INDIAN GAMING AND THE FEDERAL TRIBAL RELATION: TOWARDS COOPERATIVE TRI-FEDERALISM

Alex Tallchief Skibine

(This is an early draft for discussion purposes only)

This panel discussion is titled the federal tribal relationship. I noted that earlier there was another panel which talked about the tribal-state relations. But is it right to talk about such relationships and omit either the state or the federal government. In other words, should we not talk about the federal-tribal-state relationship? The federal tribal relationship is a trust relationship. One of the problem with the Trust doctrine is that it creates an exclusive relationship between the federal and tribal governments. There is no place for the states in this relationship, at least not as initially conceived. IGRA is unique among all federal Indian legislation in that it is the only national Indian legislation which included the states into the federal tribal relationship and in the process attempted to balance the tribal and state interests.[1] The time has passed for Indian nations to pretend that they are not within the states where their reservations are located any more than the state can no longer pretend that Indian Nations are not sovereigns and will eventually disappear or dissolve themselves within the states.[2]

In the wake of the Cobell litigation,[3] and the dismissal of the Navajo Nation breach of trust case by the Supreme Court,[4] it is fashionable these days to talk about ending the trust relationship as we know it. In fact, this is nothing new. The federal tribal trust relationship has always been a love hate relationship for the Indian tribes. I recall that

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[1] States were somewhat included in other national Indian legislation such as P.L. 280 and the Indian Child Welfare Act (ICWA), although the tribal interests were not taken into account in P.L. 280 and, arguably, the states interests were not really addressed in ICWA..

[2] See Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal State Relations,* 43 Tulsa L. Rev. 73 (2007)(stating that "The foundational principle that excludes states from Indian affairs is no longer necessary, nor is it viable." Id., at 82.

[3] Following upon its August 7, 2008 decision, Cobell v. Kempthorne, 2008 WL 3155157 (D.D.C. 2008), the district court ruled on September 4th, 2008, that the plaintiff class was entitled to recover $455.6 million in damages.

[4] Navajo Nation v. United States, 123 S. Ct. 1079 (2003). But see, Navajo Nation v. United States, 501 F.3d 1327 (2008)(Reinstating the Navajo Nation's breach of trust law suit after the Nation invoked the breach of additional statutes and regulations.

when congressman Morris Udall introduced the first Indian gaming bill back in the mid 1980's, almost everyone was against it. . Many tribes objected to the requirement that the BIA would have to approve the tribal gaming ordinances and the management contracts. I remember one tribal chairman saying something like "Gaming is the one thing that is working for the tribes and the one thing the BIA does not have anything to do with, and now, you are going to mess it all up by getting the BIA involved." The idea behind the original Udall Bill, however, was not to have the BIA take over regulation from the tribes as much as it was an effort at preempting state regulation of the tribes.[5] Whether we like it or not, it is mostly the existence of a trust relationship and federal law that preempts state jurisdiction in Indian country, not tribal sovereignty. Yet the tribal chairman's comment was representative of tribal feelings that there is nothing much trustworthy in the federal tribal trust relationship.

In this article, I explore the interconnectedness between the trust relationship and IGRA. Like some other scholars, I believe that there are two prongs, or two versions, of the trust doctrine, one which is aimed at giving control to the federal government over Indian tribes. The other version, however, is aimed at protecting tribal self-government while at the same time giving power to the federal government over the states in the area of Indian affairs.[6] I argue here that abandoning this prong of the doctrine may be premature. As I have explained elsewhere, I believe that the trust doctrine was an integral part of the process of incorporating the tribes not only physically within the geographical limits of the United States but also politically as sovereign political governments within Our Federalism.[7] As such, while the doctrine can be tinkered with, it should not be rejected out right, at least not without a constitutional amendment or some congressional legislation of a more or less equivalent permanency. Without it, the tribes would be at the

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[5] The Court had recently decided Rice v. Rehner, 463 U.S. 206 (1983), where it allowed the states to have concurrent jurisdiction with the tribes to regulate Alcohol distribution within Indian reservations. Although the case could have been decided strictly as a matter of statutory construction, the Court seemed to have gone out of its way to also rely on the fact that state jurisdiction was not preempted because there was no tradition and backdrop of tribal sovereignty in the area of liquor control.

[6] See Reid Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty First Century*, 2005 No. 5 Rocky Mtn. Min. L. Inst. Paper No. 13A (2005). See also Mary C. Wood, *Indian Land and the Promise of native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L. Rev 1471 (1994).

[7] Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution,* 39 Tulsa L. Rev. 247 (2003).

mercy of the states, let alone an anti-tribal Supreme Court.[8] This is not to say that the doctrine is perfect or being perfectly implemented. Far from it. For we know that the federal government is plagued with many conflicts of interest in adequately enforcing its trust responsibilities. So the issue here should be on how to improve the doctrine by getting rid of its colonial and racist baggage so that it can reemerge as a doctrine protecting tribal sovereignty and guarantee the place of tribes as political sovereigns within Our Federalism.

In PART I, I explain my conceptualization of he trust doctrine and tie this analysis to what should be the proper understanding of congressional plenary power in Indian Affairs. In PART II, I explores the evolution of congressional legislation in Indian affairs. I argue that such evolution shows a move towards what has been referred to as cooperative federalism. Because the idea here is both to define the role of the state in the trust relationship and integrate the tribes into what was previously a dual federalism, the purpose of this analysis is to figure out which model represents the best model to embody the concept of cooperative tri-federalism.[9] Finally in PART III, I analyze the various parts of IGRA and shows how they represent Congress acting at times as a trustee, and at times not. I think it is imperative for the various federal agencies to understand which parts of IGRA were enacted pursuant to the Trust doctrine, and which parts were enacted pursuant to the power of Congress to govern, or regulate, Indian tribes. A better understanding of this would bring clarity to some of the most controversial issues in Indian gaming such as defining the exact role of the National Indian Gaming Commission (NIGC) as for instance, when it attempt to shape the distinction between class II and Class III. Such an understanding would also clarify the role of the Secretary of the Interior when issuing the Class III Gaming procedures in the wake of the Supreme Court decision in *Seminole Tribe v. Florida,*[10] or when deciding whether to take off-reservation land in trust for tribal gaming purposes. I end the article with a discussion and evaluation of some of the more recent proposals that have been suggested to improve IGRA.

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[8] See Skibine *Teaching Federal Indian Law in an Anti-Tribal Era*, 82 North Dakota L. Rev. 777 (2006).

[9] I first heard of the term from Carol Tebben's article, *An American Tri-Federalism Based upon the Constitutional Status of Tribal Nations*, 5 U. Pa. J. Const. L. 318 (2003).

[10] 116 S. Ct. 1114 (1996). 25 C.F.R. Part 291. See also 63 FR 3289 (January 22,1998), and 64 FR 17535 (April 12, 1999).

PART I: RECONCILING CONFLICTING VISIONS AND UNDERSTANDING ABOUT THE TRUST DOCTRINE.

To talk about the federal tribal relationship is inevitably to talk about the trust relationship. Yet, these days it is fashionable among scholars and others to call for a severe modification of the relationship,[11] and even for its out right rejection.[12] This Part of the article evaluates the conflicting views about the trust in order to come up with a sound understanding of the doctrine and whether it still has, or should have, any meaningful role to play in Indian gaming.

1. Origin(s) of the Trust doctrine.

A proper understanding of the origin of the doctrine is helpful in determining whether the doctrine should, or even can, be discarded or modified. While we can all agree that there is a indeed a trust relationship between the Indian Nations and the United States, there is little agreement as to the extent and even the nature of this relationship.[13] There is even a lack of consensus about when and why the trust doctrine arose. Mary Wood thinks it arose from the huge transfers of lands from the tribes to the United States in treaties.[14] Reid Chambers along with probably most scholar traced the beginning of the trust doctrine to Marshall's famous reference in *Cherokee Nation v. Georgia,* [15] that the relationship between the United States and the tribes could be likened to "that of a guardian to a ward."[16] Robert Miller and myself have taken the position that the trust

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[11] Kevin Gover, *An Indian Trust for the Twenty First Century.* 46 Nat, Resources J., 317 (2006).

[12] Lincoln Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, ...Maryland L. Rev.....(2008).

[13] See, Note, *Rethinking the Trust Doctrine in federal Indian Law,* 98 Harv. L. Rev. 422 (1984)(Stating that "Despite the central role of the trust doctrine plays in Indian law, its precise legal contours remain unchartered and its various interpretations inconsistent with one another." Id.

[14] Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine revisited,* 1994 Utah L. Re. 1471, at 1495-96.

[15] See Reid Chambers, supra at n.....2.

[16] 30 U.S. 1, at 17 (1831).

doctrine cannot be disassociated from the doctrine of discovery.[17] .[18] In other words, both Chambers and Wood are partially correct, Marshall did create the doctrine and it did originate from land transfers. However, Marshall reference to a guardian ward relationship in *Cherokee* nation is very closely tied to the position he took in *Johnson v. M'Intosh,* Furthermore, the huge land transfers did not start with the treaties, but occurred pursuant to the doctrine of discovery. This does not mean, of course, that the extent and delineation of the trust duties have not been refined through later treaties, acts of Congress, and court decisions. However, connecting the trust doctrine to the doctrine of discovery is meaningful because it makes the doctrine relevant of the incorporation of Indian tribes within the United States.

