



Is Federal Indian Law Unconstitutional?

National Indian Health Board
35th Annual National Tribal Health Conference
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Commerce Clause

- "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Equal Protection Clause, 14th Amendment

- Prohibits a state from denying any person within its territory the equal protection of the laws.
- Federal Government must do the same, but this is required by the Fifth Amendment Due Process.

Rational Basis

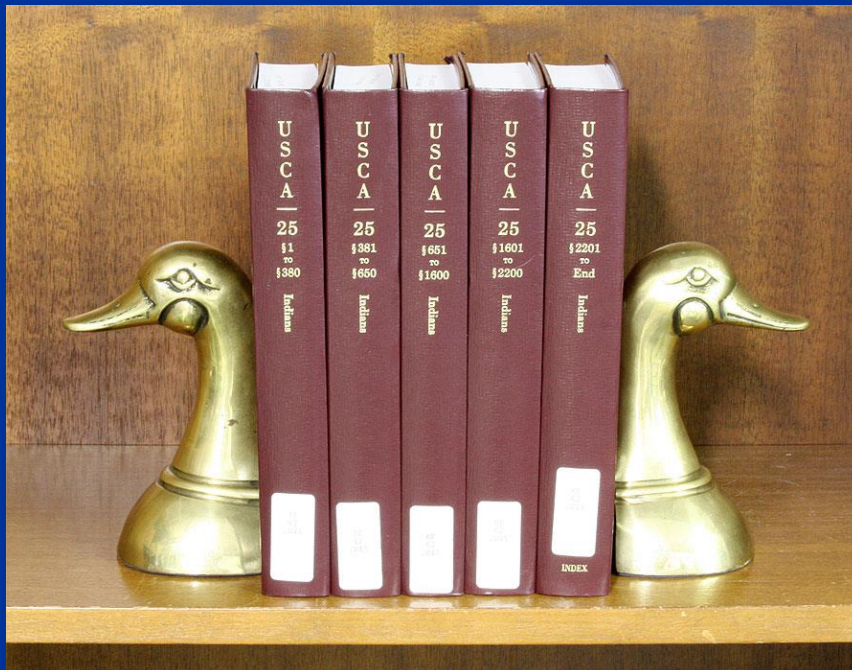
- Rational basis review. Is the law “rationally related” to a “legitimate” government purpose.

Strict Scrutiny

- Strict scrutiny; the government must prove that the law is **narrowly tailored** to advance a **compelling government interest**.
- “suspect class” or burdens one’s right to exercise a “fundamental right.”

Morton v. Mancari

- Morton v. Mancari (rational basis test)
 - Gov't purpose must be “legitimate”
 - Means used must be “rationally related”
 - Political Relationship Between US and Tribes



FY 2017 Signing Statement

- My Administration shall treat provisions that allocate benefits on the basis of race, ethnicity, and gender (e.g., ... Division K, under the heading “Native American Housing Block Grants”; ...) in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution’s Fifth Amendment.
- Donald J. Trump,
May 5, 2017.

CMS “Civil Rights” Concern

- On January 17, 2018, CMS Director Brian Neale wrote that CMS **could not approve exempting IHS beneficiaries** from mandatory Medicaid work and community engagement requirements. because CMS is “concerned that requiring states to exempt AI/ANs could raise **civil rights concerns.**”

INDIAN HEALTH CARE IMPROVEMENT ACT

- Bush DOJ releases “white paper” opposing bill -
Uses Adarand Case – argues Urban Indian
programs are unconstitutional
- One Senator questions “Why is there a separate
Indian Health Service?” Isn’t this race-based
legislation?”

Indian Child Welfare Act

- Supreme Court in Baby Veronica limits application of the Indian Child Welfare Act
- Four briefs argued that ICWA was unconstitutional.
- The decision, a concurrence and the dissent all referenced the question of whether ICWA was constitutional, although the decision was not decided on that point.

