

2009 – 2010
Teacher's Memorandum to accompany
Getches, Wilkinson & Williams

FEDERAL INDIAN LAW
(5th ed. 2004)

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INTRODUCTION

Since the publication of **Federal Indian Law: Cases and Materials (5th ed. 2004)**, there have been several important court decisions and other developments that are relevant to the course. Thus, this memorandum has been prepared to provide supplemental materials that update or, in some cases, alter the materials in the fifth edition. This memorandum brings the fifth edition up-to-date as of the end of July 2009. You should feel free to use this memorandum in any way that you may find helpful.

Included in this memorandum are edited versions of the United States Supreme Court's 2009 decisions in *United States v. Navajo Nation*, *Carcieri v. Salazar*, and *Hawaii v. Office of Hawaiian Affairs*, the 2008 decision in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the 2006 decision in *Wagon v. Prairie Band Potawatomi Nation*, and the Court's 2005 decision in *City of Sherrill v. Oneida Indian Nation*. The Court's 2005 decision in *Cherokee Nation of Oklahoma v. Leavitt* is noted as well in this memorandum.

In addition to these Supreme Court cases, developments in several other lower court cases covered in the fifth edition, including *Cobell* and the *Harjo* Washington "Redskins" trademark decision, are updated in this memorandum. Other cases with broad implications for Indian country are added, including the Ninth Circuit's recent decision in *Marceau v. Blackfeet Housing Authority* (sovereign immunity under a tribal corporate charter), the Tenth Circuit's decision in *United States v. Friday* (a constitutional challenge to the National Eagle Repository), the D.C. Circuit's decision in *San Manuel Indian Bingo and Casino v. NLRB* (whether the National Labor Relations Act applies to tribal gaming operations), and *Texas v. United States* (Class III Gaming Compact Procedures promulgated in order to remedy the result in *Seminole Tribe*).

As well, the approved text of the United Nations Draft Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly Human Rights Council on September 13, 2007, is also included in this memorandum.

Comments on the 2009-2010 memorandum and on the 5th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan (FAX# 517-432-6879); e-mail matthew.fletcher@law.msu.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon Getches, Wilkinson, and Williams, **Federal Indian Law: Cases and Materials (5th ed. 2005)**.

Matthew Fletcher

East Lansing, Michigan
August 2009

Chapter One

INTRODUCTION: INDIANS AND INDIAN LAW

SECTION B. AMERICAN INDIANS TODAY—AN OVERVIEW

Page 17, add to the end of note 3:

A thorough analysis of the 1990 and 2000 Indian census data can be found in Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* (2005), published by the Harvard Project on American Indian Economic Development.

The analysis by Taylor and Kalt highlights the tremendous changes experienced by Indians living on reservations during a period of increasing tribal self-determination and the expansion of gaming activities under the Indian Gaming Regulatory Act of 1988. Key trends in the U.S. Census data include:

- Indian population rose by more than 20% between 1990 and 2000. Having started the 1990s with incomes lagging significantly behind the general U.S. population, reservation Indians experienced substantial growth in income per capita. Real (inflation-adjusted) per capita Indian income rose by about one-third. For both gaming and non-gaming tribes, the overall rate of income growth was significantly higher than the 11% increase in real per capita income for the U.S. as a whole.
- From 1990 to 2000, family poverty dropped eight-tenths of a percentage point for the U.S. as a whole. But in Indian country, Indian family poverty rates dropped by seven percentage points or more in non-gaming areas, and by about ten percentage points in gaming areas.
- U.S. unemployment dropped by half a percentage point during the period. Indian unemployment rates dropped by about two-and-a-half percentage points in non-gaming areas and by more than five percentage points in gaming areas.
- Housing overcrowding on the reservation decreased from 1990 to 2000. The percentage of American Indians living in homes with plumbing increased significantly in both gaming and non-gaming areas.
- The proportion of adult Indians on reservations with less than a ninth grade education declined substantially. The proportion of Indian adults with college degrees rose substantially.

The report, its underlying data, and the annotated bibliography can be accessed on the Harvard Project's website, www.ksg.harvard.edu/hpaied/key.htm.

Chapter Two

THE EUROPEAN DOCTRINE OF DISCOVERY AND AMERICAN INDIAN RIGHTS

SECTION C. UNITED STATES COLONIZING LEGAL THEORY

Add to the end of page 71:

Professor Matthew L.M. Fletcher offers a rebuttal of Professor Kades' theory, arguing that a result opposite to that reached in *Johnson v. M'Intosh* is at least as efficient:

The transaction costs in the "efficient" world Kades describes (which is what actually happened) would seem to be higher than in the alternative world. In the Kades world, the United States negotiators do not believe that their negotiating partners, the Indians, retain title to their lands. At worst, they treat the negotiations as a joke or a salve to placate the Indians; at best, they drive a hard bargain on price, safe in the knowledge that the Indians don't have a leg to stand on in terms of title or that the Indians would soon die off from disease or starvation. After the sale, the United States and the American citizens still don't think the Indians own title to the land they retain, so they tend to disrespect the borders of retained Indian lands. Moreover, because they sold the land for such a low price and under other harsh terms, the Indians' welfare declines. Conflict ensues, with the Americans feeling righteously indignant because they know that the Indians don't own the land they're claiming. The Indians, having nothing to lose, fight to extermination. Kades, somehow, argues that this is the more efficient outcome.

In the alternate world, where the *Johnson* rule is reversed, despite Kades' thesis, transaction costs would be lower or, at worst, equivalent. In this world, the United States negotiators treat the negotiations as real, as a legitimate attempt to reach a meeting of the minds. The land purchase agreements are more evenly weighted, with higher prices for the land and better terms, allowing the Indians to better fend for themselves on their retained lands. Federal officials, one would hope, respect the land interests of the Indians more because they own their land. The "measured separatism" of the time could come to fruition, in theory, depending on the Americans' willingness to quench their greed and attitudes toward expansion.

Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 686-693 (2006).

Chapter Four

A CENTURY OF SHIFTING POLICY

SECTION A. ALLOTMENTS AND ASSIMILIATION (1871 – 1928)

Page 175, add to the end of note 4:

Congress again amended the Indian Land Consolidation Act (ILCA) in 2004, *see* American Indian Probate Reform Act of 2004, P.L. 108-374 (codified at 25 U.S.C. A. §2201 *et. seq.*). The new amendments seek to encourage the development of tribal probate codes, approved by the Secretary of the Interior under guidelines set out by Congress in the legislation. In the absence of a will, trust property descends according to an approved tribal code. In the absence of a will and an approved tribal probate code, a uniform probate code will be applied under ILCA that replaces the problematic automatic escheat provisions of earlier versions of the legislation. Surviving spouses receive a life estate in the decedent's trust lands. If there is no surviving spouse then only after a list of potential eligible heirs, including lineal descendants down to great grandchildren, parents, and siblings, is exhausted, does the land escheat to the tribe. The 2004 amendments do provide however for a co-owner of the property to acquire the decedent's interest by paying fair market value to the estate. In addition to these consolidating mechanisms, the amendments also authorize funding for Bureau of Indian Affairs Land Consolidation Offices to acquire fractional interests and legal services corporations to write wills for individual Indians.

SECTION D. THE ERA OF SELF-DETERMINATION (1961 TO PRESENT)

4. THE SUPREME COURT AS DEFENDER OF "SPECIAL" TRIBAL RIGHTS

Page 255, add to the end of the notes, before the Wilkinson excerpt:

Professor Matthew L.M. Fletcher in an editorial to Indian Country Today suggested that the *certiorari* process – the process by which the Supreme Court decides which cases to hear – may discriminate against tribal interests. *See* Matthew L.M. Fletcher, *Supreme Court's Clerks Find Indian Law Unimportant*, INDIAN COUNTRY TODAY, Dec. 28, 2007, <http://www.indiancountry.com/content.cfm?id=1096416372>:

Each year, the U.S. Supreme Court chooses which appeals it wishes to decide. In most years, the court decides to hear fewer than 80 cases out of several thousand appeals. These usually include cases in which there is a split of authority in lower courts (often called a "circuit split," referencing the 13 federal circuit courts of appeals), cases in which a lower court has committed a gross error or cases in which there is a critical

constitutional issue at stake. Cases in which there is no split, cases that will affect only a few people, cases involving simple correction of a minor lower court error or cases involving an unimportant issue are unlikely to be heard by the court.

At least, this is true in theory. But Indian law seems to be different. Consider the following examples:

* In the early 1990s, the Western Shoshone National Defense Council brought a claim in federal court alleging that the state of Nevada's hunting regulations had infringed on the tribe's aboriginal rights throughout most of the entire state. The federal 9th Circuit Court of Appeals, in dismissing the claim, applied the incorrect legal standard to the claim - a gross error. When the tribe appealed, the Supreme Court refused to hear the case.

* In the late 1980s, the state of South Dakota brought a similar suit in federal court against the Cheyenne River Sioux Tribe, arguing that the tribe did not have the authority to regulate hunting by small groups of non-Indians on a relatively small strip of land. The tribe won on most of the claims before the 8th Circuit. On South Dakota's appeal to the Supreme Court, the court agreed to hear the case.

In both cases, there was no lower split in lower court authority, so there had to be some other reason for the court to be persuaded to hear the case. In the case of the Western Shoshone, the affected individuals were tribal members, the affected area included much of the entire state of Nevada and the appellate court had made a fundamental error in its analysis. The Supreme Court declined to hear that case. In the Cheyenne River Sioux case, the affected individuals were non-Indians, the affected area was relatively small and the appellate court had merely followed prior precedent. But the Court decided to hear the state of South Dakota's appeal.

Why?

Since the 1980s, more and more justices have resorted to a pool of law clerks for a write-up of each appeal that includes a recommendation of whether the court should hear them using these factors. With the release of the late Supreme Court Justice Harry Blackmun's papers a few years back, the pool memos from the docket years 1986 to 1993 are available for study. The views of Supreme Court clerks in the pool memos are often the only written documentation of the court's views of the vast majority of appeals that are denied.

A review of these few hundred papers demonstrates that the court's process of reviewing potential appeals creates a structural barrier to the fair adjudication of federal Indian law cases. Because more than 80 percent of Indian law cases arise in the West, where there are only three federal circuit courts of appeals, few splits in authority arise, rendering most appeals "splitless." Moreover, Indian law fact patterns tend to apply to one tribe only, limiting the impact of the appeals. ...

What this means is that the clerks almost never recommend that the court decide to hear a case when the petitioner is an Indian tribe or an Indian because the petition is “splitless” or just unimportant. From 1986 to 1993, the court decided to hear one appeal out of more than 80 filed by Indian tribes and individual Indians.

Conversely, when a state or local government appeals a case it lost to a tribe or a tribal member, the court granted the petition around 75 percent of the time. Perhaps this is part of the explanation for why tribal interests have lost the vast majority of their cases before the court since 1987.

The classic case is a treaty rights case brought by a tribe. If the tribe loses below, the clerks will never find a split in authority because the treaty is unique, with fact situations unlikely to recur in other parts of the country. And Supreme Court clerks almost never find the petitions of Indians and Indian tribes to be independently important enough to be worthy of decision by the court. But if the tribe wins below, the opponents often are state governments, whose appeals are viewed as being important by the clerks almost by definition.

Chapter Five

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A. TRIBAL PROPERTY INTERESTS

Page 305, add to the end of note 1:

**CITY OF SHERRILL, NEW YORK v.
ONEIDA INDIAN NATION OF NEW YORK**
Supreme Court of the United States, 2005.
544 U.S. 197, 125 S. Ct. 1478

Justice GINSBURG delivered the opinion of the Court.

This case concerns properties in the city of Sherrill, New York, purchased by the Oneida Indian Nation of New York (OIN or Tribe) in 1997 and 1998. The separate parcels of land in question, once contained within the Oneidas’ 300,000-acre reservation, were last possessed by the Oneidas as a tribal entity in 1805. For two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units. In *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226 (1985) (*Oneida II*), this Court held that the Oneidas stated a triable claim for damages against the County of Oneida for wrongful possession of lands they conveyed to New York State in 1795 in violation of federal law. In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN’s acquisition of fee title to discrete parcels of historic reservation land revived

the Oneidas' ancient sovereignty piecemeal over each parcel. Consequently, the Tribe maintains, regulatory authority over OIN's newly purchased properties no longer resides in Sherrill.

Our 1985 decision recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit. Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

I

A

OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), "one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution." *Id.*, at 230. At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York. *Ibid.* In the years after the Revolutionary War, "the State of New York came under increasingly heavy pressure to open the Oneidas' land for settlement." *Oneida II*, 470 U.S., at 231. Reflective of that pressure, in 1788, New York State and the Oneida Nation entered into the Treaty of Fort Schuyler. For payments in money and kind, the Oneidas ceded to New York "all their lands." [Pet. for Cert]. Of the vast area conveyed, "[t]he Oneidas retained a reservation of about 300,000 acres," *Oneida II*, 470 U.S., at 231, "for their own use and cultivation." [Pet. for Cert.].¹

B

¹ Under the "doctrine of discovery," *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 234 (1985) (*Oneida II*), "fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States," *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 667 (1974) (*Oneida I*). In the original 13 States, "fee title to Indian lands," or "the pre-emptive right to purchase from the Indians, was in the State." *Id.*, at 670. Both before and after the adoption of the Constitution, New York State acquired vast tracts of land from Indian tribes through treaties it independently negotiated, without National Government participation.

This***present case***concerns parcels of land in the city of Sherrill, located in Oneida County, New York. According to the 2000 census, over 99% of the population in the area is non-Indian: American Indians represent less than 1% of the city of Sherrill's population and less than 0.5% of Oneida County's population. OIN owns approximately 17,000 acres of land scattered throughout the Counties of Oneida and Madison, representing less than 1.5% of the counties' total area. OIN's predecessor, the Oneida Nation, had transferred the parcels at issue to one of its members in 1805, who sold the land to a non-Indian in 1807. The properties thereafter remained in non-Indian hands until OIN's acquisitions in 1997 and 1998 in open-market transactions. OIN now operates commercial enterprises on these parcels: a gasoline station, a convenience store, and a textile facility.

Because the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, OIN maintained that the properties are exempt from taxation, and accordingly refused to pay the assessed property taxes. The city of Sherrill initiated eviction proceedings in state court, and OIN sued Sherrill in federal court. In contrast to *Oneida I* and *II*, which involved demands for monetary compensation, OIN sought equitable relief prohibiting, currently and in the future, the imposition of property taxes. OIN also sued Madison County, seeking a declaration that the Tribe's properties in Madison are tax exempt. The litigation involved a welter of claims and counterclaims. Relevant here, the District Court concluded that parcels of land owned by the Tribe in Sherrill and Madison are not taxable.

A divided panel of the Second Circuit affirmed. ***

We granted the city of Sherrill's petition for a writ of certiorari, and now reverse the judgment of the Court of Appeals.

II

OIN and the United States argue that because the Court in *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels. When the Oneidas came before this Court 20 years ago in *Oneida II*, they sought money damages only. The Court reserved for another day the question whether "equitable considerations" should limit the relief available to the present-day Oneidas. *Id.*, at 253, n. 27.

"The substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." D. Dobbs, *Law of Remedies* § 1.2, p. 3 (1973). "[S]tandards of federal Indian law and federal equity practice" led the District

Court, in the litigation revived after *Oneida II*, see *supra*, at 1487-1488, to reject OIN's plea for ejectment of 20,000 private landowners. *Oneida Indian Nation of N. Y.*, 199 F.R.D., at 90 (internal quotation marks omitted). (“[T]here is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right ...”). In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations.⁷ We now reject the unification theory of OIN and the United States and hold that “standards of federal Indian law and federal equity practice” preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.⁸

The appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory. From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State. In fact, the United States' policy and practice through much of the early 19th century was designed to dislodge east coast lands from Indian possession. Moreover, the properties here involved have greatly increased in value since the Oneidas sold them 200 years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill. *Oneida II*, 470 U.S., at 264-265. (STEVENS, J., dissenting in part).

This Court has observed in the different, but related, context of the diminishment of an Indian reservation that “[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,” may create “justifiable expectations.” *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605, (1977). Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here.

The wrongs of which OIN complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation.¹¹ This long lapse of time, during which the Oneidas did not seek to

⁷ The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

⁸ We resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus “fairly included” within, the questions presented. See this Court's Rule 14.1(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”).

¹¹ The fact that OIN brought this action promptly after acquiring the properties does not overcome the Oneidas' failure to reclaim ancient prerogatives earlier or lessen the problems

revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.

The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief. See, e.g., *Badger v. Badger*, 2 Wall. 87, 94, (1865) (“[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.”)

As between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory. *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973) (“The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter’s title and rightful authority.” (quoting *Michigan v. Wisconsin*, 270 U.S. 295, 308, (1926))). The acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary. *California v. Nevada*, 447 U.S. 125, 131 (1980).

This Court’s original-jurisdiction state-sovereignty cases do not dictate a result here, but they provide a helpful point of reference: When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor “the historic wisdom in the value of repose.” *Oneida II*, 470 U.S., at 262 (STEVENS, J., dissenting in part).

Finally, this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. See *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) (“It is impossible ... to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers...”). The District Court, in the litigation dormant during the pendency of *Oneida II*, rightly found these pragmatic concerns about restoring Indian sovereign control over land “magnified exponentially here,

associated with upsetting New York’s long-exercised sovereignty over the area. OIN’s claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality.

where development of every type imaginable has been ongoing for more than two centuries.” *Oneida Indian Nation of N. Y.*, 199 F.R.D., at 92.

In this case, the Court of Appeals concluded that the “impossibility” doctrine had no application because OIN acquired the land in the open market and does not seek to uproot current property owners. But the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine. The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State-- created unilaterally at OIN’s behest--would “seriously burde[n] the administration of state and local governments” and would adversely affect landowners neighboring the tribal patches. *Hagen*, 510 U.S., at 421 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471-472, n. 12 (1984)). If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.

Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area’s governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land “shall be exempt from State and local taxation.” See *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe’s need for additional land; “[t]he purposes for which the land will be used”; “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls”; and “[j]urisdictional problems and potential conflicts of land use which may arise.” 25 CFR § 151.10 (2004). Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.

In sum, the question of damages for the Tribe’s ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*. However, the distance from 1805 to the present day, the Oneidas’ long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice SOUTER, concurring.***

Justice STEVENS, dissenting.

This case involves an Indian tribe's claim to tax immunity on its own property located within its reservation. It does not implicate the tribe's immunity from other forms of state jurisdiction, nor does it concern the tribe's regulatory authority over property owned by non-Indians within the reservation.

For the purpose of its decision the Court assumes that the district Court and the Court of Appeals correctly resolved the major issues of fact and law that the parties debated in those courts and that the City of Sherrill (City) presented to us in its petition for certiorari. Thus, we accept those courts' conclusions that the Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe; that it is the successor-in-interest to the original Oneida Nation; that in 1788 the Treaty of Fort Schuyler created a 300,000 acre reservation for the Oneida; that in 1794 the Treaty of Canandaigua established that tract as a federally protected reservation; and that the reservation was not disestablished or diminished by the Treaty of Buffalo Creek in 1838. It is undisputed that the City seeks to collect property taxes on parcels of land that are owned by the Tribe and located within the historic boundaries of its reservation.

Since the outset of this litigation it has been common ground that if the Tribe's properties are "Indian Country," the City has no jurisdiction to tax them without express congressional consent. For the reasons set forth at length in the opinions of the District Court and the Court of Appeals, it is abundantly clear that all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country. Without questioning the accuracy of that conclusion, the Court today nevertheless decides that the fact that most of the reservation has been occupied and governed by non-Indians for a long period of time precludes the Tribe "from rekindling embers of sovereignty that long ago grew cold." This is a novel holding, and in my judgment even more unwise than the Court's holding in *County of Oneida v. Indian Nation of N.Y.*, 470 U.S. 226 (1985), that the Tribe may recover damages for the alleged illegal conveyance of its lands that occurred in 1795. In that case, I argued that the "remedy for the ancient wrong established at trial should be provided by Congress, not by judges seeking to rewrite history at this late date," *id.*, at 270, (opinion dissenting in part). In the present case, the Tribe is not attempting to collect damages or eject landowners as a remedy for a wrong that occurred centuries ago; rather, it is invoking an ancient immunity against a city's present-day attempts to tax its reservation lands.

Without the benefit of relevant briefing from the parties, the Court has ventured into legal territory that belongs to Congress. Its decision today is at war with at least two bedrock principles of Indian law. First, only Congress has the power to diminish or disestablish a tribe's reservation. Second, as a core incident of tribal sovereignty, a tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress. Far from revoking this immunity, Congress has specifically reconfirmed it with respect to the reservation lands of the New York Indians.⁴ Ignoring these principles, the Court as done what

⁴ In providing New York state courts with jurisdiction over civil actions between Indians, Congress emphasized that the statute was not to be "construed as subjecting the lands within any

only Congress may do – it has effectively proclaimed a diminishment of the Tribe’s reservation and an abrogation of its elemental right to tax immunity. Under our precedents, whether it is wise policy to honor the Tribe’s tax immunity is a question for Congress, not this Court, to decide.

As a justification for its lawmaking decision, the Court relies heavily on the fact that the Tribe is seeking equitable relief in the form of an injunction. The distinction between law and equity is unpersuasive because the outcome of the case turns on a narrow legal issue that could just as easily, if not most naturally, be raised by a tribe as a *defense* against a state collection proceeding. In fact, that scenario actually occurred in this case: The City brought an eviction proceeding against the Tribe based on its refusal to pay property taxes; that proceeding was removed to federal court and consolidated with the present actions; the District Court granted summary judgment for the Tribe; and the Court of Appeals affirmed on the basis of tribal tax immunity. Either this defensive use of tax immunity should still be available to the Tribe on remand, or the Court’s reliance on the distinctions between law and equity and between substantive rights and remedies, is indefensible.

