JUDICIALLY DISMANTLING INDIAN COUNTRY IN THE 10TH CIRCUIT: LESSONS FROM *HYDRO RESOURCES* AND *OSAGE NATION*.

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This paper focuses on two recent cases from the Tenth Circuit, *Hydro Resources Inc. v. EPA,*[2] (HRI) and *Osage Nation v. Irby*.[3] In *HRI*, the court abandoned its *community of reference* test (hereinafter, COR), and held that some non-Indian fee land located next to the Navajo reservation but not within the reservation was not "Indian Country" for the purposes of the Clean Water Act. In *Osage Nation*, the court held that the Osage Nation reservation had been disestablished by a 1906 Act of Congress. Both cases were influenced by Supreme Court opinions which, perhaps not coincidentally, were written by Justice Thomas,[4] a Justice who almost never rules in favor of tribal interests and is, arguably, the most anti-tribal Justice in a Court filled with Justices unfriendly to tribal rights.

Five years ago, I wrote an article arguing that while the Supreme Court was ruling disproportionately against tribal interests, the same thing was not true for lower federal courts.[5] I concluded that perhaps some lower federal judges realized that many of these Supreme Court decisions were not based on sound legal principles and, therefore, these judges were going out of their way to distinguish their cases from such questionable precedents.[6] In the last five years, the attitude of the lower courts seems to have changed. I think that these two cases, *HRI* and *Osage Nation,* reflect the fact that nowadays, courts of appeals are much more willing to go along with the Supreme Court program. In fact, some courts of appeals have gone beyond the call of duty and seem to be ruling against

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[2] 608 F.3D 1131 (10th Cir. June 15, 2010).

[3] 597 F.3d 1117 (10th Cir. March 5, 2010).

[4] Alaska v. Native Village of Venetie, 522 U.S. 520 (1998), and Carcieri v. Salazar, 129 S. Ct. 1058 (2009).

[5] See, Alex Tallchief Skibine, *Teaching Indian Law in an Anti Tribal Era,* 82 N. D. L. Rev 777 (2006).

[6] I also concluded that the Supreme Court had adopted a new framework which was to recognize tribal rights only if such rights were specifically and clearly recognized in statutory law.

tribal interests even though Supreme Court precedents do not require them to do so. The results in these two cases reflect, however, an accurate perception by lower courts that the Supreme Court is basically anti tribal and that if it was to grant cert in those cases, the overwhelming odds would be that it would rule against a finding of Indian Country in those cases.

Part I of this paper analyzes *HRI* and *Alaska v. Native Village of Venetie,*[7] the Supreme Court decision which influenced the Tenth Circuit to abandon its COR test. Part II looks at the *Osage Nation* case and draws some analogies with *Carcieri v. Salazar,*[8] the Supreme Court's most recent Indian case dealing with statutory construction. Part III explains why, in both *HRI* and *Osage,* the Supreme Court should have used the Indian canon of statutory construction according to which statute enacted for the benefit of Indians are supposed to be construed liberally and any ambiguities found in them are supposed to be resolved in the Indians' favor. Finally the Conclusion draws some comparisons between *HRI* and *Osage Nation* and also briefly reviews the scholarly debate exploring what may be driving the Supreme Court to rule against tribal interests.

PART I: *HYDRO RESOURCES V. EPA.*

Before mining one of its property located in New Mexico, close to the Navajo Indian reservation, HRI had to obtain a Safe Drinking Water Act permit (SDWA). The issue in this case was whether HRI had to obtain the permit from the EPA or the state of New Mexico. If HRI's property was within "Indian Country," the permit would have to be acquired from EPA. The term "Indian Country" is derived from 18 USC 1151, a statute enacted in 1948. Under 1151, Indian Country consists of (1) all lands within 1ndian reservations, (2) Indian allotments held in trust or restricted status even if those are located outside of Indian reservations, and (3) Dependent Indian Communities. Since the land in question here was not within an Indian reservation and was not an Indian allotment the only way it could be considered *Indian Country* was if it was part of a "dependent Indian community."

EPA took the position that under Tenth Circuit precedent, the "community of reference" for defining what is a dependent Indian community in this case was the whole Church Rock Chapter of the Navajo Nation.[9] This is an area of about 57,000 acres where

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[7] 522 U.S. 520 (1998).

