

A REGULATORY QUICK FIX FOR  
*CARCIERI V. SALAZAR*:  
HOW THE DEPARTMENT OF INTERIOR  
CAN INVOKE AN ALTERNATIVE SOURCE  
OF EXISTING STATUTORY AUTHORITY  
TO OVERCOME AN ADVERSE JUDGMENT  
UNDER THE *CHEVRON* DOCTRINE

HOWARD L. HIGHLAND\*

TABLE OF CONTENTS

Introduction.....	934
I. Relevant Case History of <i>Carcieri v. Salazar</i> .....	939
II. Regulatory “Quick Fix” of <i>Carcieri</i> : Invoking Existing Statutes and Federal Regulations to Validate Fee-into-Trust Transactions on Behalf of Tribes Acknowledged After 1934 .....	942
A. 25 U.S.C. §§ 2 and 9 Authorize the Secretary to Make Land-into-Trust Acquisitions for Tribes Not Under Federal Jurisdiction in 1934 Under 25 C.F.R. Part 151 and 25 C.F.R. Part 83.....	943
B. The Supreme Court’s Ruling in <i>Carcieri</i> Affects the IRA Alone and Not the Secretary’s Authority Under 25 U.S.C. §§ 2 and 9.....	947

---

\* The Author would like to give special thanks to Dean Mark Grunewald, Dean Mary Natkin, Professor Brian Murchison, and Professor Al Carr for their contributions to his knowledge of federal administrative law, and for their encouragement to pursue his specific research interests within this enormous field of study.

1. The Indian Canons of Construction Severely Restrict Any Interpretation of 25 U.S.C. § 479 as a Limit to the Secretary’s Power to Promulgate Legislative Regulations Under 25 U.S.C. §§ 2 and 9.....	948
2. Congressional Policy Prefers that the Secretary Have Exclusive Authority to Acknowledge Previously Unrecognized Tribes and Grant Them Federal Benefits.....	949
III. Pandora’s Box of Other Administrative Law Issues: Addressing Concerns Arising from <i>Chenery II</i> , the Nondelegation Doctrine, and the Intersection of the Indian Canons of Construction with the <i>Chevron</i> Doctrine .....	951
A. Problem One: Taking a Second Bite at the Apple .....	952
B. Problem Two: The Nondelegation Challenge to 25 U.S.C. §§ 2 and 9.....	953
C. Problem Three: Shedding Light on the Intersection of the Indian Canons of Construction and the <i>Chevron</i> Doctrine.....	954
Conclusion .....	959

## INTRODUCTION

At the Solicitor’s Indian Law Practitioner’s Conference on March 3, 2011, Secretary of the Interior Ken Salazar reiterated his desire for a “legislative fix” for the Supreme Court opinion in *Carcieri v. Salazar*.<sup>1</sup> In *Carcieri*, the Court interpreted the Indian Reorganization Act of 1934 (IRA)<sup>2</sup> to effectuate a perverse distinction between Indian tribes under federal jurisdiction in June 1934 and Indian tribes whose relationship with the federal government was not established until after June 1934.<sup>3</sup> Applying step one of the doctrine articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which inquires “whether Congress has directly

---

1. 129 S. Ct. 1058 (2009). Ken Salazar, Sec’y of the Interior, Address at the Solicitor’s Indian Law Practitioner’s Conference (Mar. 3, 2011); *see also* News Release, U.S. Dep’t of the Interior, Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), <http://www.bia.gov/idc/groups/public/documents/text/idc012558.pdf> (calling the *Carcieri* decision “devastating”).

2. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

3. *See Carcieri*, 129 S. Ct. at 1069–70 (Breyer, J., concurring) (“[A] tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time . . . [however,] nothing in the briefs . . . suggests the Narragansett Tribe could prevail . . . on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional.”).

spoken to the precise question at issue,”<sup>4</sup> the majority opinion of Justice Thomas declared that “the term ‘now under Federal jurisdiction’ in [the IRA] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>5</sup> As a result, § 5 of the IRA, codified at 25 U.S.C. § 465, only authorizes the Secretary of the Interior to “provid[e] land for Indians” whose tribe fits within the IRA’s definition of an “Indian,” codified at 25 U.S.C. § 479: “The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any *recognized Indian tribe now under Federal jurisdiction*.”<sup>6</sup> A cloud now hangs over any land-into-trust transactions that the Secretary has made for Indian tribes which were not federally recognized until after 1934, and which are now unable to prove that their “post-1934 recognition [was granted] on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional.”<sup>7</sup>

The cries for a legislative fix began to pour out as soon as the *Carcieri* decision was delivered.<sup>8</sup> A slew of proposed reform bills have made their way into the public discussion of federal land-into-trust policies.<sup>9</sup> And yet, because the Department of the Interior’s land-into-trust acquisitions for Indian tribes are “not without passionate opposition,”<sup>10</sup> Congress is wading slowly into this potentially explosive controversy.<sup>11</sup> While Congress hesitates to fix *Carcieri*, the Secretary continues to contemplate whether to promulgate a new regulation to mitigate the decision’s harshness. Unfortunately, “a proposed regulation being considered by the Obama

---

4. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

5. *Carcieri*, 129 S. Ct. at 1068.

6. 25 U.S.C. §§ 465, 479 (emphasis added).

7. *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring).

8. See Heidi McNeil Staudenmaier & Ruth K. Khalsa, *A Post-Carcieri Vocabulary Exercise: What if “Now” Really Means “Then”?* 1 UNLV GAMING L.J. 39, 53–66 (2010) (summarizing legislative proposals from the House Committee on Natural Resources hearing on April 1, 2009 and the Senate Committee on Indian Affairs hearing on May 21, 2009).

9. See, e.g., G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 594–619 (2009) (calling for the United States to become a leader in “implementation of human rights on a global scale” as it develops its legislative fix of *Carcieri*). See generally Amanda D. Hettler, Note, *Beyond a Carcieri Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377 (2011) (calling for Congress to take this opportunity to undertake fundamental legislative reforms to the land-into-trust process).

10. Hettler, *supra* note 9, at 1389.

11. See Staudenmaier & Khalsa, *supra* note 8, at 70.

administration . . . is generally disfavored by tribal leadership, owing largely to the perception that a regulatory fix will delay, or even halt, progress towards a legislative remedy, which is regarded as a more permanent measure.”<sup>12</sup>

Unlike older proposals, which presume the need for new legislation or regulations to fix *Carcieri*, this Recent Development argues that existing statutes and regulations already authorize the Secretary to overcome the effects of *Carcieri*. Even though the IRA no longer authorizes the Secretary to take land into trust for Indian tribes not under federal jurisdiction in June 1934, the Secretary’s fee-into-trust regulations under 25 C.F.R. Part 151 rest on several other pillars of statutory authority. 25 U.S.C. §§ 2 and 9 are the strongest alternative sources of statutory authority under which the Secretary may claim delegated authority for fee-into-trust acquisitions on behalf of Indian tribes not under federal jurisdiction in June 1934.<sup>13</sup> The Supreme Court has already recognized that 25 U.S.C. §§ 2 and 9 vest the Secretary with the power to

formulat[e] policy and [to make] rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the [Bureau of Indian Affairs (BIA)].<sup>14</sup>

Under the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 constitute an explicit delegation of authority to the Secretary to promulgate “legislative regulations [which] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>15</sup> Such legislative regulations are thus entitled to the maximum amount of *Chevron* deference.

