The Supreme Court Erects a Fence Around Indian Gaming

J. Matthew Martin, University of North Carolina at Chapel Hill
The Supreme Court Erects a Fence Around Indian Gaming

J. Matthew Martin*

Introduction

On June 18, 2012, the Supreme Court of the United States established an almost insurmountable boundary for American Indian Tribes seeking to establish Indian gaming on lands newly taken into trust by the government of the United States. In *Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Patchak*, the Supreme Court allowed a private suit to proceed against the government, challenging the validity of the decision of the Secretary of the Interior to take land into trust on behalf of an Indian Tribe for the purposes of establishing a casino.

While the decision of the Supreme Court has implications beyond Indian gaming, the holding is aimed directly at gambling and illustrates the Court's continuing concerns regarding the growth of these activities in Indian Country. In particular, the Opinion creates a hitherto unknown private right of action, permitting a private citizen to sue the Secretary of the Department of the Interior in an effort to stop the government from complying with its trust obligations to an Indian Tribe. This decision expands the holding of the Court in *Carcieri v. Salazar*, and continues the Court's balkanization of Indian Tribes with the Indian Reorganization Act of 1934 as the line of demarcation. Secondly, the Court effectively extended the statute of limitations for challenges to trust transfers from thirty days to six years. The decision could impact potential projects across the country. Finally, the decision highlights the Court's ongoing restrictive view of the government's trust obligations to the Indian

---

* Adjunct Professor of Law at the UNC School of Law and the Elon University School of Law and retired Associate Judge, the Cherokee Court, the Tribal Court for the Eastern Band of Cherokee Indians. The author would like to thank Professor Dan R. Reaser, Professor Matthew L.M. Fletcher, Jonathan Ambrose and Clarke S. Martin for their input, suggestions and assistance with this paper.

1 132 S.Ct. 2199 (2012).
Tribes.

This paper describes the litigious history of the subject property, the Bradley Tract, in part I. Part II analyzes and deconstructs the decision of the Supreme Court and Justice Sotomayor's dissent. In part III, I consider the drastic impact of this Opinion on Indian development in general and Indian gaming in particular and what it augers for the future. The paper concludes with a call for Congress to accept the invitation of the Supreme Court to step in and articulate the Executive Branch's trust responsibilities with specificity.

Part I---The Development of the Bradley Tract

The Gun Lake Tribe

The Match-E-Be-Nash-She Wish Band of Pottawatomi Indians (hereinafter “Gun Lake Tribe” or “Tribe”) is a Federally recognized Indian Tribe commonly referred to as the Gun Lake Tribe.\(^5\) Tribal culture and tradition consider the members to be the descendents of Match-E-Be-Nash-She Wish (“Bad Bird”), a significant historical figure, who fought alongside Tecumseh at the Battle of Fallen Timbers in 1794 against the Americans led by General “Mad” Anthony Wayne and later was one of the signatories of the Treaty of Greenville\(^6\), which ceded to the United States much of what is now known as Ohio and Indiana as well as the area encompassing the modern city of Chicago.\(^7\) On October 14, 1998, the United States government formally recognized the Match-E-Be-Nash-She Wish Band of Pottawatomi Indians as an American Indian Tribe within the meaning of Federal law. The recognition became effective in 1999.\(^8\)

Today the Gun Lake Tribal government is situated in Dorr, Michigan, not far from Bad Bird's

---

\(^5\) Gale Courey Toensing and Rob Capriccioso, *From Carcieri to Worse*, INDIAN COUNTRY TODAY, July 18, 2012, at 22.

\(^6\) A treaty of peace between the United States of America, and the tribes of Indians called the Wyandots, Delawares, Shawanees, Ottawas, Chippewas, Pattawatomis, Miamis, Eel Rivers, Weas, Kickapoos, Piankeshaws, and Kaskaskias, August 3, 1795.


home of Kalamazoo. “The Bradley Indian Mission, located less than 3 miles from the Casino site, is the historic residential and cultural center point of the tribal community.” The Tribe offers cultural workshops in: fire making; sugaring; creation of traditional “snowsnakes;” cordage production; and black ash basketry.10

**Acquisition of the Bradley Tract**

Shortly after receiving Federal recognition, the Gun Lake Tribe purchased a 165 acre tract of land in rural Waylan Township, Allegan County, Michigan, known as the Bradley Tract, where it wished to construct and operate a casino.11 At that time, the Bradley Tract comprised an abandoned, blighted light industrial area, located amidst a rail line and U.S. 131, littered with shuttered, empty factory and warehouse buildings.12

In 2001, the Tribe requested that the Secretary of Interior exercise her discretion pursuant to 25 U.S.C. § 465, a provision of the Indian Reorganization Act (IRA), to take the Bradley Tract into trust on behalf of the Tribe.13

The Band's application explained that the Band would use the property 'for gaming purposes,' with the goal of generating the 'revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs.14

The Supreme Court noted, “[t]he application thus requested the Secretary to take the action necessary for the Band to open a casino.”15 The Gun Lake Tribe could not operate Class II or III Indian gaming

---

10 See Language/Culture, MATCH-E-BE-NASH SHE WISH BAND OF POTTAWATOMI INDIANS, [http://www.mbpi.org/Administration/languageculture.asp](http://www.mbpi.org/Administration/languageculture.asp)
13 Brief for Petitioner, supra note 11, at 5.
14 Patchak, 132 S.Ct. 2203.
15 *Id.* at note 1.
on the Bradley tract unless it was held in trust for the Tribe by the United States.\(^\text{16}\)

