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**Teacher's Memorandum to accompany
Getches, Wilkinson, Williams & Fletcher
FEDERAL INDIAN LAW, 6th ed.**

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INTRODUCTION

The Seventh Edition of this casebook tentatively will be available for the January 2017 semester. We welcome Kristen A. Carpenter as a new author and editor.

This teacher's memorandum includes excerpts of several recent decisions of the United States Supreme Court: *United States v. Jicarilla Apache Tribe* (2011), *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak* (2012), *Adoptive Couple v. Baby Girl* (2013), *Michigan v. Bay Mills Indian Community* (2014); and *United States v. Bryant* (2016). We also discuss to a lesser extent *United States v. Tohono O'odham Nation* (2011); *Salazar v. Ramah Navajo Chapter* (2012); *Nebraska v. Parker* (2016); and *Dollar General v. Mississippi Band of Choctaw Indians* (2016).

We update discussion of the twin Sixth Circuit decisions involving the application of the National Labor Relations Act to Indian casino operations, *NLRB v. Little River Band of Ottawa Indians Tribal Government* and *Soaring Eagle Casino and Resort v. NLRB*. We also update the notes following *Santa Clara Pueblo v. Martinez* to document that the Pueblo has amended its membership criteria to allow for persons similarly situated to Julia Martinez's children are now eligible for membership.

We have updated the casebook to note that the *Cobell* settlement has been finalized, and that all challenges to the settlement are concluded. We include discussion of four recent federal circuit decisions on tribal court civil jurisdiction over nonmembers – *Crowe & Dunlevy, P.C. v. Stidham, Water Wheel Camp Recreational Area, Inc. v. LaRance, Grand Canyon Skywalk Development, LLC v. ‘Su’ Nyu Wa*, and *Dolgencorp v. Mississippi Band of Choctaw Indians*. The Supreme Court split 4-4 in the last case, now captioned *Dollar General Corp. v. Mississippi Band of Choctaw Indians*.

We also include discussion of the conclusion of the Katie John aboriginal subsistence fishing rights in Alaska, state taxation of tribal gaming machine vendors, the so-called “Culverts case” subproceeding in *United States v. Washington*, recent sovereign immunity decisions out of the federal circuits, a gaming case affected by the Supreme Court’s decision in *Carcieri, Big Lagoon Rancheria v. State of California*, the new federal guidelines on the implementation of the Indian Child Welfare Act, and materials on Indian country criminal jurisdiction.

Comments on the memorandum and on the 6th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan at 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, WILLIAMS, AND FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (6th ed. 2011)**.

Matthew Fletcher
East Lansing, Mich.
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CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 267:

5. In *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) (en banc) (per curiam), a split Ninth Circuit en banc panel held (7-4) against the subsistence fishing claims of several Native Alaskan villages in the outer continent shelf, finding that the villages failed to prove exclusive use of claimed areas. The majority found that the villages met one of the two requirements to prove aboriginal rights – “continuous use and occupancy” – but failed to prove “exclusivity”:

Aboriginal rights don’t depend on a treaty or an act of Congress for their existence. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Rather, the Villages have the burden of proving “actual, exclusive, and continuous use and occupancy ‘for a long time’” of the claimed area. *Sac & Fox Tribe of Indians of Okla. v. United States*, 179 Ct.Cl. 8, 383 F.2d 991, 998 (Ct.Cl.1967). This use and occupancy requirement is measured “in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.” *Id.*

*** The district court concluded that the Villages were unable to prove aboriginal rights because they did not show by a preponderance of the evidence that they were in a position to occupy or exercise exclusive control of the claimed areas. *See 2 McCormick on Evid.* § 339 (6th ed.) (“[A] party who has the burden of persuasion of a fact must prove it ... on the general run of issues in civil cases ‘by a preponderance of the evidence.’ ”); *see also Iowa Tribe v. United States*, 22 Ind. Cl. Comm. 232, 237–38 (1969) (“To establish Indian title under the Indian Claims Commission Act, the Iowa plaintiffs and the Sac and Fox plaintiffs each must prove by a preponderance of the evidence that their forebearers had actual exclusive and continuous use and occupancy of their respectively claimed areas for a ‘long time’ [prior to the loss of the property].”). We adopt the district court’s uncontested factual findings and conclude that the Villages have failed to prove their entitlement to aboriginal rights on the OCS.

The “difficulty of obtaining the essential proof necessary to establish Indian title” during ancient times requires the court to adopt a “liberal approach”

in weighing evidence regarding aboriginal title claims. *Nooksack Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 492, 499 (1955). Nevertheless, we conclude that the district court properly found that the Villages failed to show, by a preponderance of the evidence, that they exclusively used the claimed areas.

The district court found that the Villages “made irregular use of the OCS,” and that “[s]uch use and occupancy as probably existed was temporary and seasonal.” The Secretary argues that the Villages’ use of the OCS was “too sporadic” to support a claim for aboriginal rights. This “use and occupancy” requirement is measured in accordance with the “way of life, habits, customs and usages of the Indians who are its users and occupiers.” *Sac & Fox Tribe of Indians of Okla.*, 383 F.2d at 998. Because the district court determined that the ancestral residents of the Villages “found their sustenance largely in marine waters,” and were “skilled marine hunters and fishermen,” we analyze their use of the OCS in accordance with their way of life as marine hunters and fishermen. *See Confed. Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct.Cl. 184, 194 (1966).

There’s evidence that the Villages’ ancestors traveled to Middleton Island, the Barren Islands, Cook Inlet, the Copper River Delta and Wessels Reef to hunt and fish. When traveling between Kodiak and the Middleton Islands, their ancestors traversed portions of the OCS and engaged in opportunistic fishing during the course of these travels. The 8600 record supports the finding that the Villages’ ancestors made seasonal use of “portions of the OCS nearest their respective villages and when traveling to the outlying islands.” Intermittent or seasonal use is sufficient to support aboriginal title because it’s consistent with the seasonal nature of the ancestors’ way of life as marine hunters and fishermen. *See id.* The Villages thus satisfy the “continuous use and occupancy” requirement.

Eyak, 688 F.3d at 622-23. On the question of exclusivity, the majority rejected the Villages’ argument that there was sufficient evidence of exclusivity:

[T]he Villages still failed to present sufficient evidence of exclusivity. The district court found that the Villages’ claimed area was too large and there were too few people who could control it. The Villages’ low population, which was estimated to have been between 400 and 1500, suggests that the Villages were incapable of controlling any part of the OCS. *See Osage Nation of Indians*, 19 Ind. Cl. Comm. at 490 (finding the Osages didn’t have exclusive control given their low population and evidence tending to prove that other parties used the claimed territory); *Strong v. United States*, 207 Ct.Cl. 254, 518 F.2d 556, 561 (Ct.Cl.1975) (“[O]ne of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed.”). The Villages

claim that low population density can't defeat exclusivity. *See, e.g., Zuni Tribe of N.M. v. United States*, 12 Cl.Ct. 607, 608 n. 2 (1987); *United States v. Seminole Indians of the State of Fla.*, 180 Ct.Cl. 375, 385–86 (1967). But Zuni and Seminole held only that a low population density wasn't enough to defeat aboriginal title, especially where there was other evidence that the tribes involved had dominion and control of their claimed lands. *See, e.g., Zuni*, 12 Cl.Ct. at 608 n. 2; *Seminole*, 180 Ct.Cl. at 383. Zuni and Seminole don't foreclose reliance on population density where there is no evidence that the tribes exercised full dominion and control of the claimed area.

Eyak, 688 F.3d at 624-25.

In dissent, Judge William Fletcher argued that the majority misstated the law on the question of “exclusivity,” noting that no evidence existed to prove another Indian group claimed access to the resource:

The majority reads “periphery” to mean not only the edge, but also the interior, of a territory. The majority's misreading of the word transforms the district court's finding of use by others at the edge of the Chugach territory into a finding of use within that territory. The majority writes:

The dissent adopts an understanding of the word “periphery” that's contrary to both common usage and the dictionary. Perhaps the most common use of the word “periphery” is in the phrase “peripheral vision.” What's in your peripheral vision is what you can see, not what you can't; the periphery is something at the limits of, but within, your vision. Here, as well, the “periphery” cited by the district court includes the outer boundary of the claimed area. The revered Webster's Second defines “periphery” as, among other things, “the outward bounds of a thing as distinguished from its internal regions or center; encompassing limits; confines; borderland; as, only the periphery of Greenland has been explored.” Webster's New International Dictionary 1822 (2d ed.1939). The dissent's interpretation of “periphery” was outdated even in the 1930s when Webster's Second was published. *Id.* (offering an alternate definition of “periphery” as a “[s]urrounding space; the area lying beyond the boundaries of a thing. Now Rare.”). Fish is best rare; language, not so much. As the district court clearly found, “some of the OCS areas in question” were exploited by other groups.

Eyak, 688 F.3d at 633 (W. Fletcher, C.J., dissenting) (emphases in original).

The majority's misreading of “periphery” is baffling. I understand why the majority is misreading the word: If periphery is read, as it should be, to mean edge or boundary, a rationale for the majority's decision disappears. But I do not

understand how the majority can, with a straight face, maintain that its reading is correct. Indeed, the majority quotes a Webster's definition of the word that squarely contradicts its reading. The plain meaning of the district court's finding that other groups likely used areas "on the periphery of the Chugach territory" is that they used areas on the edge or boundary of Chugach territory. The plain meaning is not that they used areas within Chugach territory.

Eyak, 688 F.3d at 633-34 (W. Fletcher, C.J., dissenting).

6. In *Pueblo of Jemez v. United States*, 790 F.3d 1143 (10th Cir. 2015), the Tenth Circuit revived a Quiet Title Act claim for aboriginal title against the federal government.

The court first went into a detailed history of aboriginal title and how that doctrine relates to the New Mexico Pueblos. Of critical importance were the 1848 Treaty of Guadalupe Hidalgo and the Supreme Court's 1941 decision in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). The 1848 treaty extended the aboriginal title ("Indian title") analysis to the New Mexico territory:

As the above cases make clear, the nature of Indian title in the United States was established before the country acquired what would become much of the southwest and west of the United States. In 1848, "[t]he Treaty of Guadalupe Hidalgo ended the war between the United States and Mexico, designated the Rio Grande as the Texas border, reduced the size of Mexico by more than half, and doubled the territory of the United States, including parts of present-day Arizona, California, New Mexico, Texas, Colorado, Nevada, and Utah." Robert J. McCarthy, Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S.-Mexico, U. Denv. Water L.Rev. 197, 209 (2011). In Article VIII of the Treaty, the United States agreed to respect pre-existing property rights of all Mexican citizens, which included the Indians living within the territory covered by the Treaty. Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, 928. The government concedes this much in its brief on appeal. Aple. Br. at 7–8. Read together with section twelve and thirteen of the Plan of Iguala, the Treaty of Cordova, the Mexican declaration of Independence, and the several acts of the first Mexican Congress implementing the Plan of Iguala, *supra* at 18–19, Article VIII of the Treaty between Mexico and the United States effectively recognized the then-existing property rights of the pueblo Indians. 9 Stat. at 928. See Cohen's Handbook, § 4.0[9], at 311.

Id. at 1156. *Santa Fe Pacific* confirmed that the New Mexico Pueblos aboriginal title survived a century of federal government interventions:

While *Sante Fe* is important in the development of Indian law because it reaffirmed principles first established in *Johnson v. M'Intosh*, reaffirmed that

aboriginal title is not determined by treaty, and applied the doctrine of aboriginal title to the Mexican cession area, it is more important for yet another reason that is directly relevant to the case before us. That is, the Court held that aboriginal possession and occupancy of an Indian tribe “survived a course of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land.” *Cohen*, *supra* at 56. Accordingly, “the decision stands as a warning to purchasers of real property from the Federal Government, reminding them that not even the Government can give what it does not possess.”

Id. at 1160-61.

Ultimately, the court held that a federal government surveyor’s determination in 1860 that the relevant lands were “vacant,” and the following transfer of the land to a non-Indian did not serve to abrogate aboriginal title:

The government instead argues that a claim accrued to the Jemez Pueblo in 1860 when the Surveyor General concluded the lands at issue were “vacant.” It asserts that this finding is “flatly inconsistent” with the Jemez Pueblo’s contention that it “had actual, exclusive, and continuous use and occupancy of those lands.” *Aple. Br.* at 26 (internal quotation marks omitted). First, this conflates the factual merits question of establishing aboriginal possession with the jurisdictional question on appeal of when a claim actually accrued. See, e.g., *Santa Fe*, 314 U.S. at 345, 359 (“[O]ccupancy necessary to establish aboriginal possession is a question of fact.”). As we have pointed out, Supreme Court decisions since 1823 make clear that the *Baca* grant at issue was subject to the Jemez Pueblo’s aboriginal title—assuming the Jemez maintained aboriginal possession at the time”).

Id. at 1163.

SECTION B.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2. TREATY ABROGATION

Add to the end of the note on *Indian Treaty Abrogation and Congressional Intent* on page 329:

The Sixth Circuit recently decided two cases involving the NLRB's assertion of jurisdiction over two Michigan Indian tribes. In the first, *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), cert. denied, 2016 WL 615367 (June 27, 2016) a split panel held that the National Labor Relations Act could be asserted against the tribal casino operation.

The court first concluded that federal statutes of general applicability should apply to Indian nations – as in the *Coeur d'Alene* framework – because tribal authority over nonmembers is limited:

Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Wheeler*, 435 U.S. at 323, 98 S.Ct. 1079. Yet, such residual sovereignty is “unique and limited.” *Id.* As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is “subject to complete defeasance” by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, see generally COHEN’S HANDBOOK § 4.02(3), at 226–42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

Id. at 549. The court therefore applied the *Coeur d'Alene* framework:

We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. See *Mashantucket Sand & Gravel*, 95 F.3d at 179; *Pueblo of San Juan*, 276 F.3d at 1206 (Murphy, J., dissenting) (“A limited notion of tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters.

Any concerns about abrogating tribal powers ... are fully addressed by the *Coeur d'Alene* exceptions.”). The *Coeur d'Alene* framework reflects the teachings of Montana, Iowa Mutual, and Santa Clara Pueblo: there is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d'Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress’s power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. See 751 F.2d at 1115; cf. *Montana*, 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by *Coeur d'Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of Iowa Mutual and Santa Clara Pueblo that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d'Alene* framework preserves “the unique trust relationship between the United States and the Indians.” *Grand Traverse Band*, 369 F.3d at 971 (quoting *Blackfeet Tribe*, 471 U.S. at 766, 105 S.Ct. 2399). We therefore adopt the *Coeur d'Alene* framework to resolve this case.

Id. at 551. The court’s application of that framework placed the onus on the tribe to get out from under the federal statute:

Under the *Coeur d'Alene* framework, since there is no treaty right at issue in this case, the NLRA applies to the Band’s operation of the casino unless the Band can show either that the Board’s exercise of jurisdiction “touches exclusive rights of self-governance in purely intramural matters” or that “there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations.”

Id. Though the tribe argued that the Act and the Board’s assertion of jurisdiction effectively abrogated the tribe’s internal self-governance authority:

The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the Board’s order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

Id. at 552. The court systematically rejected all those claims. *Id.* at 552-55.

In dissent, Judge McKeague slammed the majority’s reasoning:

The sheer length of the majority's opinion, to resolve the single jurisdictional issue before us, betrays its error. Under governing law, the question presented is really quite simple. Not content with the simple answer, the majority strives mightily to justify a different approach. In the process, we contribute to a judicial remaking of the law that is authorized neither by Congress nor the Supreme Court. Because the majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split, I respectfully dissent.

Id. at 556. He referred to the *Couder d'Alene* framework based on the Supreme Court's *Tuscarora* decision as a "house of cards":

So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress's silence. *San Manuel*, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960): "[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The statement buttressed the Court's holding, but was not essential to it. While the *Tuscarora* statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the *Tuscarora* "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

Id. 557-58.

A few weeks later, a different panel of the Sixth Circuit – also split 2-1 – applied the *Little River* holding in *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), cert. denied, 2016 WL 632714 (June 27, 2016), to reach the same result in a matter involving the Saginaw Chippewa Indian Tribe. Unlike *Little River*, the tribe directly tied its authority over nonmembers to its treaty right to exclude persons from its reservation.

The court first rejected the tribe's claim that its general, treaty-reserved power to exclude persons from its reservation precluded application of the National Labor Relations Act:

Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. See, e.g., *Id.*; *Smart*, 868 F.2d at 935. The 1864 Treaty states that the Isabella reservation land would be “set apart for the exclusive use, ownership, and occupancy [by the Tribe].” 14 Stat. 657. Similar to the treaty language in *US DOL*, the 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents, as in *Navajo Forest Products*. Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. Thus, as did the Seventh Circuit in *Smart*, we find *Navajo Forest Products* distinguishable. Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe's right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties, standing alone, bars application of the NLRA to the Casino.

Id. at 661.

The court then rejected the *Little River* panel's reasoning in adopting the *Coeur d'Alene* framework, proposing one of its own that would have mandated a contradictory outcome:

The *Little River* majority concluded that the NLRA applies to on-reservation casinos operated on trust land. *Little River*, 2015 WL 3556005, at *13–17. Given the legal framework adopted in *Little River* and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in *Little River*.

Id. at 662. The *Soaring Eagle* panel focused its analysis on the *Montana-Hicks* line of cases in which the Supreme Court held that tribal civil jurisdiction over nonmembers is limited, even on tribally owned lands. Id. at 662-67. The court then adopted a presumption that statutes of general applicability apply to Indian tribes absent a clear statement from Congress that they do not apply:

We believe this Supreme Court precedent clarifies that, absent a clear statement by Congress, to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*. Iowa Mut., 480 U.S. at 18 (“Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”); *Merrion*, 455 U.S. at 148 n. 14 (recognizing that the “Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government...”); *Santa Clara Pueblo*, 436 U.S. at 60 (“[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.”); *Wheeler*, 435 U.S. at 323 (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

Under *Montana*, we believe our analysis should proceed as follows. We would first determine whether Congress has demonstrated a clear intent that a statute of general applicability will apply to the activities of Indian tribes. If so, we would effectuate Congress’s intent, as Congress has the authority, as the superior sovereign, “to legislate for the Indian tribes in all matters.” *Wheeler*, 435 U.S. at 319. If Congress has not so spoken, we would then determine if the generally applicable federal regulatory statute impinges on the Tribe’s control over its own members and its own activities. Id. at 322 n. 18; see also *Montana*, 450 U.S. at 564. If it has, the general regulatory statute will not apply against the Tribe as a sovereign. If we find that the generally applicable federal statute does not impinge on the Tribe’s right to govern activities of its members—such as those sovereign rights discussed in *Wheeler* and *Merrion*—we would assume that, generally, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. And we would determine, then, whether the Tribe has demonstrated that one of the two *Montana* exceptions to the general rule—consensual commercial relationships between the Tribe and nonmembers, or conduct “that ... threatens or has some direct effect on” aspects of tribal sovereignty—applies. Id. at 565–66; see also *Plains Commerce Bank*, 554 U.S. at 330 (“The burden rests on the tribe to establish one of the exceptions to *Montana*’s general rule”). When analyzing the exceptions, we would apply a totality of the circumstances analysis, considering factors such as

the member/nonmember distinction, and the location of the conduct at issue (whether on trust or member fee land, or on nonmember fee land). Hicks, 533 U.S. at 357–60. If one of the exceptions applies, the generally applicable federal statute should not apply to tribal conduct, and Congress must amend the statute for it to apply against the Tribe if Congress so desires. If one of the exceptions does not apply, the Tribe would be subject to the provisions of the federal statute.

Id. at 666-67. The court would have concluded that the Act *does not* apply under the *Montana-Hicks* framework:

We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board's desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses.¹³ See Bay Mills, 134 S.Ct. at 2037 (“[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.”) We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. § 461 et seq., to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 & n. 17, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (identifying the IRA, as well as similar statutes like the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq., and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq., as supporting tribal self-government by promoting “tribal self-sufficiency and economic development.”); see also Brief for the National Congress of American Indians as Amicus Curiae in Support of Petitioner at 11–19, *Saginaw Chippewa Indian Tribe of Michigan v. NLRB* (6th Cir.2015) (Nos.14–2405, –2558). Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” and “to ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. §

2702; see also id. § 2710(b)(2)(B)(i) (requiring that “net revenues from any tribal gaming” are only be used, inter alia, “to fund tribal government operations or programs,” “to provide for the general welfare of the Indian tribe and its members,” and “to promote tribal economic development”); id. §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts regarding employment practices of gaming employers); *Bay Mills*, 134 S.Ct. at 2043 (Sotomayor, J., concurring) (“And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues .” (internal quotation marks omitted)).

Id. at 668-69. But since the *Little River* panel decision was first, the *Soaring Eagle* court’s analysis could not control.

En banc petitions were denied, despite the fact that four of the six judges to have heard these cases disagreed with the controlling framework adopted by the *Little River* panel and the NLRB acquiesced to the cases being reheard. The Supreme Court, short a justice, denied cert.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 1. EXECUTIVE ACCOUNTABILITY UNDER THE TRUST RELATIONSHIP

Add to the end of note 2 on page 333:

In a sequel to *Leavitt*, the Supreme Court held (5-4) in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), that federal agencies with self-determination contracts must pay full indirect contract costs even where Congress has not appropriated funds for those costs. Congress may set an annual appropriations limit on contract support costs (as indirect costs are also called) for Indian self-determination contracts (for example, in fiscal year 2000 that amount was more than \$120 million), but if a tribal organization successfully proves entitlement to indirect costs, the government must pay those funds even if the agency’s appropriations have been exhausted.

Add to the end of page 342.

UNITED STATES v. JICARILLA APACHE NATION

Supreme Court of the United States, 2011

___ U.S. ___, 131 S.Ct. 2313, 180 L.Ed.2d 187

Justice ALITO delivered the opinion of the Court.

The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.

In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not. Although the Government’s responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.

I

The Jicarilla Apache Nation (Tribe) [brought claims against the United States, alleging that “the Government failed to maximize returns on its trust funds, invested too heavily in short-term maturities, and failed to pool its trust funds with other tribal trusts.” During discovery, the “Government turned over thousands of documents but withheld 226 potentially relevant documents as protected by the attorney-client privilege, the attorney work-product doctrine, or the deliberative-process privilege.” Later, the government turned over some of the documents, but still “continued to assert the attorney-client privilege and attorney work-product doctrine with respect to the remaining 155 documents.” The lower court held that the documents relating to the management of the trust funds fell within the “fiduciary exception” to the attorney-client privilege doctrine. In common law trust doctrine, the trustee may not assert the privilege against the beneficiary as to trust management. The Court of Federal Claims held that the Indian trust

assets in this case were sufficiently analogous to a common law trust. The United States appealed that decision, arguing that the federal trust responsibility, at least in this context, is not analogous to a common law trust.]

II

The Federal Rules of Evidence provide that evidentiary privileges “shall be governed by the principles of the common law ... in the light of reason and experience.” FED. RULE EVID. 501. ***

The objectives of the attorney-client privilege apply to governmental clients. “The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture.” 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74, Comment b, pp. 573–574 (1998). Unless applicable law provides other-wise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys. *Id.*, at 574 (“[G]overnmental agencies and employees enjoy the same privilege as nongovernmental counterparts”). The Tribe argues, however, that the common law also recognizes a fiduciary exception to the attorney-client privilege and that, by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed. As preliminary matters, we consider the bounds of the fiduciary exception and the nature of the trust relationship between the United States and the Indian tribes.

