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NEVER CONSTRUED TO THEIR PREJUDICE: IN HONOR OF DAVID GETCHES

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This article reviews and analyzes the judicial canons of construction for Native American treaties and statutes. It discusses their theoretical justifications and practical applications. It concludes that the treaty canon has ready support in contract law and the law of treaty interpretation. Justification of the statutory canon is more challenging and could be strengthened by attention to the democratic deficit when Congress imposes laws on Indian country. Applications of the canons have mattered in disputes between Indian nations and private or state interests. They have made much less difference, and have suffered major failings, in disputes with the federal government. Recent Supreme Court decisions restricting tribal sovereignty show significant weakening of the canons.

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INTRODUCTION

Numerous judicial opinions recite that ambiguities in treaties with Indian nations and in federal statutes relating to Indians and tribes should be interpreted in their favor.[1] Can these canons be justified? If they can, have they mattered?

The treaty canon has strong theoretical support in contract law and the law of treaty interpretation, domestic and international.[2] By resolving unclear wording in tribes' favor, the rule has effectively helped tribes to preserve their resources and sovereignty over their members against opposing private and state interests.[3] However, the Supreme Court has ignored the canon in recent rulings divesting tribes of jurisdiction over nonmembers in tribal territory.[4] In addition, the treaty rule has been much less effective in disputes between tribes and the federal government. The Supreme Court dishonored it in major decisions denying constitutional protection of tribal land

1. *See* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2005) [hereinafter 2005 COHEN].
2. *See infra* Part II.A and text accompanying notes 24–38.
3. *See infra* Part II.B.
4. *See infra* Part IV.B.

ownership.[5]

Theoretical grounding for the statutory canon is less clear. The statutory rule is supported by the trust relationship between the United States and the Indian nations arising from treaties, but the extent of the government's trust duties is contested and uncertain.[6] The canon is also supported by democratic theory. Until recently, when Congress imposed laws on Indian country, it lacked any normal political restraint. However, application of general federal laws to Native Americans may differ according to context. Some laws uniquely impact Indians and Indian tribes and thus lack political restraint. Other laws apply alike to Indian interests and to those of other citizens and governments and are subject to normal democratic forces.[7]

Like its treaty counterpart, the statutory canon has effectively helped tribes in disputes against private and state interests.[8] But again, the rule has been much less effective against the federal government. Decisions defining remedies for taking tribal land and other resources have often been stingy or nonexistent.[9]

The next section is a brief history of the two canons. The two sections that follow discuss the origins, theory, and applications of both canons, first the treaty rule, then its statutory counterpart. To highlight significant differences, discussions of the canons' applications address disputes between Native Americans and state or private interests separately from disputes between Indians and the federal government. The article's fourth section addresses the canons' deteriorating force in Supreme Court decisions since 1975.

I. A BRIEF HISTORY

Native American rights and obligations arise from treaties, federal statutes, and the Constitution itself.[10] It follows that

5. *See infra* Part II.C.
6. *See infra* Part III.A and text accompanying notes 130–44.
7. *See infra* Part III.A and text accompanying notes 145–61.
8. *See infra* Part III.B.
9. *See infra* Part III.C.
10. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 2; 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904); 25 U.S.C. §§ 1–4307 (2006). Early Supreme Court opinions applied international law to interpret Indian treaties, and in recent years, Native Americans have made modern international law claims. *See* 2005 COHEN, *supra* note 1, §

interpretation of federal laws is a paramount concern of Indians and tribes, and of others who interact with them. Prior to 1959, interpretation was mostly administrative, left to the Bureau of Indian Affairs and other federal agencies, and in some contexts to the tribes themselves.[11] But occasional judicial opinions since the Marshall Court have reasoned that ambiguous treaties with tribes should be interpreted in their favor.[12] When Felix Cohen and his Interior team organized federal Indian law in 1941, they generalized the treaty cases into a "cardinal rule."[13] The Cohen Handbook applied the same rule to federal statutes that ratify agreements with tribes made after treaty making ended.[14] The treatise did not address whether ambiguities in other federal statutes should be interpreted in favor of Indian rights; at the time it was published, only one important Supreme Court decision had relied on such a rule.[15] When the Interior Department published its vulgate version of the treatise in 1958, its statement of the interpretive rule for treaties and treaty equivalents was unchanged, and nothing was added on statutory interpretation.[16] Thereafter, judicial opinions that recited a statutory rule became more common, and by the time

5.07. The early decisions are sound precedents, but neither the Supreme Court nor Congress appear likely to embrace the modern movement for the foreseeable future. For discussion of the subject, compare Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 78–79 (1996) (advocating reliance on international law), with Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. C.L. & C.R. 1, 43 (2003) (doubting the efficacy of Frickey's approach).

11. The year 1959 is often recited as the onset of significant modern renewal of Indian rights. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

12. *See infra* text accompanying notes 21–23.

13. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37 (1941) [hereinafter 1941 COHEN]. On Cohen's importance to federal Indian law, see *Symposium in Honor of Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954).

14. *See* 1941 COHEN, *supra* note 13, at 37 n.45. Recent agreements between tribes and the government are made under very different conditions. Tribal parties are now versed in English and represented by lawyers. But most agreements contested at law were made long before these changes. *See infra* notes 59–88, 147–48 and accompanying text.

15. *See infra* text accompanying notes 122–25 (discussing United States v. Reily, 290 U.S. 33, 39 (1933)); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); United States v. Celestine, 215 U.S. 278, 290–91 (1909).

16. U.S. DEP'T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 145–48 (1958). Scholars consider this edition heavily biased in favor of the federal government's interests. *See, e.g.*, RENNARD STRICKLAND ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at ix (1982) [hereinafter 1982 COHEN].

the 1982 revision of Cohen's Handbook was published, the treatise rightly stated the statutory rule to be an established canon of interpretation.[17] The 2005 revision of Cohen's treatise further elaborated and solidified the statutory canon's place as an established rule of interpretation.[18] However, modern Supreme Court decisions against Indian interests have caused a number of scholars to assert both canons' demise.[19] The next two sections expand this history to analyze each canon's origin, theory, and applications.

II. THE TREATY CANON

This section discusses the treaty canon in depth. Its first part relates the canon's origin in nineteenth century Supreme Court decisions and identifies the canon's strong support in legal theory based on both treaty and contract law. The section's second part discusses the canon's major applications to disputes between Native Americans and state and private interests. It concludes that the canon has been important in decisions protecting Indian resources and sovereignty. The third part addresses the canon's application to disputes between Indians and the federal government. It concludes that the canon has been much less effective in these matters and was dishonored by the Supreme Court's failure to accord timely constitutional protection to tribal land ownership.

A. Origin and Theory

The Court's 1832 decision in *Worcester v. Georgia* is the bedrock of the Indian sovereignty doctrine, and Chief Justice Marshall's opinion for the Court is one of his crowning achievements.[20] Justice M'Lean's concurring opinion is commonly cited as the point of origin for the treaty canon. M'Lean wrote:

> The language used in treaties with the Indians should never

17. 1982 COHEN, *supra* note 16, at 223–25.

18. 2005 COHEN, *supra* note 1, §§ 2.02–.03.

19. *See infra* notes 77, 87, 280, 312–13, 324, 341 and accompanying text (citing articles by symposium honoree David H. Getches and by Nell Jessup Newton, Matthew L.M. Fletcher, Bethany R. Berger, Sarah Krakoff, Samuel E. Ennis, Alex Tallchief Skibine, Philip P. Frickey, Joseph William Singer, and Peter C. Maxfield).

20. 31 U.S. 515 (1832). *See infra* text accompanying notes 40–47.

> be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.[21]

Later opinions of the full Court adopted Justice M'Lean's statement, making it into Cohen's "cardinal rule" of treaty interpretation.[22] A variation on the rule that appears in many decisions requires that treaty terms be interpreted as the Indians understood them because treaties were written only in English, so that Indian parties' understanding depended on oral interpreters who had to render legal concepts.[23] The precedents do not support a significant difference in the two formulations. Both look for a plausible interpretation favorable to the Indian party.

The treaty canon has strong theoretical backing. A fair case can be made that requiring interpretation in the Indians' favor is simply shorthand for applying contract and treaty rules of interpretation to the context of Indian treaties. The actual agreements were oral, negotiated through interpreters hired by the United States.[24] The agreements were memorialized in writing in a language understood only by the government side.[25] The rule that ambiguities in writings be construed against the drafter, however controversial in some situations, should surely apply.[26] And there can be no doubt

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21. *Id.* at 582 (M'Lean, J., concurring). My title cribs him.

22. *See, e.g.*, Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); Jones v. Meehan, 175 U.S. 1, 11 (1899); *In re* Kansas Indians, 72 U.S. 737, 760 (1867). The latter opinion mistakenly attributed the quote to Marshall, and the error was repeated by reference in *Carpenter* and *Choate*. Other notable opinions relying on the rule include *Winters v. United States*, 207 U.S. 564, 576–77 (1908) and *United States v. Winans*, 198 U.S. 371, 380–81 (1905). *Carpenter, Choate*, and *Winters* involved statutes ratifying agreements with tribes, that is, treaty equivalents. The others interpreted treaties.

23. *E.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979); Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943); Jones v. Meehan, 175 U.S. 1, 10–11 (1899). *See also Worcester*, 31 U.S. at 551 ("There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.").

24. For extensive description of the process, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES (1994).

25. *See id.*

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). On controversy about the rule, see, for example, Michael B. Rappaport, *Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed against the*

that parol evidence should be freely admitted; the treaty texts recorded agreements that were essentially oral, and they never purported to be integrations.[27] As the Supreme Court has observed, Indian treaties resembled international protectorate treaties, and there is authority for interpretation to favor the weaker party.[28] Modern treaty and contract rules of interpretation demand good faith.[29] Considered together, these rules require an effort to ascertain and honor the reasonable expectations of the Indian parties.

Because of the language advantage enjoyed by the United States, reasonable expectations of the treaty parties cannot rest on technical parsing of treaty terms.[30] Rather, expectations must be deduced from context. Tribal understandings can be determined from pre-existing tribal ownership. Tribes always sought to retain their land, sovereignty over retained territory, and rights to continue traditional economic activities that depended on natural resources: hunting, fishing, farming, and gathering.[31] The United States always sought to take away part of what the tribal party had.[32] In exchange, it offered payment for ceded

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Drafter, 30 GA. L. REV. 171 (1995–1996). *See generally* Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, *in* CONTRACT THEORY - CORPORATE LAW 66, 66–104 (Gavvala Radhika ed., 2009), *available at* http://works.bepress.com/peter_cserne/28.

27. *See* RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981). Treaty law has not observed a formal parol evidence rule, but it requires interpreting terms "in their context and in light of [the treaty's] objects and purpose." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987). Parol evidence is admitted for these purposes. *See generally* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 421–49 (2009); RICHARD K. GARDINER, TREATY INTERPRETATION 301–50 (2008).

28. *Worcester*, 31 U.S. at 560–61 ("the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."). *See also* D. P. O'CONNELL, INTERNATIONAL LAW 256–57 (2d ed. 1970).

29. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987); RESTATEMENT (SECOND) OF CONTRACTS §§ 201(2), 205 (1981). For discussion in the international context, see GARDINER, *supra* note 27, at 147–61.

30. International treaty law has extensive precedents and literature on the problem of treaties written in more than one language. For discussion of the problem of translating technical terms, see GARDINER, *supra* note 27, at 369–75.

31. *See* PRUCHA, *supra* note 24.

32. *See id.*

lands and protection of territory that tribes retained.[33]

Other basic rules of treaty and contract law provide that no valid agreement results from fraud or coerced consent.[34] Tribal consent to treaties was at times impaired by fraud and often involved at least some degree of coercion from the implied threat that settlers would otherwise overwhelm tribes. An Indian Service veteran observed, "The method of making the treaties varied according to the character of the commissioners negotiating for them. Some were manifestly fraudulent . . . . Others were signed by the Indians practically under duress."[35]

These factors alone would not always be enough to vitiate consent, but they are reason enough to interpret ambiguities in favor of Indian expectations. At times, outright coercion was manifest, particularly when treaties were imposed on tribes following their military defeat.[36] Agreements based on fraud or coercion are not enforceable, but that remedy is useless for tribes.[37] The best a court can do to protect Indian rights is to resolve ambiguities in an imposed treaty against the United States.

The treaty canon should not be jettisoned simply because

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33. *See id.*

34. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331(1)(b), (2)(a) (1987); RESTATEMENT (SECOND) OF CONTRACTS §§ 174–175 (1981). In international law, see generally STUART S. MALAWER, IMPOSED TREATIES AND INTERNATIONAL LAW (1977).

35. LAURENCE F. SCHMECKEBIER, THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES, AND ORGANIZATION 59 (1927), *quoted in* 1941 COHEN, *supra* note 13, at 37 (describing an 1808 Osage treaty); *see also* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 452 (1994) ("The history of United States-Indian relations thus reveals very few occasions in which treaties were negotiated under market-like conditions. As soon as the Bluecoats' propensity for violence became known, it served as the background to every treaty. Every tribal leader knew that if negotiations fell through, the most likely alternative was war.") (citation omitted).

36. Notable examples are treaties imposed on midwestern tribes following the 1794 Battle of Fallen Timbers and treaties imposed on the Five Civilized Tribes after the Civil War, each of which included at least factions that sided with the South. *See* PRUCHA, *supra* note 24, at 91–93, 264–68. Another notorious incidence of coercion was the process of removal of southeastern tribes in the 1830s. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631–32 (1970) ("[T]reaties were imposed upon them and they had no choice but to consent."); Choctaw Nation v. United States, 119 U.S. 1, 37 (1886) ("It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal . . . ."). Yet another was the imposed agreement that took the Black Hills. *See* United States v. Sioux Nation, 448 U.S. 371, 382 n.13 (1980).

37. The principal obstacle to a judicial remedy would be statutes of limitations. *See infra* notes 105, 202, 214, 224, 269 and accompanying text.

general rules of treaty and contract interpretation may theoretically be adequate to the just resolution of contests about treaty meaning. The canon is a core part of the trust relationship that is firmly established as federal policy.[38] Moreover, it is often difficult to prove the particular circumstances of a treaty's negotiation over a century after its making. The effect of the canon is to place the burden on opponents of Indian claims to prove uncoerced Indian consent to yield the asset at issue. This is an appropriate rule in light of the language barrier and the prevalence of at least some degree of duress. The canon also forces courts to try to understand the unfamiliar, Indian side of a case, and it stiffens the spines of uncertain judges when prevailing politics run against Indian interests.

B. Applications to Disputes with State and Private Interests

The treaty canon has often been effective when Indian interests conflicted with those of states or private parties.[39] But it has had significant failures when tribes challenged federal authority. One might say that the Supremacy Clause has been an Indian ally against state and private interests, but a liability against the feds.

Worcester v. Georgia[40] remains the most important and impressive decision interpreting treaties to carry out the Indians' understanding. Georgia had aggressively tried to impose state laws on Cherokee treaty territory in the state.[41] But the Court held that the Cherokee treaties preserved Cherokee sovereignty over tribal territory, in which "the laws of Georgia can have no force."[42] Marshall's opinion relied almost exclusively on the earliest of thirteen Cherokee treaties, made when the Cherokees had bargaining power as potential allies of American enemies and thus the most freely made.[43] It

38. *See infra* text accompanying notes 130–44.
39. *See infra* text accompanying notes 40–57.
40. 31 U.S. 515 (1832).
41. *Id.* at 521–28.
42. *Id.* at 520.
43. *Id.* at 551–55 (interpreting the 1785 Treaty of Hopewell). The 1791 Treaty of Holston, second of the thirteen, was discussed at 555–56. No later treaty was cited. For a list of Cherokee treaties, see *Cherokee Treaties*, WIKIPEDIA, http://en.wikipedia.org/wiki/Cherokee_treaties (last updated May 28, 2012). The list includes treaties with colonies, the British Crown, American states, and other

then meticulously analyzed possible meanings of every relevant treaty term and construed all in favor of tribal authority.[44] It crucially read the treaties as self-executing, that is, directly enforceable by courts.[45] All this was done in the teeth of the political winds of the day. Andrew Jackson had been elected on an anti-Indian platform and had dedicated himself to tribes' removal from proximity to white settlers.[46] Justice Baldwin's banal dissent shows how easily a politically compliant Court could have decided otherwise.[47]

Worcester's interpretation of the Cherokee treaties to retain tribal sovereignty was extended by political action and judicial decision to all recognized tribes, including those with less favorable treaty terms or with no treaty at all.[48] Thus,

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parties, as well as many United States treaties dated after *Worcester*. The count of thirteen includes only treaties with the United States predating the *Worcester* decision.