Marshall did derive the existence of a trust relationship from the treaties made with Indian tribes as well as the historical traditions inherited from England. However, the invocation of a relationship resembling that of a guardian to its ward was not meant to be detrimental to the Indians. In fact, it can be argued that Marshall first invoked the term in *Cherokee Nation* as an antidote to the power he had conferred on the United states in *Johnson v. M'Intosh.*[19] In effect, it reflects a judicial attempt to temper the harshness of the doctrine of discovery by imposing at least a moral duty on the discoverer. Professor Mary Wood has termed this vision of the trust, which she attributed to Chief Justice Marshall, the "sovereign trust" branch of the doctrine.[20]

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[17] See Robert J. Miller: Native America: Discovered and conquered,(Praeger 2006)(Stating "The trust doctrine plainly had its genesis in the Discovery Doctrine... The thinking came largely from the Eurocentric ideas of Discovery and the motion that uncivilized, infidel savages needed to be saved by Euro-Americans."(at 166). See also Alex Tallchief Skibine, *Chief Justice Marshall and the Doctrine of Discovery*: *Friend or Foe to the Indians?*, 42 Tulsa L. Rev. 125, at 134(2006)(Reviewing Robert Miller's book and noting that Chief Justice Marshall had already hinted at such trust relationship when he stated in Johnson v. M'Intosh that the Indians were "to be protected, indeed while in peace in the possession of their lands," 21 U.S. (8 Wheat.) 543, at 591 (1823).

[18] Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self Government and the Process of Self-Determination,* 1995 Utah. L. Rev. 1105, at 1124.

[19] 21 U.S. (8 Wheat. 543 (1823).

[20] See Wood, supra, at n.....at p. 1498-1501.

2. Perversion of the Trust doctrine during the Allotment Era.

Because scholars such as Reid Chambers and Kevin Gover have already eloquently demonstrated that the trust doctrine underwent some major modifications during the Allotment era,[21] I will not here dwell at length over that point. It is beyond discussion, however, that the trust doctrine, which was originally derived partly from the treaties and geared at protecting the tribe's right to self-government by integrating the Indian tribes as domestic dependent nations within the United States political system, was transformed during that Allotment era to a doctrine derived from the perceived racial inferiority and incompetency of Indians and as such, was used to augment the power of Congress over Indian tribes mostly in order to control the tribes' lands and natural resources.[22] As shown in Part II of this Article, however, Congress not only discarded the policies of the Allotment era as early as 1934 with the enactment of Indian Reorganization Act,[23] but has since embarked on a policy that re-instated the initial vision of the trust doctrine.[24]

One aspect of the modification of the doctrine is the notion that all lands set aside for and by Indian tribes in treaties is held in trust by the United States with the United States having the legal title and the tribes the beneficial title to such lands. Scholars have recently questioned why such treaty land is said to be held in trust when these words never appear in the actual treaties.[25] Yet this aspect of the trust has become so prevalent that many have taken the position that the trust responsibilities of the United States only extend to tangible trust assets such as land and trust funds. [26] While it is true that under

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[21] See Chambers, supra n. .... at p. 8, Gover, supra at n..... at p. 321-329.

[22] See United States v. Kagama, 118 U.S. 375 (1886), Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641 (1890), Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). Professor Mary Wood has termed this branch of the doctrine the "guardian-ward" branch which she contrasted with Chief Justice John Marshall's "sovereign trust branch." Wood supra at n...

[23] 25 U.S.C. 461 et seq.

[24] For an in depth analysis showing this point, see Kevin Gover, *An Indian trust for the 21st century*, supra at n.....

[25] See Tim Coulter, Native Land Law Project, Indian Law Resource Center, Justice for Indigenous Peoples. (2008).

[26] As stated by professor Davies, "At its most basic, the trust doctrine is in many ways precisely what it implies – a duty on the federal government's part, acting a trustee, to protect a *res*, typically considered tribal land, that has been placed in trust for beneficiaries, namely, tribes

prevailing law, the United States can only be financially liable for the mismanagement of tangible trust assets,[27] it would be unfortunate to concede that under the trust doctrine, the United States does not have a duty to protect the tribes' non physical assets such as the right to self-government.

3. Modification or elimination of the doctrine: The scholarly debate.

My colleague Lincoln Davis is publishing an article in which he advocates the end of the trust relationship.[28] His solution is that Congress should make it possible for tribes to be treated as states within the United States political and legal system. He believes that the idea of a trust cannot be reconciled with the concept of inherent tribal sovereignty. As he stated, "Sovereignty is about self-governance and self-determination; it is about tribal power. The trust on the other hand, is about a federal duty to protect Indians; it is about the submission of tribal power to a higher authority."[29] Davies is making his argument in the context of the managing tribal land for economic development. I agree that in this context, the trust may no longer be useful. However this does not mean that in other context, the trust should be abandoned. As stated earlier, I think that trust and tribal sovereignty can be reconciled if the purpose of the trust is the protection of tribal sovereignty.[30]

While some scholars like Stacey Leeds seem to share Davies' position, at least

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and tribal members." Davies, at 18.

[27] See Navajo Nation v. United States, 123 S. Ct. 1079 (2003).

[28] See Davis, *Skull Valley Crossroads*, supra at n.

[29] Davies, at 57.

[30] Although I summarize and discuss here the views of only few scholars, the scholarship in this area is substantial. For some of the more recent articles, see Hope M. Babcock, *A Civic Republican Vision of "Domestic Dependent Nations" in the Twenty First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-empowered,* 2005 Utah L Rev. 443 (2005), Raymond Cross, *The Federal Trust Duty in an Age of Self-Determination: An Epitaph for a Dying Doctrine?* 39 Tulsa L. Rev. 369 (2003), Blake Watson, *The Thrust and Parry of Federal Indian Law,* 23 U. Dayton L. Rev. 437 (1998), Janice Atkin, *The Trust doctrine in Federal Indian Law: A look at its Development and at How its Analysis Under Social Contract Theory Might Expand its Scope*, 18 N. Ill. U. L. Rev. 115 (1997). Rodina Cave, Comment, *Simplifying the Indian Trust responsibility,* 32 Ariz. St. L. J. 1399 (2000), Student Note, *Rethinking the Trust Doctrine in Federal Indian Law,* 98 Harv. L. Rev. 422 (1984).

relative to management of trust assets,[31] others like Mary Wood and Reid Chambers are much more conciliatory towards the trust.[32] In an important recent contribution, Kevin Gover adopted a middle position.[33] Gover seems to strongly endorse the elimination of any federal control when it comes to the management of tribal land and natural resources. He argues that such control not only impairs tribal self-government but also impedes economic development within Indian reservations. He concedes, however, that "unfortunately the trust cannot just be undone. Abandoning the tribes and individual Indian landowners to cope alone with the consequences of the policy only compounds the wrongs that have been done to them."[34] Gover therefore opted for a concept which he called a "customized trust administration," under which each tribe could decide for itself how much of the federal trust it wants to retain, and how much it wants to discard.[35]

In some ways his proposal is similar to one I had proposed in an article written that

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[31] Stacey Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources,* 46 Nat. Resources J. 439 (2006)(stating that "The only model that will return control and autonomy to tribes is one that envisions a final end to the federal trust of Indian lands.") Id., at 461. .

[32] See Mary Christina Wood, *Protecting the Attributes of Sovereignty: A New Trust Paradigm for Federal Actions affecting Tribal Lands,*1995 Utah L. Rev. 109. See also Reid Chambers *supra, Compatibility of the Trust Doctrine.* Although it is important to note that neither Chambers nor Wood agree with the trust doctrine as it was re-conceptualized during the Allotment era. Their basic thesis is that the trust doctrine is not incompatible with tribal self-determination as long as one has the correct understanding of the trust doctrine: the one devised by Justice Marshall as a doctrine protecting tribes as distinct political societies. See also Ray Torgerson, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the federal Trust Doctrine in American Indian Law,* 2 Tex. F. On C.L & C.R. 165 (1996).

[33] See Gover, *An Indian Trust for the 21st Century,* supra, at n.....

[34] Gover at 357. Gover also added "Surely though, it is no answer to simply say that the United States should make the current system operate well through management reforms. To do so is only to execute bad policy more effectively." Id., at 358. Gover believes that in the end, any reform is bound to fail because as he put "the result inevitably, will be that the Department of the Interior is going to be able "to do stupid things better," in the words of a knowledgeable friend." Id., at 373.

[35] See Gover, at 359-362.

same year.[36] I had first suggested in an even earlier article, that the United States should place the Indian nations on the list of non-self-governing territories of the United Nations.[37] Later on, acknowledging that this was unlikely to happen, I argued that tribes should look at the Puerto Rican model of incorporation.[38] This is not totally dissimilar from Kevin Gover's proposal except that instead of having the Secretary of the Interior approving each tribal-federal agreement, I would have Congress ratify each tribal federal sovereign-trusteeship agreement.[39] While some may argue that this process could be quite cumbersome for the Congress,[40] it is in fact not unusual for Congress to enact tribal specific Bills. Thus, in addition to numerous individual tribal bills restoring some tribes to federal recognition,[41] Congress has enacted a myriad of tribal specific water and land settlement legislation.[42]

When it comes to incorporating Indian tribes a third sovereigns within the United States political system so as to protect their sovereign rights, the tribes need either the trust doctrine, a constitutional amendment, or some organic congressional legislation that cannot be easily repealed. States sovereignty is recognized under the 10th and 11th amendments to the United States Constitution. The tribes' inherent sovereignty and right to self-government is not guaranteed nor protected in the Constitution. At least the

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[36] See Skibine, *Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006).