25 U.S.C. §§ 2 and 9 also form the statutory basis for 25 C.F.R. Part 83, which codifies the federal administrative process for the acknowledgment of Indian tribes previously lacking federal recognition.<sup>16</sup> Because 25 C.F.R. § 83.12(a) entitles acknowledged tribes “the privileges and immunities available to other federally recognized historic tribes,” and renders them “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes,”<sup>17</sup> federal acknowledgment under 25 C.F.R. Part 83 ought to include the benefits available to tribes

---

12. *Id.* at 69 (footnote omitted).

13. 25 U.S.C. §§ 2, 9 (2006).

14. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (footnotes omitted).

15. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

16. 25 C.F.R. §§ 83.1–83.13 (2011).

17. *Id.* § 83.12.

under 25 C.F.R. Part 151. Accordingly, this Recent Development urges that the ruling in *Carcieri* does not prohibit the Secretary from asserting that he has always held statutory authority under 25 U.S.C. §§ 2 and 9 to transfer land into trust for Indian tribes acknowledged under 25 C.F.R. Part 83.<sup>18</sup> Although not every tribe federally recognized after 1934 was given status under 25 C.F.R. Part 83,<sup>19</sup> the regulatory quick fix proposed in this paper would minimize the devastating consequences of *Carcieri* while a legislative fix stalls in Congress.

This Recent Development is divided into three Parts. Part I outlines the case history of *Carcieri v. Salazar*, which is relevant to the proposed regulatory quick fix for *Carcieri*. Part II explains the legal reasoning behind the proposed *Carcieri* quick fix. Briefly restated, Congress expressly delegated authority under 25 U.S.C. §§ 2 and 9 for the Secretary to establish a process under 25 C.F.R. Part 83, which has brought many tribes not recognized in 1934 under federal jurisdiction, entitling them to receive any benefits and services which the IRA granted to tribes that were under federal jurisdiction in 1934 including land-into-trust transfers under 25 C.F.R. Part 151. Under the *Chevron* doctrine, the Secretary is owed the greatest amount of administrative deference possible when the Secretary invokes authority under 25 U.S.C. §§ 2 and 9. These statutory provisions are explicit delegations from Congress for the Secretary to promulgate legislative regulations, which are given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>20</sup> Nothing in *Carcieri* or in the IRA prevents the Secretary from exercising authority under 25 U.S.C. §§ 2 and 9 to make land-into-trust acquisitions under 25 C.F.R. Part 151 for tribes acknowledged under 25 C.F.R. Part 83.

Part III addresses three collateral issues within federal administrative law jurisprudence that the *Carcieri* quick fix raises. Part III.A anticipates that when an administrative agency offers an alternative justification to perform an action previously invalidated by a federal court, the agency must be prepared for the court’s inevitable perception that such a rejustification is

---

18. Cf. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947) (upholding the validity of an agency’s ruling, which was previously declared ultra vires and subsequently re-justified based on the agency’s legitimate authority).

19. See, e.g., Staudenmaier & Khalsa, *supra* note 8, at 67 (summarizing the legal challenge facing Fond du Lac Band of Minnesota Chippewa Tribe Indians based on government allegations that, because their Constitution and Charter were approved in 1936 and 1937, respectively, the tribe lacks proof of earlier existence under federal jurisdiction as *Carcieri* requires).

20. *Chevron*, 467 U.S. at 844.

“a ‘*post hoc* rationalization’ and thus must be viewed critically.”<sup>21</sup> Secondly, the explicit delegation of power to the Secretary under 25 U.S.C. §§ 2 and 9 necessitates discussion in Part III.B concerning the constitutional authority of Congress to delegate its plenary power over Indian affairs almost entirely to a federal agency. As Part III.B indicates, even though the nondelegation doctrine arose in the early twentieth century to invalidate statutes as broadly phrased as 25 U.S.C. §§ 2 and 9, statutes directed toward Indian tribes are an exception to traditional nondelegation analysis. Since the nineteenth century, the “avowed solicitude of the Federal Government for the welfare of its Indian wards”<sup>22</sup> has supplied an inherent intelligible principle to every statute directed toward Indian tribes. Furthermore, the Indian canons of construction, which “are rooted in the unique trust relationship between the United States and the Indians,”<sup>23</sup> require that any “doubtful [statutory] expressions . . . are to be resolved in favor” of Indian tribes.<sup>24</sup>

Finally, Part III.C describes how the use of 25 U.S.C. §§ 2 and 9 in the proposed *Carcieri* quick fix sheds light on our understanding of the relationship between the *Chevron* doctrine and the Indian canons of construction. In response to the legitimate criticism that “competing versions of Step One [and] conflicting lines of cases [have made] the application of the *Chevron* doctrine . . . highly unpredictable,”<sup>25</sup> Part III.C first re-conceptualizes *Chevron*’s two-step inquiry as a quasi-prudential doctrine.<sup>26</sup> Step one preserves judicial use of the “traditional tools of statutory construction”—whatever those may be<sup>27</sup>—to discern “whether Congress has directly spoken to the precise question at issue”;<sup>28</sup> whereas step two functions like a prudential doctrine, to the extent that the *Chevron*

---

21. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

22. *United States ex rel. Hualpai Indians of Ariz. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

23. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985).

24. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

25. Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010).

26. Cf. Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (making an argument for the prudential not mandatory nature of *Chevron*, and summarizing the view of a mandatory rule).

27. See Beermann, *supra* note 25, at 817–22 (examining four different perspectives on the permissible tools of statutory construction at *Chevron* step one: the “original directly spoken *Chevron*,” the “traditional tools *Chevron*,” the “plain meaning *Chevron*,” and the “extraordinary cases *Chevron*”).

28. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

doctrine obliges a federal court to defer to a reasonable administrative interpretation, and consequently narrows the range of justiciable challenges to a federal agency's statutory authority. Part III.C concludes that there can be no one-size-fits-all approach to the use of the Indian canons of construction when the *Chevron* doctrine applies. Even though the Indian canons of construction typically apply at *Chevron* step one alongside the "traditional tools of statutory construction,"<sup>29</sup> a federal agency cannot dissociate itself from any fiduciary obligations of the United States to Indian tribes simply because it has convinced a federal court to proceed to *Chevron* step two.

### I. RELEVANT CASE HISTORY OF *CARCIERI V. SALAZAR*

The Narragansett Tribe formally entered into relations with the federal government of the United States in 1983, when the Secretary acknowledged the tribe under 25 C.F.R. Part 83.<sup>30</sup> In 1991, the Narragansett purchased thirty-one acres of land in Rhode Island, which would become the center of controversy in the *Carcieri* litigation.<sup>31</sup> When the Secretary agreed in 1998 to convert this thirty-one acre parcel into federal land held in trust for the Narragansett under § 5 of the IRA,<sup>32</sup> the State of Rhode Island, Governor Donald L. Carcieri, and the Town of Charlestown, Rhode Island challenged the taking in federal court, on the grounds that the Secretary exceeded her statutory authority under the IRA.<sup>33</sup>

At trial and on appeal, the Secretary defended her authority to acquire land on behalf of the Narragansett under 25 U.S.C. § 465.<sup>34</sup> In reply, Rhode Island specifically countered that 25 U.S.C. § 465 cannot apply to

---

29. *Id.* at 843 n.9.

30. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 2, 1983).

31. See Brief for Petitioner Donald L. Carcieri at 9, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526).

32. See *id.* at 10.

33. See *id.* The other issues raised by the plaintiffs both in trial and on appeal were ultimately not dispositive to the outcome of the case.

34. Under 25 U.S.C. § 465 (2006):

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

the Narragansett because the definition of *Indian* under 25 U.S.C. § 479 prevents the application of the IRA to tribes not recognized in June 1934:

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation . . . .<sup>35</sup>

The Secretary rejoined that her interpretation of 25 U.S.C. § 479 was owed deference under *Chevron* step two, which mandates that when “the legislative delegation to an agency on a particular question is implicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>36</sup> With respect to the phrase “any recognized Indian tribe now under Federal jurisdiction,” the Secretary asserted that “‘now’ can mean either at the time of a statute’s enactment or at the time of its application.”<sup>37</sup> The Secretary thus claimed an implicit delegation to place land into trust for the Narragansett under 25 U.S.C. § 465. Rhode Island, however, reiterated that the case ought to be disposed at *Chevron* step one on grounds that “Congress has directly spoken to the precise question at issue,”<sup>38</sup> and unambiguously intended the term *now* in 25 U.S.C. § 479 to refer to the date that the IRA was enacted in 1934.<sup>39</sup>

The U.S. District Court for Rhode Island and the U.S. Court of Appeals for the First Circuit upheld the Secretary’s taking of the thirty-one acre parcel into trust on behalf of the Narragansett.<sup>40</sup> Citing *Chevron*, the First Circuit deferred to the Secretary’s interpretation of 25 U.S.C. § 479 as a reasonable construction of an ambiguous term.<sup>41</sup> The Supreme Court, however, reversed the First Circuit. Writing for the majority, Justice

---

35. 25 U.S.C. § 479 (emphasis added).

36. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

37. Brief for Respondents at 14, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526).

38. *Chevron*, 467 U.S. at 842.

39. See Brief for Petitioner Donald L. Carcieri at 17–29, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526) (arguing that Congress intentionally chose to bind the authority of the Secretary through its choice of words).

40. *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003), *aff’d sub nom.* *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), *rev’d sub nom.* *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

41. See *Kempthorne*, 497 F.3d at 22 (concluding that the Secretary’s interpretation is entitled to deference under the *Chevron* doctrine because the Secretary’s position has not been inconsistent or arbitrary).

Thomas held that “the term ‘now under Federal jurisdiction’ in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>42</sup> Justices Stevens, Souter, and Ginsburg dissented. The most notable point of dissent was raised by Justice Souter, who urged a remand for reconsideration of an issue not raised previously:

The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, “any recognized Indian tribe now under Federal jurisdiction.” Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.<sup>43</sup>

Accordingly, Justices Souter and Ginsburg voted to remand the case and afford “the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the ‘jurisdiction’ phrase that might favor their position here.”<sup>44</sup> As Justice Breyer’s concurring opinion noted, “The statute, after all, imposes no time limit upon recognition.”<sup>45</sup> The majority and a concurring Justice Breyer, however, believed that the evidence on the record demonstrated that the Narragansett, which did not receive federal acknowledgment until 1983,<sup>46</sup> were expressly excluded from federal jurisdiction in 1934.<sup>47</sup>

In response to the Supreme Court decision in *Carcieri*, the Secretary has asked Congress to enact corrective legislation of the Supreme Court majority’s ruling. Although both houses of Congress were quick to hold hearings in 2009 to discuss their options to “fix” *Carcieri*,<sup>48</sup> more than two years have passed without congressional action. No legislative fix appears imminent, especially since members of Congress intend to consider “the views of the states, counties and cities who advanced this case all the way to

---

42. *Carcieri*, 129 S. Ct. at 1068.

43. *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).

44. *Id.*

45. *Id.* at 1070 (Breyer, J., concurring).

46. See Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 2, 1983) (announcing formal acknowledgement of the Narragansett Tribe).

47. See *Carcieri*, 129 S. Ct. at 1068 (holding that the Narragansett Tribe was not included in the statute in 1934 upon further construction). Breyer concurred with the majority, rather than joining the dissent in urging a remand for consideration of this issue, on grounds that “both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934.” *Id.* at 1070–71 (Breyer, J., concurring).

48. See Staudenmaier & Khalsa, *supra* note 8, at 53–66 (providing a summary of the House and Senate hearings triggered by the *Carcieri* decision).

the United States Supreme Court where their legal arguments prevailed.”<sup>49</sup> In the meantime, the Department has contemplated whether to promulgate a new regulation addressing the decision in *Carciere*. Such a resolution is generally disfavored, however, as it could delay (and perhaps even diminish) the possibility of a more permanent legislative solution.<sup>50</sup> As none of the available options for new legislation or regulations appear to be forthcoming, Part II of this Recent Development will expound how the Secretary might overcome the consequences of *Carciere* without having to wait either for an Act of Congress or for public comments on proposed regulatory reforms.

## II. REGULATORY “QUICK FIX” OF *CARCIERE*: INVOKING EXISTING STATUTES AND FEDERAL REGULATIONS TO VALIDATE FEE-INTO-TRUST TRANSACTIONS ON BEHALF OF TRIBES ACKNOWLEDGED AFTER 1934

Even though the Secretary may no longer claim authority under the IRA to purchase land for tribes that were not under federal jurisdiction in 1934, the Department’s regulations for land-into-trust acquisitions on behalf of tribes, codified at 25 C.F.R. Part 151,<sup>51</sup> are authorized under numerous statutes. Accordingly, the Secretary can rely on existing statutory authority other than the IRA to legitimize land-into-trust transactions for tribes not under federal jurisdiction in 1934. The *Carciere* quick fix would enable the Secretary to immediately defend his power to convert land-into-trust for tribes excluded from the IRA without any need to promulgate new regulations or to await corrective legislation.

Among the statutes which undergird 25 C.F.R. Part 151, 25 U.S.C. §§ 2 and 9 offer the strongest authority for the Secretary to convert fee-into-trust for tribes not under federal jurisdiction “when the IRA was enacted in 1934.”<sup>52</sup> According to the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 have been classified as “an express delegation of authority to the agency to elucidate . . . legislative regulations [which] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the

---

49. *Id.* at 70 (quoting *To Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes: Hearing on H.R. 3697 and H.R. 3742 Before the H. Comm. on Natural Res.*, 111th Cong. 3 (2009) (statement of Rep. Doc Hastings, Ranking Republican Member, H. Comm. on Natural Res.)).

50. *See id.* at 69 (summarizing the tribal position in the wake of *Carciere*).

51. 25 C.F.R. §§ 151.1–151.8 (2011).