In any event, as a matter of equity I believe that the “principle that the passage of time can preclude relief,” should be applied sensibly and with an even hand. It seems perverse to hold that the reliance interests of non-Indian New Yorkers that are predicated on almost two centuries of inaction by the Tribe do not foreclose the Tribe’s enforcement of judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity that has been consistently and uniformly protected throughout our history. In this case, the Tribe reacquired reservation land in a peaceful and lawful manner that fully respected the interests of innocent landowners – it purchased the land on the open market. To now deny the Tribe its right to tax immunity – at once the most fundamental of tribal rights and the least disruptive to other sovereigns – is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty. I would not decide this case on the basis of speculation about what may happen in future litigation over other regulatory issues. For the answer to the question whether the City may require the Tribe to pay taxes on its own property within its own reservation is pellucidly clear. Under settled law, it may not.

Accordingly, I respectfully dissent.

Notes

1. In a post-*Sherrill* decision, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F. 3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006), a divided panel of the Second Circuit interpreted *Sherrill* as precluding the tribe’s “disruptive” possessory land claim based on a violation of the

Indian reservation in the State of New York to taxation for State or local purposes.” 25 U.S.C. § 233. See *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 680-681, n. 15.

Nonintercourse Act, regardless of whether it was equitable or legal in nature with respect to the relief sought, and applied equitable defenses to bar the tribe's ejectment *and* damages claims. The damages claim barred by the appeals court had resulted in a \$248 million judgment for the tribe in the federal district court. Stating that the *Sherrill* holding had "dramatically" altered the legal landscape of Indian land claims throughout New York, the court also held that the federal law of laches "can apply against the United States [joined as a plaintiff in the *Cayuga* case] in these particular circumstances." The United States is not normally subject to laches as a defense. See Kathryn E. Fort, *The (In)Equities of Federal Indian Law*, 54 FED. LAW., March/April 2007, at 32, 35. See also Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009).

2. In *Oneida Indian Nation of N.Y. v. State of New York*, 500 F. Supp. 2d 128 (N.D. N.Y. 2007), the State argued that *Cayuga Indian Nation* foreclosed land claims brought by the Oneida Indian Nation as well. But the district court rejected the claim, applying a reformation of contract theory that would allow nonpossessory land claims to survive the laches defense:

[T]he Second Circuit, relying on the reasoning in *Sherrill*, dismissed the Cayugas' possessory land claims because they were disruptive, forward-looking claims subject to laches and other equitable defenses. *Cayuga*, 413 F.3d at 277. The Circuit also barred the Cayugas' request for trespass damages in the amount of the fair rental value of the land for the entire period of dispossession. *Id.* at 278. The Circuit explained that trespass damages were also "predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question." As a result, the Circuit reasoned that the Cayugas' request for trespass damages depended on their disruptive, possessory land claim and was also barred by laches. *Id.* Accordingly, a claim not predicated on Plaintiffs' possession of the disputed land would not be subject to the equitable defense of laches. This outcome is consistent with precedent: Plaintiffs are pursuing this action at law and the application of laches in such an action "would be novel indeed." *Oneida II*, 470 U.S. at 245 n. 16, 105 S.Ct. 1245.

An appeal before the Second Circuit Court of Appeals is pending. *Oneida Indian Nation v. Oneida County* (No. 07-2430).

3. In *Saginaw Chippewa Indian Tribe v. Granholm*, 2008 WL 4808823 (E.D. Mich., Oct. 22, 2008), the court distinguished *Sherrill* and *Cayuga* on grounds that equitable defenses may not apply in cases where the underlying claim is based in treaty rights, meaning that the United States is asserting its sovereign rights under the Treaty Clause to preserve its interests as a party to the treaty:

Moreover, the exceptions to the general rule, that laches may not be asserted as a defense to the United States, are not present. Here, it cannot be reasonably disputed that the United States is acting in its sovereign capacity, seeking to enforce its own rights under the treaties and also in its trust capacity to

enforce the treaties on behalf of the Saginaw Chippewa. This is not an instance where the United States is conducting business or commerce similar to a private party. Instead, the United States is seeking to enforce an Indian treaty, a power exclusively reserved to the federal government by the Constitution. Such conduct falls squarely within its exclusive exercise of sovereign power. Thus, the commerce exception advanced by Defendants to the general rule, that equitable defenses may be advanced against the United States, does not apply here.

Finally, as a matter of constitutional law, the United States has brought this action not only in its trust capacity but in its sovereign capacity under the Treaty Clause. It would be remarkable to hold that the commitments and obligations of the United States embodied in its treaties may be altered by a judicially endorsed equitable defense based upon the State of Michigan's inconsistent incremental exercise of governmental authority over time. Moreover, Congress presented the State of Michigan an opportunity to exercise civil and criminal law jurisdiction over the Saginaw Chippewa by passage of Public Law 280. Counsel conceded during argument that the State of Michigan elected not to do so. The analytical framework outlined in *Rosebud Sioux*, with its focus on congressional intent as expressed in the treaties and later legislation provides the appropriate analytical framework for the resolution of this case. Extending *Sherrill's* holding to defeat the interpretation of Treaties approved by Congress would fundamentally conflict with the provisions of the United States Constitution that allocate those responsibilities to Congress and the executive branch of the United States government.

Id. at *23.

SECTION B. THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

2. Treaty Abrogation

Note: Indian Treaty Abrogation and Congressional Intent

Page 340, add to end of note:

On February 9, 2007, the D.C. Circuit held in *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), that the National Labor Relations Act does apply to tribal gaming operations, affirming the NLRB's decision. Rather than apply the so-called *Coeur d'Alene* test adopted by the Ninth Circuit, or the more tribal-friendly test applied by the Tenth Circuit, the D.C. Circuit stated:

[W]e need not choose between *Tuscarora's* statement that laws of general applicability apply also to Indian tribes and *Santa Clara Pueblo's* statement that courts

may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent. Even applying the more restrictive rule of Santa Clara Pueblo, the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino. First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question. Because applying the NLRA to San Manuel's Casino would not impair tribal sovereignty, federal Indian law does not prevent the Board from exercising jurisdiction.

475 F.3d at 1315.

On October 24, 2007, an NLRB regional director followed the *San Manuel* precedents from the NLRB and the D.C. Circuit in overruling objections to Board jurisdiction made by the Mashantucket Pequot Nation over union activity at the Foxwoods Casino. *See Foxwoods Resort Casino*, No. 34-RC-2230 (National Labor Relations Board, Region 34, Oct. 27, 2007), available at http://www.nlr.gov/shared_files/Regional%20Decisions/2007/34-RC-2230%2010-24-07.htm.

Similarly, on October 30, 2007, an NLRB regional director adopted virtually the same opinion word-for-word as *Foxwoods* in a case involving the Teamsters' effort to organize at the Soaring Eagle Casino owned by the Saginaw Chippewa Indian Tribe. *See Soaring Eagle Casino and Resort*, No. GR-7-RC-23147 (National Labor Relations Board, Region 7, Oct. 30, 2007), available at <http://turtletalk.files.wordpress.com/2007/12/soaring-eagle-v-teamsters-nlr-decision.pdf>.

SECTION C. THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

1. EXECUTIVE ACCOUNTABILITY UNDER THE TRUST RELATIONSHIP

Page 343, add to the end of note 2

More recently, the United States Supreme Court held in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 63 (2005), that when a tribal government agrees to supply health services that the Indian Health Service would otherwise have provided under the Indian Self-Determination and Education Assistant Act, 25 U.S.C. §450, the tribe is entitled to the "contract support costs" promised by the government in its annual funding agreement. Similar to the situation in *Lincoln*, Congress in this case had failed to appropriate sufficient funds to the Secretary, but had simply provided lump-sum amounts without "statutorily restricting what can be done with those funds."

Nonetheless, the Court held that this fact itself did not affect the tribe's contract rights against the government.

Page 350, add to the end of Note 1:

The Federal Circuit Court of Appeals, reversing a Federal Court of Claims decision, held that the Navajo Nation had a cognizable claim under the Indian Tucker Act and federal common law. *See Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'g*, 68 Fed. Cl. 805 (2005). The Supreme Court granted *certiorari* and unanimously reversed the Federal Circuit.

UNITED STATES v. NAVAJO NATION

Supreme Court of the United States, 2009.

___ U.S. ___, 129 S. Ct. 1547, 173 L.Ed.2d 429

Justice SCALIA delivered the opinion of the Court.

For over 15 years, the Indian Tribe known as the Navajo Nation has been pursuing a claim for money damages against the Federal Government based on an asserted breach of trust by the Secretary of the Interior in connection with his approval of amendments to a coal lease executed by the Tribe. The original lease took effect in 1964. The amendments were approved in 1987. The litigation was initiated in 1993. Six years ago, we held that “the Tribe's claim for compensation ... fails,” *United States v. Navajo Nation*, 537 U.S. 488, 493, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (*Navajo I*), but after further proceedings on remand the United States Court of Appeals for the Federal Circuit resuscitated it. 501 F.3d 1327 (2007). Today we hold, once again, that the Tribe's claim for compensation fails. This matter should now be regarded as closed.

* * *

III. Analysis

A. Threshold Matter

The Government points to our categorical concluding language in *Navajo I*: “[W]e have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act,” 537 U.S., at 514, 123 S.Ct. 1079. This proves, the Government claims, that this Court definitively terminated the Tribe's claim last time around, so that the lower court's later resurrection of the suit was flatly inconsistent with our mandate. But, to be fair, our opinion (like the Court of Appeals decision we were reviewing, *Navajo Nation*, 263 F.3d, at 1327, 1330-1331) did not analyze any statutes beyond the IMLA, the IMDA, and § 399. It is thus conceivable, albeit unlikely, that some other relevant statute, though invoked by the Tribe at the outset of the litigation, might have gone unmentioned by the Federal Circuit and unanalyzed by this Court.

* * *

B. 25 U.S.C. § 635(a)

The first of the two discussed provisions of the Navajo-Hopi Rehabilitation Act of 1950-like the IMLA-permits Indians to lease reservation lands if the Secretary approves of the deal:

“Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members ... may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary.... Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.” 25 U.S.C. § 635(a).

The Tribe contends that this section renders the Government liable for any breach of trust in connection with the approval of leases executed pursuant to the authority it grants. Whether or not that is so, the provision only even *arguably* matters if Lease 8580 was issued under its authority.

* * *

We need not decide whether the Government is correct on that point, or whether mining could ever qualify as a “business purpose” under the statute, because the Tribe’s argument suffers from a more fundamental problem. Section 635(a) authorizes leases only for terms of up to 25 years, renewable for up to another 25 years. In contrast, the IMLA allows “for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.” 25 U.S.C. § 396a. Lease 8580, mirroring the latter language, sets a term of “ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities.” App. 189. That indefinite lease term strongly suggests that it was negotiated by the Tribe and approved by the Secretary under the powers authorized by the IMLA, not the Rehabilitation Act.

* * *

Because the lease in this case “falls outside” § 635(a)’s “domain,” *Navajo I, supra*, at 509, 123 S.Ct. 1079, the Tribe cannot invoke it as a source of money-mandating rights or duties.

C. 25 U.S.C. § 638

Next, the Tribe points to a second provision in the Navajo-Hopi Rehabilitation Act:

“The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to

the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.” 25 U.S.C. § 638.

In the Tribe's view, the Secretary violated this provision by failing promptly to abide by its wishes to affirm the Area Director's order increasing the royalty rate under Lease 8580 to a full 20 percent of gross proceeds.

We cannot agree. The “program” twice mentioned in § 638 refers back to the Act's opening provision, which directs the Secretary to undertake “a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation.” § 631. The statute then enumerates various projects to be included in that program, and authorizes appropriation of funds (in specific amounts) for each. *E.g.*, “Soil and water conservation and range improvement work, \$10,000,000.” § 631(1).

The only listed project even remotely related to this case is “[s]urveys and studies of timber, coal, mineral, and other physical and human resources.” § 631(3). Of course a lease is neither a survey nor a study. To read § 638 as imposing a money-mandating duty on the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act, and to allow for the enforcement of that duty through the Indian Tucker Act, would simply be too far a stretch.

* * *

E. Government's “Comprehensive Control” over Coal

The Federal Circuit's opinion also suggested that the Government's “comprehensive control” over coal on Indian land gives rise to fiduciary duties based on common-law trust principles. It noted that the Government had conducted surveys and studies of the Tribe's coal resources, 501 F.3d, at 1341; that the Interior Department imposed various requirements on coal mining operations on Indian land-regulating, for example, “signs and markers, postmining use of land, backfilling and grading, waste disposal, topsoil handling, protection of hydrologic systems, revegetation, and steep-slope mining,” *id.*, at 1342; and that the Government in practice exercised control over the calculation of coal values and quantities for royalty purposes, even though such control was codified by regulation only after the events at issue here, *id.*, at 1342-1343.

The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under “the Constitution, laws or treaties of the United States, or Executive orders of the President” are cognizable (unless the claim could be brought by a non-Indian plaintiff under the ordinary Tucker Act). 28 U.S.C. § 1505. In *Navajo I* we reiterated that the analysis must begin with “specific rights-creating or duty-imposing statutory or regulatory prescriptions.” 537 U.S., at 506, 123 S.Ct. 1079. *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a “conventional

fiduciary relationship,” *White Mountain*, 537 U.S., at 473, 123 S.Ct. 1126, *then* trust principles (including any such principles premised on “control”) could play a role in “inferring that the trust obligation [is] enforceable by damages,” *id.*, at 477, 123 S.Ct. 1126. But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.

Navajo I determined that the IMLA, which governs the lease at issue here, does not create even a “ ‘limited trust relationship’ ” with respect to coal leasing. *Navajo I*, *supra*, at 508, 123 S.Ct. 1079 (quoting *Mitchell I*, 445 U.S., at 542, 100 S.Ct. 1349). Since the statutes discussed in the preceding subparts, *supra*, at 1554 - 1557, do not apply to the lease at all, they likewise create no such relationship. Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's “control” over coal nor common-law trust principles matter.

* * *

None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its breach-of-trust lawsuit against the Federal Government than those we analyzed in *Navajo I*. This case is at an end. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to affirm the Court of Federal Claims' dismissal of the Tribe's complaint.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS joins, concurring.

I am not through regretting that my position in *United States v. Navajo Nation*, 537 U.S. 488, 514-521, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (dissenting opinion), did not carry the day. But it did not, and I agree that the precedent of that case calls for the result reached here.

Page 356, add to the end of Note:

The *Cobell* litigation continues on. In December 2004, the D.C. Court of Appeals reversed an injunction issued by Judge Lamberth requiring the Department of Interior to disconnect most of its computer systems from the Internet in light of concerns about the security of individual Indian trust account data “housed on an unknown number of Interior’s computer systems.” *Cobell v. Norton*, 391 F. 3d 251, 253 (D.C. Cir. 2004), *vacating and remanding Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004). While holding that the district court’s jurisdiction properly extends to security of Interior’s information technology systems holding Indian trust fund data, Judge Lamberth had erred by placing the burden of persuasion on Interior, disregarding its certificates on the state of its computer security, and failing to hold an evidentiary hearing prior to issuing the injunction.

Soon after that, the court of appeals issued another decision reviewing several of Judge Lamberth's continuing stream of orders and injunctions directed at Interior in the litigation. This time, the court overturned for the second time Judge Lamberth's attempt at appointment of a judicial monitor in the case, this one to report on Interior's compliance with the judge's injunction to the Department to "fix the system." The appeals court held that the appointment exceeded the district court's authority. *Cobell v. Norton*, 392 F.3d. 461, 477 (D.C. Cir. 2004).

Then on July 12, 2005, Judge Lamberth delivered a scathing condemnation of Interior while issuing another injunction in the case, this one requiring Interior to give notice to all past or present IIM account holders that "any information related to the IIM Trust lands or other IIM Trust assets that current and former IIM Trust account holders receive from the Department of the Interior may be unreliable." The notice went on to warn IIM Trust account holders to "keep in mind the questionable reliability of IIM Trust information received from Interior in making any decisions affecting their trust assets. *Cobell v. Norton*, 229 F.R.D. 5 (D.D.C. 2005). Judge Lamberth had this to say about Interior in issuing this injunction in the case:

At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

The Indians who brought this case are beneficiaries of a land trust created and maintained by the government. The Departments of the Interior and Treasury, as the government's Trustee Delegates, were entrusted more than a century ago with both stewardship of the lands placed in trust and management and distribution of the revenue generated from those lands for the benefit of the Indians. Of course, it is unlikely that those who concocted the idea of this trust had the Indians' best interests at heart—after all, the original General Allotment Act that created the trust was passed in 1887, at a time

when the government was engaged in an “effort to eradicate Indian culture” that was fueled, in part, “by a greed for the land holdings of the tribes[.]” *Cobell v. Babbitt* (“Cobell V”), 91 F. Supp. 2d 1, 7–8 (D.D.C. 1999). But regardless of the motivations of the originator of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our “modern” Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.

The present motion asks the Court to revisit what has become one in a list of lamentable circumstances revealed by this litigation: Despite Interior’s near wholesale abdication of its trust duties, the vast majority of the Indian beneficiaries remain unaware that anything is out of order. Interior distributes various kinds of information to Indian beneficiaries, and the beneficiaries, uninformed of the wretched state of things at Interior, make decisions that affect their trust assets on the basis of that information. The plaintiffs now ask the Court to consider the possibility that Interior’s ghastly past performance calls into question the reliability of any information it distributes to the Indians. If Interior cannot truthfully guarantee that it is providing the beneficiaries with accurate information on which to base decisions that materially affect their interests in the trust, then the beneficiaries deserve, at the very least, a warning to that effect. Any ordinary, reasonable trustee under similar circumstances would have given each and every beneficiary such a warning years ago. Unhappily, Interior is no ordinary trustee.

Id. at 7.

Not surprisingly, the Bush Administration immediately appealed Lamberth’s order, and asked to have him removed from the case alleging bias against the government. In July 2006, the D.C. Circuit Court of Appeals reversed Lamberth’s order requiring Interior to give the warning notice to IIM account holders, and also took the extraordinary step of removing him as presiding judge in the *Cobell* litigation. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). According to the court of appeals:

In short, in case after case the district court granted extensive relief against Interior, and in case after case we reversed, even under highly deferential standards of review. To be sure, repeated reversals, without more, are unlikely to justify reassignment. But here there is more. For one thing, on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering. For another, the July 12 opinion levels serious charges against Interior and its officials, charges that not only bear no relationship to the issue pending before the court, but also go beyond criticizing Interior for its serious failures as trustee and condemn the Department as an institution.

From all of this evidence, “an objective observer is left with the overall impression,” *Microsoft I*, 56 F.3d at 1463, that the district court’s professed hostility to Interior has become “so extreme as to display clear inability to render fair judgment,” *Liteky*, 510 U.S. at 551. What distinguishes this case from one in which a judge has merely become “exceedingly ill disposed towards [a party which] has been shown to be ... thoroughly reprehensible,” *id.* at 550-51, is, most certainly, not any redeeming aspect of Interior’s behavior as trustee. Rather, what distinguishes this case is the combination of the content of the July 12 opinion and the nature of the district court’s actions. Given these seemingly unique circumstances, and given that “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954)--that is, reasonable observers must have confidence that judicial decisions flow from the impartial application of law to fact, not from a judge’s animosity toward a party--we conclude, reluctantly, that this is one of those rare cases in which reassignment is necessary.

VI.

We close with a warning to the parties. In *Cobell VI*, we recognized that “the federal government has failed time and again to discharge its fiduciary duties,” resulting in a serious injustice that has persisted for over a century and that cries out for redress. *Cobell VI*, 240 F.3d at 1086. Yet today, five years later, no remedy is in sight, this case continues to consume vast amounts of judicial resources, and growing hostility between the parties distracts from the serious issues in the case.

Our ruling today presents an opportunity for a fresh start. As the litigation proceeds, the government must remember that although it regularly prevails on appeal, our many decisions in no way change the fact that it remains in breach of its trust responsibilities. In its capacity as trustee and as representative of all Americans, the government has an obligation to rise above its deplorable record and help fashion an effective remedy. For their part, counsel for plaintiff-beneficiaries, as counsel to a large class of Indians and as officers of the court, would more ably advance their worthy cause by focusing their energies on legal issues rather than on attacking the government and its lawyers.

The July 12 order is vacated and the matter remanded to the chief judge of the district court with instructions to reassign the case. We expect both parties to work with the new judge to resolve this case expeditiously and fairly.

Id. at 335-336.

The new judge, Hon. James Robertson, quickly held a 10-day bench trial in October 2007. In the order that followed, Judge Robertson, quoting heavily from Dickens’ *Bleak House*, concluded that the accounting ordered by the court could not be concluded:

This case has been in this courthouse for over eleven years. A “long procession of [judges] has come in and gone out” during that time. The “suit has, in course of time,

become so complicated” that “no two lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises.” It has been on my docket for one year, during which time I have dismissed persons who were still “parties in [the suit] without knowing how or why,” resolved dozens of motions, enforced an attorneys’ fee award that pre-dated the invasion of Iraq, and studied the case enough to be among the few people “alive [who] know[] what it means.” “Innumerable children have been born into the cause,” and, as plaintiffs have reminded us on occasion, “innumerable old [plaintiffs] have died out of it.” I held the October 2007 bench trial in order to review defendants’ historical accounting work and to demonstrate that a just resolution of this dispute, despite what has been said, is not “perennially hopeless.”

My conclusion that Interior is unable to perform an adequate accounting of the IIM trust does not mean that a just resolution of this dispute is hopeless. It does mean that a remedy must be found for the Department’s unrepaid, and irreparable, breach of its fiduciary duty over the last century. And it does mean that the time has come to bring this suit to a close.

The Court in this case “retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy,” *Cobell XII*, 391 F.3d at 257, but the 1994 Act does not “have language in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee.” *Cobell XVII*, 428 F.3d at 1075. Nor do I have the authority to “order broad, programmatic reform” or to provide the agency with a “detailed plan of action.” *Cobell XVIII*, 455 F.3d at 307. What has been determined to this point is that the Department of the Interior has not-and cannot-remedy the breach of its fiduciary duty to account for the IIM trust. The Clerk is directed to schedule a hearing for about 30 days after the issuance of this opinion for the purpose of discussing a process for determining an appropriate remedy.

Cobell v. Kempthorne, 532 F. Supp. 2d 37, 103 (D. D.C. 2008).