[8] 129 S. Ct. 1058 (2009).

[9] A Chapter is a local governmental and geographical unit of the Navajo Nation.

80% of the land is owned in trust by the United States for the benefit of the Navajo tribe or individual Navajos. Another 10% is owned by the BLM. The last 10% is owned by non-Indian entities such as HRI or the State of New Mexico. 98% of the population living on those 57,000 acres consists of members of the Navajo Nation.

In a 6-5 en banc decision, the Tenth Circuit overturned the panel decision which had ruled in favor of EPA. The en banc Court held that HRI's property, which was held in fee, was not within a Dependent Indian Community and therefore did not qualify as Indian Country. The SDWA permit, therefore, had to be acquired from the state of New Mexico and not EPA. In order to come to this result, the majority had to abandon the Community of reference test.[10] This test, also referred as the *Watchman* test consists of a two step multi factored approach.[11] As phrased by the *HRI* majority "At its first step, the test required the identification of an appropriate community of reference. When identifying an appropriate community of reference a court had to consider three factors: (1) the geographical definition of the area proposed as a community, (2) the status of the area in question as a community, and (3) the community of reference within the context of the surrounding area." [12] The *HRI* court then added the following :" Having identified a community of reference, our test then sought at the second step to determine whether the community qualified as a dependent Indian community. And this we said, required the balancing of still more factors:"(1) whether the United states has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective law respecting territory; (2) the nature of the area in question, the relationship of the inhabitants in the area top Indian tribes and to the federal government, and the established practice of government agencies towards th area; (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitant as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian people."[13]

A. The Majority:

Briefly stated, the majority believed that the 1998 Supreme Court decision in

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[10] The majority and dissenting opinion could not even agree on how long the test had been in effect. The majority stated that it arose 15 years ago, the dissent thought it was 20 years ago.

[11] See Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).

[12] 608 F.3d 1131 at 1141.

[13] Id.

Alaska v. Venetie,[14] required the abandonment of the community of reference test. The HRI's majority remarked that in *Venetie*, the Supreme Court specifically overturned a 9th circuit decision that had used a 6 factor balancing test to determine whether the land was Indian country. Instead the *Venetie* Court held that 1151 (b) "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements: first they must have been set aside by the federal government for the use of the Indians as Indian lands; second, they must be under federal superintendence."[15] On the other side, EPA acknowledged that the *Venetie* decision had an impact on the test but took the position that it only eliminated the second and third factors of the second step's four factors. Under EPA's theory, factor 1 and 4 were in accord with *Venetie's* approach and, therefore, if a high percentage of the land within a "community of reference" was still set aside for Indians and under federal supervision, then all the land in that area should be treated as Indian Country.

Besides relying on *Venetie*, the Tenth Circuit also relied on the history, purpose and structure of 1151(b). Thus the court noted that the purpose 1151(b) was to codify two previous Supreme Court cases:[16] *United States v. Sandoval,*[17] and *United States v. McGowan*.[18] Both cases involved lands specifically set aside for the benefit of Indians and under active federal superintendence. The *HRI* court also remarked that the structure of the 1151(b) reflected the "notion that some explicit, congressionally approved action is required to create "Indian Country,"[19] and the very notion of the COR test was in contravention of this idea.

Finally the Tenth Circuit put forth some normative and practical arguments supporting its interpretation of the statute. Normatively, it should only be for Congress to add or terminate Indian country. It is not for the courts, the states or the tribes to

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[14] 522 U.S. 520 (1998).

[15] 522 U.S. at 527.

[16] 608 F.3d 1131, at 1155.

[17] 231 U.S. 28 (1913).

[18] 302 U.S. 535 (1938). The Supreme Court decision in *Venetie* mentioned a third case codified in 1151(b), United States v. Pelican, 232 U.S. 442 (1914).

[19] 608 F.3d 1131, at 1157.

enlarge tribal territory.[20] Practically speaking, the court stated that "*Venetie*'s set aside and superintendence requirements at least ensure that the boundaries of dependent Indian community will be precisely and predictably defined."[21] Thus, in the last part of the opinion, the majority criticized the COR test for being nebulous, unpredictable, and impractical. It argued that under the test used by EPA, the community of reference may be much bigger, so as to for instance include Gallup or the whole of McKinley county, or it may be much smaller. There is really no way to know. Since 1151(b) was after all initially part of a criminal statute, what constitutes a dependent Indian community should be stable and predictable.

