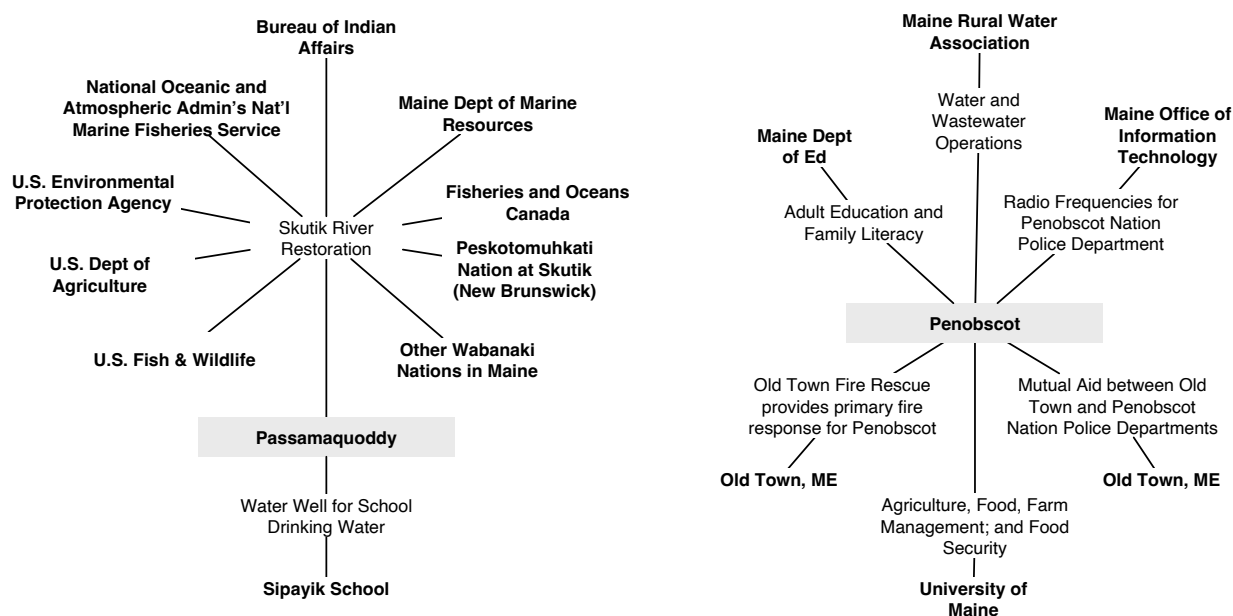
As always, conflict captures the headlines and cauterizes minds. Yet, as tribal governments have matured and asserted their self-governing powers in the other Lower 48 states, it has frequently been state governments who have played lead roles in fostering productive state-tribal relations. With educational and operational mechanisms of cooperation continuing to be built in specific areas ranging from judicial affairs and policing to health and child protection services, organizations such as the National Council of State Legislatures (NCSL) have built overarching programs and structures designed to foster mutually beneficial tribal-state relations. Through institutes, guides, trainings, working groups, databases, and studies, NCSL has built knowledge, techniques, and models now in wide use. As NSCL concluded in its 2009 study of models for state-tribal relations:

As Indian tribes improve governmental capacity and more frequently exercise their powers of self-government, tribal and state governments are increasingly finding areas of mutual interest and discovering ways to set aside jurisdictional rivalry in favor of cooperative government-to-government interactions. Tribes and states have been creating entirely new structures for communication and collaboration, solutions and agreements have been created for the ever-changing range of issues, and older tribal-state institutions have been strengthened and revived. (Johnson et al., 2009, at vii)



MICSA has left the Wabanaki Nations and the state of Maine out of step with tribes and states elsewhere. Nevertheless, there is experience in Maine that could be built on in a setting of expanded powers of tribal self-government in Maine. This is visible in the selection of intergovernmental agreements and related mechanisms of tribal-state cooperation shown in Figure 12. In fact, as discussed above, in the effort to restore the Skutik River, the Wabanaki Nations and the state of Maine have cooperated with a multitude of other institutions, including the US Fish and Wildlife Service, Fisheries and Oceans Canada, the US Environmental Protection Agency, and the Peskotomuhkati First Nation in New Brunswick. Also discussed above, a similar multi-party effort has been undertaken to improve water service for the Passamaquoddy Tribe *and* its neighbors (see Figure 12). These are governments pursuing the interests of their respective constituents through *cooperation*.

Figure 12: Selected Active Penobscot and Passamaquoddy Agreements



Information provided by the Wabanaki Nations.