[37] See Skibine, *Reconciling Federal and State Power Indian Reservations with the Right of Tribal Self-Government and the process of Self-Determination*, 1995 Utah L. Rev. 1105.

[38] See Skibine, *Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667, 691-692.

[39] This is what was done in the case of Puerto Rico where Congress had to approve the Puerto Rican Constitution pursuant to the Puerto Rican Federal Relations Act, 48 U.S.C. 731b-731e, 64 Stat 319 (1950). For a comprehensive treatment of legal issues relating to the incorporation of Puerto Rico within the political and legal system of the United States, see 110 F.R.D. 449 (1986)(First Circuit Judicial Conference Proceedings.)

[40] See Gover supra at n.... at p. 360 (Stating "Certainly Congress cannot be expected to legislate Tribe-by-Tribe as to each element of the trust.")

[41] See for instance Pub. L. 97-391 (Cow Creek Band of Umpqua Restoration Act), Pub. L. 98-165 (Grande Ronde Restoration Act), Pub. L. 98-481 (Coos, Lower Umpqua, and Siuslaw Restoration Act), Pub. L. 99-398 (Klamath Restoration Act).

[42] See Cohen's Handbook of Federal Indian Law, 2005 Edition, (stating that between 1978 and 2004, Congress enacted 18 water rights settlement acts, at p. 1212.)

Supreme court does not believe so.[43]

In conclusion, while I agree with Kevin Gover that a total re-conceptualization of the trust doctrine by ending federal control may be appropriate when it comes to the management of land and natural resources, I also agree with those such as Reid Chambers and Mary Wood, who have argued that there are two prongs to the trust doctrine, and that the one first envisioned by Justice Marshall in his fabled *Cherokee* cases is worth preserving. The original John Marshall version of the doctrine is all about protecting Indian tribes right to self-government from the states and other external threats. The first incarnation of the trust doctrine is also the animating principle behind many beneficial aspects of federal Indian law. For instance, it is the basis for the Indian canon of statutory construction,[44] under which statutes enacted for the benefit of Indians are supposed to be interpreted liberally with ambiguous terms resolved in the Indians' favor.[45] It is also used to uphold congressional power to treat Indians differently so as to give them at times preferential favorable treatment.[46]

4. Tying the trust doctrine to the power of Congress in Indian Affairs.

In *Red Lake Band of Chippewa v. Swimmer*,[47] a federal district court surprisingly took seriously the Band's argument that Congress had violated the trust relationship in enacting IGRA. Thus the court stated "the Supreme Court in recent years has laid to rest

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[43] See Justice Thomas concurring opinion in United States v. Lara, 541 U.S. 193, 214-226 (2004). Some scholars have come to a different conclusion, see Carol Tebben, *An American Tri-Federalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. Pa. J. Const. L. 318 (2003).

[44] See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993). See also Scott ZC. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Indian and the Unambiguous Answer to the Ambiguous Problem,* 37 Conn. L. Rev. 495 (2004).

[45] For a dismal failure by the Supreme Court to use such canon when interpreting IGRA, see Chickasaw v. United States, 534 U.S. 84 (2001). See also Graydon Dean Luthey, Jr., *Chickasaw Nation v. United States: The Beginning of the End of the Indian-Law Canons in Statutory Cases and the Start of the Judicial Assault on the Trust Relationship,* 27 Am. Indian L. Rev. 553 (2002-2003).

[46] See *Morton v. Mancari,* 417 U.S. 535 (1974). See also Carole Goldberg,, *American Indians and "Preferential Treatment,"* 49 U.C.L.A. L. Rev. 943, 970-71.

[47] 740 F. Supp 9(1990)

any notion that Congress decision regarding the Indian tribes are not reviewable."[48] Although the Court agreed that "Congress' power is subject to limitations inhering in ....a guardianship,"[49] it nevertheless held that Congress did not violate the trust relationship in enacting IGRA. Had the court found a violation of the trust responsibility by Congress the question would have been "what is the remedy" since neither monetary damages nor injunctive relief have ever been given against Congress and earlier in its opinion the court had found that Congress did have the power to enact IGRA.

This case nevertheless illustrates the conflict inherent in the trust relationship. To the extent that the court took the position that IGRA was enacted solely pursuant to the trust doctrine, it was almost certainly wrong. As Part II of this article will demonstrate in more details, generally speaking, congressional legislation in Indian affairs can be divided into three types: The first type are those laws enacted pursuant to a vision of the trust conceptualized during the Allotment era and giving a certain amount of control to the federal government over both the tribes' political sovereignty and especially over the tribes's *physical* trust resources and assets. Laws enacted during the Allotment era such as the Indian Major Crimes Act or the early leasing statutes are typical of such legislation, and so are laws enacted during the termination era such as P.L. 280. The second type of legislation are those Acts which are enacted pursuant to a more modern vision of the trust doctrine and are aimed at truly protecting and promoting tribal self-government: the Indian Child Welfare Act, the Indian Self determination Act, and the Indian Financing Act, are good examples of such legislation. The third type of legislation consist of those statutes which are enacted not only pursuant to the trust doctrine but also pursuant to general congressional authority to govern or regulate Indian tribes. IGRA is the prime example of such legislation but so are the Indian amendments to the Clean Air, Clean Water, and Safe Drinking Water Acts Act.[50] In that respect, IGRA brings all the inner tension of the trust doctrine together. As the Supreme Court once stated

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[48] 740 F. Supp 9, at 13.

[49] Id., 13, citing United States v. Sioux Nation, 448 U.S. 371, 415 (1980).

[50] These laws do impose federal rules and regulations on tribal governments. Yet to the extent that these Acts treat tribes as states and allow them to assume primacy for the implementation of such laws over their territory, they do protect tribal self-government to a certain extent See Ann E. Tweedy, *Using Plenary Power as a Sword" Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara,* 25 Envtl. L. 471 (2005). See also Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agency's Duty to Interpret Legislation in Favor of Indians: Did the EPA reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act*, 11 St Thomas L. Rev. 15 (1998).

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary power over the Indians and their property...and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.[51]

I have previously made the argument that the trust doctrine had been integrated into the Constitution.[52] By that, I meant that the trust doctrine plays a crucial role in expanding the power that Congress has under the Indian Commerce Clause. I also argued, however, that such expansion was not infinite. The legislation still had to be rationally tied to Congress's unique obligations in fulfilling its role as a trustee for the tribes. This did not mean that Congress could never enact legislation not tied to the trust. It only meant that if not acting pursuant to the trust, Congress's legislation had to be somehow tied to commerce. However, I think that if not truly acting for the benefit of the tribes or in matter related to commerce, Congress should be considered as having acted as a conqueror.[53]

In this article, I am willing to concede, for the sake of argument, that pursuant to its commerce power, Congress does have almost plenary power in Indian affairs.[54] As

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[51] United States v. Sioux Nation, 448 U. S 371, 408 (1980). In this case, the Court also stated "But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inherent ... in a guardianship and to pertinent constitutional restrictions." Id., at 415 (quoting United States v. Creek nation, 295 U.S. 103, 109-10 (1935).

[52] See Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution,* 39 Tulsa L. Rev. 247 (2003).

[53] While I realize that under current prevailing doctrine, this would not mean that such congressional action could be set aside as unconstitutional, perhaps courts in the future will adopt a theory of political property rights which would entitle the tribes to, at least, compensatory monetary damages for such intrusion on their sovereignty.

[54] Thus, while I have to acknowledge that in Cotton Petroleum v. New Mexico, the Court stated that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs." 490 U.S. 192 (1989), I do not have to agree with that statement. For criticisms of the plenary power doctrine as conceptualized by the Supreme Court, see, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a*

once critically observed by Robert Clinton, under Supreme Court jurisprudence, the Indian Commerce clause does not have any *internal* limitations although it does have some *external* ones.[55] In other words, acting pursuant to its Commerce Clause power, Congress still has to act in conformity with other parts of the Constitution such as the Fifth,[56] or Eleventh Amendments.[57] It is nevertheless important to distinguish when Congress is acting pursuant to its trust power and when it is acting pursuant to its power as a regulator, if not a conqueror, especially when it comes to evaluating the role of the Executive in implementing legislation such as IGRA. For it would seem to follow that if Congress acted as a trustee when enacting an Act or section of an Act, then the Executive agencies should act likewise when implementing such Act or section thereof.

PART II: THE EVOLUTIONARY TREND IN FEDERAL INDIAN LEGISLATION.

A court decision once referred to IGRA as a prime example of cooperative federalism.[58] The purpose of this PART is not to do a comprehensive in-depth analysis of all major congressional legislation effecting Indian Affairs,[59] but to analyze the evolution of such legislation, discern the normative assumptions behind the different models, and figure out which one is the best model to achieve what could be called cooperative tri-federalism: A version of federalism involving the tribes in addition to the federal government and the states. Congressional legislation after the treaty period can be divided into four eras: The Allotment era, the Indian Reorganization Era, the Self-Determination era, and the current period which, perhaps, could be called the Self-Governance era.

The first model was, of course, the treaty model which was in effect for almost 100

Decolonized Federal Indian Law, 46 Ark. L. Rev. 77 (1993), see also Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes,* 82 St. John's L. Rev. 153 (2008).

