

Developments in Policy: Federal Indian Law

I. GAMBLING IN THE WAKE OF *SEMINOLE*

The Supreme Court's decision in *Seminole Tribe v. Florida*¹ comes at a critical moment not only in the controversy over states' rights,² but also in the regulation of Indian gaming. Gambling in the United States has increased dramatically in recent years.³ Indian reservations account for much of this growth: at this writing, over 170 Indian casinos and bingo halls⁴ gross approximately \$5 billion per year.⁵ The regulation of Indian gaming thus inevitably implicates issues transcending reservations' boundaries, and, conversely, the looser regulation of other forms of gambling may well threaten the continued viability of Indian gaming. The federal government, which has plenary power to regulate relations with the Indian tribes under the Constitution,⁶ sees the growth of gambling on Indian lands⁷ as "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."⁸ State governments, by contrast, have often opposed the expansion of Indian gaming because of public policy concerns about gambling per se and because Indian casinos compete with non-Indian gaming operations that constitute a significant source of state revenues.⁹ The differing agendas of the

1. No. 94-12, 1996 WL 134309 (U.S. Mar. 27, 1996).

2. See, e.g., Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, Mar. 28, 1996, at A1; Nina Bernstein, *An Accountability Issue: As States Gain Political Power, a Ruling Seems to Free Them of Some Legal Reins*, N.Y. TIMES, Apr. 1, 1996, at A1. For the range of preliminary reactions to the Supreme Court's decision, compare *Lurching Toward States' Rights*, N.Y. TIMES, Mar. 29, 1996, at A20, with *A Return to Conservative Activism*, ST. LOUIS POST-DISPATCH, Mar. 29, 1996, at 16C.

3. Americans gamble over \$300 billion yearly, and the amount is increasing rapidly. David Holmstrom, *U.S. Gambling as Never Before*, CHRISTIAN SCI. MONITOR, Jan. 26, 1993, at 8; Steve Kerch, *Gambling Industry Placing Its Bets On Explosive Growth*, CHI. TRIB., Nov. 8, 1992, at C1.

4. Francis X. Clines, *The Pequots*, N.Y. TIMES, Feb. 27, 1994, § 6 (Magazine), at 49.

5. David Holmstrom, *Indian Gaming Booms Nationwide*, CHRISTIAN SCI. MONITOR, Nov. 10, 1992, at 6.

6. "The Congress shall have Power . . . To regulate Commerce . . . with the Indian tribes" U.S. CONST. art. I, § 8, cl. 3. This clause, part of the better-known Interstate Commerce Clause, is sometimes known as the "Indian Commerce Clause."

7. The Indian Gaming Regulatory Act of 1988 (IGRA) defines "Indian lands" as all lands within the limits of any Indian reservation; and . . . any land title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C.A. § 2703(4) (Supp. 1995).

8. 25 U.S.C.A. § 2702 (Supp. 1995).

9. See, e.g., Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 166-67 (1990) (discussing competing state and tribal interests).

federal and state governments have raised fundamental questions of federalism. This conflict has led to inconsistency and controversy in the enforcement of the Indian Gaming Regulatory Act of 1988 (IGRA),¹⁰ ironically passed by Congress to resolve similar federal-state constitutional disputes.¹¹ Although the Supreme Court's decision in *Seminole* resolves some of the uncertainty surrounding the IGRA, it may have raised more questions than it answered.

A. *The Regulation of Indian Gaming*

Congress intended the IGRA to be both a boon to state governments and an acknowledgment of tribal sovereignty.¹² When the IGRA was enacted, the power of states to intervene in the affairs of Indian tribes¹³ had been dramatically curtailed by the United States Supreme Court. In *California v. Cabazon Band of Mission Indians*,¹⁴ the Court prevented state governments from regulating or prohibiting gambling on Indian lands, as long as the state had no absolute prohibition on gambling.¹⁵ The Court ruled that the federal government, particularly the Department of the Interior, had the "primary responsibility" for the regulation of gambling on Indian lands.¹⁶ Congress passed the

10. 25 U.S.C.A. §§ 2701-21 (Supp. 1995) and 18 U.S.C.A. §§ 1166-68 (1988 & Supp. 1995). The IGRA establishes a National Indian Gaming Commission within the Department of the Interior to oversee tribal gaming, which is divided into three categories. 25 U.S.C.A. § 2703(6)-(8). "Class I gaming" includes social games and traditional Indian wagering ceremonies and celebrations, *id.* § 2703(6), and is to be regulated exclusively by the Indian tribal governments. *Id.* § 2710(a)(4). "Class II gaming" includes mainly bingo-like games, which are within tribal jurisdiction, *id.* § 2703(7)(A), but only allowed if the state already allows similar games. *Id.* § 2710(b)(1). "Class III gaming," the center of most of the controversy, includes casino-type table games, slot machines, "lotteries," and parimutuel wagering, *see id.* § 2703(8), which are only allowed if the state "permits such gaming for any purpose by any person, organization, or entity," pursuant to a "Tribal-State compact" governing the conduct, regulation, and policing of such activity. *Id.* § 2710(d)(1). For further definition of terms and policies under the IGRA, see the regulations promulgated by the National Indian Gaming Commission, 25 C.F.R. § 502 (1995). *See also* S. REP. NO. 100-446, 100th Cong. 2d Sess. 5, reprinted in 1988 U.S.C.C.A.N. 3071 (legislative history of the IGRA).

11. For an extended discussion of the inconsistency in application of the IGRA, see Marc S. Feinstein, Case Note, *Cheyenne River Sioux Tribe v. South Dakota, Indian Gaming, and the State's Eleventh Amendment Immunity: Where Will the Conflict in the Circuits Fuse?*, 39 S.D. L. REV. 604 (1994) (comparing different circuit courts' interpretations of the IGRA).

12. *See, e.g.,* Sokolow, *supra* note 9, at 164 (federal attempt to compromise Indian sovereignty); Sean Brewer, Note, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L.J. 469, 470 (1995) (Congress's attempt to balance state and Indian interests).

13. The IGRA defines "Indian tribes" as "any Indian . . . organized group or community of Indians which . . . is recognized by the Secretary [of the Interior] . . . [and] is recognized as possessing powers of self-government." 25 U.S.C.A. § 2703(5) (Supp. 1995).

14. 480 U.S. 202 (1987).

15. *Id.* at 221.

16. *Id.* at 216-17. The holding in *Cabazon* undermined several assumptions about the states' regulation of gambling within their borders. For example, the Court stated, "[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law . . ." *Id.* at 211. Thus the Court held that California could not enforce a criminal law against commercial (i.e., high stakes or non-charitable) gambling within Indian lands because federal law denied the state general civil regulatory authority over Indian tribes. In determining the applicability of state laws to Indian jurisdictions under Pub. L. 280, the courts determined whether relevant state law

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IGRA to restore some measure of state control over such gambling. The Act explicitly delegates¹⁷ to the states some of the federal government's sovereignty over Indian gambling. The IGRA requires state governments to engage in "good faith negotiations"¹⁸ toward "Tribal-State compacts" with tribes seeking to open casinos.¹⁹ A critical provision of the IGRA allowed an Indian tribe to sue a state in federal court if the state failed to negotiate in good faith.²⁰

Seminole struck down, as a violation of the Eleventh Amendment,²¹ this key enforcement apparatus.²² The Court thus overruled its holding in *Pennsylvania v. Union Gas*,²³ a plurality opinion which upheld Congress's power to abrogate states' sovereign immunity from suit pursuant to its plenary power under the Interstate Commerce Clause.²⁴ The Court further ruled that tribes could not avoid the Eleventh Amendment bar by suing individual state officials in federal court in order to enforce the IGRA.²⁵

Although the Court invalidated only the enforcement provisions of the IGRA, it is unclear what force the remaining provisions have in the absence of an enforcement mechanism. The IGRA includes a severability clause,²⁶ but fails to provide explicitly for a finding that the courts could not constitutionally entertain jurisdiction. The Court specifically excluded the possibility that the

and policy were "criminal-prohibitory" or "civil-regulatory" in nature. The latter could not be enforced on Indian lands. *Cabazon*, 480 U.S. at 209 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983)). This language was later included in the IGRA itself. 25 U.S.C.A. § 2701(5) (Supp. 1995).

17. The IGRA did not conflict with *Cabazon*, which held only that states could not regulate Indian gambling in the absence of a federal statute delegating this power to the states. 480 U.S. at 207.

18. 25 U.S.C.A. § 2710(d)(7)(B)(iii) (Supp. 1995). For an extended discussion of the possible interpretations of the "good faith" standard, see Nancy McKay, Comment, *The Meaning of Good Faith in the Indian Gaming Regulatory Act*, 27 GONZ. L. REV. 471 (1992).

19. See 25 U.S.C.A. § 2710(d)(3)(C) (Supp. 1995). For a critique of the conception of Tribal-State compacts, see, e.g., Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 132-33 (1993).

20. 25 U.S.C.A. § 2710(d)(7)(A) (Supp. 1995).

21. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

22. *Seminole*, 1996 WL 134309 at *3 ("We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued.").

23. 491 U.S. 1 (1989).

24. 491 U.S. at 19-20.

25. 1996 WL 134309 at *16-17. The Court's decision in this regard is a matter of statutory rather than constitutional construction. Indeed, the decision suggests that were the IGRA drafted differently, a suit might be possible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) (allowing federal jurisdiction over suit against state official seeking only prospective injunctive relief). *Seminole*, at *17 n.17 ("[W]e do not hold that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme.").

26. 25 U.S.C. § 2721 (1995).

judiciary would construct an enforcement regime to ensure good-faith negotiation.²⁷

One possible outcome of *Seminole* is that the Secretary of the Interior might seek to authorize tribal casinos directly in the absence of good-faith negotiation by states. Justice Stevens, uncontroverted by the majority, claims in dissent that this may be permissible,²⁸ citing the disposition of the Eleventh Circuit below. The Eleventh Circuit reasoned that the IGRA allows the Secretary such direct authority when the state refuses to negotiate with a tribe.²⁹ This reasoning seems flawed, however, since the IGRA provides the Secretary this authority only when the state refuses to accept a compact selected by a mediator after a federal district court's ruling that the state had refused to negotiate in good faith.³⁰ Of course, the Department of the Interior might argue that Congress intended to allow Indian tribes to open casinos³¹ and that courts should read into the IGRA permission for the Secretary to issue regulations to that effect. In any case, direct federal intervention based on the remaining provisions of the IGRA would likely spur states to file further legal challenges.

Florida may have pursued its Eleventh Amendment claim partly because of concerns about state sovereignty generally, but the specter of rampant casino gambling surely contributed to the state's resistance to the IGRA's enforcement provision.³² Although the IGRA was a compromise among state, tribal, and federal concerns, it did not eliminate the tension between states' interest in preserving control over intrastate public policy issues and the federal interest in the independence and economic self-sufficiency of Indian tribes.³³ The

27. 1996 WL 134309 at *17 ("Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.")

28. *Seminole*, 1996 WL 134309, *18, *28.

29. See *Florida v. Seminole Tribe*, 11 F.3d 1016, 1029 (11th Cir. 1994) ("If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands.")

30. Because the federal court appoints the mediator, there will be no compact for the state to refuse in the absence of federal court jurisdiction. See 25 U.S.C. § 2710(d)(7)(B)(iv) (providing for appointment of a mediator). Moreover, the IGRA requires that the procedures prescribed by the Secretary be "consistent with the proposed compact selected by the mediator." 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

31. Congress clearly intended to give the Indian tribes ultimate authority to regulate gaming activity on their lands. The congressional findings note that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

32. Indeed, Florida reaction to the *Seminole* decision focused on the gambling controversy rather than on state sovereignty issues. See, e.g., *Cheer Court Ruling Over Casinos, Be Alert to Another Legal Loophole*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 31, 1996, at 4G ("The majority of Floridians—who three times have overwhelmingly voted down legalizing casinos—are entitled to sigh with relief and even cheer the news.")

