

INDIAN GAMING AND COOPERATIVE FEDERALISM

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I. Introduction.....	2
II. Reconciling conflicting visions of the Trust Doctrine.....	6
A. Origin(s) of the Trust.....	6
B. Perversions of the Trust.....	8
C. Modification of the Trust: The scholarly debate.....	9
D. Tying the Trust to the power of Congress over Indian Affairs.....	14
E. Tying the Trust to the Executive branch’s role in statutory interpretation.....	18
III. Dissecting the Trust from the non-trust functions of IGRA....	23
A. The trust and regulatory roles of the NIGC.....	24
B. The trust and non-trust roles of the Secretary of the Interior.....	26
1. Approval of Revenue Allocation Plans.....	26
2. Approval of Tribal State compacts.....	27
3. Issuance of Class III Gaming Procedures.....	28
4. Approval of off reservation land transfers into trust for the purpose of gaming.....	29
IV. Reshaping IGRA as a model of cooperative federalism.....	32
A. The Evolutionary Trend in Federal Indian legislation....	32
B. Rethinking or Amending IGRA	38
1. The problem with good faith.....	41
2. Providing a <i>Seminole Fix</i>	43
V. Conclusion.....	50

The main theme of this Article is to identify the proper place of Indian tribes within our federalist system. The Article uses Indian gaming as a vehicle to focus on this important issue. Along with making some tribes much wealthier, Indian gaming has

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had three major consequences. First, it has propelled Indian tribes into the mainstream of American economic life. Secondly and relatedly, it has brought more attention on what is or should be the tribes' relationship with state governments. Finally, it has put some stress on the conventional understanding concerning the traditional role of the federal government as a trustee for Indian tribes.

When Congress enacted the Indian Gaming Regulatory Act in 1988 (IGRA),¹ an overwhelming majority of tribal leaders were against it.² Their main objection was that the Act was an infringement on tribal sovereignty because not only did it provide for a federal commission, the National Indian Gaming Commission (NIGC), to regulate what is known as Class II games,³ but it also provided that the potentially much more lucrative Class III games could not be conducted without a tribal state compact.⁴ As such, the tribes believed that the Act allowed for the possible insertion of state authority over the reservation and was not only an invasion of tribal sovereignty but a violation of the federal Indian trust relationship. Yet, for all its imperfections, initial criticisms, and a notable United States Supreme Court effort to gut the Act,⁵ IGRA has been a success, at least a far as injecting badly needed revenues into reservation economies. In fact, revenues from Indian gaming which averaged around \$200 million per year in 1988, the year IGRA was enacted into law, are expected to be over \$26 billion in 2008 which is IGRA's 20th anniversary.⁶

¹ 25 U.S.C. 2701-2721.

² See Roland Santoni, *The Indian Gaming Regulatory Act, How did We Get Here? Where Are We Going?* 26 Creighton L. Rev. 387 (1993).

³ Class II generally includes Bingo, other games similar to Bingo, and some non-banking card games. See 25 U.S.C. 2703 (7).

⁴ 25 U.S.C. 2703 (8) defines Class III gaming as "all forms of gaming that are not Class I gaming or Class II gaming." Class I gaming consists of social games played solely for prizes of minimal value. 25 U.S.C. 2703 (6).

⁵ See *Seminole tribe v. Florida*, 51 U.S. 44 (1996)(holding that Congress could not, under its Commerce power, abrogate the states's Eleventh Amendment sovereign immunity so as to allow a tribe to sue a state over that state's alleged failure to negotiate a Class III gaming compact in good faith.)

⁶ It is beyond the scope of this article to delve into why IGRA has been such an economic success. For a comprehensive and insightful analysis of this phenomenon, see Robert N. Clinton, *Enactment of the Indian Gaming regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*. (Manuscript on file with author).

The title of this article refers to cooperative federalism. Historically, the federal tribal relationship has been 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. Similarly, *Our Federalism* has traditionally been viewed as a dual sovereignty system involving only the states and the Federal government. Indian tribes are not included in such a system. 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.⁷ 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 states can pretend that Indian Nations are not sovereigns and will eventually disappear or dissolve themselves within the states.⁸ It is time to re-conceptualize *Our Federalism* as including Indian tribes under a third sphere of sovereignty.⁹

Although mentioned in the Constitution's Commerce Clause,¹⁰ Indian tribes were never officially incorporated into the United States legal system through an organic document such as a constitutional amendment. Moreover, from 1778 until 1871, the United States dealt with Indian tribes almost exclusively through treaties. While the Indian tribes acknowledged their "dependence" on the United States in many of these treaties, the treaties contemplated Indian tribes as sovereign entities existing outside the United States legal and political system. Yet, over the years, the Indian tribes have been at least informally incorporated into such system. But instead of formal organic documents, the tribes have been incorporated through two mechanisms. The first of

⁷ States were somewhat included in other national Indian legislation such as P.L. 280, 67 Stat. 588 (1953) and the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901-1963, although the tribal interests were not taken into account in P.L. 280 and, arguably, the states interests were not addressed in ICWA.

⁸ 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.

⁹ See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependancy Paradigm*, 38 Conn. L. Rev. 667 (2006). See also Carol Tebben, *An American Tri-Federalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. Pa. J. Const. L. 318 (2003), and Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United states and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Tol. L. Rev. 617 (1994).

¹⁰ Article 2, section 8, clause 3 provides that the Congress shall have the power "To regulate Commerce with foreign nation s, and among the several States, and with Indian Tribes."

these are acts of Congress such as the Act that ended treaty making,¹¹ the Indian citizenship Act,¹² and the Indian Reorganization Act of 1934.¹³ The second one, which has played perhaps a much more significant role as a method of incorporation has been legal doctrines announced through Supreme Court decisions. The three most influential incorporating doctrines have been the trust doctrine, the inherent tribal sovereignty doctrine, and the congressional plenary power doctrine.

In PART II of this article, I explore the interconnectedness between the incorporation of tribes within the federal system, the trust relationship, and congressional power over Indian affairs. One of the important thesis of this article is that when it comes to incorporation within the federal system and the relationship with the federal government the trust doctrine should fulfill the same role for Indian tribes as the Tenth Amendment has done for the individual States of the Union.¹⁴ Indian tribes are conflicted about the trust relationship because starting in the 1880's, the trust doctrine was used by the Court to vest Congress with plenary power not only over Indian affairs vis a vis the states, but also over the internal affairs of the Indians themselves.¹⁵ Furthermore, the Court justified this position not from constitutional first principles but from racist and colonial perspectives concerning Indians and Indian tribes. There are, however, two versions of the trust doctrine. The one just mentioned above which is aimed at giving control to the federal government over Indian tribes. The other or initial 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.¹⁶ Professor Mary Wood has termed this original version of the doctrine which she attributed to Chief

¹¹ Act of March 2, 1871, 16 Stat. 544 (codified at 25 U.S.C. 71).

¹² Indian Citizenship Act of 1924, 43 Stat. 253.

¹³ 48 Stat. 985, 25 U.S.C. 464-479.

¹⁴ The Tenth Amendment provides “The powers not delegated to the United states by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹⁵ 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), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

¹⁶ 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).

Justice John Marshall, the “sovereign trust branch,” which she contrasted with the second version of the doctrine which she termed the “guardian-ward” branch.¹⁷

I argue here that abandoning the sovereign trust branch of the doctrine may be premature. Without it, the tribes would be at the mercy of the states, let alone an anti-tribal Supreme Court.¹⁸ 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.¹⁹ However, 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. So the issue here is 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 guaranteeing the place of tribes as political sovereigns within *Our Federalism*.

In PART III, I analyze various parts of IGRA and shows how they represent Congress acting at times as a trustee, and at times not. 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) when it attempts, for instance, to shape the distinction between class II and Class III gaming. Such an understanding would also clarify the role of the Secretary of the Interior when issuing Class III Gaming procedures in the wake of the Supreme Court decision in *Seminole Tribe v. Florida*,²⁰ when deciding whether to take off-reservation land in trust for tribal gaming purposes, or when approving tribal revenue allocation plans.

Finally In PART IV, after first exploring the evolutionary trend in congressional legislation involving Indian Affairs, I end the article with a discussion and evaluation of some of the more recent proposals that have been suggested on how to improve IGRA. I

¹⁷ See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev 1471, 1498-1501 (1994).

¹⁸ See Skibine *Teaching Federal Indian Law in an Anti-Tribal Era*, 82 North Dakota L. Rev. 777 (2006).

¹⁹ See Mary C. Wood, *Protecting the Attributes of Sovereignty: A New Trust Paradigm for Federal Actions affecting Tribal Lands*, 1995 Utah L. Rev. 109 (1995).

²⁰ 116 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).

argue that the evolution of congressional legislation in Indian affairs shows a move towards what has been referred to as cooperative federalism. By that I mean that instead of imposing federal laws, regulations, and programs on tribes directly, the federal government negotiates a compact with the tribes or make federal funds contingent on tribal compliance with federal directives . Because the idea here is both to define the role of the state in the federal-tribal trust relationship and integrate the tribes into what was previously a dual federalism, the purpose of this analysis is to figure out which legislative model represents the better approach for establishing a system some may call cooperative tri-federalism, and apply such principles to any potential amendments of IGRA.

PART II: RECONCILING CONFLICTING VISIONS OF THE TRUST DOCTRINE.