Upon receipt of the request, the Secretary notified the local and State authorities whose tax and regulatory authority would be impacted by the transfer of the Bradley Tract from fee simple ownership by the Tribe to trust ownership by the United States.\(^\text{17}\) Wayland Township, Allegan County, the City of Wayland, Dorr Township, Martin Township, Hopkins Township, and Yankee Springs Township, all responded enthusiastically, as they “are engaged in cooperative efforts to foster economic development in an area that includes the Bradley Tract.”\(^\text{18}\)

The Secretary then undertook a lengthy administrative review of Gun Lake’s application.\(^\text{19}\) Among other things, the administrative review included:

1. A determination of the land’s eligibility for trust status under the IRA;
2. A required environmental assessment under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h; and

In May of 2005, following the conclusion of her review, the Secretary of the Interior issued a public notice “announc[ing] her decision to acquire the Bradley Property in trust for” the Gun Lake Tribe.\(^\text{21}\) The Notice clearly stated that the Bradley Tract would be "used for the purpose of construction and operation of a gaming facility.”\(^\text{22}\) Before the Secretary could take the Bradley Tract into trust, however, “applicable regulations” committed the Secretary to forbear for thirty days before transferring

\(^{16}\) Pursuant to 25 U.S.C. § 2719(b)(1)(A), the Secretary was required to “consult with the tribe, the state, local officials, and officials of nearby tribes to determine that gaming on the newly acquired lands would be in the best interests of the tribe and its members and would not be detrimental to the surrounding community.” Steven Andrew Light and Kathryn R.L. Land, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 438-39 (2009).

\(^{17}\) See 25 C.F.R. § 151.10.

\(^{18}\) Amicus Brief for Wayland Township, et. al., supra note 11, at 1.

\(^{19}\) Patchak, 132 S.Ct. 2203.


\(^{21}\) Patchak, 132 S.Ct. 2203.

title to the Bradley Tract in order for interested parties to seek judicial review of her decision.23

Litigation Over the Bradley Tract

Within that thirty day statute of limitations, an anti-gaming interest group called Michigan Gambling Opposition sued the Secretary in the United States District Court for the District of Columbia to enjoin her from concluding the title transfer.24 The plaintiff alleged that that the trust acquisition violated both the National Environmental Policy Act25 and IGRA, and that Section 5 of the IRA amounted to an unconstitutional delegation of congressional power.26 No other suit was filed during the thirty day window established by the public notice.

A stay kept the Secretary from taking the Bradley Tract into trust while the litigation with Michigan Gambling Opposition continued.27 Michigan Gambling Opposition's claims were denied on the merits by the District Court in 2007.28 In 2008, the D.C. Circuit affirmed the District Court.29

Shortly after the Circuit Court ruled, in August, 2008, David Patchak30, a non-Indian who lives near the Bradley Tract, filed suit against the Department of the Interior, attempting to forestall the transfer of title.31 Patchak's claim was originally advanced by Michigan Gambling Opposition in its litigation, but apparently not considered by the Federal court.32

So Patchak started a new lawsuit, in which he employed a losing claim first made by the State of Rhode Island in *Carcieri v. Norton*33 and *Carcieri v. Kempthorne*.34 But Patchak and Michigan

---

23 *Id.; see also* 70 Fed. Reg. 25,596 (May 12, 2005).
24 Patchak, 132 S.Ct. 2203.
25 42 USCA §§ 4321 et seq.
27 Brief for Respondent, supra note 11, at 4. The Supreme Court characterized it thusly, “The Secretary held off taking title to the property while that litigation proceeded.” Patchak, 132 S.Ct. 2203.
32 Brief for Respondent, supra note 11, at 4.
34 497 F.3d 15 (1st Cir. 2007) (*en banc*).
Gambling Opposition knew that the Supreme Court had granted certiorari in Carcieri on February 25, 2008 and that a chance existed that this last minute challenge might succeed. The long shot bet paid off.

Patchak claimed that the Administrative Procedure Act (APA)\(^{35}\) prevented the Secretary from taking the Bradley Tract into trust because the Secretary lacked authority under the IRA\(^{36}\) to effectuate the transfer.\(^{37}\) Patchak asserted standing to file his suit on the grounds that

>'he will be exposed to and injured by the negative effects of building and operating' a gaming facility, including changes in the alleged 'rural character' of the area, 'loss of aesthetic and environmental qualities,' 'increased property taxes,' 'weakening of the family atmosphere of the community,' and 'other aesthetic, socioeconomic, and environmental problems.'\(^{38}\)

Patchak alleged that he moved to the area "because of its unique rural setting," asserting that he "values the quiet life he leads in Wayland Township."\(^{39}\) He predicted that a casino would irreversibly change the area’s rural character and deprive him of the sylvan enjoyment of the agricultural landscape.\(^{40}\)

Interestingly, Patchak chose not to include the Gun Lake Tribe in his lawsuit.\(^{41}\) The Tribe intervened as a defendant in the District Court.\(^{42}\)

In January, 2009, the Supreme Court denied certiorari in Michigan Gambling Opposition v. Kempthorne.\(^{43}\) The stay expired and, that same month, the Secretary of the Interior took the Bradley Tract into trust for the Gun Lake Tribe and transferred title to the United States.\(^{44}\) "That action mooted Patchak's request for an injunction to prevent the acquisition, and all parties agree that the suit now

---

\(^{35}\) 5 U.S.C. §§ 701 et seq.