44. *Worcester*, 31 U.S. at 551–55; *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 398–405 (1993) (reviewing the Court's analysis).

45. English law required and requires an Act of Parliament for judicial enforcement of treaties. *See* 8(2) HALSBURY'S LAWS OF ENGLAND ¶ 236 n.2 (4th ed. reissue 1996). By contrast, the Supreme Court interpreted our Constitution to permit direct judicial enforcement so long as treaty terms are suitable, which the Court calls self-executing terms. Foster v. Neilson, 27 U.S. 253, 314 (1829); Ware v. Hylton, 3 U.S. 199 (1796). The *Worcester* Court did not discuss the point but assumed that Indian treaties were subject to the same rule by its conclusion that the laws of Georgia at issue were "repugnant" to the Cherokee treaties. 31 U.S. at 561–62. (Counsel for Worcester and Butler did cite *Ware*. *Id.* at 535.) Had American courts adopted the English rule, American Indian treaties would likely have become a dead letter, at least after the election of President Jackson. On direct enforcement generally, see D. P. O'CONNELL, *supra* note 28, at 54–65.

46. *See* ROBERT V. REMINI, ANDREW JACKSON: THE COURSE OF AMERICAN FREEDOM, 1822–1832 117, 200 (1998); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L .REV. 500, 528–29 (1969).

47. *Worcester*, 31 U.S. at 562. Justice Baldwin dissented by reference to his prior opinion in *Cherokee Nation v. Georgia*, 30 U.S. 1, 31 (1831), in which he opined that the Cherokee Nation had no status as a government. Justice Johnson wrote a similar opinion in the earlier case, 30 U.S. at 20, but did not dissent in *Worcester*.

48. *See* 1982 COHEN, *supra* note 16, at 224. Federal statutes relating to tribal sovereignty, such as §§ 16–17 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476–477 (2006), have never differentiated between treaty tribes and others. Numerous modern statutes continue this policy. *See* 2005 COHEN, *supra* note 1, § 1.07. However, tribal ownership based on treaties and statutes has better legal protection than that based on original title or executive orders. *See infra* text accompanying notes 233–63. *But see* Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2005); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (both advocating departure from the policy). Alaska and Hawaii are exceptions to the policy described here; each has a distinct legal history. *See* Rice v. Cayetano, 528 U.S. 495 (2000) (state law preferring Native Hawaiians unconstitu-

while tribal sovereignty has been restricted in various ways, its dimensions have not depended on having a treaty or on particular treaty terms.[49] The Supreme Court also reasoned that the tribal sovereignty doctrine includes tribal immunity from suit, similar to the sovereign immunity of the federal government.[50]

A remarkable application of the treaty canon to disputes with state and private interests arose in the Supreme Court's 1908 *Winters* decision recognizing Indian water rights.[51] A federal statute ratified an agreement with a tribe; neither the text of the agreement nor that of the statute said anything about water, but the Court inferred reservation of water rights to carry out Indian expectations.[52] Other prominent decisions that relied on the treaty canon were lawsuits defining treaty provisions that retained Indian rights to hunt and fish on former tribal land. Though results are mixed and decisions cannot be reconciled, tribes won most cases and all of the important ones, and decisions often relied on the treaty canon.[53] Most notable were the northwestern fishing rights decisions. Treaties with Washington tribes ceded most of their land but retained explicit rights to fish off-reservation at usual and accustomed sites in common with settlers.[54] The Supreme Court successively interpreted these provisions to imply easements of access to the sites,[55] immunity from state regulations other than those necessary to preserve fish species,[56] and Indian entitlement to a generous fixed share of

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tional racial discrimination); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (Alaskan Native Villages not Indian country as dependant Indian communities); Alaska v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011) (history of native village sovereignty); Heather Kendall-Miller, Alaska v. Native Village of Tanana: *Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country*, 28 ALASKA L. REV. 217 (2011) (same).

49. *See supra* note 48 and accompanying text.

50. *See* 2005 COHEN, *supra* note 1, § 7.05[1]. The treatise opines that tribal sovereign immunity derives from federal common law and the Constitution rather than *Worcester*. *See id.* A full analysis needs all sources: federal sovereign immunity rests on federal common law and the Constitution; *Worcester* attaches that theory to tribal sovereignty.

51. Winters v. United States, 207 U.S. 564, 576–77 (1908) (interpreting statute ratifying agreement with tribe, that is, a treaty equivalent). On Indian water rights generally, see 2005 COHEN, *supra* note 1, §§ 19.01–.06.

52. *Winters*, 207 U.S. at 576–77.

53. *See generally* 2005 COHEN, *supra* note 1, § 18.04.

54. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 661–62 (1979).

55. United States v. Winans, 198 U.S. 371, 384 (1905).

56. Tulee v. Washington, 315 U.S. 681 (1942) (Indians do not need state li-

up to half the catch.[57]

The treaty canon's most important application today is in major disputes about the scope of tribal sovereignty. These issues command a full discussion later in this paper.[58]

C. Applications to Disputes with the Federal Government

In contrast to the treaty canon's support for Indians' rights in their disputes with state and private parties, the Court has honored the canon much less often when reviewing Native American claims against the federal government. The Court's clearest failure to honor Indians' reasonable treaty expectations was its refusal to accord tribal land ownership constitutional protection against federal takings until it was too late to have much beneficial effect. Until 1887, tribal land cessions were nominally consensual, by treaty or other agreement.[59] Some deals involved enough coercion to support a takings claim, and much land was simply seized,[60] but no suit was filed, or at least none that generated a reported decision. In lawsuits relating to present or former tribal land, Supreme Court opinions recited conflicting dicta on the nature of tribal land ownership.[61] At various times, tribal ownership was ambiguously called a "right of occupancy" with "a legal as well as just claim to retain possession of it, and to use it according to their own discretion;" or robustly characterized to be "as |sacred as the fee simple of the whites;" or dismissed as no ownership at all.[62] No decision had raised a takings issue.

From 1880, Congress passed a series of so-called allotment laws whose purpose was to eliminate tribal common land by

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cense); Dep't of Game v. Puyallup Tribe, Inc., 414 U.S. 44 (1973) (states can regulate tribal fishing when necessary to preserve species, but regulations may not discriminate against Indians).

57. *Fishing Vessel Ass'n*, 443 U.S. at 690.

58. *See infra* Part IV.

59. *See* 2005 COHEN, *supra* note 1, § 1.03[1].

60. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 108–14 (1984). At times the Senate refused to ratify treaties of cession, resulting in seizure. *See* PRUCHA, *supra* note 24, at 558 (index entry for unratified treaties citing numerous entries).

61. *See* United States v. Rogers, 45 U.S. 567, 572 (1846) ("The native tribes . . . have never been . . . regarded as the owners of the territories they respectively occupied."); Mitchel v. United States, 34 U.S. 711, 746 (1835); Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). *Mitchel* was authored by Justice Baldwin and quoted from his prior opinion that had denied tribal sovereignty. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831).

62. *See supra* note 61.

conveying some to tribal members individually and selling the rest to settlers.[63] Most important was the General Allotment Act of 1887, which mandated allotment of most tribal land.[64] The Act provided for individual Indians to choose their allotments, so common practice was to seek tribal consent to an allotment scheme, then to have Congress ratify each agreement.[65] But some schemes were simply imposed, and others included altered provisions inflicted on unconsenting tribes.[66]

While allotment injustices simmered, the Supreme Court rendered its first opinion on tribal land ownership and the Takings Clause in a case unrelated to allotment. An 1884 statute granted a railroad the power to condemn a right-of-way across Cherokee territory upon payment of just compensation.[67] The Cherokee Nation sued the railroad, claiming that the United States lacked power to condemn its treaty land and, in the alternative, that the statute's procedures did not adequately guarantee payment of just compensation as the Constitution required.[68] The Supreme Court upheld federal power of eminent domain.[69] But the Court interpreted the statute to assure just compensation to the Cherokees, and Justice Harlan's opinion for a unanimous Court clearly assumed that tribal ownership was protected by the

63. *See* 1982 COHEN, *supra* note 16, at 130–34, 612–14. From 1854, many treaties had provided for voluntary allotment. *See, e.g.*, Lykins v. McGrath, 184 U.S. 169 (1902). The first allotment statute appears to be the Act of June 15, 1880, ch. 228, 21 Stat. 199, 200 (Ute tribes).

64. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (formerly codified as amended at 25 U.S.C. §§ 331–33). Some tribes were excepted from the statute but brought under the policy separately; some tribes avoided allotment altogether. *See* 2005 COHEN, *supra* note 1, § 16.03[2][b].

65. Act of Feb 8, 1887, ch. 119, § 2, 24 Stat. 388 (formerly codified at 25 U.S.C. § 332); *see* 1982 COHEN, *supra* note 16, at 613. The wholesale nature of the process is shown by several statutes passed in the 1890s that ratified numerous allotment agreements. *E.g.*, Act of Mar. 3, 1891, ch. 543, §§ 8–31, 26 Stat. 989, 1016–43 (seven agreements).

66. *See infra* text accompanying notes 73–74, 293, 301–02, 304, and 306; WILCOMB E. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 49–60 (1975); DELOS SACKETT OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 82–97 (reprint 1973).

67. Act of July 4, 1884, ch. 179, 23 Stat. 73.

68. Cherokee Nation v. S. Kans. Ry. Co., 135 U.S. 641 (1890).

69. *Id.* at 653–57. The Cherokees' case was based on the general concept of retained tribal sovereignty rather than on any specific treaty provision, and on the claim that Congress cannot override a treaty. *See id.* at 648–49. It thus depended on inferring constitutional status to tribal sovereignty, a claim beyond the scope of the treaty canon. *See* text accompanying notes 77 and 250.

Takings Clause.[70]

In 1903, the allotment laws at last generated a decision on constitutional protection of tribal land ownership. The prominent decision in *Lone Wolf v. Hitchcock* dishonored the treaty canon.[71] In 1900, Congress ratified a purported 1892 agreement with Kiowa, Comanche, and Apache Tribes that provided for conveyance of reservation common land to individual tribal members as allotments and for sale of most of the rest at a set price.[72] However, the agreement was apparently made in violation of the 1867 treaty that established the reservation.[73] The tribes also claimed that consent to the agreement had been obtained by fraud, and the set price for land sale was much too low.[74] They sued to enjoin implementation, but a unanimous Supreme Court rejected their claim outright.[75]

Lone Wolf's holding had two parts: first, that Congress had power to override the Indian treaty, and second, that it could do so without complying with the Fifth Amendment.[76] Modern critics argue that the Court should have implied a constitutional barrier to congressional power to override Indian treaties.[77] That is a difficult claim because congressional power to override foreign treaties was and is well-established,[78] the Court had previously sustained overrides of Indian treaty

70. *Cherokee Nation*, 135 U.S. at 657–61.

71. 187 U.S. 553 (1903).

72. Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676–81.

73. The treaty required tribal approval of allotment or other conveyance by at least three-fourths of eligible voters. The federal negotiators reported that three-fourths had approved, but in 1899 the Senate asked the Interior Secretary to review the issue, and he reported that the vote taken had fallen short. Later that year the tribes voted to repudiate the 1892 agreement. *Lone Wolf*, 187 U.S. at 554–58. In any case, the Court proceeded on the assumption that Congress had acted without tribal consent.

74. *Id.* at 560–61.

75. *Id.* at 553.

76. *Id.* at 564.

77. *See, e.g.*, Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1598–99 (2004); Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979 (1981); Frickey, *supra* note 10, at 55–56; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 236–47 (1984); *cf.* Frickey, *supra* note 44, at 405–49 (arguing for a "quasi-constitutional" rule of clear statement in favor of tribal sovereignty); Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003) (advocating adoption of a constitutional amendment).

78. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893).

rights several times,[79] and it has consistently reaffirmed those rulings.[80] Modern international law authorities reject legitimacy of overrides while acknowledging contrary national laws.[81] However, the Supreme Court has not been receptive to any claimed limit on the power, international or domestic.[82]

The *Lone Wolf* Court's failure to accord Fifth Amendment protection to tribal property was another matter. Because the tribes' claim sought to enjoin the scheme rather than recover damages for a taking, their counsels' arguments stressed the Due Process Clause rather than the Takings Clause, claiming both substantive and procedural violations.[83] Justice White's dreadful opinion for the Court referred only to the Fifth Amendment, citing neither clause.[84] The Court's first response was packed into the statement that "[p]lenary authority over the tribal relations of the Indians has been exercised by

79. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (sustaining federal power to lease tribal land for oil extraction); Stephens v. Cherokee Nation, 174 U.S. 445, 483–86 (1899) (sustaining power to determine tribal membership); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890) (sustaining power to take Cherokee land by eminent domain); The Cherokee Tobacco, 78 U.S. 616 (1871) (sustaining statute overriding treaty tax exemption). Treaty rights were also overridden in *Thomas v. Gay*, 169 U.S. 264, 270–72 (1897) (sustaining power to incorporate tribal land into Oklahoma Territory in violation of treaty); *Ward v. Race Horse*, 163 U.S. 504, 511 (1896) (sustaining repeal of treaty hunting right); *United States v. Kagama*, 118 U.S. 375 (1886) (sustaining federal power to prosecute tribal Indian); and *United States v. Rogers*, 45 U.S. 567, 572 (1846) (sustaining federal power to prosecute adopted Cherokee), although in none was a treaty tribe party to the case.

80. *E.g.,* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011).

81. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 & Reporters Note 1 (1987); VILLIGER, *supra* note 27, at 541, 547.

82. Justice Thomas questioned the extent of federal power over Indian affairs in *United States v. Lara*, 541 U.S. 193, 214–27 (2004) (Thomas, J., concurring). However, he almost surely favors curbing federal power in favor of state, not tribal, authority; in all divided decisions on states versus tribes during his tenure, he has voted against tribal sovereignty. *E.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008); Idaho v. United States, 533 U.S. 262, 281 (2001); Minnesota v. Mille Lac Band of Chippewa Indians, 526 U.S. 172, 220 (1999); Hagen v. Utah, 510 U.S. 399, 421 (1994); South Dakota v. Bourland, 508 U.S. 679, 694 (1993).

83. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). Additionally, see the plaintiffs' argument in the decision below, Lone Wolf v. Hitchcock, 19 App. D.C. 315, 316–20 (1902), *aff'd*, 187 U.S. 553 (1903). Plaintiffs could not join a claim for injunction with one for damages. Cherokee Nation v. S. Kansas Ry. Co., 135 U.S. at 651–53 (discussed *supra* text accompanying notes 67–70). Moreover, a takings claim would have encountered sovereign immunity barriers. *See infra* text accompanying notes 202–12.

84. *Lone Wolf,* 187 U.S. at 564.

Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[85] However, "always been deemed" was mostly invention. White's only citations to support this claim related to the power to override a treaty; none justified taking tribal property without compensation or even a hearing on the merits, and he carefully ignored the Court's opinion in the Cherokee railroad case.[86]

The opinion later stated that "the action of Congress now complained of was . . . a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[87] This ignored the forced sale of much tribal land at a specified price without determining whether it was the fair value demanded by the Constitution. It also ignored the possibility that allotment of arid, western Oklahoma land would seriously devalue it. Its invocation of guardianship failed even to attempt to determine whether the government had complied with a guardian's legal duties. A later Court pointed out that the government cannot hide an "act of confiscation" behind the cloak of guardianship.[88]

Any doubt that the *Lone Wolf* Court had denied constitutional protection to tribal land is dispelled by comparing its decision to the Court's opinion nine years later in *Choate v. Trapp*.[89] *Choate* involved another episode in the government's relentless allotment policy. To break up the tribal holdings of the Choctaw and Chickasaw Nations in what is now

85. *Id.* at 565.