The D.C. Circuit vacated Judge Robertson’s order that an accounting was impossible, and remanded with directions. *See Cobell v. Salazar*, __ F.3d __, 2009 WL 2195111 (D.C. Cir. 2009). The court wrote:

The proper scope of the accounting ultimately remains a question for the district court, but we will provide as much guidance as we can on appropriate methodology, and principles to guide the analysis of unforeseen circumstances. The overarching aim of the district court should be for Interior to provide the trust beneficiaries the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate.

In *Cobell XVII*, we made clear that an equitable accounting may include the use of statistical sampling when verifying transactions. *See* 428 F.3d at 1077-78. A primary reason for this decision was that, “for the subset of transactions valued at less than \$500, Interior estimated that the average cost of accounting,

per transaction, would exceed the average value of the transactions.” *Id.* at 1078. Because of this, Interior proposed to study only “about 0.3% of the roughly 25 million transactions under \$500.” *Id.* We now instruct the district court to extend this reasoning to the rest of the accounting. Departing from this approach—that is, by sticking to the ideal concept of a complete historical accounting—would render the accounting impossible (or, what is functionally the same, it “would not be finished for about two hundred years, generations beyond the lifetimes of all now living beneficiaries,” *id.* at 1076).

The equitable approach we envision is illustrated by so-called *Youpee* escheatments. The Dawes Act, and subsequent legislation, allotted land to individual Indians that could not be sold or leased without permission of the government. *See Cobell XX*, 532 F.Supp.2d at 40-41. When these allotments were “divided and divided again by inheritance through succeeding generations,” many individuals owned fractional, undivided interests in the land that “caus [ed] enormous administrative difficulties” for the government. *Id.* at 41. The Indian Land Consolidation Act, Pub.L. No. 97-459, tit. II, 96 Stat. 2517 (1983), tried to consolidate these holdings by causing them to escheat to the Indian tribes, but the escheatments were held to be unconstitutional takings in *Hodel v. Irving*, 481 U.S. 704, 718, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). An amended statute was similarly rejected in *Babbitt v. Youpee*, 519 U.S. 234, 117 S.Ct. 727, 136 L.Ed.2d 696 (1997). *See Cobell XX*, 532 F.Supp.2d at 79-80. Small payments are now owed for 775,000 fractional land interests, according to estimates by the Department of the Interior. *Id.* at 80. Interior considers calculating these payments to be “an accounting for land” and so argues they should be excluded from the historical accounting project, which accounts only for funds. *Id.*

The government may be correct, but for the wrong reason. To determine whether the accounting should cover the escheatments, the district court should ask the practical question of whether the cost to account will exceed the amount recovered by class beneficiaries. As the district court observed, escheated “interests are tiny, generally of very low value, and the cost of reversing the escheatments is high.” *Id.* The district court should exercise its equitable power to ensure that Interior allocates its limited resources in rough proportion to the estimated dollar value of payments due to class members. It should also consider low-cost statistical methods of estimating benefits across class sub-groups.

* * *

This is another instance in which the limited resources of the historical accounting project may be better spent elsewhere. Accounting for closed accounts, dealing with probate and probate regulations, and considering the impact of the IIM trust on a host of heirs and creditors could needlessly further complicate an already complicated process. The purpose of an equitable accounting, as we have tried to articulate, is for Interior to concentrate on picking

the low-hanging fruit. We must not allow the theoretically perfect to render impossible the achievable good.

Cobell, 2009 WL 2195111, at * 5-7.

Judge Robertson's efforts to conclude *Cobell* quickly appear to have failed.

Chapter Six

TRIBAL SOVEREIGNTY AND THE ADMINISTRATION OF JUSTICE IN INDIAN COUNTRY

SECTION B. THE CONTEMPORARY SCOPE OF TRIBAL SOVEREIGNTY UNDER THE INDIAN CIVIL RIGHTS ACT

*Note: Santa Clara, Feminist Legal Theory, and the Definition of "Membership" in a
Traditional Tewa Society*

Page 404, add to the end of the page:

Professor Angela R. Riley wrote that there is cultural value in the illiberalism of Indian tribes. She specifically noted that to eradicate illiberal outcomes such as the one in *Santa Clara Pueblo* would undermine tribal cultures; namely, in the development of Indian justice systems, and tribal government leadership based in gender and religion. *See* Angela R. Riley, (*Tribal Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835-47 (2007)). She concludes:

Political theorists have recently noted an increased desire on the part of contemporary liberals to impose liberalism on indigenous groups. This is a mistake. Despite heavy criticism fueled largely by *Santa Clara Pueblo*, evidence indicates that violations of civil liberties by tribal governments are, in fact, rare. And because Indian tribes vary dramatically in their governmental structures, cultures, and contemporary lives, Congress and the Supreme Court have recognized that the federal courts are ill-equipped to differentiate between them. Thus, forcing a one-size-fits-all approach to civil liberties onto Indian tribes is not only unjustified, it would seriously endanger Indian differentness.

Undoubtedly, Indian tribal governments owe duties to the tribal polity. And these duties should not be taken lightly. But these issues are better addressed by tribes themselves, who are in the best position to shape change in ways consistent with tribal values and traditions. This enables Indian nations to continue their own internal processes of cultural evolution and growth. Thus, as indigeneity as a way of life is increasingly threatened by an encroaching dominant culture, it is critical that the federal government

take no further steps to force the assimilation and potential destruction of America's indigenous peoples.

Riley, (*Tribal*) *Sovereignty and Illiberalism*, 95 CAL. L. REV. at 847-48.

SECTION C. TRIBAL SOVEREIGN IMMUNITY

Page 412, add to the end of note:

In a case with broad implications throughout Indian country, *Marceau v. Blackfeet Housing Authority*, 455 F. 3d 974 (9th Cir. 2006), the Ninth Circuit Court of Appeals has reinstated a lawsuit against the Blackfeet Tribal Housing Authority, in which tribal members alleged the homes which they had purchased or leased from the tribal housing authority under a Department of Housing and Urban Development (HUD) housing assistance program were built with wood treated with arsenic and other toxic chemicals, causing their homes to deteriorate, and resulting in severe health problems for the homes' residents, including asthma, kidney failure and respiratory problems. Plaintiffs' original lawsuit in federal district court against the tribe's housing authority and HUD seeking to have their homes, built in the 1970s, replaced, was dismissed, with the trial judge ruling that the tribe's housing authority had sovereign immunity. In reversing the district court's dismissal of the plaintiffs' claims against the Blackfeet Housing Authority, the Ninth Circuit panel held that a "sue and be sued" clause in the enabling ordinance that created the Authority was "a clear and unambiguous waiver" of tribal immunity. *Id.* at 979.

In 2008, the Ninth Circuit panel granted the Blackfeet Housing Authority's motion for a rehearing, and reaffirmed its earlier decision, 2-1. *See Marceau v. Blackfeet Housing Authority*, 519 F.3d 838 (9th Cir. 2008), *amended and superceded*, 540 F.3d 916 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009). Judge Pregerson, who had authored the 2006 opinion, filed a dissenting opinion in the rehearing on the sole question of whether the federal government had a trust responsibility to protect the plaintiffs and maintain the housing. *See id.*, 540 F.3d at 930-40 (Pregerson, C.J., dissenting).

The clause in the Blackfeet Housing Authority's Enabling Ordinance, originally proposed in HUD's model enabling ordinance, and repeated in the enabling ordinances of most tribal housing authorities nationwide, states:

The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

Blackfeet Tribal Ordinance No. 7, art. V, § 2 (Jan. 4, 1977). In interpreting the ordinance, the original panel opinion (adopted upon rehearing) rejected the argument that the clause was merely "surplusage."

*** First, the “sue and be sued” clause expressly permits suit on “any contract, claim or obligation arising out of its activities.” This wording forecloses the argument that some further waiver must be obtained by a later contract; such a holding renders “claim or obligation” as surplusage. Moreover, the phrase “arising out of its activities” signals that the “sue and be sued” clause opens the door to liability that was not necessarily the product of negotiation, but rather liability that arose by virtue of the Housing Authority’s conduct.

Second, interpreting the “sue and be sued” clause as sufficient to waive the Housing Authority’s immunity allows us to interpret the entire section consistently. The enabling ordinance has two clauses: (1) that the council “gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name”; and (2) that the council “authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have.” *Id.* The first clause clearly has some *present* effect. To give meaning to the first clause, we must interpret it to mean that the tribe waived the Housing Authority’s immunity from suit, i.e., that no further tribal consent was required. Moreover, by doing so, we do not render the second clause--authorizing the Housing Authority to agree by contract to waive any immunity “it might otherwise have”--surplusage. ***Thus, the language of the enabling ordinance supports the conclusion that the “sue and be sued” clause effected a waiver of the Housing Authority’s tribal immunity.

Third, Article VII, clause 7 of the Enabling Ordinance provides that “any judgment against the [Housing] Authority” shall not be a charge or lien against Blackfeet Housing’s property, but instead could be satisfied out of “its rents, fees or revenues.” This section clearly countenances that the Housing Authority would be subject to a judgment against it, and only limits the *funds* out of which such a judgment could be satisfied.

Thus a plain reading of the Blackfeet Housing Authority’s enabling ordinance supports Plaintiffs’ argument that the Blackfeet Housing Authority intended to waive its immunity when it enacted the enabling ordinance.

455 F.3d at 981. The first panel opinion also contained an extensive analysis of the effects of tribal designation of a corporate entity as a Section 16 or Section 17 organization under the Indian Reorganization Act (IRA) of 1934. Most tribal housing authorities are chartered as Section 17 organizations.

Moving away from the text of the ordinance, the context in which such housing authorities were created also informs the interpretation we give these clauses. In 1934, Congress passed the Indian Reorganization Act, which permitted tribes to form corporate and quasi-corporate entities that could enter into and compete in the world of commerce. Tribes could ratify a constitution, write bylaws and otherwise organize “for its common welfare” under Section 16 of the Indian Reorganization Act. *See* 25 U.S.C. § 477. While

performing sovereign acts, a tribe organized under Section 16 enjoyed immunity as a sovereign.

Under Section 17 of the Indian Reorganization Act, tribes were also permitted to form corporate organizations--business corporations through which they could enter the world of commerce. Housing authorities are Section 17 organizations. Housing authorities are public corporations with enabling ordinances that resemble articles of incorporation, and contain a hierarchical structure similar to a board of directors. Charters for Section 17 organizations often contain "sue and be sued" clauses like the one at issue here. And, although the Housing Authority "occupies a role quintessentially related to self-governance," *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir.2001), a tribal housing authority is nonetheless a "public corporation carrying on public enterprises," *see Eligibility of Indian Tribes for Loans and Grants under National Housing Act of 1937*, 57 Interior Dec. 145, 149 (Dep't of the Interior 1940).

The designation of an entity as a Section 16 or a Section 17 organization affects how we interpret any waiver of immunity. This court has been careful to separate a tribe's corporate functions from its governmental functions. Accordingly, we have refused to read a waiver of immunity in the Section 17 corporate context as abrogating immunity for the tribe's governmental actions as a Section 16 entity. In the same way, however, a "sue and be sued" clause in the enabling ordinance of a Section 17 entity must be examined in light of the rationale of Section 17. The purpose of allowing tribes to create Section 17 corporations, even corporations that perform some quasi-governmental role, is to allow tribal entities to fully participate in the world of commerce. *See* 78 Cong. Rec. 11732 (1934) (noting that, in allowing tribes to incorporate under Section 17, Congress sought to promote the organization of tribal business enterprises and to enable those enterprises "to enter the white world on a footing of equal competition"). And:

It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.

Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 395 F.Supp. 23 (D.Minn.1974), *aff'd*, 517 F.2d 508 (8th Cir.1975), 395 F.Supp. at 29 (citing *Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y.1920)). Where there is an express waiver of tribal immunity, such as this "sue and be sued" clause, we should read that waiver in light of the purpose of Section 17. Because "developers and lenders will be reluctant to deal with a corporation which is legally irresponsible and cannot be made to answer for its debts," *id.* at 29, tribes can compete fully in the business world only if they voluntarily agree to limit their right to immunity.

Finally, the language of *Namekagon* that it is "grossly unjust" to interpret such a clear "sue and be sued" clause as anything less than a waiver of tribal immunity rings true

here as well. The Housing Authority invited individuals to do business with it. It signed contracts with these Plaintiffs, bound the homeowners to make payments, and had contractual remedies in the event that Plaintiffs breached their promises. To interpret the “sue and be sued” clause in the manner suggested by the Housing Authority would render the Housing Authority’s contractual obligations illusory.

For these reasons, we hold that the Tribe waived the immunity of the Housing Authority when it enacted the enabling ordinance with its “sue and be sued” clause, subject to the limitations contained in the enabling ordinance. Of course, the enabling ordinance contains two important limitations on the Housing Authority’s liability: (a) Article V, Cl. 2: the Tribe shall not be liable for the debts or obligations of the Authority; and (b) Article VII, Cl. 7: No judgment shall be a lien upon Authority property; judgments may only be enforced out of the Authority’s rents, fees or revenues. Because a sovereign is entitled to set the terms on which it waives its immunity, such limits restrict the ability of Plaintiffs to collect damages against the Housing Authority. We remand Plaintiffs’ claims against the Housing Authority to the district court for further proceedings.

455 F.3d at 981-984.

Upon rehearing, the majority held that the housing authority had waived its right to argue that the sovereign immunity issue should be resolved in the first instance by the tribal court:

But the Supreme Court has stated that the tribal exhaustion rule is “prudential” rather than “jurisdictional.” *Strate v. A-1 Contractors*, 520 U.S. 438, 451, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). Because it is a non-jurisdictional principle, the preference for tribal exhaustion may be forfeited. The Housing Authority forfeited the argument that the tribal court should decide the immunity issue by failing to raise it until the Housing Authority’s petition for rehearing. *Talk of the Town v. Dep’t of Fin. & Bus. Servs.*, 353 F.3d 650, 650 (9th Cir.2003). That being so, we readopt our earlier opinion on this issue....

Moreover, in this case, the tribal court already has ruled on the question. In *DeRoche v. Blackfeet Indian Housing Authority*, 17 Indian L. Rptr. 6036 (Blackfeet Trib. Ct.App.1989), the Blackfeet Tribal Court of Appeals considered a breach of contract claim against the Housing Authority. That court adopted the Eighth Circuit’s approach to interpreting a “sue and be sued” clause. *Id.* at 6042 (citing *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 510 (8th Cir.1975)). The Blackfeet Tribal Court of Appeals held that the original Housing Authority enabling ordinance “is an indisputable qualified waiver of immunity by the Blackfeet Tribe and housing authority for a breach of contract action” and that, by adopting the clause, “the tribe waived, to some extent, the housing authority’s immunity from suit.” *Id.* The court thus allowed the contract claim to proceed. *Id.* *DeRoche* is the only Blackfeet appellate decision, and it is on point. Even if exhaustion in tribal court were warranted, abstention would not be required. *DeRoche* is binding tribal precedent, and we would defer to the tribal court’s

extant interpretation. *See Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir.1994) (“The Tribal Court’s interpretation of tribal law is binding on this court.”).

519 F.3d at 843.

However, in its final amended opinion, the panel majority reversed itself and held that the plaintiffs must first exhaust their tribal court remedies:

Tribal court jurisdiction over the contract disputes here is unquestionably colorable: Plaintiffs are tribal members, Defendant Blackfeet Housing Authority is a tribal entity, and at least some key events-construction of the homes, for instance-occurred on tribal lands. *See Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir.1992) (en banc) (holding that tribal court jurisdiction was colorable where a *non-tribe* member sued a tribe in a contract and tort dispute and the key events *may* have taken place on tribal lands). Because there is no evidence of bad faith or harassment, we hold that Plaintiffs must exhaust their tribal court remedies. Accordingly, we remand the case. Because of the lengthy course of this litigation, the district court should stay, rather than dismiss, the action against the Housing Authority while Plaintiffs exhaust their tribal court remedies. *See Allstate Indem. Co.*, 191 F.3d at 1076 (remanding with instructions to stay action while party exhausted tribal court remedies). *Cf. Atwood*, 513 F.3d at 948 (approving a district court's discretionary decision to dismiss a domestic relations action when tribal court proceedings were pending).

In our earlier opinions, we declined to require Plaintiffs to exhaust their tribal court remedies. Instead, we held that the Blackfeet Tribe had waived tribal immunity through the enabling ordinance that established the Housing Authority. *Marceau II*, 519 F.3d at 842-44; *Marceau I*, 455 F.3d at 978-83; *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (noting that “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity”). Our doing so was in error, and we now vacate that holding and decline to reach the issue. Whether or not the Tribe waived tribal immunity, the tribal court must have the first opportunity to address all issues within its jurisdiction, including that one.

Marceau, 540 F.3d at 916.

The Supreme Court denied certiorari. *Marceau v. Blackfeet Housing Authority*, 129 S. Ct. 2379 (2009).

SECTION D. TRIBAL JUSTICE SYSTEMS IN HISTORICAL AND CULTURAL CONTEXT

3. TRIBAL LAW MAKING IN MODERN TRIBAL LEGAL SYSTEMS

a. *The Courts of the Navajo Nation*

Page 443, add to the end of the Notes:

8. Professor Bethany R. Berger concluded that Navajo Nation trial courts are not hostile to nonmembers in her empirical study, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047 (2005). She wrote:

Through this method, 122 cases involving non-Navajo litigants were identified. Ten of these cases involve Indians that are not members of the Navajo Nation, and the rest, 91.8% of the total, involve non-Indians. The cases were read and categorized as to who won or lost the case and the subject matter of the case. The cases run the gamut in subject matter; they include, for example, cases regarding contracts, torts, child custody, employment law, practice of law, trusts and estates, and taxation. The majority of cases involve non-Indian companies, whether as employers, vendors, alleged tortfeasors, taxpayers, or insurers. In the vast majority, both sides had representation drawn from the same pool of local attorneys and advocates.

Out of these cases, in sixteen, no contested issues were decided or the results were too mixed to say one party won or lost. In five, non-Navajos were on both sides, and in six, non-Navajos and Navajos were on the same side. The remaining 95 cases were almost equally divided: in 45 cases, or 47.4% of the total, the non-Navajo party won, and in 50, or 52.6% of the total, the non-Navajo party lost. Until the last few years, when non-Indians, encouraged by recent federal decisions restricting tribal civil jurisdiction, have repeatedly challenged Navajo jurisdiction and the court has repeatedly rejected these challenges, the win-loss rate was 50-50.

Id. at 1075.

Note: Tribal Customary Law in Contemporary Tribal Courts

Page 451, add to the end of the Note:

Professor Matthew L.M. Fletcher theorized that tribal courts tend not to apply customary and traditional law in cases involving nonmembers, but instead apply a form of “intertribal common law” that closely resembles Anglo-American legal jurisprudence. *See* Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701 (2006):

“Intertribal common law” is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct. It is this Author’s sense that the

vast majority of tribal court cases arise out of an Anglo-American legal construct. Intertribal common law includes the common law decisions of other tribal courts and may include a tribal court's importation of federal and state court common law. Tribal courts create intertribal common law, for example, when litigants ask the court to interpret a statute such as the ICRA or a tribal secured transactions code. Tribal courts create intertribal common law when they adopt a common law rule of another tribal court or a federal or state court, such as the doctrine of sovereign immunity.

Id. at 720.

Conversely, “[i]ntratribal common law, in a normative sense, should be the law that a tribal court would apply, a law that relies on tribal custom and traditional law and norms. Intratribal common law also may be the ‘law’ that traditional or nonadversarial tribal courts, such as peacemaker courts, use to resolve disputes.” *Id.* at 728.

Note: The Model Tribal Secured Transactions Code

In recent years, Indian tribes have begun the process of modernizing their tribal codes for purposes of transitioning into a modern global economy. In particular, the National Conference of Commissioners on Uniform State Laws, the authors of statutes such as the Uniform Commercial Code, have contributed model codes for tribes to consider adopting. The first code is the Model Tribal Secured Transactions Act, available at http://www.nccusl.org/Update/Docs/MTSTA/MTSTA_Aug05_Final.doc.

Professor Wenona T. Singel analyzed the costs and benefits to the adoption of this code and others like it in her article *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J. L. & PUB. POL’Y 357 (2006). She argues that the pressure for uniform codes may come with a significant cost to tribal customs and traditions:

In the past five years, many tribes have developed a growing interest in enacting a form of secured transactions code as tribal law. This is because tribes have developed a growing recognition of the fact that secured transactions codes are often critical tools for promoting economic growth in Indian country. Without a secured transactions code enacted as tribal law, lenders remain wary of extending credit in Indian country because they cannot predict whether or how any security interest they may take in goods will be recognized or enforced under tribal law. This problem is exacerbated because Article 9 includes a choice of law provision providing that the secured transactions law that governs the perfection of any security interest is generally the law of the location of the debtor. Under this choice of law rule, if the debtor is an individual or entity or Indian nation located in Indian country, then the law that governs the making and enforcement of security interests is always the tribe with jurisdiction over the Indian country in question. The result is that under the law of nearly every state, whenever a debtor is located in an area of Indian country where the relevant tribe with jurisdiction lacks a secured transactions code on the books, there is no definite set of rules that will govern

the making and enforcement of a security interest. The uncertainty that results from this phenomenon creates a disincentive for lender investment in Indian country generally, and the effects of this disincentive are felt by individuals, by small and large businesses, and by tribal governments.

In response to the threat to economic growth that the absence of tribal secured transactions codes presents, many Indian nations have responded by enacting tribal secured transactions codes as tribal law. In addition, a few law schools have devoted resources to helping tribes develop tribal secured transactions codes, and the National Conference of Commissioners on Uniform State Laws (NCCUSL) also became involved in the effort to develop and promote the tribal enactment of this code. NCCUSL is a national organization that develops a wide variety of uniform laws for state enactment. In particular, NCCUSL monitors state law UCC developments and considers whether developments merit revision of the model form of the UCC. When NCCUSL creates or revises a uniform law, it combines the expertise of academics and practitioners from each of the fifty states and ultimately issues an official form of the model law in question which it then endorses for state adoption. The American Law Institute (ALI) also reviews and decides whether to endorse the model laws that NCCUSL develops. Once the model form is endorsed by NCCUSL and ALI, both organizations then encourage each state legislature to adopt the model law with as few changes as possible. A guiding principle that informs the NCCUSL's development of model codes generally is that uniformity of the law from state to state promotes greater certainty, predictability, and efficiency in the law. In the area of commercial law, this uniformity encourages efficient economic transactions because parties are able to contract with each other without a significant investment of time and resources each time a party engages in commerce in a new state law jurisdiction.