33. See *supra* text accompanying note 5.

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IGRA essentially forced states to “negotiate” issues of regulation, policing, and infrastructure for gambling facilities they may not have wanted at all. There were two ways in which this encroachment upon state sovereignty limited state governments’ ability to shape policies that preserve their fiscal and public-public interests.

First, states have their own vested economic interests in taxing non-Indian gaming, which can be a significant source of revenue.³⁴ States are not likely to favor Indian gaming, which they cannot tax,³⁵ when it is likely to compete with gambling enterprises on non-Indian land.³⁶ The IGRA acknowledges states’ revenue needs by providing that states and tribes must consider “adverse economic impact on existing gaming activities” in negotiating a compact,³⁷ but this provision does not indicate how much weight to accord such impact.

Second, the IGRA amounted to a de facto endorsement of high-stakes gambling on Indian reservations. Although the Act bans high-stakes gambling on reservations in states that prohibit such gambling as a matter of public policy, courts interpreting the Act generally allowed any type of high-stakes gaming on Indian reservations if a state allows *some* type of casino-style gaming.³⁸ Courts effectively refused to recognize a public policy distinction between allowing “Las Vegas Nights” as charity fundraisers and condoning hard-core casino gambling.³⁹ This left state governments with two choices: either to prohibit gambling (including lotteries, church bingo, and parimutuel betting like horse races and jai-alai) entirely or to legalize it further in hope of raising revenues.⁴⁰ Indeed, the economic competition between states’ revenue considerations and Indian casinos often pushes states toward looser regulation

34. See ROBERT GOODMAN, *THE LUCK BUSINESS* 111-18 (1995).

35. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that states may not tax Indians on reservation without congressional authorization).

36. “The states resented the federal government not only for giving the tribes a nontaxable opportunity to compete with their existing gambling ventures like state lotteries and racetracks, but also for allowing them to operate commercial gambling enterprises that weren’t generally permitted in a state.” GOODMAN, *supra* note 19, at 113.

37. 25 U.S.C.A. § 2710(d)(7)(B)(iii)(I) (Supp. 1995).

38. In accordance with the holding in *Cabazon*, “if a state allows charity ‘Las Vegas’ nights with low-stakes roulette or blackjack, a tribe can include high-stakes roulette or blackjack in its reservation casino.” GOODMAN, *supra* note 19, at 116.

39. As Justice Stevens wrote in *Cabazon*, “I find this approach to ‘public policy’ curious, to say the least To argue that the tribal [high-stakes] bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds up to 55 miles an hour.” 480 U.S. at 224-25 (Stevens, J., dissenting).

40. “Since tribes can claim the right to use [electronic gambling] machines once a state allows them, there is often some pressure against legalization. On the other hand, in states where tribal casinos already have slot machines, there are powerful incentives for politicians to legalize them, in order to compete with the Indian gambling ventures.” GOODMAN, *supra* note 19, at 129. As Goodman points out, tribes in such states as Minnesota and Connecticut have agreed to state-demanded concessions in return for monopolies on statewide gambling, which in turn has curtailed intrastate expansion of gambling in those states. *Id.* at 114; see *infra* text accompanying notes 59-62.

of off-reservation gambling. After New York negotiated a tribal gaming compact, a state senator said that unless the state legalized non-Indian casinos, it would "be giving great benefits to Indians while our tourism industry is dying and people are out of work."⁴¹

Even before *Seminole*, some members of Congress, concerned that the states are thwarting a law that was intended to increase their authority, reconsidered the wisdom of the IGRA compromise. In a letter to the chair of the National Governors' Association, the chair of the Select Committee on Indian Affairs wrote,

If, by asserting the Eleventh Amendment, the states are indicating that they wish to have no role to play in the regulation of Indian gaming operations, it would seem that we are left with the alternative of having the federal government negotiate compacts with the tribal governments for the conduct of Class III gaming, and of comprehensive federal regulation of Indian gaming.⁴²

The *Seminole* decision makes the possibility of direct federal regulation more immediate. Although the Supreme Court may have an opportunity to clarify the permissibility of such regulation in a pending case,⁴³ resolution of the Indian gaming regulatory scheme may ultimately require Congressional action.

B. *The Regulation of Non-Indian Gaming*

The destiny of Indian gaming is intertwined with the fate of its non-Indian counterparts for two reasons. First, an increase in non-Indian gaming could jeopardize the Indian gaming boom. Second, because gambling often substantially affects interstate commerce, non-Indian gaming, like Indian gaming, involves considerations of the appropriate balance between federal and state regulatory powers. Any IGRA reform could be part of a general overhaul of the federal regulatory scheme for gambling. Discussion of gambling policy on Indian lands must therefore consider policy developments in general

41. James Dao, *Cuomo Signs Pact With Indians for Casino in Upstate New York*, N.Y. TIMES, Apr. 17, 1993, at 1.

42. Letter from Senator Daniel K. Inouye to Governor John Ashcroft (June 16, 1992) (quoted in Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387, 446-47 (1993)).

43. *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994). The result in *Seminole* appears to mandate the reversal of the Tenth Circuit's decision holding that the Eleventh Amendment did not grant Oklahoma immunity from an IGRA suit. While the Court might simply remand the case to the Tenth Circuit for proceedings consistent with *Seminole*, it could also use this case as a vehicle to remove lingering confusion created by the *Seminole* decision. In *Ponca*, the states raised a further Tenth Amendment challenge to the IGRA, on the grounds that the IGRA impermissibly usurps the states' regulatory and legislative apparatus. *Id.* at 1432-36; cf. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992) (holding that Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."). The Tenth Circuit rejected this argument, which, if accepted by the Supreme Court, could invalidate the entire IGRA.

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gambling regulation.

State and federal regulation of non-Indian gambling determines the competition that tribal casinos face.⁴⁴ Congress has not extended its regulatory power under the Interstate Commerce Clause to establish a uniform policy toward non-Indian gaming. However, Congress has enacted a number of statutes that buffer the policies of those states that restrict gambling. Several statutes federalize crimes related to gambling.⁴⁵ Federal law also regulates the manufacture of gambling devices and prohibits the transport of gambling devices into states prohibiting gambling.⁴⁶ Although states generally have wide latitude to legalize any types of gambling, federal law since 1992 has restricted states' abilities to operate sports-wagering games.⁴⁷

The boom in Indian gambling has depended on tight federal and state limits on other forms of gambling. The loosening of restraints on innovative gambling venues may stifle this boom. Two growth areas for gambling lie at the limits of federal jurisdiction, in cyberspace and on riverboats. Internet gambling is in its infancy, but it allows for the operation of rogue offshore virtual casinos, transactions which are illegal but beyond the reach of U.S. law enforcement.⁴⁸ Meanwhile, recent changes in federal law have loosened the ban on gambling in the federal maritime jurisdiction,⁴⁹ permitting states to legalize riverboat gaming in certain cases.⁵⁰ To date, six states have legalized at least some

44. For a review of state gambling laws, see Victor J. Franckiewicz, Jr., Comment, *The States Ante Up: An Analysis of Casino Gambling Statutes*, 38 LOY. L. REV. 1123 (1993).

45. 18 U.S.C.A. § 1955 (1995) federalizes the conducting, financing, managing, supervising, directing, or owning of most gambling businesses that violate state or local laws. For a critical discussion of this statute, see Robert W. Lee, Comment, *18 U.S.C.A. Section 1955: Who Conducts an Illegal Gambling Business? It's Just a Roll of the Dice*, 12 W. ST. U. L. REV. 239 (1984). See also 18 U.S.C.A. §§ 1301-07 (1995) (prohibiting mailing of lottery tickets other than those legal under state law); 18 U.S.C.A. § 1511 (1995) (criminalizing conspiracy to obstruct enforcement of criminal laws to facilitate illegal gambling business, where one or more conspirators is government official or employee).

46. 15 U.S.C.A. §§ 1171-78 (1995).

47. Professional and Amateur Sports Protection Act, 28 U.S.C.A. §§ 3701-04 (1995). The Act prohibits state government entities and their employees from operating sports wagering games but exempts pre-existing games, parimutuels, jai-alai, and some exclusively local casino games.

48. Technically, gambling over the Internet violates 18 U.S.C.A. § 1084(a) (1995) (banning use of wire communication facility for transmission of bets in interstate or foreign commerce). The Justice Department, however, does not expect to be able to enforce the new law. See Todd Copilevitz, *Foreign Casinos Offer Old Games in New Format*, NEW ORLEANS TIMES-PICAYUNE, Nov. 5, 1995, at A14; Joshua Quitner, *Betting on Virtual Vegas*, TIME, June 12, 1995, at 63; James Sterngold, *Ideas & Trends: Imagine the Internet as Electronic Casino*, N.Y. TIMES, Oct. 22, 1995, § 4 (Week in Review), at 3.

49. For a discussion of jurisdictional issues in riverboat gaming, see Jeremy R. Kriegel, *Place Your Bets on the Constitutionality of Riverboat Gambling Acts: Do They Violate the Commerce Clause?*, 47 WASH. U. J. URB. & CONTEMP. L. 123 (1995).

50. Gambling Devices Transportation (Johnson) Act, Pub. L. No. 102-251, Title II § 202(b), 106 Stat. 61 (1992) (codified as amended at 15 U.S.C. §§ 1171, 1172, 1175 (1994)). The Act exempts from prohibition gambling devices on a vessel whose voyage begins and ends in the same state or possession or does not make an intervening stop within another state, possession, or foreign country.

form of riverboat gaming,⁵¹ and Congress is considering legislation that would enable additional casinos to open.⁵²

Concerned about the increase in legalized gambling and its economic consequences,⁵³ many gambling opponents have called for the creation of a national commission on gambling.⁵⁴ Several members of Congress have voiced concern about the increase in legalized gambling,⁵⁵ and President Clinton has agreed, in principle, to support the creation of such a commission.⁵⁶ The commission would consider the increase in both Indian and non-Indian gaming. Thus, the general loosening of regulation of non-Indian gaming might, by prompting a backlash against all forms of gaming, lead to legislative reconsideration of the IGRA framework. The possibility of such reconsideration was given added impetus by the decision in *Seminole*.⁵⁷

C. *Tensions Between Indian and Non-Indian Gaming Under the IGRA: A Case Study*

The recent unsuccessful effort by Connecticut's Mashantucket Pequot tribe to open a casino in Bridgeport, Connecticut, provides a case study of the obstacle course that may face a tribe working within the provisions of the IGRA.⁵⁸ Even when a tribe and state appear to have settled their differences, the resulting compacts can lead to further complications. After the successful conclusion of good-faith negotiations, the state retains the power to enact

51. The states are Illinois, Indiana, Iowa, Louisiana, Mississippi, and Missouri. See, e.g., S.H.A. 230 ILCS 10/1-23 (1993) (Illinois' riverboat gambling act). Other states that have considered legalization include Maryland, New Jersey, Ohio, Pennsylvania, Texas, and Virginia.

52. Several bills would limit a state's authority to regulate gambling vessels traveling into the state. See, e.g., H.R. 116, 104th Cong., 1st Sess. (1995); S. 138, 104th Cong., 1st Sess. (1995). Another bill would exempt some vessels making voyages on Lake Michigan. H.R. 1419, 104th Cong., 1st Sess. (1995).

53. For discussions of the economic consequences of legalized gambling, see John W. Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 *DRAKE L. REV.* 51 (1994); Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 *MISS. L.J.* 291 (1995).

54. S. 704, 104th Cong., 1st Sess. (1995); H.R. 497, 104th Cong., 1st Sess. (1995); H.R. 462, 104th Cong., 1st Sess. (1995). These bills are modeled on the Organized Crime Control Act of 1970, Pub. L. No. 91-452 §§ 804-09, 84 Stat. 939, which created the earlier Commission on the Review of the National Policy Toward Gambling, expiring four years and sixty days after enactment.