A

The leading American case on the fiduciary exception is *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del.Ch.1976). In that case, the beneficiaries of a trust estate sought to compel the trustees to reimburse the estate for alleged breaches of trust. The beneficiaries moved to compel the trustees to produce a legal memorandum related to the administration of the trust that the trustees withheld on the basis of attorney-client privilege. *** Applying the common-law fiduciary exception, the court held that the memorandum was discoverable....

The Federal Courts of Appeals applied the fiduciary exception based on the same two criteria. *** Not until the decision below had a federal appellate court held the exception to apply to the United States as trustee for the Indian tribes.

B

In order to apply the fiduciary exception in this case, the Court of Appeals analogized the Government to a private trustee. ... We have applied that analogy in limited contexts, *see, e.g., United States v. Mitchell*, 463 U.S. 206, 226 ... (1983) (*Mitchell II*), but that does not mean the Government resembles a private trustee in every respect. On the contrary, this Court has previously noted that the relationship between the United States and the Indian tribes is distinctive, “different from that existing between individuals whether dealing at arm’s length, *as trustees and beneficiaries*, or otherwise.” *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254 ... (1935) (emphasis added). “The *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship.” *Cherokee Nation of Okla. v. United States*, 21 Cl.Ct. 565, 573 (1990) (emphasis added).

The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a “trust,” *see, e.g., 25 U.S.C. § 162a*, that trust is defined and governed by statutes rather than the common law. *See United States v. Navajo Nation*, 537 U.S. 488, 506 ... (2003) (*Navajo I*) (“[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions”). As we have recognized in prior cases, Congress may style its relations with the Indians a “trust” without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is “limited” or “bare” compared to a trust relationship between private parties at common law. *United States v. Mitchell*, 445 U.S. 535, 542 ... (1980) (*Mitchell I*); *Mitchell II*, *supra*, at 224....

The difference between a private common-law trust and the statutory Indian trust follows from the unique position of the Government as sovereign. The distinction between “public rights” against the Government and “private rights” between private parties is well established. The Government consents to be liable to private parties “and may yield this consent upon such terms and under such restrictions as it may think just.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 283, 15 L.Ed. 372 (1856). This creates an important distinction “between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” *Crowell v. Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress. *See ... Winton v. Amos*, 255 U.S. 373, 391 ... (1921) (“Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 ... (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government”); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 ... (1902) (“The power existing in Congress to administer upon and guard the tribal property, and the

power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts”)....

Because the Indian trust relationship represents an exercise of that authority, we have explained that the Government “has a real and direct interest” in the guardianship it exercises over the Indian tribes; “the interest is one which is vested in it as a sovereign.” *United States v. Minnesota*, 270 U.S. 181, 194 ... (1926). This is especially so because the Government has often structured the trust relationship to pursue its own policy goals. Thus, while trust administration “relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States.” ...

We do not question “the undisputed existence of a general trust relationship between the United States and the Indian people.” *Mitchell II*, 463 U.S., at 225.... The Government, following “a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,” *Seminole Nation v. United States*, 316 U.S. 286, 296–297 ... (1942), obligations “to the fulfillment of which the national honor has been committed[.]” Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. *See Mitchell I*, 445 U.S., at 544 ... (Congress intended the United States to hold land “ ‘in trust’ “ under the General Allotment Act “simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation”); *Navajo I*, 537 U.S., at 507–508 ... (Indian Mineral Leasing Act imposes no “detailed fiduciary responsibilities” nor is the Government “expressly invested with responsibility to secure ‘the needs and best interests of the Indian owner’ “).

In other cases, we have found that particular “statutes and regulations ... clearly establish fiduciary obligations of the Government” in some areas. *Mitchell II*, *supra*, at 226.... Once federal law imposes such duties, the common law “could play a role.” *United States v. Navajo Nation*, ... 129 S.Ct. 1547, 1558 ... (2009) (*Navajo II*). We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed. ... But the applicable statutes and regulations “establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” ... When “the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government’s ‘control’ over [Indian assets] nor common-law trust principles matter.” ... The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.

Over the years, we have described the federal relationship with the Indian tribes using various formulations. The Indian tribes have been called “domestic dependent nations,” *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 ... (1831), under the “tutelage” of the United States, ...

and subject to “the exercise of the Government’s guardianship over ... their affairs,” *United States v. Sandoval*, 231 U.S. 28, 48 ... (1913). These concepts do not necessarily correspond to a common-law trust relationship. *** That is because Congress has chosen to structure the Indian trust relationship in different ways. We will apply common-law trust principles where Congress has indicated it is appropriate to do so. For that reason, the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.

III

In this case, the Tribe’s claim arises from 25 U.S.C. §§ 161–162a and the American Indian Trust Fund Management Reform Act of 1994, § 4001 et seq. These provisions define “the trust responsibilities of the United States” with respect to tribal funds. § 162a(d). ***

As we have discussed, the Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes. The two features justifying the fiduciary exception—the beneficiary’s status as the “real client” and the trustee’s common-law duty to disclose information about the trust—are notably absent in the trust relationship Congress has established between the United States and the Tribe.

A

The Court of Appeals applied the fiduciary exception based on its determination that the Tribe rather than the Government was the “real client” with respect to the Government attorneys’ advice. ... In cases applying the fiduciary exception, courts identify the “real client” based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. ... Applying these factors, we conclude that the United States does not obtain legal advice as a “mere representative” of the Tribe; nor is the Tribe the “real client” for whom that advice is intended. ...

Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. Courts look to the source of funds as a “strong indicator of precisely who the real clients were” and a “significant factor” in determining who ought to have access to the legal advice. ... We similarly find it significant that the attorneys were paid by the Government for advice regarding the Government’s statutory obligations.

The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Undoubtedly, Congress intends the Indian tribes to benefit from the Government’s management of tribal trusts. That intention represents “a humane and self imposed policy” based on felt “moral obligations.” ... This statutory purpose does not imply a full common-law trust, however. Cf. RESTATEMENT 2D, § 25, Comment b (“No trust is created if the settlor manifests an intention to impose merely a

moral obligation”). Congress makes such policy judgments pursuant to its sovereign governing authority, and the implementation of federal policy remains “distinctly an interest of the United States.” [citations]⁷ We have said that “the United States continue[s] as trustee to have an active interest” in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States....

In some prior cases, we have found that the Government had established the trust relationship in order to impose its own policy on Indian lands. ... In other cases, the Government has invoked its trust relationship to prevent state interference with its policy toward the Indian tribes. ... And the exercise of federal authority thereby established has often been “left under the acts of Congress to the discretion of the Executive Department.” ... In this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes. [citations]⁸

We cannot agree with the Tribe and its amici that “[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role,” Brief for Respondent 9, or that “the United States’ interests in trust administration were identical to the interests of the tribal trust fund beneficiaries,” Brief for National Congress of American Indians et al. as Amici Curiae 5. The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that “management does not manage for itself.” ... But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship

⁷ Chief Justice Hughes, writing for a unanimous Court, insisted that the “national interest” in the management of Indian affairs “is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.” *Heckman*, 224 U.S. [413,] 437....

⁸ Congress has structured the trust relationship to reflect its considered judgment about how the Indians ought to be governed. For example, the Indian General Allotment Act of 1887, 24 Stat. 388, was “a comprehensive congressional attempt to change the role of Indians in American society.” F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.04, p. 77 (2005) (hereinafter Cohen). Congress aimed to promote the assimilation of Indians by dividing Indian lands into individually owned allotments. The federal policy aimed “to substitute a new individual way of life for the older Indian communal way.” *Id.*, at 79. The Indian Reorganization Act of 1934, 48 Stat. 984, marked a shift away “from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.” Cohen § 1.05, at 84. The Act prohibited further allotment and restored tribal ownership. *Id.*, at 86. The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, and the Tribal Self-Governance Act of 1994, 108 Stat. 4270, enabled tribes to run health, education, economic development, and social programs for themselves. Cohen § 1.07, at 103. This strengthened self-government supported Congress’ decision to authorize tribes to withdraw trust funds from Federal Government control and place the funds under tribal control. American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, 4242–4244; see 25 U.S.C. §§ 4021–4029 (2006 ed. and Supp. III). The control over the Indian tribes that has been exercised by the United States pursuant to the trust relationship—forcing the division of tribal lands, restraining alienation—does not correspond to the fiduciary duties of a common-law trustee. Rather, the trust relationship has been altered and administered as an instrument of federal policy.

related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a “personal” rather than a fiduciary capacity....

Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication. When “multiple interests” are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down. ... That principle applies with particular force to the Government. Because of the multiple interests it must represent, “the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary’s consent.” *Nevada v. United States*, 463 U.S. 110, 128 ... (1983).

As the Court of Appeals acknowledged, the Government may be obliged “to balance competing interests” when it administers a tribal trust. ... The Government may need to comply with other statutory duties, such as the environmental and conservation obligations that the Court of Appeals discussed. ... The Government may also face conflicting obligations to different tribes or individual Indians. See, e.g., *Nance v. EPA*, 645 F.2d 701, 711 (C.A.9 1981) (Federal Government has “conflicting fiduciary responsibilities” to the Northern Cheyenne and Crow Tribes); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (C.A.9 1986) (“No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians”). Within the bounds of its “general trust relationship” with the Indian people, we have recognized that the Government has “discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.” *Lincoln v. Vigil*, 508 U.S. 182, 195 ... (1993).... And sometimes, we have seen, the Government has enforced the trust statutes to dispose of Indian property contrary to the wishes of those for whom it was nominally kept in trust. The Government may seek the advice of counsel for guidance in balancing these competing interests. Indeed, the point of consulting counsel may be to determine whether conflicting interests are at stake.

The Court of Appeals sought to accommodate the Government’s multiple obligations by suggesting that the Government may invoke the attorney-client privilege if it identifies “a specific competing interest” that was considered in the particular communications it seeks to withhold. ... But the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable.

B

The Court of Appeals also decided the fiduciary exception properly applied to the Government because “the fiduciary has a duty to disclose all information related to trust management to the beneficiary.” ***

The United States, however, does not have the same common-law disclosure obligations as a private trustee. As we have previously said, common-law principles are relevant only when applied to a “specific, applicable, trust-creating statute or regulation.” *Navajo II*, ... 129 S.Ct., at 1550. The relevant statute in this case is 25 U.S.C. § 162a(d), which delineates “trust responsibilities of the United States” that the Secretary of the Interior must discharge. The enumerated responsibilities include a provision identifying the Secretary’s obligation to provide specific information to tribal account holders: The Secretary must “suppl[y] account holders with periodic statements of their account performance” and must make “available on a daily basis” the “balances of their account.” § 162a(d)(5). The Secretary has complied with these requirements by adopting regulations that instruct the Office of Trust Fund Management to provide each tribe with a quarterly statement of performance, 25 CFR § 115.801 (2010), that identifies “the source, type, and status of the trust funds deposited and held in a trust account; the beginning balance; the gains and losses; receipts and disbursements; and the ending account balance of the quarterly statement period,” § 115.803. Tribes may request more frequent statements or further “information about account transactions and balances.” § 115.802.

The common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government’s disclosure obligation to the Tribe. The Tribe emphasizes, Brief for Respondent 34, that the statute identifies the list of trust responsibilities as nonexhaustive. See § 162a(d) (trust responsibilities “are not limited to” those enumerated). The Government replies that this clause “is best read to refer to other statutory and regulatory requirements” rather than to common-law duties. Brief for United States 38. Whatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. When Congress provides specific statutory obligations, we will not read a “catchall” provision to impose general obligations that would include those specifically enumerated. *** Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.

By law and regulation, moreover, the documents at issue in this case are classed “the property of the United States” while other records are “the property of the tribe.” 25 CFR § 115.1000 (2010); see also §§ 15.502, 162.111, 166.1000. Just as the source of the funds used to pay for legal advice is highly relevant in identifying the “real client” for purposes of the fiduciary exception, we consider ownership of the resulting records to be a significant factor in deciding who “ought to have access to the document.” See *Riggs*, 355 A.2d, at 712. In this case, that privilege belongs to the United States.¹¹

¹¹ The dissent tells us that applying the fiduciary exception is even more important against the Government than against a private trustee because of a “history of governmental mismanagement.” Post, at 2342. While it is not necessary to our decision, we note that the Indian tribes are not required to keep their funds in federal trust. See 25 U.S.C. § 4022 (authorizing tribes to withdraw funds held in trust by the United States); 25 CFR pt. 1200(B). If the Tribe wishes to have its funds managed by a “conventional fiduciary,” post, at 2336, it may seek to do so.

* * *

Courts and commentators have long recognized that “[n]ot every aspect of private trust law can properly govern the unique relationship of tribes and the federal government.” *Cohen* § 5.02[2], at 434–435. The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the Government’s administration of Indian trusts. The Court of Appeals denied the Government’s petition for a writ of mandamus based on its erroneous view to the contrary. We leave it for that court to determine whether the standards for granting the writ are met in light of our opinion. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice GINSBURG, with whom Justice BREYER joins, concurring in the judgment.

Justice SOTOMAYOR, dissenting.

Federal Indian policy, as established by a network of federal statutes, requires the United States to act strictly in a fiduciary capacity when managing Indian trust fund accounts. The interests of the Federal Government as trustee and the Jicarilla Apache Nation (Nation) as beneficiary are thus entirely aligned in the context of Indian trust fund management. Where, as here, the governing statutory scheme establishes a conventional fiduciary relationship, the Government’s duties include fiduciary obligations derived from common-law trust principles. Because the common-law rationales for the fiduciary exception fully support its application in this context, I would hold that the Government may not rely on the attorney-client privilege to withhold from the Nation communications between the Government and its attorneys relating to trust fund management.

The Court’s decision to the contrary rests on false factual and legal premises and deprives the Nation and other Indian tribes of highly relevant evidence in scores of pending cases seeking relief for the Government’s alleged mismanagement of their trust funds. But perhaps more troubling is the majority’s disregard of our settled precedent that looks to common-law trust principles to define the scope of the Government’s fiduciary obligations to Indian tribes. Indeed, aspects of the majority’s opinion suggest that common-law principles have little or no relevance in the Indian trust context, a position this Court rejected long ago. Although today’s holding pertains only to a narrow evidentiary issue, I fear the upshot of the majority’s opinion may well be a further dilution of the Government’s fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes.

A

The majority correctly identifies the two rationales courts have articulated for applying the fiduciary exception, ante, at 2322, but its description of those rationales omits a number of important points. With regard to the first rationale, courts have characterized the trust beneficiary as the “real client” of legal advice relating to trust administration because such advice, provided to a trustee to assist in his management of the trust, is ultimately for the benefit of the trust beneficiary, rather than for the trustee in his personal capacity. *** The majority places heavy emphasis on the source of payment for the legal advice, see ante, at 2322, 2326, but it is well settled that who pays for the legal advice, although “potentially relevant,” “is not determinative in resolving issues of privilege.” RESTATEMENT (THIRD) OF TRUSTS § 82, Comment f, p. 188 (2005) (hereinafter Third Restatement). Instead, the lynchpin of the “real client” inquiry is the identity of the ultimate beneficiary of the legal advice. See *Wachtel*, 482 F.3d, at 232 (“[O]f central importance ... [i]s the fiduciary’s lack of a legitimate personal interest in the legal advice obtained”). If the advice was rendered for the benefit of the beneficiary and not for the trustee in any personal capacity, the “real client” of the advice is the beneficiary.

As to the second rationale for the fiduciary exception—rooted in the trustee’s fiduciary duty to disclose all information related to trust management—the majority glosses over the fact that this duty of disclosure is designed “to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.” THIRD RESTATEMENT § 82, Comment a(2), at 184. As the leading American case on the fiduciary exception explains, “[i]n order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial.” *Riggs*, 355 A.2d, at 712. Courts justifying the fiduciary exception under this rationale have thus concluded that “[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is ... ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.” *Id.*, at 714; see *Mett*, 178 F.3d, at 1063 (under this rationale, “the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle”). The majority fails to appreciate the important oversight and accountability interests that underlie this rationale for the fiduciary exception, or explain why they operate with any less force in the Indian trust context.

B

Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831) (Marshall, C. J.). Our decisions over the past century have repeatedly reaffirmed

this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians. *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); see *United States v. Mitchell*, 463 U.S. 206, 225–226, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*) (collecting cases and noting “the undisputed existence of a general trust relationship between the United States and the Indian people”). Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.” F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a], pp. 420–421 (2005 ed.) (hereinafter Cohen).

Against this backdrop, Congress has enacted federal statutes that “define the contours of the United States’ fiduciary responsibilities” with regard to its management of Indian tribal property and other trust assets. *Mitchell II*, 463 U.S., at 224, 103 S.Ct. 2961. The Nation’s claims as relevant in this case concern the Government’s alleged mismanagement of its tribal trust fund accounts. See ante, at 2319.

The system of trusteeship and federal management of Indian funds originated with congressional enactments in the 19th century directing the Government to hold and manage Indian tribal funds in trust. See, e.g., Act of June 9, 1837, 5 Stat. 135; see also *Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102–449, p. 6 (1992) (hereinafter *Misplaced Trust*). Through these and later congressional enactments, the United States has come to manage almost \$3 billion in tribal funds and collects close to \$380 million per year on behalf of tribes. Cohen § 5.03[3][b], at 407.

“[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over [trust assets] belonging to Indians.” [*Mitchell II*], at 225, 103 S.Ct. 2961. Under the statutory regime described above, the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries. As a result, “[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [Tribe]), and a trust corpus (Indian ... funds).” *Ibid.* Unlike in other contexts where the statutory scheme creates only a “bare trust” entailing only limited responsibilities, *United States v. Navajo Nation*, 537 U.S. 488, 505, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (*Navajo I*) (internal quotation marks omitted), the statutory regime governing the United States’ obligations with regard to Indian trust funds “bears the hallmarks of a conventional fiduciary relationship,” *United States v. Navajo Nation*, 556 U.S. —, —, 129 S.Ct. 1547, 1558, 173 L.Ed.2d 429 (2009) (*Navajo II*) (internal quotation marks omitted); see *Lincoln v. Vigil*, 508 U.S. 182, 194, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (“[T]he law is ‘well established that the Government in its dealings with Indian tribal property acts in a fiduciary

capacity’ “) (quoting *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707, 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987)).

II

A

When the Government seeks legal advice from a government attorney on matters relating to the management of the Nation’s trust funds, the “real client” of that advice for purposes of the fiduciary exception is the Nation, not the Government. The majority’s rejection of that conclusion is premised on its erroneous view that the Government, in managing the Nation’s trust funds, “has its own independent interest in the implementation of federal Indian policy” that diverges from the interest of the Nation as beneficiary. Ante, at 2327 – 2328; see also ante, at 2331 (GINSBURG, J., concurring in judgment).

As a conventional fiduciary, the Government’s management of Indian trust funds must “be judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S., at 296–297, 62 S.Ct. 1049. Among the most fundamental fiduciary obligations of a trustee is “to administer the trust solely in the interest of the beneficiaries.” 2A A. Scott & W. Fratcher, *Law of Trusts* § 170, p. 311 (4th ed.1987); see *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.) (“Not honesty alone, but the punctilio of an honor the most sensitive,” is “the standard of behavior” for trustees “bound by fiduciary ties”). Although Indian trust funds are deposited in the United States Treasury, “they are not part of the federal government’s general funds and can be used only for the benefit of the tribe.” Cohen § 5.03[3][b], at 408, and n. 140 (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80–81, 28 S.Ct. 690, 52 L.Ed. 954 (1908)).

Because federal Indian policy requires the Government to act strictly as a conventional fiduciary in managing the Nation’s trust funds, the Government acts in a “representative” rather than “persona[l]” capacity when managing the Nation’s trust funds. *Riggs*, 355 A.2d, at 713. By law, the Government cannot pursue any “independent” interest, ante, at 2327 – 2328, distinct from its responsibilities as a fiduciary. See Cohen § 5.03[3][b], at 408, and n. 141 (“Federal statutes forbid use of Indian tribal funds in any manner not authorized by treaty or express provisions of law” (citing 25 U.S.C. §§ 122, 123)). In other words, any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration. It naturally follows, then, that when the Government seeks legal advice from government attorneys relating to the management of the Nation’s trust funds, the “real client” of the advice for purposes of the fiduciary exception is the Nation, not the Government.

This conclusion holds true even though government attorneys are “paid out of congressional appropriations at no cost to the [Nation].” Ante, at 2326. As noted above, although the source of funding for legal advice may be relevant, the ultimate inquiry is for whose benefit the legal advice was rendered. See *supra*, at 2319 – 2320. And, for all the emphasis the majority places on the funding source here, see ante, at 2322, 2326, the majority never suggests that the fiduciary exception would apply if Congress amended federal law to permit Indian tribes to pay government attorneys out of their own trust funds.

The majority’s categorical rejection of the fiduciary exception in the Indian trust context sweeps far broader than necessary. This case involves only the Government’s alleged mismanagement of the Nation’s trust fund accounts, and the Government did not claim below that the attorney-client communications at issue relate to any competing governmental obligations. See App. to Pet. for Cert. 18a–19a. To the extent the United States in other contexts has competing interests, the Government and its attorneys already have to identify those interests in determining how to balance them against their obligations to Indian tribes, and attorney-client communications relating to those interests may properly be withheld or redacted consistent with application of the fiduciary exception. See 88 Fed.Cl. 1, 13 (2009) (observing that redactions “allo[w] the privilege and exception to reign supreme within their respective spheres”).

B

Like the “real client” rationale, the second rationale for the fiduciary exception, rooted in a trustee’s fiduciary duty to disclose all matters relevant to trust administration to the beneficiary, fully supports disclosure of the communications in this case. As explained above, courts relying on this second rationale have recognized that “[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is ... ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.” *Riggs*, 355 A.2d, at 714. Because the statutory scheme requires the Government to act as a conventional fiduciary in managing the Nation’s trust funds, the Government’s fiduciary duty to keep the Nation informed of matters relating to trust administration includes the concomitant duty to disclose attorney-client communications relating to trust fund management. See THIRD RESTATEMENT § 82, Comment f, at 187–188; RESTATEMENT OF THE LAW (THIRD) GOVERNING LAWYERS § 84, pp. 627–628 (1998).

The majority’s conclusion employs a fundamentally flawed legal premise. We have never held that all of the Government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes

that the relationship between the Government and an Indian tribe “bears the hallmarks of a conventional fiduciary relationship,” *Navajo II*, 556 U.S., at —, 129 S.Ct., at 1558 (internal quotation marks omitted), we have consistently looked to general trust principles to flesh out the Government’s fiduciary obligations.

For example, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), we construed a statute that vested the Government with discretionary authority to “use” trust property for certain purposes as imposing a concomitant duty to preserve improvements that had previously been made to the land. *Id.*, at 475, 123 S.Ct. 1126 (quoting 74 Stat. 8). Even though the statute did not “expressly subject the Government to duties of management and conservation,” we construed the Government’s obligations under the statute by reference to “elementary trust law,” which “confirm[ed] the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” 537 U.S., at 475, 123 S.Ct. 1126. Similarly, in *Seminole Nation*, we relied on general trust principles to conclude that the Government had a fiduciary duty to prevent misappropriation of tribal trust funds by corrupt members of a tribe, even though no specific statutory or treaty provision expressly imposed such a duty. *See* 316 U.S., at 296, 62 S.Ct. 1049.