86. *Id.* at 566. *See also supra* text accompanying notes 67–70. Denial of protection for tribal ownership had been hinted in Justice White's opinion for the Court a month earlier in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307–08 (1902), but the focus of that case was on other issues.

87. *Lone Wolf*, 187 U.S. at 568. The mereness doctrine triumphed again. The lower court opinion was similarly vacant. *Lone Wolf*, 19 App. D.C. at 329–32. For criticism, see Joseph William Singer, Lone Wolf*, or How to Take Property by Calling it a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37 (2002).

88. United States v. Creek Nation, 295 U.S. 103, 110 (1935). Ironically, this opinion was authored by the government's lawyer in *Lone Wolf*. *See infra* text accompanying note 173. Among pre-*Lone Wolf* dicta on tribal ownership, the *Lone Wolf* opinion recited the positive statement that tribal ownership is "as sacred as the fee of the United States in the same lands," 187 U.S. at 564, and ignored Chief Justice Taney's statement that tribes had no ownership rights. *See supra* note 61. Perhaps Justice White did not want to revive the ghost of *Dred Scott*. After the decision, the Indian Service followed through with allotment of the reservation. *See* Act of Mar. 20, 1906, ch. 1125, 34 Stat. 80.

89. 224 U.S. 665 (1912).

eastern Oklahoma, the government negotiated the 1897 Atoka Agreement providing for allotment and sale of "surplus" land owned by the tribes.[90] Allotments were to be exempt from taxation for up to twenty-one years, and the Agreement was ratified by Congress in 1898.[91] But in 1908, Congress purported to repeal the tax exemption.[92] The lawsuit by some eight thousand plaintiffs challenged the repeal, and the Court sustained their claim.[93]

The opinion's essential move was to interpret the tax exemption as a property right protected by the Fifth Amendment.[94] The decision granted injunctive relief, so the Court's focus was again on the Due Process Clause rather than on the Takings Clause.[95] The opinion expressly held that individual Indians are protected by the Bill of Rights,[96] but it cited *Lone Wolf* favorably.[97] The Court distinguished individual from tribal property, implying that the latter lacked constitutional protection: "there is a broad distinction between tribal property and private property."[98] It seems astonishing to treat a tax exemption as a constitutionally protected property right but to deny even minimal protection to the tribes' beneficial fee.

Apropos of this article, the *Choate* Court supported its decision by vigorously invoking the treaty canon of interpretation that it had ignored in *Lone Wolf*.[99] The issue

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90. *See id.* at 668–69.

91. *See id.* at 667 (citing Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, 507). The tax exemption was found in § 29 of the statute. Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, 507.

92. *See* Act of May 27, 1908, ch. 199, 35 Stat. 312, 313. The provision was explicit.

93. *Choate*, 224 U.S. 665.

94. *See id.* at 677–79.

95. *See id.*; *see also supra* note 83 and accompanying text (noting that the tribes' counsel in *Lone Wolf* used a parallel argumentative strategy).

96. *Choate*, 224 U.S. at 677–78. However, the year before *Choate*, the Court held that an allottee's right to sell his land was not constitutionally protected and could be removed by Congress's imposition of a twenty-year restriction on alienation. Tiger v. W. Inv. Co., 221 U.S. 286 (1911). In the same vein, the Oklahoma Supreme Court had called the tax exemption "a mere gratuity." Gleason v. Wood, 114 P. 703, 709 (Okla. 1911), *rev'd per curiam*, 224 U.S. 679 (1912). *Gleason* and *Choate* were companion cases with the same issues. The Oklahoma court issued its primary opinion in *Gleason*, and the Supreme Court its primary opinion in *Choate*, so *Choate* was in substance a review of *Gleason*.

97. *Choate*, 224 U.S. at 671.

98. *Id.*

99. *See id.* The 1898 statute ratified an agreement with a tribe, so it was a treaty equivalent. *See id.* at 668.

returned in the Court's 1930 decision in *Carpenter v. Shaw*,[100] a reprise of *Choate* that involved the same Atoka allotments. A 1928 federal statute subjected oil and gas royalties from restricted Indian allotments in eastern Oklahoma to state and federal taxes.[101] The Court enjoined the state tax on reasoning identical to *Choate*, including reliance on the treaty canon.[102]

The Supreme Court's failure to accord constitutional protection to tribal land allowed Congress's massively flawed policy of forced allotment to proceed unchallenged.[103] However, a decision recognizing tribal ownership in *Lone Wolf* would not likely have undone much of the allotment juggernaut. As the *Lone Wolf* tale illustrates, tribes wanted to keep their land, so lawsuits had to be timely. Damages claims faced federal sovereign immunity, which was then assumed to be a barrier even to claims under the Takings Clause, and consent to be sued in the Court of Claims excluded claims based on treaties.[104] By the time *Lone Wolf* was decided, the statute of limitations had run on most nineteenth century tribal claims.[105] Congress has waived the statute and consented to damages claims by tribes on a case-by-case basis, but consents were usually subject to conditions that fell short of just compensation.[106] Still another obstacle was the mistaken view of many that tribes lacked corporate capacity to sue unless specifically recognized by Congress.[107]

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100. 280 U.S. 363 (1930).

101. *See id.* at 366 (citing Act of May 10, 1928, ch. 517, § 3, 45 Stat. 495, 496).

102. *See id.* at 365–68. The *Carpenter* Court also rejected Oklahoma's claim that royalties were personalty and did not come within the Atoka tax exemption. *Id.* at 365, 368–69. Apparently, the federal tax collector had respected the exemption, which by that time applied only to some of the allotments. *See id.* at 365. The 1908 statute involved in *Choate* and the 1928 statute involved in *Carpenter* could have been read to exercise Congress's power of eminent domain, but the lawsuit for injunctive relief did not seek compensation, and the Court did not mention this possibility in either opinion.

103. For details of these laws' many defects, see Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1612–20 (2001); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

104. *See* Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L.J. 83, 112 (2006).

105. The statute of limitations for property claims against the government was and remains six years. Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505, 505 (codified as amended at 28 U.S.C. § 1491 (2006)).

106. *See* 2005 COHEN, *supra* note 1, § 5.06[2], [6][b]; *see also infra* notes 213–18 and accompanying text.

107. Lone Wolf's counsel thought it was a barrier, so they sued in the names of tribal leaders in a representative capacity. *See* Lone Wolf v. Hitchcock, 187 U.S.

Changing federal policy stopped further allotment and sale of tribal common land.[108] And in the 1930s, the Supreme Court at last recognized tribal ownership against the feds. The process began with *Creek Nation v. United States*, in which the Court rejected immunity for federal actions with the remark that the government cannot hide an "act of confiscation" behind the cloak of guardianship.[109] The constitutional issue was squarely resolved two years later when the Court held that tribal land had been taken in violation of the Constitution, requiring just compensation including prejudgment interest.[110] The next year, the Court rejected another stingy government claim, holding that tribal ownership included the land's timber and minerals.[111] In 1987, the Court held the Takings Clause to be self-executing, so that consents to sue for takings are no

553 (1903). The *Lone Wolf* Court said nothing about the question, and the Court had readily allowed the Cherokee Nation to sue several times. Indeed, no Supreme Court opinion ever suggested agreement with the claim, and in *Lane v. Pueblo of Santa Rosa*, the Court rejected the government's attempt to assert it. 249 U.S. 110, 112–14 (1919). However, Cohen's 1941 treatise stated it was a live issue. 1941 COHEN, *supra* note 13, at 283–85. Events thereafter resolved the issue conclusively in favor of tribal capacity. *See* Collins & Miller, *supra* note 104, at 112–17.

108. *See* 2005 COHEN, *supra* note 1, § 1.05 (describing the 1928 Meriam Report and the 1934 Indian Reorganization Act).

109. United States v. Creek Nation, 295 U.S. 103, 110 (1935). In *Yankton Sioux Tribe of Indians v. United States*, the Court held that an 1894 agreement had given the tribe fee title to a 648-acre tract that the government had seized without compensation. 272 U.S. 351, 354–58 (1926). The Court held this to be an exercise of eminent domain requiring just compensation. *Id.* However, the specific reference to fee title made the decision distinguishable until the broader holdings of the 1930s.

110. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 498 (1937) ("Spoliation is not management."). In this and other decisions, courts interpreted statutes passed as early as 1920 consenting to claims against the government that silently allowed courts to find takings and award interest. *See* 299 U.S. at 497 and cases cited. A few Indian claims judgments prior to 1937 had awarded prejudgment interest based on agreement. *See* United States v. Cherokee Nation, 202 U.S. 101 (1906); United States v. Blackfeather, 155 U.S. 180 (1894); Pawnee Tribe of Indians v. United States, 56 Ct. Cl. 1, 15 (1920); Mille Lac Band of Chippewa Indians v. United States, 51 Ct. Cl. 400, 407–08 (1916).

111. United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); *see also* United States v. Klamath & Moadoc Tribes of Indians, 304 U.S. 119 (1938) (sustaining judgment with interest for taking timber). A 1980 decision refined the boundary between federal authority to manage tribal land as trustee and federal liability for taking. United States v. Sioux Nation, 448 U.S. 371, 416–21 (1980) (affirming $100 million-plus judgment for taking the Black Hills). *See generally* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule,* 61 OR. L. REV. 245 (1982) [hereinafter Newton 1982] (criticizing the distinction).

longer needed.[112] Occurring long after Indian lands were taken, this was yet another ruling too late to aid tribes.[113]

Land under navigable water is a special category in both general law and Indian law. As a result, Indian claims to own submerged lands have generated mixed applications of the treaty canon. The general federal rule is that states own submerged land in trust for their people except to the extent that the federal government transferred interests prior to statehood.[114] There is a strong presumption against such transfers, and they must have been made for a proper public purpose.[115] Reserving land for Native Americans by treaty, statute, or executive order can qualify as a lawful purpose, but simply setting aside an Indian reservation is not, without more, sufficient to reserve submerged land to tribal ownership.[116] Tribes, usually with federal support, have gained ownership when their economies depended on fishing the disputed waters and under the special removal treaties applicable to eastern Oklahoma.[117] Otherwise, submerged land within reservations belongs to the state.[118] In other words, the treaty canon has helped protect submerged lands of fishing tribes and treaty lands in eastern Oklahoma, but it has failed to avoid loss of submerged lands on other reservations.

Complex issues about tribal sovereignty after 1975 involve both treaty and statutory canons. Application of the canons to these disputes is discussed separately below.[119]

III. THE STATUTORY CANON

This section provides a detailed account of the statutory canon. Its first part explains the canon's gradual emergence from early in the twentieth century until it was clearly established in the 1970s. It then reviews whether the canon

112. First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 314–16 & n.9 (1987). *See generally infra* note 210.

113. *First English* mandates a damages remedy, but statutes of limitations are nevertheless valid. *See supra* note 105.

114. *See* 2005 COHEN, *supra* note 1, § 15.05[3][a].

115. *See id.* § 15.05[3][a] (citing United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Martin v. Waddell, 41 U.S. 367 (1842)).

116. *See id.* § 15.05[3][b].

117. *E.g.*, Idaho v. United States, 533 U.S. 262 (2001); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Alaska Pac. Fisheries v. United States, 248 U.S. 789 (1918).

118. *See* 2005 COHEN, *supra* note 1, § 15.05[3][b].

119. *See infra* Part IV.B.

has suitable support in legal theory. Emerging from dubious paternalism, its modern support is usually said to depend on the trust relationship between the United States and the Indian nations. However, the scope of that theory is contested and uncertain. The canon should have additional support in democratic theory when Congress imposes laws on Indian country because Indian votes have never been an important political check on congressional power. Application of the canon to general federal laws, however, is more complex and should depend on context.

This section's second part discusses the statutory canon's major applications to disputes between Native Americans and state and private interests. It concludes that, like the treaty canon, the statutory canon has helped to protect Indian resources and sovereignty. It also identifies the canon's unlikely creator, Justice Willis Van Devanter. The third part addresses the canon's application to disputes between Indians and the federal government. This involves complex issues about federal sovereign immunity that have been major barriers to justice for tribes.

A. Origin and Theory

Congress ended new Indian treaties in 1871, but the government continued to make formal agreements with Indian nations that were ratified by the full Congress rather than by two-thirds of the Senate.[120] These statutes are essentially treaty equivalents that should be subject to the treaty canon.[121]

The first Supreme Court opinion to suggest a rule for other federal statutes was little more than an aside in a context that likely disadvantaged the Indian party to the case.[122] In *United States v. Celestine*, the Court sustained federal jurisdiction to prosecute an Indian for murder on a reservation against counsel's argument that his citizenship implicitly divested federal authority. The Court stated:

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120. *See* 2005 COHEN, *supra* note 1, § 1.03[9] (citing Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006))).

121. *See* Choate v. Trapp, 224 U.S. 665, 675–77 (1912); Winters v. United States, 207 U.S. 564, 576–77 (1908); 1941 COHEN, *supra* note 13, at 37 n.45 (citing Marlin v. Lewallen, 276 U.S. 58, 64 (1928); Carpenter v. Shaw, 280 U.S. 363, 366–67 (1980)). For recent agreements, tribal parties are versed in English and represented by lawyers, so a different set of rules may be appropriate. However, most contested agreements long predated these changes.

122. *See* United States v. Celestine, 215 U.S. 278 (1909).

> Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, . . . it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race.[123]

The first major decision clearly stating that ambiguous Indian statutes, other than those ratifying agreements, should be interpreted in Indians' favor upheld fishing rights of a small tribe in Alaska.[124] The next use was in an obscure and technical decision.[125] The second major decision was made soon after publication of Cohen's 1941 treatise, and Cohen participated in its briefing.[126] Thereafter, decisions invoking the statutory rule gradually increased until it became an established canon of interpretation.[127]

The theoretical justification for the treaty rule will not work for statutes that are not treaty equivalents. The treaty

123. *Id.* at 290–91. The statement may have meant that the interpretation was favorable to Indians generally (and to the class represented by defendant's victim) if not to the defendant. No authority for "the rule" was cited, but the opinion's author was Justice Brewer, who had applied the treaty canon to a statute ratifying an agreement with a tribe in the landmark decision in *Winters v. United States*, 207 U.S. 564, 576–77 (1908). *See supra* text accompanying notes 51–52 (discussing the decision).

124. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89–90 (1918). The opinion cited *Choate v. Trapp*, 224 U.S. 665 (1912), "and cases cited." *Choate* interpreted a statute ratifying an agreement, that is, a treaty equivalent; its "cases cited" involved interpretation of treaties rather than statutes. For further discussion of *Alaska Pac. Fisheries*, see *infra* text accompanying notes 164–70.

125. *See* United States v. Reily, 290 U.S. 33, 39 (1933) (holding that under a special allotment statute, heir's title retained restriction on alienation). A few other opinions said or implied that Congress should not be found to have intended repeal of treaty rights absent clear intent. *See* United States v. Rickert, 188 U.S. 432, 442–43 (1903); Minnesota v. Hitchcock, 185 U.S. 373, 395–96 (1902); Choctaw Nation v. United States, 119 U.S. 1, 27–28 (1886); Leavenworth, Lawrence & Galveston R.R. Co. v. United States, 92 U.S. 733, 741–44 (1876). However, in all but the *Choctaw* case, the Court sustained a position advocated by the government. For a dissent similar to *Choctaw*, see *The Cherokee Tobacco*, 78 U.S. 616, 622–24 (1871) (Bradley, J., dissenting).

126. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353–55 (1941); *see also infra* text accompanying notes 183–87. On Cohen's participation, see *Santa Fe Pac. R.R. Co.*, 314 U.S. at 341; Felix S. Cohen, *Bibliography of Felix S. Cohen*, 9 RUTGERS L. REV. 351, 353 (1954). For details on the case, see generally CHRISTIAN W. MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY (2007). Briefs for Indians asserted a statutory rule in other pre-1941 cases. *See, e.g.*, Shoshone Tribe of Indians v. United States, 299 U.S. 476, 480 (1937).