B. The dissent:

The dissent's argument can be summarized in the following 5 points.

1. Plain meaning of the statutory words: The normal meaning of the words "dependent Indian community" implies context, not just who owns the land. The words chosen in 1151(b) make no reference to land being specifically set aside or controlled by the federal government.

2. Structure of the statute: The two other categories of land comprising Indian country specifically refer to land or title: "all lands within the limits of any Indian reservations," and "Indian allotments, the Indian titles to which have not been extinguished." If Congress had wanted to describe land ownership when describing a dependent Indian community, it knew how to be specific. For instance, it could have said "all lands set aside for, and owned by, a Dependent Indian Community."

3. The purpose of the statute: The purpose of 1151 was to avoid jurisdictional checkerboarded areas. These are areas where what governmental entity has jurisdiction over the land depends on who has title to the land and ownership of the land ownership is interspersed or divided between Indians and non-Indians. Thus, the dissent stated "the majority's conclusion that title alone is determinative of whether a parcel is Indian country would completely eviscerate this congressional purpose."[22]

4. Precedents: the meaning of the word "community" as not tied to land title is consistent

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[20] 608 F.3d at 1152-1153.

[21] 608 F.3d at 1159.

[22] Id., at 1172.

with the meaning of the word "community" as interpreted by the Supreme Court in *United States v. Mazurie*.[23] The Supreme Court in *Mazurie,*[24] had to interpret section 1154 which excluded from the definition of Indian Country "fee patented land in non-Indian community even if within a reservation." The section was part of a statute prohibiting the introduction of alcoholic beverage within Indian Country. As stated by the HRI dissent " The Court agreed that the unincorporated town and surrounding areas were an "Indian community" within the meaning of 18 USC 1154(c) based principally on the fact that over 80% of the families in the area were Indians... The Court thus gave meaning to the word "communities" in the statute by looking at the surrounding area of land in which the bar was located, rather than simply looking at the plot of land itself.[25]

5. *Venetie* did not hold that the community of reference test was not valid. In fact it used a version of the community of reference test. Thus, instead of just considering whether the land where the school was being built should be taxed by the tribe, it determined whether the whole 1.8 million acres owned by the Native Village of Venetie was a Dependent Indian Community. As the dissent stated:

> I agree with the majority that *Venetie* abrogated the multi factor test for determining whether a given community is a dependent Indian community. However *Venetie* simply did not discuss the first step of the analysis, namely how the appropriate community is to be defined. At best *Venetie* endorsed the application of its two part requirement of set aside and superintendence to a broader community of reference than just the isolated parcel where the dispute is situated. At worst, *Venetie* simply does not address the issue..."[26]

Therefore, according to the dissent, *Venetie* only modified the COR test as followed: First the court has to determined what is the community of reference.[27]

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[23] 608 F.3d 1131, at 1173-1174.

[24] 419 U.S. 544 (1975).

[25] 608 F.3d at 1174. The dissent further added "This further demonstrates that the word 'communities," as used in the Indian statutes, requires an approach that places the specific parcel of land at issue in the context of the surrounding area."

[26] 608 F.3d at 1176.

[27] This first part has the following 3 steps: 1. Does the community has reasonably ascertainable boundaries, 2. Does the land within the boundaries has a reasonable amount of coherence, and 3. Does the use of the land by the people living there has a reasonable degree of

Secondly, the court has to apply to this community of reference the two *Venetie* factors: 1. Was the area as a whole set aside by the federal government, and 2. Is the area as a whole substantially controlled by the federal government. The dissent found both factors satisfied here. The government purchased most of the land for the Navajos and it was exercising a considerable amount of authority within the whole area.

C. So who was right?

1. Venetie as controlling.

The majority's strongest argument of course is that *Venetie* is controlling. If determining who is right is the same as asking "how would Justice Thomas have ruled on the *HRI* case?" then the nod seems to go to the *HRI* majority.