Conceptualizing the true nature of the trust doctrine as essentially a doctrine integrating the Indian nations as third sovereigns within *Our Federalism* and understanding the federal obligation towards the Indians as being one primarily concerned with protecting the continuing sovereignty of Indian tribes is especially important when it comes to Indian gaming. If one takes the position that the trust doctrine only exists because Indian tribes are “weak and defenseless” and the tribal members “incompetent” to manage their own affairs, then the doctrine can be set aside, or discarded for those tribes that have become wealthy, or those whose members have become successful and sophisticated.

A. Origin(s) of the Trust.

To talk about the federal tribal relationship is inevitably to talk about the trust relationship. This Part of the article evaluates the conflicting views about the trust doctrine 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.

While we can all agree that there is 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.²¹ There is even a lack of consensus about when and why the trust doctrine arose. Professor Mary Wood thinks it arose from the huge amount of lands the United States acquired from the tribes in the treaties made between the United States and the tribes.²² Reid Chambers along with probably most scholar traced the beginning of the

²¹ 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.

²² Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine revisited*, 1994 Utah L. Re. 1471, at 1495-96.

trust doctrine to Marshall's famous reference in *Cherokee Nation v. Georgia*,²³ that the relationship between the United States and the tribes could be likened to "that of a guardian to a ward."²⁴ Professor Robert Miller takes the position that the trust doctrine cannot be disassociated from the doctrine of discovery.²⁵ I tend to agree with professor Miller.²⁶ In other words, both Chambers and Wood are partially correct, Marshall did create the trust doctrine and it did originate from land transfers. However, Marshall's reference to a guardian ward relationship in *Cherokee Nation* is very closely tied to the position he had earlier taken in *Johnson v. M'Intosh*.²⁷ Furthermore, the huge land transfers did not start with the treaties, but originated pursuant to the doctrine of discovery.²⁸ 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.

I also believe that the invocation of a relationship resembling that of a guardian to its ward by Marshall 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*.²⁹ In effect, it reflected a judicial attempt to temper the harshness of the doctrine of discovery by imposing at least a moral duty on the discoverer.³⁰ As one commentator stated "While

²³ 30 U.S. 1 (1831)

²⁴ *Id.*, at 17. See Reid Chambers, *supra* at n.16.

²⁵ 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 notion that uncivilized, infidel savages needed to be saved by Euro-Americans." (at 166).

²⁶ See 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, "Native America, discovered and conquered" 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).

²⁷ 21 U.S. 543 (1823).

²⁸ Under Marshall's original version of that doctrine, upon "discovering" Indian lands, the European power acquired the ultimate legal title to all that land and the tribes' title was reduced to a right of occupancy. Upon its formation as a sovereign country, the United States inherited such rights of discovery from England.

²⁹ 21 U.S. (8 Wheat.) 543 (1823).

Justice Marshall accepted the discovery of America as a “conquest” that gave legal rights to the colonizers.... Marshall... tempered U.S. power with responsibility, creating a kind of “conqueror with a conscience.”³¹

B. Perversion of the Trust.

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,³² I will not here dwell at length over that point. It is beyond discussion, however, that the trust doctrine, which was originally partly derived 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 based on the perceived racial inferiority of Indians and helplessness of tribes 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.³³ As shown in Part IV 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,³⁴ but has since embarked on a policy that re-instated the initial vision of the trust doctrine.³⁵

One aspect of the modification of the doctrine during the Allotment era is the notion that all lands set aside for and by Indian tribes in treaties are held in trust by the United States with the United States having the legal title and the tribes the beneficial

³⁰ See 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 (1995).

³¹ Scott C. 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, 516 (2004)(citing to Philip P. Frickey, *Adjudication and Its Discontent: Coherence and Conciliation in Federal Indian Law*. 110 Harv. L. Rev. 1754, 1766 (1997), quoting Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 9 (1995).

³² See Chambers, *supra* n.16 at p. 8. See also Kevin Gover, *An Indian Trust for the twenty First Century*, 46 Nat. Resources J., 317, 321-329 (2006).

³³ 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).

³⁴ 25 U.S.C. 461 et seq.

³⁵ For an in depth analysis showing this point, see Gover, *An Indian Trust for the 21st Century*, *supra* at n.32.

title to such lands. Scholars have recently questioned why such treaty land is said to be held in trust when these words never appear anywhere in the actual treaties.³⁶ 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.³⁷ While it is true that under prevailing law, the United States can only be financially liable for the mismanagement of tangible trust assets,³⁸ 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, or more relevant to this article, tribal gaming activities and revenues.

C. Modification of the trust: The scholarly debate.

In the wake of the Cobell litigation,³⁹ and the dismissal of the Navajo Nation breach of trust case by the Supreme Court,⁴⁰ it is fashionable these days to talk about modifying,⁴¹ if not ending the trust relationship as we know it.⁴² In fact, this is nothing new. The federal tribal trust relationship has always been a love hate relationship for Indian tribes. When congressman Morris Udall introduced the first Indian gaming bill back in the mid 1980's,⁴³ almost everyone was against it. Many tribes objected to the

³⁶ See Tim Coulter, Native Land Law Project, Indian Law Resource Center, Justice for Indigenous Peoples. (2008).

³⁷ 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 and tribal members." Davies, at 18.

³⁸ See *Navajo Nation v. United States*, 123 S. Ct. 1079 (2003).

³⁹ 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.

⁴⁰ *Navajo Nation v. United States*, 123 S. Ct. 1079 (2003).

⁴¹ See Kevin Gover, *An Indian Trust for the Twenty First Century*. 46 Nat. Resources J., 317 (2006).

⁴² See Lincoln Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*,Maryland L. Rev.....(2008), 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.

⁴³ H.R. 4566, 98th Cong., 1st Sess. (1983).

requirement that the BIA would have to approve the tribal gaming ordinances and the management contracts.⁴⁴ 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.⁴⁵ For better or worse, it is mostly the existence of a trust relationship and federal law that preempts state jurisdiction in Indian country, not tribal sovereignty.⁴⁶

My colleague Lincoln Davies is publishing an article in which he advocates the end of the trust relationship.⁴⁷ 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."⁴⁸ Professor Davies is making his argument in the context of the management of tribal lands for economic development. I agree that in this context, the trust may no longer be useful. However this does not mean that in other contexts, the trust should be abandoned. As stated earlier, I think that the trust doctrine and tribal sovereignty can be reconciled if the purpose of the trust is the protection of tribal sovereignty.⁴⁹

⁴⁴ As Deputy Counsel for Indian Affairs for the Interior and Insular Affairs Committee of the U.S. House of Representatives, the author assisted in the drafting of this first gaming Bill.

⁴⁵ 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 mention that state jurisdiction was not preempted because there was no tradition or backdrop of tribal sovereignty in the area of liquor control.

⁴⁶ On the evolution of the Indian preemption doctrine, see Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, at 1191-1225. See also Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 Am. Ind. L. Rev. 391, 416-422 (2007-2008).

⁴⁷ See Davies, *Skull Valley Crossroads*, supra at n. 42.

⁴⁸ Davies, at 57.

⁴⁹ 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*

While some scholars like professor Stacey Leeds seem to share Davies' position,⁵⁰ others like professors Mary Wood and Reid Chambers are much more conciliatory towards the trust.⁵¹ In an important recent contribution, Kevin Gover adopted a middle position.⁵² 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."⁵³ 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.⁵⁴

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).

⁵⁰ 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. .

⁵¹ 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).

⁵² See Gover, *An Indian Trust for the 21st Century*, *supra*, at n. 32.

⁵³ 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.

⁵⁴ See Gover, at 359-362.

In some aspects his proposal is similar to one I had made in an article written that same year.⁵⁵ I argued there that tribes should look at the Puerto Rican model of incorporation.⁵⁶ Puerto Rico has a Commonwealth agreement within the United States.⁵⁷ When it comes to incorporating Indian tribes as third sovereigns within the United States political system, one has to acknowledge that unlike the sovereignty of the states, which is recognized under the Tenth and Eleventh 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 Supreme court does not believe so.⁵⁸ To remedy this problem, the tribes need either the trust doctrine, a constitutional amendment, or some organic congressional legislation that cannot be easily repealed.⁵⁹ Unlike Gover's proposal, which calls for the Secretary of the Interior to approve each tribal-federal agreement, I would have Congress ratify each tribal federal sovereign-trusteeship agreement.⁶⁰ While some may argue that this process could be quite

⁵⁵ See Skibine, *Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006). In an earlier effort, I once suggested that the United States should place the Indian nations on the list of non-self-governing territories of the United Nations. 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 (1995). I realize, however, that politically speaking, this is not about to happen.

⁵⁶ See Skibine, *Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667, 691-692.

⁵⁷ For recent treatment of issues relating to Puerto Rico's legal status see Pedro A. Malavet, *America's Colony: The Political and Cultural Conflict Between the United States and Puerto Rico* (New York University Press), and Angel R. Oquendo's article reviewing this book, 55 J. Legal Educ. 416 (2006). See also T Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrum and Prospects*, 11 Const. Comment 15 (1994).

⁵⁸ 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). It seems that even the most skeptical Justices would have to at least acknowledge that the mentioning of Indian tribes in the Commerce clause along with other sovereigns, the states and foreign nations, does indicate that the founders must have believed that Indian tribes possess some degree of sovereignty.

⁵⁹ See Frank Pommersheim, *Is there a (Little or not so Little) Constitutional Crisis developing in Indian Law?: A Brief Essay*, 5 U Pa. J. Const L. 271, 285 (2003), see also Davies, *supra* at n.14, at Part IV.E.3.