Accordingly, although the “general ‘contours’ of the government’s obligations” are defined by statute, the “interstices must be filled in through reference to general trust law.” *Cobell*, 240 F.3d, at 1101 (quoting *Mitchell II*, 463 U.S., at 224, 103 S.Ct. 2961). This approach accords with our recognition in other trust contexts that “the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime.” *** Indeed, “[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.” ***

Contrary to the majority’s view, the Government’s disclosure obligations are not limited solely to the “narrowly defined disclosure obligations” set forth in § 162a(d)(5) and its implementing regulations, ante, at 2329 – 2330; rather, given that the statutory regime requires the Government to act as a conventional fiduciary in managing Indian trust funds, the Government’s disclosure obligations include those of a fiduciary under common-law trust principles. *See supra*, at 2326 – 2327. Instead of “overrid[ing]” the specific disclosure duty set forth in § 162a(d)(5) and its implementing regulations, general trust principles flesh out the Government’s disclosure obligations under the broader statutory regime, consistent with its role as a conventional fiduciary in this context.

This conclusion, moreover, is supported by the plain text of the very statute cited by the majority. Section 162a(d), which was enacted as part of the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 108 Stat. 4239, sets forth eight “trust

responsibilities of the United States.” But that provision also specifically states that the Secretary of the Interior’s “proper discharge of the trust responsibilities of the United States shall include (but are not limited to) “those specified duties. 25 U.S.C. § 162a(d) (emphasis added). By expressly including the italicized language, Congress recognized that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds. Indeed, Title I of the 1994 Act is entitled “Recognition of Trust Responsibility,” 108 Stat. 4240 (emphasis added), and courts have similarly observed that the Act “recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians.” *Cobell*, 240 F.3d, at 1098; see also H.R.Rep. No. 103–778, p. 9 (1994) (“The responsibility for management of Indian Trust Funds by the [Government] has been determined through a series of court decisions, treaties, and statutes”). That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act.

The majority requires the Nation to “point to a right conferred by statute” to the attorney-client communications at issue, ante, at 2325, and finding none, denies the Nation access to those communications. The upshot of that decision, I fear, may very well be to reinvigorate the position of the dissenting Justices in *White Mountain Apache* and *Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government’s fiduciary obligations to Indian tribes. See *White Mountain Apache*, 537 U.S., at 486–487, 123 S.Ct. 1126 (THOMAS, J., dissenting); *Mitchell II*, 463 U.S., at 234–235, 103 S.Ct. 2961 (Powell, J., dissenting). That approach was wrong when *Mitchell II* was decided nearly 30 years ago, and it is wrong today. Under our governing precedents, common-law trust principles play an important role in defining the Government’s fiduciary duties where, as here, the statutory scheme establishes a conventional fiduciary relationship. Applying those principles in this context, I would hold that the fiduciary exception is fully applicable to the communications in this case.

III

We have described the Federal Government’s fiduciary duties toward Indian tribes as consisting of “moral obligations of the highest responsibility and trust,” to be fulfilled through conduct “judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S., at 297, 62 S.Ct. 1049; see also *Mitchell II*, 463 U.S., at 225–226, 103 S.Ct. 2961 (collecting cases). The sad and well-documented truth, however, is that the Government has failed to live up to its fiduciary obligations in managing Indian trust fund accounts. See, e.g., *Cobell*, 240 F.3d, at 1089 (“The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of [Indian] trust accounts over the past twenty years”); *Misplaced Trust* 8 (“[T]he [Government’s] indifferent supervision and control of the Indian trust funds has consistently resulted in a failure to exercise its responsibility and [to meet] any reasonable expectations of the tribal and individual accountholders, Congress, and taxpayers”); *id.*, at 56 (“[H]ad this type of

mismanagement taken place in any other trust arrangements such as Social Security, there would be war”).

As Congress has recognized, “[t]he Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans.” *Id.*, at 5. Given the history of governmental mismanagement of Indian trust funds, application of the fiduciary exception is, if anything, even more important in this context than in the private trustee context. The majority’s refusal to apply the fiduciary exception in this case deprives the Nation—as well as the Indian tribes in the more than 90 cases currently pending in the federal courts involving claims of tribal trust mismanagement, App. to Pet. for Cert. 126a–138a—of highly relevant information going directly to the merits of whether the Government properly fulfilled its fiduciary duties. Its holding only further exacerbates the concerns expressed by many about the lack of adequate oversight and accountability that has marked the Government’s handling of Indian trust fund accounts for decades.

But perhaps even more troubling than the majority’s refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government’s fiduciary obligations to Indian tribes. By rejecting the Nation’s claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government’s fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes. Because there is no warrant in precedent or reason for reaching that result, I respectfully dissent.

NOTES

1. What remains of the United States’ “general” trust obligations to Indian tribes and Indian people? Does Justice Sotomayor’s dissent, which characterizes the majority’s view of the trust relationship as one that “must be set forth expressly in a specific statute or regulation,” give notice of the end of the trust relationship as we know it? Recall Justice Thomas’ dissent in *White Mountain*, where he asserted that the “general” trust relationship is defined in the earliest Supreme Court cases: “We have recognized a general trust relationship since 1831. *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 8 L.Ed. 25 (1831) (characterizing the relationship between Indian tribes and the United States as “*a ward to his guardian*”) ***.” 537 U.S. 465, 474 n.3 (2003) (emphasis added).

2. The *Jicarilla* decision generated an unusual amount of national press coverage. *E.g.*, Andrew Cohen, *You Can't Verify the Trust, Supreme Court Tells the Apache Nation*, THE ATLANTIC, June 13, 2011, available at <http://www.theatlantic.com/national/archive/2011/06/you-cant-verify-the-trust-supreme-court-tells-apache-nation/240359/>.

3. In a case decided earlier in the 2010 Term, *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011), the Supreme Court held that tribal money claims for breach of trust may not be brought in the Court of Federal Claims under 28 U.S.C. § 1500 where the tribe also has sued in federal district court for a trust accounting.

Add to the end of the sixth full paragraph on page 346:

On June 20, 2011, Judge Thomas F. Hogan granted a motion for final approval of the *Cobell* settlement. Some allotment holders chose to opt out of the settlement, to the extent they could. Jerilyn DeCoteau, an Indian lawyer and law professor, and a member of the Turtle Mountain Band of Chippewa Indians, wrote a powerful editorial explaining her reasons. *See* Jerilyn DeCoteau, *Why I Opted Out of the Cobell Settlement*, INDIAN COUNTRY TODAY, June 4, 2011, available at http://indiancountrytodaymedianetwork.com/ict_sbc/why-i-opted-out-of-the-cobell-settlement/.

Here is an excerpt:

I feel cheated because my grandmother was cheated and her heirs were cheated and cowed by the very lack of information, by the lack of answers when questions were asked, cowed into believing we had little or no right to ask about our interest in her allotment. This is one of the reasons I opted out: I still don't know what resources are on the allotments (there are 3) that I have interests in. To say on quarterly statement, which have miraculously appeared in recent years, that the land is leased for "business purpose" or "agriculture" tells me very little. The point is, these leased lands are the source of the trust accounts that are the subject of *Cobell* and I still don't know enough about the value of my interests to make an informed decision about whether to agree to settle.

I do know that I continue to feel cheated. My family has never benefited in any meaningful way from our allotments. Now some 110 years later, I have the offer of another paltry piece of paper with a few small numbers typed on it. What am I supposed to do with \$500? What would you do? What would you do if you didn't feel so powerless and like you deserved at least something, even if it is this

silly amount called a “settlement”? My daughter pointed out the plain reality, “There are poor people who would gladly take \$500, a month’s worth of fuel oil [in a cold North Dakota winter], or a couple of week’s groceries in exchange for a piece of land they will never see and have no money to ever see.”

The fact is, the settlement will make no real difference in the lives of most account holders and can hardly be considered justice in any real sense of the word. It is just a way to put an ugly chapter in American history to rest for the perpetrators, while conveniently ignoring that it is largely a meaningless act for most Indians.

Kimberly Craven, one of the *Cobell* class members, challenged the settlement in court, most notably a portion of the settlement in which class members have no opt-out right and some members will be over- or under-compensated. The D.C. Circuit affirmed the validity of the settlement in *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir.), *cert. denied sub nom.*, *Craven v. Cobell*, 133 S. Ct. 543 (2012). Helpfully, the D.C. Circuit outlined the critical aspects of the settlement:

First, an amended complaint would be filed setting forth two classes:

(1) the Historical Accounting Class, consisting of individual beneficiaries who had an IIM account (with at least one cash transaction) between October 25, 1994 (the date on which the 1994 Act became law) and September 30, 2009 (the “record date” of the parties’ agreement), and

(2) the Trust Administration Class, consisting of the beneficiaries who had IIM accounts between 1985 and the date of the proposed amended complaint as well as individuals who, as of September 30, 2009, “had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM [a]ccount and regardless of the proceeds, if any, generated from the [l]and”.

The settlement envisioned that the Historical Accounting Class would be certified pursuant to [FRCP] Rule 23(b)(1)(A) and 23(b)(2), in the alternative, with no individual right to opt out of the class; the Trust Administration Class would be certified pursuant to Rule 23(b)(3) with an opt-out right.

Second, the Secretaries of Interior and Treasury would deposit \$1.412 billion into a settlement fund. From this fund, each member of the Historical Accounting Class would receive \$1,000, in exchange for the release of the Secretary of Interior’s “obligation to perform a historical accounting of [the class member’s] IIM Account or any individual Indian trust asset”. The Trust Administration Class members would receive a baseline payment of \$500 plus an

additional pro rata share of the remaining settlement funds in accordance with an agreed-upon compensation formula. The Trust Administration Class payment would release the Secretary from liability arising out of any past mismanagement of IIM accounts and trust properties. The scope of that release would not be unlimited: for example, claims for payment of existing account balances, breach-of-trust claims arising after September 30, 2009, and water-rights claims would fall outside of its scope.

Third, in addition to the class and compensation structure, the proposed settlement provided for:

- (1) establishment of a \$1.9 billion Trust Land Consolidation Fund for the Secretary to acquire fractional interests in trust lands;
- (2) establishment of an Indian Education Scholarship Fund;
- (3) potential tax-exempt status, at the election of Congress, for funds received by the class members;
- (4) reasonable attorneys' fees, expenses, and costs for class counsel, to be awarded at the discretion of the district court,
- (5) incentive payments for the class representatives, to be awarded at the discretion of the district court.

The proposal also stated that the class settlement agreement was contingent upon the enactment of legislation by Congress to authorize certain aspects of the settlement.

Cobell, 679 F.3d at 914-15 (citations omitted).

The D.C. Circuit rejected all of Craven's objections to the settlement, most of which were based on non-Indian law grounds. However, the court did address the question of the overall fairness of the settlement:

Finally, Craven's general objection to the fairness of the class settlement agreement focuses on the information-deficit concern discussed previously: without an historical accounting, it is impossible to tell whether some members are being over-compensated while others are being under-compensated, and yet class members are being forced to surrender their right to an historical accounting and are thereby left without the information needed to establish the value of their claims. The protracted and contentious nature of this litigation underscores the reasonableness of the district court's evaluation of the fairness and adequacy of the class settlement agreement under Rule 23(e). Congress had shown no

inclination to fund the historical accounting to which the plaintiff class was entitled under the 1994 Act. The question was could the class nonetheless benefit appropriately without it. Class counsel acknowledged that, despite significant work with existing data, efforts had failed to show significant accounting errors in the IIM accounts, *see Cobell XXI*, 569 F.Supp.2d at 238. The class settlement agreement was the result of an arms-length negotiation. What interests it protected and what benefits it provided were weighed by the district court, and considered in view of the class-member objections. The settlement acknowledged the plaintiff class' entitlement to an historical accounting and that the United States would pay for the surrender of that right and for trust claims in accordance with an agreed-upon formula. The settlement further provided that the Secretary would attempt to purchase fractional ownership shares to enable accurate accounting in the future in fulfillment of the Secretary's trust responsibilities. Congress has approved the settlement and appropriated the necessary funds. For Craven to characterize the settlement as "tak[ing] shortcuts to solve the problem at the expense of individual rights," Appellant's Br. at 13, and "tak[ing] a series of impermissible shortcuts that abuse the class action process to settle this case," *id.* at 15, is to ignore the history of this hard-fought litigation and the obstacles to producing an historical accounting.

Cobell, 679 F.3d at 923-24.

CHAPTER 6

TRIBAL SOVEREIGNTY AND THE CHALLENGE OF NATION-BUILDING

SECTION C.

THE CONTEMPORARY SCOPE OF TRIBAL SOVEREIGNTY UNDER THE INDIAN CIVIL RIGHTS ACT

Add to the end of the notes on page 394:

In 2014, the Santa Clara Pueblo Tribal Council repealed the 1939 membership ordinance, 1944 and 1982 membership resolutions, and “unwritten law” on tribal membership. Tribal Resolution 2014-81. The Council also enacted a resolution establishing interim membership procedures allowing for persons of mixed parentage previously excluded (such as persons similarly situated to Julia Martinez’s children) to be admitted. Tribal Resolutions 2014-82 & 2014-83.

In 2007, the Council enacted the Non-Member Residence Code. The Code provided that all persons then residing and those who wished to reside on Pueblo lands must apply to be a nonmember resident. The Council began implementation of the Code in 2015.

SECTION D.

TRIBAL SOVEREIGN IMMUNITY

Add to the end of note 11 on page 403:

12. Tribal governments and individual on-reservation businesses have tapped into the emerging market of payday lending, with some proponents calling it the “new gaming.” Opponents refer to the practice as “rent-a-tribe.” See Mark Fogarty, *Payday Lenders “Using Tribes as Fronts”*, INDIAN COUNTRY TODAY MEDIA NETWORK, Feb. 14, 2011, available at <http://indiancountrytodaymedianetwork.com/2011/02/14/payday-lenders-%E2%80%98using-tribes-as-fronts%E2%80%99-17421>.

In late 2010, the Colorado Supreme Court decided a major tribal sovereign immunity case involving the efforts of the Colorado Attorney General to investigate payday lender franchises allegedly operated by the Miami Tribe of Oklahoma and the Santee Sioux Tribe of Nebraska, affirming that the tribes (and more specifically, their business arms) are immune from the state's investigative process. *See Colorado ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 242 P.3d 1099 (Colo. 2010). The court noted:

The modern realities of tribal sovereignty explain the broad applicability of the doctrine of tribal sovereign immunity. As Indian law scholar Robert A. Williams, Jr. recognized twenty-five years ago, “[t]erritorial remoteness, an inadequate public infrastructure base, capital access barriers, land ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policymakers to stifle Indian Country development and investment.” Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 335-36 (1985). Because of these barriers and tribes’ virtual lack of a tax base, tribal economic development—often in the form of tribally owned and controlled businesses—is necessary to generate revenue to support tribal government and services. *See generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D.L.REV. 759 (2004).

Unsurprisingly, tribes recognize the critical nature of economic development and provide for it in their laws and governing charters. For example, the preamble to the Constitution of the Santee Sioux Nation includes the purpose of forming businesses, and section 1(k) of article VI addressing the powers of self-government provides tribal council with authority to charter subordinate organizations for economic purposes. Similarly, the preamble to the Constitution of the Miami Tribe of Oklahoma discusses taking advantage of opportunities for self-determination and economic independence, and section 1 of article VI provides for a Business Committee with authority to transact business and enact resolutions and ordinances to that end.

Cash Advance, 242 P.3d at 1107.

Other state efforts to investigate and regulate on-reservation-based payday lenders are proceeding, e.g., *State of Colorado v. Western Sky Financial, LLC*, 845 F. Supp. 2d 1178 (D. Colo. 2011) (remanding state’s claim back to state court); *Western Sky Financial, LLC v. Maryland Commissioner of Financial Regulation*, 2012 WL 1284407 (D. Md., April 9, 2012) (same). Federal agency suits, which are not subject to tribal immunity defenses, are also progressing. E.g., *Federal Trade Commission v. AMG Services, Inc.*, Order and Report &

Recommendations, No. 12-536 (D. Nev., July 16, 2013), available at <http://www.ftc.gov/os/caselist/1123024/130722amgorder.pdf>.

Prominent scholars are beginning to weigh in on this phenomenon, worried about the potential long-term impact to tribal sovereignty. See Nathalie Martin & Joshua Schwartz, *The Alliance between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (2012).

13. The Ninth Circuit held in *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), that tribal public safety officials (police and ambulance workers) are not immune from suit under the tribal official immunity doctrine:

In short, our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities. We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo*, 436 U.S. at 58 We therefore hold that sovereign immunity does not bar the suit against the Viejas Fire paramedics as individuals. The Viejas Band is not the real party in interest. The Maxwells have sued the Viejas Fire paramedics in their individual capacities for money damages. Any damages will come from their own pockets, not the tribal treasury. ...

At oral argument, the Viejas defendants gave two reasons why the Viejas Band could be the real party in interest in this suit. First, they suggested that the Viejas Band might have indemnified the paramedics and would thus have to pay for any liability. But even if an indemnification agreement exists, it would be “a purely intramural arrangement” between a sovereign and its officers. ... The unilateral decision to insure a government officer against liability does not make the officer immune from that liability. ... Second, they suggested that liability would impact the Viejas Band’s ability to hire paramedics. But this case concerns allegedly grossly negligent acts committed outside tribal land pursuant to an agreement with a non-tribal entity. In this context, denying tribal sovereign immunity to individual employees sued as individuals will have a minimal effect, if any, on the tribe’s hiring ability.

Maxwell, 697 F.3d at 955.

The Viejas Band of Kumeyaay Indians sought en banc review of the panel decision. In their petition, the Band argued:

According to this Court’s decision, however, Indian tribes and their officers may be subject to liability for money damages under state tort law in any

case where the plaintiff simply alleges claims against a tribal employee in his or her “individual” capacity. (The officer would be subject to direct liability, while the tribe would be required to indemnify or insure against the loss.) Thus, the decision has the potential of stripping Indian tribes of the fundamental protection of tribal immunity – the ability to determine when they and their officers may be sued in civil courts for actions taken on the sovereign’s behalf.

Moreover, this Court’s decision ignores the fact that this lawsuit relates to voluntary emergency services provided by the tribal entity, and that the entity here explicitly retained its sovereign immunity in the written contracts where it offered those services. ... If this Court abrogates those contracts (which were carefully negotiated by local governments and the tribal entity), Indian tribes may no longer have control over when they may be sued. Thus, it may become financially impossible for them to provide emergency services – or police, fire, or other related services – both on and off their reservations.

Petition for Rehearing and Rehearing *En Banc* at 19-20, *available at* <http://turtletalk.files.wordpress.com/2013/01/viejas-band-en-banc-petition.pdf>. The Ninth Circuit denied the petition.

MICHIGAN V. BAY MILLS INDIAN COMMUNITY

Supreme Court of the United States, 2014

__ U.S. __, 134 S. Ct. 2024, __ L.Ed.2d __

Justice KAGAN delivered the opinion of the Court.

The question in this case is whether tribal sovereign immunity bars Michigan’s suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action. Congress has not abrogated tribal sovereign immunity from a State’s suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity. Michigan must therefore resort to other mechanisms, including legal actions against the responsible individuals, to resolve this dispute.

I

[In 2010, the Bay Mills Indian Community opened a small casino on fee lands owned by the tribe located about 125 miles from the tribe’s reservation. The State of Michigan sued the

tribe in federal court, alleging violations of the Indian Gaming Regulatory Act and the Class III gaming compact with the tribe. The tribe raised its sovereign immunity. The Sixth Circuit held that neither the gaming compact nor the Indian Gaming Regulatory Act abrogated tribal immunity, and dismissed the State’s complaint.]

II

Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the “common-law immunity from suit traditionally enjoyed by sovereign powers.” [Santa Clara Pueblo]. That immunity, we have explained, is “a necessary corollary to Indian sovereignty and self-governance.” ... And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe’s immunity, like its other governmental powers and attributes, in Congress’s hands. [United States v. United States Fidelity & Guaranty Co.] (“It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit”). Thus, we have time and again treated the “doctrine of tribal immunity [as] settled law” and dismissed any suit against a tribe absent congressional authorization (or a waiver). [Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.].

In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals. [Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165, 167–168, 172–173 ... (1977); Potawatomi]. ... While each State at the Constitutional Convention surrendered its immunity from suit by sister States, “it would be absurd to suggest that the tribes”—at a conference “to which they were not even parties”—similarly ceded their immunity against state-initiated suits. Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 ... (1991).

Equally important here, we declined in Kiowa to make any exception for suits arising from a tribe’s commercial activities, even when they take place off Indian lands. [Our precedents] had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to “defer” to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct. ...

Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and “[t]o abrogate [such] immunity, Congress must ‘unequivocally’ express that purpose.” [C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe]. That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government. ...

The upshot is this: Unless Congress has authorized Michigan’s suit, our precedents demand that it be dismissed. And so Michigan, naturally enough, [argues] that if it does not, we should revisit—and reverse—our decision in *Kiowa*, so that tribal immunity no longer applies to claims arising from commercial activity outside Indian lands. ...

IV

[Michigan argues that tribes increasingly participate in off-reservation gaming and other commercial activity, and operate in that capacity less as governments than as private businesses. ... Further, Michigan contends, tribes have broader immunity from suits arising from such conduct than other sovereigns—most notably, because Congress enacted legislation limiting foreign nations’ immunity for commercial activity in the United States. ... It is time, Michigan concludes, to “level[] the playing field.” ...

But this Court does not overturn its precedents lightly. *Stare decisis*, we have stated, “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” ... Although “not an inexorable command,” ... *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop “in a principled and intelligible fashion.” ... For that reason, this Court has always held that “any departure” from the doctrine “demands special justification.” ...

And that is more than usually so in the circumstances here. First, *Kiowa* itself was no one-off: Rather, in rejecting the identical argument Michigan makes, our decision reaffirmed a long line of precedents, concluding that “the doctrine of tribal immunity”—without any exceptions for commercial or off-reservation conduct—“is settled law and controls this case.” ... Second, we have relied on *Kiowa* subsequently: In another case involving a tribe’s off-reservation commercial conduct, we began our analysis with *Kiowa*’s holding that tribal immunity applies to such activity (and then found that the Tribe had waived its protection). ... Third, tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity. ... And fourth..., Congress exercises primary authority in this area and “remains free to alter what we have done”—another factor that gives “special force” to *stare decisis*. ...

But instead, all the State musters are retreads of assertions we have rejected before. *Kiowa* expressly considered the view, now offered by Michigan, that “when tribes take part in the Nation’s commerce,” immunity “extends beyond what is needed to safeguard tribal self-governance.” ... Indeed, as *Kiowa* noted, ... Potawatomi had less than a decade earlier rejected Oklahoma’s identical contention that “because tribal business activities ... are now so detached from traditional tribal interests,” immunity “no longer makes sense in [the commercial] context.”

... So too, the Kiowa Court comprehended the trajectory of tribes' commercial activity.... In the preceding decade, tribal gaming revenues had increased more than thirty fold...; and Kiowa noted the flourishing of other tribal enterprises, ranging from cigarette sales to ski resorts[.] Moreover, the Kiowa Court understood that other sovereigns did not enjoy similar immunity for commercial activities outside their territory; that seeming "anomal[y]" was a principal point in the dissenting opinion. ... Kiowa did more, in fact, than acknowledge those arguments; it expressed a fair bit of sympathy toward them. ... Yet the decision could not have been any clearer: "We decline to draw [any] distinction" that would "confine [immunity] to reservations or to noncommercial activities." ...