The gist of Thomas's reasoning was that the term "dependent Indian community" in 1151 was extrapolated from three Supreme Court decisions and that in "in each of these cases we relied upon a finding of both federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country.... Section 1151 does not purport to alter this definition of Indian country but merely lists the three different categories of Indian country mentioned in our prior cases."[28]

Furthermore in answering the tribe's claim that the term *dependent Indian community* referred to "political" dependency and not to actual federal control of tribal lands, Justice Thomas in *Venetie* stated

> This argument ignores our Indian country precedents which indicate both that the Federal government must take some action setting apart the land for the use of Indians "as such," and that it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal government."[29]

Aside from adherence to *Venetie*, what are the strongest arguments made by the majority? Two come to mind: First, the normative reason given by the *HRI* majority for abandoning the COR test was the idea that the test allowed Indian tribe, the courts, and

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coherence.

[28] 522 U.S. 520 at 530.

[29] Id., footnote 5 at 531.

the executive branch to enlarge Indian country without specific congressional legislation. This, according to the majority, showed a lack of respect towards the "plenary" authority of Congress in Indian affairs. Secondly, from a practical or pragmatic point of view, the COR test is too indefinite, too confusing, too unpredictable.

There are reasons, however, not to endorse the majority's decision. First, the Court in *Venetie* was wrong on two counts. When faced with an ill reasoned decision, court of appeals should go out of their way to find ways to distinguish it. Secondly, it is not true that the COR test allows for the creation without congressional action. In this case, Congress did act. It enacted 1151(b) using the term "dependent Indian community." Implicit in the usage of this rather ambiguous word is a delegation to the executive branch and the courts to interpret the statute.

2. *Venetie* as wrongly decided.

First, Justice Thomas interpretation of 1151 (b) as requiring both specific set aside and active federal superintendence is very questionable at best. Secondly, even if his interpretation of 1151 is correct, the tribal lands in *Venetie* met these criteria.[30]

The *Venetie* Court seemed to have had a myopic focus on the idea that the land had to be set aside specifically for Indians and controlled by the federal government to qualify as a dependent Indian community. It based this focus on the finding that the Congress that enacted 1151 was just trying to codify three of the Court's precedents, the most important of which was *United States v. Sandoval*,[31] a case dealing with the special situation of the Pueblos. It is somewhat surprising that Justice Thomas, normally a textualist, suddenly became so fond of focusing on the congressional "intent" to codify the three precedents in order to interpret the meaning of statutory words, the plain meaning of which seemed to have nothing to do with land being set aside or controlled by the federal government but only referred to "Indian Communities."

Moreover, Justice Thomas reading of *Sandoval* as requiring both specific land set aside and federal superintendence over such lands is perplexing. To start with, the

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[30] Of course this last part would not help the EPA here since the land in question in HRI (fee simple owned by non-Indian) is very different than the land in *Venetie* (fee land owned by the tribe. On this aspect of why *Venetie* was wrongly decided, see David M. Burton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A test of Judicial Integrity,* 16 Alaska L. Rev. 37 (1999).

[31] 231 U.S. 28 (1913).

Pueblo lands at issue in *Sandoval* had never been, initially at least, set aside specifically for the Pueblos by the federal government. These lands had been in the control of the Pueblos since time immemorial and the right of the Pueblos to these lands was originally "confirmed" through Royal Spanish land grants.[32] Secondly, *Sandoval* was mostly about determining were the Pueblos were "Indians," for the purpose of the federal liquor laws prohibiting the introduction of liquor into Indian country. The status of Pueblo lands was secondary to the status of the Pueblos themselves and was only discussed at the end of the case to answer the argument raised by the defendants that such land could not be Indian Country because it was held in fee by the Pueblo.[33] The *Sandoval* Court used racist language in concluding that the Pueblos were Indians:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Although living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.[34]

Having resolved the status of the Pueblos as Indians, the Court addressed whether it made any difference that the Pueblos held their lands in fee simple. The Court answered in the negative, remarking only that the Pueblos had "communal title" to their lands and therefore "Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos."[35]

Statutory interpretation is a difficult and, sometimes, controversial task. It is nevertheless interesting that the Venetie Court was so eager to rely on *Sandoval,* a

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[32] For a comprehensive background to the Sandoval decision, see Gerald Torres, *Who is an Indian? The Story of United States v. Sandoval,* in Indian Law Stories, Foundation Press 2011 (Chapter 4).