⁶⁰ 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).

cumbersome for the Congress,⁶¹ it is in fact not unusual for Congress to enact tribal specific legislation.⁶² Thus, in addition to numerous individual tribal bills restoring some tribes to federal recognition,⁶³ Congress has enacted a myriad of tribal specific water and land settlement legislation.⁶⁴

In conclusion, I agree with professors Gover and Davies 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. However, as explained above, I believe that the original version of the doctrine is worth preserving because it is about protecting Indian tribes right to self-government from the states and other external threats. This 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,⁶⁵ under which statutes enacted for the benefit of Indians are supposed to be interpreted liberally with ambiguous terms resolved in the Indians' favor.⁶⁶ It is also used to uphold congressional power to treat Indians and Indian tribes differently so as to give them at times preferential and favorable treatment.⁶⁷

D. Tying the trust to the power of Congress in Indian Affairs.

⁶¹ See Gover *supra* at n. 32. at p. 360 (Stating “Certainly Congress cannot be expected to legislate Tribe-by-Tribe as to each element of the trust.”)

⁶² See for instance all the tribal specific exemptions to the restrictions contained in the federal leasing statute, 25 U.S.C. 415.

⁶³ 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).

⁶⁴ See Cohen’s Handbook of Federal Indian Law, 2005 Edition, p. 1212 (stating that between 1978 and 2004, Congress enacted 18 water rights settlement acts.)

⁶⁵ 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 Hall, *Indian Law Canons*, *supra* at n. 37, (setting forth arguments tying the Indian law canons of statutory construction to a proper understanding of the trust doctrine.)

⁶⁶ 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).

⁶⁷ 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.

Like other scholars, I believe that the Court's current position which is to derive congressional plenary power from the Indian Commerce Clause and the treaty power is disingenuous and historically inaccurate.⁶⁸ I also believe that any notion that Congress has such plenary authority pursuant to some *inherent* power over Indian nations, even if initially accurate,⁶⁹ should have dissipated when tribes became incorporated in the political system of the United States.⁷⁰ Although there is no one definite Act of Congress accomplishing such incorporation, it can be argued that such incorporation took place between 1871 the year Congress enacted legislation ending treaty making with Indian tribes,⁷¹ and 1924, the year all Indians became United States citizens. In this article, however, I am willing to concede, for the sake of argument, that Congress has been recognized as having almost "plenary" power in Indian affairs pursuant to its commerce power. As stated by the Court in *Cotton Petroleum v. New Mexico*, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs."⁷² As 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.⁷³ 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,⁷⁴ or Eleventh Amendments.⁷⁵ Moreover, even though the Court has conceded almost plenary authority to Congress in the field of Indian Affairs, it has also stated

⁶⁸ 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 Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993)

⁶⁹ See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 68-69 (1996), Sarah H. Cleveland, *Power Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 25 (2002).

⁷⁰ See for instance, Robert G. Natelson, *The Original Understanding of the Indian Commerce Power*, 85 U. Denver L. Rev. 201 (2007), but see Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 Tulane L. Rev. 509 (2007).

⁷¹ Act of March 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. 71).

⁷² 490 U.S. 192 (1989).

⁷³ See Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113, 254 (2002)(criticizing such jurisprudence).

⁷⁴ See *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) *United States v. Sioux Nation*, 448 U.S. 371 (1980).

⁷⁵ See *Florida v. Seminole Tribe*, 517 U.S. 44 (1996).

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.⁷⁶

Following up on such language, I have previously made the argument that the trust doctrine had been integrated into the Constitution.⁷⁷ 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 enacted pursuant to the trust, Congress's legislation had to be substantially tied to commerce with the Indian tribes. 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. So, formalistically speaking, congressional legislation in Indian affairs can be divided into three categories.

The first type are those laws enacted pursuant to the trust doctrine. As explained earlier, such trust legislation can be sub-divided into two types: those laws enacted pursuant to a vision of the trust conceptualized during the Allotment era. The purpose of the laws enacted during that period was to give a greater amount of control to the federal government over both the tribes' political sovereignty and the tribes's physical trust resources and assets.⁷⁸ The second type of trust laws are those which were enacted pursuant to a more modern vision of the trust doctrine and are aimed at truly protecting and promoting tribal self-government.⁷⁹

⁷⁶ United States v. Sioux Nation, 448 U. S 371, 408 (1980). 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).

⁷⁷ See Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 Tulsa L. Rev. 247 (2003).

⁷⁸ Laws such as the Indian Major Crimes Act, or the early leasing statutes, are typical of such legislation. See discussion at n. 148-153

⁷⁹ The Indian Child Welfare Act, the Indian Self determination Act, and the Indian Financing Act, are good examples of such legislation. See discussion at n. 154-159.

The second type of legislation are laws that are aimed at regulating commerce with the Indian tribes. Although such laws could be beneficial to the tribes, they were not primarily enacted pursuant to the trust doctrine but they fit squarely within the Congress's power to regulate commerce with the Indian tribes. When enacting such laws, Congress should be said to be acting as a regulator.

The third type of laws are those laws that extend beyond the regulation of commerce and are not supportive of tribal self-government. Laws enacted during the Termination era, such as P.L. 280,⁸⁰ are representative of such legislation.

In summary, I believe that correctly conceptualized, when Congress enacts laws in Indian affairs, it can wear either of three hats. Either it acts as a trustee, a regulator, or a conqueror. When acting as a trustee, it can pursuant to its Indian Commerce Clause power as enhanced by the trust doctrine, exercise power reaching beyond the regulation of commercial affairs but the legislation has to be truly for the benefit of the tribes and the protection of tribal self-government. Congress can also act as a regulator but in such case, its legislation should be substantially tied to commerce.⁸¹ In an ideal world, when Congressional legislation is not enacted for the benefit of the tribes and is beyond the regulation of commerce, it should be considered unconstitutional. Unfortunately, the Court has not seen it that way and has allowed the Court to wear yet a third hat: that of a "conqueror." In the next sections of this article, I discuss how the mental outlook of executive branch officials should change depending on whether they are implementing statutes enacted by Congress as a trustee, a regulator, or a conqueror. I also discuss how the courts should respond in reviewing such executive actions and interpreting such statutes.

In *Red Lake Band of Chippewa v. Swimmer*,⁸² a federal district court, somewhat 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 any notion that Congress decision regarding the Indian tribes are not reviewable."⁸³ Although the Court agreed that "Congress' power is subject to limitations

⁸⁰ Act of August 15, 1953, 67 Stat. 588(codified at 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360.)

⁸¹ For a comprehensive argument delineating what should really be the extent and limit of Congressional power over Indian tribes, see Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113 (2002).

⁸² 740 F. Supp 9(1990)

⁸³ 740 F. Supp 9, at 13.

inhering ina guardianship,”⁸⁴ it nevertheless held that Congress did not violate the trust relationship in enacting 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. Realistically speaking, much legislation enacted by the Congress in Indian affairs combined all three categories mentioned above. IGRA is the prime example of such legislation but so are the Indian amendments to the Clean Air,⁸⁵ Clean Water,⁸⁶ and Safe Drinking Water Acts Act.⁸⁷ In that respect, IGRA brings all the inner tension of the trust doctrine together. The important issue here is how the federal agency in charge of implementing such legislation should behave: as a trustee, as a regulator, or as a conqueror. The next section of this article focuses on the role of the agency in interpreting legislation affecting Indian tribes.

E. Tying the trust to the Executive branch’s role in statutory interpretation.

The question this section addresses is whether an agency should always follow the Indian canon of statutory construction when interpreting an ambiguous statute affecting Indians and Indian tribes. Under the Indian Canon, statutes enacted concerning Indians should be liberally construed and ambiguities resolved to their benefit.⁸⁸ There are two approaches in resolving this issue. The first one is to take the position, as the Court has done at times, that the Indian canon is just one more technical or grammatical canon and as such is not a mandatory “substantive” rule of statutory construction. As such, it does not have to be applied every time agencies or courts are interpreting ambiguous statutes.⁸⁹

⁸⁴ Id., 13, citing *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980).

⁸⁵ 42 U.S.C. 7601(d).

⁸⁶ 33 U.S.C. 1377(e).

⁸⁷ 42 U.S.C. 300-j-11(a). 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).

⁸⁸ See Charles Wilkinson and John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as the Water Flows, or Grass Grows Upon the Earth”- How Long a Time is That?*, 63 *Cal. L. Rev.* 601 (1975), Philip P. Frickey, *Marshalling Past and Present*, supra at n. 59.

⁸⁹ See *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)(finding the statute unambiguous but suggesting in dicta that even if the statute was ambiguous, the Indian canon could be trumped by other canons. (Id., at 95). See also *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

The other position is to take the view, as the Court has also at times stated, that the Indian Canon is a substantive rule of statutory construction because it is derived from the trust relationship and as such, it should be followed every time there is an ambiguity.⁹⁰ As stated by the editors of the leading treatise on federal Indian Law,

Chief Justice Marshall grounded the Indian law canons in the value of structural sovereignty, not judicial solicitude for powerless minorities... The consequences of understanding the Indian law canons as fostering structural and constitutive purposes are quite significant. The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our system of governance.⁹¹

In federal Indian law cases, this issue is made more complicated by the thorny problem of whether the Indian canon should trump the *Chevron* doctrine or vice versa. Under *Chevron*, faced with an ambiguous statutory term, courts are supposed to defer to a permissible or reasonable interpretation of the federal agency in charge of implementing the legislation. This *Chevron* inquiry has been described as a two step process. Under *Chevron* Step I, a court determines whether there is an ambiguity in a statutory term. If the answer is yes, then under step II, the court determines whether the agency's interpretation is permissible or reasonable.⁹² The Supreme Court has never issued a final ruling on which canon trumps the other and there is a division among the circuits.⁹³ It has to be noted, however, that some other substantial canons have trumped the *Chevron*

⁹⁰ See *Montana v. Blackfoot Tribe*, 471 U.S. 759, at 766 (1985), *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247(1985)(stating that the Indian canons are “rooted in the unique trust relationship between the United states and the Indians.” *Id.*, at 247.