We ruled that way for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress. ... Congress, we said—drawing an analogy to its role in shaping foreign sovereign immunity—has the greater capacity "to weigh and accommodate the competing policy concerns and reliance interests" involved in the issue. ... And Congress repeatedly had done just that: It had restricted tribal immunity "in limited circumstances" (including, we noted, in § 2710(d)(7)(A)(ii)), while "in other statutes" declaring an "intention not to alter" the doctrine. ... So too, we thought, Congress should make the call whether to curtail a tribe's immunity for off-reservation commercial conduct—and the Court should accept Congress's judgment.

All that we said in Kiowa applies today, with yet one more thing: Congress has now reflected on Kiowa and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following Kiowa, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular—drafted by the chair of the Senate Appropriations Subcommittee on the Interior—expressly referred to Kiowa and broadly abrogated tribal immunity for most torts and breaches of contract. See S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998). But instead of adopting those reversals of Kiowa, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval. See Indian Tribal Economic Development and Contract Encouragement Act of 2000, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2)); see also F. Cohen, *Handbook of Federal Indian Law* § 7.05[1][b], p. 643 (2012). Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants. So rather than confronting, as we did in Kiowa, a legislative vacuum as to the precise issue presented, we act today against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one.

Reversing Kiowa in these circumstances would scale the heights of presumption: Beyond upending "long-established principle[s] of tribal sovereign immunity," that action would replace Congress's considered judgment with our contrary opinion. ... As Kiowa recognized, a fundamental commitment of Indian law is judicial respect for Congress's primary role in

defining the contours of tribal sovereignty. See [Kiowa]; see also *Santa Clara Pueblo*, 436 U.S., at 60 ... (“[A] proper respect ... for the plenary authority of Congress in this area cautions that [the courts] tread lightly”); Cohen, *supra*, § 2.01[1], at 110 (“Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law”). That commitment gains only added force when Congress has already reflected on an issue of tribal sovereignty, including immunity from suit, and declined to change settled law. And that force must grow greater still when Congress considered that issue partly at our urging. See [Kiowa] (hinting, none too subtly, that “Congress may wish to exercise” its authority over the question presented). Having held in *Kiowa* that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong. Congress of course may always change its mind—and we would readily defer to that new decision. But it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity. As in *Kiowa*—except still more so—“we decline to revisit our case law[,] and choose” instead “to defer to Congress.” ...

V

As “domestic dependent nations,” Indian tribes exercise sovereignty subject to the will of the Federal Government. *Cherokee Nation*, 5 Pet., at 17. Sovereignty implies immunity from lawsuits. Subjection means (among much else) that Congress can abrogate that immunity as and to the extent it wishes. If Congress had authorized this suit, Bay Mills would have no valid grounds to object. But Congress has not done so: The abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands. We will not rewrite Congress’s handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct. This Court has declined that course once before. To choose it now would entail both overthrowing our precedent and usurping Congress’s current policy judgment. Accordingly, Michigan may not sue Bay Mills to enjoin the Vanderbilt casino, but must instead use available alternative means to accomplish that object.

We affirm the Sixth Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring.

The doctrine of tribal immunity has been a part of American jurisprudence for well over a century. See, e.g., *Parks v. Ross*, 11 How. 362, 13 L.Ed. 730 (1851); Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 148–155 (2004) (tracing the origins of the doctrine to the mid-19th century); Wood, *It Wasn’t An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U.L. Rev. 1587, 1640–1641 (2013) (same). And in more recent decades, this Court has consistently affirmed the doctrine. ...

I

Long before the formation of the United States, Tribes “were self-governing sovereign political communities.” *United States v. Wheeler*, 435 U.S. 313, 322–323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). ...

[T]he principal dissent analogizes tribal sovereign immunity to foreign sovereign immunity. Foreign sovereigns (unlike States) are generally not immune from suits arising from their commercial activities. [Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2).] This analogy, however, lacks force. Indian Tribes have never historically been classified as “foreign” governments in federal courts even when they asked to be. [*Cherokee Nation v. Georgia*.]

II

... Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct.

Comity—“that is, ‘a proper respect for [a sovereign’s] functions’”—fosters “respectful, harmonious relations” between governments.... For two reasons, these goals are best served by recognizing sovereign immunity for Indian Tribes, including immunity for off-reservation conduct, except where Congress has expressly abrogated it. First, a legal rule that permitted States to sue Tribes, absent their consent, for commercial conduct would be anomalous in light of the existing prohibitions against Tribes’ suing States in like circumstances. Such disparate treatment of these two classes of domestic sovereigns would hardly signal the Federal Government’s respect for tribal sovereignty. Second, Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal.

A

As the principal dissent observes, “comity is about one sovereign respecting the dignity of another.” ... This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing States for commercial activity on Indian lands. Both States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government.

B

The principal dissent contends that Tribes have emerged as particularly “substantial and successful” commercial actors. ... The dissent expresses concern that, although tribal leaders can be sued for prospective relief, ... Tribes’ purportedly growing coffers remain unexposed to broad damages liability. ... These observations suffer from two flaws.

First, not all Tribes are engaged in highly lucrative commercial activity. Nearly half of federally recognized Tribes in the United States do not operate gaming facilities at all. ... And even among the Tribes that do, gaming revenue is far from uniform. As of 2009, fewer than 20% of Indian gaming facilities accounted for roughly 70% of the revenues from such facilities. ... One must therefore temper any impression that Tribes across the country have suddenly and uniformly found their treasuries filled with gaming revenue.

Second, even if all Tribes were equally successful in generating commercial revenues, that would not justify the commercial-activity exception urged by the principal dissent. For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes’ core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. 25 U.S.C. § 2702(1) (explaining that Congress’ purpose in enacting IGRA was “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”); see also Cohen’s Handbook of Federal Indian Law 1357–1373 (2012) (Cohen’s Handbook) (describing various types of federal financial assistance that Tribes receive). And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases “may be the only means by which a tribe can raise revenues,” Struve, 36 Ariz. St. L. J., at 169. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

For example, States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources. ... States may also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians. ...

As commentators have observed, if Tribes were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N. D. L. Rev. 759, 771 (2004); see also Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pittsburgh Tax Rev. 93, 95 (2005); Enterprise Zones, Hearings before the Subcommittee on Select Revenue Measures of the House Committee On Ways and Means, 102d Cong., 1st Sess., 234 (1991) (statement of Peterson Zah, President of the Navajo Nation) (“[D]ouble taxation

interferes with our ability to encourage economic activity and to develop effective revenue generating tax programs. Many businesses may find it easier to avoid doing business on our reservations rather than ... bear the brunt of an added tax burden”).

If non-Indians controlled only a small amount of property on Indian reservations, and if only a negligible amount of land was held in fee, the double-taxation concern might be less severe. But for many Tribes, that is not the case. History explains why this is so: Federal policies enacted in the late 19th and early 20th centuries rendered a devastating blow to tribal ownership. In 1887, Congress enacted the Dawes Act. 24 Stat. 388. That Act had two major components relevant here. First, it converted the property that belonged to Indian Tribes into fee property, and allotted the land to individual Indians. *Id.*, at 388–389. Much of this land passed quickly to non-Indian owners. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L. J.* 1, 12 (1995). Indeed, by 1934, the amount of land that passed from Indian Tribes to non-Indians totaled 90 million acres. See Cohen’s Handbook 74. Other property passed to non-Indians when destitute Indians found themselves unable to pay state taxes, resulting in sheriff’s sales. Royster, *supra*, at 12.

Moreover, Tribes are largely unable to obtain substantial revenue by taxing tribal members who reside on non-fee land that was not allotted under the Dawes Act. As one scholar recently observed, even if Tribes imposed high taxes on Indian residents, “there is very little income, property, or sales they could tax.” Fletcher, *supra*, at 774. The poverty and unemployment rates on Indian reservations are significantly greater than the national average. ... As a result, “there is no stable tax base on most reservations.” Fletcher, *supra*, at 774; see Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 *Harv. J. Legis.* 335, 385 (1985).

To be sure, poverty has decreased over the past few decades on reservations that have gaming activity. One recent study found that between 1990 and 2000, the presence of a tribal casino increased average per capita income by 7.4% and reduced the family poverty rate by 4.9 percentage points. Anderson, *Tribal Casino Impacts on American Indians Well-Being: Evidence From Reservation-Level Census Data*, 31 *Contemporary Economic Policy* 291, 298 (Apr. 2013). But even reservations that have gaming continue to experience significant poverty, especially relative to the national average. See *id.*, at 296. The same is true of Indian reservations more generally.

Justice SCALIA, dissenting.

[Omitted]

Justice THOMAS, with whom Justice SCALIA, Justice GINSBURG, and Justice ALITO join, dissenting.

[I]n *Kiowa* itself, this Court dismissed the self-sufficiency rationale as “inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.” ... The Court expressed concern that “[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” ...

Nor is immunity for off-reservation commercial acts necessary to protect tribal self-governance. As the *Kiowa* majority conceded, “[i]n our interdependent and mobile society, ... tribal immunity extends beyond what is needed to safeguard tribal self-governance.” *Ibid.* Such broad immunity far exceeds the modest scope of tribal sovereignty, which is limited only to “what is necessary to protect tribal self-government or to control internal relations.” ... And no party has suggested that immunity from the isolated suits that may arise out of extraterritorial commercial dealings is somehow fundamental to protecting tribal government or regulating a tribe’s internal affairs.

Accident or no, it was this Court, not Congress, that adopted the doctrine of tribal sovereign immunity in the first instance. And it was this Court that left open a question about its scope. Why should Congress—and only Congress, according to the *Kiowa* Court—have to take on a problem this Court created? ... We have the same duty here.

In the 16 years since *Kiowa*, the commercial activities of tribes have increased dramatically. This is especially evident within the tribal gambling industry. Combined tribal gaming revenues in 28 States have more than tripled—from \$8.5 billion in 1998 to \$27.9 billion in 2012. National Indian Gaming Commission, 2012 Indian Gaming Revenues Increase 2.7 Percent (July 23, 2013).... But tribal businesses extend well beyond gambling and far past reservation borders. In addition to ventures that take advantage of on-reservation resources (like tourism, recreation, mining, forestry, and agriculture), tribes engage in “domestic and international business ventures” including manufacturing, retail, banking, construction, energy, telecommunications, and more. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N. D. L. Rev. 597, 600–604 (2004). Tribal enterprises run the gamut: they sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski resorts, and hotels. *Ibid.*; see also, e.g., *The Harvard Project on American Indian Economic Development, The State of the Native Nations* 124 (2008) (Ho-Chunk, Inc., a tribal corporation of the Winnebago Tribe of

Nebraska, operates “hotels in Nebraska and Iowa,” “numerous retail grocery and convenience stores,” a “tobacco and gasoline distribution company,” and “a temporary labor service provider”); Four Fires, San Manuel Band of Mission Indians, <http://www.sanmanuel-nsn.gov/fourfires.php.html>) (four Tribes from California and Wisconsin jointly own and operate a \$43 million hotel in Washington, D.C.). These manifold commercial enterprises look the same as any other—except immunity renders the tribes largely litigation-proof.

As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States’ ability to protect their citizens and enforce the law against tribal businesses. This case is but one example: No one can seriously dispute that Bay Mills’ operation of a casino outside its reservation (and thus within Michigan territory) would violate both state law and the Tribe’s compact with Michigan. Yet, immunity poses a substantial impediment to Michigan’s efforts to halt the casino’s operation permanently. The problem repeats itself every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws, and tribal immunity bars the only feasible legal remedy. Given the wide reach of tribal immunity, such scenarios are commonplace...

In the wake of *Kiowa*, tribal immunity has also been exploited in new areas that are often heavily regulated by States. For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality. Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* 69 Wash. & Lee L. Rev. 751, 758–759, 777 (2012). Indian tribes have also created conflict in certain States by asserting tribal immunity as a defense against violations of state campaign finance laws. See generally Moylan, *Sovereign Rules of the Game: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity*, 20 B.U. Pub. Interest L.J. 1 (2010).

Justice GINSBURG, dissenting.

[Omitted]

NOTES

1. Justice Thomas’s dissenting opinion all but tees up the next major tribal immunity case before the Supreme Court when he warns that tribal immunity is a problem “every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws,

and tribal immunity bars the only feasible legal remedy.” 134 S. Ct. at 2051 (Thomas, J., dissenting).

Tribes that raise immunity to bar legitimate tort claims in all courts may be paving the way toward additional Supreme Court review of tribal immunity. Cf. Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum: Michigan v. Bay Mills Indian Community*, 123 YALE L. J. ONLINE 310 (2013), available at http://yalelawjournal.org/pdf/1215_s4ndkbwh.pdf (“Indian law scholars such as Frank Pommersheim have been warning tribal leaders and counsel for decades that if they do not solve the no-forum conundrum, someone else will—either Congress or the federal courts.”) (citing Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 347-51 (1989)).

2. An omitted portion of the opinion relating to the Indian Gaming Regulatory Act is discussed elsewhere in this Teacher’s Memorandum, pages 93-95.

CHAPTER 7
TRIBAL SOVEREIGNTY AND JURISDICTION:
CONGRESSIONAL AND JUDICIAL RECOGNITION
AND LIMITATIONS

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

**PART 1. LITIGATING “INDIAN COUNTRY”: RESERVATION DIMINISHMENT
AND DISESTABLISHMENT**

NOTE: LAND IN TRUST AS ENSURING TRIBAL JURISDICTION

Add after note on pages 459-63

NEBRASKA V. PARKER

Supreme Court of the United States, 2016.

__ U.S. __, 136 S.Ct. 1072, 194 L.Ed.2d 152.

JUSTICE THOMAS delivered the opinion of the Court.

The village of Pender, Nebraska sits a few miles west of an abandoned right-of-way once used by the Sioux City and Nebraska Railroad Company. We must decide whether Pender and surrounding Thurston County, Nebraska, are within the boundaries of the Omaha Indian Reservation or whether the passage of an 1882 Act empowering the United States Secretary of the Interior to sell the Tribe’s land west of the right-of-way “diminished” the reservation’s boundaries, thereby “free[ing]” the disputed land of “its reservation status.” *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). We hold that Congress did not diminish the reservation in 1882 and that the disputed land is within the reservation’s boundaries.

I
A

Centuries ago, the Omaha Tribe settled in present-day eastern Nebraska. By the mid-19th century, the Tribe was destitute and, in exchange for much-needed revenue, agreed to sell a large swath of its land to the United States. In 1854, the Tribe entered into a treaty with the United States to create a 300,000-acre reservation. Treaty with the Omahas (1854 Treaty), Mar. 16, 1854, 10 Stat. 1043. * * *

In 1865, after the displaced Wisconsin Winnebago Tribe moved west, the Omaha Tribe agreed to “cede, sell, and convey” an additional 98,000 acres on the north side of the reservation to the United States for the purpose of creating a reservation for the Winnebagoes. Treaty with the Omaha Indians (1865 Treaty), Mar. 6, 1865, 14 Stat. 667–668. The Tribe sold the land for a fixed sum of \$50,000. *Id.*, at 667.

* * *

Then came the 1882 Act, central to the dispute between petitioners and respondents. In that Act, Congress again empowered the Secretary of the Interior “to cause to be surveyed, if necessary, and sold” more than 50,000 acres lying west of a right-of-way granted by the Tribe and approved by the Secretary of the Interior in 1880 for use by the Sioux City and Nebraska Railroad Company. Act of Aug. 7, 1882 (1882 Act), 22 Stat. 341. The land for sale under the terms of the 1882 Act overlapped substantially with the land Congress tried, but failed, to sell in 1872. Once the land was appraised “in tracts of forty acres each,” the Secretary was “to issue [a] proclamation” that the “lands are open for settlement under such rules and regulations as he may prescribe.” §§ 1, 2, *id.*, at 341. Within one year of that proclamation, a nonmember could purchase up to 160 acres of land (for no less than \$2.50 per acre) in cash paid to the United States, so long as the settler “occup[ie]d” it, made “valuable improvements thereon,” and was “a citizen of the United States, or ... declared his intention to become such.” § 2, *id.*, at 341. The proceeds from any land sales, “after paying all expenses incident to and necessary for carrying out the provisions of th[e] act,” were to “be placed to the credit of said Indians in the Treasury of the United States.” § 3, *id.*, at 341. Interest earned on the proceeds was to be “annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.” *Ibid.*

The 1882 Act also included a provision, common in the late 19th century, that enabled members of the Tribe to select individual allotments, §§ 5–8, *id.*, at 342–343, as a means of encouraging them to depart from the communal lifestyle of the reservation. * * * The 1882 Act provided that the United States would convey the land to a member or his heirs in fee simple after holding it in trust on behalf of the member and his heirs for 25 years. § 6, 22 Stat. 342. Members could select allotments on any part of the reservation, either east or west of the right-of-way. § 8, *id.*, at 343.

After the members selected their allotments—only 10 to 15 of which were located west of the right-of-way—the Secretary proclaimed that the remaining 50,157 acres west of the right-of-way were open for settlement by nonmembers in April 1884. One of those settlers was W.E. Peebles, who “purchased a tract of 160 acres, on which he platted the townsite for Pender.” *Smith v. Parker*, 996 F.Supp.2d 815, 828 (D.Neb.2014).

B

The village of Pender today numbers 1,300 residents. Most are not associated with the Omaha Tribe. Less than 2% of Omaha tribal members have lived west of the right-of-way since the early 20th century.

Despite its longstanding absence, the Tribe sought to assert jurisdiction over Pender in 2006 by subjecting Pender retailers to its newly amended Beverage Control Ordinance. The ordinance requires those retailers to obtain a liquor license (costing \$500, \$1,000, or \$1,500 depending upon the class of license) and imposes a 10% sales tax on liquor sales. Nonmembers who violate the ordinance are subject to a \$10,000 fine.

The village of Pender and Pender retailers, including bars, a bowling alley, and social clubs, brought a federal suit against members of the Omaha Tribal Council in their official capacities to challenge the Tribe's power to impose the requirements of the Beverage Control Ordinance on nonmembers. Federal law permits the Tribe to regulate liquor sales on its reservation and in "Indian country" so long as the Tribe's regulations are (as they were here) "certified by the Secretary of the Interior, and published in the Federal Register." 18 U.S.C. § 1161. The challengers alleged that they were neither within the boundaries of the Omaha Indian Reservation nor in Indian country and, consequently, were not bound by the ordinance.

* * *

II

We must determine whether Congress "diminished" the Omaha Indian Reservation in 1882. If it did so, the State now has jurisdiction over the disputed land. *Solem*, 465 U.S., at 467, 104 S.Ct. 1161. If Congress, on the other hand, did not diminish the reservation and instead only enabled nonmembers to purchase land within the reservation, then federal, state, and tribal authorities share jurisdiction over these "opened" but undiminished reservation lands. *Ibid*.

The framework we employ to determine whether an Indian reservation has been diminished is well settled. *Id.*, at 470–472, 104 S.Ct. 1161. "[O]nly Congress can divest a reservation of its land and diminish its boundaries," and its intent to do so must be clear. *Id.*, at 470, 104 S.Ct. 1161. To assess whether an Act of Congress diminished a reservation, we start with the statutory text, for "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Under our precedents, we also "examine all the circumstances surrounding the opening of a reservation." *Id.*, at 412, 114 S.Ct. 958. Because of "the turn-of-the-century assumption that Indian reservations were a thing of the past," many surplus land Acts did not clearly convey "whether opened lands retained reservation status or were divested of all Indian interests." *Solem*, *supra*, at 468, 104 S.Ct. 1161. For that reason, our precedents also look to any "unequivocal evidence" of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State of Nebraska. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

A

As with any other question of statutory interpretation, we begin with the text of the 1882 Act, the most "probative evidence" of diminishment. [*Solem*] * * * Common textual indications of Congress' intent to diminish reservation boundaries include "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." * * * Such language "providing for the total surrender of tribal claims in exchange for a fixed payment" evinces Congress' intent to diminish a reservation, * * * and creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished," * * *. Similarly, a statutory provision restoring portions of a reservation to "the public domain" signifies diminishment. * * * In the 19th century, to restore land to the public domain was to extinguish the land's prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes. * * *

The 1882 Act bore none of these hallmarks of diminishment. The 1882 Act empowered the Secretary to survey and appraise the disputed land, which then could be purchased in 160-acre tracts by nonmembers. 22 Stat. 341. The 1882 Act states that the disputed lands would be "open for settlement under such rules and regulations as [the Secretary of the Interior] may prescribe." *Ibid*. And the parcels would be sold piecemeal in 160-acre tracts. *Ibid*. So rather than the Tribe's

receiving a fixed sum for all of the disputed lands, the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land.

From this text, it is clear that the 1882 Act falls into another category of surplus land Acts: those that “merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians’ benefit.” * * * Such schemes allow “non-Indian settlers to own land on the reservation.” * * * But in doing so, they do not diminish the reservation’s boundaries.

* * *

B

We now turn to the history surrounding the passage of the 1882 Act. The mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation. That historical evidence in no way “unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.” * * *

Petitioners rely largely on isolated statements that some legislators made about the 1882 Act. Senator Henry Dawes of Massachusetts, for example, noted that he had been “assured that [the 1882 Act] would leave an ample reservation ” for the Tribe. 13 Cong. Rec. 3032 (1882) (emphasis added). And Senator John Ingalls of Kansas observed “that this bill practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers.” Id., at 3028. Whatever value these contemporaneous floor statements might have, other such statements support the opposite conclusion—that Congress never intended to diminish the reservation. Senator Charles Jones of Florida, for example, spoke of “white men purchas[ing] titles to land within this reservation and settl [ing] down with the Indians on it.” Id., at 3078 (emphasis added). Such dueling remarks by individual legislators are far from the “clear and plain” evidence of diminishment required under this Court’s precedent. * * *

More illuminating than cherry-picked statements by individual legislators would be historical evidence of “the manner in which the transaction was negotiated” with the Omaha Tribe. * * * In Yankton Sioux, for example, recorded negotiations between the Commissioner of Indian Affairs and leaders of the Yankton Sioux Tribe unambiguously “signaled [the Tribe’s] understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation.” * * * No such unambiguous evidence exists in the record of these negotiations. In particular, petitioners’ reliance on the remarks of Representative Edward Valentine of Nebraska, who stated, “You cannot find one of those Indians that does not want the western portion sold,” and that the Tribe wished to sell the land to those who would ““reside upon it and cultivate it’ ” so that the Tribe members could “benefit of these improvements,” 13 Cong. Rec. 6541, falls short. Nothing about this statement or other similar statements unequivocally supports a finding that the existing boundaries of the reservation would be diminished.

C

Finally, we consider both the subsequent demographic history of opened lands, which serves as “one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers,” * * * as well as the United States’ “treatment of the affected areas, particularly in the years immediately following the opening,” which has “some evidentiary value,” * * *. Our cases suggest that such evidence might “reinforc[e]” a finding of diminishment or nondiminishment based on the text. * * * But this Court has never relied solely on this third consideration to find diminishment.