[33] As stated by the Court:" The question to be considered then is whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands." 231 U.S. 28, at 38.

[34] 231 U.S. at 39.

[35] 231 U.S. at 48.

decision full of racist language, as being the cornerstone for interpreting the meaning of 1151(b) today. In this way, Justice Thomas chose to resurrect a racist view of Indians and Indian tribes. As professor Gerald Torres stated:

> One of the most important issues that arose in the *Sandoval* litigation was the role of race as a defining characteristics of Indian identity. Their "race and condition" was a factor that drove the so-called ethnographic inquiry... we should be worried that race mattered at all to the relationship between the Pueblos and the non-Indian governments that were trying to exercise control over them.[36]

In requiring that the lands had to be not only set aside but also under active federal control and supervision, Justice Thomas adopted *Sandoval's* racist version of "dependence." Again as stated by professor Torres,

> In *Sandoval*, the Supreme Court elided some of this difficulty by focusing on the question of dependence rather than race; but here too the Court relied on a degraded conception of dependence that would finally be incorporated into federal law and stripped of its political dignity...The concept of dependence put forward in *Sandoval* was not the kind of dependence the tribes had in mind when they signed the treaties....It is the worse kind of factual dependence that would tie political protection and support to an empirically corrupted condition.[37]

One has to ask, was resurrecting this decision from America's racist past in order to interpret the statute the wise thing to do when the words of 1151(b) themselves did not require such an interpretation? And why would the Tenth Circuit go out of its way to extend such racist view of "dependence" and Indian tribes in order to repudiate its COR test?

The second case relied on by the *Venetie* Court, *United States v. McGowan,*[38] does not do much to support Justice Thomas's interpretation of 1151(b). The issue there was again the power of the federal government to control introduction of liquor within an Indian community. In this case, a small amount of land, 28.38 acres, had been purchased by the United States from funds appropriated by Congress for the purpose of providing land for the Reno Indian Colony. After stating that "Indians in this colony have been

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[36] See Torres, Who is an Indian, supra at n. 32, at p. 243.

[37] Id., at 143-144.

[38] 302 U.S. 535 (1938).

afforded the same protection by the government as that given Indians in other settlements known as 'reservations.' Congress alone has the right to determine the manner in which this Country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a reservation or a colony,"[39] the Court quickly concluded that the land in question was Indian Country. Before concluding, however, the Court added this interesting comment:

> The words "Indian country" have appeared in the statutes relating to Indians for more than a century. We must consider the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes.[40]

In other words, the Court adopted a flexible approach where the meaning of Indian Country can change over time. Such an approach would seem to be consistent with the COR test as adopted by the Tenth Circuit before *HRI.*

Sandoval and *McGowan* raise an interesting hypothetical relevant to the *HRI* case. If for some obscure reasons, a few acres of land in the middle of the Pueblos at the time of *Sandoval* or one acre in the middle of the Reno Indian Colony at the time of *McGowan* had been owned in fee by a non-Indian, would the Court in those two cases have held that under no condition, these two parcels of land could be considered Indian Country for the purpose of allowing the United States to control liquor in Indian country? I have a suspicion that federal power would have been upheld.

In conclusion, it seems to me that at best, the meaning of what constitutes a 'Dependent Indian Community' was ambiguous. To the extent that the text reveals an ambiguity, it should have been resolved to the benefit of the Indians pursuant to the Indian canon of statutory construction. More on this in PART III of this Essay.

3. ***Venetie*** **distinguished?**

Arguably, *Venetie* can be distinguished. First, the political contexts of the two cases are very different. In *Venetie*, the tribe was trying to use the concept of Dependent Indian Community to tax a non-Indian entity. The *HRI* case on the other hand did not involve tribal jurisdiction over non-Indians. So it was not a case where, as feared by the *HRI* majority, a tribe can on its own motion create new Indian country. The case involved

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[39] Id., at 538-539.

[40] Id., at 537-538.

a federal agency, the EPA, deciding that for practical consideration, implementation of the SDWA would be more effective in the absence of a checkerboarded area of jurisdiction between the state and the federal government.