127. *See* 2005 COHEN, *supra* note 1, § 2.02[1]–[2]; *infra* text accompanying notes 188–201 (discussing Bryan v. Itasca Cnty., 426 U.S. 373 (1976); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); and other leading cases).

rule's search for expectations that were the basis for Indian consent to a treaty and for evidence of how Indian parties understood treaty terms cannot support a statute enacted without Indian consent. From the beginning, the government has had a loose policy of consultation with tribes, which waxed and waned with policy shifts.[128] But in the end, the statutes were what Congress favored, whether or not any or some or many tribes agreed.

1. Paternalism

Theories to justify the statutory rule are either suggested by the Court's opinions or asserted by scholars. The oldest is paternalism, based on the frequent statement in judicial opinions prior to the 1960s that the policy of the United States toward weak and defenseless Native Americans is one of benevolence. Among other problems, these statements often appeared in opinions justifying oppressive laws, most notoriously *Lone Wolf's* denial of tribal ownership and its green light for forced allotment.[129] One cannot match these encomiums to any consistent policy of judicial respect for Indian rights. The statements appear in decisions of every sort.

2. The Federal Trust Relationship

The most frequent theory in modern discourse is based on the trust relationship between Indian nations and the United States: Because of the federal trust obligation, ambiguous federal statutes should be interpreted in favor of Indian rights to property and sovereignty. The trust relationship is cited in judicial opinions and is the dominant theory in scholarly works including the 1982 and 2005 editions of the Cohen treatise.[130]

The trust concept regarding Indian land has been said to derive from the 1763 Royal Proclamation that placed land "under the dominion and protection" of the Crown "for the use of the . . . Indians."[131] However, the trust relationship is more commonly traced to Chief Justice Marshall's remark in

128. *See* Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 AM. IND. L. REV. 583, 587–91 (2008).

129. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

130. *See, e.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); 2005 COHEN, *supra* note 1, § 2.02[2]; 1982 COHEN, *supra* note 16, at 221–25.

131. *See* 2005 COHEN, *supra* note 1, § 15.03.

Cherokee Nation v. Georgia that Indians' "relation to the United States resembles that of a ward to his guardian."[132] This dictum evolved from Marshall's analogy to a formal guardianship policy and into the allotment laws' land title terms, by which the United States owns allotments in trust for Indian beneficiaries.[133] For a century after *Cherokee Nation*, federal guardianship was repeatedly cited to justify policies adopted by the political branches, both those favoring and harming Indian interests.[134] When Indians opposed a federal policy, courts invoked the guardianship concept against them rather than in their favor.[135]

From the 1930s, the term trust relationship gradually replaced guardianship in legal discourse, and decisions invoking the statutory canon have cited the trust relationship as support for it.[136] Some discussions of the trust relationship assert special solicitude for Indian treaty rights.[137] This supports the trust concept indirectly. Political decisions extended the *Worcester* treaty interpretation in favor of |retained tribal sovereignty into federal policy for all Indian country, including reservations set aside by statute, executive order, or Spanish law.[138] As Cohen said in 1941, "The reciprocal obligations assumed by the [f]ederal [g]overnment and by the Indian tribes during a period of almost a hundred years constitute a chief source of present day Indian law."[139] This made *Worcester's* sovereignty doctrine the "backdrop" for sovereignty issues generally.[140]

However, the Court has at times defined the trust relationship as whatever Congress says it is.[141] A number of

132. 30 U.S. 1, 17 (1831).

133. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a]; *see generally* 2005 COHEN, *supra* note 1, § 16.03[2][b] (discussing the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. §§ 331–333) and subsequent amendments thereto).

134. *See, e.g.*, Choate v. Trapp, 224 U.S. 665, 677 (1912) (favoring); *Lone Wolf*, 187 U.S. at 566 (harming).

135. *See, e.g.*, United States v. Nice, 241 U.S. 591 (1916); *Lone Wolf*, 187 U.S. at 565.

136. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a].

137. *See, e.g.*, Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

138. *See supra* notes 48–49 and accompanying text.

139. 1941 COHEN, *supra* note 13, at 33.

140. *See* McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973).

141. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 127–28 (1983) (statutory duty to reclamation project overrode trust duty to tribe); United States v.

modern statutes expressly embrace the trust relationship and thus provide another background principle for the statutory canon.[142] But some Court decisions interpreting statutes passed during the allotment era pointed out that federal policy at that time was not favorable to tribal interests and read the statutes accordingly.[143] Notably, the Court has interpreted ambiguous allotment statutes that opened tribal reservations to white settlement to have implicitly eliminated reservation status of the opened area.[144]

3. The Democratic Deficit

Another theoretical concept should provide additional support for the statutory canon. When Congress imposes laws on Indian country, it lacks any semblance of political restraint. A member who votes against Indian interests will not risk losing the next election and may gain support from powerful interests opposing Indians.[145] Marshall's guardianship analogy and its successors alluded to this point: a guardian or trustee has such great control over a ward's or beneficiary's property that courts must impose strict standards of honesty and fair dealing.[146]

This democratic deficit is a strong reason for courts to

Mitchell, 445 U.S. 535, 541–46 (1980) (allotment trust imposed no management duties); *see also* 2005 COHEN, *supra* note 1, § 5.05[4][a]–[b] (detailing conflicts of interest within federal departments). Justice Thomas said the right analogy is guardianship rather than trust, which carries lesser duties. United States v. White Mountain Apache Tribe, 537 U.S. 465, 483 n.1 (2003) (Thomas, J., dissenting).

142. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a] (gathering statutes).

143. *See, e.g.*, Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 262–63 (1992).

144. *See infra* Part IV.A (discussing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975)).

145. In the nation's earliest days, its Indian population was relatively numerous, but Indians were not citizens and could not vote. When Indians became citizens, they had become a small minority, and state voting laws kept many from voting until modern times. *See generally* 2005 COHEN, *supr*a note 1, §§ 14.01[1]–[4]; 14.02[1], [2][b]. Some points in this section were raised in Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 378–81 (1989). A more recent analysis is found in Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012).

146. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 2, 77–79, 86–87 (2003); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (2d ed., rev. 1984). On Marshall's analogy, see *supra* text accompanying notes 132–33.

insist that Congress spell out legislative impairments of Indian rights. Ambiguous laws will not do. Whether this concern has directly influenced any court decision is uncertain. No judicial opinion has been found that recognizes it more exactly than the analogy identified above. The Court's adoption of the statutory canon may imply recognition; its demeaning references to Indians as weak and defenseless were at least an accurate description of their lack of direct political influence in Congress.

Recent events have softened the democratic deficit. Though tribes lack the votes to influence Congress directly, they have acquired greater public support and the ability to lobby Congress.[147] However, during most of our history, Congress acted with virtually no Indian influence and often in response to Indians' powerful enemies.[148] Thus, when courts interpret statutes adopted under those conditions, the democratic deficit ought to support a strong statutory canon.

This reasoning encounters more complex applications when we shift our attention from statutes governing Indian country to general federal laws applicable to everyone. These laws are tempered by normal political restraints. When Indians' interests are similar to those of other citizens, there should be no occasion for a statutory canon.[149] When general federal statutes impose on governments, tribal sovereignty is affected. At times tribes' interests may align with those of state and local governments, which have serious political clout.[150]

147. *See, e.g.*, Report on National Congress of American Indians, INFLUENCE EXPLORER, http://influenceexplorer.com/organization/national-congress-of-american-Indians/b8e898903c5047db872e5f20acc5f5ca?cycle=-1 (last visited Mar. 5, 2012). Tribal interests even became tangled with the scandals involving Jack Abramoff and were accordingly the subject of a congressional inquiry and report. *See* STAFF OF S. COMM. ON INDIAN AFFAIRS, 109TH CONG., "GIMME FIVE"—INVESTIGATION OF TRIBAL LOBBYING MATTERS (Comm. Print June 22, 2006), *available at* http://www
.indian.senate.gov/public/_files/Report.pdf. Improved public support is shown by President Nixon's 1970 Special Message on Indian Affairs, 1970 PUB. PAPERS 564 (1970), and by the positive recognition of the trust relationship in both major parties' presidential-year platforms since 1976, see *Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/platforms.
php (last visited Mar. 7, 2012).

148. For discussion and analysis of manifold instances, see 2005 COHEN, *supra* note 1, § 1.03[4][a] (Indian Removal Act); United States v. Sioux Nation, 448 U.S. 371, 382–84 (1980) (Black Hills taking).

149. Reported decisions are in accord, though not on this explicit basis. *See* 2005 COHEN, *supra* note 1, § 2.03 ("Individual Indians and their property are presumed subject to the same general federal laws as all other persons.").

150. For example, federal law governs the status of noncitizens wherever

More often, however, tribal sovereignty raises distinct concerns. Tribal property has important cultural value.[151] Tribes and states are often in direct conflict over authority to govern Indian country.[152] These are important occasions to apply the statutory canon.[153] Other laws that apply to everyone can have uniquely negative impacts on Indian interests. A notable example is the Eagle Protection Act, which forbids killing eagles and possession of eagle parts.[154] Another is the statutory protection for religious freedom[155] applied to Indian claims to protect sacred sites on public lands. The statutory canon is justly applied to them, but results are mostly negative.[156]

The Supreme Court has so far addressed cases involving Indian challenges to general federal laws by saying that the issue in every case is whether Congress intended application of the contested statute to Indian country.[157] Because Congress often fails to consider the issue, we are left with the usual game of attributed intent. This yields some useful points, such as judging whether a statute would be rendered ineffective by an Indian country exception.[158] Some courts have thought it relevant whether a tribal activity is traditionally governmental

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found. *See* Arizona v. United States, 132 S. Ct. 2492 (2012).

151. *See* 2005 COHEN, *supra* note 1, § 15.01.

152. *See generally id.* §§ 6.01[5], 6.02[1]–[2][b], 6.03[1][a]–[2][c], 6.04[3][b][i]–[iv], 11.01[1]–[2], 11.02[1]–[3], 11.03, 11.04[1]–[5], 11.05[1]–[4], 11.06, 11.07, 11.08.

153. *See generally* 2005 COHEN, *supra* note 1, §§ 2.03, 21.02[5][c][i]–[6]; Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U. C. DAVIS L. REV. 85 (1991).

154. 16 U.S.C. §§ 668–668d (2006). On the importance of the Eagle Protection Act to Native Americans, see *United States v. Dion*, 476 U.S. 734 (1986); 2005 COHEN, *supra* note 1, § 14.03[2][c][ii][C]. The *Dion* Court applied the statutory canon but found clear congressional intent to override a treaty right. 476 U.S. at 738–45.

155. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(4) (2006).

156. *See, e.g.*, Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207 (9th Cir. 2008); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009); S. Fork Band v. U.S. Dep't of Interior, 643 F.Supp.2d 1192 (D. Nev. 2009), *aff'd per curiam*, 588 F.3d 718 (9th Cir. 2009); Comanche Nation v. United States, No. 08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). Only the *Comanche Nation* claim was successful. None of the opinions recited the canon.

157. *See, e.g.*, Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960). Most decisions on this issue are in the lower federal courts, but they observe a like rule. For more information, see cases cited in 2005 COHEN, *supra* note 1, §§ 2.03, 10.01[2][a]–[c], 21.02[5][c][i]–[ii], 21.02[6].

158. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 811–13 (1976).

or private, opining that private tribal activity should not merit an Indian exception.[159] This fits analysis based on political restraint because laws imposed on the private sector impact more voters.[160] However, when federal laws exempt enterprises owned by state and local government, tribes should have like treatment.[161]

Whether and when to rely on political restraint is a frequent subject of judicial review that sharply divides the Supreme Court on such basic issues as state sovereignty, voting rights, personal autonomy, interstate commerce, and rights of corporations.[162] In Indian law to date, the only explicit reliance on the concept of democracy has deployed the concept against tribal sovereignty, as explained below.[163] A more balanced approach is in order.

B. Application to Disputes with State or Private Parties

Like the treaty canon, the statutory rule has been more effective for tribes when the opposing interest is a state or private party. The rule's inaugural decision, *Alaska Pacific Fisheries v. United States*,[164] is illustrative and remarkable for several reasons. In 1887, the small Metlakatla band migrated from British Columbia to Alaska.[165] In 1891, Congress by statute set aside Annette Islands as a reserve for the tribe.[166]

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159. *See* 2005 COHEN, *supra* note 1, § 2.03 (describing the cases).

160. *Cf.* New York v. United States, 505 U.S. 144, 160 (1992) (in state sovereignty dispute, distinguishing laws imposed only on state governments from "generally applicable laws" imposed on states in common with private sector).

161. *See* Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and* NLRB v. San Manuel Band of Mission Indians, 43 IDAHO L. REV. 127 (2006) (criticizing application of National Labor Relations Act to tribal business when it does not apply to state and local businesses). On labor and employment laws, see Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487; Vicki J. Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467; Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435; Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

162. *See* United States v. Lopez, 514 U.S. 549 (1995); Bush v. Gore, 531 U.S. 98 (2000); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

163. *See infra* Part IV.C.

164. 248 U.S. 78 (1918).

165. *Id.* at 86.

166. *Id.* at 86–87 (citing Act of March 3, 1891, ch. 561, sec. 15, 26 Stat. 1094,

In 1916, the Alaska Pacific Fisheries Company installed a "formidable" fish-trap in waters off the islands.[167] The government successfully sued to enjoin maintenance of the trap.[168] The Court held that the 1891 statutory reservation included adjacent waters and submerged land despite the strong rule that land under navigable waters of federal territories is held by the United States in trust for future states and may be conveyed before statehood only on the clearest showing of intent.[169] Thus, the decision giving birth to the statutory canon was in favor of an immigrant tribe with no treaty rights, and the decision overcame a strong, contrary rule of interpretation.

Another notable feature of the *Alaska Pacific* opinion was its author, Justice Willis Van Devanter. Constitutional scholars know him as one of the conservative justices who voted to strike down New Deal legislation in the 1930s and federal child labor laws a generation earlier.[170] He was also the one justice in the Court's history with significant personal experience in American Indian law. His work in the field began when he represented his home state of Wyoming to win a notorious decision denying Indian hunting and fishing rights.[171] The same year, he moved to Washington and became an assistant attorney general in the Interior Department.[172] Over the next several years, he argued several Indian law cases to the courts, opposing suits by tribes against the government—including *Lone Wolf*—and supporting tribal rights when the government sued to enforce them.[173] Appointed to the Eighth Circuit in 1903, he did not sit for any major Indian law cases but heard

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1101).

167. *Id.* at 87.

168. *Id.* at 86.

169. *Id.* at 87–90; *see also supra* text accompanying notes 114–18. Despite the novelty of the Court's decision, it was unanimous.

170. *See Willis Van Devanter*, WIKIPEDIA, http://en.wikipedia.org/wiki/Willis_Van_Devanter (last visited June 6, 2012).

171. *See* Ward v. Race Horse, 163 U.S. 504, 507 (1896). This was one of the few hunting and fishing decisions that Indians have lost. *See supra* notes 53–57 and accompanying text.

172. *See Willis Van Devanter*, WIKIPEDIA, http://en.wikipedia.org/wiki/Willis_Van_Devanter (last visited June 6, 2012).

173. *See* United States v. Rickert, 188 U.S. 432, 434 (1903); Lone Wolf v. Hitchcock, 187 U.S. 553, 563 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 299 (1902); Minnesota v. Hitchcock, 185 U.S. 373, 382 (1902). He also represented the government in Indian law cases before the D.C. courts. *See, e.g.*, U.S. *ex rel.* West, v. Hitchcock, 19 App. D.C. 333, 337 (D.C. Cir. 1902).

many appeals from the Indian Territory.[174] On the Supreme Court from 1911, he became the Court's Indian law specialist, writing its notable opinions favorable to Indian interests in *Alaska Pacific Fisheries*, *United States v. Sandoval*,[175] *United States v. Quiver*,[176] *Lane v. Pueblo of Santa Rosa*,[177] *Seufert Bros. Co. v. United States*,[178] *United States v. Candelaria*,[179] *United States v. Chavez*,[180] and *Creek Nation v. United States*,[181] as well as in forty-four routine Indian law cases.[182] Justice Van Devanter's involvement in the *Lone Wolf* case was atoned by a strong judicial record respectful of Indian rights.