As petitioners have discussed at length, the Tribe was almost entirely absent from the disputed territory for more than 120 years. Brief for Petitioners 24–30. The Omaha Tribe does

not enforce any of its regulations—including those governing businesses, fire protection, animal control, fireworks, and wildlife and parks—in Pender or in other locales west of the right-of-way. 996 F.Supp.2d, at 832. Nor does it maintain an office, provide social services, or host tribal celebrations or ceremonies west of the right-of-way. *Ibid.*

This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our role to “rewrite” the 1882 Act in light of this subsequent demographic history. * * * After all, evidence of the changing demographics of disputed land is “the least compelling” evidence in our diminishment analysis, for “[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the ‘Indian character’ of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.” * * *

Evidence of the subsequent treatment of the disputed land by Government officials likewise has “limited interpretive value.” * * * Petitioners highlight that, for more than a century and with few exceptions, reports from the Office of Indian Affairs and in opinion letters from Government officials treated the disputed land as Nebraska’s. * * * It was not until this litigation commenced that the Department of the Interior definitively changed its position, concluding that the reservation boundaries were in fact not diminished in 1882. * * * For their part, respondents discuss late-19th-century statutes referring to the disputed land as part of the reservation, as well as inconsistencies in maps and statements by Government officials. * * * This “mixed record” of subsequent treatment of the disputed land cannot overcome the statutory text, which is devoid of any language indicative of Congress’ intent to diminish. * * *

Petitioners’ concerns about upsetting the “justifiable expectations” of the almost exclusively non-Indian settlers who live on the land are compelling, *Rosebud Sioux*, supra, at 605, 97 S.Ct. 1361 but these expectations alone, resulting from the Tribe’s failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. *DeCoteau*, 420 U.S., at 449, 95 S.Ct. 1082. And though petitioners wish that Congress would have “spoken differently” in 1882, “we cannot remake history.” *Ibid.*

* * *

In light of the statutory text, we hold that the 1882 Act did not diminish the Omaha Indian Reservation. Because petitioners have raised only the single question of diminishment, we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender in light of the Tribe’s century-long absence from the disputed lands. Cf. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217–221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005).

Add after note 2 on page 470

3. In *Big Lagoon Rancheria v. State of California*, 741 F.3d 1032 (9th Cir. 2014), the Ninth Circuit held that the tribe could not demand Class III gaming compact negotiations over an 11-acre parcel because, under its interpretation of *Carcieri*, the lands in question could not be gaming-eligible. Here is Bryan Newland’s commentary on the decision (slightly edited) from *Turtle Talk*:

Big Lagoon began as a bad-faith lawsuit filed against the State of California, which was seeking to prevent the rural, northern California tribe from developing a gaming facility on its own coastal reservation. The Tribe had filed a

lawsuit against the State under IGRA, seeking to compel the Governor to negotiate a compact in good faith; and, the Tribe was making slow, but steady progress in its effort.

In 2009, the State [claimed] that the Tribe's trust lands (some of which were acquired in 1918, and some acquired in 1994) were not eligible "Indian lands" due to the *Carcieri* decision issued earlier that year.

As evidence that this argument was, in fact, a throw-away argument by the State, the Court notes on pages 9-10 that the State was working with the Tribe to find alternate gaming sites that would eventually need to be placed into trust.

It should be noted that a number of states, local governments, and individuals have cited *Carcieri* in litigation against tribes in recent years. These arguments are almost always thrown into the mix – regardless of apparent relevancy to the case – just to see if they might stick.

The 9th Circuit panel [stated] that it must determine whether the lands are eligible for gaming to determine whether the State was obligated to negotiate a gaming compact with the Tribe in the first place: "a tribe may only request negotiations to conduct gaming on a particular piece of Indian land over which it has jurisdiction." [741 F.3d at 1040.]

The Court framed its analysis as follows:

We think [this case] requires us to answer three questions: Must a tribe have jurisdiction over "Indian lands" to compel [compact] negotiations? Has the State waived the "Indian lands" requirement? Is the eleven-acre parcel "Indian lands"? [741 F.3d at 1039.]

1. State's Obligation to Negotiate

The Court answered the first question in the affirmative – holding that "a state need not negotiate with a tribe under IGRA unless the tribe has jurisdiction over Indian lands." [741 F.3d at 1040.] This is not that surprising, given that the law was already trending in that direction.

But, the Court took it one step further, holding, "a tribe's right to request [compact] negotiations...depends on its having jurisdiction over Indian lands on which it proposes to conduct class III gaming." [Id.]

This rule is merely the beginning of the problems this case may pose.

Does the second part of this holding require that all Class III gaming compacts designate the specific parcels of land on which a tribe will conduct gaming? Will some states use this rule to require tribes to submit a jurisdictional analysis prior to beginning compact negotiations?

Many tribes have entered into Class III gaming compacts without designating particular parcels of land as a Class III gaming site. Many others have entered into compacts without having gaming-eligible trust lands whatsoever. These agreements have been useful in helping tribes secure investors for increasingly expensive projects.

This particular ruling has the potential to require tribes to negotiate gaming compacts as a last step in developing a gaming project, after a project site has been selected and acquired in trust.

3. Big Lagoon's trust lands are not "Indian lands" due to *Carcieri*

When reading this part of the decision, it is important to remember that the State's *Carcieri* arguments were thrown onto the heap in what was, originally, a lawsuit about gaming compacts under IGRA.

On page 12 of the decision, the Court even acknowledges that the State of California sought discovery on the issue of whether the Tribe was "under federal jurisdiction" in 1934. [741 F.3d at 1038.] The lower court did not grant discovery, and the parties did not substantially develop a factual record on that point.

On page 25, the Court again acknowledged this fact:

Neither party squarely addresses how we should go about deciding whether Big Lagoon was a tribe under federal jurisdiction in 1934. The State says that further discovery will shed light on the issue, but does not explain how. Big Lagoon argues that it has been a federally recognized tribe since at least the time of the compact negotiations, but we are concerned with its status in 1934, not 1999. [741 F.3d at 1044.]

Notwithstanding the fact that both parties were not prepared to litigate the issue before the 9th Circuit, the Court felt compelled to go ahead and render a decision anyhow. Without a single citation to any legal authority that analyzes

the IRA's fee-to-trust authority in light of the *Carcieri* decision, the Court stated on pages 26-27:

Since no one resided on what is now the Rancheria [in 1934], there was no group to organize. The absence of Big Lagoon from the 258-tribe list was not an intentional or inadvertent omission; it was a reflection of reality.

As we have held, a predicate to the right to request negotiations under the IGRA is jurisdiction over the Indian lands upon which a tribe proposes to conduct class III gaming. IGRA defines "Indian lands" as including lands held in trust for a tribe. *Carcieri* holds that the BIA's authority to take lands in trust for a tribe extends only to tribes under federal jurisdiction in 1934. Thus, the effect of our conclusion that Big Lagoon is not such a tribe is that Big Lagoon cannot demand [compact] negotiations.... [741 F.3d at 1045.]

The Ninth Circuit has effectively created a new test under the *Carcieri* decision. To meet this test, a tribe would have to show two things:

- That its members must have been residing on the parcel of land in 1934; and,
- That it was one of the 258 tribes listed in the 1947 Haas Report.

There are a lot more than 258 federally recognized tribes in the United States. A lot of them would be left out if the reasoning in this case was adopted elsewhere as a basis for lands to be placed into trust.

The 9th Circuit's *Carcieri* analysis looks nothing like the analysis that the Department of the Interior has adopted to determine whether a tribe was "under federal jurisdiction" in 1934 for purposes of having land acquired in trust. The Court didn't even look to the Department to guide its consideration of this issue (in footnote 8, on page 28, the Court denied the State's request to implead the BIA). [741 F.3d at 1045 n. 8.]

Moreover, this decision invites collateral attacks on the status of tribal trust lands long after the federal Administrative Procedures Act's six-year statute of limitations has passed. The trust lands at issue in Big Lagoon were acquired in 1918 and 1994, respectively. More than two decades has passed since the Tribe's lands were acquired in trust (Laches? Settled expectations?). The State was able

to challenge the status of those lands through a lawsuit about gaming compacts under IGRA. Who knows what other avenues may be used for a collateral attack on tribal jurisdiction over trust lands?

Bryan Newland, *9th Circuit's Decision in Big Lagoon Case Spells Trouble (breakdown)*, Turtle Talk (Jan. 22, 2014), available at <http://turtletalk.wordpress.com/2014/01/22/9th-circuits-decision-in-big-lagoon-case-spells-trouble-breakdown/>.

The Ninth Circuit reheard the appeal en banc, and vacated the panel's decision. *Big Lagoon Rancheria v. State of California*, ___ F.3d ___, 2015 WL 3499884 (9th Cir., June 4, 2015) (en banc). The court held that the six-year statute of limitations period for the state to bring suit under the Administrative Procedures Act had expired.

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS V. PATCHAK

Supreme Court of the United States, 2012

___ U.S. ___, 132 S. Ct. 2199, 183 L.Ed.2d 211

Justice KAGAN delivered the opinion of the Court.

A provision of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire property “for the purpose of providing land for Indians.” ... The Secretary here acquired land in trust for an Indian tribe seeking to open a casino. Respondent David Patchak lives near that land and challenges the Secretary's decision in a suit brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Patchak claims that the Secretary lacked authority under § 465 to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino's operation.

We consider two questions arising from Patchak's action. The first is whether the United States has sovereign immunity from the suit by virtue of the Quiet Title Act (QTA), 86 Stat. 1176. We think it does not. The second is whether Patchak has prudential standing to challenge the Secretary's acquisition. We think he does. We therefore hold that Patchak's suit may proceed.

I

The Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. ***

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. ... [A]n organization called Michigan Gambling Opposition (or MichGO) filed suit alleging that the Secretary’s decision violated environmental and gaming statutes. The Secretary held off taking title to the property while that litigation proceeded. Within the next few years, a District Court and the D.C. Circuit rejected MichGO’s claims. See *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27–28 (C.A.D.C.2008); *Michigan Gambling Opposition v. Norton*, 477 F.Supp.2d 1 (D.D.C.2007).

Shortly after the D.C. Circuit ruled against MichGO (but still before the Secretary took title), Patchak filed this suit under the APA advancing a different legal theory[, relating to *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that 25 U.S.C. § 465 authorizes the Secretary to take land into trust only for tribes that were “under federal jurisdiction” in 1934”.] ... To establish his standing to bring suit, Patchak contended that he lived “in close proximity to” the Bradley Property and that a casino there would “destroy the lifestyle he has enjoyed” by causing “increased traffic,” “increased crime,” “decreased property values,” “an irreversible change in the rural character of the area,” and “other aesthetic, socioeconomic, and environmental problems.” ... Notably, Patchak did not assert any claim of his own to the Bradley Property. ...

II

We begin by considering whether the United States’ sovereign immunity bars Patchak’s suit under the APA. That requires us first to look to the APA itself and then, for reasons we will describe, to the QTA. We conclude that the United States has waived its sovereign immunity from Patchak’s action.

The APA generally waives the Federal Government’s immunity from a suit “seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” 5 U.S.C. § 702. That waiver would appear to cover Patchak’s suit, which objects to official action of the Secretary and seeks only non-monetary relief. But the APA’s waiver of immunity comes with an important carve-out: The waiver does not apply “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought” by the plaintiff. *Ibid.* That provision

prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes. The question thus becomes whether another statute bars Patchak's demand for relief.

The Government and Band contend that the QTA does so. The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28 U.S.C. § 2409a(d). The statute, however, contains an exception: The QTA's authorization of suit "does not apply to trust or restricted Indian lands." § 2409a(a). According to the Government and Band, that limitation on quiet title suits satisfies the APA's carve-out and so forbids Patchak's suit. In the Band's words, the QTA exception retains "the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." Brief for Tribal Petitioner 18.

Two hypothetical examples might help to frame consideration of this argument. First, suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations. "[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy"—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment. *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286, n. 22, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (quoting H.R.Rep. No. 94-1656, p. 13 (1976), 1976 U.S.C.C.A.N. 6121, 6133).

But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm, and raising no objection at all to the Secretary's title. The QTA could not bar that suit because even though involving Indian lands, it asserts a grievance altogether different from the kind the statute concerns. Justice SCALIA, in a former life as Assistant Attorney General, made this precise point in a letter to Congress about the APA's waiver of immunity (which we hasten to add, given the author, we use not as legislative history, but only for its persuasive force). When a statute "is not addressed to the type of grievance which the plaintiff seeks to assert," then the statute cannot prevent an APA suit. *Id.*, at 28 (May 10, 1976, letter of Assistant Atty. Gen. A. Scalia).

We think that principle controls Patchak's case: The QTA's "Indian lands" clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is *not* a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's "Indian lands" limitation simply

inapposite to this litigation.

In reaching this conclusion, we need look no further than the QTA's text. From its title to its jurisdictional grant to its venue provision, the Act speaks specifically and repeatedly of "quiet title" actions. ... That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. See, e.g., Black's Law Dictionary 34 (9th ed. 2009) (defining an "*action to quiet title*" as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it....

And the QTA's other provisions make clear that the recurrent statutory term "quiet title action" carries its ordinary meaning. The QTA directs that the complaint in such an action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). If the plaintiff does not assert any such right (as Patchak does not), the statute cannot come into play. Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. § 2409a(b). That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right to the property. If the United States loses the suit, an award of just compensation to the rightful owner (whoever and wherever he might be) could do nothing to satisfy Patchak's claim.

Our decision in *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), is of a piece. There, we considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. We thought the QTA the relevant statute because the plaintiff herself asserted title to the property. Our opinion quoted the plaintiff's own description of her suit: "At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case." *Id.*, at 842, 106 S.Ct. 2224 (quoting Brief for Respondent in *Mottaz*, O.T. 1985, No. 546, p. 3). That fact, we held, brought the suit "within the [QTA's] scope": "What [the plaintiff] seeks is a declaration that she alone possesses valid title." 476 U.S., at 842, 106 S.Ct. 2224. So once again, we construed the QTA as addressing suits by adverse claimants.

But Patchak is not an adverse claimant—and so the QTA (more specifically, its reservation of sovereign immunity from actions respecting Indian trust lands) cannot bar his suit. Patchak does not contend that he owns the Bradley Property, nor does he seek any relief corresponding to such a claim. He wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it. Patchak's lawsuit therefore lacks

a defining feature of a QTA action. He is not trying to disguise a QTA suit as an APA action to circumvent the QTA’s “Indian lands” exception. Rather, he is not bringing a QTA suit at all. He asserts merely that the Secretary’s decision to take land into trust violates a federal statute—a garden-variety APA claim. See 5 U.S.C. § 706(2)(A), (C) (“The reviewing court shall ... hold unlawful and set aside agency action ... not in accordance with law [or] in excess of statutory jurisdiction [or] authority”). Because that is true—because in then-Assistant Attorney General Scalia’s words, the QTA is “not addressed to the type of grievance which [Patchak] seeks to assert,” H.R. Rep. 94–1656, at 28, 1976 U.S.C.C.A.N. 6121 at 6147—the QTA’s limitation of remedies has no bearing. The APA’s general waiver of sovereign immunity instead applies.

Last, the Band and Government argue that we should treat Patchak’s suit as we would an adverse claimant’s because they equally implicate the “Indian lands” exception’s policies. According to the Government, allowing challenges to the Secretary’s trust acquisitions would “pose significant barriers to tribes [‘] ... ability to promote investment and economic development on the lands.” Brief for Federal Petitioners 24. That harm is the same whether or not a plaintiff claims to own the land himself. Indeed, the Band argues that the sole difference in this suit cuts in its direction, because non-adverse claimants like Patchak have “the most remote injuries and indirect interests in the land.” ...

That argument is not without force, but it must be addressed to Congress. In the QTA, Congress made a judgment about how far to allow quiet title suits—to a point, but no further. (The “no further” includes not only the “Indian lands” exception, but one for security interests and water rights, as well as a statute of limitations, a bar on jury trials, jurisdictional and venue constraints, and the just compensation option discussed earlier.) Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government’s ownership of land. But that is not our call. The Band assumes that plaintiffs like Patchak have a lesser interest than those bringing quiet title actions, and so should be precluded *a fortiori*. But all we can say is that Patchak has a different interest. Whether it is lesser, as the Band argues, because not based on property rights; whether it is greater because implicating public interests; or whether it is in the end exactly the same—that is for Congress to tell us, not for us to tell Congress. As the matter stands, Congress has not assimilated to quiet title actions all other suits challenging the Government’s ownership of property. And so when a plaintiff like Patchak brings a suit like this one, it falls within the APA’s general waiver of sovereign immunity.

III

We finally consider the Band’s and the Government’s alternative argument that Patchak cannot bring this action because he lacks prudential standing. This Court has long held that a

person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. ... Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under § 465, which authorizes the acquisition of property "for the purpose of providing land for Indians." And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. See *supra*, at 2203. The Government and Band argue that the relationship between § 465 and Patchak's asserted interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino. See Brief for Tribal Petitioner 46 ("The Secretary's decision to put land into trust does not turn on any particular use of the land, gaming or otherwise [,] ... [and] thus has no impact on [Patchak] or his asserted interests"); Brief for Federal Petitioners 34 ("[L]and may be taken into trust for a host of purposes that have nothing at all to do with gaming"). We find this argument unpersuasive.

The prudential standing test Patchak must meet "is not meant to be especially demanding." ... We apply the test in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." ... The test forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." ...

Patchak's suit satisfies that standard, because § 465 has far more to do with land use than the Government and Band acknowledge. Start with what we and others have said about § 465's context and purpose. As the leading treatise on federal Indian law notes, § 465 is "the capstone" of the IRA's land provisions. F. Cohen, *Handbook of Federal Indian Law* § 15.07[1][a], p. 1010 (2005 ed.) (hereinafter Cohen). And those provisions play a key role in the IRA's overall effort "to rehabilitate the Indian's economic life," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (internal quotation marks omitted). "Land forms the basis" of that "economic life," providing the foundation for "tourism, manufacturing, mining, logging, ... and gaming." Cohen § 15.01, at 965. Section 465 thus functions as a primary mechanism to foster Indian tribes' economic development. As the D.C. Circuit explained in the *MichGO* litigation, the section "provid[es] lands sufficient to enable Indians to achieve self-support." *Michigan Gambling*, 525 F.3d, at 31 (internal quotation marks omitted); see *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (noting the IRA's economic aspect). So when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.

The Department's regulations make this statutory concern with land use crystal clear. Those regulations permit the Secretary to acquire land in trust under § 465 if the "land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25

CFR § 151.3(a)(3). And they require the Secretary to consider, in evaluating any acquisition, both “[t]he purposes for which the land will be used” and the “potential conflicts of land use which may arise.” §§ 151.10(c), 151.10(f); see § 151.11(a). For “off-reservation acquisitions” made “for business purposes”—like the Bradley Property—the regulations further provide that the tribe must “provide a plan which specifies the anticipated economic benefits associated with the proposed use.” § 151.11(c). DOI’s regulations thus show that the statute’s implementation centrally depends on the projected use of a given property.

The Secretary’s acquisition of the Bradley Property is a case in point. The Band’s application to the Secretary highlighted its plan to use the land for gaming purposes. See App. 41 (“[T]rust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming”); *id.*, at 61–62 (“The Tribe intends to ... renovate the existing ... building into a gaming facility.... to offer Class II and/or Class III gaming”). Similarly, DOI’s notice of intent to take the land into trust announced that the land would “be used for the purpose of construction and operation of a gaming facility,” which the Department had already determined would meet the Indian Gaming Regulatory Act’s requirements. 70 Fed.Reg. 25596; 25 U.S.C. §§ 2701–2721. So from start to finish, the decision whether to acquire the Bradley Property under § 465 involved questions of land use.

And because § 465’s implementation encompasses these issues, the interests Patchak raises—at least arguably—fall “within the zone ... protected or regulated by the statute.” If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute’s limits. The difference here, as the Government and Band point out, is that § 465 specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See 25 CFR §§ 151.10(c), 151.10(f), 151.11(a). And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary’s decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465’s regulatory ambit.

* * *

The QTA’s reservation of sovereign immunity does not bar Patchak’s suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D.C. Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

II

Three consequences illustrate the difficulties today's holding will present for courts and the Government. First, it will render the QTA's limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of *Block*, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an "aesthetic" interest in the land but seeking an identical practical objective—to divest the Government of title and possession. § 2409a(a), (b). Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.

Second, the majority's holding will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously. When a plaintiff like Patchak asserts an "aesthetic" or "environmental" concern with a planned use of Indian trust land, he may bring a distinct suit under statutes like the National Environmental Policy Act of 1969 and the Indian Gaming Regulatory Act. Those challenges generally may be brought within the APA's ordinary 6-year statute of limitations. Suits to contest the Government's decision to take title to land in trust for Indian tribes, however, have been governed by a different rule. Until today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review. 25 CFR § 151.12 (2011); 61 Fed.Reg. 18,082–18,083 (1996). That deadline promoted finality and security—necessary preconditions for the investment and "economic development" that are central goals of the Indian Reorganization Act. *Ante*, at 2210. Today's result will promote the opposite, retarding tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed.

Finally, the majority's rule creates substantial uncertainty regarding who exactly is barred from bringing APA claims. The majority leaves unclear, for instance, whether its rule bars from suit only those who "claim any competing interest" in the disputed land in their complaint, *ante*, at 2206, or those who could claim a competing interest, but plead only that the Government's title claim violates a federal statute. If the former, the majority's holding would allow Patchak's challenge to go forward even if he had some personal interest in the Bradley Property, so long as his complaint did not assert it. That result is difficult to square with *Block* and *Mottaz*. If the latter, matters are even more peculiar. Because a shrewd plaintiff will avoid referencing her own property claim in her complaint, the Government may assert sovereign immunity only if its detective efforts uncover the plaintiff's unstated property claim. Not only does that impose a substantial burden on the Government, but it creates perverse incentives for private litigants. What if a plaintiff has a weak claim, or a claim that she does not know about? Did Congress really intend for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?

As these observations illustrate, the majority’s rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the “national public interest” demanded should remain immune from challenge. Congress did not intend either result.

* * *

For the foregoing reasons, I would hold that the QTA bars the relief Patchak seeks. I respectfully dissent.

NOTE

1. *Patchak* potentially opens the door to a dramatic increase in the number of challenges to the Secretary of Interior’s decisions to take land into trust. The prudential standing portion of the opinion allows virtually any private citizen objecting to proposed tribal activities on trust lands *several years* to bring suit. What that may do to the financing of tribal governmental and business opportunities is anyone’s guess. As Justice Sotomayor wrote in dissent, the decision allows a “shrewd plaintiff” multiple opportunities to challenge tribal interests.

2. In 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113–179, Sept. 26, 2014, 128 Stat.1913, purporting to strip the federal courts of jurisdiction over the *Patchak* remand and other potential challenges to the tribe’s trust lands. In *Patchak v. Jewell*, ___ F. Supp. 3d ___, 2015 WL 3776490 (D. D.C., June 17, 2015), the court rejected constitutional challenges to the statute.

Add after note on pages 487-88:

UNITED STATES V. BRYANT

Supreme Court of the United States, 2016.

___ U.S. ___, 136 S.Ct. ___, ___ L.Ed.2d ___.

JUSTICE GINSBURG delivered the opinion of the Court.

[18 U. S. C. §117(a)] makes it a federal crime for any person to “commi[t] a domestic assault within . . . Indian country” if the person has at least two prior final convictions for domestic violence rendered “in Federal, State, or Indian tribal court proceedings.” * * * Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. For most of those convictions, he was sentenced to terms of imprisonment, none of them exceeding one year’s duration. His tribal-court convictions do not count for §117(a) purposes, Bryant maintains, because he was uncounseled in those proceedings.

The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Scott v. Illinois*, 440 U. S. 367, 373–374 (1979). But the Sixth Amendment does not apply to tribal-court proceedings. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U. S. 316, 337 (2008). The Indian Civil Rights Act of 1968 (ICRA), Pub. L. 90–284, 82 Stat. 77, 25 U. S. C. §1301 et seq., which governs criminal proceedings in tribal

courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed. §1302(c)(2). Bryant's tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of §117(a). Our answer is yes. Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a §117(a) prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.