\(^{38}\) Brief for Petitioner, supra note 11, at 8.

\(^{39}\) Brief for Respondent, supra note 11, at 5.

\(^{40}\) Id.

\(^{41}\) Such a decision is consistent with a long line of Federal cases involving title to Indian lands, but omitting the Indians themselves from the litigation, dating back at least to Johnson v. M'Intosh; 21 U.S. 543 (1823).

\(^{42}\) Brief for Petitioner, supra note 11, at 9.

\(^{43}\) 555 U.S. 1137 (2009).

\(^{44}\) Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Patchak, 132 S.Ct. 2203 (2012); Brief for Respondent, supra note 11, at 5.
effectively [sought] to divest the Federal Government of title to the land.”

On February 24, 2009, the Supreme Court issued the Opinion in Carcieri v. Salazar. In Carcieri, the Court considered the nature of transfers from fee to trust status pursuant to 25 U.S.C. § 465.

Chafing under the yoke of local regulation with regard to the development of a housing project on 31 acres of fee lands, the Narragansett Tribe sought to increase its sovereignty and decrease the regulatory authority of the State of Rhode Island by asking the Secretary of the Interior to take the parcel into trust. The State objected, and, within the 30 day window, challenged the ability of the Secretary to take the 31 acres into trust under the APA.

In an Opinion authored by Justice Thomas, the Court drew a line differentiating between those Tribes recognized at the time of the enactment of the IRA and those, like the Narragansetts, whose recognition came later. Concluding that 25 U.S.C. § 479 limited the trust acquisition process to those Tribes “under federal jurisdiction” when the IRA was enacted in June 1934, the Court held that the Secretary had no authority to take land into trust for the Narragansett Tribe, which was recognized in 1983. Overnight Patchack's lawsuit changed into a very serious case.

The Gun Lake Casino

In April 2009, pursuant to 25 U.S.C. § 2719 the Secretary of the Department of the Interior approved a gaming compact negotiated and entered into between the Gun Lake Tribe and the State of Michigan. The Gun Lake Tribe and the local community began preparations for the casino.

In August, 2009, the District Court dismissed Patchak's case, holding that he had no prudential

45 Id.
47 Id. at 382.
48 Id. at 385.
49 Id.
50 Id. at 395
51 Id.
52 Brief for Petitioner, supra note 11, at 7.
standing under the APA to invoke the jurisdiction to make his Carcieri claim. Patchak appealed to the D.C. Circuit Court of Appeals.

In September, 2009, the Gun Lake Tribe broke ground on the Gun Lake Casino. Approximately 750 skilled workers – including plumbers, electricians, carpenters, and sheet metal workers -- were employed during the construction of the $165 million facility. Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs. The creation of new jobs has resulted in an expanded tax base for local governments and increased demand for goods and services provided by local businesses.

Other portions of the Bradley Tract are used for tribal governmental offices, water treatment facilities, a waste water plant, and a public safety office.

The United States Court of Appeals for the D.C. Circuit reversed the District Court in January, 2011. In particular, the Circuit Court held that Patchak had prudential standing to initiate jurisdiction and that the Quiet Title Act (QTA) did not operate to bar Patchak's action pursuant to the APA. The D.C. Circuit remanded Patchak's case to the District Court.

On February 10, 2011, the Gun Lake Casino opened. The Casino was immediately and enormously popular: “Media reports indicated that after opening, the parking lots at the casino were 'so full and traffic [was] so heavy along US 131 [that police] closed the northbound and southbound exits' to the highway.”

---

55 Amicus Brief for Wayland Township, et. al, supra note 11, at 8 (citations omitted).
56 Brief for Petitioner, supra note 11, at 7.
57 Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011).
59 Patchak v. Salazar, 632 F.3d 712.
60 Id. at 712-713.
62 Brief for Respondent, supra note 11, at 8 (citation omitted).
The economic effect of the Gun Lake Casino was almost as immediate as the automobile traffic. “The economic development of the Bradley Tract created 900 new jobs in 2011.”

The [Tribe] estimates that, as a result of its development of the trust lands, it will spend approximately $30 million annually to purchase vendor goods and services. Most of those purchases will be made from businesses in southwest Michigan, providing a further substantial boost to the local economy. In addition, the Band estimates that the gaming facility will create 60,000 new guest stays per year at area hotels, generating an additional $4.4 million in revenues for hotel operators. Other local businesses, such as restaurants, gas stations, drycleaners, and landscapers, can expect similar increases in demand for their services.

A feature of the gaming compact between the Tribe and the State is the Revenue Sharing Agreement. Under the Revenue Sharing Agreement, the Tribe agreed to pay a percentage of the revenues from the gaming facility to local government entities located in close proximity to the trust lands. As a part of the Revenue Sharing Agreement, the Tribe and ten public agencies created the Revenue Sharing Board, whose duty it is to establish the criteria by which gaming revenue will be distributed to the local governments every six months.

The distributions are significant. In the first payment, after just two months of operation, local governments received $514,871.00, and the State of Michigan received more than $2 million. At the time of briefing before the Supreme Court, over $10.3 million had been distributed pursuant to the Revenue Sharing Agreement.