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174. *See, e.g.*, Stanclift v. Fox, 152 F. 697, 698 (8th Cir. 1907). Van Devanter did write the opinion in one Indian law case of note, *Rainbow v. Young*, 161 F. 835, 835 (8th Cir. 1908), which sustained the authority of Indian police on the Winnebago Reservation in Nebraska.

175. 231 U.S. 28 (1913) (holding Pueblo land is Indian country protected by federal laws defining crimes against Indians).

176. 241 U.S. 602 (1916) (denying federal authority to prosecute tribal Indians for adultery in Indian country).

177. 249 U.S. 110 (1919) (sustaining injunction against Interior Secretary to prevent wrongful disposal of tribal land).

178. 249 U.S. 194 (1919) (protecting Yakima treaty fishing rights).

179. 271 U.S. 432 (1926) (sustaining authority of U.S. to protect Pueblo land ownership).

180. 290 U.S. 357 (1933) (Pueblo land is Indian country protected by federal laws against theft of Indian livestock).

181. *See supra* note 109 and accompanying text.

182. Chippewa Indians of Minn. v. United States, 301 U.S. 358 (1937); British-American Oil Producing Co. v. Bd. of Equalization, 299 U.S. 159 (1936); Stewart v. Keyes, 295 U.S. 403 (1935); United States v. Reily, 290 U.S. 33, 39 (1933) (relying on statutory canon); Halbert v. United States, 283 U.S. 753 (1931); Mott v. United States, 283 U.S. 747 (1931); Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206 (1930); Larkin v. Paugh, 276 U.S. 431 (1928); Longest v. Langford, 276 U.S. 69 (1928); Marlin v. Lewallen, 276 U.S. 58, 64 (1928) (relying on treaty canon); Smith v. McCullough, 270 U.S. 456 (1926); United States v. Minnesota, 270 U.S. 181 (1926); United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924); Bunch v. Cole, 263 U.S. 250 (1923); United States v. Bowling, 256 U.S. 484 (1921); Privett v. United States, 256 U.S. 201 (1921); La Motte v. United States, 254 U.S. 570 (1921); Harris v. Bell, 254 U.S. 103 (1920); Broadwell v. Bd., 253 U.S. 25 (1920); Ward v. Bd., 253 U.S. 17 (1920); Parker v. Richard, 250 U.S. 235 (1919); Parker v. Riley, 250 U.S. 66 (1919); Kenny v. Miles, 250 U.S. 58 (1919); Jefferson v. Fink, 247 U.S. 288 (1918); United States v. Ferguson, 247 U.S. 175 (1918); United States v. Chase, 245 U.S. 89 (1917); United States v. Rowell, 243 U.S. 464 (1917); Williams v. City of Chicago, 242 U.S. 434 (1917); Dickson v. Luck Land Co., 242 U.S. 371 (1917); Hill v. Reynolds, 242 U.S. 361 (1917); United States v. Nice, 241 U.S. 591 (1916); La Roque v. United States, 239 U.S. 62 (1915); Sizemore v. Brady, 235 U.S. 441 (1914); Washington v. Miller, 235 U.S. 422 (1914); Adkins v. Arnold, 235 U.S. 417 (1914); Skelton v. Dill, 235 U.S. 206 (1914); United States v. Bartlett, 235 U.S. 72 (1914); Pronovost v. United States, 232 U.S. 487 (1914); Perrin v. United States, 232 U.S. 478 (1914); Thurston v. United States, 232 U.S. 469 (1914); Monson v. Simonson, 231 U.S. 341 (1913); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913); Kindred v. Union Pac. R.R. Co., 225 U.S. 582 (1912); Gritts v. Fisher, 224 U.S. 640 (1912).

The Court's second major decision to recite a statutory canon of interpretation was *United States v. Santa Fe Pacific Railroad Company* in 1941.[183] The rule again appeared to make a difference. The United States sued a railroad to enforce the Walapai Tribe's original Indian title.[184] The railroad claimed that several federal statutes had extinguished that title by implication.[185] The Court rejected each extinguishment claim for lack of clear intent, citing the treaty-equivalent rule of *Choate v. Trapp*:[186]

> We search the public records in vain for any clear and plain indication that Congress . . . intended to extinguish all of the rights which the Walapais had in their ancestral home . . . . Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands . . . . No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement . . . unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read.[187]

In the 1950s and 1960s, the government adopted and pursued a mindless policy to terminate the distinct legal status of Indian nations and end trust protection for tribal land. Indian opposition generated two of the most notable applications of the statutory canon.[188] In *Menominee Tribe of Indians v. United States*, the Court held that the statute terminating the Menominees' federal status had not abolished their freedom to hunt and fish on their former reservation without complying with state regulations.[189] The opinion relied on the treaty canon to infer that hunting and fishing rights were implicitly guaranteed by the treaty and on the statutory canon to hold that Congress had not abolished those rights.[190]

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183. 314 U.S. 339, 353–55 (1941).

184. *Id.* at 343.

185. *Id.* at 348–54.

186. *Id.* at 354. Walapai is now customarily spelled Hualapai. *See* THE HUALAPAI TRIBE WEBSITE, http://hualapai-nsn.gov/ (last visited Mar. 19, 2012). On original Indian title, see *infra* text accompanying notes 233–58.

187. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 353–56.

188. On the termination policy generally, see 2005 COHEN, *supra* note 1, § 1.06.

189. 391 U.S. 404 (1968).

190. *Id.* at 405–06, 412–13. Dissenters agreed on the treaty right but thought that the statute had abolished it. *Id.* at 415 (Stewart, J., dissenting) ("The statute

The second occasion in which the Court applied the statutory canon to a termination policy was a 1976 decision interpreting the scope of a 1953 statute giving state courts civil and criminal jurisdiction over reservations in many states.[191] A Minnesota county relied on the statute to impose its personal property tax on an Indian resident of the Leech Lake Reservation.[192] The relevant text applied to reservation Indians "those civil laws of such State that are of general application to private persons or private property" except for laws relating to Indian trust property.[193] The plaintiff's mobile home was not trust property, so the statute appeared to apply state tax law, and the state courts so held.[194] The Supreme Court unanimously reversed, relying strongly on the statutory canon.[195]

The Court invoked the canon in a 1978 decision that protected tribal sovereignty from federal court review of individual rights claims: *Santa Clara Pueblo v. Martinez*.[196] A 1968 statute imposed most provisions of the Bill of Rights and the Equal Protection Clause on tribal governments.[197] The statute expressly authorized federal district courts to review tribal detentions by habeas corpus but was otherwise silent about enforcement.[198] The Santa Clara Pueblo passed and enforced a law on membership of children of mixed marriages under which offspring of Santa Clara men are members, while those of women are not.[199] In a suit to overturn the law as a denial of equal protection, the Supreme Court held that a civil cause of action to enforce the 1968 federal statute should not be

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is plain on its face . . . .").

191. Bryan v. Itasca Cnty., 426 U.S. 373 (1976).

192. *Id.* at 378.

193. 28 U.S.C. § 1360 (2006). The statute also expressly authorizes concurrent tribal authority where it is not inconsistent with state law. *Id.* § 1360(c).

194. *Itasca Cnty.*, 426 U.S. at 375.

195. *Id.* at 392.

196. 436 U.S. 49 (1978).

197. 25 U.S.C. §§ 1301–1303 (2006) (Indian Civil Rights Act). Congress passed the law in part because in 1896 the Court had held that tribes were not subject to the Bill of Rights directly. Talton v. Mayes, 163 U.S. 376 (1896). *Talton* is often hailed as an affirmation of tribal sovereignty, which in outcome it was. *See, e.g.*, 2005 COHEN, *supra* note 1, § 4.01[1][a]. However, the opinion was murky. It relied on the former view that the Bill of Rights did not apply to states, either. *Talton*, 163 U.S. at 382. The rights claim at issue was indictment by grand jury, and the Court cited its decisions, still good law today, refusing to impose that right on states under the Fourteenth Amendment. *Id.* at 384–85. And the Court stressed that Congress could impose laws on tribes. *Id.* at 384.

198. 25 U.S.C. §§ 1301–1303.

199. *Santa Clara Pueblo*, 436 U.S. at 51.

implied.[200] The opinion strongly relied on the statutory canon.[201]

C. Application to Disputes with the Federal Government

When tribes have sought judicial remedies against the federal government, sovereign immunity has been a dominant barrier to justice, and the statutory canon has seldom aided their claims. The first section of this part points out that sovereign immunity has defeated any claims for return of land in kind. While sovereign immunity is no barrier to injunctive relief against future wrongdoing by officials, such claims must be timely filed. Therefore, the only remedy for historical wrongs is damages claims, but these require either finding an unconstitutional taking or clear statutory consent to suit.

The second section of this part discusses the most important category of damages claims: those seeking redress for land wrongfully taken. Statutory consents to damages claims present challenging issues of interpretation, and decisions have often been hyper-technical and stingy. The section relates the long history of consent statutes including an account of the Indian Claims Commission.

The third section addresses the particular subject of the Court's failure to accord constitutional protection to original Indian title. The fourth briefly describes the status of executive order Indian reservations. The fifth section is a discussion of breach of trust claims for wrongs other than taking of land. Here again, interpretation of statutes consenting to damages remedies has been overly strict.

1. Remedy

Because of federal sovereign immunity, it is crucial to analyze remedies when reviewing Indians' disputes with the federal government. Tribes above all wanted to keep their land, but federal law had no judicial remedy to recover land

200. *Id.*

201. *Id.* at 60. As the dissent noted, the Court had readily implied a private civil cause of action to enforce previous civil rights laws. *Id.* at 73–74 (White, J., dissenting). In 2012 Santa Clara's membership voted to modify or repeal the restriction. *See* Tom Sharpe, *Santa Clara Vote on New Member Rules Leaves Loose Ends*, THE NEW MEXICAN, May 1, 2012, *available at* http://www.santafenewmexican.com/localnews/Pueblo-vote-on-member-rules-leaves-loose-ends.

wrongfully taken until recently.[202] Tribal land has often been restored by political action that set aside or expanded reservations by statute or executive order.[203] The 1934 Indian Reorganization Act provided for return of unsold land ceded under allotment statutes and authorized the Interior Department to take other land in trust "for the purpose of providing land for Indians."[204] Under secretarial regulations, unrestricted land within or adjacent to existing reservations is readily taken into trust, but the process is more difficult for land elsewhere.[205] Moreover, the Supreme Court restricted the statute to tribes recognized by Interior in 1934; the statutory canon was defeated by misapplication of the plain meaning rule, as the dissenters showed.[206]

In recent years, tribes have had occasional success in suits seeking an injunction or declaratory judgment against federal officials alleged to have breached federal trust obligations to tribes or otherwise to have acted illegally, and the statutory canon has played a role in some of these decisions.[207] However, equitable remedies are for future conduct,[208] while tribes often need remedies for past wrongs. When tribal property is

202. *See* Quiet Title Act, 28 U.S.C. § 2409A (2006). The statute expressly does not apply to Indian trust lands. *Id.* § 2409A(a). It includes a limitations period of twelve years. *Id.* § 2409A(g).

203. *See* 2005 COHEN, *supra* note 1, § 15.04[3][b]–[4]; Act of Sept. 4, 1980, Pub. L. No. 96-340, 94 Stat. 1072 (expanding land base of Siletz Tribe); Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455 (expanding Fallon Indian Reservation); Act of Sept. 21, 1972, Pub. L. No. 92-427, 86 Stat. 719 (expanding Warm Springs Reservation); Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (restoring Taos Pueblo ownership of sacred Blue Lake); *see also* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 476–77 (1994) [hereinafter Newton 1994].

204. 25 U.S.C. §§ 463, 465 (2006). Laws specific to named tribes have similar provisions. *See* 2005 COHEN, *supra* note 1, § 15.07[1][a]. The 1983 Indian Land Consolidation Act promotes elimination of fractionated titles caused by the allotment laws. 25 U.S.C. §§ 2201–2209 (2006); *see also* 2005 COHEN, *supra* note 1, § 15.07[2].

205. *See* 25 C.F.R. pt. 151 (2011); 2005 COHEN, *supra* note 1, § 15.07[1][b]. Constitutional attacks on the statute by Indians' opponents have caused the criteria to be scrutinized and refined. *See id.* § 15.07[1][c].

206. Carcieri v. Salazar, 555 U.S. 379 (2009) (applying 25 U.S.C. § 479 (2006)). The Court majority pronounced the statute unambiguous, but the dissent and lower courts did not agree. For criticism of *Carcieri*, see Scott A. Taylor, *Indian Law: Taxation in Indian Country After* Carcieri v. Salazar, 36 WM. MITCHELL L. REV. 590 (2010). For criticism of "plain meaning," see Michael R. Merz, *Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31 (1979).

207. *See* 2005 COHEN, *supra* note 1, § 5.05[1][a]. Of course, *Lone Wolf* was a failed attempt to enjoin loss of land. *See supra* text accompanying notes 75, 83.

208. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974).

mismanaged by federal overseers, the wrong will often be unknown until after the fact because officials control the relevant records, often located far from Indian country.

For these reasons, most judicial contests between tribes and the federal government have involved damages claims, and all damages claims against the government depend on waivers of sovereign immunity.[209] In 1987, the Supreme Court held the Takings Clause to be a constitutional waiver;[210] but other claims depend on contracts or statutes that waive immunity.[211] The Supreme Court has often said that statutory waivers are strictly construed in favor of the government, though an irregular trend has generated some play in the rule's applications.[212] As relevant here, when the statutory Indian law canon clashed with the sovereign immunity rule, sovereign immunity usually, but not always, prevailed.

2. Damages for Land

An 1863 federal statute (known by its 1887 amended form as the Tucker Act) consented to damages claims against the government based on property or contract, but the statute unambiguously excluded claims based on treaties.[213] For this reason, Indian treaty claims required a special act of Congress for each tribe, consenting to suit, defining the cause of action, and waiving the statute of limitations.[214] The process was plagued by delay.[215] Many waivers were strictly construed against tribes: narrow causes of action, stingy damages rules,

209. United States v. Testan, 424 U.S. 392 (1976).

210. First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 311–16 (1987). As it often does, the Court claimed that this had always been the law, or at least had been clear since its decision in *Jacobs v. United States*, 290 U.S. 13 (1933). However, Professor Sisk explained that *Jacobs* had simply acknowledged the Tucker Act's statutory consent to constitutional claims, which the Court had previously restricted to cases in which the government sought title to land. *See* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 568–71 (2008). It is reasonable to suppose that *Jacobs*' recognition of Tucker Act jurisdiction based on inverse condemnation owed something to the Court's first recognition of the concept in the celebrated decision of *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

211. *Testan*, 424 U.S. at 400; *see generally* Sisk, *supra* note 210, at 525–33.

212. *See* Sisk, *supra* note 210, at 543–606.

213. *See* United States v. Sioux Nation, 448 U.S. 371, 384 n.15 (1980).

214. *See* 2005 COHEN, *supra* note 1, § 5.06[4]–[5].

215. *See* H. D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 19–20 (1990) (reporting an average of 15 years from enactment of consent to final judgment).

and substantial offsets for federal aid.[216] As a result, most claims were unsuccessful.[217] The Court of Claims could hear nontreaty claims, but many lawyers believed that all tribal claims were barred,[218] and most nontreaty claims would have needed waiver of the statute of limitations in any event.

That scheme was fundamentally changed by the 1946 Indian Claims Commission Act ("ICCA").[219] This act consented to all historical Indian claims being heard by a new Indian Claims Commission and reviewed by the Court of Claims.[220] The statute was generous in its definition of causes of action, encompassing a broad range of land claims and a provision to allow recovery for other wrongs.[221] However, the Commission and Court of Claims narrowed the latter substantially.[222] Furthermore, while ICCA waived immunity and limitations, it allowed other defenses and offsets.[223] ICCA also consented to future Indian treaty claims by removing the treaty exclusion from the Tucker Act, subject to the Act's six-year statute of limitations.[224]

The statute implied, but did not specify, that only damages could be awarded. In any case, the Commission and courts assumed as much from the outset.[225] Congress punted on other

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216. *See* 2005 COHEN, *supra* note 1, § 5.06[2]; ROSENTHAL, *supra* note 215, at 20–21, 27–33; Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 517–18 (1966).