I

A

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. * * * American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." Dept. of Justice, Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (Nov. 2014) * * *. American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." * * *

* * *

The "complex patchwork of federal, state, and tribal law" governing Indian country, *Duro v. Reina*, 495 U. S. 676, 680, n. 1 (1990), has made it difficult to stem the tide of domestic violence experienced by Native American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of §117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. 25 U. S. C. §1302(a)(7) (2006 ed.). Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. 124 Stat. 2279–2280 (codified at 25 U. S. C. §1302(a)(7)(C), (c)). To date, however, few tribes have employed this enhanced sentencing authority. * * *

States are unable or unwilling to fill the enforcement gap. Most States lack jurisdiction over crimes committed in Indian country against Indian victims. See *United States v. John*, 437 U. S. 634, 651 (1978). In 1953, Congress increased the potential for state action by giving six States "jurisdiction over specified areas of Indian country within the States and provid[ing] for the [voluntary] assumption of jurisdiction by other States." *California v. Cabazon Band of Mission Indians*, 480 U. S. 202, 207 (1987) (footnote omitted). See Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (codified, as amended, at 18 U. S. C. §1162 and 25 U. S. C. §§1321–1328, 1360). States so empowered may apply their own criminal laws to "offenses committed by or against Indians within all Indian country within the State." *Cabazon Band of Mission Indians*, 480 U. S., at 207; see 18 U. S. C. §1162(a). Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country. Jimenez & Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L.Rev. 1627, 1636–1637 (1998); Tribal Law and Policy Inst., S. Deer, C. Goldberg, H. Valdez Singleton, & M. White Eagle, *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7–8 (2007) * * *.

That leaves the Federal Government. * * * [W]hen §117(a) was before Congress, Indian perpetrators of domestic violence "escape[d] felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain).

As a result of the limitations on tribal, state, and federal jurisdiction in Indian country, serial domestic violence offenders, prior to the enactment of §117(a), faced at most a year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse. To ratchet up the punishment of serial offenders, Congress created the federal felony offense of domestic assault in Indian country by a habitual offender. * * * The section provides in pertinent part:

“Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate partner . . . shall be fined . . . , imprisoned for a term of not more than 5 years, or both . . .” §117(a)(1).

Having two prior convictions for domestic violence crimes—including tribal-court convictions—is thus a predicate of the new offense.

B

This case requires us to determine whether §117(a)’s inclusion of tribal-court convictions is compatible with the Sixth Amendment’s right to counsel. * * *

“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978). The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. * * *

In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants “similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.” * * *

The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,” including appointment of counsel for an indigent defendant at the tribe’s expense. §1302(c)(1), (2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel “at his own expense.” §1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.

* * *

In *Nichols v. United States*, 511 U. S. 738 (1994), * * * Nichols pleaded guilty to a federal felony drug offense. 511 U. S., at 740. Several years earlier, unrepresented by counsel, he had been convicted of driving under the influence (DUI), a state-law misdemeanor, and fined \$250 but not imprisoned. *Ibid.* Nichols’ DUI conviction, under the then mandatory Sentencing Guidelines, effectively elevated by about two years the sentencing range for Nichols’ federal drug offense. *Ibid.* We rejected Nichols’ contention that, as his later sentence for the federal drug offense involved imprisonment, use of his uncounseled DUI conviction to elevate that sentence violated the Sixth Amendment. *Id.*, at 746–747. “[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution,” we held, “an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” *Id.*, at 748–749.

C

Respondent Bryant’s conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe’s reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeling her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant’s repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has never challenged his tribal-court convictions in federal court under ICRA’s habeas corpus provision.

In 2011, Bryant was arrested yet again for assaulting women. In February of that year, Bryant attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. During an interview with law enforcement officers, Bryant admitted that he had physically assaulted this woman five or six times. Three months later, he assaulted another woman with whom he was then living, waking her by yelling that he could not find his truck keys and then choking her until she almost lost consciousness. Bryant later stated that he had assaulted this victim on three separate occasions during the two months they dated.

Based on the 2011 assaults, a federal grand jury in Montana indicted Bryant on two counts of domestic assault by a habitual offender, in violation of §117(a). * * * Bryant entered a conditional guilty plea, reserving the right to appeal that decision. Bryant was sentenced to concurrent terms of 46 months' imprisonment on each count, to be followed by three years of supervised release.

* * *

II

Bryant's tribal-court convictions, he recognizes, infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings. Brief for Respondent 5. Those prior convictions complied with ICRA, he concedes, and therefore were valid when entered. But, had his convictions occurred in state or federal court, Bryant observes, [the Sixth Amendment's protections] would have rendered them invalid because he was sentenced to incarceration without representation by court-appointed counsel. Essentially, Bryant urges us to treat tribal-court convictions, for §117(a) purposes, as though they had been entered by a federal or state court. We next explain why we decline to do so.

* * *

Nichols' reasoning steers the result here. Bryant's 46-month sentence for violating §117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was "adjudicated guilty of the felony offense for which he was imprisoned." *Alabama v. Shelton*, 535 U. S. 654, 664 (2002). It would be "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." 769 F. 3d [671,] 679 [(9th Cir. 2015)] (Watford, J., concurring).

Bryant acknowledges that had he been punished only by fines in his tribal-court proceedings, Nichols would have allowed reliance on his uncounseled convictions to satisfy §117(a)'s prior-crimes predicate. Brief for Respondent 50. We see no cause to distinguish for §117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year. "Both Nichols's and Bryant's uncounseled convictions 'comport' with the Sixth Amendment, and for the same reason: the Sixth Amendment right to appointed counsel did not apply to either conviction." * * *

* * *

* * * Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, "[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] 'anew.'" [United States v.] *Shavanaux*, 647 F. 3d, [993,] 998 [8th Cir. 2011)]. Bryant observes that reliability concerns underlie our right-to-counsel decisions and urges that those concerns remain even if the Sixth Amendment itself does not shelter him. * * * *Nichols*, however, counter[s] the argument that uncounseled misdemeanor convictions are categorically unreliable, either in their own right or for use in a subsequent proceeding. Bryant's recognition that a tribal-court conviction resulting in a fine would qualify as a §117(a) predicate offense, we further note, diminishes the force of his reliability-based argument. There is no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed than when the punishment is merely a fine. No evidentiary or procedural variation turns on the sanction—fine only or a year in prison—ultimately imposed.

Bryant also invokes the Due Process Clause of the Fifth Amendment in support of his assertion that tribal-court judgments should not be used as predicate offenses. But, as earlier observed, ICRA itself requires tribes to ensure "due process of law," §1302(a)(8), and it accords defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment. * * * Further, ICRA makes

habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment. §1303. By that means, a prisoner may challenge the fundamental fairness of the proceedings in tribal court. Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process. See *Shavanaux*, 647 F. 3d, at 1000; cf. *State v. Spotted Eagle*, 316 Mont. 370, 378–379, 71 P. 3d 1239, 1245–1246 (2003) (principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA).

* * *

Justice THOMAS concurring.

* * *

[T]he only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty. See *United States v. Lara*, 541 U. S. 193, 197 (2004); *United States v. Wheeler*, 435 U. S. 313, 318, 322–323 (1978). By virtue of tribes' status as “separate sovereigns pre-existing the Constitution,” tribal prosecutions need not, under our precedents, comply with “those constitutional provisions framed specifically as limitations on federal or state authority” (quoting *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978)).

On the other hand, the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. Congress ordinarily lacks authority to enact a general federal criminal law proscribing domestic abuse. See *United States v. Morrison*, 529 U. S. 598, 610–613 (2000). But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment. The Court does not explain where Congress' power to act comes from, but our precedents leave no doubt on this score. Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an “all-encompassing” power over all aspects of tribal sovereignty. *Wheeler*, supra, at 319. Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its “plenary power” over Indian tribes. See *United States v. Kagama*, 118 U. S. 375, 382–384 (1886); accord, *Lara*, 541 U. S., at 200.

I continue to doubt whether either view of tribal sovereignty is correct. See *id.*, at 215 (THOMAS, J., concurring in judgment). Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).

Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power— not Congress' power to “regulate Commerce . . . with Indian Tribes,” not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara*, supra, at 224–225 (THOMAS, J., concurring in judgment); *Adoptive Couple v. Baby Girl*, 570 U. S. ___, ___– ___ (2013) (THOMAS, J., concurring).

Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama*, supra, at 377–380. The Court asserted: “The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection It must exist in that government, because it has never existed anywhere else.” *Kagama*, supra, at 384. Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, e.g., *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566–567 (1903) (relying on *Kagama*'s race-based plenary power theory); *Wheeler*, supra, at 319; *Lara*, supra, at 224 (THOMAS, J., concurring in judgment) (“The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty”).

It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the “remnants of a race” for its own good. *Kagama*, supra, at 384.

NOTES

1. *Antelope* and *Bryant* involve federal constitutional challenges to convictions of American Indians under federal criminal statutes for crimes committed in Indian country. The Court disposed of the constitutional questions in *Antelope* by relying on the theory developed in *Morton v. Mancari*, 417 U.S. 535 (1974), that federal statutory classifications based on Indian status are not race or ancestry based, but instead based on the political status of Indian people as members or descendants of members of Indian tribes. The *Bryant* Court relied on the theory advanced in cases such as *Talton v. Mayes*, 163 U.S. 376 (1896), that the federal constitution is inapplicable to Indian tribes.

It now seems well settled that federal criminal jurisdiction in Indian country, as well as tribal criminal jurisdiction over Indians (at least) pass federal constitutional muster. But commentators have argued that federal prosecutions of Indians for crimes committed in Indian country *do* violate the constitution. E.g., Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. Colo. L.Rev. 1067 (2010) (arguing federal prosecutions are unconstitutional). See also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L.Rev. 709 (2006) (arguing federal prosecutions are at least constitutionally suspect).

If you represented an Indian person criminally charged in federal court, your client likely would not enjoy a jury that included even a single Indian person. The prosecution likely would be forced to prove to that same jury beyond a reasonable doubt that your client was an “Indian” under federal law, which is relatively easy when the defendant is a tribal member, but not so much when the defendant is not. The prosecution might also ask for sentence enhancement under the federal sentencing guidelines for your client’s prior uncounseled tribal court convictions. In short, there are seemingly some constitutional infirmities. But what are the alternatives to federal criminal jurisdiction?

2. The *Bryant* decision prompted critical commentary from those knowledgeable about tribal criminal defense. Barbara L. Creel and John P. Lavelle, *High Court Denies Rights of Natives*, Albuquerque J., June 26, 2016. Professors Creel and LaVelle argue that tribal court criminal defendants are “routinely” sentenced to imprisonment without the assistance of legal counsel. The authors also note that non-Indians subject to tribal prosecution are guaranteed the right to counsel, but Indians are not. 25 U.S.C. § 1304 (tribal jurisdiction provisions of the Violence Against Women Act).

CHAPTER 8

TRIBAL-STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION A.

CIVIL ADJUDICATORY JURISDICTION IN INDIAN COUNTRY

PART 2. SUITS AGAINST NON-MEMBERS OF THE TRIBE

Add to the end of page 585:

5. In *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the Tenth Circuit held that a tribal court did not have jurisdiction to order a law firm, whose lawyers were licensed to practice in the tribal court, to return paid attorney fees to a tribe where the tribal court ordered the return of the fees pending a determination on whether the fee payments were valid. The court wrote that the *Montana* 1 exception was not met:

There is no dispute that *Montana* and its progeny govern whether the Muscogee (Creek) Nation courts have adjudicatory jurisdiction over Crowe. Judge Stidham maintains tribal court jurisdiction is appropriate under *Montana*'s first exception because, in his view, Crowe entered a "consensual relationship" with the Muscogee (Creek) Nation by enrolling in its bar association and practicing before its courts. It is true that membership in a tribe's bar association and appearances before its courts can constitute a "consensual relationship" with the tribe. But that is not the end of the *Montana* inquiry. Such a "consensual relationship" may establish tribal court jurisdiction under *Montana* only if there is a sufficient "nexus" between that relationship and the attendant "exertion of tribal authority." *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1223 (10th Cir.2002).

The question thus posed is whether there is a sufficient nexus between Crowe's practice before the Muscogee (Creek) Nation courts and Judge Stidham's order requiring Crowe to return attorneys' fees already paid to it pursuant to its contract with the Thlopthlocco pending determination of the merits of the underlying tribal court litigation. We hold there is not. The vast majority of cases Judge Stidham cites for his proposition that a tribal court has power to regulate

attorneys who practice before it are cases addressing disciplinary matters, in which courts have permitted suits against defendant-attorneys for alleged misconduct. *** Those cases are inapposite here, where there has never been any allegation that Crowe attorneys acted unprofessionally before the Muscogee (Creek) Nation courts, and where the order directing Crowe to return its fees had nothing to do with conduct of Crowe attorneys practicing before the court.

Judge Stidham's reliance on cases in which courts have exercised ancillary jurisdiction over attorneys' fees issues is equally unavailing. Those cases involve the exercise of ancillary jurisdiction where there is an actual or potential disagreement between an attorney and his client regarding attorneys' fees related to the judgment in the proceeding. *** Here, there is no allegation regarding any tension between Crowe and the Thlopthlocco regarding attorneys' fees to establish the requisite nexus in this case. To the contrary, there is every indication that the Thlopthlocco Tribe, as currently constituted, does not want Crowe to return funds paid to it for past legal services pursuant to their contract.

For ancillary jurisdiction over Crowe as a nonmember of the tribe to be appropriate under the consensual relationship exception to *Montana*, the dispute before the tribal court must arise directly out of that consensual relationship. See Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1225–26 (2010) (“[W]hether affirming or rejecting the consensual relationship exception [of *Montana*], [courts have] followed *Strate*'s admonition that the claim must arise from the consensual relationship with the tribe or tribal members.”). That is not the case here.

Crowe's contractual relationship with the Thlopthlocco government has nothing to do with Crowe attorneys' consensual relationship with the Creek Nation based on their Bar membership. Nor is Crowe's consensual relationship with the Creek Nation related to the dispute before Judge Stidham. The substance of the Anderson defendants' cross-claim in tribal court is that the January 27, 2007 election was invalid and the wrong tribal members are therefore running the government. What the Anderson defendants seek is prospective injunctive relief against the nine individual cross-claim defendants, some of whom constitute the Business Committee of the Thlopthlocco, to correct this alleged wrong. *** Even assuming the Anderson defendants should ultimately prevail on their claim, the relief they are requesting is that the January 27, 2007 election of the current government be declared invalid. Presumably, a new election would have to be conducted. Who would win that election and become the new Business Committee of the Thlopthlocco is unknown and is not a part of this tribal court litigation. Whether that Business Committee would seek to avoid any third-party contracts made by the prior Business Committee on behalf of the Thlopthlocco

and attempt to recover any amounts paid under such contracts, including the contract with Crowe, is also unknown and is not a part of the litigation before Judge Stidham. While the Creek Nation has jurisdiction to regulate its own citizens, the Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation. Judge Stidham does not suggest that the Creek Nation has any regulatory power over the contracts the Thlopthlocco makes with third parties in general. Instead, Judge Stidham contends “the issue of the Muscogee (Creek) Nation’s jurisdiction over the law firm’s contract is simply one aspect of the Muscogee (Creek) Nation’s jurisdiction over the law firm in general as attorneys practicing before its courts.” Reply Br. at 10. No case supports ancillary jurisdiction in circumstances like those here, where the claim that Crowe must return its fees has nothing to do with the reasonableness of fees. Because the validity of the fee contract is not relevant to Crowe’s practice before the Creek Nation courts or its attorneys’ membership in the Creek Nation’s bar association, Judge Stidham did not have adjudicatory authority to order Crowe to return fees it received pursuant to its contract with the Thlopthlocco.

We therefore conclude that the first *Montana* exception does not support the exercise of tribal court jurisdiction over Crowe with respect to the fees it received from the Thlopthlocco. While Crowe attorneys submitted themselves to the Muscogee (Creek) Nation tribal court when they brought the Thlopthlocco litigation, there is no basis on which to conclude they or the firm submitted themselves to the general subject matter jurisdiction of the tribal court for all purposes, especially not for the purpose of voiding their contractual relationship with the Thlopthlocco, when that contract is not, directly or indirectly, part of the Anderson defendant’s claims before the court.

Crowe & Dunlevy, 640 F.3d at 1151-53. The court’s analysis seems to turn on a factual point. The Thlopthlocco Tribal Town apparently didn’t seek the return of the attorney fees, and wasn’t a party to the underlying claims leading to the question of the attorney fees. The Tenth Circuit seemed content to find that there was no tribal sovereignty nexus to the assertion of jurisdiction. Is this persuasive?

6. In a case that seems to conflict on all of *Crowe and Dunlevy*’s salient points (except the presence of the tribe), the Ninth Circuit affirmed tribal civil jurisdiction over a nonmember corporation – and its nonmember principal – in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). The corporation was the lessor of tribal trust lands. When the lease expired, the corporation refused to budge. The Colorado River Indian Tribes sued in tribal court to force an eviction. Water Wheel denied jurisdiction in tribal court, and also refused to comply with discovery requests on the question of whether the actions of the corporate principal were sufficient to pierce the corporate veil.

The court held that the tribal power over nonmembers is informed by (and possibly superceded by) the tribe's power to exclude nonmembers from tribal lands:

As a preliminary matter, we consider the relationship between the tribe's inherent authority to exclude and its authority to exercise jurisdiction. The district court stated, and arguably held despite its footnote indicating otherwise, that a tribe's inherent authority to exclude a non-Indian from tribal land is subject to *Montana*. But the Supreme Court has recognized that a tribe's power to exclude exists independently of its general jurisdictional authority. *See Duro v. Reina*, 495 U.S. 676, 696–97, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (noting that even where tribes lack criminal jurisdiction over a non-Indian defendant, they “possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.... Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities”), superseded on other grounds by congressional statute, 25 U.S.C. § 1301.

Montana limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982)(recognizing a tribe's inherent authority to exclude non-Indians from tribal land, without applying *Montana*); *see also* *** *Montana*, 450 U.S. at 557, 101 S.Ct. 1245 (recognizing a tribe's inherent authority to condition the entry of non-Indians on tribal land as a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) [hereinafter Cohen] (explaining that “[b]ecause the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty”) ***.

Water Wheel, 642 F.3d at 810-11.

Noting that the tribe's adjudicatory jurisdiction is equal to its regulatory jurisdiction, the court also held that the tribal court also retained jurisdiction over the nonmember principal:

For purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established “expressly or by [the nonmember's] actions.” *Plains Commerce Bank*, 554 U.S. at 337, 128 S.Ct. 2709. There is no requirement that Johnson's commercial dealings with the CRIT be a

matter of written contract or lease actually signed by Johnson. *See Montana*, 450 U.S. at 565, 101 S.Ct. 1245 (tribes may regulate the activities of nonmembers who enter into “*commercial dealing, contracts, leases, or other arrangements*” (emphasis added)). We are to consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might “trigger” tribal authority. *Id.* at 338, 128 S.Ct. 2709.

Johnson owned and operated Water Wheel on tribal land for more than twenty years and had extensive dealings with the CRIT before the lease expired. Additionally, Johnson was on notice through the leases’s explicit terms that Water Wheel, its agents, and employees were subject to CRIT laws, regulations, and ordinances. These facts adequately support the tribal court’s conclusion that Johnson had entered into a consensual relationship with the tribe and could reasonably anticipate that the tribe would exercise its jurisdictional authority. Johnson’s subjective beliefs regarding his relationship with the tribe do not change the consensual nature of that relationship for purposes of regulatory jurisdiction. Moreover, the tribe’s claims for unpaid rent and related damages arose directly from this relationship.

As noted above, the commercial dealings between the tribe and Johnson involved the use of tribal land, one of the tribe’s most valuable assets. Thus, if *Montana* applied to the breach of contract claim, either exception would provide regulatory jurisdiction over Johnson.

As for the trespass claim, there is no legal or logical basis to require a consensual relationship between a trespasser and the offended landowner. This is particularly true when the trespass is to tribal land, the offended owner is the tribe, and the trespasser is not a tribal member. *Merrion*, 455 U.S. at 144, 102 S.Ct. 894. If tribes lacked authority to evict holdover tenants and their agents, tribes would be discouraged from entering into financially beneficial leases with nonmembers for fear of losing control over tribal land.

Evaluating the trespass claim under *Montana*’s second exception, unpaid rent and percentages of the business’s gross receipts here totaled \$1,486,146.42 at the time of the tribal court’s judgment. Johnson’s unlawful occupancy and use of tribal land not only deprived the CRIT of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income. Thus, in addition to the tribe’s undisputed authority to eject trespassers from its own land, *Montana*’s second exception would provide regulatory jurisdiction.

Id. at 818-19.

Both *Water Wheel* and *Crowe & Dunlevy* involved nonmember actions on tribal trust lands or reservation lands. Recall that even Justice Scalia in *Hicks* acknowledged that tribal assertion of civil jurisdiction over nonmembers (excluding state officials) remains an open question. Both the Ninth and Tenth Circuits applied the *Montana* test, but no Supreme Court to date has held that *Montana* applies to nonmember activity on tribal trust lands. As the Ninth Circuit suggested, does *Merrion*'s recognition of the tribal power to exclude effectively trump the *Montana* test on tribal trust or reservation lands?

7. In a case watched nationally and generating enormous news coverage, the Hualapai Indian Tribe, doing business as 'Sa' Nyu Wa, its tribally chartered corporation, attempted to exercise eminent domain over the contract rights of its business partner, the Grand Canyon Skywalk Development company. The parties had been engaged in years of dispute over the completion of additional buildings composing the Grand Canyon Skywalk development. In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa*, 715 F.3d 1196 (9th Cir. 2013), the court affirmed the district court's order to have the case returned to tribal court under the tribal court exhaustion doctrine.

From whence does the authority of the tribal government to exercise eminent domain over a nonmember's interest in a contract? The tribe seems to be arguing that it is prepared to litigate the value of the taking in tribal court. The nonmember business argued in federal court that the tribal court's exercise of jurisdiction over it was in "bad faith," one of the exceptions to the tribal court exhaustion doctrine. Notably, the nonmember challenged the independence of the tribal judiciary from tribal political interference. The court rejected that claim:

The facts of this case do not support a finding of bad faith on the part of the tribal court. GCSD urges us to determine that the Hualapai Tribal Court Evaluation, the proffered testimony of its author, Executive Director Joseph Myers, and other evidence proved that the tribal court and tribal council were inextricably intertwined such that bad faith by the tribal council could be imputed to the tribal court. However, the proffered evidence does not conclusively support that claim. The majority of the statements in the Evaluation are broad generalizations or guiding principles. Two specific findings directly refute GCSD's contentions: (1) "no interviewee stated that there was any direct interference in court matters by tribal council members;" and (2) "[t]he judiciary is separate and apart from the tribal council." Additionally, the tribal council's act of bringing in an external auditing organization lends credibility to the tribal court system as a whole.

Grand Canyon Skywalk Development, 715 F.3d at 1202. Does the nonmember have a point, as a normative matter? The regular tribal judges in this case have recused themselves, giving some fuel to the fire of the notion that there is political interference? What remedies does the nonmember have if the tribal court issues an order finding just compensation to be significantly

lower than what the nonmember claims? Is the Indian Civil Rights Act or tribal takings law sufficient?

8. The Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), held over a strident dissent that a tribal court may take jurisdiction over a civil suit against a nonmember corporation for a tort alleged to have been committed on tribal trust property leased to the corporation. *Id.* at 169.