As the interest in enacting secured transactions codes in Indian country grew, so too did the number and variety of problems associated with successful tribal incorporation of the code. The first problem occurred at the outset, with tribes' failure to properly integrate the code into tribal law. In many cases, tribes adopted secured transactions codes by simply cutting and pasting either the model Article 9 of the UCC or an enacted state version of Article 9 and incorporating the cut-and-pasted product as tribal law. This method of tribal incorporation was the least likely to be successful, since it often failed to take into account previously-enacted tribal laws to ensure that the incorporated code did not conflict with existing tribal law. This method also suffered because the model Article 9 of the UCC and the various state-enacted versions of Article 9 are each laden with cross-references to other bodies of law which the drafters of Article 9 presume to be enacted by each respective jurisdiction. For example, Article 9 refers to other portions of the UCC governing sales and leases, debtor-creditor law, and commercial paper. If none of these other portions of the UCC are enacted as tribal law, then a tribe that adopts a model secured transactions code with references to concepts

embedded in these other codes will ultimately enact a law that cross-references itself to a series of dead-ends, or non-existent law.

*** Finally, a fourth problem that the adoption of secured transactions codes may trigger is the introduction of new meanings, norms and values regarding relationships between individuals that may not comport with and may even directly conflict with the meanings, norms and values that are integral to the community's identity and the cohesiveness of its members' relationships.

Among the various difficulties associated with the enactment of secured transactions codes as tribal law, the potential for conflict with cultural sovereignty is especially worthy of attention. As mentioned earlier, the project to promote cultural sovereignty includes efforts to develop tribal legal systems in a way that reflects tribal histories, cultures and community norms. In contrast to the goals of cultural sovereignty, transplanted law represents a further step toward modeling tribal legal systems after Anglo legal systems. Transplanted law also represents a failure to organically develop tribal legal systems to fit the unique cultures, communities, territories, and traditions of indigenous peoples. In the case of a secured transactions code modeled after Article 9 of the UCC, the code challenges the development of cultural sovereignty to the extent that it displaces or modifies tribal norms and values that relate to the ownership of property and the relationship between debtors and creditors.

Id. at 360-62.

Chapter Seven

TRIBAL SOVEREIGNTY AND JURISDICTION: CONGRESSIONAL AND JUDICIAL RECOGNITION AND LIMITATIONS

SECTION A. THE ARENA OF FEDERAL AND TRIBAL JURISDICTION: “INDIAN COUNTRY”

Page 473, add to the end of the first paragraph at the top of the page:

In *State of South Dakota v. United States Department of the Interior*, 423 F. 3d 790 (8th Cir. 2005), the state of South Dakota once again raised the unconstitutional delegation issue in challenging the decision of the Secretary of the Interior, acting under the new regulations, to place the land involved in the original 1995 Eighth Circuit decision, *South Dakota I*, 69 F. 3d 878, into trust. Interestingly, the 2005 decision by the Eighth Circuit Court of Appeals upheld the Secretary's action by relying on the language and legislative history of the IRA, and not the revised regulations for 25 U.S.C. § 465:

Because the Supreme Court vacated our 1995 opinion, we are not bound by its conclusion. Accordingly, we reexamine the broader context of the Act to determine whether the delegation in 25 U.S.C. § 465 includes guidance sufficient to withstand a challenge based upon nondelegation doctrine grounds. We may look solely to the

language and the context of the statute in determining its constitutionality and may not consider any particular agency interpretation as determinative in our constitutional inquiry. ***

We conclude that the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust. The IRA, enacted in 1934, "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).***

We agree with the views expressed by Judge Murphy in her dissent in *South Dakota I*: The scope of the power conferred in § 465 is broad, but *** it does not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy. We believe that it is possible to "ascertain whether the will of Congress has been obeyed" when examining an application of the Secretary's authority under § 465 based upon the guidance in the IRA and its legislative history.

Id. at 796-797. The United States Supreme Court denied *certiorari*. 127 S. Ct. 67 (2006).

One federal circuit judge, in dissent, suggested that Section 465 violates the non-delegation doctrine:

Like other courts that have rejected nondelegation challenges to § 5, *Carciere v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir.2007) (en banc); *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir.2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir.1999), the majority nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. It conjures standards and limits from thin air to construct a supposed intelligible principle for the § 5 delegation. Although I agree the nondelegation principle is extremely accommodating, the majority's willingness to imagine bounds on delegated authority goes so far as to render the principle nugatory. Analyzing the statute using ordinary tools of statutory construction, as the Supreme Court has always done in nondelegation cases, I am forced to conclude § 5 is unconstitutional.

* * *

To summarize, the statutory language lacks any discernible boundaries. To rely on the purpose of "providing land for Indians" does nothing to cabin the Secretary's discretion over providing land for Indians because it is tautological. To say the purpose is to provide land for Indians in a broad effort to promote economic development (with a special emphasis on preventing land loss) is tautology on steroids. Making a different selection from the same smorgasbord, I

might posit quite different principles—to provide land for landless Indians; to acquire trust lands to be used for farming; to supplement grazing and forestry lands; to provide lands in close proximity to existing reservations; to consolidate checkerboarded reservations. All of these goals would be reasonable, but none can be derived from the text of the IRA. The very fact that so many standards can be proposed merely highlights the fact that the statute itself fails to describe how the power conveyed is to be exercised. Thus, the Secretary's assertion of unguided power is not subject to any judicial check; nor, conversely, can he be required to act whenever he voluntarily refrains from using his discretionary power.

Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 34, 37 (D.C. Cir. 2008) (Brown, C.J., dissenting). The Supreme Court denied *certiorari*. *Michigan Gambling Opposition v. Kempthorne*, 129 S.Ct. 1002 (2009).

However, the Supreme Court recently held that Indian tribes that were not “under federal jurisdiction” in 1934 may not take advantage of Section 465.

CARCIERI V. SALAZAR

Supreme Court of the United States, 2009.

— U.S. —, 129 S.Ct. 1058, 172 L.Ed.2d 791.

Justice THOMAS delivered the opinion of the Court.

The Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior, a respondent in this case, to acquire land and hold it in trust “for the purpose of providing land for Indians.” 25 U.S.C. § 465. The IRA defines the term “Indian” to “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.” § 479.
* * *

In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase “now under Federal jurisdiction” in § 479. Petitioners contend that the term “now” refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were “under Federal jurisdiction” in 1934. The respondents argue that the word “now” is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are “under Federal jurisdiction” at the time that the land is accepted into trust.

We agree with petitioners and hold that, for purposes of § 479, the phrase “now under Federal jurisdiction” refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals.

I

At the time of colonial settlement, the Narragansett Indian Tribe was the indigenous occupant of much of what is now the State of Rhode Island. See Final Determination of Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (1983) (hereinafter Final Determination). Initial relations between colonial settlers, the Narragansett Tribe, and the other Indian tribes in the region were peaceful, but relations deteriorated in the late 17th century. The hostilities peaked in 1675 and 1676 during the 2-year armed conflict known as King Philip's War. Hundreds of colonists and thousands of Indians died. See E. Schultz & M. Tougias, *King Philip's War* 5 (1999). The Narragansett Tribe, having been decimated, was placed under formal guardianship by the Colony of Rhode Island in 1709. 48 Fed.Reg. 6177.

Not quite two centuries later, in 1880, the State of Rhode Island convinced the Narragansett Tribe to relinquish its tribal authority as part of an effort to assimilate tribal members into the local population. See *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (C.A.D.C.1998). The Tribe also agreed to sell all but two acres of its remaining reservation land for \$5,000. *Ibid.* Almost immediately, the Tribe regretted its decisions and embarked on a campaign to regain its land and tribal status. *Ibid.* In the early 20th century, members of the Tribe sought economic support and other assistance from the Federal Government. But, in correspondence spanning a 10-year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government.

* * *

The Narragansett Tribe's ongoing efforts to gain recognition from the United States Government finally succeeded in 1983. 48 Fed.Reg. 6177. In granting formal recognition, the Bureau of Indian Affairs (BIA) determined that “the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications.” *Id.*, at 6178. The BIA referred to the Tribe's “documented history dating from 1614” and noted that “all of the current membership are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode Island ‘detrribalization’ act.” *Ibid.* * * *

In 1991, [the Tribe] asked the Secretary to accept the 31-acre parcel into trust for the Tribe pursuant to 25 U.S.C. § 465. By letter dated March 6, 1998, the Secretary notified petitioners of his acceptance of the Tribe's land into trust. Petitioners appealed the Secretary's decision to the IBIA, which upheld the Secretary's decision. See *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (2000).

* * *

The Court of Appeals for the First Circuit affirmed, first in a panel decision, *Carcieri v. Norton*, 423 F.3d 45 (2005), and then sitting en banc, 497 F.3d 15 (C.A.1 2007). Although the Court of Appeals acknowledged that “[o]ne might have an initial instinct to read the word ‘now’ [in § 479] ... to mean the date of [the] enactment of the statute, June 18, 1934,” the court

concluded that there was “ambiguity as to whether to view the term ... as operating at the moment Congress enacted it or at the moment the Secretary invokes it.” *Id.*, at 26. The Court of Appeals noted that Congress has used the word “now” in other statutes to refer to the time of the statute's application, not its enactment. *Id.*, at 26-27. The Court of Appeals also found that the particular statutory context of § 479 did not clarify the meaning of “now.” On one hand, the Court of Appeals noted that another provision within the IRA, 25 U.S.C. § 472, uses the term “now or hereafter,” which supports petitioners' argument that “now,” by itself, does not refer to future events. But on the other hand, § 479 contains the particular application date of “June 1, 1934,” suggesting that if Congress had wanted to refer to the date of enactment, it could have done so more specifically. 497 F.3d, at 27. The Court of Appeals further reasoned that both interpretations of “now” are supported by reasonable policy explanations, *id.*, at 27-28, and it found that the legislative history failed to “clearly resolve the issue,” *id.*, at 28.

Having found the statute ambiguous, the Court of Appeals applied the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and deferred to the Secretary's construction of the provision. 497 F.3d, at 30. The court rejected petitioners' arguments that the Secretary's interpretation was an impermissible construction of the statute. *Id.*, at 30-34. It also held that petitioners had failed to demonstrate that the Secretary's interpretation was inconsistent with earlier practices of the Department of Interior. Furthermore, the court determined that even if the interpretation were a departure from the Department's prior practices, the decision should be affirmed based on the Secretary's “reasoned explanation for his interpretation.” *Id.*, at 34.

We granted certiorari, 552 U.S. ----, 128 S.Ct. 1443, 170 L.Ed.2d 274 (2008), and now reverse.

II

This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). If it is, we must apply the statute according to its terms. * * *

The Secretary may accept land into trust only for “the purpose of providing land for Indians.” 25 U.S.C. § 465. “Indian” is defined by statute as follows:

“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are *members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.... The term ‘tribe’ wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation....” § 479 (emphasis added).

The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction." *Ibid.* That question, in turn, requires us to decide whether the word "now under Federal jurisdiction" refers to 1998, when the Secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA.

We begin with the ordinary meaning of the word "now," as understood when the IRA was enacted. * * * At that time, the primary definition of "now" was "[a]t the present time; at this moment; at the time of speaking." Webster's New International Dictionary 1671 (2d ed.1934); see also Black's Law Dictionary 1262 (3d ed.1933) (defining "now" to mean "[a]t this time, or at the present moment" and noting that "'[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect ..." (emphasis added)). This definition is consistent with interpretations given to the word "now" by this Court, both before and after passage of the IRA, with respect to its use in other statutes. See, e.g., *Franklin v. United States*, 216 U.S. 559, 568-569, 30 S.Ct. 434, 54 L.Ed. 615 (1910) (interpreting a federal criminal statute to have "adopted such punishment as the laws of the State in which such place is situated *now* provide for the like offense" (citing *United States v. Paul*, 6 Pet. 141, 8 L.Ed. 348 (1832) (internal quotation marks omitted))); *Montana v. Kennedy*, 366 U.S. 308, 310-311, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961) (interpreting a statute granting citizenship status to foreign-born "children of persons who *now* are, or have been citizens of the United States" (internal quotation marks omitted; emphasis deleted)).

It also aligns with the natural reading of the word within the context of the IRA. For example, in the original version of 25 U.S.C. § 465, which provided the same authority to the Secretary to accept land into trust for "the purpose of providing land for Indians," Congress explicitly referred to current events, stating "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of [the] Navajo Indian Reservation ... in the event that the proposed Navajo boundary extension measures *now* pending in Congress ... become law." IRA, § 5, 48 Stat. 985 (emphasis added). In addition, elsewhere in the IRA, Congress expressly drew into the statute contemporaneous *and* future events by using the phrase "now or hereafter." See 25 U.S.C. § 468 (referring to "the geographic boundaries of any Indian reservation now existing or established hereafter"); § 472 (referring to "Indians who may be appointed ... to the various positions maintained, now or hereafter, by the Indian Office"). Congress' use of the word "now" in this provision, without the accompanying phrase "or hereafter," thus provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment. In correspondence with those who would assist him in implementing the IRA, the Commissioner of Indian Affairs, John Collier, explained that:

“Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term ‘Indian’ as used therein shall include-(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act*” Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (emphasis added).⁵

Thus, although we do not defer to Commissioner Collier's interpretation of this unambiguous statute, ... we agree with his conclusion that the word “now” in § 479 limits the definition of “Indian,” and therefore limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.

The Secretary makes two other arguments in support of his contention that the term “now” as used in § 479 is ambiguous. We reject them both. First, the Secretary argues that although the “use of ‘now’ can refer to the time of enactment” in the abstract, “it can also refer to the time of the statute's application.” Brief for Respondents 18. But the susceptibility of the word “now” to alternative meanings “does not render the word ... whenever it is used, ambiguous,” particularly where “all but one of the meanings is ordinarily eliminated by context.” *Deal v. United States*, 508 U.S. 129, 131-132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993). Here, the statutory context makes clear that “now” does not mean “now or hereafter” or “at the time of application.” Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472, or it could have omitted the word “now” altogether. Instead, Congress limited the statute by the word “now” and “we are obliged to give effect, if possible, to every word Congress used.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Second, the Secretary argues that § 479 left a gap for the agency to fill by using the phrase “shall include” in its introductory clause. Brief for Respondents 26-27. The Secretary, in turn, claims to have permissibly filled that gap by defining “ ‘Tribe’ ” and “ ‘Individual Indian’ ” without reference to the date of the statute's enactment. *Id.*, at 28 (citing 25 CFR §§ 151.2(b), (c)(1) (2008)). But, as explained above, Congress left no gap in 25 U.S.C. § 479 for the agency

⁵ In addition to serving as Commissioner of Indian Affairs, John Collier was “a principal author of the [IRA].” *United States v. Mitchell*, 463 U.S. 206, 221, n. 21, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). And, as both parties note, he appears to have been responsible for the insertion of the words “now under Federal jurisdiction” into what is now 25 U.S.C. § 479. See Hearings on S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 266 (1934). Also, the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a-24a. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it. See *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (explaining that an Executive Branch statutory interpretation that lacks the force of law is “entitled to respect ... to the extent that those interpretations have the ‘power to persuade’ ” (internal quotation marks omitted)).

to fill. Rather, it explicitly and comprehensively defined the term by including only three discrete definitions: “[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... [3] all other persons of one-half or more Indian blood.” *Ibid.* In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of “Indian” set forth in § 479. Had it understood the word “include” in § 479 to encompass tribes other than those satisfying one of the three § 479 definitions, Congress would have not needed to enact these additional statutory references to specific Tribes.

The Secretary and his *amici* also go beyond the statutory text to argue that Congress had no policy justification for limiting the Secretary's trust authority to those tribes under federal jurisdiction in 1934, because the IRA was intended to strengthen Indian communities as a whole, regardless of their status in 1934. Petitioners counter that the main purpose of § 465 was to reverse the loss of lands that Indians sustained under the General Allotment Act, see *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650, n. 1, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001), so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress' use of the word “now” in § 479 speaks for itself and “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

* * *

IV

We hold that the term “now under Federal jurisdiction” in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed.Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that “[i]n 1934, the Narragansett Indian Tribe ... was neither federally recognized nor under the jurisdiction of the federal government.” Pet. for Cert. 6. The respondents' brief in opposition declined to contest this assertion. See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court's Rule 15.2. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

Justice BREYER, concurring.

I join the Court's opinion with three qualifications. * * *

* * *

Third, an interpretation that reads “now” as meaning “in 1934” may prove somewhat less restrictive than it at first appears. That is because a tribe may have been “under Federal jurisdiction” in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22-24; Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356-359 (1990). The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was “under Federal jurisdiction” in 1934-even though the Department did not know it at the time.

The statute, after all, imposes no time limit upon recognition. See § 479 (“The term ‘Indian’ ... shall include all persons of Indian descent who are members of *any recognized* Indian tribe now under Federal jurisdiction ...” (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded that land could be taken into trust for the Tribe. See Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 6-7. Similarly, in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western Dist. of Mich.*, 369 F.3d 960, 961, and n. 2 (C.A.6 2004). But later the Department recognized the Tribe, considering it to have existed continuously since 1675. 45 Fed.Reg. 19321 (1980). Further, the Department in the 1930's thought that an anthropological study showed that the Mole Lake Tribe no longer existed. But the Department later decided that the study was wrong, and it then recognized the Tribe. See Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758, 2762-2763 (Feb. 8, 1937) (recognizing the Mole Lake Indians as a separate tribe).

In my view, this possibility-that later recognition reflects earlier “Federal jurisdiction”-explains some of the instances of early Department administrative practice to which Justice STEVENS refers. I would explain the other instances to which Justice STEVENS refers as involving the taking of land “for” a tribe with members who fall under that portion of the statute that defines “Indians” to include “persons of one-half or more Indian blood,” § 479. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974, pp. 706-707 (Shoshone Indians), 724-725 (St. Croix Chippewas), 747-748 (Nahma and Beaver Indians) (1979).

Neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934. Nor have they claimed that any member of the Narragansett Tribe satisfies

the “one-half or more Indian blood” requirement. And I have found nothing in the briefs that suggests the Narragansett Tribe could prevail on either theory. Each of the administrative decisions just discussed involved post-1934 recognition on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office. I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. * * * Because I see no realistic possibility that the Narragansett Tribe could prevail on the basis of a theory alternative to the theories argued here, I would not remand this case.

With the qualifications here expressed, I join the Court's opinion and its judgment.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part and dissenting in part.

* * *

I can agree with Justice BREYER that the current record raises no particular reason to expect that the Tribe might be shown to have been under federal jurisdiction in 1934, but I would not stop there. The very notion of jurisdiction as a distinct statutory condition was ignored in this litigation, and I know of no body of precedent or history of practice giving content to the condition sufficient for gauging the Tribe's chances of satisfying it. So I see no reason to deny the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the “jurisdiction” phrase that might favor their position here.

I would therefore reverse and remand with opportunity for respondents to pursue a “jurisdiction” claim and respectfully dissent from the Court's straight reversal.

Justice STEVENS, dissenting.

Congress has used the term “Indian” in the Indian Reorganization Act of 1934 to describe those individuals who are entitled to special protections and benefits under federal Indian law. The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of blood quantum or as descendants of members of “any recognized Indian tribe now under Federal jurisdiction.” 25 U.S.C. § 479. In contesting the Secretary of the Interior's acquisition of trust land for the Narragansett Tribe of Rhode Island, the parties have focused on the meaning of “now” in the Act's definition of “Indian.” Yet to my mind, whether “now” means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether the Secretary's actions on behalf of the Narragansett were permitted under the statute. The plain text of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of “Indian tribe.” Because the Narragansett Tribe is an Indian tribe within the meaning of the Act, I would affirm the judgment of the Court of Appeals.

* * *

II

* * *

The Secretary has long exercised his § 465 trust authority in accordance with this design. In the years immediately following the adoption of the IRA, the Solicitor of the Department of the Interior repeatedly advised that the Secretary could take land into trust for federally recognized tribes and for individual Indians who qualified for federal benefits by lineage or blood quantum.

For example, in 1937, when evaluating whether the Secretary could purchase approximately 2,100 acres of land for the Mole Lake Chippewa Indians of Wisconsin, the Solicitor instructed that the purchase could not be “completed until it is determined whether the beneficiary of the trust title should be designated as a band or whether the title should be taken for the individual Indians in the vicinity of Mole Lake who are of one half or more Indian blood.” Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758 (Feb. 8, 1937). Because the Mole Lake Chippewa was not yet recognized by the Federal Government as an Indian tribe, the Solicitor determined that the Secretary had two options: “Either the Department should provide recognition of this group, or title to the purchased land should be taken on behalf of the individuals who are of one half or more Indian blood.” *Id.*, at 2763.

The tribal trust and individual trust options were similarly outlined in other post-1934 opinion letters, including those dealing with the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Island Indians of Michigan. See 1 Dept. of Interior, *Opinions of the Solicitor Relating to Indian Affairs, 1917-1974*, pp. 706-707, 724-725, 747-748 (1979). Unless and until a tribe was formally recognized by the Federal Government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold.

Modern administrative practice has followed this well-trodden path. Absent a specific statute recognizing a tribe and authorizing a trust land acquisition, the Secretary has exercised his trust authority—now governed by regulations promulgated in 1980 after notice-and-comment rulemaking, 25 CFR § 151 *et seq.*; 45 Fed.Reg. 62034—to acquire land for federally recognized Indian tribes like the Narragansett. The Grand Traverse Band of Ottawa and Chippewa Indians, although denied federal recognition in 1934 and 1943, see Dept. of Interior, Office of Federal Acknowledgement, Memorandum from Acting Deputy Commissioner to Assistant Secretary 4 (Oct. 3, 1979) (GTB-V001-D002), was the first tribe the Secretary recognized under the 1980 regulations, see 45 Fed.Reg. 19322. Since then, the Secretary has used his trust authority to expand the Tribe's land base. See, e.g., 49 Fed.Reg. 2025-2026 (1984) (setting aside a 12.5-acre parcel as reservation land for the Tribe's exclusive use). The Tunica-Biloxi Tribe of Louisiana has similarly benefited from administrative recognition, 46 Fed.Reg. 38411 (1981), followed by tribal trust acquisition. And in 2006, the Secretary took land into trust for the Snoqualmie Tribe which, although unrecognized as an Indian tribe in the 1950's, regained federal recognition in

1999. See 71 Fed.Reg. 5067 (taking land into trust for the Tribe); 62 Fed.Reg. 45864 (1997) (recognizing the Snoqualmie as an Indian tribe).