⁹¹ Cohen's Handbook of Federal Indian Law, at 123 (Lexis Nexis 2005 Ed.) For the leading article putting forth the normative reasons supporting this position, see Philip P. Frickey, *Marshalling Past and Present*, *supra* at n. 59.

⁹² 467 U.S. 837 (1984). As stated by the Court in *Chevron* “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.” *Id.*, at 842-843.

⁹³ See Scott C. Hall, *The Indian Law Canon of Construction v. The Chevron Doctrine: Congressional intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495 (2004), (Showing that the DC and Tenth Circuits have shown a disposition to let the Indian Canon control while the 9th Circuit has favored Chevron over the Indian canon.)

doctrine at the Supreme Court.⁹⁴ Furthermore, some federal circuit courts of appeals have taken the position that the Indian canon does trump the *Chevron* rule.⁹⁵

As others and I have previously argued, even when *Chevron* is applicable, the Indian canon of statutory construction and the trust doctrine should still play a role in the agency's interpretation.⁹⁶ In my previous effort on this issue, after first concluding that the Indian canon, like *Chevron*, was also a "substantive" rule of statutory construction, I resolved the issue by taking the position that even if *Chevron* prevailed over the Indian canon, any agency interpretation that did not adequately explain why it had opted for an interpretation that did not favor the tribes should be set aside as impermissible under step II of *Chevron*.⁹⁷ A similar approach was recently adopted by at least one scholar who

⁹⁴ See *EEOC v. Arabian Am. Oil. Co.* 244, 248 (1991)(ambiguous statute should not be interpreted as extending beyond the United States), *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)(ambiguous statute should not be interpreted retroactively), *Solid Waste Agency v. U.S. Army Corps*, 531 U.S. 159, 1720173 (2001)(ambiguous statute should not be interpreted so as to raise serious constitutional doubts).

⁹⁵ See *Ramah Navajo v. Lujan*, 112 F.3d 2455 (10th Cir. 1997). After acknowledging that in normal cases *Chevron* would control, the Tenth Circuit stated "In cases involving Native Americans, however, we have taken a different approach to statutory interpretation, holding that "normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue." Instead we have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit. This canon of statutory construction is "rooted in the unique trust relationship between the United States and the Indians." *Id.*, at 1461 (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). See also *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001)(stating "This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people." *Id.*, at 1102.)

⁹⁶ See Hall, *supra* at n. 87. See also Peter S. Heineke, Comment, *Chevron and the Canon Favoring Indians*, 60 U. Chi. L. Rev. 1015 (1993).

⁹⁷ See 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). One scholar has described judicial review of a step II agency determination as similar to the inquiry courts undertake under the arbitrary and capricious standard of section 706 of the Administrative Procedure Act (APA) See Ronald M. Levin, *The Anatomy of Chevron: Step Two reconsidered*, 72 Chi-Kent L. Rev. 1253 (1997). This approach has not, however, been universally accepted by the courts. See Notes, *The Two faces of Chevron*, 120 Harv. L. Rev. 1562 (2007)(stating that while the D.C. Circuit has been receptive in using the arbitrary and capricious test in resolving whether the agency's interpretation was permissible under Step II, the Supreme Court has only

developed a theoretical framework making it applicable to all such substantial or normative canons when faced with a conflict involving the *Chevron* doctrine.⁹⁸

In 1998, I wrote that “[t]he question here is whether Congress could have made this implicit delegation of authority in an Indian statute without also attaching the requirement to have the agency interpret the statute liberally to the benefit of the Indians.”⁹⁹ Since then, the Court in 2001 issued its opinion in *United States v. Mead Corporation*,¹⁰⁰ where it emphasized that because the whole idea behind *Chevron* deference was that Congress intended to delegate the task of resolving the ambiguity to the agency, the finding of a mere ambiguity was not enough to imply such delegation of authority. Instead, a court should also find “that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute, or fill a space in the enacted law.”¹⁰¹ As stated by a noted administrative law scholar, “*Mead* clarifies that *Chevron* rests on congressional intent, and correctly concludes from this that *Chevron* applies only when Congress has given some signal that the agency, rather than the court, is to be the primary interpreter of statutory ambiguity.”¹⁰² Another noted scholar has argued that under *Mead*, before proceeding to the *Chevron* inquiry, courts have to first determine if Congress intended to delegate such interpretive authority to the agency. Professor Sunstein identified this preliminary inquiry as *Chevron* Step Zero.¹⁰³

I have now slightly refined and developed my original position in a manner which in some respects incorporates the *Mead* modification of the *Chevron* doctrine by adding

used that test 5 times out of 177 decisions involving the *Chevron* doctrine.) *Id.*, at 1568-1570, 1574-1576.

⁹⁸ See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64 (2008).

⁹⁹ Skibine, *supra*, note 97.

¹⁰⁰ 533 U.S. 218 (2001).

¹⁰¹ *Id.*, atCourts will usually hold that an agency has been delegated such authority if the agency has been given the power to issue such interpretation through formal types 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).

¹⁰² Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 833-834 (2002).

¹⁰³ See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).

an extra step similar to Sunstein's step zero. Tying this issue to what was stated in the previous section, the answer as to which canon should prevail should depend on whether the ambiguous language or section was enacted by Congress pursuant to its role as trustee for the tribes or pursuant to its role as a regulator or a conqueror. As stated by the Tenth Circuit "When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator..."¹⁰⁴

If enacted pursuant to the trust doctrine, the agency interpreting the statute should resolve the issue to the benefit of the tribes. If Congress thought it was acting pursuant to its power as a trustee when enacting the statutory language at issue, there should be no conceivable reason why the agency interpreting such ambiguous statutory term should not also act as a trustee. This means that when the ambiguity is found in a statute specifically enacted with Indians or Indian tribes in mind, the agency should always engage in an additional or preliminary inquiry. That is whether when enacting the ambiguous language, Congress was acting as a trustee pursuant to the trust doctrine, or just as a regulator pursuant to its normal power to regulate commerce with the Indian tribes. While I am willing to give *Chevron* deference to the agency even on this issue if there is truly an ambiguity concerning in which role Congress was acting, the agency still should, under *Chevron* Step II, have the burden to explain why its initial determination on this issue was a permissible one.

Under my revised approach, once the agency determined that the statutory language at issue was enacted pursuant to the trust doctrine, this would mean that Congress did not intend to delegate to the agency the power to interpret the ambiguous provision without using the Indian canon. The agency would be bound, therefore, to apply the Indian canon in resolving the ambiguity. On judicial review, upon finding reasonable the agency's determination that the section where the ambiguous term is located was enacted pursuant to the trust doctrine, the court should strike the agency's interpretation of the ambiguous term at Step II if the agency's interpretation did not use the Indian canon. However, if the agency determined that Congress was acting only as a regulator or a conqueror when enacting the section where the ambiguous term is located, and that determination was upheld as permissible by the court, then the court would proceed to determine, under regular *Chevron* jurisprudence, whether the agency's interpretation of the ambiguous term was reasonable.

¹⁰⁴ *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 844 (10th Cir. 1986 *reconsideration en banc* (adopting the dissenting opinion of Judge Seymour, 728 F.2d 1555 at 1567 (10th Cir. 1984).

What was said in this section concerning the role of the Executive in statutory interpretation extends to all other aspects of the executive's implementation of laws affecting Indians. In the next section I carry forward this analysis to the role of federal agencies in implementing specific provisions of IGRA.

PART III: DISSECTING THE TRUST FROM THE NON-TRUST FUNCTIONS IN IGRA.

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, two of the main stated purposes of IGRA. The first one is to promote gaming "as a means of providing tribal economic development, self-sufficiency, and strong tribal governments."¹⁰⁵ A second one is to "shield it [gaming] from organized crime and other corrupting influences."¹⁰⁶ The first purpose clearly reflects a uniquely trust purpose. The second purpose is, however, 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 from criminal elements. Another good example with both trust and non trust elements is Section 2710 (c). Section(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.

A. 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 more modern vision of the trust doctrine. 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 in the 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.¹⁰⁷ To be consistent with what was stated previously, even though sections not supportive of tribal self-government, and asserting

¹⁰⁵ 25 U.S.C. 2702 (1).

¹⁰⁶ 25 U.S.C. 2702 (2).

¹⁰⁷ They also provide requirements for the conduct of annual outside audits and mandate adequate systems to ensure background investigations of certain gaming personnel.

federal control over internal tribal affairs (unrelated to commerce) on the grounds that Indians and Indian tribes are weak and defenseless are not really legitimate, they should nevertheless be considered by federal officials implementing such sections as having been enacted pursuant to the trust doctrine. This argument follows from the fact that, even though it was misguided, Congress still took the position that it was acting as a trustee when enacting such legislation. It follows that federal officials implementing such sections should be held to the standard of a trustee.

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,¹⁰⁸ and has seen the NIGC adopt different positions throughout the years.¹⁰⁹ IGRA's definitional section asks the NIGC to make increasingly complicated and technical decisions in distinguishing between Class II and Class III gaming.¹¹⁰ Under the Act, all technologically aided Bingo games are supposed to be in Class II,¹¹¹ while all electronic facsimiles of Bingo have to be classified as Class III gaming.¹¹² The question is: should the trust relationship play any role in the NIGC determination?