52. *Carciere*, 129 S. Ct. at 1068; *see also* 25 U.S.C. §§ 2, 9 (2006).

statute.”<sup>53</sup> Furthermore, 25 U.S.C. §§ 2 and 9 also undergird 25 C.F.R. Part 83, which enables the Secretary to grant federal acknowledgment to previously unrecognized tribes. 25 C.F.R. Part 83 specifically entitles tribes that obtain acknowledgment under the federal administrative process “to the privileges and immunities available to other federally recognized historic tribes,” and renders them “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes.”<sup>54</sup>

The question arises whether the interpretation of 25 U.S.C. § 479 in *Carcieri* operates to restrict the Secretary from extending such “services and benefits” to tribes acknowledged under 25 C.F.R. Part 83. Conspicuously, the Indian canons of construction make it difficult for the federal Judiciary to interpret 25 U.S.C. § 479 as an unambiguous limitation upon the Secretary’s authority under 25 U.S.C. §§ 2 and 9 to extend the benefits of 25 C.F.R. Part 151 to tribes acknowledged under 25 C.F.R. Part 83. Quite the opposite, since Congress ended the federal tradition of treaty making with Indian tribes in 1871, Congress has continued to diminish its role in the establishment of government-to-government relationships between the United States and newly recognized Indian tribes. Since the Department promulgated 25 C.F.R. Part 83 in 1978, Congress has routinely avoided recognition bills for previously unrecognized tribes and emphasized its preference that the Department alone handle the federal acknowledgment process for unrecognized tribes under 25 C.F.R. Part 83, pursuant to 25 U.S.C. §§ 2 and 9.<sup>55</sup>

*A. 25 U.S.C. §§ 2 and 9 Authorize the Secretary to Make Land-into-Trust Acquisitions for Tribes Not Under Federal Jurisdiction in 1934 Under 25 C.F.R. Part 151 and 25 C.F.R. Part 83*

Enacted in 1832, 25 U.S.C. § 2 vests the Secretary with the plenary power to regulate Indian tribes:

---

53. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *see also Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (announcing the principle that the “power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.” (citing 25 U.S.C. §§ 2, 9)).

54. 25 C.F.R. § 83.12(a).

55. *See* discussion *infra* Part II.B.2.

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.<sup>56</sup>

25 U.S.C. § 9, enacted in 1834, further empowers the Executive to have the widest latitude in administering statutes relating to Indian affairs:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.<sup>57</sup>

The symbiotic relationship between 25 U.S.C. §§ 2 and 9 forms the quintessential legislative gap *explicitly* left by Congress for a federal agency to fill. In *Morton v. Ruiz*, the Court first recognized that:

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies [under 25 U.S.C. § 9], and the power has been given explicitly to the Secretary and his delegates at the BIA [under 25 U.S.C. § 2].<sup>58</sup>

Whenever 25 U.S.C. §§ 2 and 9 supply the Secretary's statutory authority to perform an action, the holding in *Morton v. Ruiz* compels the federal Judiciary to afford the Secretary the maximum amount of deference possible under the *Chevron* doctrine. In fact, Justice Stevens's opinion in *Chevron* incorporates the reasoning of *Morton v. Ruiz* directly into its explanation of when deference is owed at step two:

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."* If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a

---

56. 25 U.S.C. § 2; *see* Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, 564.

57. 25 U.S.C. § 9; *see* Act of June 30, 1834, ch. 162, § 17, 4 Stat. 735, 738.

58. *Ruiz*, 415 U.S. at 231–32 & nn.25–26 (1974).

case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.<sup>59</sup>

The Supreme Court has recognized that the combination of 25 U.S.C. §§ 2 and 9 reflects the intent of Congress: “In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given *explicitly* to the Secretary and his delegates at the BIA.”<sup>60</sup> Under the *Chevron* framework, 25 U.S.C. §§ 2 and 9 amount to an explicit delegation to the Secretary of the power to promulgate legislative regulations, which are entitled to the maximum amount of deference: “If Congress has explicitly left a gap for the agency to fill . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>61</sup>

25 C.F.R. Part 151, which regulates the Secretary’s “acquisition of land by the United States in trust status for individual Indians and tribes,”<sup>62</sup> was promulgated under numerous statutes, including 25 U.S.C. §§ 2 and 9. Although the Secretary failed in *Carcieri* to persuade the Supreme Court that the IRA implicitly authorized use of 25 C.F.R. Part 151 for the Narragansett, nothing in the *Carcieri* majority opinion prevents the Secretary from alternatively claiming that 25 U.S.C. §§ 2 and 9 explicitly left a gap for the Secretary to apply 25 C.F.R. Part 151 to place land into trust for the Narragansett. In *Carcieri*, the question was strictly limited to “[w]hether the Indian Reorganization Act authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.”<sup>63</sup> The Supreme Court considered only two possible outcomes: either (1) the phrase *now under Federal jurisdiction* in 25 U.S.C. § 479 applied only to tribes under federal jurisdiction in 1934, or (2) 25 U.S.C. § 479 left a narrow definitional gap in the IRA for the Secretary to interpret that 25 U.S.C. § 465 could extend 25 C.F.R. Part 151 to tribes not under federal jurisdiction in 1934 because “the word ‘now’ is an ambiguous term that can reasonably be construed to authorize the

---

59. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (emphasis added) (footnotes omitted) (quoting *Ruiz*, 415 U.S. at 231).

60. *Ruiz*, 415 U.S. at 231 (emphasis added) (footnote omitted).

61. *Chevron*, 467 U.S. at 843–44.

62. 25 C.F.R. § 151.1 (2011).

63. Brief for Respondents at I, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526) (citation omitted).

Secretary to take land into trust for members of tribes that are ‘under Federal jurisdiction’ at the time that the land is accepted into trust.”<sup>64</sup>

This proposed regulatory quick fix for *Carcieri*, on the other hand, allows the Secretary to tap into the deep roots of statutory authority available through 25 U.S.C. §§ 2 and 9, which explicitly delegate comprehensive authority to manage “all Indian affairs and . . . all matters arising out of Indian relations” to the Secretary.<sup>65</sup> Under the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 would transmute 25 C.F.R. Part 151 into legislative regulations carrying controlling weight in federal court. Wherefore, the Secretary would be afforded the greatest amount of *Chevron* deference available to justify land-into-trust transactions under 25 C.F.R. Part 151 for tribes not under federal jurisdiction in 1934.

25 C.F.R. Part 83 also reinforces the Secretary’s authority to extend the benefits of land-into-trust acquisitions to tribes not included in the IRA’s statutory definition of *Indian*. Promulgated pursuant to 25 U.S.C. §§ 2 and 9 in 1978, 25 C.F.R. Part 83 empowers the Secretary to extend official acknowledgement, and thereby federal jurisdiction, to Indian tribes previously unrecognized by the federal government.<sup>66</sup> The power of the Secretary to acknowledge previously unrecognized Indian tribes under 25 C.F.R. Part 83 illustrates how expansive the delegation of power over Indian affairs to the Secretary is under 25 U.S.C. §§ 2 and 9. Whereas Congress formerly recognized tribes primarily through treaties, the Secretary now handles this process administratively, explicitly filling a gap that Congress left for the Secretary to address under 25 U.S.C. §§ 2 and 9. Most important to the *Carcieri* quick fix, under 25 C.F.R. § 83.12(a), the Secretary has promulgated a legislative regulation that enables him to

---

64. *Carcieri*, 129 S. Ct. at 1061. Although the Secretary’s brief on the merits did attempt to make arguments in favor of an unambiguous intent of Congress to define *now* just as the Secretary had defined it, the Supreme Court majority did not directly reference these arguments in its opinion, as the force of its own reasoning supported its finding of an unambiguous intent of Congress to the contrary.