This brief history of § 465 places the case before us into proper context. Federal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land. No party has disputed that the Narragansett Tribe was properly recognized as an Indian tribe in 1983. See 48 Fed.Reg. 6177. Indeed, given that the Tribe has a documented history that stretches back to 1614 and has met the rigorous criteria for administrative recognition, Recommendation for Acknowledgment 1, 7-18, it would be difficult to sustain an objection to the Tribe's status. With this in mind, and in light of the Secretary's longstanding authority under the plain text of the IRA to acquire tribal trust land, it is perfectly clear that the Secretary's land acquisition for the Narragansett was entirely proper.

* * *

Notes

1. *Carcieri* created an immediate reaction from Indian tribes and state and local governments as soon as it was released. No one knows with certainty how many Indian tribes not federally recognized in 1934 will be affected because no one has ever determined with any certainty what “under federal jurisdiction” means. The concluding paragraph of the majority opinion, as well as Justice Breyer’s concurrence, suggest that the decision applies only to tribes who happened to be under *state* jurisdiction, whatever that means. The resulting uncertainty virtually guarantees that Indian tribes will be litigating their status dating back to 1934 in order to qualify for the fee to trust statute.

2. Within weeks of the decision, the House Resources Committee held hearings on the viability of “fixing” Section 5 as a means of reversing the Supreme Court. Professor Colette Routel’s testimony demonstrated that the Court’s interpretation of Section 5 was out of context unless it properly examined the legislative history, something the majority refused to do:

This legislative history demonstrates that the Supreme Court’s decision in *Carcieri v. Salazar* is exactly backwards. The addition of the phrase “now under federal jurisdiction” to the definition of “Indian” was not intended to fix application of the Act to only those under jurisdiction in 1934. Senator Wheeler repeatedly stated that he was concerned about Indians that were, at the time, admittedly under federal jurisdiction. The phrase in question was inserted to ensure that the Secretary would continue to have discretion to decide that individual Indians who had fully assimilated would no longer be granted the benefits of the IRA. “Now” must therefore refer to the date that the Act is being applied to the particular Indian in question.

Hearing on the Supreme Court Decision *Carcieri v. Salazar*: Ramifications to Indian Tribes, House of Representatives Committee on Natural Resources, 111th Cong., 1st Sess. (2009) (Statement of Colette Routel, Visiting Assistant Professor, University of Michigan Law School).

SECTION C. “PUBLIC LAW 280”—A CONGRESSIONAL TRANSFER OF JURISDICTION TO SOME STATES

Page 499, add to the end of note 2:

Onihan was then effectively overruled by *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), which held that absent tribal consent, South Dakota has no jurisdiction over the highways running through Indian lands in the state. As a result, there is no P.L. 280 jurisdiction of any kind in South Dakota. Note 1 on page 498 does state that South Dakota “asserted” jurisdiction over “criminal and civil matters arising on highways,” but that assertion was rendered invalid under the decision in *Rosebud Sioux Tribe*.

SECTION D. JUDICIALLY IMPOSED LIMITATIONS ON TRIBAL JURISDICTION IN INDIAN COUNTRY

Page 536, add to the end of note 2:

Means filed a petition for a writ of habeas corpus in federal court after losing his appeal in the Navajo courts. The federal district court denied the motion and Means appealed that decision to the Ninth Circuit Court of Appeals. The court upheld the denial of the writ, on the grounds that *Lara* established “definitively” that “an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe’s reservation.” *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005). The court rejected Means’ equal protection challenge to the “*Duro fix*” by stating as follows:

***Means argues that by recognizing tribal criminal jurisdiction over nonmember Indians, the 1990 Amendments violate the equal protection guarantees of the Fifth Amendment and the Indian Civil Rights Act because they discriminate against him as an Indian, subjecting him to adverse treatment on account of his race.

Means’s equal protection argument has real force. He argues that although the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation. This makes Means’s case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the State of California. Not only can an Alaskan become a Californian, but the State of California, although “sovereign,” nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states,

when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution. As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

Despite the force of Means's argument, we nonetheless conclude that the weight of established law requires us to reject Means's equal protection claim. *Morton v. Mancari* holds (albeit in the distinguishable context of Indian employment preferences by the federal government) that federal statutory recognition of Indian status is "political rather than racial in nature." Means argues that *Mancari* is undermined by *Adarand Constructors, Inc. v. Peña* [515 U.S. 200, 227 (1995)], but both the Supreme Court and our court have continued to rely on *Mancari*, and we are bound to follow it.

Id. at 932. The court also told Means that his "applied" due process challenge to the Navajo trial proceedings (the type of challenge suggested to nonmember Indians prosecuted under the "Duro-fix" by *Lara*,) was premature, as no actual trial on the charges had been held. The Supreme Court denied certiorari in *Means* and in a similar case involving the Confederated Salish and Kootenai Tribes. *See Means v. Navajo Nation*, 127 S. Ct. 381 (2006); *Morris v. Tanner*, 127 S. Ct. 379 (2006).

Chapter Eight

TRIBAL AND STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION A. TAXATION AND REGULATION

Page 586 add to the end of note 1:

WAGNON v. PRAIRIE BAND POTAWATOMI NATION

Supreme Court of the United States, 2005
546 U.S. 95, 126 S. Ct. 676

Justice THOMAS delivered the opinion of the Court.

The State of Kansas imposes a tax on the receipt of motor fuel by fuel distributors within its boundaries. Kansas applies that tax to motor fuel received by non-Indian fuel distributors who subsequently deliver that fuel to a gas station owned by, and located on, the Reservation of the Prairie Band Potawatomi Nation (Nation). The Nation maintains that this application of the Kansas motor fuel tax is an impermissible affront to its sovereignty. The Court of Appeals agreed, holding that the application of the Kansas tax to fuel received by a non-Indian distributor, but subsequently delivered to the Nation, was invalid under the interest-balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). But the *Bracker* interest-balancing test applies only where “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” *Id.*, at 144. It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation. Accordingly, we reverse.

I

The Nation is a federally recognized Indian Tribe whose reservation is on United States trust land in Jackson County, Kansas. The Nation owns and operates a casino on its reservation. In order to accommodate casino patrons and other reservation-related traffic, the Nation constructed, and now owns and operates, a gas station on its reservation next to the casino. Seventy-three percent of the station’s fuel sales are made to casino patrons, while 11 percent of the station’s fuel sales are made to persons who live or work on the reservation. The Nation purchases fuel for its gas station from non-Indian distributors located off its reservation. Those distributors pay a state fuel tax on their initial receipt of motor fuel, Kan. Stat. Ann. §79—3408 (2003 Cum. Supp.),¹ and pass along the cost of that tax to their customers, including the Nation.

¹ The Kansas Legislature recently amended the fuel tax statute. 2005 Kan. Sess. Laws ch. 46. The text of the sections to which we refer remains the same, although the subsection numbers

The Nation sells its fuel within 2 cents per gallon of the prevailing market price. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982 (CA10 2004). It does so notwithstanding the distributor's decision to pass along the cost of the State's fuel tax to the Nation, and the Nation's decision to impose its own tax on the station's fuel sales in the amount of 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). *Id.*, at 982. The Nation's fuel tax generates approximately \$300,000 annually, funds that the Nation uses for “ ‘constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation,’ ” including the access road between the state-funded highway and the casino. *Ibid.*

The Nation brought an action in Federal District Court for declaratory judgment and injunctive relief from the State's collection of motor fuel tax from distributors who deliver fuel to the reservation. The District Court granted summary judgment in favor of the State. Applying the *Bracker* interest-balancing test, it determined that the balance of state, federal, and tribal interests tilted in favor of the State. The court reached this determination because “it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors,” *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1311 (Kan. 2003), and because the ultimate purchasers of the fuel, non-Indian casino patrons, receive the bulk of their governmental services from the State, *id.*, at 1309. The court held that the State's tax did not interfere with the Nation's right of self-government, adding that “a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business.” *Id.*, at 1311.

The Court of Appeals for the Tenth Circuit reversed. 379 F.3d 979 (2004). It determined that, under *Bracker*, the balance of state, federal, and tribal interests favored the Tribe. The Tenth Circuit reasoned that the Nation's fuel revenues were “derived from value generated primarily on its reservation,” 379 F.3d, at 984—namely, the creation of a new fuel market by virtue of the presence of the casino—and that the Nation's interests in taxing this reservation-created value to raise revenue for reservation infrastructure outweighed the State's “general interest in raising revenues,” *id.*, at 986. We granted certiorari, and now reverse.

II

Although we granted certiorari to determine whether Kansas may tax a non-Indian distributor's *off-reservation* receipt of fuel without being subject to the *Bracker* interest-balancing test, the Nation maintains that Kansas' “tax is imposed not on the off-reservation receipt of fuel, but on its *on-reservation sale and delivery*,” Brief for Respondent 11 (emphasis in original). As the Nation recognizes, under our Indian tax immunity cases, the “who” and the “where” of the challenged tax have significant consequences. We have determined that “[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax,” *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (emphasis

have changed. For consistency, our subsection references are to the 2003 version applied by the lower courts and cited by the parties.

added), and that the States are categorically barred from placing the legal incidence of an excise tax “on a tribe or on tribal members for sales made inside Indian country” without congressional authorization, *id.*, at 459 (emphasis added). We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. See 448 U.S. 136 (holding that state taxes imposed on on-reservation logging and hauling operations by non-Indian contractor are invalid under the interest-balancing test); cf. *Central Machinery Co. v. Arizona Tax Comm’n*, 448 U.S. 160 (1980) (holding that the Indian trader statutes pre-empted Arizona’s tax on a non-Indian seller’s on-reservation sales).

The Nation maintains that it is entitled to prevail under the categorical bar articulated in *Chickasaw* because “[t]he fairest reading of the statute is that the legal incidence of the tax actually falls on the Tribe [on the reservation].” Brief for Respondent 17, n. 5. The Nation alternatively maintains it is entitled to prevail even if the legal incidence of the tax is on the non-Indian distributor because, according to the Nation, the tax arises out of a distributor’s on-reservation transaction with the Tribe and is therefore subject to the *Bracker* balancing test. Brief for Respondent 15. We address the “who” and the “where” of Kansas’ motor fuel tax in turn.

A

Kansas law specifies that “the incidence of [the motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel.” Kan. Stat. Ann. §79—3408(c) (2003 Cum. Supp.). We have suggested that such “dispositive language” from the state legislature is determinative of who bears the legal incidence of a state excise tax. *Chickasaw*, *supra*, at 461. But even if the state legislature had not employed such “dispositive language,” thereby requiring us instead to look to a “fair interpretation of the taxing statute as written and applied,” *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985), we would nonetheless conclude that the legal incidence of the tax is on the distributor.

Kansas law makes clear that it is the distributor, rather than the retailer, that is liable to pay the motor fuel tax. Section 79—3410(a) (1997) provides, in relevant part, that “[e]very distributor . . . shall compute and shall pay to the director . . . the amount of [motor fuel] taxes due to the state.” While the distributors are “entitled” to pass along the cost of the tax to downstream purchasers, see §79—3409 (2003 Cum. Supp.), they are not required to do so. In sum, the legal incidence of the Kansas motor fuel tax is on the distributor. The lower courts reached the same conclusion. And the Kansas Department of Revenue, the state agency charged with administering the motor fuel tax, has concluded likewise. See Letter from David J. Heinemann, Office of Administrative Appeals, to Mark Burghart, Written Final Determination in Request for Informal Conference for Reconsideration of Agency Action, *Davies Oil Co., Inc.*, Docket No. 01—970 (Jan. 3, 2002) (hereinafter Kansas Dept. of Revenue Letter) (“The legal incidence of the Kansas fuel tax rests with Davies, the distributor, who is up-stream from Nation, the retailer”).

B

The Nation maintains that we must apply the *Bracker* interest-balancing test, irrespective of the identity of the taxpayer (*i.e.*, the party bearing the legal incidence), because the Kansas fuel tax arises as a result of the *on-reservation* sale and delivery of the motor fuel. Notably, however, the Nation presented a starkly different interpretation of the statute in the proceedings before the Court of Appeals, arguing that “[t]he balancing test is appropriate even though the legal incidence of the tax is imposed on the Nation’s non-Indian distributor and is triggered by the distributor’s receipt of fuel *outside the reservation*.” Appellant’s Reply Brief in No. 03—3218 (CA10), p. 3 (emphasis added). A “fair interpretation of the taxing statute as written and applied,” *Chemehuevi Tribe*, 474 U.S., at 11, confirms that the Nation’s interpretation of the statute before the Court of Appeals was correct.

As written, the Kansas fuel tax provisions state that “the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein . . .” Kan. Stat. Ann. §79—3408(c) (2003 Cum. Supp.). Under this provision, the distributor who initially receives the motor fuel is liable for payment of the fuel tax, and the distributor’s tax liability is determined by calculating the amount of fuel received by the distributor.

Section 79—3410(a) (1997) confirms that it is the distributor’s off-reservation receipt of the motor fuel, and not any subsequent event, that establishes tax liability. That section provides:

“[E]very distributor, manufacturer, importer, exporter or retailer of motor-vehicle fuels or special fuels, on or before the 25th day of each month, shall render to the director . . . a report certified to be true and correct showing the number of gallons of motor-vehicle fuels or special fuels received by such distributor, manufacturer, importer, exporter or retailer during the preceding calendar month Every distributor, manufacturer or importer within the time herein fixed for the rendering of such reports, shall compute and shall pay to the director at the director’s office the amount of taxes due to the state on all motor-vehicle fuels or special fuels received by such distributor, manufacturer or importer during the preceding calendar month.”

Thus, Kansas law expressly provides that a distributor’s monthly tax obligations are determined by the amount of fuel received by the distributor during the preceding month.

III

Although Kansas' fuel tax is imposed on non-Indian distributors based upon those distributors' off-reservation receipt of motor fuel, the Tenth Circuit concluded that the tax was nevertheless still subject to the interest-balancing test this Court set forth in *Bracker*, 448 U.S. 136. As *Bracker* itself explained, however, we formulated the balancing test to address the "difficult questio[n]" that arises when "a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*." *Id.*, at 144—145 (emphasis added). The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. And although we have never addressed this precise issue, our Indian tax immunity cases counsel against such an application.

A

We have applied the balancing test articulated in *Bracker* only where "the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members," *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999), on the reservation. See *Bracker*, *supra*; *Department of Taxation and Finance of N. Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U.S. 832 (1982); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); *Central Machinery Co.*, 448 U.S.. Similarly, the cases identified in *Bracker* as supportive of the balancing test were exclusively concerned with the on-reservation conduct of non-Indians. See *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Thomas v. Gay*, 169 U.S. 264 (1898); *Williams v. Lee*, 358 U.S. 217 (1959).⁵

Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence. We have explained that this jurisprudence relies "heavily on the doctrine of tribal sovereignty . . . which historically gave state law 'no role to play' within a tribe's territorial

⁵ Our recent discussion in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), regarding the application of the interest-balancing test to motor fuel taxes is not to the contrary. In *Chickasaw*, we noted in dicta that, "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the state may impose its levy, and may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Id.*, at 459 (citation omitted). *Chickasaw* did not purport to expand the applicability of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), to an off-reservation tax on non-Indians. Indeed, the quoted sentence reveals that *Chickasaw* discussed the applicability of the interest-balancing test in the context of a tax that is collected by the tribe—a tax that necessarily arises from on-reservation conduct. Moreover, in purporting to craft a "'bright-line standard'" in that case, we noted that Oklahoma "generally is free" to impose the legal incidence of its motor fuel tax on the consumer—who purchases fuel on the reservation—and then require the Indian retailers to "'collect and remit the levy.'" 515 U.S., at 460. If Oklahoma would have been free to impose the legal incidence of its fuel tax downstream from the Indian retailers, then Kansas should be equally free to impose the legal incidence of its fuel tax upstream from Indian retailers notwithstanding the applicability of the interest-balancing test. Indeed, the *Chickasaw* dicta should apply *a fortiori* here; the upstream approach is *less* burdensome on the Tribe because it does not include the collecting and remitting requirements that typically, and permissibly, accompany a consumer tax.

boundaries.” *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123—124 (1993) (quoting *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 168 (1973)). We have further explained that the doctrine of tribal sovereignty, which has a “significant geographical component,” *Bracker*, *supra*, at 151, requires us to “revers[e]” the “‘general rule’” that “‘exemptions from tax laws should . . . be clearly expressed.’” *Sac and Fox*, *supra*, at 124 (quoting *McClanahan*, *supra*, at 176). And we have determined that the geographical component of tribal sovereignty “‘provide[s] a backdrop against which the applicable treaties and federal statutes must be read.’” *Sac and Fox*, *supra*, at 124 (quoting *McClanahan*, *supra*, at 172). Indeed, the particularized inquiry we set forth in *Bracker* relied specifically on that backdrop. See 448 U.S., at 144—145 (noting that where “a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation* . . . we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence” (emphasis added)).

We have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country. Without applying the interest-balancing test, we have permitted the taxation of the gross receipts of an off-reservation, Indian-owned ski resort, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and the taxation of income earned by Indians working on-reservation but living off-reservation, *Chickasaw*, 515 U.S. 450. In these cases, we have concluded that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Mescalero Apache*, *supra*, at 148—149; *Chickasaw*, *supra*, at 465 (quoting *Mescalero Apache*, *supra*, at 148—149). If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances, the interest-balancing test set forth in *Bracker* is inapplicable. Cf. *Blaze Constr.*, 526 U.S., at 37 (declining to apply the *Bracker* interest-balancing test “where a State seeks to tax a transaction [on-reservation] between the Federal Government and its non-Indian private contractor”).

The application of the interest-balancing test to the Kansas motor fuel tax is not only inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish “bright-line standard[s]” in the context of tax administration. *Ibid.* (“The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations”); cf. *Chickasaw*, *supra*, at 460 (noting that the legal incidence test “‘provide[s] a reasonably bright-line standard’”). Indeed, we have recognized that the *Bracker* interest-balancing test “only cloud[s]” our efforts to establish such standards. *Blaze Constr.*, *supra*, at 37. Under the Nation’s view, however, any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing. Such an expansion of the application of the *Bracker* test is not supported by our cases.

Nor is the Nation entitled to interest balancing by virtue of its claim that the Kansas motor fuel tax interferes with its own motor fuel tax. As an initial matter, this is ultimately a complaint about the downstream economic consequences of the Kansas tax. As the owner of the station, the Nation will keep every dollar it collects above its operating costs. Given that the Nation sells gas at prevailing market rates, its decision to impose a tax should have no effect on its net revenues from the operation of the station; it should not matter whether those revenues are labeled “profits” or “tax proceeds.” The Nation merely seeks to increase those revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues. See *Colville*, 447 U.S., at 156 (“Washington does not infringe the right of reservation Indians to ‘make their own laws and be ruled by them,’ *Williams v. Lee*, 358 U.S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving”). Nor would our analysis change if we accorded legal significance to the Nation’s decision to label a portion of the station’s revenues as tax proceeds. See *id.*, at 184, n. 9 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part) (“When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority”).⁶

B

Finally, the Nation contends that the Kansas motor fuel tax is invalid notwithstanding the inapplicability of the interest-balancing test, because it “exempts from taxation fuel sold or delivered to all other sovereigns,” and is therefore impermissibly discriminatory. Brief for Respondent 17–20 (emphasis deleted); Kan. Stat. Ann. §§79–3408(d)(1)–(2) (2003 Cum. Supp.). But the Nation is not similarly situated to the sovereigns exempted from the Kansas fuel tax. While Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation’s reservation, including the main highway used by the Nation’s casino patrons, Kansas offers no such services to the several States or the Federal Government. Moreover, to the extent Kansas fuel retailers bear the cost of the fuel tax, that burden falls equally upon all retailers within the State regardless of whether those retailers are located on an Indian reservation. Accordingly, the Kansas motor fuel tax is not impermissibly discriminatory.

* * *

For the foregoing reasons, we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians. Accordingly, the tax is valid

⁶ These authorities also foreclose the Nation’s contention that the Kansas motor fuel tax is invalid, irrespective of the applicability of *Bracker*, 448 U.S. 136, because it interferes with the Nation’s right to self government.

and poses no affront to the Nation's sovereignty. The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice GINSBURG, with whom Justice KENNEDY joins, dissenting.

The Kansas fuel tax at issue is imposed on distributors, passed on to retailers, and ultimately paid by gas station customers. Out-of-state sales are exempt, as are sales to other distributors, the United States, and U.S. Government contractors. Fuel lost or destroyed, and thus not sold, is also exempt. But no statutory exception attends sales to Indian tribes or their members.

The Prairie Band Potawatomi Nation (hereinafter Nation) maintains a casino and related facilities on its reservation. On nearby tribal land, as an adjunct to its casino, the Nation built, owns, and operates a gas station known as the Nation Station. Some 73% of the Nation Station's customers are casino patrons or employees. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982 (CA10 2004). The Nation imposes its own tax on fuel sold at the Nation Station, pennies per gallon less than Kansas' tax. *Ibid*.

Both the Nation and the State have authority to tax fuel sales at the Nation Station. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (describing "[t]he power to tax [as] an essential attribute of Indian sovereignty[,] ... a necessary instrument of self-government and territorial management," which "enables a tribal government to raise revenues for its essential services"). As a practical matter, however, the two tolls cannot coexist. 379 F.3d, at 986. If the Nation imposes its tax on top of Kansas' tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all. In these circumstances, which tax is paramount? Applying the interest-balancing approach described in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court of Appeals for the Tenth Circuit held that "the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax." 379 F.3d, at 983. I agree and would affirm the Court of Appeals' judgment.