Texas v. Zinke

- Judge interested in the **equal protection** arguments.
- Asked Feds what the Supreme Court had meant when it referred in *Adoptive Couple* to possible “equal protection concerns,”
- Asked about language in both *Mancari* and *Cayetano* that seemed to limit the *Mancari* “political classification” principle to on- and near reservation Indians.

Texas v. Zinke

- He asked Feds to argue how ICWA might survive **strict scrutiny** if the court held that it operated on the basis of race;
- Feds said they would want additional time to brief this issue,
- Judge noted that Plaintiffs had briefed strict scrutiny and that Defendants had not

Justice Clarence Thomas



U.S. v. Lara, April 19, 2004

- Justice Thomas: “As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases ... In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.”
- “I do not necessarily agree that the tribes have any residual inherent sovereignty...”
- “I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs . . . And I would be willing to revisit the question.”

NEW YORK TIMES BESTSELLER



NOTORIOUS RBG

THE LIFE AND TIMES OF
RUTH BADER GINSBURG

IRIN CARMON & SHANA KNIZHNIK

Upper Skagit v Lundgren

- Justice Ginsburg: “Is it not the case that no other political entity would be immune from such a – from such a quiet title suit, not the United States, not a state of the United States, not a foreign government? So you are claiming a kind of **super-sovereign** immunity for the tribe that no – no one else gets.”

ARE INDIAN PREFERENCES “UNCONSTITUTIONAL”?

- So says the President of the Mountain States Legal Foundation – William Perry Pendley
 - *Adarand v. Peña* (Equal Protection strict scrutiny test)
 - Gov’t purpose must be “compelling”
 - Means used must be “narrowly tailored”

U.S. 10th Circuit Court of Appeals

ADARAND CONSTRUCTORS v PENA

Appeal from the United States District Court
for the District of Colorado

...

(D.C. No. 90-K-1413)

Leslie A. Simon, Department of Justice (Mark L. Gross, Department of Justice; Nancy E. McFadden, General Counsel, Paul M. Geier, Assistant General Counsel for Litigation, Sara McAndrew, Trial Attorney, Edward V.A. Kussy, Acting Chief Counsel, Federal Highway Administration, Department of Transportation; Isabelle Katz Pinzler, Acting Assistant Attorney General; Thomas E. Perez, Deputy Assistant Attorney General; and William R. Yeomans, Acting Deputy Assistant Attorney General, with her on the briefs), Washington, D.C., for Defendants - Appellants.

William Perry Pendley (Todd S. Welch, with him on the brief), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff - Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

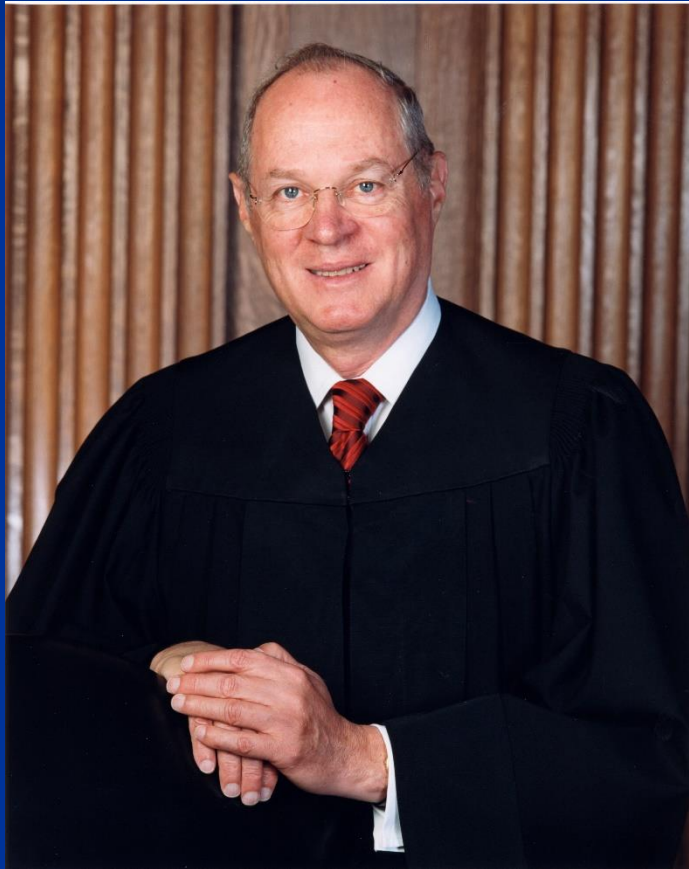
William C. McNeill, III and Julian A. Gross for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie A. Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before LUCERO, McKAY and MURPHY, Circuit Judges.