55. See, e.g., 141 *CONG. REC.* H10754 (daily ed. Oct. 25, 1995) (statement of Rep. Wolf); 141 *CONG. REC.* S10912 (daily ed. July 31, 1995) (statement of Sen. Simon); 141 *CONG. REC.* S10916 (daily ed. July 10, 1995) (statement of Sen. Dorgan); 141 *CONG. REC.* H182 (daily ed. Jan. 11, 1995) (statement of Rep. LaFalce).

56. See Henry Stern, *Clinton Supports Gambling Commission Proposal*, AP, Nov. 1, 1995, available in 1995 WL 4412644.

57. Immediately after the Supreme Court's decision, Rep. Robert G. Torricelli (D-NJ) called for hearings to assess it and to consider the adoption of a new national policy toward gambling. Greenhouse, *supra* note 2, at B9.

58. The state senate ultimately defeated the proposal, 24-10. See Matthew Daly & Christopher Keating, *Bridgeport Casino Dies in Senate*, HARTFORD COURANT, Nov. 18, 1995, at A1.

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statewide gambling laws over non-Indian lands,⁵⁹ and this power fundamentally affects interaction between the state, the tribe, and other gaming interests. In this case, although the Pequots' proposal involved off-reservation land, it illustrates tensions common to all tribe-state interactions related to gambling.

If a state does decide to expand gambling beyond reservations, as Connecticut considered, a tribe may seek to maintain its monopoly by controlling off-reservation gambling as well. The land in Bridgeport was not owned by the Pequots, so a casino there required state authorization.⁶⁰ One reason that the Pequots' proposal became controversial⁶¹ is that the Pequots already operate the Western Hemisphere's most profitable casino, the Foxwoods Resort Casino in Ledyard, Connecticut, which grosses \$1 billion⁶² annually.⁶³ The Pequots had been able to open Foxwoods only after resistance from the state.⁶⁴ The new complex would have cost an estimated \$875 million to build and would have been just fifty-five miles from Manhattan, less than half the distance between Manhattan and Atlantic City, New Jersey.⁶⁵

Because tribal casinos are tax-free enterprises under federal law,⁶⁶ they have a competitive advantage over other gambling operators. However, a tribal casino will be most attractive to prospective gamblers when there are few alternative wagering outlets, so it is in a tribe's interest to persuade the state

59. Before rejecting the Pequots' plan, the Connecticut legislature considered several bills that would have imposed burdens on casino operators. *See, e.g.*, 1995 Conn. H.B. 6823 (providing for environmental impact evaluations of casino gaming facilities); 1995 Conn. H.B. 6579 (concerning political contributions by gaming interests); 1995 Conn. H.B. 5446 (prohibiting state-court enforcement of gambling debts in excess of \$10,000).

60. Under the Indian Reorganization Act, 25 U.S.C. §§ 465 (1994), the Pequots may transfer land the tribe has purchased to the United States in trust, subject to Department of Interior approval, and may then establish gambling facilities on the land. Connecticut is currently suing to void an Interior Department decision authorizing the transfer of land by the Pequots in the vicinity of the Foxwoods casino. *See Connecticut ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80 (D. Conn. 1995). U.S. Sen. Lieberman (D-CT) has introduced a bill that would require the Interior Department to take a tribe's economic status into account before allowing such a transfer in trust for commercial purposes including gaming. S. 952, 104th Cong., 1st Sess. (1995).

61. *See* Matthew Daly, *Bridgeport's Sole Hope Is Casino, Officials Told*, HARTFORD COURANT, Oct. 31, 1995, at A7; Jonathan Rabinovitz, *Rowland Tells Legislature Bridgeport Needs a Casino*, N.Y. TIMES, Oct. 26, 1995, at B7.

62. This is over five times more than the gross of the next most successful tribal casino. *See* Pat Doyle, *Nations Within a Nation*, STAR TRIBUNE, July 23, 1995, at 1A.

63. The history of the Pequot Tribe is a rags-to-riches story. *See* Wil Haygood, *Did the Pequots Hit the Jackpot?*, BOSTON GLOBE, Aug. 17, 1995, at 61; Ian Katz, *The Tribe That Found a Fortune*, GUARDIAN, July 29, 1995, at 23.

64. The State contended that it was not required to enter good-faith negotiations with the Pequots because it prohibited gambling generally, but the Second Circuit ruled that because it permitted "Las Vegas nights" in certain circumstances, it was required to enter such negotiations under the IGRA. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029-32 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

65. Jonathan Rabinovitz, *Casino Bid Gets Backing of Rowland*, N.Y. TIMES, Oct. 2, 1995, at B1.

66. The House Ways and Means Committee voted to impose a tax on Indian casinos, but the Senate Finance Committee refused to go along with such a tax after lobbying by the Pequots and other tribes. *See* H.R. 2491, 104th Cong., 1st Sess. § 13631 (version of Oct. 31, 1995); *see also* David Lightman, *GOP in Senate Shuns Tax on Indian Casinos*, HARTFORD COURANT, Oct. 19, 1995, at A1.

government not to legalize other casinos or forms of gambling. At the same time, a tribal casino is a threat to other gambling enterprises; perhaps unsurprisingly, competing wagering interests formed the primary opposition to the Pequots' Bridgeport proposal. Among those opposing the Pequots' proposal were Las Vegas-based Mirage Resorts, Inc.,⁶⁷ Connecticut parimutuel companies,⁶⁸ and the Mohegan Indian tribe.⁶⁹

Although Indian tribes are sovereigns not subject to taxation by the state, the possibility that the state will legalize forms of gambling off reservations gives tribes incentives to agree to pay states considerable fees. An earlier Indian gaming compact clouded the ramifications of the Pequot proposal. In April 1994, the Mohegan Tribe had signed an agreement with Connecticut promising an annual payment to the state of twenty-five percent of slot-machine revenues or at least \$80 million as long as Connecticut law enforced a Pequot-Mohegan slot-machine duopoly.⁷⁰ The Pequot Tribe also signed an amendment to its earlier Memorandum of Understanding with the State, applying similar terms to the Pequots' relationship with Connecticut. These agreements gave the Pequots an advantage over Mirage Resorts in negotiation with Connecticut, since the Pequots would be released from their payment obligations if the state were to grant the casino, which would include slot machines, to Mirage Resorts.⁷¹ Furthermore, although the Pequots' initial bid called for it to pay twenty-five percent of slot revenues from whichever of the two casinos had greater revenues, it later enhanced its offer by promising instead to supplement its current Foxwoods payments with twenty percent of Bridgeport slot revenues.⁷² Partly offsetting the potential financial windfall for Connecticut from the Pequots' proposal, the Mohegan Tribe threatened not to tender its promised payment if Connecticut authorized any new Bridgeport casino, arguing that the casino would violate the 1994 agreement.⁷³ Thus the

67. Mirage Resorts submitted a competing bid for a Bridgeport casino. Mirage had agreed to compensate the state for slot-machine revenues that the state would lose under other agreements, but only if it promised not to delay construction by suing for environmental or other reasons. See Matthew Daly, *Pequots Selected for Bridgeport Casino*, HARTFORD COURANT, Oct. 3, 1995, at A1, A10.

68. Connecticut has six parimutuel gambling sites, five of which would have received slot machines under the Mirage Resorts proposal. Legislators from districts including these sites were particularly hostile to the Pequot plan. *Id.*

69. The Mohegan Tribe is currently building a casino in Montville, Connecticut, about 10 minutes from Foxwoods. See Sam Libby, *In Montville, a Mohegan Casino Grows*, N.Y. TIMES, Nov. 12, 1995, § CN (Connecticut Weekly), at 19.

70. Gaming Compact, Apr. 25, 1994, Conn.-Mohegan Tribe; see *Connecticut Signs Deal for Second Indian-Run Casino*, LAS VEGAS REV. J., Apr. 27, 1994, at 12D; *Weicker Signs Casino Pact*, BOSTON GLOBE, Apr. 27, 1994, at 46; see also Op. Conn. Att'y Gen. No. 94-010 (May 18, 1994) (arguing that governor had power to strike deal with Mohegans).

71. See Jonathan Rabinovitz, *Tribe Threatens to Withhold Its Payment*, N.Y. TIMES, Nov. 1, 1995, at B6.

72. See Phil Primack, *Pequots Sweeten Bridgeport Casino Proposal*, BOSTON HERALD, Sept. 21, 1995, at 52.

73. Rabinovitz, *supra* note 71.

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state's legislative power gives tribes incentives to agree to provide cash payments as long as other casino gambling in the state is illegal. Tribes will subsequently use such compacts, which are enforceable in federal court, to dissuade states from legalizing further off-reservation gambling.

D. Conclusion

The public policy ramifications of increased gambling under the IGRA are legion. On the one hand, many Indian tribes have moved strongly toward pride, economic self-sufficiency, and sovereignty as they have become "major players in national and state politics."⁷⁴ On the other hand, gambling is both an inconstant, unpredictable revenue source and a potentially destructive social force.⁷⁵ Indian tribes, unlike states or localities, are often so economically dependent and isolated that they have little economic stability to lose by establishing casinos.⁷⁶ Yet these tribes may begin to see their gambling revenues drop as states, and other tribes, begin to compete for the same "consumers."⁷⁷ Moreover, Indian tribes that choose to open gambling facilities may begin to suffer the same crime, addiction, and other harms generally associated with gambling.⁷⁸ Insofar as the Indian gambling explosion accounts for much of the growth in legalized gambling nationwide, the regulation of Indian gaming must take into account harms caused both inside and outside the reservations. The decision in *Seminole*, while limiting the federal judicial power to coerce states to accept casino gambling on Indian reservations, does not preclude a new federal effort to formulate a national policy on these issues. Ultimate resolution of whether the federal government or state governments exercise regulatory authority over Indian gaming may determine how its harms are weighed against its benefits.

— Michael Abramowicz and Partha Chattoraj

74. *Id.* at 106.

75. Robert Goodman's 1995 study enumerates a number of harms caused by increased gambling, including compulsive behavior; economic losses; increased crime; lowered property values; lost private and public human and financial capital for productive investment; and decreased consumer spending with resultant local retail, tourism, and service industry failures. GOODMAN, *supra* note 34, *passim*.

76. *Id.* at 109.

77. *Id.* at 110-11.

78. Problem gambling rates in the Native American population are two to three times higher than those among the white population. Among several North Dakota tribes that have legalized gambling, the rates are even higher. Don A. Conzetto, *The Economic and Social Implications of Indian Gambling: The Case of Minnesota*, 19 AM. INDIAN CULTURE & RES. J. 1 (1995); Don A. Conzetto & Brent W. LaRogue, *Compulsive Gambling in the Indian Community: A North Dakota Case Study* (1995) (unpublished manuscript) (both cited in GOODMAN, *supra* note 34, at 209 n. 10).

II. RECALIBRATING AN UNEQUAL BALANCE: GRANTING WEIGHT TO SACRED SITE CLAIMS

The land is my relative, we are one, we are all connected and interrelated. . . . The earth is our mother, the sky is our father. We are related to every living thing, and even the clouds, the buttes, springs, rocks; they all have spirits and they are also our relatives.⁷⁹

Religion permeates every aspect of traditional Native American life; no division exists between the spiritual and the secular.⁸⁰ The interdependence of all entities in nature comprises the essence of Native American spirituality;⁸¹ all things—animate and inanimate—possess a soul.⁸² All life forms are sacred gifts from the Creator,⁸³ and humans are to act as responsible caretakers of the environment, preserving harmony among all natural elements.⁸⁴ Land forms the cornerstone of this concept of unity, so the earth itself is a fundamental religious symbol.⁸⁵ While Native Americans treat all

79. *Improvement of the American Indian Religious Freedom Act: Hearings Before the Select Committee on Indian Affairs United States Senate on S. 2250, 100th Cong., 2d Sess. 217 (1988)* (affidavit of Kee Shay) (quoted in Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 605 n.24).