I

Kansas and the Court heavily rely upon *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (*Mescalero I*). That case involved a ski resort operated by the Mescalero Apache Tribe on off-reservation land leased from the Federal Government. This Court upheld New Mexico's imposition of a tax on the gross receipts of the resort. Balancing was not in order, the Court explained, because the Tribe had ventured outside its own domain, and was fairly treated, for gross receipts purposes, just as a non-Indian enterprise would be. In such cases, the Court observed, an express-preemption standard is appropriately applied. As the Court put it: "Absent

express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Id.*, at 148—149. Accord *Chickasaw Nation*, 515 U.S., at 462—465 (State permitted to tax income of tribal members residing outside Indian Country). Cases of the *Mescalero I* kind, however, do not touch and concern what is at issue in the instant case: taxes formally imposed on nonmembers that nonetheless burden *on-reservation* tribal activity.

Balancing tests have been criticized as rudderless, affording insufficient guidance to decisionmakers. See *Colville*, 447 U.S., at 176 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part) (criticizing the “case-by-case litigation which has plagued this area of law”); Brief for Petitioner 30—32. Pointed as the criticism may be, one must ask, as in life’s choices generally, what is the alternative. “The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Colville*, 447 U.S., at 156. No “bright-line” test is capable of achieving such an accommodation with respect to state taxes formally imposed on non-Indians, but impacting on-reservation ventures. The one the Court adopts inevitably means, so long as the State officially places the burden on the non-Indian distributor in cases of this order, the Tribe loses. *Faute de mieux* and absent congressional instruction otherwise, I would adhere to precedent calling for “a particularized inquiry into the nature of the state, federal, and tribal interests at stake.” *Bracker*, 448 U.S., at 145.

II

The Nation’s interests coincide with “strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments.” 379 F.3d, at 986. The United States points to the poor condition of Indian reservation roads, documented in federal reports, conditions that affect not only driving safety, but also the ability to furnish emergency medical, fire, and police services on an expedited basis, transportation to schools and jobs, and the advancement of economic activity critical to tribal self-sufficiency. Brief for United States as *Amicus Curiae* 26; see, e.g., Dept. of Commerce, Bureau of Indian Affairs, TEA—21 Reauthorization Resource Paper: Transportation Serving Native American Lands (May 2003). The shared interest of the Federal Government and the Nation in improving reservation roads is reflected in Department of the Interior regulations implementing the Indian Reservation Roads Program. See 69 Fed. Reg. 43090 (2004); 25 CFR §170 *et seq.* (2005). The regulations aim at enhancing the ability of tribal governments to promote road construction and maintenance. They anticipate that Tribes will supplement federal funds with their own revenues, including funds gained from a “[t]ribal fuel tax.” §170.932(d). Because the Nation’s roads are integrally related to its casino enterprise, they also further federal interests in tribal economic development

advanced by the Indian Gaming Regulatory Act, Pub. L. 100—497, 102 Stat. 2467, 25 U.S.C. § 2701 *et seq.*

Against these strong tribal and federal interests, Kansas asserts only its “general interest in raising revenues.” 379 F.3d, at 986. “Kansas’ interest,” as the Court of Appeals observed, “is not at its strongest.” *Id.*, at 987. By effectively taxing the Nation Station, Kansas would be deriving revenue “primarily from value generated on the reservation” by the Nation’s casino. *Ibid.* Moreover, the revenue Kansas would gain from applying its tax to fuel destined for the Nation Station appears insubstantial when compared with the total revenue (\$6.1 billion in 2004) the State annually collects through the tax. See *id.*, at 982; Brief for Respondent 12 (observing that “[t]he tax revenues at issue—roughly \$300,000 annually—are less than one-tenth of one percent of the total state fuel tax revenues”).

The Court asserts that “Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation’s reservation.” *Ante*, at 18. The record reveals a different reality. According to the affidavit of the Director of the Nation’s Road and Bridge Department, Kansas and its subdivisions have failed to provide proper maintenance even on their own roads running through the reservation. App. 79. As a result, the Nation has had to assume responsibility for a steadily growing number of road miles within the reservation (roughly 118 of the 212 total miles in 2000). *Ibid.*; see also Brief for Respondent 3, 40, 44—45. Of greater significance, Kansas expends *none* of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads. 379 F.3d, at 986—987; cf. *Ramah*, 458 U.S., at 843, n. 7 (“This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the efforts to provide, adequate [tribal services].”). In contrast, Kansas sets aside a significant percentage of its fuel tax revenues (over 40% in 1999) for counties and localities. Kan. Stat. Ann. §79—3425 (2003 Cum. Supp.); see also §79—34,142 (1997) (prescribing allocation formula); 1999 Kan. Sess. Laws, ch. 137, §37. And, as indicated earlier, *supra*, at 4—5, Kansas accords the Nation no dispensation based on the Nation’s sovereign status. The Nation thus receives neither a state exemption so that it can impose its own fuel tax, nor a share of the State’s fuel tax revenues. Accordingly, the net result of invalidating Kansas’ tax as applied to fuel distributed to the Nation Station would be a somewhat more equitable distribution of road maintenance revenues in Kansas.

Kansas argues that, were the Nation to prevail in this case, nothing would stop the Nation from reducing its tax in order to sell gas below the market price. Brief for Petitioner 30. *Colville* should quell the State’s fears in this regard. Were the Nation to pursue such a course, it would be marketing an exemption, much as the smokeshops did in *Colville*, and hence, interest balancing would likely yield a judgment for the State. See 447 U.S., at 155—157. In any event, as the Nation points out, the State could guard against the risk that “Tribes will impose a ‘nominal tax’ and sell goods at a deep discount on the reservation.” Brief for Respondent 34—35. The State could provide a credit for any tribal tax imposed or enact a state tax that applies only to the extent that the Nation fails to impose an equivalent tribal tax. *Id.*, at 35.

Today’s decision is particularly troubling because of the cloud it casts over the most beneficial means to resolve conflicts of this order. In *Oklahoma Tax Comm’n v. Citizen Band*

Potawatomi Tribe of Okla., 498 U.S. 505 (1991), the Court counseled that States and Tribes may enter into agreements establishing “a mutually satisfactory regime for the collection of this sort of tax.” *Id.*, at 514; see also *Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O’Connor, J., concurring in part and concurring in judgment) (describing various state-tribal agreements). By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.

In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas’ collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation’s tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals for the Tenth Circuit.

SECTION B. FEDERAL ENVIRONMENTAL LAWS

4. OTHER FEDERAL ENVIRONMENTAL STATUTES

Page 602, add to the end of the second paragraph:

In *Hydro Resources, Inc. v. United States Environmental Protection Agency*, 562 F.3d 1249 (10th Cir. 2009), the court affirmed the agency’s determination that certain Navajo Nation lands located in New Mexico were “Indian lands” as defined by the Safe Drinking Water Act, which utilizes 18 U.S.C. § 1151 as its operative definition. As such, the EPA has jurisdiction over a uranium mine.

SECTION C. CIVIL ADJUDICATORY JURISDICTION IN INDIAN COUNTRY

Page 627, add to the end of notes:

7. In *Ford Motor Company v. Todecheene*, 394 F.3d 1172 (9th Cir. 2005), the Ninth Circuit applied the *Montana* test to hold that the Navajo tribal courts lacked civil adjudicatory jurisdiction over Ford Motor Company for a product liability action arising out of a Ford Explorer roll-over accident. The accident occurred on trust land on the Navajo Reservation and claimed the life of an on-duty Navajo law enforcement officer. Neither of the *Montana* exceptions were found to apply, even though the Explorer has been purchased by the tribe as a

patrol vehicle for the Navajo Department of Public Safety, with financing provided by Ford's wholly-owned subsidiary.

But on rehearing, the Ninth Circuit panel held that the tribal court did not "plainly" lack jurisdiction, and stayed the case until Ford exhausted its remedies in tribal court. *See Ford Motor Co. v. Todecheenee*, 488 F.3d 1215 (9th Cir. 2007).

Page 643, add to the end of notes:

PLAINS COMMERCE BANK V. LONG FAMILY LAND AND CATTLE CO.

Supreme Court of the United States, 2008

128 S. Ct. 2709

Chief Justice ROBERTS delivered the opinion of the Court.

This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them. The couple sued on that claim in tribal court; the bank contested the court's jurisdiction. The tribal court concluded that it had jurisdiction and proceeded to hear the case. It ultimately ruled against the bank and awarded the Indian couple damages and the right to purchase a portion of the fee land. The question presented is whether the tribal court had jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned. We hold that it did not.

I

The Long Family Land and Cattle Company, Inc. (Long Company or Company), is a family-run ranching and farming operation incorporated under the laws of South Dakota. Its lands are located on the Cheyenne River Sioux Indian Reservation. Once a massive, 60-million acre affair, the reservation was appreciably diminished by Congress in the 1880s and at present consists of roughly 11 million acres located in Dewey and Ziebach Counties in north-central South Dakota. The Long Company is a respondent here, along with Ronnie and Lila Long, husband and wife, who together own at least 51 percent of the Company's shares. Ronnie and Lila Long are both enrolled members of the Cheyenne River Sioux Indian Tribe.

The Longs and their Company have been customers for many years at Plains Commerce Bank (Bank), located some 25 miles off the reservation as the crow flies in Hoven, South Dakota. The Bank, like the Long Company, is a South Dakota corporation, but has no ties to the reservation other than its business dealings with tribal members. The Bank made its first commercial loan to the Long Company in 1989, and a series of agreements followed. As part of those agreements, Kenneth Long-Ronnie Long's father and a non-Indian-mortgaged to the Bank 2,230 acres of fee land he owned inside the reservation. At the time of Kenneth Long's death in the summer of 1995, Kenneth and the Long Company owed the Bank \$750,000.

In the spring of 1996, Ronnie and Lila Long began negotiating a new loan contract with the Bank in an effort to shore up their Company's flagging financial fortunes and come to terms with their outstanding debts. After several months of back-and-forth, the parties finally reached an agreement in December of that year—two agreements, to be precise. The Company and the Bank signed a fresh loan contract, according to which Kenneth Long's estate deeded over the previously mortgaged fee acreage to the Bank in lieu of foreclosure. ... In return, the Bank agreed to cancel some of the Company's debt and to make additional operating loans. The parties also agreed to a lease arrangement: The Company received a two-year lease on the 2,230 acres, deeded over to the Bank, with an option to purchase the land at the end of the term for \$468,000.

...

It is at this point, the Longs claim, that the Bank began treating them badly. The Longs say the Bank initially offered more favorable purchase terms in the lease agreement, allegedly proposing to sell the land back to the Longs with a 20-year contract for deed. The Bank eventually rescinded that offer, the Longs claim, citing “ ‘possible jurisdictional problems’ “ that might have been caused by the Bank financing an “ ‘Indian owned entity on the reservation.’ “ 491 F.3d 878, 882 (C.A.8 2007) (case below).

Then came the punishing winter of 1996-1997. The Longs lost over 500 head of cattle in the blizzards that season, with the result that the Long Company was unable to exercise its option to purchase the leased acreage when the lease contract expired in 1998. Nevertheless, the Longs refused to vacate the property, prompting the Bank to initiate eviction proceedings in state court and to petition the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit. In the meantime, the Bank sold 320 acres of the fee land it owned to a non-Indian couple. In June 1999, while the Longs continued to occupy a 960-acre parcel of the land, the Bank sold the remaining 1,910 acres to two other nonmembers.

In July 1999, the Longs and the Long Company filed suit against the Bank in the Tribal Court, seeking an injunction to prevent their eviction from the property and to reverse the sale of the land. They asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. The discrimination claim alleged that the Bank sold the land to nonmembers on terms more favorable than those offered the Company. The Bank asserted in its answer that the court lacked jurisdiction and also stated a counterclaim. The Tribal Court found that it had jurisdiction, denied the Bank's motion for summary judgment on its counterclaim, and proceeded to trial. Four causes of action were submitted to the seven-member jury: breach of contract, bad faith, violation of self-help remedies, and discrimination.

The jury found for the Longs on three of the four causes, including the discrimination claim, and awarded a \$750,000 general verdict. After denying the Bank's post-trial motion for judgment notwithstanding the verdict by finding again that it had jurisdiction to adjudicate the Longs' claims, the Tribal Court entered judgment awarding the Longs \$750,000 plus interest. A later supplemental judgment further awarded the Longs an option to purchase the 960 acres of the land they still occupied on the terms offered in the original purchase option, effectively nullifying the Bank's previous sale of that land to non-Indians.

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court. The Bank then filed the instant action in the United States District Court for the District of South Dakota, seeking a declaration that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs' discrimination claim. The District Court granted summary judgment to the Longs. ...

The Court of Appeals for the Eighth Circuit affirmed. ...

We granted certiorari ... and now reverse.

III

A

For nearly two centuries now, we have recognized Indian tribes as “distinct, independent political communities,” *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832), qualified to exercise many of the powers and prerogatives of self-government, see *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)....

But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, at 450 U.S., at 565, 101 S.Ct. 1245. As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the tribes have, by virtue of their incorporation into the American republic, lost “the right of governing ... person[s] within their limits except themselves.” *Id.*, at 209, 98 S.Ct. 1011 (emphasis and internal quotation marks omitted).

This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians-what we have called “non-Indian fee land.” *Strate v. A-1 Contractors*, 520 U.S. 438, 446, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (internal quotation marks omitted). Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648, 651, n. 1, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001). The history of the General Allotment Act and its successor statutes has been well rehearsed in our precedents. See, e.g., *Montana*, *supra*, at 558-563, 101 S.Ct. 1245; *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-255, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). Suffice it to say here that the effect of the Act was to convert millions of acres of formerly tribal land into fee simple parcels, “fully alienable,” *id.*, at 264, 112 S.Ct. 683, and “free of all charge or encumbrance whatsoever,” 25

U.S.C. § 348 (2000 ed., Supp. V). See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2][b], pp. 1041-1042 (2005 ed.).

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima, supra*, at 267-268, 112 S.Ct. 683 (General Allotment Act permits Yakima County to impose ad valorem tax on fee land located within the reservation); *Goudy v. Meath*, 203 U.S. 146, 149-150, 27 S.Ct. 48, 51 L.Ed. 130 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); *In re Heff*, 197 U.S. 488, 502-503, 25 S.Ct. 506, 49 L.Ed. 848 (1905) (fee land subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U.S.C. § 349) (2000 ed.)). Among the powers lost is the authority to prevent the land's sale, see *County of Yakima, supra*, at 263, 112 S.Ct. 683 (General Allotment Act granted fee holders power of voluntary sale)-not surprisingly, as "free alienability" by the holder is a core attribute of the fee simple, C. MOYNIHAN, INTRODUCTION TO LAW OF REAL PROPERTY § 3, p. 32 (2d ed.1988). Moreover, when the tribe or tribal members convey a parcel of fee land "to non-Indians, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (emphasis added). This necessarily entails the "the loss of regulatory jurisdiction over the use of the land by others." *Ibid.* As a general rule, then, "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinion of White, J.).

We have recognized two exceptions to this principle, circumstances in which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S., at 565, 101 S.Ct. 1245. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Ibid.* Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 566, 101 S.Ct. 1245. These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of "the activities of nonmembers" or "the conduct of non-Indians on fee land."

Given *Montana*'s " 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' " *Atkinson, supra*, at 651, 121 S.Ct. 1825 (quoting *Montana, supra*, at 565, 101 S.Ct. 1245), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid," *Atkinson, supra*, at 659, 121 S.Ct. 1825. The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U.S., at 654, 121 S.Ct. 1825. These exceptions are "limited" ones, *id.*, at 647, 121 S.Ct. 1825, and cannot be construed in a manner that would "swallow the rule," *id.*, at 655, 121 S.Ct. 1825, or "severely shrink" it, *Strate*, 520 U.S., at 458,

117 S.Ct. 1404. The Bank contends that neither exception authorizes tribal courts to exercise jurisdiction over the Longs' discrimination claim at issue in this case. We agree.

B

According to our precedents, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*, at 453, 117 S.Ct. 1404. We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land.

The Longs' discrimination claim challenges a non-Indian's sale of non-Indian fee land. Despite the Longs' attempt to recharacterize their claim as turning on the Bank's alleged "failure to pay to respondents loans promised for cattle-raising on tribal trust land," Brief for Respondents 47, in fact the Longs brought their discrimination claim "seeking to have the land sales set aside on the ground that the sale to nonmembers 'on terms more favorable' than the bank had extended to the Longs" violated tribal tort law, 491 F.3d, at 882 (quoting Plaintiffs' Amended Complaint, App. 173). *See also* Brief for United States as *Amicus Curiae* 7. That discrimination claim thus concerned the sale of a 2,230-acre fee parcel that the Bank had acquired from the estate of a non-Indian.

The status of the land is relevant "insofar as it bears on the application of ... *Montana's* exceptions to [this] case." *Hicks*, 533 U.S., at 376, 121 S.Ct. 2304 (SOUTER, J., concurring). The acres at issue here were alienated from the Cheyenne River Sioux's tribal trust and converted into fee simple parcels as part of the Act of May 27, 1908, 35 Stat. 312, commonly called the 1908 Allotment Act. *See* Brief for Respondents 4, n. 2. While the General Allotment Act provided for the division of tribal land into fee simple parcels owned by individual tribal members, that Act also mandated that such allotments would be held in trust for their owners by the United States for a period of 25 years-or longer, at the President's discretion-during which time the parcel owners had no authority to sell or convey the land. *See* 25 U.S.C. § 348 (2000 ed., and Supp. V). The 1908 Act released particular Indian owners from these restrictions ahead of schedule, vesting in them full fee ownership. *See* § 1, 35 Stat. 312. In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, which "pu [t] an end to further allotment of reservation land," but did not "return allotted land to pre-General Allotment status, leaving it fully alienable by the allottees, their heirs, and assigns." *County of Yakima*, 502 U.S., at 264, 112 S.Ct. 683.

The tribal tort law the Longs are attempting to enforce, however, operates as a restraint on alienation. It "set[s] limits on how nonmembers may engage in commercial transactions," 491 F.3d, at 887-and not just any transactions, but specifically nonmembers' sale of fee lands they own. It regulates the substantive terms on which the Bank is able to offer its fee land for sale. Respondents and their principal *amicus*, the United States, acknowledge that the tribal tort at issue here is a form of regulation. *See* Brief for Respondents 52; Brief for United States as *Amicus Curiae* 25-26; *see also Riegel v. Medtronic, Inc.*, 552 U.S. ----, ----, 128 S.Ct. 999, 1008, 169 L.Ed.2d 892 (2008). They argue the regulation is fully authorized by the first *Montana* exception. They are mistaken.

Montana does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, 101 S.Ct. 1245, allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations," *id.*, at 564, 101 S.Ct. 1245. See *Big Horn Cty. Elect. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (C.A.9 2000) ("*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers" (internal quotations omitted; emphasis added)).

We cited four cases in explanation of *Montana*'s first exception. Each involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members. The first concerned a tribal court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. See *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The other three involved taxes on economic activity by nonmembers. See *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-153, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (in cases where "the tribe has a significant interest in the subject matter," tribes retain "authority to tax the activities or property of non-Indians taking place or situated on Indian lands"); *Morris v. Hitchcock*, 194 U.S. 384, 393, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal taxes on nonmembers grazing cattle on Indian-owned fee land within tribal territory); *Buster v. Wright*, 135 F. 947, 950 (C.A.8 1905) (Creek Nation possessed power to levy a permit tax on nonmembers for the privilege of doing business within the reservation).

Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land. We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. See *Kerr-McGee*, 471 U.S., at 196-197, 105 S.Ct. 1900. We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Tellingly, with only "one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*." *Hicks, supra*, at 360, 121 S.Ct. 2304 (emphasis added). See *Atkinson*, 532 U.S., at 659, 121 S.Ct. 1825 (Tribe may not tax nonmember activity on non-Indian fee land); *Strate*, 520 U.S., at 454, 457, 117 S.Ct. 1404 (tribal court lacks jurisdiction over tort suit involving an accident on non-tribal land); *Montana, supra*, at 566, 101 S.Ct. 1245 (Tribe has no authority to regulate nonmember hunting and fishing on non-Indian fee land). The exception is *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, and even it fits the general rubric noted above: In that case, we permitted a tribe to restrain particular *uses* of non-Indian fee land through zoning regulations. While a six-Justice majority held that *Montana* did *not* authorize the Yakima

Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers, 492 U.S., at 430-431, 109 S.Ct. 2994 (opinion of White, J.); *id.*, at 444-447, 109 S.Ct. 2994 (opinion of STEVENS, J.), five Justices concluded that *Montana* did permit the Tribe to impose different zoning restrictions on nonmember fee land isolated in “the heart of [a] closed portion of the reservation,” 492 U.S., at 440, 109 S.Ct. 2994 (opinion of STEVENS, J.), though the Court could not agree on a rationale, see *id.*, at 443-444, 109 S.Ct. 2994 (same); *id.*, at 458-459, 109 S.Ct. 2994 (opinion of Blackmun, J.).

But again, whether or not we have permitted regulation of nonmember activity on non-Indian fee land in a given case, in no case have we found that *Montana* authorized a tribe to regulate the sale of such land. Rather, our *Montana* cases have always concerned nonmember conduct on the land. See, e.g., *Hicks*, 533 U.S., at 359, 121 S.Ct. 2304 (*Montana* and *Strate* concern “tribal authority to regulate nonmembers’ activities on [fee] land” (emphasis added)); *Atkinson*, 532 U.S., at 647, 121 S.Ct. 1825 (“conduct of nonmembers on non-Indian fee land”); *id.*, at 660, 121 S.Ct. 1825 (SOUTER, J., concurring) (“the activities of nonmembers”); *Bourland*, 508 U.S., at 689, 113 S.Ct. 2309 (“use of the land”); *Brendale*, *supra*, at 430, 109 S.Ct. 2994 (“use of fee land”); *Montana*, *supra*, at 565, 101 S.Ct. 1245 (first exception covers “activities of nonmembers”)....