[55] See Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes,* 34 Arz. St. L. J. 113, 254 (2002)(criticizing such jurisprudence).

[56] See Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) United States v. Sioux Nation, 448 U.S. 371 (1980).

[57] See Florida v. Seminole Tribe.

[58] Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

[59] For such an overview, see Gover. An Indian Trust for the 21st Century, supra at n....

years,[60] and much longer if one takes into account the pre-constitutional colonial period.[61] Even though in many of those treaties, the Indian nations acknowledged their "dependence" on the United States, the assumption behind the treaties was that Indian Nations were separate and distinct sovereign political entities.[62] Indians were not citizens of the United States, and no federal laws initially extended to Indians within Indian Country. Until 1871, the year Congress ended treaty making with Indian tribes, the only federal laws of any relevance in Indian Country seemed to have been criminal statutes such as the General Crimes Act, sometimes known as the Indian Country Crimes Act.[63] But even that Act had an exception for crimes committed by one Indian against another, or when jurisdiction over the crime had been reserved to the tribes in treaties, or when the tribe had already punished the offender. These were times when , the tribal-federal relationship was mostly defined by the various treaties and the federal role as a trustee, was mostly limited to providing whatever was mandated under the various treaties.[64]

Things started changing drastically shortly after 1871, the year Congress enacted a law prohibiting the making of any additional treaties with Indian nations.[65] It is around that time that the Supreme Court first recognized the applicability of a federal regulatory law to Indians within Indian country,[66] took the position that unless specifically excluded by treaty from being considered within the limits of a state, Indian reservations were to be considered to within the geographical limits of the state surrounding them.[67] It is also during that period, also known as the Allotment era, that the Court first recognized state criminal jurisdiction over crimes committed by non-Indians against other non-Indians

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[60] The Treaty period ended in 1871 although agreements were made with Indian tribes until around 1911.

[61] See Adam F. Kinney, Note, *The Tribe, the Empire, and the Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes,* 39 Case W. Int'l L. 897 (2007-2008).

[62] See Worcester v. Georgia, 31 U.S. 515 (1932).

[63] 18 U.S.C. 1152.

[64] It should not be forgotten that during those years, one of the federal government's major role was conquering the Indian Nations militarily.

[65] 25 U.S.C. 71.

[66] See The Cherokee Tobacco Cases, 78 U.S. (11Wall.) 616 (1870).

[67] See Langford v. Monteith 102 U.S. 145 (1880), distinguishing, perhaps not that convincingly, Harkness v. Hyde, 98 U.S. 476 (1878).

within Indian Country.[68] The Court also upheld the Congress's power to enact laws, such as the Major Crimes Act, specifically aimed at assuming political control of Indian tribes.[69] During the allotment era, Congress was most interested in assuming control of tribal land and natural resources.[70] The model legislation here was the leasing statutes. These statutes reserved total control to the federal government.[71] Some of the leasing Acts did not even require tribal consent,[72] and the Supreme Court upheld the power of Congress to delegate plenary authority to the Secretary of the Interior in the management of tribal natural resources.[73]

The next statutory model came about with the Indian Reorganization Act era,[74] starting in 1934. The IRA's major goal was to put an end to the allotment policy. The Act also allowed the secretary of the Interior to acquire land for Indian tribes and place such lands in trust status. In addition, tribes were allowed to "reorganize" by adopting new constitutions. These constitutions would become valid once approved by the Secretary of the Interior. The IRA also provided for tribal consent before tribal lands could be leased. The proto-typical statute of this era is the Indian Mineral Leasing Act (IMLA).[75] Although tribes obtained more control over their resources, professor Royster asserts that "federal management and control remained the norm for resources development... tribes and more authority over resources development in paper than in practice.[76]

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[68] See United States v. McBratney, 104 U.S. 621 (1881).

[69] See 18 U.S.C. 1153. For a perceptive critique against the continuing legitimacy of this law, see Kevin K. Washburn, *American Indian, Crime, and the Law,* 104 Michigan L. Rev. 709 (2006),

[70] See Judith Royster, *Tribal Economic Development and Mineral Resources: Practical Sovereignty. Political Sovereignty, and the Indian Tribal Energy Development and Self Determination Act,* .....Lewis and Clark L. Rev.... (2008).

[71] See for instance 25 U.S.C. 407, 397, and 399.

[72] See 25 U.S.C. 398-398a, 399.

[73] See Cherokee Nation v. Hitchcock, 187 U.S. 371 (1902).

[74] 48 Stat. 985, 25 USC 464-479.

[75] 25 USC 396a-396g.

[76] Id., at p. 9.

The next period came in the 1970's, the decade that ushered in the federal policy of tribal self-determination. Besides the Indian Self-Determination Act,[77] perhaps the most important legislative model during this era is the Indian Child Welfare Act (ICWA).[78] The ICWA model is interesting because it does represent Congress's attempt to protect tribal sovereignty in an area otherwise ruled by state law and state institutions. Concerning development of natural resources, the Indian Mineral Development Act (IMDA) of 1982 is representative of the new model of statutes enacted during this era.[79] Pointing out that IMDA allowed tribes not only to negotiate the terms of their mineral development but to also move beyond leases into new types of arrangements, professor Royster stated that the IMDA represented a "significant step beyond the self-determination-era statutes...toward increased political sovereignty and greater practical sovereignty."[80]

The final generation of statutes are part of a new era which could be called the Tribal Self-Governance era. An indicative progression from the self-determination to the self-governance era has been the evolution of the Indian Self Determination Act, from an Act only allowing tribes to assume the management of federal programs pursuant to a procurement contract type model, to a model based on tribal federal agreements allowing each tribe to design its own program with its own funding priorities.[81] In the natural resources area, a good example of the evolution from one model to another is the difference between the Indian Mineral Development Act of 1982 and the Tribal Energy Development and Self-Determination Act of 2005, (ITEDSA).[82] Under the later Act, tribes can enter into tribal energy resource agreements (TERA's) with the Secretary of the Interior. Once the agreement is approved by the Secretary, tribes can enter into leases or other agreements concerning development of natural resources with third parties without any additional federal approval requirements.

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[77] P.L. 93-638, 88 Stat. 2203.

[78] 25 U.S.C. 1901-1923.

[79] 25 USC 2101-2108.

[80] Royster, at 18.

[81] See Tribal Self-Governance Act, P.L. 103-413, 108 Stat 4270 (1994). See Tadd Johnson and James Hamilton, *Self-Governance of Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251 (1995).

[82] 25 U.S.C. 3501-3506.

In some ways, the process provided for in IDETSA is not totally dissimilar to the Indian Self Governance Act of 1994. Both Acts provide for an initial foundational agreement between a tribe and a federal agency, after which federal controls disappear and the tribe assumes primacy of the program. Peculiar to ITEDSA, however, is that at the same time as the federal government releases its daily management and ultimate control over tribal natural resources, the Congress is also giving more of a voice to affected third parties. Thus, under IDETSA, the Secretary of the Interior has to request public comments on the final TERA proposal,[83] and has to take such public comments into consideration when deciding whether to approve a TERA.[84] Professor Royster points out that "many of the public input provision of ITEDSA... conflict sharply with tribal self-governance."[85] Nevertheless, after acknowledging that many tribes, most prominently the Navajo Nation, are critical of many of the Act's provisions, she is optimistic that ITEDSA will be an improvement over past legislation. Although the Act does maintain the overall trust relationship between the Federal government and the tribes, Royster does conclude that "Tribes can take advantage of new options and increased practical sovereignty, but in exchange the government has a deeply discounted trust responsibility."[86]

In many ways both the Self Governance Act and IDETSA follow the model adopted for the implementation of some of the federal environmental laws, a model which has been described as cooperative federalism. Starting in the mid 1980's Congress did include Indian tribes in such legislation, such as the Clean Air Act,[87] the Clean Water

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[83] 25 C.F.R. 224.67-68.

[84] 25 U.S.C. 3504(e)(2)(B)(iii)(IX).

[85] Royster, at 22. She also noted other provisions in the Act requiring tribes to establish environmental review processes providing for public notice and comment, as well as providing consultation with state governments concerning any potential off reservation impacts. See 25 USC 3504(e)(2)(B)(iii)(X), (C)(iii). There is also a provision allowing any interested party to petition for Secretarial review of the Tribe's compliance with the TERA. 25 U.S.C. 2504(e)(7)..

[86] Id., at p. 37. Under the Act, while the secretary has to "act in accordance with the trust responsibility.. and in the best interest of the tribes," 25 USC 3504 (e)(6)C, the Act also provides that "the United States shall not be liable to any party (including any Indian tribe" for any negotiated term of, or any loss resulting from the negotiate terms.." of any agreement reached pursuant to an approved TERA. 25 USC 3504(e)(6)(D)(ii).

[87] P.L. 101-549, 104 Stat 2399, 42 U.S.C. 7601(d).

Act,[88] and the Safe Drinking Water Act,[89] and provided that for some of the sections and under certain conditions, tribes could be treated as states for the purposes of assuming primacy under such legislation.