Justice Kennedy Scorecard

5 Pro & 3 Against



CASE
Dollar General Corp. v. Mississippi Band of Choctaw Indians (ASSUMED)
U.S. v. Bryant
Nebraska v. Parker
Michigan v. Bay Mills Indian Cmty
Adoptive Couple v. Baby Girl
Match-E-Be-Nash-She-Wish Band v. Patchak
Salazar v. Ramah Navajo Chapter
U.S. v. Jicarilla Apache Nation

Kavanaugh on Native Hawaiians



Bluejackets of the USS Boston during overthrow of Hawaiian Kingdom - 1893



Native Hawaiian Recognition

- Rhetoric used to defeat Native Hawaiian bill could arguably be applied to Indian tribes:
 - Hawaiian recognition undermines belief that we are one people among many
 - Establishing a Native Hawaiian government would give its citizens rights other Americans do not have
 - Native Hawaiian recognition is racially divisive

Statement of Bush Administration Policy

- Issued October 22, 2007
- “The Administration strongly opposes passage of H.R. 505....’we must ... honor the great American tradition of **the melting pot**, which has made us one nation out of many peoples.”
- “H.R. 505 raises significant constitutional concerns that arise anytime legislation seeks to separate American citizens **into race-related classifications rather than according to their own merits and essential qualities.**”

Violence Against Women Act

- VAWA Tribal Provision
 - Partially Overturns Oliphant Case



Women – VAWA Tribal Provision

- Greatest lobbying triumph for Indian Country in decades
- Tremendous resistance . . . On allegedly constitutional grounds: Senator Kyl: "by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race," the tribal jurisdiction provision "would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process."

Senate Indian Affairs Committee

“No” Votes – A Different View of Tribal Sovereignty

- Senator John Barrasso
- Senator John McCain
- Senator John Hoeven
- Senator Deb Fischer

ent for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is dis-

International Rwanda. This p the Foreign Op Act, which wa President Bush authorized about clear that the U

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

ayetano, at 517.

Under Section 7, the enrolled race-based members are empowered to elect an Interim Governing Council from one of their own, another race-based voting distinction that is

OBAMA, on the if he agrees.

Mr. OBAMA. Senator from V

Termination Thinking

- Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship....

- Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now
Therefore ...