80. It is not surprising, then, that the policies and laws of the United States, which are founded on the notion of separation of church and state, conflict with American Indian religious practices on many fronts. Economic development of federally-managed public lands, for example, has often desecrated native sacred sites. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 435 U.S. 439 (1988); *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980). Drug enforcement laws have banned the religious use of peyote. *See, e.g., Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Endangered species laws and a desire to protect the symbol of America have infringed upon the use of eagle feathers in American Indian religious ceremonies. *See, e.g., United States v. Dion*, 476 U.S. 734 (1986); *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986). Finally, the need to maintain order and uniformity has prevented Native American prisoners from adorning themselves in a religious manner. *See, e.g., Polloch v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 987 (1988). While each of these topics raises important questions, we focus on the first as a guide to exploring the development of American policy on Native American religious freedom. For a description of many of the policies undertaken to destroy Native American religions, see Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451 (1995).

81. *See* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22 (1991). There are over 500 Native American nations, practicing a variety of religions. Discussing these many religions at any but the most general level is beyond the scope of this essay.

82. *See* Hardt, *supra* note 79, at 605.

83. *See* Mary C. Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 195 & n.379 (1995); *see also* Rhodes, *supra* note 81, at 19.

84. *See* Wood, *supra* note 83, at 195-96 & n.381.

85. *See* Hardt, *supra* note 79, at 605.

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land respectfully,⁸⁶ tribal groups may cherish particular natural locations as sacred.⁸⁷ Certain mountain peaks, desert cliff formations, or river valleys may represent the legendary birthplace of a tribal people, provide a dwelling place for the gods, or yield rare medicinal herbs or waters.⁸⁸ A particular sacred site manifests a tribal people's symbiotic relationship to land that encompasses not merely religious belief, as understood in Judeo-Christian terms, but an entire way of life. This site-specific nature of American Indian religions renders them uniquely vulnerable. Because these sacred sites often lie on federally-managed public lands,⁸⁹ government-sanctioned economic development of these sites acquires an ominous zero-sum element: once developed, a sacred site is desecrated irrevocably.⁹⁰ There exists no room for compro-

86. This reverent attitude toward land does not preclude all land development. The decision to use or develop land in a certain way depends on the people's needs, taking into account the impact of such development upon subsequent generations. A respectful decision to develop land will be blessed by the Creator if the land provides for the tribe. See Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994). Such decisionmaking does not apply to sacred sites: if the site in question implicates important social, spiritual, or physical values of the tribe, development is not even considered. *Id.* at 1153-54.

87. While Western religious traditions tend to be commemorative of past events, Native American religious ceremonies embody specific purposes necessitated by present conditions. See Hardt, *supra* note 79, at 603. The purpose of a particular ceremony (e.g., to restore balance in nature) dictates its location; "place" therefore assumes paramount importance in Native American religions. *Id.*

88. See Barbara S. Falcone, *Legal Protections (Or The Lack Thereof) of American Indian Sacred Religious Sites: The Need for Comprehensive Legislation*, 41 FED. B. NEWS & J. 568, 569 (1994).

89. See Donald Falk, Note, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515, 564 n.368 (1989) (citing Brief for Amici Confederated Salish and Kootenai Tribes at 22, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986) (No. 83-2225)); Daniel McCool, *Federal Indian Policy and the Sacred Mountains of the Papago Indians*, 9 J. ETHNIC STUD. 57 (1981)). Congress has plenary power under the Property Clause of the U.S. Constitution to manage federal lands, U.S. CONST. art. IV, § 3, cl. 2, which today comprise 732 million acres, or one-third of the land area of the United States. See Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 136 (1994). Most federally owned land is administered by the Bureau of Land Management, which operates under a land use policy of multiple use, as defined in the Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-84 (1988) [hereinafter FLPMA]. Multiple use means "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people"; 43 U.S.C. § 1702(c) (1982), discussed in Celia Byler, Comment, *Free Access or Free Exercise?: A Choice Between Mineral Development and American Indian Sacred Site Preservation on Public Lands*, 22 CONN. L. REV. 397, 406 n.53 (1990). While the FLPMA specifically discusses mining, grazing, habitation, cultivation, and manufacturing, it does not mention religious uses. See Robert C. Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 804 n.58 (1992).

90. Furthermore, because the site is so tied to the Native American practice of religion, and religion is so connected with tribal life in general, "tribal identity can dissipate within a generation as practices lapse when the place that gave them definition lies desecrated." Falk, *supra* note 89, at 565-66. When Indian society loses its defining cultural characteristics, it risks losing its political autonomy as well. See Wood, *supra* note 83, at 193. Federal recognition of tribes extends only to those "which are ethnically and culturally identifiable." *Id.* at 194 & n.375 (quoting 25 C.F.R. § 83.3(a) (1994)).

mise.⁹¹

Judicial and legislative approaches thus far, nonetheless, have attempted to compromise through balancing tests⁹² and toothless administrative or procedural protections.⁹³ In practice, these existing approaches fail to weigh adequately Native American religious liberty because of a deeply embedded cultural bias that aggravates existing limitations of the cost-benefit analysis underlying the evaluation of competing interests. Explicit legislative protection that consciously prioritizes Native American religious liberty is necessary to offset the ethnocentrism that dismisses Native Americans' relationships to land,⁹⁴ blinds policy makers to the zero-sum proportions of the issue, and ultimately permits bulldozers to raze the mountains⁹⁵ and floodwaters to

91. By comparison, when a Western religious facility is threatened with destruction, the church usually owns the property in question and is entitled to just compensation for its loss. *See, e.g.*, *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250 (Colo. 1973). Native Americans, on the other hand, usually lack property interests in the lands in question. *See, e.g.*, *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1161 (6th Cir. 1980). Justice O'Connor noted in *Lyng* that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its rights to use what is, after all, *its* land." 485 U.S. at 453 (emphasis in original). However, as one commentator noted, "The 'property interest' basis for denying the free exercise claims raises the question, of course, of where the government 'got' the property in the first place. . . . If the taking was unjust to begin with, it seems especially egregious to use the lack of a legal interest in land to deny a free exercise claim for protection of preexisting sacred sites." Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1455 n.32 (1985). Moreover, even if a given sacred site were the private property of the tribe, its loss is not compensable, nor is relocation a viable alternative.

Interestingly, Western religions dominant in the United States also recognize the "holiness" of certain places, but the "holy sites" of such religions are located beyond American borders in their countries of origin. *See* Falcone, *supra* note 88, at 568. Were Jerusalem, Bethlehem, or Mecca situated within the United States, Congress probably would enact measures to prevent development on such lands. To Native Americans, sacred sites such as Bear Butte, Rainbow Bridge, and Mount Graham are just as vital and worthy of such protection. *Id.*

92. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

93. *See, e.g.*, American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (AIRFA); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) (RFRA). An exception to this is the trust doctrine, or the government's fiduciary duty toward Native Americans (as wards of the United States government) to preserve the Native American way of life. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (arguing trust doctrine should be extended specifically to include sacred site claims). When applied to Indian reservation lands, the trust doctrine avoids a balancing of interests because the government owes an uncompromising responsibility to the tribe and its members. *See* Wood, *supra* note 75, at 211. However, the trust doctrine has fared poorly where invoked to protect cultural or religious practices on publicly-held lands because in such cases the government's fiduciary obligation toward the tribe clashes with its concomitant obligation to the interests of other constituencies. *Id.* at 211, 230-31. Where such tension exists in sacred site claims, courts tend either to ignore the trust claim as an argument separate from constitutional or statutory claims, *e.g.*, *Havasupai Tribe v. United States*, 752 F. Supp. at 1488 (interpreting AIRFA); or to defer to congressional intent, requiring the trust obligation to be predicated on express language in a statute, treaty, or executive order. *See* Wood, *supra* note 75, at 212 & nn.458, 460. Attempts to reconcile this tension fall prey to the kind of ethnocentric bias that pervades the balancing of interests process of these cases. *See infra* notes 100-103 and accompanying text.

94. *See* Rhodes, *supra* note 81, at 22-23.

95. *See, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (involving timber harvesting and road construction through forest land considered sacred by Yurok,

drown the gods.⁹⁶

A. *The Present Judicial Approach*

1. *The Traditional Compelling Interest Test*

When Native Americans bring valid sacred site claims, the court weighs the religious values of Native Americans against the interests of the government in a First Amendment “compelling interest test,” first articulated in *Sherbert v. Verner*.⁹⁷ The *Sherbert* two-part, strict scrutiny test requires the court to determine if the government action creates a burden on the free exercise of religion,⁹⁸ and if so, whether a compelling government interest justifies the burden.⁹⁹

2. *Cost-Benefit Analysis Influenced by Ethnocentric Bias*

A cost-benefit framework fueled largely by utilitarian values underpins this balancing of religious and secular interests. Where the costs to government of protecting a particular liberty appear to exceed the benefits, that liberty will be denied. Although generally a useful tool for evaluating public policies, cost-benefit analysis is inherently limited in free exercise claims because it is not meaningful to attach dollar value to religious freedom.¹⁰⁰ Because the government interest in development is likely to be concretely monetizeable, it can tend to overshadow the more abstract value inherent in free exercise.

In Native American sacred site claims, cultural bias tends to exacerbate the natural imbalance created by this limitation of a monetized cost-benefit analysis. American judicial conceptions of religion are heavily influenced by

Karok, and Talowa Indians); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (involving expansion of ski area in mountain peaks deemed sacred by Hopi and Navajo tribes).

96. See, e.g., *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980) (flooding of canyon drowned Navajo gods at Rainbow Bridge); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1160 (6th Cir. 1980) (flooding of valley threatened to destroy Cherokee sacred sites, medicine gathering sites and cemeteries).

97. 374 U.S. 398 (1963); see also *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972).

98. “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I, cl. 1.

99. In 1990, the Supreme Court set aside *Sherbert* and its progeny in *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990), and resurrected a belief-conduct distinction first established in *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the Court upheld a Mormon’s conviction under Utah’s antipolygamy statute, finding that the government may have the right to intervene when beliefs become actions. In *Smith*, the Court found that it had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” 494 U.S. at 878-79. *Smith* applied a rational relationship test to conclude that generally applicable laws that are facially neutral require no special justification to satisfy First Amendment scrutiny. In direct response, Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993 to reinstate the *Sherbert* compelling interest test. For a discussion of the impact of RFRA on sacred site claims, see *infra* text accompanying notes 126-130.

100. See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 46 (1989).

the Enlightenment tradition which separates the religious from secular life.¹⁰¹ Additionally, sacred site claims must confront a governing culture historically dedicated to the conquest of nature¹⁰² and economic development that contrasts fundamentally with Native American principles of communal property and stewardship of the earth. From the government's perspective, economic development of these areas produces legitimate net social benefits of public goods or private profits. However, an ethnocentric lens may distort the negative impact on indigenous religious practices and cause the government to discount (or disregard) any positive externalities generated by the preservation of these lands. As a result, our constitutional, legislative, and judicially constructed legal doctrines can systemically disadvantage Native American beliefs or ways of life.¹⁰³

3. *Lynx and the Failure of Native American Free Exercise Claims*

In practice, ethnocentric bias slants the cost-benefit analysis in sacred site cases in that courts fail to find that the government act constitutes a "burden" on religion.¹⁰⁴ In turn, this prevents claims from ever reaching the true balance of interests required by *Sherbert*. Free exercise claims can be deeply troubling to courts because they often call for cessation of a legitimate government policy with valid secular justifications,¹⁰⁵ and they may encroach upon the Establishment Clause.¹⁰⁶ To the extent that these claims create discomfort, it is not surprising to find courts looking to sidestep the balancing test by turning to restrictive threshold burden requirements.¹⁰⁷ "Burden," then, functions as a "gatekeeper" in Free Exercise law,¹⁰⁸ serving to distinguish the boundaries of claims that warrant constitutional review. However, determination of this threshold requirement lacks a coherent and principled approach in the case law, creating a risk of discrimination against unconventional religious practices and beliefs.¹⁰⁹ The 1988 Supreme Court

101. See, e.g., Rhodes, *supra* note 81, at 16.

102. See, e.g., Gordon, *supra* note 91, at 1464 ("The pioneer and development ideals of the westward movement in the nineteenth century glorified taming the wilds in the interests of progress and prosperity.").