To the cash strapped local governments, exiled in the financial desert of rural Michigan during the Great Recession and politically unable to raise taxes, the revenue sharing must have seemed like

---

63 Amicus Brief for Wayland Township, et al., supra note 11, at 7.
64 Id. at 8-9.
65 Id. at 9.
66 Id.
67 Id. at 10.
68 Id.
69 Brief for Petitioner, supra note 11, at 7. See also, Ryan Lewis, “Year in Review: 2012,” The Allegan County News, http://www.allegannews.com/articles/2013/01/03/local_news/3.txt, noting that the Gun Lake Tribe distributed $2.1 million in 2011 and $3.2 million in 2012 to the local governments, and has shared a total in excess of $27 million with the State and local governments.
manna from heaven. The laundry list of small town initiatives, some doubtless postponed for a long
time, finally given the green light with gaming money, reads also like a Christmas list.

Wayland Township added two additional patrol deputies. Wayland School District cut pre-
school tuition by one third, eliminated a $100.00 “pay-to-play” fee for high school athletics, painted the
gym ceiling, developed a scholarship fund for graduating seniors and funded capital and maintenance
projects, freeing up cash for academics. Martin Township contemplated a new fire truck. Dorr
Township planned playgrounds and parks. Allegan County shored up its general fund, undertook road
maintenance projects, created a veterans’ relief fund and negotiated the funding of an inter-
governmental contract between the County and Wayland Township providing for law enforcement
coverage of the Township. Absent the Gun Lake Tribe’s development of the Bradley Tract, “critical
infrastructure projects” would not have been planned by the local governments like a major water and
sewer treatment system in Wayland Township.

But the specter of the Patchak litigation still hovered above the money tree known as the
Bradley Tract. The Tribe and the government filed a Petition for a writ of certiorari in the Supreme
Court on August 25, 2011. The Court granted certiorari on December 12, 2011. The parties argued the
case on April 24, 2012. On June 18, 2012, the Court announced its Opinion.

Part II---The Supreme Court Reset

The Majority Opinion

Justice Kagan authored the 8-1 majority Opinion. The Court addressed two questions presented
by the Tribe and the Government: first, did the QTA confer sovereign immunity on the government;

---

70 Amicus Brief for Wayland Township, et al., supra note 11, at 10.
71 Id. at 10-11; Matthew L.M. Fletcher, Ironies of the Patchak Decision, TURTLE TALK, (June 26, 2012, 11:38 AM)
http://turtletalk.wordpress.com/2012/06/26/ironies-of-the-patchak-decision/
72 Amicus Brief for Wayland Township, et al., supra note 11, at 12.
73 Id. at 12, 13.
74 Id. at 13.
75 Id. at 11.
and second, did Patchak have prudential standing to challenge the acquisition of the Bradley tract into trust by the Secretary?

I. Sovereign Immunity

Patchak's Carcieri claim was not brought pursuant to 25 U.S.C. § 465, as Michigan Gambling Opposition's claims were premised and indeed as Carcieri was. Instead, Patchak's Carcieri claim was made pursuant to the APA.76 “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 cover of legal authority.'”77

The Court quickly and repeatedly accepted that Patchack sought no money damages, noting that he sought “only” the “non-monetary relief” of “strip[ping] the United States of title to the” Bradley Tract.78 Without discussion, the Court also accepted as a fact that Patchak's Carcieri claim was an objection to an official act of the Secretary.79 The APA waiver seemed to apply, the Court noted simply. However, the Court observed that the APA is not designed to allow a plaintiff to exploit the APA waiver of sovereign immunity in an effort “to evade limitations on suit contained in other statutes.”80 The Gun Lake Tribe and the Government both argued that the QTA contained such a limitation on Patchak's suit.81

Like the APA, the QTA waives sovereign immunity and authorizes a specific kind of action against the Government, in this case an action to quiet title.82 These cases arise when a plaintiff asserts a “'right title or interest' in real property that conflicts with a “right, title or interest” claimed by the United States.83 The QTA's waiver of sovereign immunity and “authorization of suit does not apply to

77 Id. at 2204 (quoting 5 U.S.C. § 702 (2006)).
78 Id.
79 Id.
80 Id. at 2204-2205.
81 Id. at 2205.
82 Id.
83 Id. citing 28 U.S.C. § 2409a(d).
trust or restricted Indian lands.” The Government and the Gun Lake Tribe argued that the QTA exception retained the sovereign immunity of the Government where the suit involved the taking of the Bradley Tract into trust.

The Court acknowledged that the QTA would bar Patchak's suit if he owned or claimed some interest in the Bradley tract. In comparison, the Court also pointed out that the QTA would not bar a suit under the APA based on environmental harm emanating from Indian lands. Although Patchak's claim contested the Secretary's title, he asserted no competing interest in the Bradley Tract and therefore was not an adverse claimant. Since Patchak was not seeking to quiet title between himself and the Government, the Quiet Title Act did not apply.

In rebutting the dissent and the arguments of the Government and the Gun Lake Tribe, the Court conceded that it was construing the QTA narrowly, limiting the holding solely to adverse claims against the Government. Similarly, it brushed aside the suggestion that the QTA implied that a non-adverse claimant, like Patchak, was precluded from judicial review. Finally, the Court considered whether Patchack should be viewed as an adverse claimant under the QTA because his suit challenged the viability of the QTA's “Indian lands” exception. This argument the Court found, was “not without force.” Nevertheless, it was an argument for Congress and not the Court. Under the narrow construction of the QTA, Patchak's claim fell within the APA's waiver of sovereign immunity.