DECEMBER 16, 2002

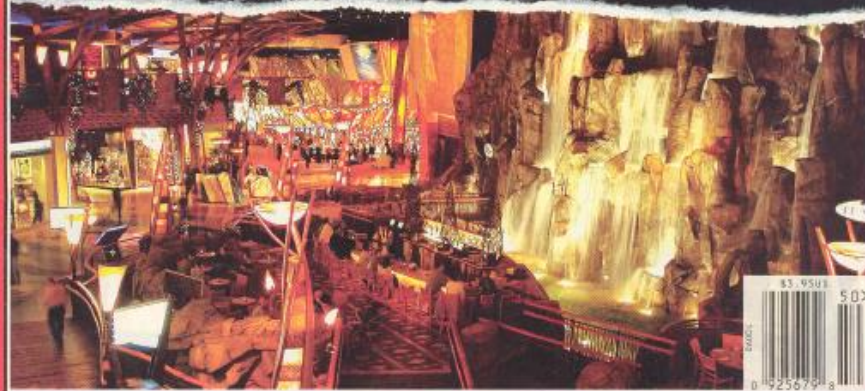
www.time.com AOL Keyword: TIME



LOOK WHO'S CASHING IN AT INDIAN CASINOS

HINT: It's not the people who are supposed to benefit

SPECIAL INVESTIGATION BY DONALD L. BARLETT AND JAMES B. STEELE



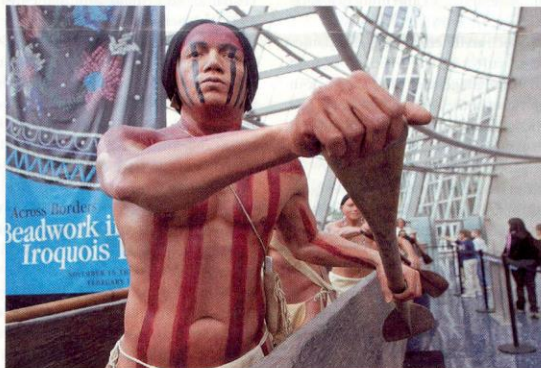
THE FESTERING PROBLEM OF INDIAN "SOVEREIGNTY"

The Supreme Court ducks.
Congress sleeps. Indians rule.

BY JAN GOLAB

Foxwoods, the King Kong of casinos, was brought to Connecticut with dreams of untold riches. Now, locals are trying to kill the beast. Foxwoods and its sister institution, Mohegan Sun, (the world's two most profitable casinos), pay host state Connecticut a hefty \$400 million a year—one fourth of the take. Yet in 2003, Connecticut became the first state in the country to pass legislation designed to halt any future casino development. The measure passed unanimously, not exactly a ringing endorsement for Indian gambling institutions. "Another gambling palace anywhere in the state would be disastrous," the *Hartford Courant* warned in an editorial. "The state must stop this slot-machine tsunami."

Jeff Benedict is president of the Connecticut Alliance Against Casino Expansion, and the author of *Without Reservation*, a book about the Mashantucket Pequot Indians and their Foxwoods casino. "Casino money costs us a lot more than it's worth," Benedict argues. He recites a litany of woes: Casinos have a negative impact on roads, water and land consumption, fire, police, ambulance service, air pollution, and traffic. Local school systems are flooded with the children of low-income casino workers, who also create a shortage of affordable housing. And there are social costs—increased bankruptcies, foreclosures, divorces, child abuse, and crime. "The closer a community gets to a casino, the higher those numbers are," says Benedict. "Who pays for that? The local and state governments."



Awash in tribal money: a model canoe on display inside the \$193 million Mashantucket Pequot Museum and Research Center in Connecticut.

Casinos cause property devaluation and lost taxes when businesses and lands are taken over by tax-exempt tribes. While casino owners argue that they create jobs and help neighboring businesses, the casinos (which, as Indian enterprises, do not have to pay the same taxes or abide by the same laws as other establishments) actually damage competing businesses nearby—restaurants, bars, hotels, retail outlets. "When the Indian casino comes to town, nobody else does well," says Benedict.

Except for the lawyers. The Pequots have subjected their host state and local governments to a decade of legal battles over tribal land annexation, environmental and land-use regulations, and sovereign immunity from lawsuits and police jurisdiction. Local communities have spent millions litigating against further casino expansion. Twelve more would-be "tribes" are petitioning the Bureau of Indian Affairs for federal tribal status, and new land claims threaten over one third of Connecticut's real estate.

Another book on Foxwoods, *Hitting the Jackpot*, by Wall Street reporter Brett Fromson, explains how a "tribe" that disappeared 300 years ago resurrected itself and won a gambling monopoly now worth \$1.2 billion a year. Like Benedict, Fromson concludes that the re-created Pequot tribe is illegitimate, a polit-

California reporter Jan Golab has written about Indian issues since 1983. His earlier in-depth exploration of Indian gambling appeared in the January/February 2004 issue of *The American Enterprise*.