Under the theory adopted in this article, the question is whether Congress could have enacted the provision placing tribal games that are electronic facsimiles 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

¹⁰⁸ See for instance, *Seneca Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1094 (10th Cir. 2003), *United States v. Santee Sioux Tribe*, 324 F.3d 607 (8th Cir. 2003), *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000), *Diamond Game Enter. V. Reno*, 230 F.3d 365 (D.C. Cir. 2001), *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000).

¹⁰⁹ 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). See also Kevin Washburn, *Conflict and Culture, Federal Implementation of IGRA by the NIGC, the BIA and the Department of Justice*, article on file with the author.

¹¹⁰ At least one scholar has remarked that such distinctions are increasingly removed 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).

¹¹¹ 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)." .

¹¹² 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."

commerce with Indian tribes under the *Lopez*,¹¹³ and *Morrison*,¹¹⁴ line of Supreme Court cases? 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.”¹¹⁵ 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 the subsection requiring that electronic facsimile of Bingo cannot be considered part of Class II was enacted against tribal interests, the one providing that technologically aided bingo games shall be considered Class II games was definitely enacted for the benefit of tribes. This indicates that the roles of Congress as a regulator and as a trustee may have been in equipoise when it came to the enactment of this section. This seems to represent a typical instance where Congress has put a federal agency between the proverbial rock and a hard place.

Requiring the NIGC to act as a trustee in such cases, however, would be much more in conformance with the more modern vision of the trust doctrine according to which the principal reason for the doctrine is the protection of tribal self-government, especially from potential attacks by the states. 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.

B. The trust and non trust roles of the Secretary of the Interior.

This section will focus on four important aspects of the Secretary’s role pursuant to IGRA: the approval of revenue allocation plans, the approval of tribal state compacts, the issuance of regulations and gaming procedures concerning Class III gaming, and finally the decision to transfer off reservation land into trust for the purpose of tribal gaming.

1. Approval of revenue allocation plans.

Under section 2710(b)(3) of IGRA, net revenues generated from Class II gaming activities can only be used to make per capita payments to tribal members if, among other

¹¹³ United States v. Lopez, 514 U.S. 549 (1995)(striking down parts of a federal statute making it a crime to possess a firearm in or near a school.)

¹¹⁴ United States v. Morrison, 529 U.S. 598 (2000)(Striking down the parts of the Violence Against Women Act, 42 U.S.C. 13981).

¹¹⁵ 514 U.S. 549, 561.

things, the plan for such distribution is approved by the Secretary of the Interior.¹¹⁶ The power to approve such allocation plans was not enacted by Congress pursuant to the more modern version of the trust doctrine since it does not enhance tribal self-government or protect Indian tribes from outside actors such as the states. It also seems that it was not enacted pursuant to Congress's role as a regulator since these per capita plans only affect the amount of money received by tribal members which seem to be an internal tribal matter not having any substantial connection to commerce between Indian tribes and the United States.¹¹⁷ Thus it seems that Congress was really acting as a conqueror when it decided to allow the Secretary to have a say on how tribes issue per capita payments derived from gaming revenues to their tribal members. Under the theory adopted in this article, however, this means that the Secretary should be held to the standards of a trustee when implementing this section. Among other things, this means that the Secretary has to construe this section liberally and interpret ambiguous provisions to the benefit of the tribe. That is because, even though it was perhaps misguided, Congress thought that it was acting as a trustee when enacting this section.¹¹⁸

2. Approval of Tribal State compacts.

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."¹¹⁹ 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.¹²⁰ Finally section 2710(d)(7) has a trust element since it allows tribes to sue those states that do not negotiate a tribal state

¹¹⁶ The Department of Interior has issued regulations governing the approval of such tribal revenue allocation plans. See 25 C.F.R. 290.1–290.26.

¹¹⁷ If this money was not distributed per capita to tribal members, the discretion on how to spend such funds would remain with the tribal government. While I do not deny that "whether" the money is spent would have some impact on commerce, it does not seem that who, as between the tribe or its members, decides "how" to spend the money would have a substantial impact on commerce between the tribe and the United States.

¹¹⁸ See discussion at notes 77-78.

¹¹⁹ 25 U.S.C. 2710 (d)((8)(B)(iii). The Secretary has recently issued regulations governing the approval of these compacts. See 25 C.F.R. 293. See also 73 F.R. Volume 235, pp. 74004-74010.

¹²⁰ Section 5 of the Johnson Act prohibits the operation of gambling devices on any federal reservations, including Indian reservations 18 U.S.C. 1175.

compact in good faith. So while this section as a whole, was definitely not enacted solely pursuant to the trust doctrine, the role of the Secretary under that section is one of a trustee.

3. Issuance of class III gaming procedures.

When it comes to 2710(d)(7)(B), the issue is not so clear cut. This subsection contains what Justice Rehnquist once termed a “carefully crafted intricate remedial scheme,”¹²¹ in the event a state refuses to negotiate in good faith.¹²² 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, however, that Subsection 2710(d)(7)(B)(vii)(I) of IGRA does not say that the Secretary has to choose 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.

Following the Supreme Court decision holding that Congress does not have the authority under its commerce clause power to abrogate the states’ Eleventh Amendment sovereign immunity so as to allow a tribe to sue a state in federal court for failure to negotiate a gaming compact in good faith,¹²³ the Secretary of the Interior issued a rule authorizing the issuance of Class III gaming procedures even when a state asserted its sovereign immunity.¹²⁴ The states have argued, and some courts have agreed, that the Secretary’s trust duties renders him biased in making such determinations or in deciding to issue the gaming procedures.¹²⁵ These concerns are misplaced. Under the regulations, the Secretary has to submit the tribe’s proposal to the state Governor and Attorney General who shall have 60 days to comment and /or propose their own compact. After both parties have submitted their proposals, the Secretary has to appoint a mediator who

¹²¹ See *Seminole Tribe v. Florida*, 51 US 44 at 73-74 (1996).

¹²² Under this section, upon finding that state has failed to negotiate in a compact in good faith, a court shall order the state and the tribe to conclude such a compact within 60 days. If the tribe and the state fail in this effort, they each shall submit to a court appointed mediator their best and final proposal for a compact. After selecting the proposal that best conforms with the policies of IGRA, the mediator shall submit this proposed compact to the tribe and the state. If the state does not consent to the selected compact, the mediator shall notify the Secretary of the who shall then prescribe procedures (consistent with the proposed compact) under which Class III gaming may be conducted.

¹²³ *Seminole Tribe v. Florida*, 51 U.S. 44 (1996).

¹²⁴ See 25 C.F.R. 291.1-- 291.15.

¹²⁵ See *Texas v. United States*, 497 F.3d 491, at 506-509.

shall select one of the proposal. The Secretary must then either approve the proposal selected by the mediator or notify the parties as to why he has decided to disapprove it. Moreover, the Secretary does have the power, under the rule, to disapprove the selected compact if “contemplated gaming activities included in the proposal are not “permitted by the state for any purposes by any person, organization, or entity,”¹²⁶ or “the proposal is not consistent with relevant provisions of the laws of the state.”¹²⁷ Furthermore, within 60 days of rejecting the proposal selected by the mediator, the Secretary must prescribe gaming procedures “that comport with the mediator’s selected proposal as much as possible.”¹²⁸

While it is true that the Secretary can also disapprove a proposal if it is “not consistent with the trust obligations of the United States to the Indian tribe,”¹²⁹ the Secretary can and does, to borrow the language of the Court, carry two hats, (and probably three) when it comes to Indian gaming.¹³⁰

4. Approval of off-reservation land transfers into trust for the purpose of gaming.

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.¹³¹ The section was clearly enacted for the benefit of Indians and therefore pursuant to the trust doctrine. However, section 2719 of IGRA imposed some restrictions on this IRA derived authority. As originally proposed, these restrictions had nothing to do with the trust relationship since their aim was 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. One of these exceptions now contains a mix of trust and non trust language.¹³² Under the exception, before approving the transfer of the land from fee to trust, the Secretary has to make a determination that gaming on such off reservation

¹²⁶ 25 C.F.R. 291.11(b)(3).

¹²⁷ 25 C.F.R. 291.11(b)(4).

¹²⁸ 25 C.F.R. 191.11 (c).

¹²⁹ 25 C.F.R. 291.11(b)(5).

¹³⁰ 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).

¹³¹ 25 U.S.C. 465.

¹³² 25 U.S.C. 2710 (b)(1)(A).

lands would be in the best interest of the tribe. 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 with such Secretarial determinations.¹³³

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.¹³⁴ 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. Under previous rules promulgated pursuant to 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.¹³⁵ 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 tribe and the various local governments, the concerns of state officials had 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.¹³⁶

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 decisions pursuant to this statutory framework. I believe that the crucial mistake the Guidance Document made is not that it imposed conditions and limits on when such land can be transferred into trust. Even the most ardent tribal advocate has to

¹³³ Besides the exception just described, under 25 U.S.C. 2719 (b)(1)(B) there are also 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.

¹³⁴ Memorandum from Carl Artman, Assistant Secretary for Indian Affairs to Bureau of Indian Affairs Regional Directors and to the office of Indian Gaming.

¹³⁵ See 25 C.F.R. 151.11(b). See also 60 FR 32874 (1995).