Secondly, *Venetie* should be considered as a case that was all about interpreting ANCSA. Instead of an absence of specific congressional direction, which was the case in *HRI, Venetie* involved a specific Act of Congress (ANCSA) which the Court interpreted as reflecting a specific intent NOT to create additional Indian country in Alaska.

PART II. OSAGE NATION V. IRBY:

A. The Court's reasoning.

The question here was whether the Osage Nation Reservation in Oklahoma had been disestablished by an 1906 Act of Congress which allotted the reservation.[41] The legal fight concerned the power of the state of Oklahoma to tax tribal members living on fee land within the area that had been allotted in 1906.

The leading opinion on reservation disestablishment is *Solemn v. Bartlett.*[42] There the Court stated "Our precedents in the area have established a fairly clean analytical structure for distinguishing those *surplus land acts* that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries..... our analysis of *surplus land acts* requires that Congress clearly evince an intent to change boundaries." [43] The *Solemn* Court, however, also stated that

> explicit language of cession and unconditional compensation are not prerequisite for a finding of diminishment. When events surrounding the passage of a *surplus land act* unequivocally reveal a widely held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding..... To a lesser extent, we have also looked to events that occurred after the passage of a surplus Land act to decipher Congress's intentions .... On a more pragmatic level we have recognized that who actually moved onto opened reservation lands is also relevant

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[41] 34 Stat. 539, P.L. 59-321.

[42] 465 U.S. 463 (`1984)

[43] Id., emphasis added.

to deciding whether a surplus land act diminished a reservation.[44]

The Tenth Circuit in *Osage Nation* took great care to announce that "Congress's intent to terminate [a reservation] must be clearly expressed."[45] Yet, because there was no language in the statute remotely indicating a congressional intent to terminate the reservation, the court relied on the following:

1. The Act was passed at a time when the United States wanted to abolish reservations.

2. Opinions of scholars such as Prucha and lesser known historians such as David Baird, Lawrence Kelly, and Berlin Chapman.[46]

3. Some unnamed federal officials who at one point apparently referred to the area as "the former reservation under state jurisdiction."[47]

4. The state thought it had jurisdiction and exercised such jurisdiction over the area.[48]

5. Finally but perhaps by far most importantly: "Uncontested population demographics and land ownership within the area." The undeniable fact was that the "reservation" was now over 84% non-Indian and only 3.5% Osage. Furthermore, an overwhelming percentage of the land was owned by non-Indians and was not held in trust by the United States.[49]

Thus the court ended up establishing clear "congressional" intent by relying on opinions of historians and scholars, and by looking at who moved unto the reservation after the Allotment Act. In effect there was nothing whatsoever in the congressional record that indicated any intentions of Congress to disestablish the reservation. At best,

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[44] Id., (emphasis added).

[45] 597 F. 3d 1117 at 1122. The opinion in the case was written by Kelly and joined by Tacha and Ebel. Kelly and Tacha were part of the majority in HRI. Interestingly, Ebel who had authored the HRI dissent just joined Kelly and Tacha in Osage.

[46] Id., at 1124-1125.

[47] Id., at 1126.

[48] Id. At 1126-1127.

[49] Id., Id., at 1127.

one could say that in some other allotment acts, involving other tribes than the Osage tribe, Congress had intended disestablishment. But, as will presently be explained, the Osage reservation involved a very different situation.

B. What makes the Osage reservation situation different?

I can see at least three main reasons.

1. Although it is generally accepted that *Solemn v. Bartlett* is the controlling precedent, there is a serious question whether the case is applicable to the Osage reservation. The Court in *Solemn* involved a Surplus Land Act. The problem here is that the Osage Allotment Act of 1906 was not a Surplus Land Act. Contrary to almost all other allotment Acts, the Osage 1906 Act did not open the reservation for settlement by non-Indians. The whole reservation was allotted either to tribal members or the tribe and the mineral estate was retained in tribal ownership. The whole idea behind a Surplus land Act was to allot only one part of the reservation to tribal members so that the rest of the lands could be declared surplus and opened up for purchase by non-Indians. Under such situation, I can at least understand why *Solemn v. Bartlett* allowed a presumption of congressional intent to terminate reservation status and allow for termination of such status even without express statutory words to that effect. But that was not the case with the Osage reservation.