217. *See* Wilkinson, *supra* note 216, at 513.

218. *See* Collins & Miller, *supra* note 104, at 102–12.

219. Act of Aug. 13, 1946, ch. 139, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70–70n-2). The act's history is related at John T. Vance, *The Congressional Mandate and the Indian Claims Commission,* 45 N.D. L. REV. 325, 326–32 (1969).

220. Act of Aug. 13, 1946, ch. 139, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70–70n-2).

221. *Id.* § 2, 60 Stat. 1050. Nonland claims came under § 2(5): "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

222. *See* 2005 COHEN, *supra* note 1, § 5.06[3]; Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror,* 41 AM. U. L. REV. 753, 776–84 (1992) [hereinafter Newton 1992]. The most common nonland claim allowed was accounting for mismanagement of tribal funds. Many accounting claims were heard, but proofs were difficult. *See* ROSENTHAL, *supra* note 215, at 137, 139–40.

223. *See* 2005 COHEN, *supra* note 1, § 5.06[3].

224. ICCA § 24, 60 Stat. 1055 (codified as amended at 28 U.S.C. § 1505 (2006)); *see also* 2005 COHEN, *supra* note 1, § 5.06[5].

225. The implication arose from the Claims Commission name, review by the Court of Claims, and references in section 2 of the statute to deductions, offsets, and quantum of relief, and to the words "amount" and "sums" in §§ 15, 19, & 22(a), 60 Stat. 1050, 1053–55. When claimants sought awards of land in kind, their claims were rejected. *E.g.*, Osage Nation of Indians v. United States, 97 F.

issues of remedy, notably the major question of prejudgment interest.[226] In due course, decisions said that Fifth Amendment takings must include prejudgment interest.[227] However, the Commission and Court of Claims found numerous ways to avoid finding a taking.[228] The most egregious were refusing to recognize coerced or fraudulent treaties as takings and allowing the government to prevail on its claim that it acted as good faith manager of tribal assets when the facts belied the claim.[229] On the other hand, a few claims for interest based on agreements rather than takings succeeded, aided by the treaty canon.[230] And fair market value was the measure for land taken, rejecting the government's attempts to assert a lesser standard.[231]

An important and ironic defense was res judicata based on prior claims judgments. In two cases, the defense barred claims based on past judgments in special consent cases that were held—in effect, retroactively—to have found constitutional takings, though no takings claim had been made and no interest awarded.[232]

Supp. 381 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 896 (1951). The statute's provisions on evidence, lawyers, and offsets implied some sort of adversarial procedure, but it has been criticized as overly adversarial by its last chair and by scholars. *See* Newton 1992*, supra* note 222, at 772; Vance, *supra* note 219, at 332–36

226. The statute's silence was not simply an oversight. Congress had considered but failed to pass statutes limiting prejudgment interest to six years. *See* ROSENTHAL, *supra* note 215, at 27–28; Howard M. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc,* 5 VAL. U. L. REV. 26, 28 (1970).

227. *See* Friedman, *supra* note 226, at 41.

228. *See id.* at 30–37. An experienced claims lawyer reported that as of 1966, only two ICCA takings claims for interest had succeeded. *See* Wilkinson, *supra* note 216, at 526.

229. Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl.1968); *see also* Friedman, *supra* note 226, at 34–37. The Supreme Court embraced the "good faith" theory of *Fort Berthold* in *United States v. Sioux Nation*, 448 U.S. 371, 416–21 (1980). For additional criticism, see Newton 1982, *supra* note 111.

230. *E.g.*, Peoria Tribe of Indians of Okla. v. United States, 390 U.S. 468, 472–73 (1968); Nez Perce Tribe v. United States, 176 Ct. Cl. 815, 829 (Ct. Cl. 1966), *cert. denied*, 386 U.S. 984 (1967) (partial recovery); Menominee Tribe of Indians v. United States, 67 F. Supp. 972, 975 (Ct. Cl. 1946).

231. *See, e.g.*, Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 781–84 (Ct. Cl. 1968).

232. Assiniboine Indian Tribe v. United States, 121 F. Supp. 906 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 863 (1954); Blackfeet & Gros Ventre Tribes of Indians v. United States, 119 F. Supp. 161 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 835 (1954). Failure to claim interest in the prior cases was, in hindsight, malpractice but understandable because of the widespread opinion that it was not recoverable until the Supreme Court decisions in 1935 and 1937. *See supra* text accompanying notes 109–11. On res judicata in the *Sioux Nation* case, see *infra* note 258 and ac-

3. Original Indian Title

Takings of land in original Indian title presents distinct issues of legal recognition and remedy. Original or aboriginal Indian title refers to tribal ownership antecedent to legal relations with a European or successor power.[233] The first American treaties with tribes involved cessions of part of a tribe's original territory and treaty recognition of land retained.[234] Parts of other tribes' original territory were recognized by statute or international treaty; lands of others were simply seized by settlers.[235] Under the theory of *Lone Wolf*, these distinctions would not have mattered in disputes about takings of tribal land because that decision denied constitutional protection to all tribal land.[236] The 1930s Court changed the law and held treaty title to be protected by the Takings Clause, but it did not say whether protection would include land in original title.[237]

Pre-1946, special acts of Congress consenting to damages claims were limited to causes of action specified in each statute. Until 1929, consents to land claims were based on ownership recognized in treaties, statutes, or executive orders, and the courts interpreted them strictly, thus excluding claims based on original title.[238] Starting in 1929, a few statutes allowed original title claims, and in 1945, the Court of Claims upheld the *Alcea* claim and was affirmed by the Supreme Court.[239] Soon after, ICCA was passed, and its broad causes of action were eventually interpreted to allow claims based on

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companying text.

233. *See* 2005 COHEN, *supra* note 1, § 15.04[2].

234. *See* PRUCHA, *supra* note 24, at 226–31.

235. *See id.* at 62–63, 978–82. Many reservations were set aside or expanded by executive order of the President. Their legal status is reviewed *infra* text accompanying notes 259–63.

236. *See supra* text accompanying notes 76–88.

237. *See supra* text accompanying notes 109–11.

238. *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 49–54 (1946). The leading example is *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945) (stating that consent to claim based on treaty did not allow recovery based on original title). The Court divided 5-4; Justice Murphy's dissent relied strongly on the treaty canon to argue that plaintiffs should succeed under their treaty. *Id.* at 362. The dissent did not address original title.

239. Alcea Band of Tillamooks v. United States, 59 F. Supp. 934 (Ct. Cl. 1945), *aff'd*, 329 U.S. 40 (1946). The Court of Claims related that prior claims had failed for lack of proof or because jurisdictional acts were limited to treaty or other recognized title. *Id.* at 961–65. *Alcea* involved unratified treaties in Oregon, making proof easier.

original title.[240]

Constitutional protection was not at issue in *Alcea* until remand, when the plaintiffs sought interest on the judgment.[241] On its second review, the Supreme Court rejected the claim in a per curiam opinion that addressed the constitutional issue in a single sentence: "[l]ooking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment."[242]

The Court squarely addressed the constitutional issue in *Tee-Hit-Ton Indians v. United States*, decided in 1955.[243] The Tee-Hit-Ton tribe in Alaska claimed that a federal timber sale condemned the timber interest in its original title land.[244] The tribe asserted that the Alaska Organic Act and other statutes recognized its ownership, entitling it to constitutional protection; in the alternative, it argued that its original title was protected by the Takings Clause.[245] The Court rejected both claims.[246]

The tribe's statutory claim was an opportunity to apply the statutory canon. However, three dissenting justices voted for the tribe on this claim without invoking the canon, and the majority also ignored it.[247] When Congress passed the Alaska Organic Act and other early statutes, it knew little about the extent of Native Alaskan interests, and these acts included

240. Otoe & Missouria Tribe v. United States, 131 F. Supp. 265 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 848 (1955). As this decision shows, the government contested the issue vigorously. *See infra* note 244.

241. United States v. Alcea Band of Tillamooks, 341 U.S. 48, 48–49 (1951).

242. *Id.* at 49. Professor Friedman opined that the case did not settle the takings issue. Friedman, *supra* note 226, at 38.

243. 348 U.S. 272 (1955).

244. *Id.* Although the Court of Claims rejected the claim, the Supreme Court agreed to review the conflict because a few years earlier the Ninth Circuit had upheld another Alaskan tribe's takings claim. *Id.* at 275–76. The Court's opinions in prior cases, and a dissent, had language foreshadowing the constitutional ruling. Hynes v. Grimes Packing Co., 337 U.S. 86, 101–07 (1949); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 56 (1946) (Reed, J., dissenting); Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 338–40 (1945). Like the *Tee-Hit-Ton* majority, all were authored by Justice Stanley Reed, who seemed to have a personal vendetta on the issue. See also his gratuitous denigration of the treaty canon in *Northwestern Bands of Shoshone Indians*, 324 U.S. at 353.

245. *Tee-Hit-Ton Indians*, 348 U.S. at 273, 277.

246. *Id.* at 277–91.

247. *Id.* at 291 (Douglas, J., dissenting). In 1955 the statutory canon was not yet established. The Court had recognized it in all but three or four decisions. *See supra* notes 122–26 and accompanying text.

general provisions preserving Native rights.[248] The majority summarily read the statutes to preserve only whatever Native title would later be recognized, while the dissenters said that the Organic Act recognized Native ownership.[249]

For want of a treaty or statute, *Tee-Hit-Ton*'s constitutional holding presented an interpretive issue beyond the scope of the recognized canons. The Court's precedents on the Due Process and Takings Clauses say that constitutionally protected property interests are those recognized in state or federal law.[250] Therefore, the constitutional holding in *Tee-Hit-Ton* was either an interpretation of federal common law or of the Constitution itself. The Court's opinion largely begged the question by relying on the sort of circular reasoning used in *Lone Wolf*: that guardianship justifies anything the government does.[251] The policies underlying the treaty and statutory canons should have ready application to federal common law, but the courts have ignored the canons in that context.[252]

Tee-Hit-Ton prevented recovery of just compensation, including interest, in the few ICCA original-title cases that survived the minefield of government defenses.[253] For current and future claims, the decision's practical effect was mainly in Alaska because the statute of limitations bars most original-title claims elsewhere, unless Congress waives the statute. Many tribes would also face the barrier of res judicata based on

248. *Tee-Hit-Ton Indians*, 348 U.S. at 279–279.

249. *Id.* at 277–78, 291.

250. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.5(a) (4th ed. 2008).

251. *Tee-Hit-Ton Indians*, 348 U.S. at 279–82. Professor Friedman reviewed the history of the issue and made a strong case against the Court, suggesting that it simply adopted the distinction *ipse dixit* out of fear that liability would be too costly. Friedman, *supra* note 226, at 39–46. He did ignore the Court's statement in *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues."). This tracked the brief for the United States with Cohen as counsel. *Id.* at 341. However, the matter was not at issue in that case. *See supra* text accompanying notes 183–87. Moreover, the statement can be read to refer only to the decision to extinguish, not to liability for taking.

252. Worse, it may have been avoided to undermine tribal sovereignty. *See infra* text accompanying note 347.

253. *See supra* notes 228–29 and accompanying text. However, Alaskan ICCA claims for fair market value of original title land, without prejudgment interest, succeeded. *E.g.*, Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

a prior claims case judgment.[254] For this reason, loss of the Tee-Hit-Ton tribe's statutory claim had practical effect similar to loss of the constitutional issue, and failure to interpret the statute in favor of the tribe had almost the same practical impact as the constitutional holding. Congress resolved Alaskan claims in the 1971 Alaska Native Claims Settlement Act.[255] There was significant consultation with Natives during the drafting and hearings on the statute, and it conveyed substantial land holdings in kind to new Native corporations with shares owned by Natives individually.[256] However, critics have pointed out a number of shortcomings.[257]

For most tribes, recognition of constitutional protection to original Indian title in 1955 would have been too late to avoid statute of limitations or res judicata defenses. On the other hand, such recognition would have made a stronger political case for tribes to seek new waivers from Congress. The Sioux claim based on its treaty title illustrates both issues: new waiver and compensation in kind rather than cash.[258]

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254. *See supra* note 232 and accompanying text. For a notorious example, see United States v. Dann, 873 F.2d 1189 (9th Cir. 1989), *cert. denied,* 493 U.S. 890 (1989); *see also* Newton 1992, *supra* note 222, at 761–63; Caroline L. Orlando, *Aboriginal Title Claims in the Indian Claims Commission:* United States v. Dann *and Its Due Process Implications*, 13 B.C. ENVTL. AFF. L. REV. 241, 265–80 (1986).

255. Act of Dec. 18, 1971, Pub. L. 92-203, 85 Stat. 688–716 (codified as amended at 43 U.S.C. §§ 1601–1629a (2006)).

256. *See* James E. Torgerson, *Indians Against Immigrants—Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada*, 14 AM. INDIAN L. REV. 57, 72 (1989) ("Alaskan Natives were deeply involved in the development and passage of ANCSA"); Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROB. 132, 132–38 (1976).

257. *See* THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (1985); Marilyn J. Ward Ford & Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 TOURO L. REV. 479, 489 (1999) ("ANCSA did not provide wealth, land, or improvement in the lifestyles of Alaska Natives. Instead it divided Alaska Natives [and] placed their lands and culture in jeopardy . . . ."); Newton 1994, *supra* note 203, at 461, 471–74. An attempt to recover damages for original title extinguished by the statute failed based on *Tee-Hit-Ton.* Inupiat Community of Arctic Slope v. United States, 680 F.2d 122 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 969 (1982).

258. *See* United States v. Sioux Nation, 448 U.S. 371 (1980) (affirming $100 million-plus judgment for taking the Black Hills). The Sioux had lost their initial claim based on a 1920 special consent statute but then obtained a second statute that waived res judicata as well as immunity and limitations. *Id.* at 384–89. However, by the time of the 1980 judgment, the Sioux had decided that the only just resolution was restoration of land in kind, so they refused to accept the cash. Their judgment sits in the Treasury continuing to draw interest. *See* Oglala Sioux Tribe of the Pine Ridge Indian Res. v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (dismissing suit for land); Different Horse v. Sal-

4. Executive Order Reservations

Many Indian reservations were established or expanded by executive orders of presidents between 1855 and 1919.[259] Of course, the land set aside was originally Indian land, usually in possession of the tribe for which the order reserved it and for which original title had never been formally extinguished. However, legal status was much improved by executive order. An order's boundaries obviate any need to prove the extent of original title. These reservations have full legal status for all purposes except constitutional protection against the federal government.[260] ICCA expressly allowed claims based on executive orders, but the Commission and Claims Court rejected constitutional protection.[261] That protection requires legislative recognition, but this can be implied.[262] Under the standard of implied recognition, aided by the statutory canon, it is likely that all current reservations have recognized title.[263]

5. Damages for Breach of Trust

Issues about interpretation of federal waivers of sovereign immunity also arise in cases claiming wrongs other than taking land. These are commonly called breach of trust cases, and again, the statutory canon of interpretation has often failed to overcome federal sovereign immunity. The basis for these claims derives from the smothering control over Indian resources exercised by the federal Indian affairs bureaucracy and by the U.S. Treasury.[264] When land is not taken outright, it is often mismanaged. Proceeds for land purchases are stolen or lost in the Treasury.[265]

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azar, No. 09-4049, 2011 WL 3422842 (D.S.D. Aug. 4, 2011) (denying suit to reopen the case). *See generally* JEFFREY OSTLER, THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND (2010).

259. *See* 2005 COHEN, *supra* note 1, § 15.04[4].

260. *See id.*

261. *See id.*

262. *See id.*

263. *See id.* For some doubt on this point, see Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1257–59 (1980). *But see* Idaho v. United States, 533 U.S. 262 (2001) (sustaining authority of executive order to reserve navigable waterway to tribe).

264. *See, e.g.*, United States v. Mitchell, 463 U.S. 206 (1983). *See generally* 2005 COHEN, *supra* note 1, §§ 17.01–17.03[2].