¹³⁶ On implementation of the Guidance document, see generally, Kathryn R.L. Rand, Allan P. Meister, and Steven Andrew light, *Questionable Federal “Guidance” on Off- Reservation Indian Gaming: Legal and Economic Issues*, 12 Gaming Law Review and Economics 194 (2008).

concede that there has to be some limit on such authority. 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.

Under the arbitrary and capricious judicial review section of the APA,¹³⁷ 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. As I explained in my testimony in front of the House Committee on Natural Resources, imposing a commuting distance test may not be to the benefit of Indians in that first, it discounts the interests of those tribal members who do not live on the reservation. Secondly, deciding what location for a casino will be in the best interest of the Indians should be left to the tribes. Imposing a commuting distance requirement contrary to tribal wishes flies in the face of tribal self-determination. Third, the commuting distance requirement is only imposed for land to be taken in trust for the purpose of gaming. Why treat gaming differently than any other type of business? The Guidance Document provided no explanations for this arbitrary discrimination. Finally, the Guidance document failed to take into consideration the policies of IGRA and rationally reconcile those with the imposition of a commuting distance requirement.¹³⁸ In conclusion, 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 as a compromise between the trust and non-trust aspects of IGRA’s section 2719.

The above analysis of IGRA shows that the Act is a mix of trust and non trust provisions. Furthermore, while some sections not related to the trust can be tied to Commerce and can therefore be considered strictly regulatory, others cannot. The important issue here is whether a clear line of demarcation 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 questioned whether 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 as to when it is acting pursuant to

¹³⁷ See 5 U.S.C. 706(2)(A),

¹³⁸ See testimony of Alex Skibine to the Committee on Natural Resources of the United States House of Representatives, February 27, 2008, 110th Congress, 2d Session.

the trust, when it is acting strictly pursuant to its power as a regulator, and when it is acting as a conqueror.

PART IV: RESHAPING IGRA AS A MODEL OF COOPERATIVE FEDERALISM.

A federal court once referred to IGRA as a prime example of cooperative federalism.¹³⁹ The purpose of this PART is not to do a comprehensive in-depth analysis of all major congressional legislation affecting Indian Affairs,¹⁴⁰ 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 for amending IGRA and achieve what could be called cooperative tri-federalism: A version of federalism involving the tribes in addition to the federal government and the states.

A: The Evolutionary Trend in Federal Indian Legislation.

Congressional legislation after the treaty period which ended in 1871 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 years,¹⁴¹ and much longer if one takes into account the pre-constitutional colonial period.¹⁴² Even though the Indian nations acknowledged their “dependence” on the United States in many of those treaties, the assumption behind the treaties was that Indian Nations were separate and distinct sovereign political entities.¹⁴³ Indians were not citizens of the United States, and no federal laws initially extended to Indians within

¹³⁹ *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

¹⁴⁰ For such an overview, see Gover. *An Indian Trust for the 21st Century*, supra at n. 32.

¹⁴¹ The Treaty period ended in 1871 when Congress enacted a law prohibiting the making of any further treaties with Indian tribes, see 25 U.S.C. 71. This did not stop the federal government from making “agreements” with Indian tribes. The last of these agreement was made in 1911.

¹⁴² 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).

¹⁴³ See *Worcester v. Georgia*, 31 U.S. 515 (1932).

Indian Country. Until 1871, besides the early Trade and Non-Intercourse Acts,¹⁴⁴ 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.¹⁴⁵ But even that Act had exceptions 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.¹⁴⁶

Things started changing drastically around 1871, the year Congress enacted legislation prohibiting the making of any further treaties with Indian tribes.¹⁴⁷ It is around that time that the Supreme Court first recognized the applicability of a federal regulatory law to Indians within Indian country,¹⁴⁸ and took the position that unless specifically excluded by treaty, Indian reservations were to be considered within the geographical limits of the state surrounding the reservations' borders.¹⁴⁹ It is also during that period, also known as the Allotment era,¹⁵⁰ that the Court first recognized state criminal jurisdiction over crimes committed by non-Indians against other non-Indians within Indian Country.¹⁵¹ The Court also upheld the power of Congress to enact laws, such as

¹⁴⁴ The first temporary Indian Trade and Intercourse Act was enacted in 1790. 1 Stat. 137 (1790). The first permanent one was enacted in 1802. 2 Stat. 139. The final version was enacted in 1834. 25 U.S.C. 177.

¹⁴⁵ 18 U.S.C. 1152.

¹⁴⁶ It should not be forgotten, however, that during those years, one of the federal government's major role was conquering the Indian Nations militarily.

¹⁴⁷ Act of March 2, 1871, 16 Stat. 544 (codified at 25 U.S.C. 71).

¹⁴⁸ See *The Cherokee Tobacco Cases*, 78 U.S. (11Wall.) 616 (1870).

¹⁴⁹ See *Langford v. Monteith* 102 U.S. 145 (1880), distinguishing, perhaps not that convincingly, *Harkness v. Hyde*, 98 U.S. 476 (1878).

¹⁵⁰ Congress enacted the Dawes Act, also known as the general Allotment Act, in 1887. The policy behind the Act was to dismantle the communally owned tribal land base by dividing or allotting the reservations into distinct parcels of land and distribute such "allotment" to individual tribal members. The idea was to transform the Indians from hunters into farmers so that they could be more readily assimilated into the mainstream of American society See generally Judith Royster, *The Legacy of Allotment*, 27 *Ariz. L. J.* 1 (1995).

¹⁵¹ See *United States v. McBratney*, 104 U.S. 621 (1881).

the Major Crimes Act,¹⁵² specifically aimed at assuming political control over Indian tribes.¹⁵³ During the allotment era, Congress was most interested in assuming control of tribal land and natural resources. The model legislation then was the leasing statutes. These statutes reserved total control to the federal government.¹⁵⁴ Some of the leasing Acts did not even require tribal consent,¹⁵⁵ 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.¹⁵⁶

The next era came about with the Indian Reorganization Act of 1934 (IRA).¹⁵⁷ 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 prototypical statute of this era is the Indian Mineral Leasing Act (IMLA).¹⁵⁸ Although tribes obtained more control over their resources, professor Royster has asserted that "[t]ribes had more authority over resources development on paper than in practice...the federal government retained most of the practical decision-making about Indian natural resources development and use."¹⁵⁹

¹⁵² See *United States v. Kagama*, 118 U.S. 375 (1886).

¹⁵³ See 18 U.S.C. 1153. For a perceptive critique against the continuing legitimacy of such colonial era law, see Kevin K. Washburn, *American Indian, Crime, and the Law*, 104 Michigan L. Rev. 709 (2006),

¹⁵⁴ See for instance 25 U.S.C. 407, 397, and 399.

¹⁵⁵ See 25 U.S.C. 398-398a, 399.

¹⁵⁶ See *Cherokee Nation v. Hitchcock*, 187 U.S. 371 (1902).

¹⁵⁷ 48 Stat. 985, 25 USC 464-479.

¹⁵⁸ 25 USC 396a-396g.

¹⁵⁹ See Judith Royster, *Practical Sovereignty. Political Sovereignty, and the Indian Tribal Energy Development and Self Determination Act*, 12 Lewis and Clark L. Rev. 1065, 1074 (2008).

Except for a brief time when Congress embraced a termination policy,¹⁶⁰ the next era came in the 1970's, the decade that ushered in the federal policy of tribal self-determination. Besides the Indian Self-Determination Act,¹⁶¹ perhaps the most important legislation enacted during this era was the Indian Child Welfare Act (ICWA).¹⁶² The ICWA model is interesting because it represented Congress's attempt to protect tribal sovereignty in an area otherwise ruled by state law and state institutions. The primary purpose of ICWA was to bring under control the termination of Indian parental rights and the subsequent adoption of Indian children by non-Indian families. To this end, the Act provided for exclusive tribal court jurisdiction over custody proceedings involving Indian children domiciled on Indian reservations. The Act even provided for the transfer of such Indian child custody proceedings from state to tribal courts under certain conditions when the Indian child was not a resident of the reservation.¹⁶³

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.¹⁶⁴ 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 substantial increase in political sovereignty" for the tribes."¹⁶⁵

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,¹⁶⁶ 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

¹⁶⁰ This policy started around 1953. The goal of the Termination policy was to end the federal trust relationship existing between Indian tribes and the United States by terminating any government to government relationship existing between the tribes and the federal government and ending the trust status of tribal lands. See generally Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Ind. L. Rev. 139 (1977).

¹⁶¹ P.L. 93-638, 88 Stat. 2203.

¹⁶² 25 U.S.C. 1901-1923.

¹⁶³ See generally Cohen's Handbook of Federal Indian Law, (2005 Ed.) Chapter 11, pp. 819-856.

¹⁶⁴ 25 USC 2101-2108.

¹⁶⁵ See Royster, *supra* at n. 159, at p. 1076.

¹⁶⁶ P.L. 93-638, 88 Stat. 2203

each tribe to design its own program with its own funding priorities.¹⁶⁷ 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).¹⁶⁸ 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.