65. 25 U.S.C. § 2 (2006); *see also id.* § 9 (“The President may prescribe such regulations as he may think fit for carrying into effect the provisions of any act relating to Indian affairs . . .”).

66. *See* Sarah Washburn, Comment, *Distinguishing Carcieri v. Salazar: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA’s Trust-Land Provisions*, 85 WASH. L. REV. 603, 629–30 (2010) (summarizing the history and procedures which govern federal administrative acknowledgment of Indian tribes since 1978) (citing Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Aug. 24, 1978) (codified as amended at 25 C.F.R. pt. 83 (2011))).

extend the benefit of 25 C.F.R. Part 151 to federally acknowledged tribes, including the Narragansett:

Upon final determination that the petitioner exists as an Indian tribe, it shall be considered *eligible for the services and benefits from the Federal government that are available to other federally recognized tribes*. The newly acknowledged tribe shall be considered a historic tribe and *shall be entitled to the privileges and immunities available to other federally recognized historic tribes* by virtue of their government-to-government relationship with the United States.<sup>67</sup>

The regulatory quick fix for *Carcieri* thus empowers the Secretary to extend the fee-into-trust program under 25 C.F.R. Part 151 to Indian tribes acknowledged under 25 C.F.R. Part 83. When the explicit delegation of authority to promulgate legislative regulations in the area of Indian affairs under 25 U.S.C. §§ 2 and 9 is properly invoked as the grounds for agency action, the *Chevron* doctrine obliges courts to provide the maximum deference allowable to the Secretary.<sup>68</sup> The Secretary may once again defend against lawsuits like the one in *Carcieri v. Salazar* by relying upon alternative pillars of existing statutory authority, which empower the Secretary to place land into trust for tribes that were not under federal jurisdiction when the IRA was enacted in 1934.”<sup>69</sup>

*B. The Supreme Court’s Ruling in Carcieri Affects the IRA Alone and Not the Secretary’s Authority Under 25 U.S.C. §§ 2 and 9*

The *Chevron* deference generally owed to the Secretary’s legislative regulations promulgated under 25 U.S.C. §§ 2 and 9 may only be avoided if such regulations are adjudged to be “arbitrary, capricious, or manifestly contrary” to congressional intent.<sup>70</sup> The IRA, as interpreted in *Carcieri*, is the most likely source of any legislative intent to circumscribe the Secretary’s authority under 25 U.S.C. §§ 2 and 9 with respect to placement of land into trust under 25 C.F.R. Part 151 for tribes acknowledged under 25 C.F.R. Part 83. Two factors militate against the interpretation of 25 U.S.C. § 479 as a limitation on the power of the Secretary to extend land-into-trust acquisitions to acknowledged tribes: the Indian canons of construction and the manifest desire of Congress that the Secretary have exclusive responsibility for the affairs of Indian tribes that have been or

---

67. 25 C.F.R. § 83.12(a) (2011) (emphases added).

68. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that “the question for the court is whether the agency’s answer is based on a permissible construction of the statute”).

69. See *Carcieri*, 129 S. Ct. at 1068.

70. *Chevron*, 467 U.S. at 843–44.

hope to be acknowledged under 25 C.F.R. Part 83. Part II concludes with a discussion of why 25 U.S.C. § 479 should not interfere with the proposed *Carcieri* quick fix.

1. *The Indian Canons of Construction Severely Restrict Any Interpretation of 25 U.S.C. § 479 as a Limit to the Secretary's Power to Promulgate Legislative Regulations Under 25 U.S.C. §§ 2 and 9*

First and foremost, the Indian canons of construction are an enormous obstacle to interpreting 25 U.S.C. § 479 as a restraint against the proposed regulatory fix under 25 C.F.R. Part 83. Because “the standard principles of statutory construction do not have their usual force in cases involving Indian law,”<sup>71</sup> the traditional canon of statutory construction (*lex specialis derogat generali*, i.e., the specific law circumscribes the general one) is not available in this instance to support any claim that 25 U.S.C. § 479 circumscribes the powers of the Secretary under 25 U.S.C. §§ 2 and 9. An unambiguous legislative intent that the IRA should prevent the Secretary from placing land into trust for tribes acknowledged under 25 C.F.R. Part 83 “cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.”<sup>72</sup> Instead, “When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”<sup>73</sup>

While 25 U.S.C. § 479 was undoubtedly construed in *Carcieri* to exclude many tribes from the benefits of the IRA, the IRA should never be construed to terminate or reduce the benefits and services available to these excluded Indian tribes *under other statutory provisions* that authorize the Secretary to regulate Indian affairs. The overriding purpose of the IRA was “to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.”<sup>74</sup> Although Congress also has the authority to enact statutes that extend benefits to one class of

---

71. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985).

72. *United States ex. rel. Hualpai Indians of Ariz. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

73. *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (alteration in original) (quoting *Blackfeet*, 471 U.S. at 764).

74. *Morton v. Mancari*, 417 U.S. 535, 543 (1974).

Indians or tribes to the exclusion of another class,<sup>75</sup> nothing in the IRA prevents the Secretary from extending the benefits of land-into-trust regulations under other statutes. On the contrary, numerous statutes authorize extension of 25 C.F.R. Part 151 to individual tribes whose members were not included within the definition of *Indian* in the IRA.<sup>76</sup> The power of the Secretary to perform the same land-into-trust transfers for tribes acknowledged under 25 C.F.R. Part 83 and 25 U.S.C. §§ 2 and 9 is similarly situated in relation to the IRA.

Even though the IRA was enacted after 25 U.S.C. §§ 2 and 9, federal courts may not invoke the “last-in-time” canon of construction to impute that the IRA is a restraint on the Secretary’s authority under 25 U.S.C. §§ 2 and 9; after all, the Indian canons of construction require “doubtful expressions . . . to be resolved in favor” of Indian tribes.<sup>77</sup> Absent an unambiguous repeal in the IRA of the Secretary’s power under 25 U.S.C. §§ 2 and 9 to extend services and benefits to tribes acknowledged under 25 C.F.R. Part 83, the Indian canons of construction militate against any interpretation of the IRA that would preclude the Secretary from exercising the statutory authority under 25 U.S.C. §§ 2 and 9. Under the circumstances, it would even seem to defy the spirit and the letter of the IRA to stretch the meaning of 25 U.S.C. § 479 if courts were to infer an unambiguous prohibition against granting the benefits and privileges of 25 C.F.R. Part 151 to tribes acknowledged under 25 C.F.R. Part 83.