2. In the Osage case, unlike most surplus lands Acts that opened up reservations, there are no statutory words remotely indicating a congressional intent to disestablish and the Tenth Circuit conceded as much. In fact, the contrary is true. The 1906 Act makes many reference to an existing "Osage Indian reservation,"[50] and so does subsequent legislation.[51]

3. There is good reason for the absence of such statutory words of disestablishment. Unlike just about all other tribes, the Osages agreed to allotment. There were good reasons for this. First, the Osages were being told or threatened that if they did not agree to allotment, the reservation would be taken from them anyway. Secondly, the Osages knew that a lot of oil reserves had been discovered on their reservation. As a result, the

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[50] See Act of 1906, section 4, referring to "schools on the Osage Indian reservation.", section 7, referring to deeds and leases for lands on the reservation, section 10, allowing for creation of roads in the Osage Indian reservation, and section 11, allowing for continued operation of railroad companies on certain lands in the Osage reservation.

[51] See 25 U.S.C. 398 (1924), 25 U.S.C. 396f (1938), 25 U.S.C. 373c (1942).

Osages were going to get rich. It was not a question of whether but a question of when. Suddenly, everyone wanted to be an Osage. The Osages were afraid that the longer they waited for a roll to be compiled pursuant to an Allotment Act , the more non-Osages were going to bribe themselves unto that roll.

One would think that because the Osages agreed to the Allotment, such legislation should be treated more like a treaty with an Indian tribe. Under well established rules of treaty construction, treaties made with Indian tribes are supposed to be interpreted according to how the Indians understood the treaty at the time of the signing.[52] This should make it even more imperative for the understanding of the Tribe to be taken into account when interpreting the meaning of the 1906 Act. Yet the Court of Appeals never looked at the common understanding of the Osages. Instead, the court found one isolated ambiguous statement from one Osage, Black Dog, who was against the allotment Act and, through a translator, apparently said something to the effect that Indians do not fare well when their reservation is taken from them.[53]

So, why did the Tenth Circuit interpreted the 1906 Act to terminate the reservation? Perhaps, among other things, the Tenth Circuit was influenced by another factor: the Supreme Court's most recent Indian case involving statutory interpretation: *Carcieri v. Salazar*,[54] another Justice Thomas opinion.

C. Caricieri v. Salazar.

The issue in this case was whether the Secretary could place land into trust for the benefit of the Narragansett Indian tribe using section 5 of the 1934 Indian Reorganization Act.[55] This section allows the Secretary of the Interior to acquire land into trust "for the purpose of providing land for Indians." 25 U.S.C. 479, however, defines "Indian" for the purposes of the Act to "include all members of any recognized Indian tribe now under federal jurisdiction." The issue in *Carcieri* was the exact meaning of the words "now under federal jurisdiction." Did "now" mean "as of 1934" when the Act became law or did it mean that the tribe had to be under federal jurisdiction at the time the land was

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[52] See Washington v. Washington State Commercial Passenger Vessel Association, 443 U.S. 658 (1979).

[53] 597 F.3d at 1124.

[54] 129 S. Ct. 1058 (2009).

[55] 25 U.S.C. 465.

taken into trust for its benefit? Speaking through Justice Thomas, the Court held that the unambiguous meaning of the words "now" meant as of 1934. This *(in turn)* meant that the Secretary could not use the authority given in section 5 to take land into trust for tribes, like the Narragansett Indian tribe, which were not under federal jurisdiction as of 1934.

So what persuaded Justice Thomas that the word "now" was meant to restrict application of the Act to Indian tribes under federal jurisdiction as of 1934?

Evidently three things:

1. First he mentioned the ordinary meaning of the word "now."[56]

2. He mentioned the context of the IRA. Justice Thomas thought it very meaningful that in section 468, the Congress used the words "now existing or and hereafter established" when referring to an Indian reservation."[57]

3. He also mentioned one departmental letter which indicated that the Executive Department had a different construction of the Act at the time of enactment than it has now.[58] This 1936 letter mentioned that the term "Indian" referred to all Indians who are members of any recognized tribe that was under federal jurisdiction at the date of the Act.