103. See, e.g., Rhodes, *supra* note 81, at 16.

104. Likewise, the court may avoid a true balancing of interests by focusing only on compelling government interests and refusing to reach the question of burden. See, e.g., *Badoni v. Higginson*, 638 F.2d 172, 177 n.4 (10th Cir. 1980).

105. See, e.g., *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir. 1980).

106. "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1; see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989); see also *Badoni v. Higginson*, 638 F.2d at 179 (issuing regulations to exclude tourists from sacred site would implicate Establishment Clause).

107. See Lupu, *supra* note 106, at 948.

108. *Id.* at 935.

109. *Id.* at 936. For example, court bias may discount the various elements of a *prima facie* claim, challenging the cognizability of the asserted burden, the sincerity of the claimant, and the religiosity of the claim in ways that may operate invisibly and subconsciously against unknown or unpopular religions.

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decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*¹¹⁰ illustrates this process.

Lyng dismantled Native American claims that government development of sacred site lands impinges on their First Amendment right to free exercise of religion. Although the Court explicitly recognized that construction of a road through sacred Indian land could have a devastating impact on the practice of Native American religion,¹¹¹ the Court held that the government act did not burden religion because it “ha[d] no tendency to coerce individuals into acting contrary to their religious beliefs”¹¹² Absent a finding of burden, the government did not need to show any compelling interest for building the road, despite a rich case record that clearly demonstrated both the road’s minimal utility,¹¹³ as well as the consequent harm to both Native Americans and the environment. The Court not only discounted Native American religious claims, but also placed most federal land management activity beyond Free Exercise scrutiny¹¹⁴ by casting the decision of the Forest Service to build the road on government land as an “internal government procedure.”¹¹⁵

In addition to the “coercion” requirement emphasized in *Lyng*¹¹⁶ lower courts handling earlier sacred site claims erected a “centrality”¹¹⁷ or “indispensability”¹¹⁸ hurdle that specifically targeted Native American plaintiffs trying to establish a burden on religion. However, both “centrality” and “indispensability” can be influenced by judicial subjectivity that assigns a qualitatively different value to land and land use than that given by Native Americans. This may preclude a finding of burden and a subsequent fair

Id. at 935; see also Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J.L. & SOC. PROBS. 653, 671 (1995) (arguing that evaluation of degree of burden inevitably replaces religious values of claimant with those of judicial body).

110. 485 U.S. 439 (1988).

111. *Id.* at 451.

112. *Id.* at 450. The coercive effect requirement was discussed in *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963), and further developed in *Bowen v. Roy*, 476 U.S. 693 (1986).

113. *Lyng*, 485 U.S. at 463 (discussing district court findings regarding insufficiency of the government interests served by road) (Brennan, J., dissenting); Falk, *supra* note 89, at 525-26 & nn.91-100.

114. See Falk, *supra* note 89, at 564.

115. The “internal government procedures” test was also developed in *Bowen v. Roy*: “The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.” 476 U.S. 693, 699-700 (1986).

116. Lower federal courts also required Native American plaintiffs to show coercive effect. See, e.g., *Fools Crow v. Gullet*, 541 F. Supp. 785, 790 (D.S.D. 1982).

117. See, e.g., *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (requiring Cherokee plaintiffs to show centrality of river valley to religion to establish burden).

118. See, e.g., *Wilson v. Block*, 708 F.2d 735, 743-44 (D.C. Cir. 1983) (requiring Navajo and Hopi Indians to justify First Amendment claim by demonstrating, at minimum, indispensability of site to religious practice).

balancing of interests.¹¹⁹

B. *The Present Legislative Approach*

Thus far, legislative redress has also failed to protect Native American religious liberty interests. The failure is not surprising as sacred site claims generally raise the specter of creating a stranglehold on public land development.¹²⁰ As a result, statutes concerned with cultural and environmental preservation that are often too narrow in scope to encompass sacred sites,¹²¹ even those specifically aimed at American Indians, fail to establish viable causes of action or to grant outright protection of sacred sites.

The American Indian Religious Freedom Act of 1978¹²² (AIRFA)

119. See *Sequoyah*, 620 F.2d at 1164-65. Absent centrality, the court found no burden, and therefore no need to balance opposing interests. The dissent urged remand to permit plaintiffs to prove centrality. *Id.* at 1165.

120. Cf. Gordon, *supra* note 91, at 1464. Congress has created a handful of site-specific exemptions by placing sacred land in trust for a particular tribe, e.g., Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (placing 48,000 acres around Blue Lake in Carson National Forest as a wilderness area in trust for the Pueblo de Taos Indians); Act of Jan. 3, 1975, Pub. L. No. 93-620, 88 Stat. 2092 (codified at 16 U.S.C. § 228 (i) (1988)) (placing 185,000 acres of the Grand Canyon National Park in trust for the Havasupai Indians as part of their reservation); by setting aside tracts of sacred land in the Six Rivers National Forest as wilderness area, California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (codified at 16 U.S.C. §§ 46 note, 80 note, 543, 543a-543h, 1132 note, 1274 (1988)), cited in *Lyng*, 485 U.S. at 444-45; and by setting aside the El Malpais lava flows in New Mexico as a national monument, El Malpais Act, Pub. L. No. 100-225, 101 Stat. 1539 (codified at 16 U.S.C. §§ 460uu to 460uu-50 (1988 Supp. III 1991)). For a discussion of these exemptions, see Hooker, *supra* note 81, at 139-40; see also Russell L. Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 408 (1986). However, despite these specific protections, the government was plainly fearful of establishing precedent, and did not wish to express a national policy on handling sacred site claims. *Id.* at 408-09. “[O]rdinarily, of course, Indian land claims are being, and should be, settled by cash award.” *Id.* at 409 n.315 (quoting President Nixon, 8 WEEKLY COMP. OF PRES. DOC. 880).

121. For example, the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (1988 & Supp. III 1991), preserves only sites that may contain some sort of archaeological/historical value—for example, manmade edifices such as old Spanish missionaries in the southwest—but not necessarily a pristine wilderness area. The Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1988), fails to protect religious sites because it does not ensure confidentiality of the site; such secrecy is often necessary to maintain the site’s sacredness. Furthermore, the sites remain vulnerable to desecration by archaeologists. See Ward, *supra* note 89, at 819-20. The Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (1988), invests the President with authority to designate sites as national monuments, but such status is difficult to achieve and brings with it the threat of tourism. See Ward, *supra* note 89, at 817-18. None of these cultural preservation statutes confers any substantive rights, with the possible exception of the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (Supp. V 1993), which may protect a sacred site, but only if it is a source of human remains and artifacts.

Environmental statutes also fall short of protecting sacred sites, except where sacred sites happen to fall within broader environmental values. The goal of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1988) is to “leave [lands] unimpaired for future use,” 16 U.S.C. § 1131 (a), but does not speak to the preservation of sacred sites. The Endangered Species Act, 16 U.S.C. §§ 1531-1544, may prevent a sacred site from desecration by land development, but only where the land also happens to be the habitat of an endangered species. For a summary of these statutory schemes, see Ward, *supra* note 89, at 817-21.

122. 42 U.S.C. § 1996 (1988).

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attempted to redress past injustices¹²³ and give proper weight to Native American religious claims by declaring that “it shall be the policy of the United States to protect and preserve” Native American religious freedom.¹²⁴ AIRFA, however, depends on federal administrative good will for its implementation.¹²⁵ The Act allows agencies to give little more than a perfunctory nod to tribal concerns by stating that such issues should be considered when a land site is to be developed.¹²⁶ AIRFA fails even to require any detailed environmental impact evaluation such as that required by the National Environmental Policy Act of 1969.¹²⁷ Moreover, any residual power the Act might have wielded was nullified in *Lyng*, which concluded that “[n]owhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”¹²⁸

In 1993, the Senate Select Committee on Indian Affairs drafted amendments to AIRFA to address its deficiencies,¹²⁹ but resistance from constituencies interested in developing public lands potentially subject to sacred site protection tabled the legislation at the start of the 104th Congress in 1994.¹³⁰ Section 103 of the Native American Free Exercise of Religion Act would have required the Secretary of the Interior to consult with tribes in an ongoing process to identify sacred sites.¹³¹ While this was an improvement over AIRFA, this attempt to compromise still would have failed to protect Native American interests adequately. First, disclosure of the site to the government, even if the Department of the Interior maintains confidentiality, impinges upon the privacy

123. See Ward, *supra* note 89, at 816 & n.129.

124. 42 U.S.C. § 1996.

125. See Barsh, *supra* note 112, at 411.

126. *Lyng*, 485 U.S. 439, 455 (1988); *Wilson v. Block*, 708 F.2d 735, 746-47 (D.C. Cir. 1983).

127. 42 U.S.C. §§ 4321-4347 (1988) (NEPA). NEPA is best known for its requirement that, prior to taking any major federal action “significantly affecting the quality of the human environment,” the responsible federal agency must prepare a document known as an Environmental Impact Statement. 42 U.S.C. § 4332(2)(c); see Dean B. Suagee, *The Application of the Natural Environmental Policy Act to “Development” in Indian Country*, 16 AM. INDIAN L. REV. 377, 383 (1991). Section 101(b)(4) of NEPA calls for the preservation of “important historic cultural, and natural aspects of our natural heritage;” however, NEPA’s protection is procedural only—it does not create substantive rights. See Suagee, *supra* note 127, at 379, 385-86 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978), and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

128. 485 U.S. at 455.

129. Native American Free Exercise of Religion Act of 1993 (NAFERA), S. 1021, 103d Cong., 1st Sess. (1993).

130. See Wood, *supra* note 75, at 206 & n.433. Congress did pass a limited amendment providing for traditional religious use of peyote by Indians. See *infra* text accompanying notes 138-143.

131. NAFERA contains a list of forty-four very specific and limited areas nationwide that are Indian sacred sites currently threatened by government development. See Luralene D. Tapahe, Comment, *After The Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 357 & n.121 (citing WALTER ECHO-HAWK, BRIEFING DOCUMENT: NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT (S. 1021) 3 (1993)).

necessary to maintain the sacredness of the site.¹³² Second, consultation with tribal leaders about the sanctity of particular land may inadvertently exclude true religious traditionalists who may be uninvolved in tribal politics.¹³³ Finally, the legislation only called for temporary closing of sacred sites "made so as to affect the smallest practicable area for the minimum period necessary for such purposes."¹³⁴ Such compromise is, at best, a temporary solution, because it still risks allowing land uses that may desecrate a particular site.

The other major legislation purporting to protect American Indian religious liberty is the Religious Freedom Restoration Act¹³⁵ (RFRA) which codified the compelling government interest test. However, as argued above, the burden/compelling interest test, as currently applied, fails to protect Indian religious freedom¹³⁶ and nothing in RFRA changes traditional treatment of sacred site claims.¹³⁷ Furthermore, the Senate Judiciary Committee stated that traditional Free Exercise jurisprudence "makes it clear that strict scrutiny does not apply to government actions involving only management of internal government affairs or the use of the government's own property or resources."¹³⁸ While government action need only further a goal, Native American interests will continue to be held to a "centrality" or "indispensability" requirement.¹³⁹ In sum, RFRA does little to address existing problems that allow cultural bias to distort any meaningful balancing of interests.