The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The tribe’s “traditional and undisputed power to exclude persons” from tribal land, *Duro*, 495 U.S., at 696, 110 S.Ct. 2053, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. See *Bourland*, *supra*, at 691, n. 11, 113 S.Ct. 2309 (“Regulatory authority goes hand in hand with the power to exclude”). Much taxation can be justified on a similar basis. See *Colville*, 447 U.S., at 153, 100 S.Ct. 2069 (taxing power “may be exercised over ... nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions” (quoting *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934), emphasis added)). The power to tax certain nonmember activity can also be justified as “a necessary instrument of self-government and territorial management,” *Merrion*, 455 U.S., at 137, 102 S.Ct. 894, insofar as taxation “enables a tribal government to raise revenues for its essential services,” to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order, *ibid.*

Justice GINSBURG wonders why these sorts of regulations are permissible under *Montana* but regulating the sale of fee land is not. See *post*, at 2729 - 2730. The reason is that regulation of the sale of non-Indian fee land, unlike the above, cannot be justified by reference to the tribe’s sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe’s immediate control. See *Strate*, 520 U.S., at 456, 117 S.Ct. 1404 (tribes lack power to “assert [over non-Indian fee land] a landowner’s right to occupy and exclude”). It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land’s sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to be tribal land.

Nor can regulation of fee land sales be justified by the tribe's interests in protecting internal relations and self-government. Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.

This is not to suggest that the sale of the land will have no impact on the tribe. The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, see *supra*, at 2721 - 2723, the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so.

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." *United States v. Lara*, 541 U.S. 193, 212, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (KENNEDY, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. See *Talton v. Mayes*, 163 U.S. 376, 382-385, 16 S.Ct. 986, 41 L.Ed. 196 (1896). Indian courts "differ from traditional American courts in a number of significant respects." *Hicks*, 533 U.S., at 383, 121 S.Ct. 2304 (SOUTER, J., concurring). And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U.S., at 564, 101 S.Ct. 1245.

In commenting on the policy goals Congress adopted with the General Allotment Act, we noted that "[t]here is simply no suggestion" in the history of the Act "that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority." *Id.*, at 560, n. 9, 101 S.Ct. 1245. In fact, we said it "defies common sense to suppose" that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. *Ibid.* If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either.

The Longs point out that the Bank in this case could hardly have been surprised by the Tribe's assertion of regulatory power over the parties' business dealings. The Bank, after all, had "lengthy on-reservation commercial relationships with the Long Company." Brief for Respondents 40. Justice GINSBURG echoes this point. See *post*, at 2728 - 2729. But as we have

emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not “in for a penny, in for a Pound.” *Atkinson*, 532 U.S., at 656, 121 S.Ct. 1825 (internal quotation marks omitted). The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple.

Even the courts below recognized that the Longs’ discrimination claim was a “novel” one. 491 F.3d, at 892. It arose “directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,” including the Lakota “sense of justice, fair play and decency to others.” 440 F.Supp.2d, at 1082 (internal quotation marks omitted). The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. This is surely not a typical regulation. But whatever the Bank anticipated, whatever “consensual relationship” may have been established through the Bank’s dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank’s subsequent sale of its fee land.

The Longs acknowledge, if obliquely, the critical importance of land status. They emphasize that the Long Company “operated on reservation fee and trust lands,” Brief for Respondents 40, and n. 24, 41, and note that “the fee land at issue in the lease-repurchase agreement” had previously belonged to a tribal member, *id.*, at 47. These facts, however, do not change the status of the land at the time of the challenged sale. Regardless of where the Long Company operated, the fee land whose sale the Longs seek to restrain was owned by the Bank at the relevant time. And indeed, before that, it was owned by Kenneth Long, a non-Indian. See *Hicks*, *supra*, at 382, n. 4, 121 S.Ct. 2304 (SOUTER, J., concurring) (“Land status ... might well have an impact under one (or perhaps both) of the *Montana* exceptions”), *Atkinson*, *supra*, at 659, 121 S.Ct. 1825 (SOUTER, J., concurring) (status of territory as “tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the [*Montana*] exceptions”).

The Longs attempt to salvage their position by arguing that the discrimination claim is best read to challenge the Bank’s whole course of commercial dealings with the Longs stretching back over a decade—not just the sale of the fee land. Brief for Respondents 44. That argument is unavailing. The Longs are the first to point out that their breach-of-contract and bad-faith claims, which *do* involve the Bank’s course of dealings, are not before this Court. *Ibid.* Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land. *Ibid.* Count six of the Longs’ amended complaint in the Tribal Court alleges that “[i]n selling the Longs’ land, [Plains Commerce Bank] unfairly discriminated against the Company and the Longs.” App. 172-173 (emphasis added). As relief, the Longs claimed they “should get possession and title to their land back.” *Id.*, at 173. The Longs’ discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns.

Such regulation is outside the scope of a tribe's sovereign authority. Justice GINSBURG asserts that if "[t]he Federal Government and every State, county, and municipality can make nondiscrimination the law governing ... real property transactions," tribes should be able to do so as well. *Post*, at 2731. This argument completely overlooks the very reason cases like *Montana* and this one arise: Tribal jurisdiction, unlike the jurisdiction of the other governmental entities cited by Justice GINSBURG, generally does not extend to nonmembers. See *Montana, supra*, at 565, 101 S.Ct. 1245. The sovereign authority of Indian tribes is limited in ways state and federal authority is not. Contrary to Justice GINSBURG's suggestion, that bedrock principle does not vary depending on the desirability of a particular regulation.

Montana provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. The Cheyenne River Sioux Tribe lost the authority to restrain the sale of fee simple parcels inside their borders when the land was sold as part of the 1908 Allotment Act. Nothing in *Montana* gives it back.

C

[The Court held that the second *Montana* exception also did not apply.]

D

Finally, we address the Longs' argument that the Bank consented to tribal court jurisdiction over the discrimination claim by seeking the assistance of tribal courts in serving a notice to quit. Brief for Respondents 44-46. When the Longs refused to vacate the land, the Bank initiated eviction proceedings in South Dakota state court. The Bank then asked the Tribal Court to appoint a process server able to reach the Longs. Seeking the Tribal Court's aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court. Notably, when the Longs did file their complaint against the Bank in Tribal Court, the Bank promptly contended in its answer that the court lacked jurisdiction. Brief for United States as *Amicus Curiae* 7. Under these circumstances, we find that the Bank did not consent by its litigation conduct to tribal court jurisdiction over the Longs' discrimination claim.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, concurring in part, concurring in the judgment in part, and dissenting in part.

I

Ronnie and Lila Long, husband and wife and owners of the Long Family Land and Cattle Company (Long Company), are enrolled members of the Cheyenne River Sioux Tribe. Although the Long Company was incorporated in South Dakota, the enterprise “was overwhelmingly tribal in character, as were its interactions with the bank.” 491 F.3d, at 886. All Long Company property was situated-and all operations of the enterprise occurred-within the Cheyenne River Sioux Indian Reservation. The Long Company’s articles of incorporation required Indian ownership of a majority of the corporation’s shares. This requirement reflected the Long Company’s status as an Indian-owned business entity eligible for Bureau of Indian Affairs (BIA) loan guarantees. See 25 CFR § 103.25 (2007) (requiring at least 51% Indian ownership). Loan guarantees are among the incentives the BIA offers to promote the development of on-reservation Indian enterprises. The Long Company “was formed to take advantage of [the] BIA incentives.” 491 F.3d, at 886.

The history of the Bank’s commercial dealings with the Long Company and the Long family is lengthy and complex. The business relationship dates from 1988, when Ronnie Long’s parents-one of them a member of the Tribe-mortgaged some 2,230 acres of land to the Bank to gain working capital for the ranch. As security for the Bank’s loans over the years, the Longs mortgaged both their land and their personal property. The Bank benefited significantly from the Long Company’s status as an Indian-owned business entity, for the BIA loan guarantees “allowed [it] to greatly reduce its lending risk.” *Ibid.* Eventually, the Bank collected from the BIA almost \$400,000, more than 80% of the net losses resulting from its loans to the Longs. See 440 F.Supp.2d 1070, 1078 (SD 2006) (case below); App. 135-138.

The discrimination claim here at issue rests on the allegedly unfair conditions the Bank exacted from the Longs when they sought loans to sustain the operation of their ranch. Following the death of Ronnie’s father, the Bank and the Longs entered into an agreement under which the mortgaged land would be deeded over to the Bank in exchange for the Bank’s canceling some debt and making additional loans to keep the ranch in business. The Longs were given a two-year lease on the property with an option to buy the land back when the lease term expired. Negotiating sessions for these arrangements were held at the Tribe’s on-reservation offices and were facilitated by tribal officers and BIA employees. 491 F.3d, at 881.

Viewing the deal they were given in comparative light, the Longs charged that the Bank offered to resell ranch land to them on terms less advantageous than those the Bank offered in similar dealings with non-Indians. Their claim, all courts prior to this one found, fit within the *Montana* exception for “activities of nonmembers who enter [into] ... commercial dealing, contracts, leases, or other arrangements” with tribal members. 450 U.S., at 565, 101 S.Ct. 1245. Cf. *Strate*, 520 U.S., at 457, 117 S.Ct. 1404 (citing *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)) (*Montana*’s consensual-relationships exception justifies tribal-court adjudication of claims “arising out of on-reservation sales transaction between nonmember plaintiff and member defendants”). I am convinced that the courts below got it right.

This case, it bears emphasis, involves no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court. Cf. *Nevada v. Hicks*, 533 U.S. 353, 382-385, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (SOUTER, J., concurring). Hardly a stranger to the tribal court system, the Bank regularly filed suit in that forum. See Brief for Cheyenne River Sioux Tribe as *Amicus Curiae* 29-31. The Bank enlisted tribal-court aid to serve notice to quit on the Longs in connection with state-court eviction proceedings. The Bank later filed a counterclaim for eviction and motion for summary judgment in the case the Longs commenced in the Tribal Court. In its summary judgment motion, the Bank stated, without qualification, that the Tribal Court “ha[d] jurisdiction over the subject matter of this action.” App. 187-188. Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted. See Brief for Respondents 42.

II

Resolving this case on a ground neither argued nor addressed below, the Court holds that a tribe may not impose any regulation-not even a nondiscrimination requirement-on a bank’s dealings with tribal members regarding on-reservation fee lands. See *ante*, at 2714, 2725 - 2726. I do not read *Montana* or any other case so to instruct, and find the Court’s position perplexing.

First, I question the Court’s separation of land sales tied to lending activities from other “activities of nonmembers who enter consensual relationships with the tribe or its members,” *Montana*, 450 U.S., at 565, 101 S.Ct. 1245. Sales of land-and related conduct-are surely “activities” within the ordinary sense of the word. See, e.g., *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (“The excise tax remains a tax upon the Indian’s *activity* of selling the land....” (emphasis added)). Cf. 14 Oxford English Dictionary 388 (2d ed.1989) (defining “sale” as “[t]he action or an act of selling” (def. 1(a))).

Second, the Court notes the absence of any case “f[i]nd[ing] that *Montana* authorized a tribe to regulate the sale of [non-Indian fee] land.” *Ante*, at 2722. But neither have we held that *Montana* prohibits all such regulation. If the Court in *Montana*, or later cases, had intended to remove land sales resulting from loan transactions entirely from tribal governance, it could have spoken plainly to that effect. Instead, *Montana* listed as examples of consensual relationships that tribes might have authority to regulate “commercial dealing, contracts, [and] leases.” 450 U.S., at 565, 101 S.Ct. 1245. Presumably, the reference to “leases” includes leases of fee land. But why should a nonmember’s lease of fee land to a member be differentiated, for *Montana* exception purposes, from a sale of the same land? And why would the enforcement of an antidiscrimination command be less important to tribal self-rule and dignity, cf. *ante*, at 2723 - 2724, when the command relates to land sales than when it relates to other commercial relationships between nonmembers and members?

* * *

For the reasons stated, I would leave undisturbed the Tribal Court's initial judgment, ... awarding the Longs damages, prejudgment interest, and costs as redress for the Bank's breach of contract, bad faith, and discrimination. Accordingly, I would affirm in large part the judgment of the Court of Appeals.

Notes

1. The United States Solicitor General, participating as *amicus curiae* in support of the Long Family, argued that tribal common law is not unfairly applied by tribal courts to nonmembers:

Petitioner and some of its amici suggest that tribal common-law claims may present a trap for unwary nonmembers. ... But this Court has previously “rejected *** attacks on tribal court jurisdiction” predicated on allegations of “local bias and incompetence,” ... and the facts do not bear out petitioner's concerns. Tribal courts take different forms and draw from varied traditions, but, like the CRST's own courts ..., many of them look to federal or state law to govern disputes where no established tribal law applies. [See, e.g., Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 739 (2006) (noting tribal law “tends to mirror American laws” because Tribes “must be able to function in the American political system in a seamless manner”); *id.* at 734-735 (discussing tribal-court use of Anglo-American legal constructs and state and federal common law; concluding there is little evidence that tribal courts are unfair to nonmembers); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable “to those in state courts” even when tribal codes do not).] Indeed, when the Cheyenne River Sioux Tribal Court of Appeals recognized the principle of judicial review, it relied not only on Lakota tradition but also on this Court's opinion in *Marbury v. Madison*. See COHEN'S HANDBOOK V. FEDERAL INDIAN LAW 274 n.545 (citing *Clemente v. LeCompte*, 22 Indian L. Rep. 6111 (Chy. R. Sx. Ct. App. 1994)).

Brief of the United States as Amicus Curiae Supporting Respondents 27-28 & n. 15, available at http://www.narf.org/sct/plainsvlong/merits/amicus_of_us_for_respondents.pdf.

SECTION D. JUDICIAL JURISDICTION BY CONGRESSIONAL STATUTE: THE INDIAN CHILD WELFARE ACT OF 1978

Page 671, add to end of note 7:

8. Section 1911(a) of the ICWA provides for exclusive tribal jurisdiction over any child custody proceeding involving an Indian child domiciled on the reservation, “except where such

jurisdiction is otherwise vested in the State by existing Federal law.” In a case originating in California, a mandatory Public Law 280 state, an Indian parent lost her challenge to the state’s authority to terminate her parental rights over her on-reservation Indian child in an involuntary child welfare proceeding. *See Doe v. Mann*, 415 F.3d 1038 (9th cir. 2005), *cert. denied*, 126 S. Ct. 1911 (2006). The court found the state’s involuntary child welfare proceedings to be civil adjudicatory in nature, rather than regulatory, for purposes of Public Law 280, and therefore California had jurisdiction under the Act. The appeals court noted the ICWA provides a method for tribes in California to resume exclusive jurisdiction over Indian child welfare matters, but that had not occurred in *Doe*.

Chapter Nine

SECTION C. INDIAN GAMING

2. THE CONGRESSIONAL RESPONSE TO CABAZON: THE INDIAN GAMING REGULATORY ACT

Page 737, add to the end of the Notes:

5. On May 20, 2008, the Department of Interior published its regulations on the taking of land into trust for gaming purposes. *See* 73 FED. REG. 29354 (May 20, 2008); 25 CFR Part 292.

IGRA prohibits gaming on Indian lands acquired after the October 17, 1988. *See* 25 U.S.C. § 2719(a). But there are numerous exceptions contained in Section 2719. For example, tribes granted federal recognition after the cut-off date may engage in gaming. *E.g.*, *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (Pokagon Band of Potawatomi Indians, recognized in 1994). Tribes who had been terminated and then restored to federal recognition prior to 1988 may game on restored lands acquired after the cut-off date. *E.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 961 (6th Cir. 2004).

Opponents of gaming on after acquired lands labeled the new gaming proposals “off-reservation gaming” and, worse, “reservation shopping.” *See* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. LEGIS. 39, 66 (2007). Although fewer than five tribes had been successful in locating gaming operations far from tribal traditional territories, a public backlash against Indian gaming began. *See id.* at 66-71.

The new federal regulations generally prohibit the acquisition of trust lands by the Secretary for gaming on Indian lands located further than 25 miles from a tribe’s reservation boundaries. *See* 25 CFR § 292.12(a)(3).

6. After the Supreme Court’s decision in *Seminole Tribe v. Florida*, 516 U.S. 44 (1996), declared unconstitutional the portions of IGRA designed to compel the state governors to negotiate Class III gaming compacts with tribes in good faith, the Department of Interior

promulgated regulations designed to restore the remedy that IGRA had created. *See* 25 CFR Part 291.

In *Texas v. United States*, 497 F.3d 491 (5th Cir. 2008), the Fifth Circuit Court of Appeals held 2-1 that these regulations were invalid, as they were not explicitly authorized by Congress in IGRA. The majority noted:

In IGRA, Congress plainly left little remedial authority for the Secretary to exercise. The judicially-managed scheme of good-faith litigation, followed by negotiation, then mediation, allows the Secretary to step in only at the end of the process, and then only to adopt procedures based upon the mediator's proposed compact. The Secretary may not decide the state's good faith; may not require or name a mediator; and may not pull out of thin air the compact provisions that he is empowered to enforce. To infer from this limited authority that the Secretary was implicitly delegated the ability to promulgate a wholesale substitute for the judicial process amounts to logical alchemy.

497 F.3d at 503.

The dissent responded:

The regulations challenged here, pertaining to the Secretarial Gaming Procedures, deserve *Chevron* deference because Congress explicitly authorized the Secretary to promulgate regulations to carry into effect any statute relating to Indian affairs or arising out of Indian relations, *see* 25 U.S.C. §§ 1a, 2 & 9; and implicitly authorized the Secretary to promulgate the regulations at issue here to fill the gap in the IGRA created by Congress's unintentional failure to provide for the unforeseen ineffectiveness of a federal court suit as the tribal remedy in cases in which a state refused to bargain in good faith and invoked its Eleventh Amendment sovereign immunity; the regulations are reasonably designed and appropriate for carrying into effect the IGRA after the ineffectiveness of its remedial provision was revealed by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); and the regulations are binding in the courts because they are not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statutes.

Chief Judge Jones further errs in contending that there has been no explicit or implicit congressional delegation of authority to the Secretary of the Interior to promulgate gap-filling regulations under the IGRA. Contrary to her assertions, the Secretary does not hang his hat on a mere failure of Congress to expressly withhold a delegation of agency authority. Rather, the Secretary of the Interior is the agency Congress would have expected to fill any such gap, given the powers granted to it under the IGRA and its general authority statutes. Chief Judge Jones focuses narrowly on the particular IGRA provision at issue here, relying conclusively on the fact that the IGRA

itself does not contain an express delegation of agency authority to provide an alternate tribal remedy.

It was thus not just the existence of a compact that was crucial to the balance between states and tribes under the IGRA. “It is quite clear from the structure of the statute that the tribe’s right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless.” *Spokane Tribe*, 139 F.3d at 1300. The right to sue to essentially force a compact gave tribes a crucial piece of leverage against the states--preventing a state from taking the approach of Texas in this case, which has been to utterly refuse to negotiate. Prior to the promulgation of the Secretarial Procedures regulations, states had under *Seminole*’s constitutional interpretation a veto over the tribal-state compact process. *See* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 75 (2007) (describing the stalemate resulting from the elimination of Congress’s intended remedy for tribes faced with a state refusing to negotiate). “Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now.” *Spokane Tribe*, 139 F.3d at 1302.

497 F.3d at 514, 517, 522 (Dennis, C.J., dissenting).

The Kickapoo Tribe filed a petition for certiorari. *See* 76 USLW 3471 (Feb. 25, 2008) (No. 07-1109).

Chapter Ten

INDIAN RELIGION AND CULTURE

SECTION A. PROTECTION OF AMERICAN INDIAN SACRED LANDS

Page 756, add to the end of first paragraph on the page:

The decision by the district court was upheld on appeal to the Tenth Circuit. *See Wyoming Sawmills, Inc. v. United States Forest Service*, 383 F. 3d. 1241 (10th Cir. 2004), *cert. denied*, 126 S.Ct. 330 (2005).

Page 756, add to the end of the Notes:

On March 12, 2007, the Ninth Circuit Court of Appeals decided *Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007), the so-called San Francisco Peaks case. The Forest Service had approved a plan by the non-Indian owners of a ski lodge, the Snowbowl, doing business on the San Francisco Peaks to use treated sewage effluent to create snow for use on the ski slopes. Tribes and environmental organizations brought suit under numerous federal statutes, including the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*), the National Environmental Protection Act (42 U.S.C. § 4321), and the National Historic Preservation Act (16 U.S.C. §§ 470 *et seq.*).

The Ninth Circuit panel recognized the religious importance of the area to numerous Indian tribes:

The Forest Service has described the Peaks as “a landmark upon the horizon, as viewed from the traditional or ancestral lands of the Hopi, Zuni, Acoma, Navajo, Apache, Yavapai, Hualapai, Havasupai, and Paiute.” The Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. Though there are differences among these tribes' religious beliefs and practices associated with the Peaks, there are important commonalities. As the Service has noted, many of these tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks.

479 F.3d at 1029-30.

The court also described the character of the treated sewage effluent and how the Snowbowl would use this effluent:

Treated sewage effluent is waste-water discharged by households, businesses, and industry that has been treated for certain kinds of reuse. Under Alternative Two, the City of Flagstaff would provide the Snowbowl with up to 1.5 million gallons per day of its treated sewage effluent from November through February. A new 14.8-mile pipeline would be built between Flagstaff and the Snowbowl to carry the treated effluent. At the beginning of the ski season, during November and December, the Snowbowl would cover 205.3 acres of Humphrey's Peak with artificial snow to build a base layer. The Snowbowl would then make additional artificial snow as necessary during the rest of the season, depending on the amount of natural snow.

479 F.3d at 1030-31.

The panel concluded that the use of this effluent would impose a substantial burden on Indian tribal religious practices, especially those of the Navajo and Hopi people:

The record supports the conclusion that the proposed use of treated sewage effluent on the San Francisco Peaks would impose a burden on the religious exercise of all four tribes discussed above—the Navajo, the Hopi, the Hualapai, and the Havasupai. However, on the record before us, that burden falls most heavily on the Navajo and the Hopi. The Forest Service itself wrote in the FEIS that the Peaks are the most sacred place of both the Navajo and the Hopi; that those tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks. Navajo Appellants presented evidence in the district court that, were the proposed action to go forward, contamination by the treated sewage effluent would prevent practitioners from making or rejuvenating medicine bundles, from making medicine, and from performing the Blessingway and healing ceremonies. Hopi Appellants presented evidence that, were the proposed action to go forward, contamination by the effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depend on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the Katsinam spirits.