The facts are tragic. Dolgencorp entered into a lease agreement with the tribe to operate a store on tribal trust land. The tribe ran a tribal youth job training program on the reservation, which included placing youth in unpaid internships with local businesses, including Dollar General. The plaintiff in the tribal court matter, a Youth Opportunity Program (TOP) employee, alleged that a Dollar General employee had committed an act of sexual assault on the plaintiff in the store. The Fifth Circuit found a sufficient nexus between the lease with the tribe and the alleged tort under a Montana 1 analysis:

Dolgencorp argues that there is no nexus between its participation in the YOP and Doe's tort claims. We disagree. The conduct for which Doe seeks to hold Dolgencorp liable is its alleged placement, in its Dollar General store located on tribal lands, of a manager who sexually assaulted Doe while he was working there. This conduct has an obvious nexus to Dolgencorp's participation in the YOP. In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference. ... To the extent that foreseeability is relevant to the nexus issue, as Dolgencorp suggests, it is present here. Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment.

Dolgencorp, 746 F.3d at 173-74.

The dissent argued that the panel majority's decision was unprecedented in Indian law:

For the first time ever, a federal court of appeals upholds Indian tribal-court tort jurisdiction over a non-Indian, based on a consensual relationship, without a finding that jurisdiction is "necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The majority's alarming and unprecedented

holding far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant.

This ruling profoundly upsets the careful balance that the Supreme Court has struck between Indian tribal governance, on the one hand, and American sovereignty and the constitutional rights of U.S. citizens, on the other hand. The majority's bold announcement is conspicuous for its audacity, given that this court hears few Indian cases and decides little Indian law. I respectfully dissent.

DolgenCorp, 746 F.3d at 173-74 (Smith, C.J., dissenting).

The dissent seems to view *Montana 1* as applying to contract claims only, and *Montana 2* as applying to tort claims only (when it applies at all). Is this a useful dichotomy?

On June 23, 2016, the Supreme Court affirmed the Fifth Circuit's decision by an equally divided vote. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016).

SECTION B.

TAXATION AND REGULATION

PART 2. STATE AUTHORITY TO TAX IN INDIAN COUNTRY: THE SCOPE OF FEDERAL PREEMPTION OVER RESERVATION ECONOMIC DEVELOPMENT

Add to the end the first paragraph of page 628:

4. In *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the court held that the town may impose the state's personal property taxes on slot machine vendors of the tribe's Foxwoods Casino Resort. The tribe argued that the Indian Trader Statutes, the Indian Gaming Regulatory Act, and federal Indian preemption law each preempted the state taxes. The court disagreed.

In the discussion involving the federal Indian law preemption doctrine, the court held that the state's interests outweighed the tribal and federal interests:

i. The Federal Interest

For the purposes of the *Bracker* test, determining relevant federal interests “is primarily an exercise in examining congressional intent, [and] the history of tribal sovereignty serves as a necessary ‘backdrop’ to that process.” ... IGRA, described at times as Congress’s “strongest and most explicit statement in favor of tribal economic development,” Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEV. L. REV. 121, 146 (2006), “is intended to promote tribal [economic] development, prevent criminal activity related to gambling, and ensure that gaming activities are conducted fairly.” *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010), and also to “ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702(1)-(2). Nothing within IGRA reveals congressional intent to exempt non-Indian suppliers of gaming equipment from generally applicable state taxes that would apply in the absence of the legislation. IGRA addresses state taxation, 25 U.S.C. § 2710(d)(4), without prohibiting taxes like this personal property tax. ...

The tax, imposed on non-Indian vendors, is likely to have a minimal effect on the Tribe’s economic development. While IGRA seeks to limit criminal activity at the casinos, nothing in Connecticut’s tax makes it likely that Michael Corleone will arrive to take over the Tribe’s operations. Moreover, IGRA presented an opportunity for Congress to preempt taxes exactly like this one; Congress chose to limit the scope of IGRA’s preemptive effect to the “governance of gaming.” ... As imposed on the owners of vending machines leased by the Tribe, the tax entitles the State to a tangential benefit from the Tribe’s gaming operation, but it does not prevent “the Indian tribe [from being] the *primary* beneficiary of the gaming operation.” 25 U.S.C. § 2702(2) (emphasis added). The tax therefore has only a minimal effect on federal interests.

The economic effect of the tax on the Tribe is minimal. From 2004 to 2011, AC Coin had paid \$69,894 in personal property tax. After several years, at the Tribe’s urging, AC Coin permitted the Tribe to reimburse it for this tax while this lawsuit was pending. Assuming comparable taxes on WMS, this leads to an approximate total tax of \$20,000 per annum. Although this is a substantial sum, it constitutes less than two tenths of one percent of the \$2,300,000 (AC Coin) and \$12,900,000 (WMS) in revenue per annum that the vendors anticipate from their dealings with the Tribe.

As of September 2011, the Tribe had invested over \$1.42 billion in its gaming operations at Foxwoods. Many of the vendors' most popular games are available by lease only, and the Tribe has elected to pursue leases of a significant duration; however, the challenged tax does not significantly compromise the profitability of these leases. The Tribe's payments to the State of twenty-five percent of its gross operating revenues from video facsimile games have exceeded \$1.5 billion since 2003. Even if the Tribe were forced to reimburse the vendors, \$20,000 per year would not pose a substantial threat to the revenue the Tribe derives from the vendors' games, and it does not make the State the "primary beneficiary" of even this part of the Tribe's gaming operation. The tax's economic effect on the Tribe is less than minimal.

In this case, the Town has a cognizable economic interest in imposing the tax. The Supreme Court has recognized "the dependency of state budgets on the receipt of local tax revenues" and "appreciate[s] the difficulties encountered by [local governments] should a substantial portion of [their] rightful tax revenue be tied up in" litigation. ... The Town's economic interest therefore exceeds the value of the taxes on slot machines, insofar as a ruling favorable to the Tribe could invite other nonIndian owners of personal property on the reservation to initiate similar actions. According to the Town, the anticipated litigation from such an event would tie up hundreds of thousands of dollars per year. ... Moreover, if the legality of the tax hinges upon the extent to which the taxed property is used by the Tribe in connection with Class III gaming—or other gaming at Foxwoods—the Town would need to take careful account of the use to which property owned by non-Indians on the reservation was put. This additional level of analysis would further frustrate the Town's revenue collection and would render the State's tax more difficult and expensive to administer.

There is a nexus between the tax and the services that the Town provides. The Town funds "the education and bussing [sic] of the Tribe's children" and "[t]he maintenance of the roads to the Reservation," *inter alia*. ... A well-maintained road system that brings in the customers is the lifeblood of the Tribe's gaming activities. That the Tribe benefits from generalized governmental functions performed by the Town reinforces the validity of generalized taxes imposed by the Town on third parties with whom the Tribe elects to do business. ... The Town's economic interest in the generally applicable tax is therefore connected, in some respect, to the generally available services that it provides.

The Town and State have more at stake than the Tribe. The economic effect of the tax on the Tribe is negligible; its economic value to the Town is not. The Tribe's sovereign interest in being able to exercise sole taxing authority over possession of property is insufficient to outweigh the State's interest in the uniform application of its generally-applicable tax, particularly where, as here, there is room for both State and Tribal taxation of the same activity.

Mashantucket, 722 F.3d at 472-76.

5. In 2012, the Department of Interior promulgated regulations on the leasing of tribal trust lands that purport to preempt state and local taxes on improvements on those lands. The relevant regulation reads:

§ 162.017 What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

25 C.F.R. § 162.017.

The Ninth Circuit, in line with the regulation (but not *relying* on the regulation), held in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), that a county's effort to tax Great Wolf Lodge properties on the Chehalis reservation ran afoul of the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973):

Accordingly, Mescalero makes it clear that where the United States owns land covered by [25 U.S.C.] § 465, and holds it in trust for the use of a tribe (regardless of "the particular form in which the [t]ribe chooses to conduct its

business”), § 465 exempts permanent improvements on that land from state and local taxation.

724 F.3d at 1157. The court noted that the federal leasing regulation “‘merely clarifies and Confirms’ what § 465 ‘already conveys,’ we need not reach the applicability of this regulation or the level of deference owed to the Bureau of Indian Affairs in this context.” 724 F.3d at 1057 n. 6 (citation omitted).

Other local jurisdictions are concerned about their taxing power and have unsuccessfully challenged the regulation. *See Desert Water Agency v. Dept. of Interior*, No. 13-2281 (C.D. Cal.), available at <http://turtletalk.files.wordpress.com/2014/01/028-order-granting-us-motion-to-dismiss.pdf>.

SECTION D.

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

Add to the end the notes on page 661.

5. In *Oglala Sioux Tribe v. Van Hunnik*, No. CIV. 13-5020-JLV, 2015 WL 1466067 (D. S.D., March 30, 2015), the court held that a state court judge and county attorney violated ICWA and the Fourteenth Amendment’s Due Process Clause in emergency hearings held to remove Indian children from Indian parents and guardians and placed them in foster homes. The tribe alleged five different violations:

1. Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State’s burden of proof;

2. Defendants have denied parents the opportunity to present evidence in their defense;

3. Defendants have denied parents the opportunity to confront and cross-examine adverse witnesses;

4. Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and

5. Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently issued written findings that bore no resemblance to the facts presented at the hearing.

2015 WL 1466067 at *17. The state defendants' position on the right to counsel, for example, was particularly troublesome to the federal court:

Defendants acknowledge indigent Indian parents attending 48-hour hearings are entitled to court appointed-counsel but disagree as to when an appointment of counsel must be made. (Docket 129 at p. 27). The Seventh Circuit judges' practice is to appoint counsel after entry of the temporary custody order. That is, after the court orders foster care placement for the Indian child. Defendants claim their practice of appointing counsel at the end of the 48-hour hearing is not prejudicial because if counsel is appointed, the Indian parent always retains the right to notice a further hearing at which the attorney may appear with them. *Id.* This practice defies logic because the damage is already done—Indian parents have been deprived of counsel during the course of what should have been an adversarial evidentiary hearing conducted in advance of a court order imposing out-of-home custody for an Indian child.

2015 WL 1466067 at *18.

6. In February 2015, the Bureau of Indian Affairs issued updated Guidelines for State Courts and Agencies in Indian Child Custody Proceedings. 80 Fed. Reg. 10,146 (Feb. 25, 2015). These Guidelines replaced the guidelines issued by the Bureau in 1979. See *supra*, page 659, note 2.

The updated guidelines make clear that there is no “existing Indian family” exception to ICWA:

There is no exception to application of ICWA based on the so called “existing Indian family doctrine.” Thus, the following non-exhaustive list of factors should not be considered in determining whether ICWA is applicable: the extent to which the parent or Indian child participates in or observes tribal customs, votes in tribal

elections or otherwise participates in tribal community affairs, contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians, participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe; the relationship between the Indian child and his/her Indian parents; the extent of current ties either parent has to the tribe; whether the Indian parent ever had custody of the child; and the level of involvement of the tribe in the State court proceedings.

Id. at § A.3(b), 80 Fed. Reg. 10,151-52.

The new guidelines offer more guidance on the active efforts requirement of ICWA as well, defining “active efforts” to include:

- (1) Engaging the Indian child, the Indian child’s parents, the Indian child’s extended family members, and the Indian child’s custodian(s);
- (2) Taking steps necessary to keep siblings together;
- (3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (4) Identifying, notifying, and inviting representatives of the Indian child’s tribe to participate;
- (5) Conducting or causing to be conducted a diligent search for the Indian child’s extended family members for assistance and possible placement;
- (6) Taking into account the Indian child’s tribe’s prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child’s tribe with substantial knowledge of the prevailing social and cultural standards;
- (7) Offering and employing all available and culturally appropriate family preservation strategies;
- (8) Completing a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
- (9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- (10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child’s safety during any necessary removal;

(11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;

(12) Monitoring progress and participation in services;

(13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;

(14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and

(15) Providing post-reunification services and monitoring.

Id. at § A.2, 80 Fed. Reg. 10,150.

In March 2015, the Bureau of Indian Affairs proposed regulations that track in nearly all respects the 2015 guidelines. Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880 (March 20, 2015).

Add to the end the notes on page 664.

ADOPTIVE COUPLE V. BABY GIRL

Supreme Court of the United States, 2013

__ U.S. __, 133 S. Ct. 2552, __ L.Ed.2d __

Justice ALITO delivered the opinion of the Court.

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

Contrary to the State Supreme Court’s ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent’s rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent’s “continued custody” of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the “breakup of the Indian family”—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child. We accordingly reverse the South Carolina Supreme Court’s judgment and remand for further proceedings.

I

“The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901–1963, was the product of rising concern in the mid–1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 ... (1989). Congress found that “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4). This “wholesale removal of Indian children from their homes” prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. *Id.*, at 32, 36....

Three provisions of the ICWA are especially relevant to this case. First, “[a]ny party seeking” an involuntary termination of parental rights to an Indian child under state law must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” § 1912(d). Second, a state court may not involuntarily terminate parental rights to an Indian child “in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” § 1912(f). Third, with respect to adoptive placements for an Indian child under state law, “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” § 1915(a).

II

In this case, Birth Mother (who is predominantly Hispanic) and Biological Father (who is a member of the Cherokee Nation) became engaged in December 2008. ... The couple's relationship deteriorated, and Birth Mother broke off the engagement in May 2009. In June, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights.

Birth Mother then decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father had Cherokee Indian heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The inquiry letter misspelled Biological Father's first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father's membership in the tribal records.

Working through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. ...

It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so. Indeed, Biological Father "made no meaningful attempts to assume his responsibility of parenthood" during this period. App. to Pet. for Cert. 122a (Sealed; internal quotation marks omitted).

Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. (This was the first notification that they had provided to Biological Father regarding the adoption proceeding.) Biological Father signed papers stating that he accepted service and that he was "not contesting the adoption." ... But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple.

Biological Father contacted a lawyer the day after signing the papers, and subsequently requested a stay of the adoption proceedings. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to Baby Girl's adoption. Moreover, Biological Father took a paternity test, which verified that he was Baby Girl's biological father.

A trial took place in the South Carolina Family Court in September 2011, by which time Baby Girl was two years old. ... The Family Court concluded that Adoptive Couple had not carried the heightened burden under § 1912(f) of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody. ... The Family Court therefore denied Adoptive Couple's petition for adoption and awarded custody to Biological Father. ... On December 31, 2011, at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met.

The South Carolina Supreme Court affirmed the Family Court’s denial of the adoption and the award of custody to Biological Father. ... We granted certiorari. ...

III

It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. ... The South Carolina Supreme Court held, however, that Biological Father is a “parent” under the ICWA and that two statutory provisions—namely, § 1912(f) and § 1912(d)—bar the termination of his parental rights. In this Court, Adoptive Couple contends that Biological Father is not a “parent” and that § 1912(f) and § 1912(d) are inapplicable. We need not—and therefore do not—decide whether Biological Father is a “parent.” See § 1903(9) (defining “parent”). Rather, assuming for the sake of argument that he is a “parent,” we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights.

A

Section 1912(f) addresses the involuntary termination of parental rights with respect to an Indian child. Specifically, § 1912(f) provides that “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, ... that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (Emphasis added.) The South Carolina Supreme Court held that Adoptive Couple failed to satisfy § 1912(f) because they did not make a heightened showing that Biological Father’s “prospective legal and physical custody” would likely result in serious damage to the child. ... That holding was error.

Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of “*continued custody of the child by the parent.*” (Emphasis added.) The adjective “continued” plainly refers to a pre-existing state. As Justice SOTOMAYOR concedes, ... (hereinafter the dissent), “continued” means “[c]arried on or kept up without cessation” or “[e]xtended in space without interruption or breach of connection.” Compact Edition of the Oxford English Dictionary 909 (1981 reprint of 1971 ed.) (Compact OED).... The phrase “continued custody” therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child.

Biological Father’s contrary reading of § 1912(f) is nonsensical. Pointing to the provision’s requirement that “[n]o termination of parental rights may be ordered ... in the absence of a determination” relating to “the continued custody of the child by the parent,” Biological Father contends that if a determination relating to “continued custody” is inapposite in cases where there is no “custody,” the statutory text prohibits termination. See Brief for Respondent Birth Father 39. But it would be absurd to think that Congress enacted a provision

that permits termination of a custodial parent's rights, while simultaneously prohibiting termination of a noncustodial parent's rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.

Our reading of § 1912(f) comports with the statutory text demonstrating that the primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4) (emphasis added); *see also* § 1902 (explaining that the ICWA establishes “minimum Federal standards for the removal of Indian children from their families” (emphasis added)); *Holyfield*, 490 U.S., at 32–34 And if the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families. *See, e.g.*, H.R.Rep. No. 95–1386, p. 8 (1978) (explaining that, as relevant here, “[t]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” (emphasis added)); *id.*, at 9 (decrying the “wholesale separation of Indian children” from their Indian families); *id.*, at 22 (discussing “the removal” of Indian children from their parents pursuant to §§ 1912(e) and (f)). In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA’s primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.

The dissent fails to dispute that nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) shortly after the ICWA’s enactment demonstrate that the BIA envisioned that § 1912(f)’s standard would apply only to termination of a custodial parent’s rights. Specifically, the BIA stated that, under § 1912(f), “[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to do a better job”; instead, “[i]t must be shown that ... it is dangerous for the child to *remain* with his or her *present* custodians.” Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67593 (1979) (emphasis added) (hereinafter Guidelines). Indeed, the Guidelines recognized that § 1912(f) applies only when there is pre-existing custody to evaluate. ...

Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. As an initial matter, it is undisputed that Biological Father never had physical custody of Baby Girl. And as a matter of both South Carolina and Oklahoma law, Biological Father never had legal custody either. *See* S.C.Code Ann. § 63–17–20(B) (2010)

(“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child”); Okla. Stat., Tit. 10, § 7800 (West Cum.Supp. 2013) (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction”).

In sum, the South Carolina Supreme Court erred in finding that § 1912(f) barred termination of Biological Father’s parental rights.

B

Section 1912(d) provides that “[a]ny party” seeking to terminate parental rights to an Indian child under state law “shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to *prevent the breakup of the Indian family* and that these efforts have proved unsuccessful.” (Emphasis added.) The South Carolina Supreme Court found that Biological Father’s parental rights could not be terminated because Adoptive Couple had not demonstrated that Biological Father had been provided remedial services in accordance with § 1912(d). ... We disagree.

Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family’s “breakup” would be precipitated by the termination of the parent’s rights. The term “breakup” refers in this context to “[t]he discontinuance of a relationship,” American Heritage Dictionary 235 (3d ed. 1992), or “an ending as an effective entity,” Webster’s 273 (defining “breakup” as “a disruption or dissolution into component parts: an ending as an effective entity”). ... But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent’s legal or physical custody, there is no “relationship” that would be “discontinu[ed]”—and no “effective entity” that would be “end[ed]”—by the termination of the Indian parent’s rights. In such a situation, the “breakup of the Indian family” has long since occurred, and § 1912(d) is inapplicable.

Our interpretation of § 1912(d) is, like our interpretation of § 1912(f), consistent with the explicit congressional purpose of providing certain “standards for the *removal* of Indian children from their families.” § 1902 (emphasis added); *see also, e.g.*, § 1901(4); *Holyfield*, 490 U.S., at 32–34.... In addition, the BIA’s Guidelines confirm that remedial services under § 1912(d) are intended “to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians,” not to facilitate a *transfer* of the child to an Indian parent. *See* 44 Fed.Reg., at 67592 (emphasis added).

Our interpretation of § 1912(d) is also confirmed by the provision’s placement next to § 1912(e) and § 1912(f), both of which condition the outcome of proceedings on the merits of an Indian child’s “continued custody” with his parent. That these three provisions appear adjacent to each other strongly suggests that the phrase “breakup of the Indian family” should be read in

harmony with the “continued custody” requirement. ... None of these three provisions creates parental rights for unwed fathers where no such rights would otherwise exist. Instead, Indian parents who are already part of an “Indian family” are provided with access to “remedial services and rehabilitative programs” under § 1912(d) so that their “custody” might be “continued” in a way that avoids foster-care placement under § 1912(e) or termination of parental rights under § 1912(f). In other words, the provision of “remedial services and rehabilitative programs” under § 1912(d) supports the “continued custody” that is protected by § 1912(e) and § 1912(f).⁸

Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point. The South Carolina Supreme Court held that § 1912(d) mandated measures such as “attempting to stimulate [Biological] Father’s desire to be a parent.” ... But if prospective adoptive parents were required to engage in the bizarre undertaking of “stimulat[ing]” a biological father’s “desire to be a parent,” it would surely dissuade some of them from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.

In sum, the South Carolina Supreme Court erred in finding that § 1912(d) barred termination of Biological Father’s parental rights.

IV

In the decision below, the South Carolina Supreme Court suggested that if it had terminated Biological Father’s rights, then § 1915(a)’s preferences for the adoptive placement of an Indian child would have been applicable. ... In so doing, however, the court failed to recognize a critical limitation on the scope of § 1915(a).

Section 1915(a) provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” Contrary to the South Carolina Supreme Court’s suggestion, § 1915(a)’s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no “preference” to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.

In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. ... Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. Moreover, Baby Girl’s paternal grandparents never

sought custody of Baby Girl. ... Nor did other members of the Cherokee Nation or “other Indian families” seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings. ...

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother—perhaps contributing to the mother’s decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)’s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child. We therefore reverse the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court’s opinion in full but write separately to explain why constitutional avoidance compels this outcome. Each party in this case has put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act (ICWA). However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court’s decision avoids those problems, I concur in its interpretation.

Justice BREYER, concurring.

I join the Court’s opinion with three observations. First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers may include some who would prove highly unsuitable parents, some who would be suitable, and a range of others in between. Most of those who fall within that category seem to fall outside the scope of the language of 25 U.S.C. §§ 1912(d) and (f). Thus, while I agree that the better reading of the statute is, as the majority concludes, to exclude most of those fathers..., I also understand the risk that, from a policy perspective, the Court’s interpretation could prove to exclude too many. ...

Second, ... this case does not involve a father with visitation rights or a father who has paid “all of his child support obligations.” ... Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child. ...

Third, other statutory provisions not now before us may nonetheless prove relevant in cases of this kind. Section 1915(a) grants an adoptive “preference” to “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.... in the absence of good cause to the contrary.” Further, § 1915(c) allows the “Indian child’s tribe” to “establish a different order of preference by resolution.” Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court’s consideration of “good cause?” I raise, but do not here try to answer, the question.

Justice SCALIA, dissenting.

*** The Court’s opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interest of the child.” It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.

Justice SOTOMAYOR, with whom Justice GINSBURG and Justice KAGAN join, and with whom Justice SCALIA joins in part, dissenting.

A casual reader of the Court’s opinion could be forgiven for thinking this an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result. In truth, however, the path from the text of the Indian Child Welfare Act of 1978 (ICWA) to the result the Court reaches is anything but clear, and its result anything but right.

The reader’s first clue that the majority’s supposedly straightforward reasoning is flawed is that not all Members who adopt its interpretation believe it is compelled by the text of the statute, *see* ... THOMAS, J., concurring[]; nor are they all willing to accept the consequences it will necessarily have beyond the specific factual scenario confronted here, *see* ... BREYER, J., concurring[]. The second clue is that the majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes. The third clue is that the majority openly professes its aversion to Congress’ explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes, ... but the Congress that enacted the

statute announced its intent to stop “an alarmingly high percentage of Indian families [from being] broken up” by, among other things, a trend of “plac[ing] [Indian children] in non-Indian ... adoptive homes.” 25 U.S.C. § 1901(4). Policy disagreement with Congress’ judgment is not a valid reason for this Court to distort the provisions of the Act. Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and its stated purpose. I respectfully dissent.