In conclusion, it seems that federal statutes in what could be termed the tribal self-governance era, have moved away from insisting on federal control based on the alleged weakness and incapability of Indian tribes. They have progressively adopted what could be described as a compact model, which when you think of it, is not that dissimilar from the treaty model prevailing in earlier times. These statutes are aimed at incorporating or integrating Indian tribes as sovereign political entities into Our federalism, thereby creating what could be called a system of cooperative federalism. As the next section shows, IGRA is different from other legislation in that it directly involves the states in the negotiation of compacts. In addition, it heavily involves a federal regulatory agency, the National Indian Gaming Commission (NIGC), in regulating Class II games and, to a lesser extent, Class III games.

PART III: RESHAPING IGRA AS A MODEL OF COOPERATIVE TRI-FEDERALISM

In this section I first analyze various important sections of IGRA to figure out whether the trust functions can be separated from the purely regulatory ones. I then focus at what can be done to improve IGRA.

A. Dissecting the trust from the non-trust elements in IGRA.

Although perhaps the trust sections cannot be separated from the purely regulatory ones, trying to make such a determination is important because it should , at least technically, guide the actions of the Secretary of the Interior, the Attorney General, and the NIGC. To be consistent with what was said in Part I of this article, ideally, all Congressional legislation after the treaty period can be divided into four eras: The Allotment era, the Indian Reorganization Era, the Self-Determination era, and the current period could be called the self-governance era. sections that were not enacted to truly benefit tribal self-government or tribal economic self-sufficiency should not be considered as having been enacted pursuant to the trust doctrine. This would be true for instance of a section which could only be justified on the grounds that Indians are weak and defenseless and therefore lack the capability to take care of their own affairs. On the

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[88] P.L. 100-4, 101 Stat. 7, 76, 33 U.S.C. 1377.

[89] P.L. 99-339, 100 Stat 642. 665, 42 U.S.C. 300j-311

other hand, sections attempting to help the tribes protect themselves from assertion of state jurisdiction can be considered as having been enacted pursuant to the trust doctrine.

Under my initial proposal connecting the trust to congressional power, any exercise of power unrelated to the trust would have to be reasonably tied to commerce between the United States and the tribes.[90] Some provisions in 2710 (b) would not pass that test. Although I originally argued that Congress should not have the power to enact legislation not truly connected to the trust or tied to commerce between the tribes and the United States, I understand that under prevailing Supreme Court doctrine, such legislation is bound to be upheld. So the real issue here, therefore, is whether and how the federal agency in charge of implementing such sections should behave as a trustee or a regulator. I think that as far as federal agencies are concerned, any section enacted beyond "commerce" related activity should still be considered as having been enacted pursuant to the trust even if such sections are not truly supportive of tribal self-government and represent a rather paternalistic vision of the trust doctrine. This argument follows from the fact that for those sections not connected to commerce, the trust should be considered the only potential source of congressional power to enact such laws. It would follow that such federal officials should be held to the standard of a trustee when acting pursuant to such sections.[91] A related implication of my argument is that when Congress enacts a section that is neither supportive of tribal self-government, not related to commerce with the Indian tribes, courts should look for clear indications that Congress really meant to interfere with tribal self-government or intended the federal agency to assert such power. Such position is consistent and offer a coherent and possible alternative rationale to explain the D.C. circuit's decision refusing to extend the NIGC authority to cover the issuance of Minimum Internal Control Standards (MICS).[92]

When it comes to IGRA, the task of separating the trust from non trust functions is complicated because some sections have elements of both. Take, for instance, the two

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[90] See Part I section (4) supra.

[91] Although beyond the scope of this article, this argument should carry over to determining whether the federal government has breached its trust duties for the purpose of a breach of trust under the Indian Tucker Act. This would avoid the confusion that has surrounded the Navajo breach of trust case at the Supreme Court where the underlying ground for dismissing the tribe's case must have been that when Secretary Hodel decided to approve the lease between the tribe and Peabody Coal, he was not acting as trustee for the tribe. In other words, when Congress delegated such authority to the secretary, it was not acting pursuant to the trust doctrine.

[92] See Colorado River Indian Tribes v. NIGC, 466 F.3d 134 (2006).

stated purposes of IGRA to "Promote gaming as a legitimate activity for tribal economic development," and to "ensure the integrity of the games from criminal element." The first purpose reflects clearly a uniquely trust purpose. The second purpose is more ambivalent. While, it can easily be considered as having been enacted pursuant to the trust doctrine, some tribes may take the position that they did not need nor ask Congress to help them preserve the integrity of such games. Section 2710 (c) is another section with both trust and non trust elements: (c)(1) and (2) are obviously non trust subsections in that they allow the NIGC to issue orders of closure against tribal casinos. However subsections (c)(3) and (4), allowing for issuance of certificate of self-regulation for class II gaming activities do have trust components. In the following sections, I first consider the role of the NIGC and then focus on the Secretary of the Interior.

(1) The trust and regulatory roles of the NIGC

Section 2710(b)(2) and (3) requiring the Chairman of the NIGC to approve tribal ordinances authorizing Class II and III gaming does not appear to have been enacted pursuant to the trust. Under this section, the NIGC Chairman can only approve tribal ordinances that meet certain requirements. These requirements seem to have nothing to do with ensuring tribal self-government, or economic self-sufficiency. They provide, among other things, that Indian tribes have to have the sole proprietary interest of gaming casinos, and restrict the use of net gaming revenues to basically public purpose such as funding tribal governmental operations and promoting tribal economic development.[93] Yet, under the theory proposed above, unless these sections can be tied to commerce, in which case they could be considered strictly regulatory in nature, they should be considered as having been enacted pursuant to the trust doctrine as far as governing the conduct and decisions of federal officials vested with their implementations.

Another controversial and difficult issue has been the NIGC's role in delineating the difference between Class II and Class III. This subject has generated countless law suits,[94] and has seen the NIGC adopt different positions throughout the years.[95] IGRA's definitional section asks the NIGC to make increasingly complicated and technical

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[93] They also provide requirements for the conduct of annual outside audits and mandate adequate systems to ensure background investigations of certain gaming personnel.

[94] See for instance, Seneca Cayuga Tribe of Oklahoma v. NIGC. 327 F.3d 1094 (2003).

[95] For a summary of the NIGC latest proposal to redefine Class II see Heidi McNeil Staudenmaier, *Proposed NIGC Class II Game Classification Standards: End of Class II Gaming Debate.... or Just Further Fuel for Fire?* 10 Gaming L. Rev. 527 (2006).

decisions in order to classify as Class II all technologically aided Bingo and as Class III, all games that are electronic facsimile of Bingo[96] The question is: should the trust relationship play any role in the NIGC determination?

Under the theory adopted in this article, the question would be whether Congress could have enacted the provision placing tribal games that are electronic facsimile of bingo into Class III under its regular Commerce power. In other words, is such a provision regulating an activity connected with a commercial transaction substantially affecting commerce with Indian tribes under the *Lopez,*[97] and *Morrison,*[98] line of Supreme Court cases? At first, it seems that the answer is clearly yes and, therefore, the NIGC should not have to act as a trustee in defining the extent of the term electronic facsimile of Bingo. Yet, it is obvious that while one part of this section was enacted against tribal interest, the one requiring that electronic facsimile of Bingo cannot be considered part of Class II,[99] another part was definitely enacted for the benefit of the tribes: The one providing that technologically aided bingo games shall be considered Class II games.[100] Under the more modern vision of the trust doctrine according to which, the principle reason for the doctrine is the protection of tribal self-government, especially from potential attacks by the states, the NIGC should be acting as a trustee for the tribes. That is because any determination that a game is not a Class II game means that it will be considered a Class III game, which in turn means that it will be subject to a tribal state compact and potential regulation by the states.

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[96] At least one scholar has remarked that such distinctions are increasingly remove from any policy considerations which might have moved the Congress to make such a distinction in the first place. See Fletcher, Bringing Balance to Indian Gaming. 44 Harv. J. On Legislation 29 (2007).

[97] United States v. Lopez, 514 U.S. 549 (1995)(striking down a federal statute making it a crime to possess a firearm in or near a school.) The Court in *Lopez* limited the congressional power to regulate commerce among the states to "regulations of activities that arise out of or are connected with a commercial transaction, which when viewed in the aggregate, substantially affects interstate commerce." Id., at 561.

[98] United States v. Morrison, 529 U.S. 598 (2000)(Striking down the Violence agaisnt Women Act, 42 U.S.C. 13981).

[99] 25 U.S.C. 2703 (7)(B)(ii), providing that the term Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machine or any kind."

[100] 25 U.S.C. 2703 (7(A)(1),providing that the term Class II gaming means "any game of chance commonly known as bingo (whether or not electronic, computer, or technological aids are used in connection therewith." .

In the end, the role of the NIGC in making a distinction between class II and Class III raises a problematic issue, meaning one lacking a definite solution. It seems to represent a typical instance where Congress has put a federal agency between a rock and a hard place.

(2) The trust and non trust role of the Secretary of the Interior.

This section will focus on three important aspects of the Secretary's role pursant to IGRA: the approval of tribal state compacts, the issuance of regulations and gaming procedures concerning Class III gaming, and the decision to transfer off reservation land into trust for the purpose of tribal gaming.

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The section mandating a tribal state compact for Class III, 2710(d), was obviously not entirely enacted pursuant to the trust. Yet there is trust language in this section: For instance, the Secretary can disapprove a compact if such compact violates "the trust obligations of the United States."[101] Subsection 3 (C)(4) of section 2710(d) has also a trust component since it prohibits the states from taxing tribal gaming revenues. Subsection 3 (C)(6) is definitively a trust section as it lifts the Johnson Act prohibition for games conducted pursuant to a tribal-state compact. Finally section 2710(d)(7) has a trust element since it allows tribes to sue those states that do not negotiate a tribal state compact in good faith.