---

84 Id. citing 28 U.S.C. § 2409a(a).
85 Id.
86 Id.
87 Id. It is a far different cry from abating an environmental nuisance to divesting the sovereign from title.
88 Patchak, 132 S.Ct. 2206.
89 Id.
90 Id. at 2208.
91 Id. at 2209.
92 Id.
93 Id.
94 Id.
95 Id.
II. Prudential Standing

Prudential standing is required in cases invoking the APA. In addition to the ordinary standing necessary to invoke Article III jurisdiction, a plaintiff in a lawsuit under the APA must also assert an interest which is “arguably within the zone of interests to be protected or regulated by the statute' that he says was violated.”

The Government and the Gun Lake Tribe argued that, because 25 U.S.C. § 465 authorizes property to be taken into trust “for the purpose of providing land for Indians,” the statute does not apply to the contemplated use of the property once in trust, but rather only to its acquisition. Patchak's allegations supporting standing, they maintained, only went to the use of the property and not to his allegations that the Secretary exceeded her authority in taking the Bradley Tract into trust status.

The Court disagreed, noting that the prudential standing test is not designed “to be especially demanding.” Indeed, the Court noted that Congress intended to make agency action “presumptively reviewable.” Thus, a plaintiff lacks prudential standing only when the interests claimed are so attenuated from or inconsistent with the statutory purposes that it cannot be reasonably assumed that Congress contemplated such an action.

Applying the prudential standing test to Patchak's lawsuit, the Court found the argument of the Government and the Gun Lake Tribe to be disingenuous. The Court determined the ultimate usage of trust properties to be inextricably linked to the acquisition process:

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

96 Id. at 2210.
98 Id. at 2210.
99 Id.
101 Id.
102 Id.
103 Id. at 2211.
Additionally, the Court noted, internal regulations of the Department of the Interior require the Secretary to consider the purposes for which the trust property will be used. Furthermore, when the property is not contiguous and is sought for business purposes, the regulations require the Tribal applicant to submit a plan, demonstrating the projected economic benefits from the use of the property. In the case of the Bradley Tract, that use was for gambling.

Thus, “from start to finish,” the Secretary's decision making process with regard to the Bradley Tract “involved questions of land use.” With that in mind, Patchak's claim fell within the zone of interests necessary to invoke prudential standing. Indeed, the Court openly suggested that neighbors to proposed Indian trust lands are “predictable [] challengers” to the Secretary's decision making process, casually observing that their economic, environmental or aesthetic interests fall within the regulatory ambit of § 465.

Finding no bar to the litigation under the QTA and that Patchak had prudential standing, the Court remanded the case. Patchak lived to fight another day.

Justice Sotomayor's Dissent

The sole dissenter was Justice Sotomayor. She argued that the provision in 28 U.S.C. § 2409a(a) that the Government may be named as a defendant in an action “to adjudicate a disputed title to real property in which the United States claims an interest,” was definitive. In this case, Patchak sought to do just that. However, because the right to sue does not apply to Indian trust land and

---

104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id. at 2212.
111 Id.
112 Id.
113 Id. at 2214.
Patchak sought to divest the Government of title, not to seek compensation and had no interest in the Bradley Tract, Justice Sotomayor found the QTA to bar his suit under the APA.\textsuperscript{114}

The majority ruling, Justice Sotomayor reasoned, has created the “highly implausible” result where Patchak's “aesthetic” claim may go forward, but a different plaintiff with a constitutional interest in the real estate under the due process clause remains barred by sovereign immunity.\textsuperscript{115} This anomaly, she wrote, leads to the inescapable conclusion that the majority's result would allow Patchak to maintain his suit even if he actually had some property interest in the Bradley Tract, as long as he did not plead it in his complaint.\textsuperscript{116} Pronouncing this potentiality absurd and likely to lead to mischief, Justice Sotomayor concluded that Congress could not have intended the result the Court reached.\textsuperscript{117}

Part III---The Supreme Court's Fence

A New Cause of Action

In Patchak, the Supreme Court recognized a new cause of action. While the Patchak decision is rightly seen as an extension of Carcieri, it is also something very different.\textsuperscript{118} Although both claims are premised upon 5 U. S. C. § 702, Carcieri involved litigation between two sovereign entities, a State and the government. Patchak, on the other hand involves a private right of action against the government. While the reasoning in Carcieri is certainly debatable, it seems clear that Rhode Island had legitimate state interests that it advanced as the \textit{sine qua non} for its lawsuit: tax and regulatory authority. Mr. Patchak's interests appear to be of the “not in my back yard” variety. And yet the Court found them sufficient to maintain his suit. Not only do the interests giving rise to the cause of action

\textsuperscript{114} \textit{Id.} at 2215.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 2217.
\textsuperscript{117} \textit{Id.}, Given her conclusion that the QTA applied and barred Patchak's suit, Justice Sotomayor would not have reached the prudential standing issue. \textit{Id.} at 2218.
\textsuperscript{118} Compare \textit{Addressing the Costly Administrative Burdens and Negative Impacts of the Carcieri and Patchak Decisions: Oversight Hearing Before the S. Comm. on Indian Affairs, 112th Cong. (September 13, 2012) [hereinafter Hearings] (testimony of John Echohawk, Executive Director, Native American Rights Fund) (characterizing Patchak as a Carcieri problem); with Hearings (Testimony of Colette Routel, Associate Professor, William Mitchell College of Law, at 4) (considering Patchak as a magnification of the problem created by Carcieri).
differ between Carceri and Patchak, but the relief sought is vastly different. Carceri sought to block the acquisition of trust property by the government. Patchak seeks to divest the government of title to property already held in trust for the Gun Lake Tribe, an extraordinary proposition.