I

Beginning its reading with the last clause of § 1912(f), the majority concludes that a single phrase appearing there—“continued custody”—means that the entirety of the subsection is inapplicable to any parent, however committed, who has not previously had physical or legal custody of his child. Working back to front, the majority then concludes that § 1912(d), tainted by its association with § 1912(f), is also inapplicable; in the majority’s view, a family bond that does not take custodial form is not a family bond worth preserving from “breakup.” Because there are apparently no limits on the contaminating power of this single phrase, the majority does not stop there. Under its reading, § 1903(9), which makes biological fathers “parent[s]” under this federal statute (and where, again, the phrase “continued custody” does not appear), has substantive force only when a birth father has physical or state-recognized legal custody of his daughter.

When it excludes noncustodial biological fathers from the Act’s substantive protections, this textually backward reading misapprehends ICWA’s structure and scope. Moreover, notwithstanding the majority’s focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting. The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.

A

Better to start at the beginning and consider the operation of the statute as a whole. ...

ICWA commences with express findings. Congress recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” 25 U.S.C. § 1901(3), and it found that this resource was threatened. State authorities insufficiently sensitive to “the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families” were breaking up Indian families and moving Indian children to non-Indian homes and institutions. See §§ 1901(4)-(5). As § 1901(4) makes clear, and as this Court recognized in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 ... (1989), adoptive placements of Indian children with non-Indian families contributed

significantly to the overall problem. *See* § 1901(4) (finding that “an alarmingly high percentage of [Indian] children are placed in non-Indian ... adoptive homes”).

Consistent with these findings, Congress declared its purpose “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards” applicable to child custody proceedings involving Indian children. ...

First, ICWA defines the term “parent” broadly to mean “any biological parent ... of an Indian child or any Indian person who has lawfully adopted an Indian child.” § 1903(9). It is undisputed that Baby Girl is an “Indian child” within the meaning of the statute, ... and Birth Father consequently qualifies as a “parent” under the Act. The statutory definition of parent “does not include the unwed father where paternity has not been acknowledged or established,” § 1903(9), but Birth Father’s biological paternity has never been questioned by any party and was confirmed by a DNA test during the state court proceedings....

Second, the Act’s comprehensive definition of “child custody proceeding” includes not only ““adoptive placement[s],” “preadoptive placement[s],” and “foster care placement[s],” but also ““termination of parental rights”” proceedings. § 1903(1). This last category encompasses “*any* action resulting in the termination of the *parent-child* relationship,” § 1903(1)(ii) (emphasis added). So far, then, it is clear that Birth Father has a federally recognized status as Baby Girl’s “parent” and that his “parent-child relationship” with her is subject to the protections of the Act.

These protections are numerous. ... Any voluntary consent Birth Father gave to Baby Girl’s adoption would have been invalid unless written and executed before a judge and would have been revocable up to the time a final decree of adoption was entered. *See* §§ 1913(a), (c). And § 1912, the center of the dispute here, sets forth procedural and substantive standards applicable in “involuntary proceeding[s] in a State court,” including foster care placements of Indian children and termination of parental rights proceedings. § 1912(a). ...

Section 1912(a) requires [that birth fathers receive] notice, counsel, and access to relevant documents[;] the statute ensures a biological father’s meaningful participation in an adoption proceeding where the termination of his parental rights is at issue.

The immediate inference to be drawn from the statute’s structure is that subsections (e) and (f) work in tandem with the rehabilitative efforts required by (d). Under subsection (d), state authorities must attempt to provide “remedial services and rehabilitative programs” aimed at

avoiding foster care placement or termination of parental rights; (e) and (f), in turn, bar state authorities from ordering foster care or terminating parental rights until these curative efforts have failed and it is established that the child will suffer “serious emotional or physical damage” if his or her familial situation is not altered. Nothing in subsections (a) through (d) suggests a limitation on the types of parental relationships that are protected by any of the provisions of § 1912, and there is nothing in the structure of § 1912 that would lead a reader to expect subsection (e) or (f) to introduce any such qualification. Indeed, both subsections, in their opening lines, refer back to the prior provisions of § 1912 with the phrase “in such proceeding.” This language indicates, quite logically, that in actions where subsections (a), (b), (c), and (d) apply, (e) and (f) apply too.

All this, and still the most telling textual evidence is yet to come: The text of the subsection begins by announcing, “[n]o termination of parental rights may be ordered” unless the specified evidentiary showing is made. To repeat, a “termination of parental rights” includes “*any* action resulting in the termination of the parent-child relationship,” 25 U.S.C. § 1903(1)(ii) (emphasis added), including the relationship Birth Father, as an ICWA “parent,” has with Baby Girl. The majority’s reading disregards the Act’s sweeping definition of “termination of parental rights,” which is not limited to terminations of custodial relationships.

The entire foundation of the majority’s argument that subsection (f) does not apply is the lonely phrase “continued custody.” It simply cannot bear the interpretive weight the majority would place on it.

In keeping with § 1903(1) and the structure and language of § 1912 overall, the phrase “continued custody” is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA “parent” has with his or her child. A court applying § 1912(f) where the parent does not have pre-existing custody should, as Birth Father argues, determine whether the party seeking termination of parental rights has established that the continuation of the parent-child relationship will result in “serious emotional or physical damage to the child.”

B

The majority also does not acknowledge the full implications of its assumption that there are some ICWA “parent[s]” to whom §§ 1912(d) and (f) do not apply. Its discussion focuses on Birth Father’s particular actions, but nothing in the majority’s reasoning limits its manufactured class of semiprotected ICWA parents to biological fathers who failed to support their child’s mother during pregnancy. Its logic would apply equally to noncustodial fathers who have actively participated in their child’s upbringing.

Consider an Indian father who, though he has never had custody of his biological child, visits her and pays all of his child support obligations.⁸ Suppose that, due to deficiencies in the care the child received from her custodial parent, the State placed the child with a foster family and proposed her ultimate adoption by them. Clearly, the father's parental rights would have to be terminated before the adoption could go forward. On the majority's view, notwithstanding the fact that this father would be a "parent" under ICWA, he would not receive the benefit of either § 1912(d) or § 1912(f). Presumably the court considering the adoption petition would have to apply some standard to determine whether termination of his parental rights was appropriate. But from whence would that standard come?

Not from the statute Congress drafted, according to the majority. The majority suggests that it might come from state law. ... But it is incongruous to suppose that Congress intended a patchwork of federal and state law to apply in termination of parental rights proceedings. Congress enacted a statute aimed at protecting the familial relationships between Indian parents and their children because it concluded that state authorities "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). It provided a "minimum Federal standar[d]," § 1902, for termination of parental rights that is more demanding than the showing of unfitness under a high "clear and convincing evidence" standard that is the norm in the States, *see* 1 J. Hollinger, *Adoption Law and Practice* § 2.10 (2012)....

II

⁸ The majority attempts to minimize the consequences of its holding by asserting that the parent-child relationships of noncustodial fathers with visitation rights will be at stake in an ICWA proceeding in only "a relatively small class of cases." ... But it offers no support for this assertion, beyond speculating that there will not be many fathers affected by its interpretation of § 1912(d) because it is qualified by an "abandon[ment]" limitation. ... Tellingly, the majority has nothing to say about § 1912(f), despite the fact that its interpretation of that provision is not limited in a similar way. In any event, this example by no means exhausts the class of semiprotected ICWA parents that the majority's opinion creates. It also includes, for example, biological fathers who have not yet established a relationship with their child because the child's mother never informed them of the pregnancy, ... told them falsely that the pregnancy ended in miscarriage or termination, ... or otherwise obstructed the father's involvement in the child's life.... And it includes biological fathers who did not contribute to pregnancy expenses because they were unable to do so, whether because the father lacked sufficient means, the expenses were covered by a third party, or the birth mother did not pass on the relevant bills. ...

The majority expresses the concern that my reading of the statute would produce "far-reaching consequences," because "even a sperm donor" would be entitled to ICWA's protections. ... If there are any examples of women who go to the trouble and expense of artificial insemination and then carry the child to term, only to put the child up for adoption or be found so unfit as mothers that state authorities attempt an involuntary adoptive placement—thereby necessitating termination of the parental rights of the sperm donor father—the majority does not cite them. As between a possibly overinclusive interpretation of the statute that covers this unlikely class of cases, and the majority's underinclusive interpretation that has the very real consequence of denying ICWA's protections to all noncustodial biological fathers, it is surely the majority's reading that is contrary to ICWA's design.

The majority's textually strained and illogical reading of the statute might be explicable, if not justified, if there were reason to believe that it avoided anomalous results or furthered a clear congressional policy. But neither of these conditions is present here.

A

ICWA, on a straightforward reading of the statute, is consistent with the law of those States that protected, and protect, birth fathers' rights more vigorously. This reading can hardly be said to generate an anomaly. ICWA, as all acknowledge, was "the product of rising concern ... [about] abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families." *Holyfield*, 490 U.S., at 32.... It stands to reason that the Act would not render the legal status of an Indian father's relationship with his biological child fragile, but would instead grant it a degree of protection commensurate with the more robust state-law standards.

C

The majority also protests that a contrary result to the one it reaches would interfere with the adoption of Indian children. ... This claim is the most perplexing of all. A central purpose of ICWA is to "promote the stability and security of Indian ... families," 25 U.S.C. § 1902, in part by countering the trend of placing "an alarmingly high percentage of [Indian] children ... in non-Indian foster and adoptive homes and institutions." § 1901(4). The Act accomplishes this goal by, first, protecting the familial bonds of Indian parents and children...; and, second, establishing placement preferences should an adoption take place, see § 1915(a). ICWA does not interfere with the adoption of Indian children except to the extent that it attempts to avert the necessity of adoptive placement and makes adoptions of Indian children by non-Indian families less likely.

The majority may consider this scheme unwise. But no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about. ...

The majority further claims that its reading is consistent with the "primary" purpose of the Act, which in the majority's view was to prevent the dissolution of "intact" Indian families. ... As we observed in *Holyfield*, ICWA protects not only Indian parents' interests but also those of Indian tribes. ... A tribe's interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent.

Moreover, the majority's focus on "intact" families, ... begs the question of what Congress set out to accomplish with ICWA. In an ideal world, perhaps all parents would be

perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's substantive protections; unhappy families all too often do not. They are families nonetheless. Congress understood as much. ICWA's definitions of "parent" and "termination of parental rights" provided in § 1903 sweep broadly. They should be honored.

III

Because I would affirm the South Carolina Supreme Court on the ground that § 1912 bars the termination of Birth Father's parental rights, I would not reach the question of the applicability of the adoptive placement preferences of § 1915. I note, however, that the majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that § 1915 would not apply to an adoption petition that has not yet been filed. Indeed, the statute applies "[i]n any adoptive placement of an Indian child under State law," 25 U.S.C. § 1915(a) (emphasis added), and contains no temporal qualifications. It would indeed be an odd result for this Court, in the name of the child's best interests, cf. ante, at 2564, to purport to exclude from the proceedings possible custodians for Baby Girl, such as her paternal grandparents, who may have well-established relationships with her.

* * *

The majority casts Birth Father as responsible for the painful circumstances in this case, suggesting that he intervened "at the eleventh hour to override the mother's decision and the child's best interests[.]" I have no wish to minimize the trauma of removing a 27-month-old child from her adoptive family. It bears remembering, however, that Birth Father took action to assert his parental rights when Baby Girl was four months old, as soon as he learned of the impending adoption. As the South Carolina Supreme Court recognized, "[h]ad the mandate of ... ICWA been followed [in 2010], ... much potential anguish might have been avoided[;] and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.""

...

The majority's hollow literalism distorts the statute and ignores Congress' purpose in order to rectify a perceived wrong that, while heartbreaking at the time, was a correct application of federal law and that in any case cannot be undone. Baby Girl has now resided with her father for 18 months. However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3 ½, she is again removed from her home and sent to live halfway across the country. Such a fate is not foreordained, of course. But it can be said with certainty that the anguish this case has caused will only be compounded by today's decision.

NOTES

1. Shortly after the Supreme Court decided *Adoptive Couple*, the Birth Father, his wife, and his parents each filed court papers in Oklahoma to adopt Baby Girl. See Kate Fort, Update on Baby Girl Proceedings, Turtle Talk blog post (July 9, 2013), available at <http://turtletalk.wordpress.com/2013/07/09/update-on-baby-girl-proceedings/>.

A week later, the South Carolina Supreme Court ordered that the Adoptive Couple's adoption of Baby Girl be immediately concluded. The court held: "The Supreme Court has articulated the federal standard, and its application to this case is clear: the ICWA does not authorize Birth Father's retention of custody. Therefore, we reject Birth Father's argument that § 1915(a)'s placement preferences could be an alternative basis for denying the Adoptive Couple's adoption petition." 746 S.E.2d 51, 52 (S.C. 2013).

Is the South Carolina Supreme Court correct?

2. On the same day the South Carolina Supreme Court issued its order, but a few hours earlier, the Cherokee Nation District Court granted an emergency guardianship order in favor of awarding temporary custody of Baby Girl to her stepmother and parental grandparents. See Adrea Korthase, *Cherokee Nation Tribal Court Grants Custody to Father's Wife and Father's Parents in Baby Veronica Matter*, Turtle Talk blog post (July 22, 2013), available at <http://turtletalk.wordpress.com/2013/07/22/cherokee-nation-tribal-court-grants-custody-to-fathers-wife-and-fathers-parents-in-baby-veronica-matter/>.

3. Justice Thomas concurred in the result (and joined the majority) but wrote separately to argue that his understanding of Congressional powers under the Indian Commerce Clause does not allow for Congress enact ICWA at all, arguments similar to those he raised in *United States v. Lara*, 541 U.S. 193 (2004), *supra* at page 517, 524-26. Compare *Adoptive Couple*, 133 S. Ct. at 2556-57 (Thomas, J., concurring) ("Although this Court has said that the 'central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,' ... neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power."), with *Lara*, 541 U.S. at 224 ("The

Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. ... I cannot agree that the Indian Commerce Clause ‘provide[s] Congress with plenary power to legislate in the field of Indian affairs.’”) (Thomas, J., concurring in result).

CHAPTER 9

THE NATION-BUILDING CHALLENGE: FEDERAL INDIAN LAW AND RESERVATION DEVELOPMENT

SECTION B.

INDIAN GAMING

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

Add to the end of page 726

6. In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), the court addressed an unusual gaming question – what to do about a tribal gaming operation on tribally-owned fee lands off the tribe’s reservation. Michigan argued that Congress had abrogated tribal immunity through the Indian Gaming Regulatory Act in 25 U.S.C. § 2710(d)(7)(A)(ii), which provides:

The United States district courts shall have jurisdiction over ... any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact ... that is in effect

Students should recall that the Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), struck down subsection (i), the provision allowing tribes to sue states in federal court for failing to negotiate a gaming compact in good faith.

The Supreme Court in *Bay Mills* held that Congress did not abrogate tribal immunity. First, the Court noted that IGRA’s abrogation of tribal immunity applied to gaming operations on Indian lands, not off:

[Section] 2710(d)(7)(A)(ii) ... authorizes a State to sue a tribe to “enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal–State compact.” ... A key phrase in that abrogation is “on Indian lands”—three words reflecting IGRA’s overall scope (and repeated some two dozen times in the statute). A State’s suit to enjoin gaming activity on Indian lands ... falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity off Indian lands

does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is outside Indian lands. ... By dint of that theory, a suit to enjoin gaming in Vanderbilt is correspondingly outside § 2710(d)(7)(A)(ii)’s abrogation of immunity.

134 S. Ct. at 2032.

Michigan then argued that barring state suits against tribes engaging in off-reservation gaming but allowing suits for on-reservation gaming was tantamount to an absurd result. The Court refused to rewrite the statute to allow for Michigan’s suit:

Michigan highlights a (purported) anomaly of the statute as written: that it enables a State to sue a tribe for illegal gaming inside, but not outside, Indian country. “[W]hy,” Michigan queries, “would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state’s own sovereign jurisdiction?” Reply Brief 1. That question has no answer, Michigan argues: Whatever words Congress may have used in IGRA, it could not have intended that senseless outcome. ...

But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment. ... This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan’s words) Congress “must have intended” something broader. ... And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) “Congress must ‘unequivocally’ express [its] purpose” to subject a tribe to litigation. [*C & L Enterprises v. Citizen Band of Potawatomi Indians*.]

Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else. Small surprise that IGRA’s abrogation of tribal immunity does that as well.

134 S. Ct. at 2034-35.

The Court also suggested that states like Michigan have options to deal with similar questions in the future. States could perhaps utilize state law remedies, or sue tribal officials and employees, or even assert criminal jurisdiction over Indian gaming outside of Indian lands:

So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino. ... And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. ... As this Court has stated before, analogizing to *Ex parte Young*, ... tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. ... And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment. ... [T]he panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under § 2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.

134 S. Ct. at 2035. The Court also noted that states can negotiate for a broader waiver of tribal immunity during Class III compact negotiations. 134 S. Ct. at 2035 (“Finally, if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity. ... States have more than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact ... and cannot sue to enforce a State’s duty to negotiate a compact in good faith....”).

CHAPTER 10

INDIAN RELIGION AND CULTURE

SECTION C.

PROTECTION OF AMERICAN INDIAN CULTURAL RESOURCES

PART 1. THE NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT (NAGPRA)

After the partial paragraph on page 760, add:

In 2015, scientists studying the remains of the Ancient One concluded that the remains are, after all, Indigenous. See Morten Rasmussen et al., *The ancestry and affiliations of Kennewick Man*, NATURE (June 18, 2015), available at <http://www.nature.com/nature/journal/vnfv/ncurrent/full/nature14625.html>.

Another controversial case involves the remains of famed American Indian athlete Jim Thorpe. Decades ago, a Pennsylvania town acquired his remains from members of his family, buried him there, and renamed their community Borough of Jim Thorpe. Thorpe's other descendants who are Sac and Fox Nation members brought a suit under NAGPRA seeking the repatriation of remains to Oklahoma. The Third Circuit rejected the claim in *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255 (3rd Cir. 2014), on the grounds that the Borough was not a museum or other institution subject to NAGPRA.

The Sac and Fox Nation has filed a petition for review by the Supreme Court. *Sac and Fox Nation v. Borough of Jim Thorpe*, No. 14-1419, available at <https://turtletalk.files.wordpress.com/2015/06/thorpe-petition-and-appendix-00059355.pdf>.

PART 5. INTELLECTUAL PROPERTY RIGHTS

At the end of the first full paragraph on page 764, add:

During the pendency of the *Harjo* plaintiffs' suit, several younger American Indians brought a challenge to the Washington Football Team's trademarks on largely the same record as before. However, this time, the plaintiffs were in their early 20s, preventing the team's laches defense from having a major impact. The United States Patent and Trademark Office ordered the cancellation of several of the team's trademarks in 2014. *Blackhorse v. Pro-Football, Inc.*, 2014

WL 2757516 (June 18, 2014). The team brought an appeal in federal district court on the merits, and also challenged the constitutionality of the federal trademark registration program on First Amendment grounds. The United States intervened to defend the federal program.

In *Pro-Football, Inc. v. Blackhorse*, No. 1:14-cv-01043-GBL-IDD, 2015 WL 4096277 (E.D. Va., July 8, 2015), the court affirmed the Patent and Trademark Office's decision on the merits and rejected the constitutional challenge. The court relied in part on a very recent United States Supreme Court decision holding that state license plate content is government speech that is not subject to First Amendment scrutiny. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). Presumably, the case will be appealed to the Fourth Circuit.

CHAPTER 12

FISHING AND HUNTING RIGHTS

SECTION B.

OFF-RESERVATION FISHING AND HUNTING

PART 1. PACIFIC NORTHWEST

Add to the end of the notes on page 869:

On March 29, 2013, Judge Martinez issued a permanent injunction against the State of Washington in the culverts subproceeding. *See United States v. Washington*, 2013 WL 1334391 (W.D. Wash., March 29, 2013). The injunction order the State to correct the barrier culverts that infringe on the treaty right to fish:

14. The Tribes have demonstrated, as set forth above in Findings of Fact 6–14, that they have suffered irreparable injury in that their Treaty-based right of taking fish has been impermissibly infringed. The construction and operation of culverts that hinder free passage of fish has reduced the quantity and quality of salmon habitat, prevented access to spawning grounds, reduced salmon production in streams in the Case Area, and diminished the number of salmon available for harvest by Treaty fishermen. The Tribes and their individual members have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from State-created or State-maintained fish passage barriers.

15. This injury is ongoing, as efforts by the State to correct the barrier culverts have been insufficient. Despite past State action, a great many barrier culverts still exist, large stretches of potential salmon habitat remain empty of fish, and harvests are still diminished. Remedies at law are inadequate as monetary damages will not adequately compensate the Tribes and their individual members for these harms. Salmon harvests are important to Tribal members not only

economically but in their traditions, culture, and religion; interests for which there is no adequate monetary relief.

16. The balance of hardships tips steeply toward the Tribes in this matter. The promise made to the Tribes that the Stevens Treaties would protect their source of food and commerce was crucial in obtaining their assent to the Treaties' provisions. ... Equity favors requiring the State of Washington to keep the promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties.

17. It was the intent of the negotiators, and the Tribes' understanding, that they would be able to meet their own subsistence needs forever, and not become a burden on the State treasury. ... The Tribes' ability to meet their subsistence and cultural needs is threatened by the depletion of salmon stocks which has resulted from the continued existence of fish passage barriers. State action in the form of acceleration of barrier correction is necessary to remedy this decline in salmon stocks and remove the threats which face the Tribes. The State has the financial ability to accelerate the pace of barrier correction over the next several years and provide relief to the Tribes. ... Under state and federal law, barrier culverts must be corrected in any case. Any marginal costs attributable to an accelerated culvert correction schedule are more than offset by the benefit that will accrue to the Tribes. Increased State spending on barrier correction will not adversely affect state programs such as education or social welfare, because the transportation and general operating budgets are separate. ...

18. The public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just Tribal fishermen, will benefit from the increased production of salmon. Commercial fishermen will benefit economically, but recreational fishermen will benefit as well. The general public will benefit from the enhancement of the resource and the increased economic return from fishing in the State of Washington. The general public will also benefit from the environmental benefits of salmon habit restoration.

19. The State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned. Instead, it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed. The roadbed crossing must be fitted with a culvert that allows not only water to flow, but which insures the free passage of salmon of all ages and life stages both upstream and down. That

passage is best facilitated by a stream simulation culvert rather than the less-effective hydraulic design or no-slope culvert.

20. An injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises. The reduced effort by the State over the past three years, resulting in a net increase in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations.

United States v. Washington, 2013 WL 1334391, at *23-25.

CHAPTER 13

RIGHTS OF ALASKA NATIVES AND NATIVE HAWAIIANS

SECTION A.

ALASKA NATIVES: LOOKING FORWARD TO THE PAST?

PART 3. NATIVE LANDS IN ALASKA

Add to the end of notes on page 897:

4. In *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C.), the court invalidated a Department of Interior regulation that treats Alaska Native people differently from other tribes under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, which allows the Secretary of Interior to acquire land in trust for the benefit of Indians and tribes.

PART 5. NATIVE CULTURE AND SUBSISTENCE RIGHTS

Add to end of text and before Note on page 905:

1. In *John v. United States*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom., Alaska v. Jewell*, 134 S. Ct. 1759 (2014), the Ninth Circuit affirmed regulations promulgated by the Departments of Interior and Agriculture that gave priority under the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101, et seq., for Alaska Native subsistence hunting and fishing.