We conclude that Appellants have shown that the use of treated sewage effluent on the Peaks would impose a substantial burden on their exercise of religion. This showing is particularly strong for the Navajo and the Hopi. Because we hold that the Navajo and the Hopi have shown a substantial burden on their exercise of religion, we need not reach the somewhat closer question of whether the Hualapai and the Havasupai have also done so.

479 F.3d at 1042-43.

The court rejected the government's claim that the use of treated sewage effluent, even to save the ski business at the Snowbowl, was a compelling governmental interest:

Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling *governmental* interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result. We are struck by the obvious fact that the Peaks are located in a desert. It is (and always has been) predictable that some winters will be dry. The then-owners of the Snowbowl knew this when they expanded the Snowbowl in 1979, and the current owners knew this when they purchased it in 1992. The current owners now propose to change these natural conditions by adding treated sewage effluent. Under some circumstances, such a proposal might be permissible or even desirable. But in this case, we cannot conclude that authorizing the proposed use of treated sewage effluent is justified by a compelling governmental interest in providing public recreation. Even without the proposed expansion of the Snowbowl, members of the public will continue to enjoy many recreational activities on the Peaks. Such activities include the downhill skiing that is now available at the Snowbowl. Even if the Snowbowl were to close (which we think is highly unlikely), continuing recreational activities on the Peaks would include “motorcross, mountain biking, horseback riding, hiking and camping,” as well as other snow-related activities such as cross-country skiing, snowshoeing, and snowplay. 408 F.Supp.2d at 884.

479 F.3d at 1044-45.

Finally, the court rejected the government’s claim that the authorization to use treated sewage effluent was the least restrictive means to advance the government’s interest. *See id.* at 1045.

The Ninth Circuit sitting *en banc* vacated the panel decision, 8-3. *See Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (*en banc*). The majority established a robust standard for demonstrating that the plaintiffs suffered a “substantial burden” on their religious freedom:

Plaintiffs contend the use of artificial snow, made from recycled wastewater, on the Snowbowl imposes a substantial burden on the free exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. §§ 2000bb *et seq.* We hold that the Plaintiffs have failed to establish a RFRA violation. The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a “substantial burden” on religious exercise under RFRA.

* * *

The Supreme Court's decisions in *Sherbert* and *Yoder*, relied upon and incorporated by Congress into RFRA, lead to the following conclusion: Under

RFRA, a “substantial burden” is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a “substantial burden” within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Navajo Nation, 535 F.3d at 1067, 1069-70.

The majority found no substantial burden on the plaintiffs following this test:

Applying *Sherbert* and *Yoder*, there is no “substantial burden” on the Plaintiffs' exercise of religion in this case. The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service “has guaranteed that religious practitioners would still have access to the Snowbowl” and the rest of the Peaks for religious purposes. *Navajo Nation*, 408 F.Supp.2d at 905.

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment-serious though it may be-is not a “substantial burden” on the free exercise of religion.

Id. at 1070. Judge Fletcher dissented along the grounds of his panel decision.

The Supreme Court denied the tribal petition for *certiorari*. See *Navajo Nation v. U.S. Forest Service*, 129 S.Ct. 2763 (2009).

SECTION B. PROTECTION OF AMERICAN INDIAN RELIGIOUS PRACTICES AND BELIEFS

Page 767, add to the end of the first hanging paragraph:

In *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), the Tenth Circuit rejected facial and as-applied challenges under the Religious Freedom Restoration Act to the Bald and Golden Eagle Protection Act, which created the National Eagle Repository. The Repository is the only avenue for practitioners of the Sun Dance to acquire a whole (and unprocessed) bald eagle, critical for the ceremonies.

On the Repository, the court wrote:

In contrast to the federal hostility to the Sun Dance a century ago, Congress and the Fish and Wildlife Service (FWS) now accommodate those Native Americans who need eagles for religious purposes in two ways: the National Eagle and Wildlife Property Repository, and a permitting process. Better known is the Repository, maintained by the FWS in Commerce City, Colorado, just outside Denver. It is a large warehouse where the government collects and freezes any potentially usable dead eagles or eagle parts it encounters. Some are confiscated contraband; some are the victims of electrocution on power lines; some are roadkill. Eagle parts are distributed by application to registered members of Native American tribes who need them for religious purposes.

The Repository does not work well for those whose religion requires the eagles to be pure. Bernadette Atencio, a government witness who is responsible for supervising the Repository, testified that “[m]ost of the time [the eagles a]re very decomposed.” ... Sometimes they are “full of maggots.” ... She also testified that the Repository will describe the bird to an applicant before sending it to make sure that it is usable, and that the Repository will replace unsatisfactory shipments. However, members of the tribe testified that they received parts from the Repository that were insufficiently pure to be usable in the Sun Dance, and were unable to get satisfactory replacements. One member was sent some type of waterfowl.

525 F.3d at 944.

Since the Repository is not useful for those who need a whole bald eagle, the regulations allow for American Indians to apply for a permit to take a live eagle. *See* 16 U.S.C. § 668a; 50 C.F.R. § 22.22. On the permit process, the court wrote:

The permit process is used infrequently, and is not widely known. Unsurprisingly, the FWS prefers for those who can to use dead eagles from the Repository because that does not decrease the eagle population. Mr. Milsap testified that he knew of only a few permits to take eagles—all golden—that had ever been issued under the Act: two permits issued to the Navajo tribe and one annually-recurring permit granted to the Hopi which permits them to take forty nestling eaglets per year. So far as he knew, there had never been, in any region, a request to lethally take a bald eagle.

525 F.3d at 945.

The Tenth Circuit was not persuaded that the difficulty in obtaining a permit (especially since Mr. Friday never applied for a permit in the first place) amounted to a constitutional violation:

Under the Religious Freedom Restoration Act, the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a). There is one exception: the government may impose such a burden “only if it demonstrates that application of the burden ... is in furtherance of a compelling governmental interest; and ... is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(b); *see generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). Once a defendant shows that applying a statute to him will substantially burden his religion, the government must justify the burden by establishing a sufficiently compelling interest and showing that it could not accommodate religion more without serving that interest less.

The first question in applying RFRA is whether the permit requirement-either facially or as applied to Mr. Friday-imposes a “substantial burden” on his religious exercise. This includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). ... A religiously pure eagle tail is needed to complete the Sun Dance in accordance with the Northern Arapaho religion. One witness testified that he could not participate in the Sun Dance when he was unable to obtain the needed parts. So a law that limits the Fridays’ access to the eagle needed for the ceremony substantially burdens their ability to exercise their religion by sponsoring and taking part in the Sun Dance.

A harder question is whether it substantially burdens Mr. Friday’s religion to require him to obtain a permit in advance of taking an eagle. In other words, on the assumption that the permit process would accommodate Mr. Friday’s religious needs, is the mere fact that he is required to go through the process a “substantial burden” within the meaning of RFRA? This question is not relevant to the argument that the permit process is futile, since that is an argument that permits are effectively not available. Nor is it relevant to Mr. Friday’s claim that the FWS has not given sufficient publicity to the permit program, since that argument is premised on the notion that if he had known about the possibility of a permit he might have obtained one. But it is relevant to Mr. Friday’s other claims, which challenge the permit requirement itself or the way in which the permit system is administered.

The district court held, and Mr. Friday contends on appeal, that the permit process for takings of eagles for Native American religious purposes is so maladministered as to render it futile. If this is so, the prohibition on eagle takings contained in the Eagle Act is

effectively without exception, despite the substantial burden this would place on tribal religious practices. The district court's judgment on this score may therefore be understood as a holding that the Eagle Act violates RFRA in substantially all of its applications to religious uses. This argument is a form of facial challenge. Mr. Friday also raises a facial challenge to the effect that the government has not made a sufficient empirical demonstration of need to require a permit process at all. ...

In *United States v. Hardman*, we concluded that Native Americans charged with violating the Eagle Act could make an as-applied challenge to the Act's permitting system without applying for permits if they demonstrated that "it would have been futile ... to apply for permits." 297 F.3d 1116, 1121 (10th Cir.2002) (en banc). Citing our decision in *Hardman*, the district court here found "futility in the application process." ... On this basis the court concluded that the Eagle Act, without an effective permitting system, substantially burdened Mr. Friday's religion in a manner more restrictive than is necessary. Examining the record and reviewing this conclusion de novo, *see Bose*, 466 U.S. at 501, 508, 104 S.Ct. 1949, we disagree.

It is true that the hearing revealed that the FWS "prefers" those who can to use the Repository, and indeed imposes a rule that permits will be granted only to those whose needs cannot be satisfied by frozen parts from the Repository. But this did not render it "futile" for Mr. Friday to apply for a permit. Mr. Friday's need for an eagle that can be guaranteed to be religiously pure might well have led the FWS to conclude that the Repository "could [not] satisfy [his] need" for an eagle. ... Mr. Milsap testified that this is a major factor in deciding to grant an application.

The hearing also revealed that very few people apply for permits and that the FWS engages in no "outreach." ... This is obscurity, not futility. The record demonstrates that permits are in fact granted. The record reveals no reason to believe that an application to take a single eagle annually for the Sun Dance submitted by the sponsor's family would have been treated any less favorably than the Navajo and Hopi applications to take golden eagles, which have been granted in the past.

It is simply not "clear that [Mr. Friday] would not have" received a permit if he had applied, and therefore it is not clear that he "would not have been accommodated by applying" for one. ... We therefore conclude that it was not futile for Mr. Friday to apply for a permit.

525 F.3d at 946-955.

The court then turned to the question of whether the permitting system violated RFRA. The court concluded that it did not:

Mr. Friday next argues that the permitting system is impermissible on its face because the government has not shown that the eagle population would suffer if takings for religious use were completely unregulated. ...

[T]he government has a compelling interest in protecting bald and golden eagles. That interest is compelling as regards small as well as large impacts on the eagle population. As we stated in *Hardman*, “[t]he bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles.” 297 F.3d at 1128. Even if unregulated religious takings would not be numerous enough to threaten the viability of eagle populations, the government would still have a compelling interest in ensuring that no more eagles are taken than necessary, and that takings occur in places and ways that minimize the impact. ...

We add that the Eagle Act and its attendant permitting process have the effect of protecting, as well as inconveniencing, the practices of the Northern Arapaho and other tribes that use eagles as a part of their religious ceremonies. If eagles were not protected or if there were no effective means of distinguishing between religious and nonreligious takings of eagles, it presumably would be more difficult for sponsors of ceremonials to obtain eagles for their sacred purposes.

525 F.3d at 955-56.

SECTION C. PROTECTION OF AMERICAN INDIAN CULTURAL RESOURCES

Page 771, add to end of paragraph before Note.

The D.C. Circuit Court of Appeals overturned this decision in *Pro-Football, Inc. v. Harjo*, 415 F. 3d 44 (D.C. Cir. 2005), holding that the district court mistakenly started the clock for assessing laches in 1967--the time of the first trademark’s registration--for all seven of the Native American petitioners in the case even though one, Mateo Romero, was at that time only one year old. The court explained that this approach runs counter to the well-established principle of equity that laches runs only from the time a party has reached his majority.

But on remand, the district court again held that the Romero's claim was barred by laches on the theory that he waited for eight years after the age he reached majority to file suit, and that the Washington Redskins suffered economic and procedural prejudice from his failure to sue earlier. *See Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46 (D. D.C. 2008). The D.C. Circuit affirmed on those grounds. *See Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009), writing:

Undisputed record evidence reveals a significant expansion of Redskins merchandising efforts and sizable investment in the mark during the Romero Delay Period. Romero believes this investment is irrelevant absent some evidence that Pro-Football would have acted otherwise-by, say, changing the Redskins name-if Romero had sued earlier. But the district court repeatedly rejected this argument, citing the Federal Circuit's holding in *Bridgestone/ Firestone Research, Inc. v. Automobile Club*, 245 F.3d 1359, 1363 (Fed.Cir.2001), that "[e]conomic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice." *See Harjo III*, 567 F.Supp.2d at 59. The court thus thought it sufficient that the team deployed investment capital toward a mark Romero waited too long to attack, whether or not the team could prove that it would necessarily have changed its name or employed a different investment strategy had Romero sued earlier.

This was no abuse of discretion. To be sure, a finding of prejudice requires at least some reliance on the absence of a lawsuit-if Pro-Football would have done exactly the same thing regardless of a more timely complaint, its laches defense devolves into claiming harm not from Romero's tardiness, but from Romero's success on the merits. But in contrast to the defense of estoppel-which requires evidence of specific reliance on a particular plaintiff's silence-laches requires only general evidence of prejudice, which may arise from mere proof of continued investment in the late-attacked mark alone. *See Automobile Club*, 245 F.3d at 1363 (" '[S]pecific' evidence of 'reliance' on the Automobile Club's silence could relate to proof of estoppel, but it does not apply to laches. When there has been an unreasonable period of delay by a plaintiff, economic prejudice to the defendant may ensue whether or not the plaintiff overtly lulled the defendant into believing that the plaintiff would not act, or whether or not the defendant believed that the plaintiff would have grounds for action."). We have thus described as sufficient "a reliance interest resulting from the defendant's continued development of goodwill during th[e] period of delay," and treated evidence of continued investment as proof of prejudice sufficient to bar injunctive relief. *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137-38 (D.C.Cir.1985). Such continued investment was unquestionably present here. The district court thus acted well within our precedent-as well as the precedent of the Federal Circuit, which directly reviews TTAB decisions-in finding economic prejudice on the basis of investments made during the delay period. The lost value of these investments was sufficient evidence of prejudice for the district court to exercise its discretion

to apply laches, even absent specific evidence that more productive investments would in fact have resulted from an earlier suit.

Harjo, 565 F.3d at 884.

Chapter Eleven

WATER RIGHTS

SECTION C. QUANTIFICATION

3. FINALITY OF ADJUDICATION

Page 829, add to end of first paragraph on the page:

In the Gila River general stream adjudication, page 819 *supra*, the Arizona Supreme Court held that a 1935 federal court consent decree had preclusive effect on water claims by the San Carlos Apache Tribe to additional water from the mainstream of the Gila River, but not to water from its tributaries. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Sources*, 127 P. 3d 882 (Ariz. 2006), *cert. denied*, *San Carlos Apache Tribe v. Arizona*, 127 S. ct. 928 (2007).

Chapter Thirteen

RIGHTS OF ALASKA NATIVES AND NATIVE HAWAIIANS

SECTION B. HAWAII: ISLANDS OF NEGLECT

2. NATIVE HAWAIIANS AS NATIVE AMERICANS

Page 925, add to end of note 3:

In *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005), the Ninth Circuit Court of Appeals, citing *Rice v. Kayetano*, ruled in favor of a non-Native Hawaiian student who brought suit against a private school created to benefit Native Hawaiians, challenging its race-conscious admissions policy of accepting only students of native Hawaiian ancestry. The divided court said the admissions policy operates as a “racial classification” constituting unlawful race discrimination in violation of federal civil rights laws.

The Kamehameha Schools was founded by Princess Bernice Pauahi Bishop, the great-granddaughter and last royal descendant of King Kamehameha. The schools educate Native Hawaiians from grades kindergarten through 12, with a current enrollment of approximately 5,000 students. The Ninth Circuit granted a rehearing en banc in the case, 441 F.3d 1029 (9th Cir. 2006), and reversed the panel decision. *See Doe v. Kamehemeha Schools*, 470 F.3d 827 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2160 (2007).

In *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawai'i*, 177 P.3d 884 (Hawai'i 2008), the Supreme Court of Hawai'i ordered the lower court to issue an injunction against the Housing and Community Development Corporation prohibiting it from alienating public land to third parties until the claims of Native Hawaiians are resolved. The Supreme Court reversed and remanded, preserving the possibility that the Office of Hawaiian Affairs can persuade the Hawaii Supreme Court to find independent state law grounds supporting the injunction.

HAWAII V. OFFICE OF HAWAIIAN AFFAIRS

United States Supreme Court, 2009

___ U.S. ___, 129 S. Ct. 1436, 173 L.Ed.2d 333

Justice ALITO delivered the opinion of the Court.

This case presents the question whether Congress stripped the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century. Relying on Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain of its lands, pending resolution of native Hawaiians' land claims that the court described as “unrelinquished.” We reverse.

* * *

III

Turning to the merits, we must decide whether the Apology Resolution “strips Hawaii of its sovereign authority to sell, exchange, or transfer” (Pet. for Cert. i) the lands that the United States held in “absolute fee” (30 Stat. 750) and “grant[ed] to the State of Hawaii, effective upon its admission into the Union” (73 Stat. 5). We conclude that the Apology Resolution has no such effect.

A

“We begin, as always, with the text of the statute.” *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 197, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007). The Apology Resolution contains two substantive provisions. See 107 Stat. 1513-1514. Neither justifies the judgment below.

The resolution's first substantive provision uses six verbs, all of which are conciliatory or precatory. Specifically, Congress “acknowledge[d] the historical significance” of the Hawaiian monarchy's overthrow, “recognize[d] and commend[ed] efforts of reconciliation” with native Hawaiians, “apologize[d] to [n]ative Hawaiians” for the monarchy's overthrow, “expresse[d] [Congress's] commitment to acknowledge the ramifications of the overthrow,” and “urge[d] the President of the United States to also acknowledge the ramifications of the overthrow” § 1. Such terms are not the kind that Congress uses to create substantive rights-especially those that

are enforceable against the cosovereign States. See, e.g., *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

The Apology Resolution's second and final substantive provision is a disclaimer, which provides: "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States." § 3. By its terms, § 3 speaks only to those who may or may not have "claims against the United States." The court below, however, held that the only way to save § 3 from superfluity is to construe it as a congressional recognition-and preservation-of claims against Hawaii and as "the foundation (or starting point) for reconciliation" between the State and native Hawaiians. 117 Hawai'i, at 192, 177 P.3d, at 902.

"We must have regard to all the words used by Congress, and as far as possible give effect to them," *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 475, 31 S.Ct. 265, 55 L.Ed. 297 (1911), but that maxim is not a judicial license to turn an irrelevant statutory provision into a relevant one. And we know of no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another. Cf. *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. ----, ----, 129 S.Ct. 1109, 1123, 172 L.Ed.2d 836 (2009) ("Two wrong claims do not make one that is right"). The Supreme Court of Hawaii erred in reading § 3 as recognizing claims inconsistent with the title held in "absolute fee" by the United States (30 Stat. 750) and conveyed to the State of Hawaii at statehood. See *supra*, at 1440 - 1441.

B

Rather than focusing on the operative words of the law, the court below directed its attention to the 37 "whereas" clauses that preface the Apology Resolution. See 107 Stat. 1510-1513. "Based on a plain reading of" the "whereas" clauses, the Supreme Court of Hawaii held that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." 117 Hawai'i, at 191, 177 P.3d, at 901. That conclusion is wrong for at least three reasons.

First, "whereas" clauses like those in the Apology Resolution cannot bear the weight that the lower court placed on them. As we recently explained in a different context, "where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation ..., a court has no license to make it do what it was not designed to do." *District of Columbia v. Heller*, 554 U.S. ----, ----, n. 3, 128 S.Ct. at 2789-2790, n. 3 (2008). See also *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 33 L.Ed. 302 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up").

Second, even if the "whereas" clauses had some legal effect, they did not "chang[e] the legal landscape and restructur[e] the rights and obligations of the State." 117 Hawai'i, at 190, 177 P.3d, at 900. As we have emphasized, "repeals by implication are not favored and will not

be presumed unless the intention of the legislature to repeal [is] clear and manifest.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (internal quotation marks omitted). The Apology Resolution reveals no indication—much less a “clear and manifest” one—that Congress intended to amend or repeal the State’s rights and obligations under Admission Act (or any other federal law); nor does the Apology Resolution reveal any evidence that Congress intended *sub silentio* to “cloud” the title that the United States held in “absolute fee” and transferred to the State in 1959. On that score, we find it telling that even respondent OHA has now abandoned its argument, made below, that “Congress ... enacted the Apology Resolution and thus ... change[d]” the Admission Act.App. 114a; see also Tr. of Oral Arg. 31, 37-38.

Third, the Apology Resolution would raise grave constitutional concerns if it purported to “cloud” Hawaii’s title to its sovereign lands more than three decades after the State’s admission to the Union. We have emphasized that “Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State.” *Idaho v. United States*, 533 U.S. 262, 280, n. 9, 121 S.Ct. 2135, 150 L.Ed.2d 326 (2001) (internal quotation marks and alteration omitted); see also *id.*, at 284, 121 S.Ct. 2135 (Rehnquist, C.J., dissenting) (“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow can diminish what has already been bestowed”). And that proposition applies *a fortiori* where virtually all of the State’s public lands—not just its submerged ones—are at stake. In light of those concerns, we must not read the Apology Resolution’s nonsubstantive “whereas” clauses to create a retroactive “cloud” on the title that Congress granted to the State of Hawaii in 1959. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381-382, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (the canon of constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”).

* * *

When a state supreme court incorrectly bases a decision on federal law, the court’s decision improperly prevents the citizens of the State from addressing the issue in question through the processes provided by the State’s constitution. Here, the State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawaii the authority to resolve an issue that is of great importance to the people of the State. Respondents defend that decision by arguing that they have both state-law property rights in the land in question and “broader moral and political claims for compensation for the wrongs of the past.” Brief for Respondents 18. But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law. The judgment of the Supreme Court of Hawaii is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chapter Fourteen

COMPARATIVE AND INTERNATIONAL LEGAL PERSPECTIVES ON INDIGENOUS PEOPLES' RIGHTS

SECTION B. EMERGING VOICES: INDIGNEOUS RIGHTS AND INTERNATIONAL LAW

Page 1016, add to the end of note 2:

On September 13, 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples by a majority vote of 144 states in favor, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

(U.N. Doc. A/61/L.67, Adopted September 13, 2007)

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them

from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.