C. *Proposed Statutory Protection*

Despite the shortcomings of existing legislation, the current status of Free Exercise jurisprudence compels Native Americans seeking full protection of their religious liberty to turn to Congress. Hence Congress should enact specific statutory protection that automatically shields a sacred site once a burden on religious liberty is established. Given the inherent inability to put a price on religious liberty, granting automatic protection to Native American sacred sites once a burden is established works to level an otherwise unequal playing field.¹⁴⁰

132. See Barsh, *supra* note 112, at 409 ("Indians' religious beliefs and practices cannot be accommodated by the 'multiple use' of public lands because they depend so intimately on privacy and the maintenance of land in a natural condition.")

133. See Ward, *supra* note 89, at 839. For an anecdotal discussion of factionalism among the Apache tribe in a sacred site dispute, see Williams, *supra* note 86, at 1158-63.

134. S. 1021, § 102 (c)(3).

135. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

136. Furthermore, it is not clear that Congress has the authority to tell the judiciary how to adjudicate constitutional claims. See O'Brien, *Freedom of Religion in Indian Country*, *supra* note 80, at 471.

137. See Tapahe, *supra* note 131, at 345.

138. *Id.* at 345-46 (quoting S. REP. No. 111, 103d Cong., 1st Sess., pt.V(c)).

139. *Id.* at 347; see *supra* notes 109-110.

140. Cf. Wood, *supra* note 83, at 232 (calling for substantive test that prioritizes native needs).

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Michael W. McConnell and Richard A. Posner offer an economic approach to religious liberty that mandates that benefits or burdens on religion must be measured relative to a baseline of "neutrality."¹⁴¹ That is, a religion may be aided or penalized, so long as the benefits or burdens have basically neutral consequences for other religious institutions.¹⁴² Where a compelling government interest to produce a public good burdens free exercise,¹⁴³ they argue that the balance of interests should not be presumptively weighted in either direction.¹⁴⁴ At the same time, however, they recognize that institutional concern might justify a shift away from an even balance to create a presumption in favor of minority religious practices and compensate for the likelihood that these practices will not be granted equal weight.¹⁴⁵ McConnell and Posner note, however, that such prioritization presumes some noneconomic justification.¹⁴⁶ In sacred site claims, this prioritization would counter the effects of ethnocentric bias.

Recent congressional action on Native Americans' religious use of peyote¹⁴⁷ illustrates the possibility of successful legislative redress to create outright protection of religious liberty. Before 1990, state courts were divided on the issue of whether the First Amendment entitled Native Americans to use

141. McConnell & Posner, *supra* note 100, at 1.

142. *Id.* at 12. According to McConnell and Posner, a burden on religion is a government action that creates a substitution effect coupled with a disproportionate burden. *Id.* at 39. Sometimes this burden is created by controlling the necessities of religious practice rather than through government regulation of religious activity. *Id.* at 43. Therefore, where the government has taken possession of the sole holy sites of a religion, it impermissibly burdens that religion, and must, at a minimum, allow religious exercise at the sites to continue. *Id.*

143. For sacred site cases, this may involve mining, logging, recreation, etc.

144. McConnell & Posner, *supra* note 100, at 47. They note however, that courts must frame the inquiry as a balance of the *marginal* impact on religious freedom and government interests, rather than the particular individual burden against a powerful but abstract government interest that may dwarf the Free Exercise claim. In the typical sacred site case, this means the government ought to be limited to the particular impact of the particular site, not a broad government interest in maintaining property rights in public lands. *Id.*

145. *Id.*

146. *Id.* McConnell and Posner nonetheless call for a traditional balancing of interests and assume a true balance is possible without creating a presumption that protects minority religious practices. *Id.* at 54. While they note that the injury to the plaintiffs in *Lyng* appeared substantially to outweigh the secular interests in that case, *id.* at 48, they fail to examine (or offer a method for examining) the more difficult case in which the government interests loom much larger, implying that a case involving strong secular interests might favor the government, even if the same destructive impact on religion as existed in *Lyng* were present. McConnell and Posner's neutrality test calls for the balance to be even: Indians' religious claims must be given weight commensurate with the secular claims of others, but by failing to embrace a conscious prioritizing of religious liberty, they ultimately bring the sacred site quandary no closer to resolution.

147. Peyote is currently listed as a controlled substance in the Comprehensive Drug Abuse Prevention and Control Act. 21 U.S.C. § 812(c) (1988). In designating peyote as an illegal substance, Congress specifically stated that it did not intend to cover Native Americans' religious use of the drug. The regulations to implement the law provide that "[t]he listing of peyote as a controlled substance . . . does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church." 21 C.F.R. § 1307.31.

an otherwise illegal drug in their religious ceremonies.¹⁴⁸ Then, in *Employment Division, Department of Human Resources v. Smith*,¹⁴⁹ the Supreme Court held that states outlawing peyote use were not required to make religious use exemptions without performing a compelling interest test.¹⁵⁰ In direct response to this challenge, Congress passed the Religious Freedom Restoration Act of 1993 to reinstate the test.¹⁵¹ Congress later corrected possible constitutional deficiencies of RFRA¹⁵² by simply legalizing Native American religious use of peyote in the 1994 amendments to the American Indian Religious Freedom Act.

The peyote exemption illustrates that legislative prioritization of Native American religious liberty is possible. Obviously the cost-benefit relationship in this particular realm is straightforward, since the costs to government of allowing a small number of American Indians to use peyote for religious purposes are minimal; it is nonetheless a useful example of legislative success.

Considering that the opportunity costs of preserving tracts of pristine public lands appear considerably more substantial, any statute truly seeking to protect sacred sites must consciously prioritize religious liberty once a legitimate burden is determined, or the purely economic (and calculable) opportunity costs to the State will almost invariably outweigh the intangible non-economic benefits of preserving the First Amendment Free Exercise rights of American Indians. Establishing such a priority may not be so revolutionary. For example, the trust doctrine creates an uncompromising obligation of the government to protect and preserve Native American interests.¹⁵³

While the proposed prioritization of religious liberty does not escape the dilemma of determining an initial burden, McConnell and Posner's "neutrality" baseline marks a fair starting point. It is not flawless, but it at least constitutes a more conscious and informed balancing process. Ultimately, the solution lies with Congress, not the courts. Justice O'Connor recognized as much in *Lyng*, when she observed that "[t]he Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many

148. For example, in *State v. Big Sheep*, 243 P. 1067 (Mont. 1926), the Montana Supreme Court found that the criminalization of all peyote use did not violate the First Amendment rights of Crow tribe members since it was consistent with the state's interest in maintaining the "peace, good order and safety of the state." According to Article III §4 of the Montana State Constitution, "the liberty of conscience hereby secured shall not . . . justify practices inconsistent with the good order, peace, or safety of the state." *Id.* at 1073. Conversely, the California Supreme Court found that "the use of peyote incorporates the essence of [Native American] religious expression," thus warranting First Amendment protection. *People v. Woody*, 394 P.2d 813, 821 (Cal. 1964). Because the state failed to show harmful effects of religious peyote use, the court found there was no compelling government interest to justify the infringement of the Navajo's religious use of peyote. *Id.*

149. 494 U.S. 872 (1990).

150. 494 U.S. at 882-90.

151. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

152. See *supra* notes 128-131 and accompanying text.

153. See *supra* note 85.

of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.”¹⁵⁴

— *Monica Marquez and Elizabeth Fishman*

III. NATIVE AMERICAN TRUSTS

On November 7, 1995 a divided panel of the United States Court of Appeals for the Eighth Circuit held section 465 of the Indian Reorganization Act of 1934 to be “an unconstitutional delegation of legislative power.”¹⁵⁵ For sixty-one years, section 465, which empowers the Secretary of the Interior to acquire land “for the purpose of providing land for Indians,”¹⁵⁶ has been the centerpiece of Native American economic development.

The decision in *South Dakota and City of Oacoma v. United States Department of the Interior*, calling into question the status of all land held in trust by the federal government for Native American tribes, is the latest example of the rapid change and confusion associated with Native American attempts to expand development efforts. If the decision in *South Dakota* is upheld on review it will radically alter the field of Native American-federal government¹⁵⁷ relations as well as threaten the current regulatory structure of Native American activities.

Should the Supreme Court uphold the Eighth Circuit ruling it would mark the first time a statute has been nullified on grounds of undue legislative delegation since the New Deal and would be only the third such holding ever.¹⁵⁸ This history, in light of the fact of millions of acres of land already placed in trust under the Act over the past half-century, suggests that the decision is likely to be overturned.

But even if it is overruled, the decision may have deep ramifications for Native American-federal government relations. The decision is part of a larger context of increasing municipal disgruntlement over perceived Native American economic success at the expense of local businesses and government. Issues of

154. *Lyng*, 485 U.S. 439, 452 (1988).

155. *South Dakota v. United States Department of the Interior*, 69 F.3d 878, 880 (8th Cir. 1995), *reh'g denied*, Feb. 2, 1996.

156. 25 U.S.C. § 465 (1994)

157. This essay uses the term “government” when all levels of government—federal, state and local—are implicated.

158. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Dissenting in *South Dakota*, Judge Diana Murphy offers strong grounds for reversal. She finds that the court “unnecessarily reaches a constitutional issue and bases its conclusions on speculation rather than the record,” noting further that the decision “strays far from the existing path of nondelegation doctrine.” 69 F.3d at 85-86 (Murphy, J., dissenting). Indeed, other circuits have not expressed such concern with the breadth of the Secretary’s power. See, e.g., *Florida Dept. of Bus. Reg. v. United States Dept. of Interior*, 768 F.2d 1248, 1252-53 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

taxes, land-use, and simple economic competition (all of which may be seriously affected by the decision to place land in trust for a Native American nation), among others, are straining the ties between Native Americans and their neighbors.

Trust lands—property held by the federal government for the use of Native Americans—are at the center of the problem. One of the most fundamental elements of Native American—federal government relations has been the “trust” relationship that makes the federal government’s authority with respect to Native American issues, including property rights and use, essentially exclusive.¹⁵⁹ Once land is taken into trust for a Native American tribe, the land itself and activities on it are subject only to federal regulation. Further, land taken into trust is “exempt from State and local taxation.”¹⁶⁰ While this arrangement occasionally drew criticism in the past, the limited activity on trust lands was innocuous enough to avoid serious conflict. However, as the federal government has accepted more land into trust and profitable activities on trust lands have increased, all levels of government and the tribes themselves have focused renewed attention on the legal scheme that governs trust land. Relations between American government institutions and Native American nations are more prominent today than they have been in decades. Primarily due to the growth of Native American-operated gaming facilities and the wealth they generate, the impact of Native Americans on the operations of states and municipalities has grown enormously. In large part, the growth of conflict and negotiation has arisen out of the increased physical juxtaposition of the communities and the more interdependent fiscal relationships between the communities. In turn, these contacts and evolving relationships have invigorated a complex and often anachronistic set of legal and policy issues. This is the context for *South Dakota*.

This essay describes the process by which land is placed in trust and the general controversy surrounding trust land. It proceeds to enumerate the positions of the major players—Native Americans, the federal government, states, and municipalities—with respect to two principle policy arenas: economic impact and regulatory authority. Notably, these subjects are characterized by shifting alliances and countervailing policy incentives.

This complexity is partially driven by confusion and misunderstanding. It is important to realize that while the issues in conflict are genuine, the strength of feeling on the part of the participants, especially local governments, is enhanced by two critical misperceptions: first, that Native American landholdings are increasing thanks to the trust process; and second, that Native

159. On the origins of the trust doctrine, see, e.g., Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

160. 25 U.S.C. § 465 (1994).

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American nations are flourishing economically. Both conceptions are inaccurate. Despite the trust process, a number of tribes have seen a net loss of land during the past six decades.¹⁶¹ While gaming has dramatically improved the fortunes of a tiny minority of Native Americans, the vast majority remain impoverished and seek to use the trust process to initiate or continue modest developmental projects.