When it comes to 2710(d)(7)(B), the issue is not so clear cut. This subsection contains an intricate remedial scheme in the event the state refuses to negotiate in good faith. The end result of this remedial scheme can be the issuance of Class III gaming procedures by the Secretary of the Interior if the state refused to accept the compact selected by a court appointed mediator. It should be noted that Subsection 2710(d)(B)(vii)(I) does not say that the Secretary has to chose and issue those procedures that best comport with his trust duties towards the tribes. The procedures chosen have only to be consistent with the proposal selected by the mediator, the provisions of this Act, and the relevant provisions of the laws of the state.

Under the Interior Department's Class III gaming procedures, the Secretary does have the duty to determine whether the games included in a proposal are "permitted by the state for any purposes by any person, organization, or entity."[102] The states have argued, and some courts have taken the position, that the Secretary's trust duties renders

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[101] 25 U.S.C. 2710 (d)((8)(B)(iii).

[102] 25 C.F.R. 291.7(b)(3).

him biased in making such determinations or in deciding to issue the gaming procedures.[103] In fact, the above analysis revealed that the Secretary can and does, to borrow the language of the Court, carry two hats when it comes to Indian gaming.[104]

Another contentious issue has been the role of the Secretary in approving transfer of off reservation land from fee to trust for the purpose of gaming. Land acquisition for the benefit of Indians and transfers into trust status was initially authorized under section 5 of the 1934 Indian Reorganization Act.[105] The section was clearly enacted for the benefit of Indians and therefore pursuant to the trust doctrine. While section 2719 of IGRA is not the source of the Secretarial authority since it only imposes some restrictions on the IRA derived authority, its legislative history reveals that it initially had nothing to do with the trust relationship. The provision was first introduced during the mark up of the gaming legislation on the House side at the request of congressman Gibbons who wanted to prohibit any and all off reservation transfer of fee land into trust for the purpose of Indian gaming. Eventually, this initial blanket prohibition was negotiated and modified to allow for some exceptions.[106] As such, one of these exceptions now contains a mix of trust and non trust language. For instance, before approving the transfer of the land from fee to trust, the Secretary has to make a determination that gaming on such off reservation lands would be in the best interest of the tribes.[107] Yet the Secretary also has to determine that such land transfer for the purpose of gaming would not be detrimental to the surrounding community. In addition, the governor of the state has to concur in such Secretarial determinations.

On January 3rd, 2008, the Assistant Secretary for Indian affairs issued his now notorious "Guidance Document" for taking off-reservation land into trust for gaming purposes. In this Document, the Department further delineated how it was going to give greater scrutiny to proposed land transfers that are not within existing tribal territories.

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[103] See Texas v. United States, 497 F.3d 491, at 506-509.

[104] See United States v. Sioux Nation, 448 U.S. 371 (1980), quoting Three Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (1968).

[105] 25 U.S.C. 465..

[106] Besides the exception outlined below, there are exceptions to this general prohibition for lands acquired as part of a land claim settlement, or if the lands are the initial reservation of a newly acknowledged Indian tribe, or if the lands are restored lands for a tribe that was just restored to federal recognition.

[107] 25 U.S.C. 2719(b)(1)(A).

Under previous rules interpreting the Indian Reorganization Act's broad grant of authority to the Secretary to take land in trust for the benefit of Indians, the Department had taken the position that the greater the distance the proposed lands were from a tribe's reservation, the greater the scrutiny to be given the tribe's justification for anticipated benefits, and the greater the weight to be given concerns raised by state and local officials. [108] Essentially, the Guidance Document came up with two more factors. Concerning the anticipated benefit to the tribe, the document created a presumption that placing land in trust that are located beyond commuting distance from the existing reservation would not be to the benefit of the tribe. The Guidance Document also created a presumption that unless there were existing intergovernmental agreements between the tribes and the various local governments, the concerns of state officials have not been addressed. The very next day after issuing the Document, the Assistant Secretary declined several tribal applications for off reservation fee to trust transfer for the purpose of gaming.

Under the analysis presented above, while the taking of land into trust is effectuated under the IRA pursuant to the trust relationship, the restrictions imposed in IGRA are not trust inspired, to say the least. This poses a dilemma for any governmental official making decision pursuant to this statutory framework. I believe that the crucial mistake the Guidance Document made is not to impose conditions and limits on when such land can be transferred into trust. The problem is that the Guidance Document pretended to impose the "commuting distance"standard in order to make sure that the proposed land transfer was to the benefit of the tribe. In other words, the Interior Department was asking us to believe that such restrictive standard was being imposed pursuant to the trust relationship. As such, the commuting distance standard can be attacked as being arbitrary and capricious under the Administrative Procedure Act.[109] I believe the commuting distance standard would have a better chance at surviving judicial review scrutiny if instead of being justified pursuant to the trust doctrine, it was justified in order to make sense out of the restrictions contained in section 2719 of IGRA.

The analysis of these sections of IGRA has shown that the Act is a mix of trust and non trust sections. Furthermore, while some sections not related to the trust can be tied to Commerce, some cannot. The important issue here is whether a clear line of demarcation

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[108] See 25 C.F.R. 151.11(b). See also 60 FR 32874 (1995).

[109] Under the arbitrary and capricious judicial review section of the APA,. Section 706 (2)(A), the Department could be faulted for not having adequately considered the relevant factors nor adequately explained why commuting distance from the reservation is such a crucial factor in determining what is in the best interest of the tribes.

can be drawn between the Secretary's trust duties and his other duties, so as to avoid any potential misunderstanding. Even if the answer to this question is yes, it can legitimately be asked if it is politically or realistically feasible for the Secretary and the NIGC to keep changing "hats" depending on which section of IGRA is being implemented. Before turning to more concrete proposals to amend IGRA, I think it would be tremendously helpful if Congress could acknowledge that it is not always acting as a trustee for the tribes, and give some clear indications of when it is acting pursuant to the trust, when it is acting pursuant to its power to regulate commerce with the Indian tribes, and when it is acting as a pure regulator, or as some tribes may put it, as a conqueror.

B: Proposals to Amend IGRA:

The next section of this article asks what improvement could be made to IGRA so that it would better fit the concept of cooperative tri-federalism. A concept which should be based on tri-lateral agreements between the tribes, the federal government, and the states. Fortunately, three well known and respected scholars have recently published important articles on this subject. Rand and Light in 2006,[110] and Matthew Fletcher in 2007.[111] In this section, after briefly summarizing some of the more important proposals these scholars have made, I make some comments on some of the key issues involved.

Rand and Light first come up with three *lodestars* for Indian gaming: Building tribal governmental institutions, improving tribal state relations, and develop a sound regulatory scheme for Indian gaming.[112] Among their more interesting proposal to fulfill these, they recommend a congressional fix to the problems created by *Seminole Tribe v. Florida,*[113] either by (1) allowing tribes to sue the states under *ex parte young* type of actions, an option they attribute as having first been suggested by Judge Canby,[114] or (2)

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[110] Kathryn R.L. Rand, Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform,* 13 Va J. Soc. Pol'y & L. 396 (2006).

[111] *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legislation, 39 (2007).

[112] Rand and Light, at 419-427

[113] 517 U.S. 44 (1996)(Holding that Congress could not, under its Commerce Clause power, abrogate the states' Eleventh Amendment sovereign immunity so as to allow Indian tribes to sue states alleging that the states had failed to negotiate a Class III gaming compact in good faith.

[114] See William C. Canby, Jr., American Indian Law in a Nutshell 310 (3d Ed., 1998).

forcing the U.S. attorney General to sue the states, or (3) having Congress clarify that the Secretary of the Interior does have the power to issue his Class III gaming procedures.[115] Another of their recommendation is to amend IGRA to "create a revenue sharing structure that encourages cooperative tribal state policymaking."[116] They also suggest that Congress should re-assess section 2719 allowing the Secretary to take off reservation land in trust for gaming purposes, but they do not come up with concrete recommendations on this issue.[117] Finally, they also recommend a clarification of what it means for states to negotiate in "good faith."[118]

Realizing that any amendments to IGRA would have to involve a series of political compromises between the states and the tribes, Matthew Fletcher proposed a comprehensive package to bring "balance" to Indian gaming. Under his proposal, Congress would first have to ratify the existing revenue sharing agreements,[119] as well as the Secretary of the Interior's gaming procedures for Class III.[120] Fletcher then proposes to mandate revenue sharing for certain future Class III compacts,[121] and would extend the compact requirement to what he refers to as Class II plus.[122] These are games that are technologically aided to such an extent that there are really no substantial differences between them and class III games.[123]

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[115] Id., at 445-449.

[116] Id., at 462-465.

[117] Id., at 465-471. They do think that the exception is needed for rural tribes, yet they recognize that some limits should be imposed. They suggest that perhaps Congress may want to limit the tribes to placing land within their "ancestral" area or at least in the state where their reservations are currently located.

[118] Rand and Light, at 448-449.

[119] Fletcher at 72-75.

[120] Id., at 75-79.

[121] Id., at 79-81. Fletcher would exempt some Indian gaming establishments that generate little revenues and he would put the burden on the states and local governments to show any loss revenues and detrimental impacts from tribal casinos.