2. *Congressional Policy Prefers that the Secretary Have Exclusive Authority to Acknowledge Previously Unrecognized Tribes and Grant Them Federal Benefits*

Finally, since 1978, Congress has demonstrated its growing preference that the Secretary have exclusive responsibility for formulating policies related to acknowledged tribes under 25 C.F.R. Part 83. In stating his opposition to H.R. 1294, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, Representative Hastings of Washington exemplified the growing desire of Congresspersons not to be involved in the affairs of tribes eligible to petition for acknowledgment under 25 C.F.R. Part 83:

---

75. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (denying equal protection among Indian tribes or individuals when “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”) (quoting *Mancari*, 417 U.S. at 555).

76. See, e.g., 25 U.S.C. §§ 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, and 1495 (2006) (authorizing land acquisitions for individual tribes).

77. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

This . . . consideration of a bill to Federally recognize six new Indian tribes in the State of Virginia . . . marks the first time in over 20 years that the House of Representatives has considered legislation to extend Federal recognition to a tribe.

While I will acknowledge Congress can grant Federal recognition to individual tribes, the Department of Interior's Bureau of Indian Affairs has the administrative process by which a group may establish itself as an Indian tribe and become eligible for services and benefits extended to other tribes under Federal law.<sup>78</sup>

Representative Hastings is not alone in his desire to avoid congressional responsibility for establishing direct government-to-government relationships with individual Indian tribes. In fact, congressional participation in tribal recognition has been in dramatic decline since 1871 when Congress ended the federal policy of treaty making with Indian tribes.<sup>79</sup> The advent of the Secretary's tribal acknowledgment regulations in 1978 has further alienated Congress from its traditional role of enacting federal recognition of individual tribes and defining the scope of benefits afforded to such newly recognized tribes. Nowadays, there is a growing preference in Congress that only the Department of the Interior handle the affairs of acknowledged tribes. 25 U.S.C. §§ 2 and 9 continue to be statutory authority on which Congress relies in the twenty-first century to delegate power explicitly to the Secretary over the affairs of tribes acknowledged under 25 C.F.R. Part 83.<sup>80</sup>

For the foregoing reasons, the Court's interpretation of 25 U.S.C. § 479 in *Carciari* cannot stop the Secretary from asserting that all lands taken into trust on behalf of acknowledged tribes were validly acquired under 25 U.S.C. §§ 2 and 9. Congress has manifested in numerous ways its

---

78. 153 CONG. REC. 11,496 (2007) (statement of Rep. Doc Hastings).

79. Indian Appropriation Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)).

80. The general desire of Congress to reduce its legislative activities in Indian affairs and to increase the regulatory duties of the Department of the Interior and the Board of Indian Affairs (BIA) is exemplified in *Morton v. Ruiz*, 415 U.S. 199 (1974). In *Ruiz*, the Supreme Court discerned a legislative intent behind the Snyder Act of 1921 from post-1948 Congressional appropriations subcommittee hearings, which demonstrated that the testimony of BIA agents in the 1950s and 1960s had misled members of Congress to believe that BIA policies concerning off-reservation Indians were implemented as (inaccurately) portrayed to the subcommittee. *Id.* at 212–30. Although Congress still finds occasion to enact legislation particular to Indian affairs, *e.g.*, the Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. (2010), with respect to recognition of indigenous peoples in the United States, 25 C.F.R. Part 83 is quickly becoming viewed in Congress as an essential area of expertise belonging properly to the Secretary alone.

continuing approval of 25 C.F.R. Part 83, within which § 83.12(a) specifically empowers the Secretary to acquire land in trust under 25 C.F.R. Part 151 for acknowledged tribes. Even if any doubt exists concerning the intent of Congress with respect to the effect of the IRA on 25 U.S.C. §§ 2 and 9, as well as 25 C.F.R. Parts 83 and 151, the Indian canons of statutory construction require that such uncertainties be resolved in favor of the Indian tribe.

III. PANDORA'S BOX OF OTHER ADMINISTRATIVE LAW ISSUES:  
ADDRESSING CONCERNS ARISING FROM *CHENERY II*, THE  
NONDELEGATION DOCTRINE, AND THE INTERSECTION OF THE INDIAN  
CANONS OF CONSTRUCTION WITH THE *CHEVRON* DOCTRINE

Before the Secretary can adopt the proposed *Carcieri* quick fix, it is necessary to anticipate three collateral legal issues that would arise from its implementation. Although none of these three issues should overturn the proposed regulatory quick fix for *Carcieri*, the gravity of these issues warrants advanced deliberation. First, when an administrative agency asserts an alternative justification to perform an action identical to one a federal court has previously invalidated, the next reviewing court can and should scrutinize the new legal justifications closely. Second, considering that 25 C.F.R. Part 151 and the IRA land-into-trust provision under 25 U.S.C. § 465 have been subject to nondelegation challenges in the past, the federal Judiciary could find occasion to express uneasiness with the broad statutory language of 25 U.S.C. §§ 2 and 9. Finally, the relationship between the *Chevron* doctrine and the Indian canons of construction remains somewhat obscure after the decision in *Carcieri*. Existing jurisprudence on the subject is somewhat misleading, and consequently this Recent Development concludes by clarifying how the Indian canons of construction intersect with the *Chevron* doctrine in the context of federal cases and controversies. The most significant general contribution of this Recent Development comes from the reconceptualization of *Chevron*'s two-step inquiry as a quasi-prudential doctrine: Step one preserves traditional judicial practices of statutory construction, whereas step two functions like a prudential doctrine to the extent that the *Chevron* doctrine obliges a federal court to defer to a reasonable administrative interpretation, and consequently narrows the range of justiciable challenges to a federal agency's statutory authority.

A. *Problem One: Taking a Second Bite at the Apple*

Though it may seem disingenuous for an agency to adopt an alternative basis to justify an act previously deemed ultra vires, it is well settled in federal administrative law that a federal agency can take a “second bite at the apple.” The infamous saga of the *SEC v. Chenery Corp.* litigation epitomizes the power of federal agencies to sidestep an existing precedent to achieve a desired regulatory result. Whereas the Supreme Court could not accept the Securities and Exchange Commission’s (SEC’s) administrative decision in *SEC v. Chenery Corp. (Chenery I)*<sup>81</sup> due to a procedural deficiency, in *Chenery II* the Court had no choice but to accept the SEC’s second ruling, even though the result on remand was identical to the original ruling, because the SEC’s subsequent explanation for its decision on remand “rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts.”<sup>82</sup>

In *Chenery I*, the Supreme Court rejected a ruling of the SEC that rested “solely on the basis of its adherence to principles of equity derived from judicial decisions . . . [that] do not establish principles of law and equity which in themselves are sufficient to sustain its order.”<sup>83</sup> Because “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained,”<sup>84</sup> the Court remanded the case. On remand, the SEC ordered an identical result, but supplied a different rule for its decision and concluded that “the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act.”<sup>85</sup> When the case was again appealed, the Supreme Court in *Chenery II* had no problem affirming the result the second time around, for the SEC had properly decided the case based on its valid authority: “[The SEC] has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.”<sup>86</sup>

Similarly, the Secretary could re-examine the basis for the acquisition of land into trust for the Narragansett and overcome the negative ruling in *Carcieri* by invoking a different statutory authorization than the IRA. Certainly Rhode Island and Charlestown would be forgoing a legitimate

---

81. 318 U.S. 80 (1943).