265. *See* 2005 COHEN, *supra* note 1, § 5.03[3][b]; Cobell v. Salazar, 573 F.3d 808, 809–11 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010).

Some pre-1946 special-consent cases included mismanagement claims, with mixed success.[266] The ICCA's broad provisions defining causes of action opened the possibility of many kinds of claims beyond land takings, but the Commission and courts narrowed their application.[267] Occasional Indian claims continue to be heard under special jurisdictional acts.[268] But most current breach-of-trust claims are made under the Tucker Act.

Two barriers have defeated most Tucker Act Indian claims. First, the statute of limitations barred many claims.[269] Second, other claims failed for want of a cause of action; unlike the ICCA and earlier special consent laws, the Tucker Act does not specify causes of action.[270] Rather, to state a claim, a litigant must invoke a federal law or contract that "could fairly be interpreted as mandating compensation by the [f]ederal [g]overnment."[271] In every case tribes argue that the federal trust duty should satisfy that requirement, but the Supreme Court disagrees and requires a more specific waiver of immunity.[272] Thus, under the Tucker Act, mismanagement of Indian allotments could not be redressed based on the allotments' federal trust title because that title imposed no management duties; instead, it resembles a common-law use.[273] In another case, the trust relationship did not protect the Navajo Nation from corrupt action by the Secretary of the Interior regarding Navajo coal leases because the leasing statute did not impose compensable duties.[274] In these and

266. *See, e.g.*, Crow Nation v. United States, 81 Ct. Cl. 238, 271, 281 (Ct. Cl. 1935) (claims for mismanagement and loss of funds offset by federal expenditures). These claims suffered the same difficulties as land claims during that period. *See supra* text accompanying notes 214–18.

267. *See supra* text accompanying note 222.

268. *See* 2005 COHEN, *supra* note 1, § 5.06[4][a].

269. *See* Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 543–82 (1994); Newton 1992, *supra* note 222, at 790. Professor Newton discussed Indian claims that trust theory or other rules have tolled the statute and found very limited success. *See id.* at 792–800. *See also* Sisk, *supra* note 210, at 580–605 (discussing whether statutes of limitation for waivers of sovereign immunity are jurisdictional or function as in private litigation).

270. United States v. Navajo Nation, 537 U.S. 488, 490 (2003).

271. *Id.*

272. *See, e.g.*, *id.*

273. United States v. Mitchell, 445 U.S. 535, 542–44 (1980). *See* RESTATEMENT (THIRD) OF TRUSTS § 6 (2003). For detailed review of this decision and its antecedents, see Richard W. Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of* United States v. Mitchell, 26 S.D. L. REV. 447 (1981).

274. *Navajo Nation*, 537 U.S. at 493–514.

other cases, invocation of the statutory canon did not yield interpretations favorable to the Indians. However, mismanagement of allottees' timber resource was held compensable based on statutes committing control of their timber to federal officials.[275] Recently, a massive suit for mismanagement of allottees' trust funds succeeded.[276] Generally, claims' success or failure turns on views of the justices who hold the balance of power on a consistently divided Supreme Court.[277]

One must conclude that redress for the government's wrongful dispossession or mismanagement of Indian resources has been far short of fair compensation. A few tribes achieved just results, but most were buried in a blizzard of technicalities. The statutory canon was of little importance to a process in which courts and commissioners were a greater barrier than politicians; although, like politicians, the judges often seemed motivated more by saving the Treasury than by justice.[278]

IV. TRIBAL SOVEREIGNTY'S SETBACKS SINCE 1975

Tribal sovereignty has lost ground since 1975, and changes in the Supreme Court's membership are a likely cause. In his 1968 campaign for president, Richard Nixon made the Supreme Court's membership a prominent political issue, and

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275. United States v. Mitchell, 463 U.S. 206 (1983).

276. Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010). After this decision, the parties settled the claim for $3.4 billion. *See* Elouise Cobell, *Cobell Case Wins Final Approval in Major Victory For Native Americans*, NDN NEWS, June 21, 2011, *available at* http://ndnnews.com/2011/06/cobell-case-wins-final-approval-in-major-victory-for-native-americans (last visited Aug. 17, 2012). For details, see Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609 (2010–11).

277. From 1980, all Indian claims decided on the merits by the Supreme Court have had dissents. *Navajo Nation*, 537 U.S. at 514 (Souter, J., dissenting); White Mtn. Apache Tribe v. United States, 537 U.S. 465, 481 (2003) (Thomas, J., dissenting); *Mitchell*, 463 U.S. at 228 (Powell, J., dissenting); *Mitchell*, 445 U.S. at 546 (White, J., dissenting). Chief Justice Rehnquist voted against the Indian side in each of these cases, as well as in *United States v. Sioux Nation*, 448 U.S. 371, 424 (1980).

278. This was the thrust of Professor Friedman's *Judicial Protection of the Fisc* article. Friedman, *supra* note 226, at 30–37, 39. His main examples were ICC's barriers to finding a taking in *Fort Berthold* and other cases and the footnote in *Tee-Hit-Ton v. United States*, 348 U.S. 272, 283 n.17 (1955), in which Justice Reed recited the government's estimate that recognizing original title would cost nine billion dollars, an immense sum in 1955.

it has been one ever since.[279] Most observers agree that the Court has changed and that Indian sovereignty has been affected as a result.[280] Tribes successfully defended sovereignty over their members in major decisions between 1959 and 1987, and this aspect of tribal sovereignty remains secure.[281] But in other battlegrounds, reviewed here, tribes have had either mixed or very little success. The canons were invoked and discussed in every case. The burning question for Indian nations is whether the modern Court has dishonored the canons.

The first part below explains the Supreme Court's mixed record in lawsuits contesting the boundaries of Indian reservations within which tribes can exercise sovereign powers. The boundary issue is largely settled, as all or nearly all possible contests have been decided, with some decisions favoring tribes but important ones going against them. Though regularly invoked, the statutory canon had little effect in these cases.

This section's second part addresses the Supreme Court's controversial decisions divesting tribes of most sovereign authority over nonmembers in tribal territory. The decisions that denied tribal authority over civil claims, and over Indians who did not belong to the governing tribe, recited false history and ignored precedents.

One reason the Court recited for the divesting decisions is its concern for the civil rights of nonmembers who cannot vote

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279. When running for election, Nixon promised to appoint "strict constructionists" to the Supreme Court. Except for Ford, every Republican nominee since has done the same. Beginning with the 1980 campaign, abortion became a major focus, with Republicans and Democrats dueling over whether *Roe v. Wade* should be overturned. As a result, the confirmation process became much longer. *See Strict Constructionism*, WIKIPEDIA, http://en.wikipedia.org/wiki/Strict_constructionism (last visited Aug. 16, 2012); Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 U. COLO. L. REV. 293, 304–09, 315–18 (1994) (book review essay).

280. *See, e.g.*, Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008) ("federal Indian law as practiced before the Supreme Court is in serious normative decline . . . ."); Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 814, 817 (2006) (conservative justices favor states' rights over Indians'; liberals favor individual over tribal rights based on "ignorance of history and short-sighted, even illiberal, failure of perception"); Skibine, *supra* note 10, at 2–3 (summarizing views of several writers); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 316–52 (2001) (discussing views of justices in detail in relation to liberal and conservative labels).

281. *See* 2005 COHEN, *supra* note 1, § 4.01[1][b]–[f].

in tribal elections. This section's third part argues that this is a mistaken analysis of the subject.

A. Reservation Diminishment

In modern contests over boundaries of Indian reservations, results have been mixed, and the statutory canon has had little effect. The territorial extent of tribal sovereignty depends mostly on reservation boundaries. These originally coincided with land reserved for exclusive Indian occupancy or ownership, making the determination easy.[282] But the allotment laws opened part or all of many reservations to non-Indian entry and settlement.[283] The first problem caused by these openings was determining their effects on criminal laws applicable to Indian country. Lacking legislative guidance, courts reached conflicting decisions[284] until a 1948 statute resolved many issues.[285] The statute provides that all land within reservation boundaries is Indian country regardless of ownership.[286] When active tribal sovereignty revived after 1959, litigants began to dispute whether allotment and opening had abolished reservation status of opened areas.[287] In its first two decisions on the issue, the Supreme Court noted that the opening statutes said nothing about reservation boundaries and held the reservations at issue to be intact.[288] One opinion found the relevant law clear, the other insisted on clear congressional intent to diminish.[289]

In 1975, the Court's third decision on reservation boundaries retreated from requiring clear intent of Congress to diminish.[290] In *DeCoteau v. District County Court*, the Court held that an ambiguous statute had abolished the Lake

282. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 561 (1832).

283. *See* 2005 COHEN, *supra* note 1, § 1.04.

284. *See* 1982 COHEN, *supra* note 16, at 29–34.

285. 18 U.S.C. § 1151 (2006). On issues the statute resolved, see 1982 COHEN, *supra* note 16, at 29–34.

286. 18 U.S.C. § 1151(a).

287. *See* Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Supt. Of Wash. State Pen., 368 U.S. 351 (1962); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Solem v. Bartlett, 465 U.S. 463 (1984); Hagen v. Utah, 510 U.S. 399 (1994); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), discussed *infra* notes 288–310 and accompanying text.

288. *Mattz*, 412 U.S. at 481; *Seymour*, 368 U.S. at 351.

289. *Seymour* found the statute clear. 368 U.S. at 355–59. *Mattz* insisted on clear intent. 412 U.S. at 504–05.

290. *DeCoteau*, 420 U.S. at 425.

Traverse Reservation in South Dakota.[291] The 1891 statute ratified an agreement with the Sisseton and Wahpeton Sioux without material change.[292] It was therefore a treaty substitute, and review should have been based on the Indians' reasonable expectations about its effects. The Court did rely on the agreement to distinguish the two earlier decisions, which had been imposed on unconsenting tribes.[293] It also distinguished them based on payment: Lake Traverse tribes were paid immediately from the Treasury, while tribes in the prior cases were paid only by proceeds of sales to settlers.[294] This seemed to be a makeweight. When a tribe cedes an entire territory, it is reasonable to imply that the ceded land ceases to be a reservation regardless of the form of payment. When instead it cedes only noncontiguous parts of the land in a reservation, as at Lake Traverse, it is equally difficult to understand how the form of payment should imply abolition of reservation status.

The Court's holding was grounded on the operative part of the agreement that appeared verbatim in the statute: The "Indians hereby cede, sell, relinquish, and convey to the United States all their right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . ."[295] But these words said nothing about abolishing the reservation, and the Court made no effort to ascertain the Indians' understanding of their import.[296] Instead, the opinion purported to rely on the statute's words, legislative history, and surrounding circumstances.[297] It claimed to honor the statutory canon but decided that the quoted words were "precisely suited" to abolish the reservation.[298]

Two years later, the Court held that three similar laws

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291. *Id.*

292. Act of Mar. 3, 1891, ch. 543, §§ 26–29, 26 Stat. 989, 1035–39. This was the annual Indian appropriations act that included ratification of seven allotment agreements.

293. *DeCoteau,* 420 U.S. at 448.

294. *Id.*

295. *Id.* at 445.

296. The Court quoted statements by Indian parties to the agreement from which one might have determined their understanding that the reservation would be abolished, but the question is uncertain in the absence of a systematic effort to examine it. *See id.* at 433–35. The dissenting justices were content to point out that the language relied on by the majority was ambiguous and thus insufficient. *Id.* at 463.

297. *Id.* at 445.

298. *Id.*

diminished the Rosebud Sioux Reservation.[299] The tribe made allotment and opening agreements with the government, but the Court again failed to require that the Indians' understanding be determined.[300] However, the tribe claimed that Congress had not relied on proper agreements, so that the statutes were imposed.[301] The Court accepted the tribes' claim, gave brief obeisance to the statutory canon, and then relied on statutory language that matched the 1975 case.[302] The ambiguous language had hardened into magic words, as the dissenters protested.[303]

However, the Court's next decision on the issue unanimously held that a 1908 allotment and opening statute imposed on two tribes had not effected reservation diminishment.[304] The statute lacked the magic language relied on in the prior cases, but it expressly referred to the reservations as "diminished" and their opened areas as part of the public domain.[305] Ten years later, the Court held that a statute imposed on a tribe that had resoundingly refused to agree to its terms had diminished its reservation because it referred to the opened area as part of the public domain.[306] A 1998 decision was nearly a reprise of the 1975 case: a statute ratified an agreement with the Yankton Sioux Tribe that included the magic, ambiguous language the Court had held to

299. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

300. *See id.* at 587–88. Language quoted by the Court again indicated that such an examination might have found that the tribe had understood that its reservation would be diminished. *See id.* at 592–93.

301. This claim had a complex history that the Court did not bother to sort out. Art. XII of the 1868 Sioux Treaty required consent of three-fourths of adult male members for further land cessions. 15 Stat. 635, 639. The 1889 agreement with the Sioux that divided the 1868 reservation into six smaller parts including Rosebud and ceded the rest, was allegedly agreed to by three-fourths of adult male members (though with much evidence of duress). It provided for allotment but said it should be agreed to by majority vote. Another section preserved consistent parts of the 1868 treaty. Congress ratified the agreement without material change. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, §§ 8, 9, 12, 19. Allotment at Rosebud began with a 1901 pact that was agreed to by three-fourths if adult males but required immediate cash purchase. Congress balked and refused to ratify. A 1903 agreement providing for payment out of proceeds from settlers' purchases was agreed to by majority vote short of three-fourths. Similar events led to the other two statutes at issue. The tribe argued that all three laws were imposed without consent, and the Court accepted that claim as a premise for its decision. *See Rosebud Sioux Tribe*, 430 U.S. at 590–98.

302. *Rosebud Sioux Tribe*, 430 U.S. at 586–98.

303. *Id.* at 618–19.

304. Solem v. Bartlett, 465 U.S. 463 (1984).

305. *Id.* at 474–76.

306. Hagen v. Utah, 510 U.S. 399, 412–13 (1994).

be "precisely suited" to diminishment.[307] The Court unanimously held the reservation abolished.[308] The Tribe argued that provisions of the Yankton agreement not found in the Lake Traverse agreement implied that the Indians had not understood that their reservation would be abolished.[309] The Court rejected that argument, but the claim at least led to a discussion in some detail of how the Indians had understood the agreement.[310]

Normal rules of statutory interpretation cannot reconcile these decisions. From 1973, every opinion purported to rely on the statutory canon. When the statutes were treaty substitutes, the statutory canon was the wrong focus, but in any case, very similar laws were interpreted inconsistently. As others have observed, the record of subsequent treatment of the opened area is the only factor that makes sense of all the cases.[311] Reservation areas held undiminished had continuing Indian and federal agency presence similar to other reservations. Those held to be diminished or abolished had much less Indian and federal presence and had been assumed not to be reservations for decades. The cases seem to rest on a rule of collective laches: when no one challenged the effect of an allotment and opening statute for many decades, latter-day contests were barred by the passage of time.[312] The Court did interpret ambiguities in the records of subsequent treatment in the Indians' favor. But the canons had little direct role in interpreting the agreements and statutes.

307. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344–45 (1998).

308. *Id.*

309. *Id.* at 345–49.

310. *Id.*

311. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 24–27 (1999).

312. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Oneidas purchased land within the area of their 1788 treaty reservation. The land had been wrongfully sold in 1807, and the reservation had been treated as abolished since 1805. The Court held that laches prevented restoration of reservation status to the purchased land. *Id.* at 217–20. The Court cited and relied on the diminishment cases, but the issue was different because none had involved land owned by a tribe or held in trust for Indians. *See id.* at 215. For criticism, see Sarah Krakoff, City of Sherrill v. Oneida Indian Nation*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005).

B. Tribal Jurisdiction Over Nonmembers

The canons of interpretation have had severe tests in recent contests about tribal authority over nonmembers in tribal territory. In a series of decisions since 1978, the Supreme Court has decided that tribes have very little sovereignty over non-Indians and over Indians who do not belong to the governing tribe. These decisions have generated a flood of critical scholarship.[313] My focus is on application of the canons in this context.