Nevertheless, as increased attention is focused on Native American economic development, state and local governments find themselves in a situation in which local tax burdens for non-Indians are likely to increase (or tax revenues decline) while local regulatory schemes will either be frustrated or brought into line with the less-stringent (or nonexistent) federal regulation in force on trust land. Usually, these effects are a necessary price for fulfilling the nation's commitment to assisting Native Americans. Increasingly, however, state and local governments feel threatened. The reality of the situation suggests that although their concerns are legitimate and should not be disregarded, the problems raised may be minimized through good-faith negotiation. The problems for states that remain represent an acceptable sacrifice to the interest of long-term Native American development.

A. *Creating Trusts*

Trust land is governed by the Indian Reorganization Act, originally passed in 1934. Section 465 authorizes the Secretary of the Interior

in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.¹⁶²

Currently, section 465 limits appropriations for such purposes to \$2 million per year. The land is owned by the federal government, in perpetuity, and both the tribe and the government must agree to any future sale.¹⁶³ Today, the federal

161. "[A]s to sixteen tribes with reservations in Nebraska, North Dakota and South Dakota . . . the Bureau of Indian Affairs Aberdeen Area reports that during the 10-year period from 1985 to the present a total of 18,120 acres of land were taken into trust while 46,399 acres passed from trust to fee status." Brief for Amici for rehearing en banc at 2 n.1, *South Dakota and City of Oacoma v. Dept. of Interior*, 69 F.3d 878 (8th Cir. 1995) (No. 94-2344); see also Remarks of Sen. Daschle, 141 CONG. REC. S3967 (daily ed. Mar. 15, 1995) ("Far more Indian land is converted from trust status to fee status. During the past 5 years, less than 1,000 acres have been converted to trust status in South Dakota.").

162. 25 U.S.C. § 465 (1994).

163. Jon Frandsen, *Why Indians Want Government to Take Land Into Trust*, Gannett News Service, Sept. 28, 1995, available in WESTLAW, GANNETNS file.

government holds 3.6 million square miles in trust for Native Americans.¹⁶⁴

There are two ways to put land into trust. The tribe may ask the Bureau of Indian Affairs (BIA) to take land into trust, in which case the Bureau has discretion to approve or deny the request. Alternatively, the tribes can ask Congress to order the BIA to place land in trust.¹⁶⁵ The process is characterized less by straightforward application of rules than by complex, fact-specific negotiation between the various affected parties.¹⁶⁶ While Native American groups tend to have the advantage in these negotiations—because they are not technically required by section 465 to reach agreements with local governments—the balance may shift if state and local governments succeed in persuading Congress or the Department of the Interior to reform the trust land process to improve their bargaining position. Such a shift may be unnecessary though if the decision in *South Dakota* withstands review.

South Dakota and City of Oacoma v. United States Department of the Interior began as a thoroughly normal trust acquisition case.¹⁶⁷ The Lower Brule Tribe of Sioux Indians requested that the Secretary of the Interior purchase and place into trust, pursuant to section 465, ninety-one acres of land, seven miles away from their reservation and partially within the city of Oacoma, South Dakota.¹⁶⁸ The Tribe claimed that “the land would be used to create an industrial park adjacent to an interstate highway,”¹⁶⁹ and maintained that “[t]his site, Trust status for the land, and tax advantages are critically necessary for the [industrial park] development to occur.”¹⁷⁰ The City of Oacoma unsuccessfully sought to persuade the BIA not to approve the acquisition and the federal government took title in November 1992. In their

164. Bill McAllister, *BIA Plans to Cut At Least 2,600 From Work Force*, WASH. POST, Sept. 7, 1995, at A1.

165. Frandsen, *supra* note 163.

166. The Bureau's decision, however, is guided by 25 C.F.R. § 151.10. That section sets out eight factors which the Secretary must consider when evaluating an application to put land into trust, including: the need of the individual or tribe; “the purposes for which the land will be used[;] . . . [j]urisdictional problems and potential conflicts of land use[;] . . . [and, i]f the land to be put in trust is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.” 25 C.F.R. § 151.10 (1995). However, while “[p]roof that these factors were considered must appear in the administrative record,” *City of Eagle Butte, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs*, 96 Interior Dec. 328, 331 (1989), the considerations are not “limits on the Secretary's authority to acquire land for the benefit of Indians.” *Florida Dept. of Bus. Reg. v. United States Dept. of Interior*, 768 F.2d 1248, 1253 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

They do not purport to state for what Indian Tribe the Secretary may acquire land, or how much land may be acquired, or even the circumstances under which the Secretary may use his authority. Rather, they are more precisely labeled as factors to be considered in exercising discretion. As such, they do not constrain the Secretary's authority to acquire land in trust for Indians.

Id.

167. Which is to say that it was characterized by a high degree of disagreement, confusion, and misunderstanding.

168. 69 F.3d at 880.

169. *Id.*

170. *Id.*

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subsequent suit, Oacoma and the state of South Dakota claimed that the acquisition “deprives them of tax revenues and may place the land beyond their regulatory powers.”¹⁷¹ Among their many alternative pleadings, the City and State also alleged that the Tribe was not planning to develop an industrial park at all but rather intended to build a casino—a plan of which the Department of Interior was alleged to have knowledge.¹⁷² Thus, *South Dakota* began with standard concerns of economic impact and reduction of sovereignty, tinged with suspicion and mistrust, not only between governments and Native Americans but between different levels of government as well.

B. *Economic Impact*

The plaintiffs in *South Dakota* were correct to point to the loss of tax revenue. In any Indian trust arrangement, state and local governments face potential reductions of property, sales and income tax revenue (and the prospect of tax rate hikes to compensate for the smaller base). From the Native American standpoint, of course, the absence of a federal property tax makes trust status very desirable. Meanwhile, as localities fear tax losses, the federal government—already seen by state and local governments as opposed to their interests in trust controversies—is the only governmental entity with the potential to reach Indian revenues directly.¹⁷³ Consequently, Washington suffers no noticeable loss of revenue as a result of placing land in trust and the Department of Interior’s mandate to provide land for Indians places the Department on the side of Native Americans in these disputes. Nevertheless, tax revenues are only part of the financial equation and the economic activities on trust land (or related to its development) can affect, both positively and negatively, the local economy. Ultimately, the economic concerns of state and local governments are real, but where gambling is not at issue, they are also frequently overstated.

Faced with the removal of potentially sizable tracts of land from their tax rolls, municipalities are understandably concerned. Many localities rely on property taxes as their principle source of revenue, especially for services

171. *Id.* This, of course, is true whenever land is placed into trust for Native Americans, so the challenge brought by the city effectively struck at all trust lands.

172. *Id.* Apparently the city feared the impact of a gaming industry more than other potential forms of development, or, at the very least, felt that the presence of gaming was a sufficiently important question that it should be publicly debated.

173. A federal corporate income tax, applied only to income derived from gaming, was proposed this year and made some progress in the House of Representatives. The proposal would have diverted up to thirty-five percent of gaming revenue from Indian tribes to the federal government. Should a federal tax on gaming income pass, however, tribes will either find themselves essentially double-taxed or will have to negotiate their way out of agreements with state governments for donations in lieu of taxes, a task that would surely not be easy. *See Taxing the Tribes*, Editorial, WASH. TIMES, Nov. 7, 1995, at A18. Even if no such tax passes, state and local governments clearly do not see the federal government’s position toward their tax problem as friendly. For a more complete discussion of the proposed tax, see *supra* Part I.

whose costs are not highly elastic, such as public education. Consequently, local governments are generally compelled to raise the property tax rate on the remaining taxable property.

Communities may be more sensitive to property tax increases than to many other types of local taxes or to state and federal taxes, as well as more aware of different rates in neighboring municipalities, because of citizen proximity to the decision-making and the centrality of property taxes to municipal finances. Consequently, local residents may be the most vocal opponents to expanding a Native American presence in their communities.¹⁷⁴

Trust land is also exempt from state and local sales tax for which, once again, there is no federal counterpart. Until recently, local governments had complained about little more than sales of cigarettes and the like on Indian land. However, as Native American economic development steadily increases (especially in the area of gaming), municipalities may be caught in an awkward situation of tax competition. As transactions on trust land supplant taxable transactions off trust land, sales tax revenue will decline. While there is some risk that increases in property tax rates will encourage people to move, there seems to be an even greater risk that increases in the sales tax rate could drive even more transactions onto non-taxable territory. It is a competition, therefore, in which municipalities are structurally disadvantaged.

Despite the apparent decline in state and local tax revenues, however, the effects caused by Native American trust land may not be so dire for state and local governments' cash flows as may first appear. Native American groups, for example, are hardly the only landowners that escape property taxes; government buildings, churches, and universities all diminish the tax base.¹⁷⁵ All levels of government may also benefit by a reduction in welfare service costs as Native American tribes become increasingly economically successful.¹⁷⁶ Further, as a general rule, the tribes will negotiate payment agree-

174. Local newspapers frequently alert readers to differences in regional tax rates. For an exemplary account of small-town tax comparisons, see *Hold that Line: 47 of 60 Areas Freezing Local Taxes This Year*, LANCASTER NEW ERA (PA), Jan. 14, 1993, at B1 (describing reasons for alterations in mill rates of townships of Lancaster County, Pennsylvania).

175. A number of types of federally administered lands are also tax-exempt, including those administered by the Bureau of Land Management, the National Park Service and the U.S. Fish and Wildlife Service. Notably, federal law provides for a program known as "payments in lieu of taxes" or PILT, 31 U.S.C. §§ 6901-07 (1994), under which States receive nominal compensation for lost tax revenues on applicable federally managed lands. In 1995, Senator Tom Daschle (D-SD) introduced legislation to amend section 6901 to include Indian trust land in the compensation program. S. Res. 560, 104th Cong., 1st Sess., 141 CONG. REC. S3967 (daily ed. Mar. 15, 1995). The bill would, at the very least, demonstrate some concern on the part of the federal government for state and municipal tax issues, but no action has been taken on the bill.

176. In Wisconsin, for example, the Department of Health and Social Services reported a 26.9% reduction in the number of people receiving AFDC, between January 1991 and December 1993, in "rural counties with Indian casinos compared with a reduction of just 4 percent in the rest of the state" over the same period. Dale D. Buss, *House Wins: Native American Communities Across the State are Raking in the Chips; Usually, Everybody Wins, but Sometimes Local Businesses Lose*, CORP. REP. WIS.

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ments for provision of local services such as fire and water,¹⁷⁷ and they may often agree to make voluntary payments in lieu of taxes.¹⁷⁸

Sometimes payments result in political concessions. In Connecticut, for example, the Mashantucket Pequots are the largest single contributor to the state treasury, donating twenty-five percent of their gross slot machine revenue, in exchange for their slot machine monopoly.¹⁷⁹ On the local level, when the Pequots proposed expanding their holdings by 267 acres, they offered “\$1 million apiece each year for five years” to three neighboring towns if they dropped their opposition to the purchase.¹⁸⁰

Furthermore, agreements do not always provide the stability of a tax, as the village government of Turtle Lake, Wisconsin discovered. There, the St. Croix Chippewa Tribe ceased paying \$12,500 per month in lieu of taxes after the village asked if the tribe intended to place \$3.5 million worth of village land off the tax rolls and into trust in order to build a hotel.¹⁸¹ In Oklahoma, the city of Lawton delayed running utility lines to an 85-year-old Kiowa Indian’s residential lot for fear that he or his heirs would one day open a business on the property if the town did not get a prior agreement in writing.¹⁸²

Direct taxes, of course, are only part of the financial equation for state and local governments. Stimulated business activity resulting from Native American development projects can, occasionally, partially compensate for the loss of tax revenue. However, it is unclear whether Native American commercial activity will stimulate or compete with local businesses. Most likely it will do both; the ultimate outcome will be very difficult to predict, as the effects may change over time. In any event, the negotiations sought by state and local governments often may alleviate the impact of this uncertainty.

Apr. 1995, at 20.