Off the Rez

It's time to close the Indian reservations

JOHN J. MILLER

If you want to start a business on the reservation, here's what you have to do," says Mark St. Pierre, executive director of the Pine Ridge Chamber of Commerce, on the Pine Ridge Indian Reservation in South Dakota. "First you have to go to the tribal government to see if there's an appropriate piece of land for you. Nothing's been set aside for business development, so this is harder than it sounds. If you do identify a piece of land, you apply for a five-year lease, which won't help you with the banks because they prefer 25-year leases. Next, your application goes before the tribal land committee, which often doesn't have a single businessperson on it. This part can get very political, and it matters who's in your family. If the committee approves your application, then it must go before the Bureau of Indian Affairs. This is usually a rubber stamp, except that it can take months or more than a year before you actually receive it. If the BIA signs off, you're finally done. And what does it give you? A short-term lease on a bare piece of prairie."

It's no wonder, then, that few businesses get started on the Pine Ridge reservation. The reservation's boundaries box in an area about the size of Rhode Island, just south of the desolate Badlands. Nowhere in its rolling spaces is there a store to buy shoes. There's not a single bank, hotel, or movie theater within its borders, either. Many of its tiny towns don't even have a barbershop. Yet the place is home to about 41,000 Lakota Indians (also known as the Oglala Sioux). They are the direct descendants of Crazy Horse, Red Cloud, and Sitting Bull—some of the fiercest fighters to roam the Great Plains. Yet none of them can walk into a store on their own reservation and purchase a pair of pants, because nobody sells them.

Most communities of any size have a chamber of commerce building. St. Pierre makes do in just a single room, with two desks, a table, and a dry-erase chalkboard. Sometimes

there's nobody around to answer the phone, which isn't a big problem because there aren't too many incoming calls. St. Pierre works hard at what he does—his chamber has grown to nearly a hundred members since it was founded three years ago—but it's tough to get recognition. "If there's a chamber of commerce at Pine Ridge, I haven't heard about it," says David Owen, president of the state chamber.

THE POVERTY ARCHIPELAGO

While there may be a chamber at Pine Ridge, there isn't much in the way of commerce. The rez itself is a grab bag of

mortifying statistics. In the 1990s, the poorest county in America, as determined by the Census Bureau, was wholly contained within its boundaries. Unemployment is currently at 88 percent. About one-third of its households don't have electricity or indoor plumbing. The place is supposedly dry—it's against tribal law even to possess a can of Budweiser—but alcoholism is rampant. The town of Whiteclay, just across the border in Nebraska, isn't really a town at all; it's a glorified liquor stand catering to carloads of thirsty Indians. Traffic accidents are a leading cause of death at Pine Ridge, because of all the drunk driving. The typical Lakota male can expect to live a few months shy of his 57th birthday; women get about a decade longer. In the Western Hemisphere, only Haitians fare worse.

What may be most depressing about Pine Ridge, however, is that it's not unique in Indian country. It's the second-biggest reservation in the nation, and many of its problems afflict other tribes as well. To be sure, a handful of reservations seem to succeed, even among those that don't cash in on lucrative casino operations (and most don't). On the whole, however, reservations are rural slums—demographic disaster areas in which the economy shows few signs of life. Through a suffocating combination of government meddling,