The process provided for in IDETSA shares some similarities with the one adopted in the Indian Self Governance Act of 1994.¹⁶⁹ Both Acts provide for an initial foundational agreement between a tribe and a federal agency, after which federal controls are diminished and the tribe assumes primacy over 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,¹⁷⁰ and has to take such public comments into consideration when deciding whether to approve a TERA.¹⁷¹ Professor Royster has stated that "many of the public input provision of ITEDSA... conflict sharply with tribal self-governance."¹⁷² Other provisions in the Act require 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

¹⁶⁷ The Self Determination Act, first enacted in 1975, was amended in 1988, Pub. L. 100-472, 102 Stat. 2296, and then again in 1994. See Tribal Self-Governance Act, P.L. 103-413, 108 Stat 4270 (1994). See also Tadd Johnson and James Hamilton, *Self-Governance of Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251 (1995). For an interesting account of how the Act can or has worked when tribes enter into agreements with federal agencies others than the traditional ones they have worked with such as the Bureau of Indian Affairs or the Indian Health Service, see Mary Ann King, *Co- Management of Contracting? Agreements Between native American Tribes and the U.S. National Park Service Pursuant tp the 1994 Tribal Self Governance Act*, 31 Harv. Env'tl. L. Rev. 475 (2007).

¹⁶⁸ 25 U.S.C. 3501-3506.

¹⁶⁹ See *supra*, n. 166-167.

¹⁷⁰ 25 C.F.R. 224.67-68.

¹⁷¹ 25 U.S.C. 3504(e)(2)(B)(iii)(IX).

¹⁷² See Royster, *supra* at n. 159, at p. 1086.

impacts.¹⁷³ There is also a provision allowing any interested party to petition for Secretarial review of the Tribe's compliance with the TERA.¹⁷⁴

While the Act does maintain the overall trust relationship between the Federal government and the tribes, Professor Royster concluded that "Tribes can take advantage of new options and increased practical sovereignty, but in exchange the government has a deeply discounted trust responsibility."¹⁷⁵ For instance, while the Secretary has to "act in accordance with the trust responsibility... and in the best interest of the tribes,"¹⁷⁶ 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."¹⁷⁷

In some important aspects, 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 legislation such as the Clean Air Act,¹⁷⁸ the Clean Water Act,¹⁷⁹ and the Safe Drinking Water Act,¹⁸⁰ and provided that for some of the sections and under certain conditions, tribes could be treated as states for the purposes of assuming primacy for the regulation of the environment within their reservations.¹⁸¹

In conclusion, it seems that federal statutes in the new Tribal Self-Governance era have moved away from insisting on federal control based on the alleged weakness and helplessness of Indian tribes. These statutes have progressively adopted what could be described as a compact model, which when you think of it, is not that dissimilar from the

¹⁷³ See 25 USC 3504(e)(2)(B)(iii)(X), (C)(iii).

¹⁷⁴ 25 U.S.C. 2504(e)(7).

¹⁷⁵ See Royster, *supra*, n. 159, at p. 1101.

¹⁷⁶ 25 USC 3504 (e)(6)C.

¹⁷⁷ 25 USC 3504(e)(6)(D)(ii).

¹⁷⁸ P.L. 101-549, 104 Stat 2399, 42 U.S.C. 7601(d).

¹⁷⁹ P.L. 100-4, 101 Stat. 7, 76, 33 U.S.C. 1377.

¹⁸⁰ P.L. 99-339, 100 Stat 642. 665, 42 U.S.C. 300j-311

¹⁸¹ For a recent article examining various models for the management of the environment within Indian reservations, see Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building/or a Lesson on Erosion of Tribal Sovereignty*, 15 Buff. Env. L. J. 97 (2007-2008).

treaty model prevailing in earlier times. These statutes can be seen as incorporating or integrating Indian tribes as sovereign political entities within *Our Federalism*, thereby creating what could be called a system of cooperative federalism. IGRA is different from other legislation in that it directly involved the states in the negotiation of compacts. In addition, it heavily involved a federal regulatory agency, the National Indian Gaming Commission (NIGC), in regulating Class II games and, to a lesser extent, Class III games. The next section of this article asks what improvement could be made to IGRA so that it would better fit in the concept of cooperative federalism. A concept which should be based on tri-lateral agreements between the tribes, the federal government, and the states.

B. Rethinking or Amending IGRA.

In an ideal world, instead of tinkering with IGRA, the Act could be re-drafted along the lines suggested by the evolutionary trend in Indian legislation described above. One alternative model which could be adopted would be to follow the informal rule making model set out in the Administrative Procedure Act,¹⁸² or more likely, in the Negotiated Rulemaking Act of 1990.¹⁸³ This would mean that Congress would enact comprehensive legislation outlining general federal requirements and guidelines which would include protections of legitimate state interests. These federal requirements could be very similar or even identical to the ones currently contained in IGRA. The Tribes would then enter into negotiation with the Secretary of the Interior towards concluding a gaming compact with the federal government. The legislation would provide for state interests to be represented during these negotiations. The negotiated compact would then be published as a proposed rule in the Federal Register. Interested parties including the state and local interests would then have another chance to comment on the proposed compact before it is issued as a final rule in the Code of Federal Regulations.¹⁸⁴

I realize of course that it may be too late in the day to re-invent this particular wheel. As presently written, however, IGRA is not that far off from the model just suggested here. The main difference is that although the Secretary of the Interior does

¹⁸² 5 U.S.C. 553.

¹⁸³ Pub. L. 101-648, 104 Stat. 4969, (codified at 5 U.S.C. 561-570, permanently re-authorized by the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320. I am not suggesting here that the model should be identical to the Negotiate Rulemaking Act. For a critique and potential pitfalls in this Act, especially as interpreted by the courts, see William Funk, *Bargaining Toward the New Millennium, Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351 (1997).

¹⁸⁴ On the implementation of the Negotiated Rulemaking Act, see Laura I Lanbein & Cornelius M Kerwin, *Regulatory Versus Conventional Rule Making: Claims, Counterclaims and Empirical Evidence*, 10 J. Pub. Administration Research & Theory 599 (2000).

have the duty to approve a negotiated compact before it can become valid, the tribes' trustee is not represented during the initial compact negotiations between the tribes and the states. Furthermore, the requirement that these compacts have to be officially ratified under state law has generated a considerable amount of law suits challenging the validity of such compacts on state law grounds.¹⁸⁵ More importantly, there is a genuine problem now that the Supreme Court has held that Congress could not abrogate the states' Eleventh amendment immunity and allow tribes to sue states in federal courts alleging that such states have failed to negotiate a compact in good faith.¹⁸⁶ Nevertheless, Because I have no illusion that such comprehensive re-conceptualization of IGRA is not likely to happen, I will focus below on amendments that could improve IGRA as currently written.

Fortunately, three well known and respected scholars have recently published important articles on amending IGRA. Professors Rand and Light in 2006,¹⁸⁷ and professor Matthew Fletcher in 2007.¹⁸⁸ 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.¹⁸⁹ Among their more interesting proposals to fulfill these, they recommend a clarification of what it means for states to negotiate in "good faith,"¹⁹⁰ and a congressional fix to the problems created by *Seminole Tribe v. Florida*.¹⁹¹ Their recommended fix would involve either (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,¹⁹² or (2) forcing the U.S.

¹⁸⁵ See for instance *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004)(Abrogated by *Dairyland Greyhound Park v. Doyle*, 719 N.W.2d 408 (2006)). See generally, Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marq. L. Rev, 971 (2007).

¹⁸⁶ See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

¹⁸⁷ 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).

¹⁸⁸ See Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legislation, 39 (2007).

¹⁸⁹ Rand and Light, at 419-427

¹⁹⁰ Rand and Light, at 448-449.

¹⁹¹ 517 U.S. 44 (1996).

¹⁹² See William C. Canby, Jr., *American Indian Law in a Nutshell* 310 (3d Ed., 1998).

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.¹⁹³ Another of their recommendation is to amend IGRA to “create a revenue sharing structure that encourages cooperative tribal state policymaking.”¹⁹⁴ They also suggest that Congress should reassess section 2719 allowing the Secretary to take off reservation land in trust for gaming purposes.¹⁹⁵ While not coming up with really concrete recommendations on this issue, they do recognize that some limits should be imposed on such land acquisitions. Thus, they suggest that perhaps Congress may want to limit such off reservation trust acquisition to a tribe’s “ancestral” area or at least to be within the state where the tribe’s reservation is currently located. They do think, however, that having such off-reservation land acquisition option is needed for rural tribes.

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,¹⁹⁶ as well as the Secretary of the Interior’s gaming procedures for Class III.¹⁹⁷ Fletcher then proposes to mandate revenue sharing for certain future Class III compacts,¹⁹⁸ and would extend the compact requirement to what he refers to as Class II plus.¹⁹⁹ These are games that are technologically aided to such an extent that there are really no substantial differences between them and class III games.²⁰⁰ In the following sections, after first discussing the issues relating to “good faith negotiation” as identified by Rand and Light, I focus on what is needed to provide an effective “Seminole Fix.”

¹⁹³ Id., at 445-449.

¹⁹⁴ Id., at 462-465.

¹⁹⁵ Id., at 465-471..

¹⁹⁶ See Fletcher, *supra* at n.188, at pp. 72-75.

¹⁹⁷ Id., at 75-79.

¹⁹⁸ 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.

¹⁹⁹ Id., at 81-82.

²⁰⁰ 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 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.

1. The problem with good faith.

Rand and Light are correct in pointing out that what constitutes “good faith” when negotiating the scope of gaming of Class III compacts has been a vexing problem.²⁰¹ 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.”²⁰²

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.²⁰³ At the other extreme is the “broad ” view according to which as long as a state allows one type of class III game, the state has to negotiate over all Class III gaming.²⁰⁴ 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 in nature but only civil regulatory. Under that framework, a state’s allowance of one form of class III gaming shows that Class III gaming activities are not generally against the *public policy* of the state.²⁰⁵ Good faith requires the States, therefore, to negotiate over all Class III games.

²⁰¹ 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).