Until Patchak, the only way for a private entity to challenge a trust acquisition was pursuant to 25 U.S.C. § 465 as a part of the Secretary's decision making process. Indeed, Carceri began that way, linking § 465 to the APA. With Patchak, that link has been decoupled.

Now private individuals, indeed apparently anyone, who can advance the seemingly limitless threshold of loss of aesthetic, economic or environmental qualities surrounding the real estate acquisition, can maintain standing for a Carceri action. And not just a Carceri action, for as Justice Sotomayor noted, “After today, any person may sue under the … [APA] to divest the Federal government of title to and possession of land held in trust for Indian tribes … as long as the complaint does not assert a personal interest in the land.”

By eliminating the Indian lands exception to the Quiet Title Act's sovereign immunity waiver in cases in which no property interest is claimed, the Court overturned three decades of lower Court decisions to the contrary. This upends “the widely-held understanding that once land was held in trust for the benefit of a tribe, the Quiet Title Act prevented a litigant from seeking to divest the United States of such trust title.”

A New Statute of Limitation

As Justice Sotomayor warns, the Patchak decision effectively creates a new statute of limitation for fee to trust acquisitions.

---

119 Id. (Testimony of Colette Routel, Associate Professor, William Mitchell College of Law, at 4).

120 Patchak, 132 S.Ct. 2212.

121 Hearings, supra note 118 (Testimony of Donald “Del” Laverdure, Acting Assistant Secretary---Indian Affairs, United States Department of the Interior, at 1-2) (citing Florida Dep't of Bus. Regulation v. Dept' of Interior, 768 F.2d 1248 (11th Cir. 1985); Metro. Water Dist. Of S. Cal. v. United States, 830 F.2d 139 (9th Cir. 1987); Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004)).

122 Id.

123 Patchak, 132 S.Ct. 2217.
Before the *Patchak* decision, the Secretary's decision to place a parcel of land into trust only could be challenged *prior* to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisition process which ensured that interested parties had an opportunity to seek judicial review. It was the Department's general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department's regulations. This allowed all interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed. Following the Patchak decision, tribes, Indian homeowners, neighboring communities, and the Department will be forced to wait for six years or more to achieve that finality.\(^{124}\)

Thus, prior to the decision in *Patchak*, objections to the fee to trust acquisition process were governed by the Department's own administrative process with a thirty day statute of limitations.\(^{125}\) Now, such objections enjoy the general six year statute of limitations found in 28 U.S.C. § 2401.\(^{126}\)

Such a lengthy new statute of limitations injects incredible uncertainty into what was once a fairly straightforward but already lengthy process.

Certainty of title provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors and to promote tribal economies.\(^{127}\)

**The Uncertainty Spreads**

The confusion extends into commercial relations, as well. Financing has never been easy in Indian Country. *Patchak* disrupts it even more.\(^{128}\) The status of Indian Tribes as extra-Constitutional,

\(^{124}\) *Hearings*, supra note 118 (Testimony of Donald “Del” Laverdure, Acting Assistant Secretary---Indian Affairs, United States Department of the Interior, at 5) (emphasis in original).

\(^{125}\) 25 CFR 151.12(b).

\(^{126}\) "Providing “every civil action commenced the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”"

\(^{127}\) *Hearings*, supra note 118 (Testimony of Donald “Del” Laverdure, Acting Assistant Secretary---Indian Affairs, United States Department of the Interior, at 5).

\(^{128}\) "This makes lending to tribal borrowers much, much more expensive in terms of interest rates, and maybe eliminates the ability of many tribes to borrow money until the six years has past, Fletcher said.” Gale Coursey Toensing and Rob Capriccioso, *From Carcieri to Worse*, *Indian Country Today*, July 18, 2012, at 25 (Quoting Professor Matthew L.M. Fletcher).
dependent sovereign nations with commensurate immunity introduces a level of risk that almost always precludes an ordinary business model for a development project, including a casino. Historically, this has left Tribes to fend for themselves with non-traditional financing at high interest rates to initiate business plans, purchase land and negotiate the administrative fee to trust process. Once Tribal land is held in trust by the United States, however, credit markets become more receptive and “tribes were able to access the bond market to obtain the capital needed ...” Finally, after successful operations over time, “tribes could seek to refinance their debt through conventional bank loans.” Thus, as risk diminished, Tribes' access to cheaper capital increased. The Patchak decision turns this process on its head, “because it allows the largest risk (land status and jurisdiction) to linger for years following the Secretary's decision.” While the pre-existing process was cumbersome and expensive, at least it was understood. In the wake of Patchak, the process is more cumbersome, doubtless more expensive and certainly more unclear.

This unpredictability is but a part of the blow to the government's trust responsibilities. In a series of decisions over the last decade, the Supreme Court has demonstrated a crabbed and narrow view of the Government's trust obligations to the Indian Tribes. In particular, the Court has proven to be very suspicious of Tribes who are attempting to reconstitute some part of their original aboriginal land outside of an existing reservation. The Court offers varying reasons for its doubts as to this process, including the passage of time and, ironically, the need for certainty as well as the dubious

---

129 Hearings, supra note 118 (Testimony of Colette Routel, Associate Professor, William Mitchell College of Law, at 5)
130 Id.
131 Id.
132 Id.
136 City of Sherrill, New York, 544 U.S. 197.
demarcation of the Indian Reorganization Act.\textsuperscript{137} This vision carves out a subset of Johnny come lately have-not Tribes from the lucky originals.\textsuperscript{138} In the Supreme Court's departure from previous national practice, Tribes that have lost significant portions of their land (and most have) now face a significant roadblock in their efforts to expand their trust lands. The problems are worse for those Tribes who were either marginalized early during the Contact Era or simply ignored so that they did not come under the authority of the IRA.