177. See, e.g., *Indian Gaming Profits Put Neighborly Relations at Risk*, PORTLAND OREGONIAN, Oct. 8, 1995, at E2.

178. A typical agreement is that reached by the Catawba Tribe of South Carolina with three county governments in 1993. With respect to taxes, the parties agreed that,

The tribe, the tribal trust funds, and tribally owned enterprises will be non-taxable for federal income tax purposes like other federal tribes, and its income will be non-taxable by the state for 99 years. Federal trust lands will be exempt from real property taxes, and improvements on the land will be exempt from real property taxes for 99 years. The tribe will make substitute payments to support its children in the public schools. The state will not tax sales occurring on the reservation, but the tribe agrees to impose and collect a sales tax equal to the state’s sales tax.

Summary of the Catawba Indian Land-Claim Settlement, HERALD (Rock Hill, SC), Jan. 26, 1993, at 8A (relying on information compiled by Native American Rights Fund). The agreement also provided for environmental and zoning regulations, among other things.

179. Patrick Lakamp, *Time’s Running Out: Native Casinos Threatened with Taxes, Regulation*, POST-STANDARD (Syracuse, NY), Oct. 13, 1995, at A8.

180. Elizabeth Ross, *Connecticut Towns See Tribal Expansion Plan as Too High Rollin’*, CHRISTIAN SCI. MONITOR, Aug. 24, 1993, at A7.

181. Buss, *supra* note 176, at 22. The St. Croix halted plans to build the hotel.

182. *Lawton Denies Utilities to Kiowa, BIA Claims*, TULSA TRIB., Sept. 21, 1992, at 5A. Apparently, Lawton previously experienced trouble with water payment agreements breached by the Kiowa-Comanche-Apache intertribal land-use committee. *Id.*

Wisconsin offers an excellent example of the diverse economic effect of Native American development. In the spring of 1995, *Corporate Report Wisconsin* compared the effects of Native American gaming on two Wisconsin communities—Wisconsin Dells and Turtle Lake—over the previous three years.¹⁸³ Citing preliminary research by a University of Wisconsin professor, the *Report* noted that in the Dells “52 percent of the 82 non-gaming businesses . . . surveyed have experienced an increase in summer visitor volume since the casino’s opening—and nearly 43 percent have gotten a boost during the off season.”¹⁸⁴ The Turtle Lake business community experienced a similar boom but has had more notable setbacks. One entrepreneur opened a large restaurant across the street from the casino that was successful until the casino expanded its own food-service facilities to keep more people in-house.¹⁸⁵

While the size and scope of the business effect is much larger when linked to gaming, such effects are not unique to casinos. In Turtle Lake, the Oneida tribe has expanded into a diverse range of technology, service, and manufacturing industries.¹⁸⁶ Although the Oneida development clearly has been funded by casino money, even tribes that do not develop through gaming will slowly create more and more competition and opportunities for local businesses.

Where trust land status leaves Native Americans in a privileged economic position, competition is likely to outweigh the opportunities for mutual benefit. In locations where development is not connected to gaming the economic issues are not so pressing. Where development is focused on gaming, however, the economic opportunities will often seem at least equal to potential negative impact. Regulatory authority over trust land, therefore, is of more immediate and significant concern to state and local governments.

C. *Regulatory Authority*

Once land is placed in trust, Native American tribes begin to reap the economic benefits of a reduced regulatory burden while averting the political wrangling normally associated with local regulatory regimes. Cost savings associated with minimal regulatory burdens and freedom from such things as zoning restrictions make trust land the equivalent of an economic development zone. In some sense, that is exactly the point of trust status—the problems encountered by state and local governments are not merely incidental, but anticipated, if not intended, by the section 465 scheme. Indeed, tribes may often look to purchase land “located within urban growth boundaries.”¹⁸⁷ The municipalities, then, are not only faced with the confounding of their

183. Buss, *supra* note 176, at 20.

184. *Id.* at 21.

185. *Id.* at 22.

186. *Id.* at 21.

187. *Indian Gaming Profits Put Neighborly Relations at Risk*, *supra* note 177.

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regulatory scheme but also a perceived affront to their sovereignty.

The regulatory gap, like the taxation gap, can be filled with negotiations. However, state and local governments are dependent on federal assistance to negotiate successfully. Once the land is placed in trust, the tribe's incentive to negotiate is reduced (except to the extent that municipalities can withhold services pending payment agreements or regulatory assurances). Consequently, state and municipal governments often ask the Department of Interior to reject trust applications, or at least to delay the process until state and local negotiations have settled the contours of potential regulatory problems. The federal government has the final say: it has the statutory authority to give Native Americans nearly everything they need or to withhold such benefits until local government concerns are fully met. Although both sides seek to enlist Washington's aid, negotiated settlements remain the norm and both sides surely realize that a neighborly relationship is in their best interest.

Nevertheless, reaching agreement on regulation is particularly difficult. Normally, the political process can accommodate changing regulatory needs over time, but negotiated compacts may be more rigid, thus requiring precisely the sort of long-range planning that municipalities may not be in a position to evaluate at the time of initial negotiation. It is not surprising, in this context, that the plaintiffs in *South Dakota* were especially anxious to know, *before* the trust was created, the purposes to which the tribe proposed to put the land.

The difficulties of settling regulatory differences were recently demonstrated in Oregon. The Siletz tribe there is seeking to put land into trust that it recently purchased inside Lincoln City.¹⁸⁸ Although the Siletz agreed to compensate the city for lost taxes and services, they offered only non-binding assurances to "adopt zoning regulations and building codes that will meet or exceed local regulations."¹⁸⁹ According to Lincoln City's attorney, "[t]he implications of this for the state and local governments—a patchwork of places within urban areas that are not subject to any of their regulatory sovereignty, but instead subject to independent tribal sovereignty—are enormous."¹⁹⁰

When these conflicts arise and if regulatory discrepancies persist, local and state governments will either have to live with those differences, including detrimental competition to non-Indian businesses, or bring their regulations into line with federal law. Either way, local preferences will be frustrated. The more successful Native American enterprises become, the more pressure there will be to provide locals with a comparable, "competitive" regulatory regime. Regardless of local preferences, state and municipal governments will feel compelled to match the federal regulatory scheme, at least in areas adjacent to

188. See Roberta Ulrich, *Tribe's Reach for Trust Land Antagonizes Lincoln City*, PORTLAND OREGONIAN, Sept. 25, 1995, at B1.

189. *Indian Gaming Profits Put Neighborly Relations At Risk*, *supra* note 177.

190. *Id.*

trust land, in order to remain "competitive." The federal structure of the land trust program, therefore, may create a local race to the bottom. Aside from raising questions about the merits of regulation, this conflict raises serious federalism issues for localities which may find their valuation of local resources and regulatory needs incidentally displaced by pockets of federally regulated land in their midst.¹⁹¹

At this point, such regulatory conflict is only hypothetical. The rapid expansion of Native American land-holdings, especially in the wake of gaming investment, is still fairly new. So far, municipalities, states, and Native American tribes have usually been able to reach satisfactory agreements. However, disagreements have been on the rise and, as demonstrated by the decision in *South Dakota*, state and local government advocates are finding significant sympathy for their concerns.

D. Conclusion

The concerns of state and local governments are genuine. However, they are also somewhat exaggerated. Most of the concerns focus on Indian gaming. In locations where gaming is not driving the expansion, those governments have no major cause for fear. The slower pace of development in such situations should allow for the accommodation of competing interests as parties adjust to changing circumstances. Trust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts.

Nonetheless, gaming is visible and is energizing efforts to "reform" regulation of Native Americans. Indian gaming has created a popular impression of Native American nations as economically vibrant; with a few exceptions, such as the Pequots (who number only 300), this is not the case. As a group, Native Americans remain impoverished and their primary access to development comes through trust land. According to Assistant Interior Secretary Ada Deer, only twenty of the more than 500 federally recognized tribes are "'doing fairly well,'" with gaming operations supporting only one percent of Native Americans.¹⁹²

The proper balance between government and Native Americans in this emerging area of conflict is uncertain and likely to be dependent on local circumstances. Both sides have concerns about sovereignty, beyond simple economic and regulatory competition, which may make each side more determined. What is clear is that if changes in the current arrangement are to

191. This frustration is symbolized by the broad attack made by the plaintiffs in *South Dakota*. Their substantive claims, if accepted, are sufficient to defeat not only the case at hand, but the entire scheme of trust land management.

192. McAllister, *supra* note 164.

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be made, it is the federal government's prerogative to do so. So far, Washington has been content to encourage ad hoc compacts between Native Americans and state and local governments. These governments do not seem particularly satisfied with this arrangement and continue to press for reform. The *Portland Oregonian* summarized the desires of many state and local governments by asking the BIA to "ask the tribes and all governments affected by an Indian land-trust application to resolve their differences through negotiation before it gives [its] approval."¹⁹³ The federal government may have to move in that direction.

Last year, Congress reformed the Indian Gaming Regulatory Act of 1989,¹⁹⁴ responding to State pressure to grant them greater authority to regulate Native American gaming. Section 465 may be next. On June 21, 1995, Senator Joseph Lieberman (D-CT) introduced the "Indian Trust Lands Reform Act of 1995."¹⁹⁵ The Senator's bill seeks to differentiate between economically successful tribes, particularly those involved in gambling, whose further trust acquisitions are merely new investments and those tribes still struggling to get on their feet economically. The bill "would prohibit the Secretary of Interior from taking any lands located outside of the boundaries of an Indian reservation in trust on behalf of an economically self-sufficient Indian tribe, if those lands are to be used for gaming or any other commercial purpose."¹⁹⁶ The proposal thus adds a new consideration, tribal self-sufficiency, to the process of reviewing trust land requests. The Secretary of Interior would have to promulgate regulations in accordance with procedures of the Administrative Procedure Act¹⁹⁷ "to prescribe the criteria that shall be used to determine the economic self-sufficiency of an Indian tribe . . .";¹⁹⁸ the bill requires that those regulations must include assessment of the income of the tribe and "the role that the lands at issue will play in the tribe's efforts to achieve economic self-sufficiency."¹⁹⁹ Senator Lieberman's proposal may be a sensible initiation of a needed review of the trust land system. While the concerns of state and local governments are not always substantial, they are genuine, and in situations where gambling is an important factor the tensions over trust land are growing steadily.

Nevertheless, the Senate has not yet acted on Senator Lieberman's proposal. The *South Dakota* decision invalidating section 465, even if reversed,

193. *Indian Gaming Profits Put Neighborly Relations at Risk*, *supra* note 177.

194. See *Sovereignty Issues in the Regulation of Indian Gaming*, *supra* Part I; see also Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107 (1995).

195. S.952, 104th Cong., 1st Sess. (1995); see also Sen. Lieberman's introductory remarks on the bill, 141 CONG. REC. S.8822 (daily ed. June 27, 1995).

196. Remarks of Sen. Lieberman, *id.* at S.8823.

197. 5 U.S.C. §553 (1994).

198. S.952, 104th Cong., 1st Sess. (1995).

199. Remarks of Sen. Lieberman, 141 CONG. REC. S.8822.

may be a sufficient inducement for congressional action.²⁰⁰ As the federal government begins to consider Native American regulatory issues in earnest, it will need to keep a number of concerns in mind, not the least of which is the historical commitment to preserve and advance Native American interests. While gaming success has often generated vocal responses from affected non-Indian communities, Congress and the Department of the Interior should not forget that gaming is not an issue for the vast number of Native Americans whose interests they guard. Attention to gaming controversies should not lead to ill-considered reform of the entire Native American development scheme of which trust land has become a necessary part.

— Julian Schreibman

200. The decision in *South Dakota* demonstrates a surprising willingness to skip over administrative reforms such as those proposed by Sen. Lieberman. The parties in *South Dakota* appear to have expected the case to focus on issues of administrative law. Judge Murphy noted that the appeal had originally centered on the reviewability of the Department's decisions under elements of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). *South Dakota*, 69 F.3d at 885 (Murphy, J., dissenting) ("Rather than addressing the jurisdictional issue, the majority stretches to consider the constitutionality of the underlying statute. . . . Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the plaintiffs.").