²⁰² 25 U.S.C. 2710(d)(1)(B).

²⁰³ 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).

²⁰⁴ 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).

²⁰⁵ For a good explanation and argument in favor of this position, see Judge Canby’s dissent in *Rumsey v. Wilson*, 41 F.3d 421 (9th Cir. 1994).

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.²⁰⁶ 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. They should, therefore, 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 *activities*. 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 “activities” 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. 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.²⁰⁷

2. Providing a *Seminole* Fix:

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

²⁰⁶ 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).

²⁰⁷ 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).

good faith,²⁰⁸ 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 historically enjoyed.²⁰⁹ 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 above, 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.²¹⁰ Thus I agree with professor 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 these Secretarially issued gaming procedures were convinced that the Supreme Court would, in a future case, eventually validate these regulations and overturn the position taken by the Eleventh Circuit in *Texas v. United States*.²¹¹ As I explain below, although I think Judge Jones' opinion in the *Texas* case is seriously flawed, this does not mean that the Court will either take a similar case in the near future or overturn such position.²¹²

²⁰⁸ 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).

²⁰⁹ See for instance *Shoshone-Bannock v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995). On judicial reviewability of federal agencies' prosecutorial discretion generally, see *Heckler v. Chaney*, 470 U.S. 821 (1985).

²¹⁰ The final regulations were issued on April 12, 1999. See 64 FR 17535, 25 C.F.R. Part 291.1 et seq.

²¹¹ 497 F.3d 491 (5th Cir. 2007) (*Cert. denied*, *Kickapoo Traditional Tribe of Texas v. Texas*, 129 S. Ct. 32 (2008)).

²¹² Although at least one federal district is in disagreement with the *Texas* case, *Santee Sioux v. Norton*, 2006 WL 2792734, and other circuits have stated in *dicta* 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, however, a formal split among the circuits on this issue.

The real issue in *Texas v. United States* was whether the Secretary of the Interior should be given *Chevron* deference,²¹³ when he determined that in order to give tribes the rights they were guaranteed under IGRA, he had the authority under 25 U.S.C. sections 2 and 9,²¹⁴ 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.²¹⁵ After first concluding that the Secretary was not owed any *Chevron* deference because the terms of IGRA were not ambiguous and did not authorize the Secretary to issue such procedures,²¹⁶ Judge Jones, speaking only for herself,²¹⁷ nevertheless decided to engage in an extensive *Chevron* type analysis to show that even if there was an ambiguity, the Secretary's interpretation was not entitled to deference because the Secretary had not been "delegated" the authority to issue such regulations under IGRA.²¹⁸

²¹³ *Chevron v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*, a court will uphold the agency's interpretation of an ambiguous terms as long as it is reasonable. See discussion *supra* at notes 93-101.

²¹⁴ 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."

²¹⁵ For a description of the remedial scheme, see *supra*, n.122.

²¹⁶ Judge Jones 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 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.

²¹⁷ The case generated three opinions from the three judge panel. Judge King filed a concurring opinion, and judge Dennis a dissenting opinion.

²¹⁸ 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 did mention *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.

Judge Jones is severely misguided on at least three points.²¹⁹ 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* inquiry, with the issue of whether the Secretary has been delegated the authority to issue these Class III gaming procedures through regulations in this particular case, which is not a *Chevron* issue but is more concerned with whether the agency has acted *ultra-vires*.²²⁰ Judge Jones would have been far better off arguing only this later point.²²¹ Her confused, as well as confusing foray into *Chevron* jurisprudence is baffling, to say the least.

Secondly, in proceeding on debating whether the Secretary's interpretation was reasonable under *Chevron* Step II,²²² judge Jones concluded that the Agency's

²¹⁹ It should be noted that right at the beginning of her analysis, Judge Jones announced her rather peculiar 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, however, 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) holding that P.L. 280 did not specifically *authorize* the state from regulating Indian gaming. 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 held 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. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²²⁰ 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.

²²¹ A point more clearly made in the much better written and concise concurring opinion of judge King. Judge King stated that "In my opinion, the method used by the Secretary to fill 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*.

²²² 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

interpretation was not permissible. 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.²²³

Finally, judge Jones is mistaken in her understanding of the inter-relationship between IGRA and 25 U.S.C. section 2 and 9. Although she is correct when addressing whether the Secretary has the authority to issue these gaming procedures under 25 U.S.C. sections 2 and 9, to assert that "the case law overwhelmingly confirms that sections 2 and 9 do not empower issuance of regulations without a statutory antecedent,"²²⁴ She is mistaken in concluding that IGRA "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."²²⁵ In fact, IGRA does guarantee two substantial federal "rights" to Indian tribes. The first right is to have the states negotiate in good faith.²²⁶ 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.²²⁷ It was in order to protect these statutory rights that the Secretary decided to promulgate his Class III gaming procedure regulations. That is the ultimate reason why the Secretary was correct in his interpretation of the law as giving him the authority to issue such gaming procedures.

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

Allowing tribes to sue under *Ex Parte Young*,²²⁸ sounds especially attractive because it is by far the simplest solution since it does not change anything in the

Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997).

²²³ 497 F.3d at 521-522. For a discussion of that part of IGRA and the corresponding rules of federal regulations, see discussion *supra* at notes 121-130.

²²⁴ *Id.*, at 510.

²²⁵ *Id.*, at 511.

²²⁶ 25 U.S.C. 2710 (d)(7)(A)(i).

²²⁷ 25 U.S.C. 2710(d)(7)(B)(vii).

²²⁸ 209 U.S. 123 (1908).

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"²²⁹ since Congress had enacted that provision "in conjunction with the carefully crafted and intricate remedial scheme."²³⁰ The Court concluded 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 officer based upon *Ex parte Young*."²³¹

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*.

There are many problems with these arguments.²³² For one, although it is true that there were precedents refusing to allow *Ex Parte Young* actions to be added or

²²⁹ 51 U.S. 44, at 73.

²³⁰ *Id.*, at 73-74.

²³¹ 517 U.S. at 74. Although, the Court had 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," (*id.*, at 74) it quickly modified that statement. 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.

²³² For an insightful criticism, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, at 36-40.

supplant remedies already provided by Congress, *Seminole Tribe* 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.²³³ As for the majority's bizarre finding of an implied congressional intent not to allow *Ex Parte Young* actions in this case, Justice Souter in his dissent 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.²³⁴

From a tribal perspective, and as suggested in Part V of Justice Stevens' dissent, 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 tribes.²³⁵ In other words, tribes could still go to

²³³ For comprehensive and insightful criticisms of that part of the *Seminole Tribe* opinion see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. Rev. 495 (1997)(stating that "the majority's assumptions that the relief available in an *Ex Parte Young* action is different from that available in an action under IGRA against the Governor, and that the range of coercive powers of the federal court would necessarily be greater in an action against a state official under *Ex Parte Young* than in an action under IGRA, are simply unsupported. The Court's assertion that contempt would be available in an *Ex Parte Young* action but not under the statute seems to be made entirely of whole cloth being....unsupported by any citation in the Court's opinion." (Id., at 517.)

²³⁴ 517 U.S. at 181-182.(See also Vicki Jackson, *supra*, stating that the Court's refusal to approximate what it thought Congress might have wanted had it known that section 2710(d)(7) was beyond its authority "is inconsistent with the Court's well established case law on severability. In severability analysis, the task is precisely to determine what "Congress might have wanted" had it known that a particular section of the law was beyond its authority. The severability question involves lawmaking—should the act, without its invalid portion be treated as effective, or not? If courts are able to make this determination, why are they not able to determine in light of the invalidity of a specific statutory remedy, an ordinary background remedy should be available to vindicate Congress's substantive intentions?" (72 N.Y.U. L. Rev. at 518).

²³⁵ Justice Stevens 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 state... The maximum sanction that the Court can impose is an order that refers the controversy

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.²³⁶

It is not coincidental that right after his opinion in *Seminole Tribe*, Justice Rehnquist joined an opinion by Justice Kennedy which tried to severely restrict the application of *Ex Parte Young* in yet another Indian case, *Idaho v. Coeur D'Alene Tribe*.²³⁷ Fortunately, Justice O'Connor wrote a concurring opinion for herself and two other Justices, rejecting Justices Kennedy and Rehnquist approach.²³⁸ Her approach seemed to have been adopted by later Supreme Court decisions.²³⁹

CONCLUSION

Since totally re-thinking IGRA along the lines first suggested above is not politically realistic, 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 in some quarters. 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 objections to the legislation. If not, perhaps further restricting off reservation

to 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." 517 U.S. at 99.

²³⁶ See 497 F.3d 491 (5th Cir. 2007). See discussion *supra* at notes 210-227.

²³⁷ 521 U.S. 261 (1997). For an exposition on how the Supreme Court's recent implementation of the doctrine has affected other federal Indian law cases, see John P. Lavelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur D'Alene Tribe*, 31 Ariz. St. L. J. 787 (1999).

²³⁸ See 521 U.S. at 296. In this case, the tribe had sued state officials arguing that the state had no jurisdiction over certain submerged land because the tribe had retained title to such lands. Justice O'Connor stated "Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* Doctrine, but I would not extend it to reach this case."

²³⁹ See *Verizon Maryland Inc. V. Public Services Commission of Maryland*, 535 U.S. 635, at 645 (2002). For a recent analysis of the doctrine see John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989 (2008).

land acquisitions as suggested by Rand and Light would also be worth considering. However, if I were the tribes, I would start by pushing the simple *Ex Parte Young* amendment and let others bring forth further amendments.