But \textit{Patchak} reveals that the Court is also quite concerned with the expansion of Indian gaming. While Justice Sotomayor's dissent points out that the ramifications of the Court's decision are extremely broad, Justice Kagan's majority Opinion focuses on gambling.\textsuperscript{139} The marriage of gambling to an off-reservation property perhaps can be said to have propelled the decision.\textsuperscript{140} The reader of the Opinion is left wondering whether the result would have been the same had the economic development in question had been a Super WalMart or a sawmill. Ironically, after \textit{Patchak} non-gaming commercial development in the fee to trust process is as at risk as gambling ventures.

The threats to Indian gaming created by the decision reach beyond neighbor disputes into the world of international gaming. “Antitribal gaming interests can now file any old frivolous lawsuit to challenge trust acquisitions within six years of the acquisition. … Any--and I do mean any--antitribal gaming interest [can now sue].”\textsuperscript{141} Tribes whose off-reservation gaming operations might siphon off corporate profits are now squarely in the cross hairs of litigation. The same is true for Tribes whose

\textsuperscript{137} 25 U.S.C. § 461 \textit{et seq}.
\textsuperscript{138} \textit{Carceri}, 535 U.S. 379.
\textsuperscript{139} \textit{Patchak}, 132 S.Ct. 2203 note 1, 2210, 2211.
\textsuperscript{140} On the other hand, it may be that the Court is troubled by the fact that 
  
  [a]t the time the IGRA was enacted, congress contemplated that most tribal casinos would be owned and operated by tribes on reservation lands. At the very least, the alternative seemed unlikely. To oversimplify, the idea that a tribe or tribal member could simply purchase land in the middle of New York City or Miami and set up a casino seemed both hugely undesirable and highly unfair to non-Indian city and state residents, and would put commercial gaming interests at a massive competitive disadvantage.


\textsuperscript{141} Gale Coursey Toensing and Rob Capriccioso, \textit{From Carceri to Worse}, \textit{Indian Country Today}, July 18, 2012, at 25 (Quoting Professor Matthew L.M. Fletcher).
proposed operations might affect other gaming Tribes.\textsuperscript{142}

According to Fitch Ratings, the following Tribes have notable potential projects that could be impacted by \textit{Patchak}:

1) The Cowlitz Tribe in Washington;

2) The Shinnecock Tribe in New York;

3) The Mashpee Wampanoag Tribe in Massachusetts; and

4) The Graton Rancheria and The North Fork Rancheria of Mono Indians in California.\textsuperscript{143}

The Confederated Tribes of the Grand Ronde Community of Oregon have already sued the Cowlitz Tribe in an attempt to block a 134,140 square foot casino and 250 room hotel.\textsuperscript{144} Clark County and the City of Vancouver, WA have joined the efforts to vacate the land acquisition.\textsuperscript{145}

The Shinnecock Tribe's federal recognition process was “bankrolled” by “Gateway Casino Resorts, the Detroit-based developer” … “with the aim of opening casinos in the state.”\textsuperscript{146} At risk is a primary facility which Gateway projects will generate annual gaming revenue of one billion dollars.\textsuperscript{147}

On July 30, 2012, Governor Deval Patrick of Massachusetts signed a “Resolve Relating To The Tribal-State Compact Between The Mashpee Wampanoag Tribe And The Commonwealth Of Massachusetts.”\textsuperscript{148} The agreement would funnel 21.5\% of gross gaming revenue to the Commonwealth

\begin{footnotesize}
\begin{itemize}
\item[-] \textsuperscript{143} Press Release, Fitch Ratings, \textit{Supreme Court Decision in Patchak Case Has Mixed Credit Implications for Gaming Sector}, \textit{Business Wire}, (June 19, 2012, 6:19 PM), (expressing uncertainty as to when the statute of limitations begins to run) http://www.businesswire.com/news/home/20120619007051/en/Fitch-Supreme-Court-Decision-Patchak-Case-Mixed.
\item[-] \textsuperscript{144} See note 142, infra.
\item[-] \textsuperscript{145} Id.
\item[-] \textsuperscript{146} Id.
\item[-] \textsuperscript{148} Governor Deval Patrick, Press Release, \textit{Governor Patrick Signs Gaming Compact with Mashpee Wampanoag Tribe}, July 30, 2012. \textit{But see} Letter to Governor Patrick, Kevin K. Washburn, Assistant Secretary for Indian Affairs, October 12,
\end{itemize}
\end{footnotesize}
over fifteen years of operations of a proposed casino facility in Taunton, MA. The process is a risk because the land has not yet been taken into trust.

In a June 21, 2012 letter to nearby residents, Station Casinos, the Las Vegas gaming giant, reported confidently that construction of the Graton Rancheria Resort and Casino Project was underway. However, “opponents of the casino are continuing their fight.” One opponent, Pastor Chip Worthington, leader of a group named Stop the Casino 101 Coalition, trumpeted the Patchak decision in a press release. “Said Worthington, 'When you remove federal protection, the land comes under law once again, and in states like Michigan and here in California, Class III casinos are illegal on state-governed land…Patchak has the potential to kill virtually every tribal casino in California.'”