[122] Id., at 81-82.

[123] Fletcher explained his rational for reclassifying certain Class II games as Class III as follows:"Classifying Class II technological aids as Class II-Plus gaming (or even Class III

1. The problem with good faith.

It is true that what constitute "good faith" when negotiating the scope of gaming of Class III compacts has been a vexing problem.[124] The controversy around good faith negotiation has usually centered on whether or not a state has to negotiate over certain type of games. This so-called scope of gaming issue stems from statutory language in IGRA under which "Class III gaming activities shall be lawful on Indian lands only if such activities are....(B) located in a State that permits such gaming for any purpose, by any person, organization, or entity."[125]

There are two principal views on this issue. The prevailing "narrow" view, focuses on the word "permits" in the statutory text and takes the position that the states only have to negotiate over these games that are expressly "permitted" under state law.[126] At the other extreme is the "broad " view according to which as long as a state allows one type of class III game, good faith negotiation requires the state to negotiate over all Class III gaming.[127] This broad view focuses on the words "such gaming" and takes the position that these words refer back to the words "Class III gaming," mentioned earlier in the statutory text. The assumption behind this position is that Congress in IGRA intended to incorporate the *Cabazon* framework for Class III. According to this framework, if a state allows some class III gaming, this means that state laws concerning Class III gaming are not criminal prohibitory but only civil regulatory. Under that framework, a state's allowance of one form of class III gaming showed that Class III gaming activities were not generally against the *public policy* of the state.[128] States should, therefore, have to

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gaming) under a scheme where states could not bar all Class III gaming compacts and where states could share in the revenue would solve these problems in a manner sufficient to satisfy all governmental constituents." Id., at 82.

[124] See Chris Rausch, student article, *The Problem with Good Faith: The Indian Gaming Regulatory Act a Decade After Seminole,* 11 Gaming L. Rev. 423 (2007).

[125] 25 U.S.C. 2710(d)(1)(B).

[126] See Rumsey Indian Rancheria v. Wilson, 41 F.3d 421, 9th Cir. 1994), Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993).

[127] See Lac du Flambeau Band of Law Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), Mashantuckett Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990).

[128] For a good explanation and argument in favor of this position, see Judge Canby's dissent in Rumsey v. Wilson, 41 F.3d 421, at.....(9th Cir. 1994).

negotiate over all Class III games.

Because It seems to me that the broad and narrow positions are at opposite poles of a wide spectrum of possibilities, I have previously argued for a middle position.[129] Allowing a state to negotiate only over such games that are specifically allowed is too narrow since it would, for instance allow a state to prevent tribes from operating the game of craps while allowing them to conduct the game of roulette. Yet any distinction between these two games has no public policy implications and therefore should be treated the same. On the other hand, forcing the state to negotiate over all Class III gaming seems too broad in that it would, for instance, require a state to negotiate over pari mutual wagering involving horse and dog racing, even though the state only allowed the card game known as Black Jack. Under my proposal, instead of focusing on the word "permits," as the proponents of the restrictive view would have it, or the word "such gaming" as the proponents of the broad view advocate, I would focus on the word *activity.* In other words, although the proponents of the broad view are partly right in focusing on what the words "such gaming" refers to, they are wrong in concluding that it refers to all class III gaming. I think a good argument can be made that it only refers to such Class III gaming "activities" that are allowed in the state. The word "activity" seems to be broad enough to encompass more than just those games that are specifically allowed. Yet it seems narrower than including all Class III gaming.

Under my interpretation of the statute, once the state allows a *form* of class III gaming activity such as, for instance, pari mutual betting on animal racing, there would be a presumption that such gaming activity is not against the public policy of the state.[130] The state would then have to rebut this presumption by introducing evidence that, for instance, dog racing was against the public policy of the state even though horse racing was not.

2. Providing a Seminole Fix:

(i) Mandating that the United States Attorney General sue the States over

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[129] See Alex Tallchief Skibine, *Scope of Gaming, Good Faith Negotiations, and the Secretary's Class III Gaming Procedures: Is IGRA Still a Workable Framework after Seminole,* 5 Gaming L. Rev 401, at 409-413 (2001).

[130] This "form" of gaming activity argument is similar to one once adopted by the United States Justice Department in an amicus brief filed in the Supreme Court. See Brief of Amici Curiae United States at p. 15, Rumsey Indian Rancheria v. Wilson. 64F.3d 1250 (9th Cir. 1994), *cert. Denied sub nom,* Sycuan band of Mission Indians v. Wilson, 117 S. Ct. 2508 (1997).

lack of Good Faith Negotiation.

Although I may have been among the first in suggesting that the U.S. attorney General should have a trust obligation to sue the states when they refuse to negotiate in good faith,[131] I realize that forcing the hand of the Attorney General legislatively is problematic. For one thing, the Justice Department is bound to strongly campaign against this move for I am sure the Attorney General will be eager to keep the current level of traditional prosecutorial discretion the Department has enjoyed. Furthermore, such legislation would have to come up with standards narrowing the Attorney General's discretion in deciding when to sue a state over lack of good faith negotiation. This could be problematic unless, as suggested by Rand, Light, and Fletcher, the legislation further delineates the meaning of "good faith."

(ii) Codifying the Secretary's class III gaming procedures.

Codifying the administrative rule allowing the Secretary to issue Class III gaming procedures whenever a state invokes its sovereign immunity is also politically problematic as I am sure the states will forcefully push to substantially amend such regulation during consideration of the legislation.[132] Thus I agree with Matt Fletcher that legislation ratifying the Secretary's gaming procedures does not have much of a chance to pass in and of itself. It would have to be tied to other proposals. The only chance of passing such a proposal by itself would be if the states that oppose Indian gaming were convinced that in fact Judge Edith Jones got it wrong in *Texas v. United States,*[133] and that the chances are good that the Supreme Court will overturn the decision. As I explain below, although I think Judge Jones' opinion is seriously flawed, this does not mean that the Court will either take the case or overturn her decision.[134]

The real issue in *Texas v. United States* was whether the Secretary of the Interior

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[131] See Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida,*29 Ariz. St. L. J. 121, 162-167 (1997)..

[132] The final regulations were issues on April 12, 1999, 64 FR 17535. 25 C.F.R. Part 291.

[133] 497 F.3d 491 (Fifth Cir. 2007)

[134] Although at least one federal district is in disagreement with the *Texas* case, Santee Sioux v. Norton, 2006 WL 2792734, and other circuits have issued dicta to the effect that the Secretary does have the power to issue these Class III procedures, United States v. Spokane Tribe, 139 F.3d 1297, 1302 (9th Cir. 1998), Seminole Tribe v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994), there is not yet a formal split among the circuits on this issue.

should be given *Chevron* deference[135] when he determined that in order to give tribes the rights they were guaranteed in IGRA, he had the authority under 25 U.S.C. sections 2 and 9,[136] to issue the Class III gaming procedures he could have issued had the state not invoked its sovereign immunity and IGRA's intricate remedial scheme would have been followed to its prescribed end.[137] Instead, Judge Jones first embarked on an analysis of whether the Secretary's interpretation of IGRA was entitled to *Chevron* deference. After first concluding that the Secretary was not owed deference because the terms of IGRA were not ambiguous and did not authorize the Secretary to issue such procedures,[138] she

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[135] As stated by the Court in *Chevron v. NRDC*, "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter...If however, the court determines Congress has not directly addressed the precise question at issue.....if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 842-843 (1984). In other words, under *Chevron*, a court will upheld the agency's interpretation of an ambiguous terms as long as it is reasonable.

[136] Section 2 states "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations." Section 9 states "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

[137] It should be noted that right at the beginning of her analysis, Judge Jones announced both her state rights bias and her completely warped understanding of federal Indian law when she stated "Congress has consistently authorized states to regulate or prohibit certain activities on the reservations. The Supreme Court significantly altered the assumed state tribal relationship when, in the 1987 *Cabazon Band* decision, it expansively interpreted a federal statute to prevent states from prohibiting certain tribal gaming activities." Id., at 500. As every student of the field knows, the Court in *Cabazon* did not hold that P.L. 280 *prohibited* the state from imposing its gaming regulations, it just relied and reaffirmed a long standing precedent, *Bryan v. Itasca County*, 426 U.S. 373 (1976) and held that P.L. 280 did not specifically authorize the state from regulating Indian gaming because although P.L. 280 authorized the state to assume criminal jurisdiction in Indian Country, it did not allow them to assume civil regulatory jurisdiction. Having done so, the *Cabazon* Court then proceeded to balance the federal and tribal interests at stake against the claimed state interests pursuant to the Indian preemption balancing test and found that the state interest were not strong enough to overcome the federal tribal interest.

[138] Judge Jones also insisted that a statute could not be rendered ambiguous so as to give *Chevron* deference to an agency if the ambiguity was created as a result of a court opinion, as

nevertheless decided to engage in an extensive analysis to show that even if there was an ambiguity, the Secretary's interpretation was not entitled to *Chevron* deference because the Secretary had not been "delegated" the authority to issue such regulations under IGRA.[139]

Judge Jones is severely misguided on two points. First she confused the issue of whether the agency should be given *Chevron* deference because it has been delegated the authority to interpret a statute through issuance of statements that have the *force of law,* which is part of the *Chevron-Mead* inquiry,[140] with the issue of whether the Secretary has been delegated the authority to issue such Class III gaming procedures through regulations in this particular case,[141] which is not a *chevron* issue but is more concerned with whether the agency has acted *ultra-vires*. I think Judge Jones would have been far better off arguing only this later point.[142] Her confused, as well as confusing foray into

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was the case here. As stated by judge Dennis in his dissent "With respect, there is no valid basis for Chief judge Jone's assertion that a judicial interpretation of a statute cannot lead to an ambiguity... susceptible to the Chevron step II analysis." 497 F.3d, at 515.