Intergovernmental cooperation also takes place without formal legal agreements. For example, the Passamaquoddy Tribe began convening meetings between officials from the local water district (a non-tribal public entity called Passamaquoddy Water District, PWD) and the state and federal governments to address an unsafe and decaying water system that served the Tribe and the City of Eastport. The water was found to have dangerous levels of toxins, and users complained of itching and burning after bathing with it and of its foul odor and color. The Tribe contributed \$250,000 in pandemic relief funds to the installation of a new filtration system, which was recently installed at the water district's water

treatment plant. The rest of the upgrade was funded by a combination of state funds pursuant to a program that the state created in response to the Tribe's advocacy. Notably until 2022, PWD was the only water district in the state to pay local property taxes, and the tax amount was roughly equivalent to operations and maintenance costs of the new water filter upgrade. The Tribe introduced and sought enactment of state legislation to exempt the local water district from property taxes so it could afford upkeep on the new water filter. The Tribe bore 100% of the cost of drafting and advocating for the legislation, and Gov. Janet Mills signed it in April of this year. The process has resulted in significant upgrades to local drinking water (Popp, 2022).

To be sure, the foregoing are examples of productive approaches to resolving conflicts and confusion that can arise between governments. Not all cases are resolved readily and inexpensively. This is as true of intergovernmental relations that do not involve tribes as it is in state-tribal relations. But to echo the National Council of State Legislatures, the virtuous cycles of tribal economic development and strengthening of tribal governments that have taken place across Indian Country in the era of federal policies of tribal self-government are lessening the frequency and severity of tribal-state conflict, not increasing such conflict. MICSA's restrictions have blocked, or at least significantly attenuated, such virtuous cycles in the state of Maine.

## VI. Conclusion: Nowhere to Go But Up

Maine is conspicuous for the restrictions that MICSA has placed on the Wabanaki Nations for four decades. Elsewhere in that time, federal Indian self-determination policies and tribal action produced unprecedented and sustained economic growth accompanied by expansions of tribal responsibilities and rising fiscal, institutional, and human capacities to meet those responsibilities. This Native resurgence is redounding to the benefit of tribal *and* non-tribal citizens. Increasing numbers of tribes are the economic engines of their regions, and hundreds of tribes across the other Lower 48 states now routinely serve their citizens with the full array of governmental functions that we expect from state and local governments in the US.

We find that the consequence of handcuffing Wabanaki self-government is today visible in the stark economic underperformance of all four of the tribes in Maine—Maliseet, Mi'kmaq, Passamaquoddy, and Penobscot. No inherent or Wabanaki-wide attributes readily explain why *all* the Wabanaki Nations in Maine trail their peers by so much. The one attribute they all share is the restrictive construct of MICSA.



Subjecting the Wabanaki Nations' capacities to the restrictions of MICSA stifles substantial development opportunities – to the detriment of both the Wabanaki and non-Wabanaki citizens of Maine. The unrealized opportunities measure in the hundreds of millions of dollars of GDP for the state, representing support for thousands of jobs held by Mainers and tens of millions of dollars going into Maine's tribal, state, and local treasuries. For the tribal citizens of Maine, loosening or removing MICSA's restrictions offers few downside risks and many upside payoffs. There's nowhere to go but up.

The experiences of the other Lower 48 states working with tribes indicate that “nowhere to go but up” also applies to Maine and its non-tribal citizens. In case after case, self-determined, self-governed tribal economic development spills over positively into neighboring non-tribal communities and improves governance generally. Conflicts arising between tribal and non-tribal governments are to be expected, as is the case between any neighboring and/or overlapping governments. Generally, experience outside of Maine does not predict that strengthening tribal self-government inexorably leads to heightened state-tribal conflict. Instead, increasingly capable tribal governments improve the prospects for mutually beneficial resolutions of problems because both tribal and non-tribal parties can come to the table with mature capacities to cooperate. Against these possibilities is the status quo. Sticking with the status quo means all sides leave economic opportunities “on the table,” and ongoing cycles of intergovernmental conflict, litigation, recrimination, and mistrust will continue.



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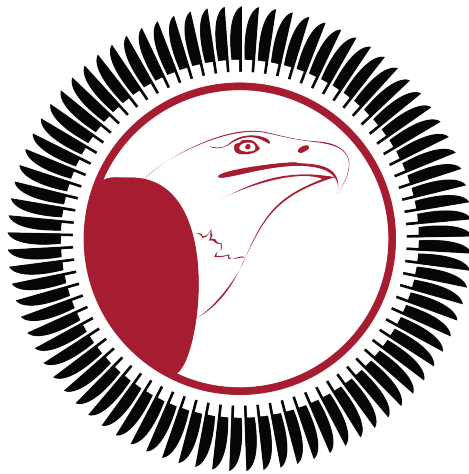


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