Governor Jerry Brown of California approved the proposal of the North Fork Rancheria of Mono Indians to build a casino on Highway 99 in Madera County, 36 miles from the reservation border. Governor Brown's August 31, 2012 action only begins the land acquisition process for the Station Casinos project. The Chukchansi Tribe, who fear the competition with their own operation, and a consortium of local churches immediately threatened litigation.

In Federal Indian Gaming Law, this fencing in by the Supreme Court marks the almost unlimited right of “not in my backyard” locals or competitors to sue the Government for the divestiture of Indian trust lands. When compared with an earlier ruling by the Supreme Court that Indian Tribes do not have the authority to sue a State to enforce statutory rights contained within the IGRA, a true paradox is created---Tribes are foreclosed from suing States to protect their IGRA rights but are subject to 2012 (finding that the Compact is in violation of the IGRA and disapproving it).

---

149 Id.
150 Id.
151 Letter from Bob Finch, Senior Vice President of Native American Operations, Station Casinos, Subject: Graton Rancheria Resort and Casino Project (June 21, 2012) (available at: http://www.gratoneis.com/Project_Update_Letter.pdf)
153 Id.
154 Id.
156 Id.
157 Id.
to being sued by anyone who objects to a proposed gaming operation.\textsuperscript{158} Seen in this light, Indian Gaming has never been more restricted than it is today.

**Conclusion**

Indian gaming seems beset on all sides in the 21\textsuperscript{st} Century, by market saturation\textsuperscript{159}, internet gambling\textsuperscript{160} and incompetence in the face of the Great Recession.\textsuperscript{161} However, these factors hemming in Indian gaming are venture related factors and can be corrected by the market or through regulation. The Supreme Court's restriction of Indian gaming is something more fundamental, as it impacts the existence, sovereignty and destiny of the Tribes.

The Supreme Court is, by design, the slowest of the branches of government to adapt to change. One commentator has suggested that, as a result of this, the Court remains stuck in an earlier time of Federal Indian policy---the Termination Era, beginning in the late 1940's, where Federal recognition of many tribes was ended and a formal push to assimilate Indians into the melting pot of America was the official policy of the United States until it ended in the Nixon administration.\textsuperscript{162} On the other hand, Tribal nations have moved forward from the Termination Era, into a Self-Determination Era, and, according to some commentators, now into a new era of nation building.\textsuperscript{163} The Executive Branch has tried to go along, but continues to have its Department of the Interior rule making authority stymied by Supreme Court fiat.


\textsuperscript{161} Corina Rocha Pandeli, *When the Chips are Down: Do Indian Tribes with Insolvent Gaming Operations Have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?*, 2 UNLV GAMING LAW REVIEW 255 (2012), note 5.

\textsuperscript{162} Kevin Sobel-Read, *Still Punching Holes in Tribal Sovereignty: How Modern Supreme Court Policy is to Indian Jurisdiction what Allotment was to Tribal Land* (Fall, 2007) (unpublished paper, on file with author). Perhaps the Court is only stuck in 1988, where the possibility of off-reservation gaming “appeared wildly unrealistic in terms of state public policy.” Steven Andrew Light and Kathryn R.L. Land, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 437 (2009).

If this theory is true, then only the plenary authority of Congressional action can reverse the
damage to Indian gaming inflicted by the *Patchak* decision. Indeed, in the absence of Congressional
action, the Supreme Court's decision is a kind of legislating, and the Court has, once again, publicly
invited Congress to step in, if it does not approve.164 Congress should accept the Court's offer.

The Senate Committee on Indian Affairs conducted a hearing on September 13, 2012,
“Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak*
Decisions.” S. 676, a bill introduced in the 112th Congress and “unanimously approved by the Senate
Committee on Indian Affairs[,]” would have removed the impediment created by *Carcieri*.165 The bill
would make the IRA applicable to all federally recognized Indian Tribes, regardless of when they were
recognized. Additionally, the bill would ratify and confirm all land to trust decisions made by the
Secretary of the Interior pursuant to the IRA for any Indian Tribe which was federally recognized at the
time of the action. Similarly, H.R. 1234, would have also “fixed” the *Carcieri* decision and ratified and
confirmed prior land into trust decisions.166 H.R. 1291 was more of a technical amendment, did not
retroactively approve the Secretary's actions, and was complicated by opposition from within Indian
Country regarding limitations for Alaska natives.167

H.R. 1234 and H.R. 1291 have both been reintroduced in the 113th Congress as H.R. 666 and
H.R. 279, respectively. Congress should approve H.R. 666.

However, none of these bills address the broad concerns warned of by Justice Sotomayor. If the
Congress envisions a trust relationship with the Indian Tribes other than the Supreme Court's, it must
act broadly, not narrowly, in defining that responsibility with specificity. In particular, Congress should
use its plenary power over Indian affairs to declare that Indian Tribes may reconstitute their lost lands
and may build gaming facilities on them. To do otherwise is to continue to cede this sovereignty

---

164 *Patchak*, 132 S.Ct. 2209.
165 *Hearings*, supra note 118, (Testimony of President Jefferson Keel of the National Congress of American Indians).
166 *Id.*
167 *Id.*
defining aspect of Federal Indian policy to the Supreme Court.