The first, and most difficult, issue decided by the Court involved criminal jurisdiction over non-Indians. And it arose under quite unfavorable facts. The Suquamish Tribe in Washington claimed criminal jurisdiction to punish non-Indian offenders.[314] Defendants argued that tribal authority was preempted by a federal statute providing for federal criminal jurisdiction over interracial crimes in Indian country, commonly called the Indian Country Crimes Act.[315] The statute's terms preserve concurrent tribal jurisdiction over Indian defendants but do not say anything about tribal jurisdiction over non-Indians.[316] The terms also say nothing about state jurisdiction, but the courts have consistently interpreted the statute to preempt state authority over interracial crimes by non-Indians, and traditional norms

313. *See, e.g.*, Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 391 (2007/2008) ("There is no question that in the last thirty years, the Supreme Court has presided over an unprecedented assault on the sovereignty of Indian tribes."); Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 659–60 (2006); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 33 (2002) ("As the years have gone by, the jurisprudential spread between the Court and the scholarly community has become a gulf that now may be impassible."); Getches, *supra* note 280, at 267 ("The Supreme Court has made radical departures from the established principles of Indian law.").

314. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978). The Court recited that the reservation had been opened, and its population was 2,928 non-Indians and 50 Suquamish members. *Id.* at 193 n.1.

315. 18 U.S.C. § 1152 (2006). The statute evolved from laws passed between 1790 and 1854 and from some treaty provisions. *See* 1982 COHEN, *supra* note 16, at 287–88.

316. 18 U.S.C. § 1152 ("This section shall not extend to . . . any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . . ."). This appears to give exclusive authority to the tribe or feds, whichever acts first.

avoided concurrent jurisdiction over serious crimes.[317] Limited judicial precedents barred tribal authority as well.[318] Thus, the statute could have been read to preempt tribal power—an interesting test of the canons.[319] Instead, the Supreme Court held that the tribe had no jurisdiction based on an expansive and radical theory.[320] Largely ignoring the statute, it claimed

317. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 253–54, 271 (1913). Donnelly was a non-Indian convicted of murdering an Indian on a reservation. Jurisdiction was based on predecessors of section 1152, and the Court sustained the conviction after extensive review of the statute's application. *See id.* at 268–72. The Court had no occasion to consider whether jurisdiction was concurrent, but counsel for both sides made arguments that assumed either the United States or the state had exclusive jurisdiction. *See id.* at 253–54. As the Court noted, crimes by non-Indians against non-Indian victims had been held subject to state jurisdiction exclusive of federal. *Id.* at 271. In *Williams v. United States*, 327 U.S. 711, 714 (1946), the Court stated in dicta that federal jurisdiction under the statute is exclusive of state jurisdiction. No judicial opinion has even hinted that jurisdiction might be concurrent.

318. The only reported decision on tribal jurisdiction was *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878). The court granted habeas corpus to a non-Indian in Cherokee custody, stating: "[T]o give [the Cherokee] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian. Rev. St. 1873, § 2146 [codified as amended in 18 U.S.C. § 1152]." *Ex parte Kenyon*, 14 F. Cas. at 355. Because there was an alternative holding, this may have been dicta. The court's statement that the victim must be Indian was wrong; the statute clearly preserves concurrent tribal authority when the accused is Indian and the victim is not. When both accused and victim are Indian, the statute preserves exclusive tribal jurisdiction, so the court's error may reflect the general assumption that jurisdiction ought to be exclusive. A Supreme Court dictum referred to the statute's effect on tribal authority. Interpreting a Cherokee treaty to reserve exclusive tribal jurisdiction over an alleged crime by a Cherokee, the Court stated,

> The general object of these statutes [predecessors of 18 U.S.C. § 1152] is to vest in the courts of the [Cherokee] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

Ex parte Mayfield, 141 U.S. 107, 116 (1891). This statement repeated the *Kenyon* error about crimes by Indians against non-Indian victims; it appears again to reflect the background assumption that jurisdiction ought to be exclusive. *Oliphant*, 435 U.S. at 209, also quoted Justice Johnson's dissenting opinion in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810) (". . . the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."). This remark had no relevance to the case and was not joined by any other justice.

319. The Court of Appeals briefly discussed and rejected the claim. Oliphant v. Schlie, 544 F.2d 1007, 1010–11 (9th Cir. 1976), *rev'd*, 435 U.S. 131 (1978). The original Cohen treatise stated that, aside from specific rights in early treaties, tribes lacked authority to prosecute non-Indians, but Cohen did not analyze the issue. 1941 COHEN, *supra* note 13, at 148. One scholar reviewed the issue extensively and concluded that the statute was not intended to preempt tribal authority over non-Indians. *See* Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole Is Greater Than the Sum of Its Parts*, 19 J. CONTEMP. L. 391, 418–23 (1993).

320. *Oliphant*, 435 U.S. at 209–11.

that criminal jurisdiction over non-Indians had been implicitly taken from tribes upon their incorporation into the United States.[321] The opinion's main theme was to argue that federal authorities had always assumed tribes had no criminal jurisdiction over non-Indians.[322] Of course, such an assumption could have been based on the statute. The Court also said that tribal authority to punish would have raised procedural concerns that were reflected in traditional assumptions.[323] Scholars have shown that the Court's collection of assumptions was selective and ignored contrary evidence,[324] but no member of the Court has questioned the decision.

Three years later, *Montana v. United States*[325] extended the new theory of implicit divestiture to civil jurisdiction. At issue there was the Crow Tribe's authority to regulate hunting and fishing on its treaty reservation, which had been allotted and opened.[326] The Court's analysis divided the issue based on land ownership.[327] For Indian trust land, the Crow Tribe could regulate civilly based on its power of exclusion.[328] For land owned by non-Indians or by the State of Montana, general tribal jurisdiction was implicitly divested by incorporation.[329] This time there was no attempt to claim that divesting had been assumed all along; almost all reported precedents had sustained tribal authority in civil matters. The Court recognized these decisions but crafted a special category of retained tribal power to distinguish them: "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing,

321. *Id.*

322. *Id.* at 197–206. This claim was previewed in the dissenting opinion of then-Judge Anthony Kennedy's dissent in the Court of Appeals. *Oliphant*, 544 F.2d at 1014–19. Terms of the early treaties that defined Indian sovereignty yielded tribes' foreign affairs powers. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831). Until *Oliphant*, powers internal to Indian country had been retained unless preempted by Congress. *See* 2005 COHEN, *supra* note 1, § 4.02[3][a].

323. *Oliphant*, 435 U.S. at 211–12.

324. *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems,* 37 ARIZ. ST. L.J. 1047, 1056 (2005); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1161–63 (1990); Maxfield, *supra* note 319, at 418–23.

325. 450 U.S. 544 (1981).

326. *Id.* at 547–48.

327. *Id.* at 551–55.

328. *Id.* at 554–56.

329. *Id.* at 563–64.

contracts, leases, or other arrangements."[330] The opinion also stated that tribes *may* retain additional power to protect essential tribal interests.[331]

As was the case for criminal jurisdiction, federal statutes provided a means to address the case in less radical fashion. The Court of Appeals had followed that course, holding that the allotment and opening laws deprived the tribe of authority to regulate hunting and fishing on fee land owned by non-Indians, but not generally.[332]

Implicit divestiture's third casualty was tribal jurisdiction over Indians belonging to other tribes. After several years of dicta and indirect holdings, the Court applied the theory of implicit divestiture to deprive tribes of criminal jurisdiction in the 1990 decision in *Duro v. Reyna*.[333] The opinion claimed the same historical pattern as in *Oliphant*,[334] but this factual claim was close to fraudulent. The Indian Country Crimes Act that was the backdrop for *Oliphant* had always applied to all Indians, not just to those locally enrolled. Thus, the *Duro* Court rewrote the tribal jurisdiction clauses of the statute.[335] The Court revealed its actual reasons later in the opinion. It said that whatever was done in the past, Indians are now American

330. *Id.* at 565–66.

331. *Id.* at 566 (emphasis added). This dictum turned out to be meaningless. *See infra* text accompanying note 341.

332. *See id.* at 550. The Court of Appeals had held that the tribe owned the beds and banks of the Big Horn River, but the Supreme Court reversed, so the lower court did not explore the jurisdictional implications of that factor either. *See id.* at 556–57.

333. 495 U.S. 676 (1990). Prior to 1978, judicial precedents of all kinds distinguished between Indians and non-Indians. For the first time a Court opinion shifted the distinction to tribal members and nonmembers in *United States v. Wheeler*, 435 U.S. 313, 326 (1978). No issue in the case depended on the distinction, so it was a gratuitous dictum on an issue that was not briefed. Next, a 1980 civil case held that nonmember Indians were subject to state jurisdiction when members were not. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 161 (1980). Briefing and analysis were minimal. The distinction arose randomly in the 1981 *Montana* opinion discussed above; again it was not at issue and not briefed. *See supra* text accompanying notes 325–32.

334. *Duro*, 495 U.S. at 688–92.

335. *See supra* text accompanying note 316. In *United States v. Rogers*, 45 U.S. 567, 573 (1846), the Court said that the provision preserving tribal jurisdiction over Indians "does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." The *Duro* opinion quoted this language, but (perhaps deliberately?) misapplied it to the statute's imposition of federal jurisdiction rather than to its preservation of tribal jurisdiction over crimes by Indians. 495 U.S. at 689.

citizens and entitled to the civil rights of citizens.[336] (Was the Court saying noncitizen Indians had none?) The opinion invoked the democratic deficit by pointing out that nonmembers cannot vote in tribal elections.[337] The Court said that tribal membership is voluntary, so members consent to tribal authority.[338] True, but membership is equally voluntary for members of other tribes. An individual can surrender tribal membership and its federal law status.[339] In any event, Congress disagreed with the Court's revision and restored the traditional interpretation.[340]

Having established implicit divestiture, the focus shifted to defining the scope of civil jurisdiction left to tribes by the *Montana* theory—consensual relations, essential tribal interests, and exclusion from trust land. As scholars have detailed, the Court has read all three categories narrowly, and its expressed concern with the inability of nonmembers to vote in tribal elections has spread to become a major factor in civil as well as in criminal matters.[341]

At least on vital economic issues, the decisions are mixed. The Court sustained tribal power to tax lessees of tribal property and to control hunting and fishing on trust land free

336. *Duro*, 495 U.S. at 692–93.

337. *Id.* at 693–94.

338. *Id.* at 693.

339. *See* 2005 COHEN, *supra* note 1, § 3.03[3]; *cf.* Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.'").

340. 25 U.S.C. § 1301(2) (2006). A constitutional attack on the validity of the override failed but did not fully resolve all issues raised. United States v. Lara, 541 U.S. 193, 209 (2004) ("[W]e need not, and we shall not, consider the merits of Lara's due process claim. . . . Like the due process argument, however, [his] equal protection argument is simply beside the point[;] therefore we do not address it."). The statute applies only to criminal law. 25 U.S.C. § 1301(2). Its possible application to issues of civil jurisdiction has not been judicially resolved. For discussion of later cases on the due process and equal protection issues, see Matthew L. M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 630–34 (2008).

341. *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 651–53 (2003); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. C.L. & C.R. 1 (2003); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States Rights, Color-Blind Justice, and Mainstream Value*s, 86 MINN. L. REV. 267 (2001).

of state interference.[342] The Court also crafted an awkward but effective rule to bar state taxation of non-Indians participating in other forms of economic development on reservations.[343] But changing Court membership betrayed that rule to allow state taxation of oil and gas production from tribal trust land.[344] And a non-Indian business on its own land can cater to tourists attracted to Navajo Indian country free of any tribal tax.[345] However, the Court interpreted ambiguous federal laws to allow tribal gambling enterprises to operate free of state interference, a decision which led to today's tribal casinos.[346]

C. Divestiture, Democracy, and the Canons

As the previous section relates, since 1978 the Supreme Court has crafted a new doctrine of implied divestiture to deprive tribes of most jurisdiction over nonmembers in tribal territory, and it has relied on democracy as an important policy reason for its decisions. The canons have been shunted aside. However, the Court did not spell out the formal basis for implied divestiture. Because recognition of tribal sovereignty derives from treaties, the new doctrine could be based on a theory of implied cession by the Indians in the treaties. One scholarly view is that divestiture was based on federal common law—with no text to interpret, common law would provide a possible way to avoid the canons.[347] Or perhaps divestiture was simply a matter of conquest. If the former, it is impossible to square the treaty implication with any fair rule of treaty interpretation, and none of the divestiture decisions made an

342. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (sustaining tribal taxation of mineral lessees); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (sustaining exclusive tribal control of hunting and fishing on tribal land).

343. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–52 (1980) (barring state taxation of transactions between tribes and others involving development of "reservation value").

344. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). Only one justice was common to the majorities in *Cotton* and in *White Mountain Apache*.

345. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

346. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The Court's complex opinion alluded to the statutory canon, mainly by reference to *Bryan v. Itasca County*, 426 U.S. 373 (1976). *Cabazon*, 480 U.S. at 207–14. Congress reacted to the decision by passing the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2006)). *See generally* 2005 COHEN, *supra* note 1, §§ 12.01–.07.

347. *See* Singer, *supra* note 341, at 650 n.32. *But see supra* text accompanying note 252 (arguing that there should be a canon for federal common law).

attempt to do so. To that extent, those who accuse the Court of abandoning the canons, including dissenting justices, have a powerful case. And of course, conquest is supposed to be a legislative power, not judicial. If the theory supporting implied divestiture is an interpretation of the Constitution, we ought to be told the reasoning for that interpretation.

Whatever the theory, the Court's invocation of democracy to create and extend divestiture is misplaced. As explained above, when Congress imposes laws on Indians in Indian country, it acts without normal voter restraint, a strong reason to require that ambiguities in these statutes be interpreted in favor of Indians and tribes.[348] When federal Indian country laws regulate nonmembers of tribes, there is a similar lack of direct voter restraint. Until the Court's modern takeover, relations between tribes and nonmembers were regulated by Congress. One might argue that nonmembers lack the political authority to obtain a fair hearing in Congress, but examination of the question should show this claim to be incorrect. Tribal jurisdiction is regularly and vigorously opposed by state governments, which have significant influence in Congress.[349] Thus, there is no evidence that nonmembers in Indian country have been neglected by Congress.

The Court has deployed the divestiture theory to create a novel set of rules governing relations between tribes and nonmembers that it considers appropriate. It has effectively shifted primary lawmaking on this subject from Congress to itself, an institution with far less political accountability than Congress. The Court has often said that the Constitution commits Indian policy to Congress.[350] It should restore that rule.

CONCLUSION

The Indian treaty canon is firmly grounded in the basic rules for interpretation of treaties and contracts. The Supreme Court has dishonored it in two major instances: delayed recognition of tribal land ownership and implicit divestiture of tribal sovereignty over nonmembers. In many other matters, the canon has served well to preserve tribal resources and

348. *See supra* text accompanying notes 145–48.

349. Many decisions cited *supra* in Parts II.B, and III.B, and *supra* notes 343–46 involved state governments opposing Indian sovereignty as parties or amici, or both.

350. *See* 2005 COHEN, *supra* note 1, § 5.02[1]–[2].

sovereignty. Notably, it helped to establish the trust relationship between Indian nations and the United States.

The Indian statutory canon derives from the treaties and the trust relationship and should have additional support from the lack of political restraint on Congress's broad power over Indian country. Its application to general federal statutes could be improved by considering whether a statute peculiarly impacts Indian country and the related question of political restraint. The statutory canon's major failure has been in the Court's crabbed and picky interpretations of statutes intended to redress federal wrongs.

Both canons have been notably more successful for Indian rights when opponents were states or private interests and less so when tribes challenged the feds. Historically, whatever policy federal authorities chose to support, for or against Indian interests, has usually prevailed. Since 1975, the pattern has changed dramatically. The government has sided with tribes on most major controversies, in particular in contests about reservation diminishment and about tribal authority over nonmembers.[351] The Court's response was to seize for itself the dominant policy-setting role. Tribes are addressing the role reversal by seeking aid of Congress against a hostile Court.[352]

351. *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379 (2009); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 646 (2001); Montana v. United States, 450 U.S. 544 (1981); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975).

352. *See, e.g.*, *supra* text accompanying note 340.