82. *Chenery II*, 332 U.S. 194, 209 (1947).

83. *Chenery I*, 318 U.S. at 88–89.

84. *Id.* at 95.

85. *Chenery II*, 332 U.S. at 199.

86. *Id.*

cause of action if they did not assert a due process challenge on grounds that a renewed attempt to convert the thirty-one acres of Narragansett fee into trust is “a *post hoc* rationalization” that “must be viewed critically”;<sup>87</sup> even so, because federal courts are obligated to extend the greatest amount of deference permitted under *Chevron* to the Secretary when the explicit delegation of authority to promulgate legislative regulations is invoked under 25 U.S.C. §§ 2 and 9, such a renewed challenge to the Secretary’s authority would face a much higher hurdle under *Chevron* than the ones which the petitioners overcame in *Carcieri*.

*B. Problem Two: The Nondelegation Challenge to 25 U.S.C. §§ 2 and 9*

Additionally, since *South Dakota v. U.S. Department of Interior*<sup>88</sup> nearly ruled that “the total absence of procurement principles and safeguards in [the IRA § 5] violates the nondelegation doctrine,”<sup>89</sup> the specter of nondelegation hangs over every case involving 25 C.F.R. Part 151. Just as the Court of Appeals for the Eighth Circuit nearly voided the land-into-trust section of the IRA on grounds that there are “no perceptible boundaries, no intelligible principles, within the four corners of the statutory language that constrain this delegated authority,”<sup>90</sup> a federal court could find it even more disconcerting to examine the expansive language of 25 U.S.C. §§ 2 and 9. Were 25 U.S.C. §§ 2 and 9 applicable to any other subject matter other than Indian tribes, the apparent lack of an intelligible principle would potentially render it unconstitutional under the nondelegation doctrine.<sup>91</sup> However, the “unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards . . . that have emerged in other areas of the law.”<sup>92</sup> Because “Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government,”<sup>93</sup> it

---

87. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

88. 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).

89. *Id.* at 884.

90. *Id.* at 882. *But cf.* *United States v. Roberts*, 185 F.3d 1125, 1136 (10th Cir. 1999) (rejecting the reasoning of the Eighth Circuit in a subsequent challenge to 25 U.S.C. § 465).

91. *See, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (declaring a statute unconstitutional because “Congress has declared no policy, has established no standard, has laid down no rule”).

92. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

93. *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (citing *Winton v. Amos*, 255 U.S. 373, 391–92 (1921)).

follows that Congress “may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses.”<sup>94</sup>

No matter how broadly Congress phrases a delegation of its plenary authority over Indian tribes to the Secretary, the “intelligible principle” intrinsic to all federal Indian laws emanates from the fiduciary duty of the federal government to Indian tribes. 25 U.S.C. §§ 2 and 9 have survived since the 1830s on account of “Congress’ unique obligation toward the Indians,”<sup>95</sup> which imposes an “overriding duty . . . to deal fairly with Indians.”<sup>96</sup> According to the Court in *Morton*, not only has “the formulation of policy and the making of rules to fill any gap left . . . been given explicitly to the Secretary,”<sup>97</sup> but the Secretary’s ability to exercise this authority is also restricted by “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”<sup>98</sup> When the fiduciary duty of the United States to Indian tribes underlies the purpose of a statute, violations of the nondelegation doctrine become much more difficult to prove.

*C. Problem Three: Shedding Light on the Intersection of the Indian Canons of Construction and the Chevron Doctrine*

This Recent Development concludes with an important correction to existing opinions concerning the relationship of the Indian canons of construction and the *Chevron* doctrine: there is a popular misconception stating, “The tension between *Chevron* and the Indian law canons is strong in cases involving agency interpretations of statutes affecting Indians because both principles come into play upon finding ambiguity in such statutes . . . . The circuit courts are split over which canon prevails, and the Supreme Court has avoided the issue.”<sup>99</sup> Quite to the contrary, there is no

---

94. *United States v. Hellard*, 322 U.S. 363, 367 (1944).

95. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 253 (1985) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

96. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

97. *Id.* at 231; *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Ruiz*, 415 U.S. at 231).

98. *Ruiz*, 415 U.S. at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *see also* Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 254, 271 (2010) (arguing “when *Chevron* is applicable, the Indian canon of statutory construction and the trust doctrine should still play a role in the agency’s interpretation”).

99. Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 543–52 (2004) (relying on opinions from the D.C. Circuit and the Ninth Circuit to demonstrate a circuit split).

conflict between *Chevron* and the Indian canons of construction. *Chevron* is not a canon of statutory construction; rather, the *Chevron* doctrine functions more like a prudential doctrine.<sup>100</sup>

At step one, *Chevron* confines judicial review of “an agency’s construction of the statute which it administers” to an inquiry regarding whether an administrative interpretation is inconsistent with “the unambiguously expressed intent of Congress.”<sup>101</sup> At step two, *Chevron* precludes any judicial encroachment upon the “sphere of mandatory deference”<sup>102</sup> that shields every “reasonable interpretation made by the administrator of an agency.”<sup>103</sup> Consequently, the Indian canons of construction are regularly applied at *Chevron* step one, along with all other “traditional tools of statutory construction” which tend to eliminate textual ambiguities.<sup>104</sup> “When we are faced with [multiple] possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”<sup>105</sup> Certainly the Supreme Court has approved of several extrinsic aids or interpretive rules that enable courts to disregard or override the Indian canons of construction at *Chevron* step one.<sup>106</sup> Nonetheless, any judicial

---

100. See generally Callahan, *supra* note 26 (making an argument for the prudential, not mandatory, nature of *Chevron* and summarizing the view of a mandatory rule).

101. *Chevron*, 467 U.S. at 842–43.

102. Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POLY STUD. J. 421, 425 (2003). Even before the *Chevron* doctrine was articulated, “The prevailing rule in American administrative law . . . was that the agency charged with administering the statute that is the subject of litigation is entitled to deference by courts so long as the interpretation had a reasonable basis in law.” *Id.* at 424 (citing *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 130–31 (1944)).

103. *Chevron*, 467 U.S. at 844.

104. *Id.* at 843 n.9.

105. *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (alteration in original) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

106. Even though the Indian canons of construction may reduce the likelihood that an agency will be entitled to *Chevron* deference for its own construction of a statute, federal agencies may resort to numerous other tools of statutory construction at *Chevron* step one to assert that Congress unambiguously intended to authorize an agency to act to the detriment of Indian tribes. Most notoriously, “the Supreme Court has used a diluted form of such a rule in applying the Indian law canons—permitting congressional intent to be found from often vague ‘surrounding circumstances.’” Hall, *supra* note 99, at 557; see also *DeCoteau v. District Court*, 420 U.S. 425, 446 (1975) (finding a clear congressional intent in the “surrounding circumstances” of an 1891 act to terminate the Lake Traverse Indian Reservation, even though the statutory language was “virtually indistinguishable from that used in” a statute which the Supreme Court interpreted *not* to have terminated the Klamath

devices that may disarm the Indian canons of construction also apply at *Chevron* step one. Their existence does not change the fact that the court will proceed to *Chevron* step two only if any statutory ambiguities remain unresolved after the court exhausts its traditional tools of interpretation in search of an unambiguous legislative intent with respect to the precise issue at controversy.<sup>107</sup>

In analyzing the role of the Indian canons of construction within *Chevron*'s framework, it is helpful to remember that "realiz[ing] that the concepts and tools of statutory interpretation are heuristic in nature . . . keep[s] us from the morass created by confusing statutory interpretation concepts and tools with substantive rules having the force and effect of law."<sup>108</sup> Accordingly, the mechanical principles of the Indian canons of construction are less important than the underlying policy that the Indian canons of construction reflect: "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."<sup>109</sup> Whenever the relationship between the *Chevron* doctrine and the Indian canons of construction is examined, the appropriate judicial inquiry is whether the "overriding duty of our Federal Government to deal fairly with Indians"<sup>110</sup> has any legal effect on the number of "permissible construction[s] of the statute" which would otherwise be considered "a

---

River Indian Reservation in *Mattz v. Arnett* (citing *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)).