[139] Strangely enough, in this part of her opinion, she never once mentioned United States v. Mead Corp., 533 U.S. 218 (2001), the case that is by far the leading Supreme Court authority on this issue. She does mentions *Mead* at the end of her opinion when discussing the relevance of 25 U.S.C. sections 2 and 9 but only as authority for her statement that "courts may consider "generally conferred authority" in the statutory scheme to determine the propriety of administrative agency action. Id., at 509.

[140] Courts will usually hold that an agency has been delegated such authority if the agency has been given the power to issue such interpretation through semi formal type of pronouncements such as rules issued pursuant to section 553 of the Administrative Procedure Act (APA), also known as informal rule-making, or on the record adjudications conducted pursuant to section 554 of the APA. For a comprehensive analysis of the issue, see Amy J. Wildermuth, *Solving the Puzzle of Mead and Christiansen: What Would Justice Stevens Do?* 74 Fordham L. Rev. 1877 (2006).

[141] As the dissent noted, "Instead of inquiring into whether Congress would have expected the Secretary of the Interior to address any ambiguities in the IGRA, Chief judge Jones focuses on whether the particular IGRA statutory provision at issue included a delegation of authority to the Secretary–an analysis that is both contrary to the Supreme Court's admonition in *Mead* and that would impose an impractical burden on Congress of including express delegations of an agency's authority to administer every provision of every statute under its aegis." Id., at 517.

[142] A point more clearly made in the much better written and concise concurring opinion of judge King. Judge Kind stated that " In my opinion, the method used by the Secretary to fill

Chevron jurisprudence is baffling, to say the least.

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Nevertheless, mistakenly believing that she has to decide the case under *Chevron,*[143] she proceeded on debating whether the Secretary's interpretation was reasonable under Chevron Step II.[144] This part of her analysis reduced itself to re-asserting what she had already stated in the previous parts of the opinion: Congress really only meant to allow the Secretary to issue Class III gaming procedures after the parties had complied with the detailed and intricate remedial scheme contained in IGRA. In fact, as convincingly demonstrated in judge Dennis's dissent, the reasoning of the Secretary in issuing the Class III gaming procedures regulations was imminently reasonable in that they re-establish the balancing of tribal and state interest that Congress had worked so hard to establish in enacting IGRA.[145]

Chief Judge Jones finally addressed what she should have addressed up front: whether the Secretary has the authority to issue these gaming procedures under 25 U.S.C. sections 2 and 9. Judge Jones correctly took the position that "the case law overwhelmingly confirms that sections 2 and 9 do not empower issuance of regulations without a statutory antecedent."[146] She then, however, mistakenly concluded that "IGRA, however, does not guarantee an Indian tribe the right to conduct Class III gaming and therefore cannot serve as a statutory antecedent justifying the Secretarial Procedures."[147] In fact, IGRA does guarantee two substantial federal "rights" to Indian tribes. The first

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the gap, here creating an alternative remedial scheme....goes beyond the mere effectuation of IGRA's provisions into the realm of wholesale statutory amendment." Id., at 512. I disagree with his conclusion but at least his analysis is clear and to the point and did not misstate the law relating to *Chevron*.

[143] This whole part of the analysis was not necessary to start with since she had earlier found that the statute was not ambiguous and therefore *Chevron* deference was just not applicable.

[144] Under Step II, the Court has to decide if the interpretation adopted by the agency is "permissible" or reasonable. The agency's interpretation does not have to be the best interpretation, or the one the Court would have chosen. It just has to be a permissible one. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered,* 72 Chi.-Kent L. Rev. 1253 (1997).

[145] 497 F.3d at 521-522.

[146] Id., at 510.

[147] Id., at 511.

right is to have the state negotiate in good faith. The second right is to have the Secretary issue class III gaming procedures if the state refused to agree or abide by the gaming compact selected by the court appointed mediator. It was in order to honor these statutory rights that the Secretary decided to promulgate his Class III gaming procedure regulations.

(iii) Allowing the tribes to sue under *Ex Parte Young*.

Allowing tribes to sue under *Ex Parte Young,*[148] sounds especially attractive because it is by far the simplest solution since it does not change anything in the substantive law. It would also underscore how perverse Chief Justice Rehnquist's opinion was when he addressed this issue in *Seminole Tribe*.

Under the *Ex Parte Young* doctrine, plaintiffs whose legal rights under federal law are allegedly being violated, are allowed to sue state officials instead of the state, thus allowing them to avoid state sovereign immunity. The only limitations being that such plaintiffs can only seek prospective injunctive relief instead of monetary ones. In *Seminole Tribe*, the Court found *Ex Parte Young* not available. The Court first remarked that although the Governor's failure to negotiate in good faith could be considered a continuing violation of Plaintiff's federal right "the duty to negotiate imposed upon the state by that statutory provision did not stand alone"[149] since Congress had enacted that provision "in conjunction with the carefully crafted and intricate remedial scheme."[150] Although, the Court first stated that "When Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary,"[151] it quickly modified that statement[152] by stating " Where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should *hesitate* before casting aside those limitations and permitting an action against a state

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[148] 209 U.S. 123 (1908).

[149] 51 U.S. 44, at 73.

[150] Id., at 73-74.

[151] Id., at 74.

[152] The reason for the quick modification may have been that Chief Justice Rehnquist realized that the easy answer to this last sentence was that the plaintiffs here were not seeking additional remedies, they were only invoking a new one because state sovereign immunity barred them from asserting the one provided in the legislation.

officer based upon *Ex parte Young*."[153]

In this case, the Court did not *hesitate* much before concluding that an *Ex Parte Young* action should not be allowed. In doing so, the Court seemed to have made two arguments. First, allowing an *Ex Parte Young* action here could provide the Plaintiff with a more complete and more immediate relief than the one provided under the "intricate remedial scheme" contained in IGRA. This, according to the Court, could displace the provisions enacted by Congress. Secondly, allowing an *Ex Parte Young* action could expose state officials to additional sanctions and liability. This strongly indicated to the Court that Congress did not intend Plaintiff to be able to sue state officials pursuant to *Ex Parte Young*.

As ably and comprehensively discussed in Justice Souter's dissenting opinion, there are many problems with this argument.[154] For one, although it is true that there were precedents refusing to allow *Ex Parte Young* actions to be added or supplant remedies already provided by Congress, this case was all about allowing an *Ex Parte Young* action because the very remedy provided by Congress was no longer available as a result of the Court's Eleventh Amendment holding. As for the majority's bizarre finding of an implied congressional intent not to allow *Ex Parte Young* actions in this case, Justice Souter made the obvious retort

> Finally, one must judge the Court's purported inference by stepping back to ask why Congress could possibly have intended to jeopardize the enforcement of the statute by excluding application of Young's traditional jurisdictional rule, when that rule would make the difference between success or failure in the federal court if state sovereign immunity was recognized...? Why would Congress not have wanted IGRA to be enforced by means of a traditional doctrine giving federal courts jurisdiction over state officers... There are no plausible answers to these questions.[155]

From a tribal perspective, and as suggested in Part V of Justice Steven's dissent,[156]

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[153] 517 U.S. at 74.

[154] 517 U.S. 44, at 174-182.

[155] Id., at 181-182.

[156] Justice Steven asserted "Fortunately, and somewhat fortuitously, a jurisdictional problem that is unmentioned by the Court may deprive its opinion of precedential significance. The IGRA establishes a unique set of procedures for resolving the dispute between the tribe and

the silver lining in the Court's explanation would be to argue that the Court's reasoning only makes sense if it assumed that the rest of the "intricate remedial scheme" provided in IGRA was in fact still available to the Tribe. In other words, tribes could still go to the Secretary and ask for class III gaming procedures under section 2710 (d)(7)(B)(vii), the very remedy the Court of Appeals for the Fifth Circuit found unavailable in the Texas case.

In conclusion, I think that amending IGRA by just providing that Congress always intended the tribes to be allowed to sue state officials under the doctrine of *Ex Parte Young* should they not be able to sue the states directly because of sovereign immunity would be the simplest and best solution. Yet even such a modest and elegant amendment is bound to raise forceful objections by the states. Perhaps professor Fletcher's suggestion to create a Class II plus category and making it subject to a compact while at the same time putting the congressional stamp of approval on revenue sharing will do the trick in removing the states' objections to the legislation. If not, perhaps further restricting off reservation land acquisitions as suggested by Rand and Light would also be worth while considering. However, if I were the tribes, I would start by pushing the simple Ex *Parte Young* amendment and let the states bring forth other proposals.

CONCLUSION

(*FORTHCOMING)*

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the state... The maximum sanction that the Court can impose is an order that refers the controversy t a member of the Executive branch for resolution. As the Court of Appeals interpreted the Act, this final disposition is available even though the action against the State and its Governor may not be maintained.... It may well follow that the misguided opinion of today's majority has nothing more than an advisory character." Id., at 99.