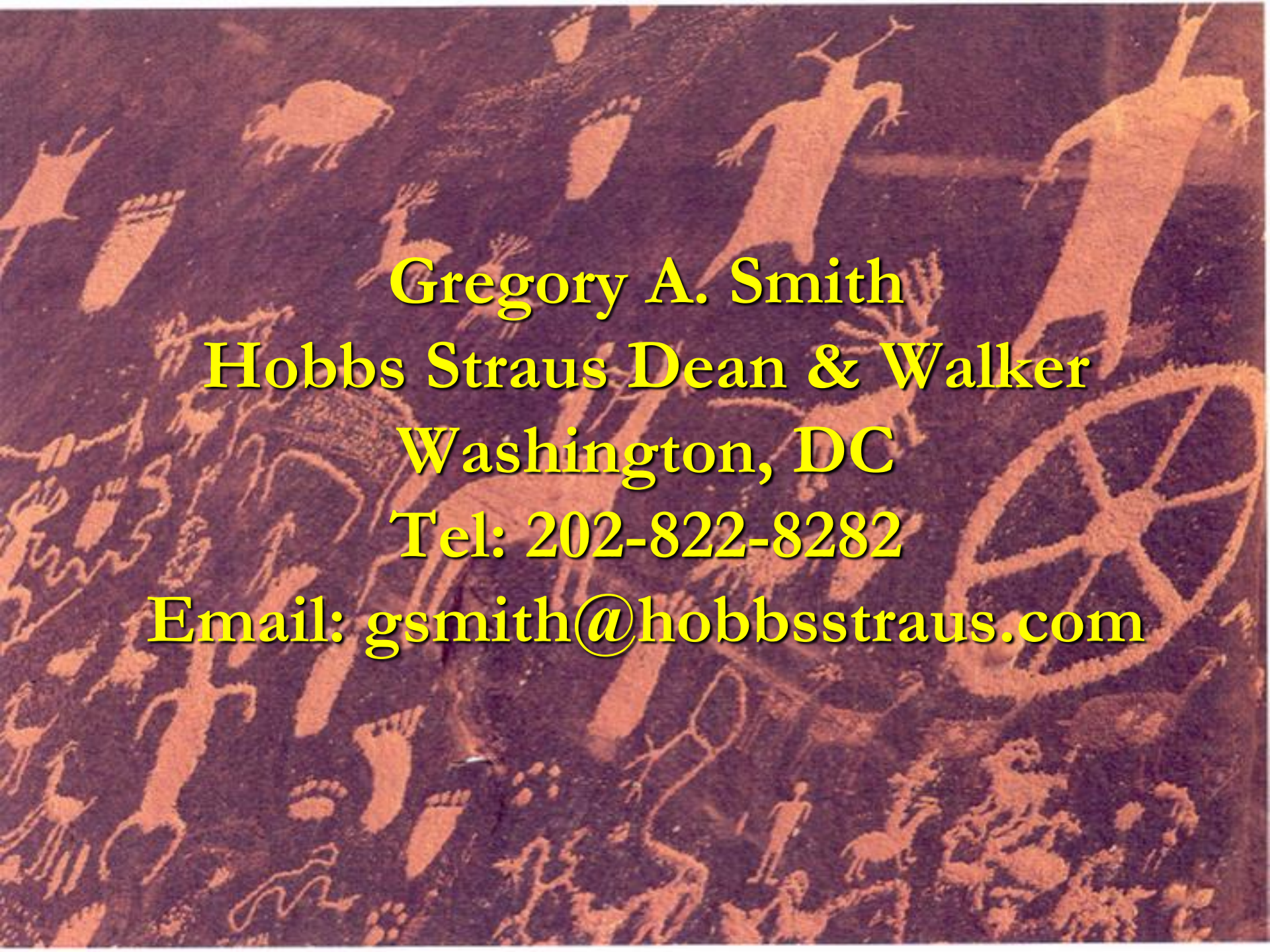


Senator Paul Rand

- **S.162 -- Cut Federal Spending Act of 2011 (Placed on Calendar Senate - PCS)**
- Mr. PAUL introduced the following bill; which was read the first time
- *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
- **SEC. 7. EDUCATION.**
- All Department of Education programs are defunded effective on the date of enactment of this Act, except for the Pell grant program which shall be capped at \$16,256,000,000.
- **SEC. 9. HEALTH AND HUMAN SERVICES.**
- (a)
- (3) **INDIAN HEALTH SERVICE-** Amounts made available to the Indian Health Service for fiscal year 2011 are reduced by \$650,000,000.
- **SEC. 11. HOUSING AND URBAN DEVELOPMENT.**
- (a) Defunding- Except as provided in subsection (b), all accounts and programs of the Department of Housing and Urban Development are defunded effective on the date of enactment of this Act.
- (b) Transfer- Effective on the date of enactment of this Act, Veteran housing programs administered by the Department of Housing and Urban Development are transferred to Department of Veterans' Affairs.
- **SEC. 12. INTERIOR.**
- (5) **REPEAL-** All accounts and programs of the Bureau of Indian Affairs are defunded effective on the date of enactment of this Act.

Tribal Leaders Defy “Progress of Civilization” Tympanum





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