Federal agencies that have expertise in areas outside of Indian affairs may also claim at Step One that their enabling statute was unambiguously intended to apply equally to Indian tribes and nonnative landowners. In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Supreme Court interpreted that a federal agency's exercise of eminent domain under the Federal Power Act "applies to these lands owned in fee simple by the Tuscarora Indian Nation," *id.* at 118, on grounds that "it 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," *id.* at 116, and also because "[i]t would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control," *id.* at 121–22 (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656–57 (1890)).

107. Tolley, *supra* note 102, at 421.

108. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 55 (2003).

109. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) (emphasis added).

110. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

reasonable interpretation made by the administrator of an agency.”<sup>111</sup> Although the Indian canons of construction typically apply at *Chevron* step one alongside the “traditional tools of statutory construction,”<sup>112</sup> a federal agency cannot dissociate from the fiduciary obligations of the United States to Indian tribes simply because it has convinced a federal court to proceed to *Chevron* step two.

Hence, there can be no one-size-fits-all hybrid “*Chevron*–Indian canons” heuristic for every future federal controversy involving an Indian tribe, an administrative agency, and the fiduciary duty of the United States to Indian tribes. For example, the regulatory quick fix for *Carcieri* proposed in this Recent Development rests entirely upon the Secretary’s power under 25 U.S.C. §§ 2 and 9, which constitute “an express delegation of authority to the agency to elucidate . . . legislative regulations” under *Chevron* step two.<sup>113</sup> As was explained in *Morton v. Ruiz*, this statutory authority cannot be exercised in any way “inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings’” with Indian tribes.<sup>114</sup> Similarly, if a court deliberates at *Chevron* step two whether it must defer to “a reasonable interpretation made by the administrator of an agency” that has resulted in an agency action detrimental to an Indian tribe,<sup>115</sup> it appears that the court must first answer whether the agency involved is legally obligated to honor the fiduciary duty of the United States to Indian tribes<sup>116</sup> before it is able to declare that an agency charged with administering a

---

111. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

112. *Id.* at 843 n.9.

113. *Id.* at 843–44.

114. *Ruiz*, 415 U.S. at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

115. *Chevron*, 467 U.S. at 844.

116. See Skibine, *supra* note 98, at 272 (arguing that courts must first determine whether an agency has the power to enact legislative rules before engaging in *Chevron* analysis (citing Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006))). Cf. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (establishing an alternative option to step two implicit delegation analysis based on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *Mead* noted that “‘some weight’ is due to informal interpretations though not ‘the same deference as norms that derive from the exercise of . . . delegated lawmaking powers,’” in light of “*Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires”. *Id.* at 234–35 (quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157 (1991)).

statute “enacted pursuant to the trust doctrine” may not “escape [its] role as trustee by donning the mantle of administrator.”<sup>117</sup>

Were Felix Cohen still an Assistant Solicitor for the Interior in twenty-first century, he would caution against abstract theorizing about the relationship between the Indian canons of construction and the *Chevron* doctrine “in their absolute purity, freed from all entangling alliances with human life,” lest these legal concepts be misused to

press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.<sup>118</sup>

Although it is especially true in cases requiring statutory interpretation within the *Chevron* framework that American jurists must embrace “a more conscious recognition of the legislative function of the courts,”<sup>119</sup> the federal Judiciary’s prudential doctrines and doctrines of justiciability promote an opposite “goal of limiting judicial intervention . . . to situations in which a decision is necessary to resolve the underlying dispute and in which intervention does not usurp authority constitutionally delegated to the representative branches.”<sup>120</sup>

[T]he case and controversy limitations found in Article III . . . preserve[] the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that

117. Skibine, *supra* note 98, at 272–73 & 273 n.113 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984), *reconsideration en banc*, 782 F.2d 855 (10th Cir. 1986) (adopting the dissenting opinion of Judge Seymour)).

118. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

119. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 36 (1881).

120. Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 274–75 (1980) (footnote omitted). *Cf. Chevron*, 467 U.S. at 865–66 (“Judges are not experts in the field, and are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . .”).

“the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>121</sup>

In identifying the quasi-prudential nature of the *Chevron* doctrine, the relationship between the *Chevron* doctrine and the Indian canons of construction can only be expounded on a case-by-case basis, as necessary to the holding of the court within each respective controversy, either at step one or step two, depending on the varied “statutory circumstances” of the federal agency and challenged administrative actions.<sup>122</sup>

### CONCLUSION

The regulatory quick fix for *Carcieri* proposed in this Recent Development would enable the Secretary to claim existing statutory and regulatory authority to acquire land into trust for tribes acknowledged under 25 C.F.R. Part 83. Under 25 U.S.C §§ 2 and 9, the Secretary has been delegated the power to promulgate rules and policies to fill any gap *explicitly* left by Congress in “all matters arising out of Indian relations.”<sup>123</sup> Since 1978, 25 C.F.R. Part 83 has enabled the Secretary to acknowledge Indian tribes not previously under federal jurisdiction and to ensure that acknowledged tribes are “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes,” such as the benefits which tribes that were under federal jurisdiction when the IRA was enacted in 1934 presently enjoy under 25 C.F.R. Part 151.<sup>124</sup>

---

121. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580–81 (1992) (second alteration in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

122. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). For a comprehensive summary of the cases involving both the *Chevron* doctrine and the Indian canons of construction prior to 2004, see Hall, *supra* note 99, at 543–49, 550–52. In addition to *Carcieri*, another important decision involving these two principles of statutory interpretation can be found in *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)) (“Under [*Chevron*], ‘ordinarily we defer to an agency’s interpretations of ambiguous statutes entrusted to it for administration,’ but we declined to defer to Interior’s interpretation of the Act. . . . [T]he normally-applicable deference was trumped by the requirement that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . . .’”).

123. *Morton v. Ruiz*, 415 U.S. 199, 231 n.26 (1974) (quoting 25 U.S.C. § 2 (1970)).

124. 25 C.F.R. § 83.12(a) (2011).

The Secretary thus holds explicit authority under 25 U.S.C §§ 2 and 9 to acquire land for the tribes acknowledged under 25 C.F.R. Part 83, just as he does for any other Indian tribe entitled to the benefit of 25 C.F.R. Part 151 under the IRA.