That's it. These three arguments were enough to conclude that there was no ambiguity whatsoever and, therefore, decades of Executive interpretation of the statute as allowing transfer of land into trust as long as the tribe was now, meaning currently, under federal jurisdiction was put to an end. Although the Secretary of the Interior and the tribes argued that there was no policy reason to limit the statute to tribes under federal jurisdiction as of 1934 and that such an interpretation went against the very purpose of the statute, the Court just bluntly stated "We need not consider these competing policy views because Congress use of the word "now" speaks for itself."[59]

Justice Stevens penned an interesting dissent where he took the position that since

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[56] 129 S. Ct. 1058, at 1064.

[57] 129 S. Ct at 1065.

[58] 129 S. Ct. at 1065.

[59] Id., at 1066.

the word "now" only appeared in the definition of"Indian" but not in the definition of "Indian tribe," the restriction did not apply to tribes. Thus he concluded "The plain *text* of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of Indian tribes."[60] The Act defined "tribe" as follows "The term "Tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." [61]

There are at least two other textual arguments, besides the arguments made by Justice Stevens, to support his reading of the Act. The first one, as pointed by one scholar, was that section 479 defines the term "Indian" to "*include* all members..." In other words, the statute does not say the term Indians "shall be limited to...."[62]

The second argument has to do with the phrasing and structure of the section. Thus, the requirement of belonging to a "recognized Indian tribe now under federal jurisdiction" while definitely applying to members of Indian tribes, does not apply to "descendants of those members who were as of June 1, 1934, residing on an Indian reservation." But it also does not apply to "all other persons of one half or more Indian blood." In other words, under the section, the Secretary of the Interior can take land into trust for individuals who are not tribal members but are descendant of tribal members but only if those descendants were living on an Indian reservation as of June 1, 1934. The Secretary can also take land into trust for anyone who is genetically one half or more Indian blood even if that person is not a member of a recognized Indian tribe now under federal supervision and even if that person did not live on an Indian reservation as of 1934. In other words, when Congress wanted to impose a time certain limitation, it knew how to be specific about it. Non tribal members who are descendant of tribal members could have land taken into trust for them but only if they lived on an Indian reservation as of 1934. If Congress had wanted to place a similar restriction on Indian tribes, it easily could have said that Indians included "members of recognized Indian tribes that were, as of June 1, 1934, under federal supervision."

So what is the meaning of *Carcieri*? To me, it means that if there is one tiny possibility to construe a statute to the detriment of Indians and Indian tribes, this Court

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[60] 129 S. Ct. 1058, at 1071.

[61] 25 USC 479.

[62] See Scott N. Taylor, *Taxation in Indian Country after Carcieri v. Salazar,* 36 Wm. Mitchell L. Rev. 590 (2010).

will do it. In other words, the Indian canon has not been eliminated, it has been reversed: from all ambiguities being construed to the benefit of Indians, it has become "all ambiguities have to be construed to the detriment of Indians." In the next Part, I explain the reasons for the Indian canon and why it should be respected.

PART III: The Indian Canon of Statutory Construction.

Both *HRI* and *Osage Nation* did not use the Indian Canon of statutory construction. Under this canon, statutes enacted for the benefit of Indians are supposed to be liberally construed and ambiguous expressions resolved in their favor.[63] In *HRI*, the meaning of the statutory words "Dependent Indian Community" was ambiguous.[64] Same thing in *Osag*e, at the most, the intent of Congress to terminate the reservation was indeterminate. It is true, however, that the Court has not used the Indian canon consistently, especially recently.[65] Although one reason for this is that in many cases, the Court refused to find an ambiguity to start with, another reason is that some Justices think that the canon is just a technical or grammatical canon, just like some of these Latin phrase canons, as in *expressio unius, noscitur a sociis, or ejusdem generis*. Under this view, the Indian canon is not a substantive canon but one that courts are free to use or not, at their discretion. Proponents of this view take the position that the Indian Canon was first used out of judicial grace because Indians were "weak and defenseless." In other words, courts just felt sorry for the tribes. This position misunderstands the reasons for the Indian canon. As explained by the editors of the leading treatise on federal Indian law,

> Chief Justice Marshall grounded the Indian law canons in the value of structural sovereignty, not judicial solicitude for powerless minorities... The consequence of understanding the Indian law canons as fostering structural and constitutive purposes are quite significant. The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our

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[63] See Scott C. Hall, *The Indian Law Canon of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 47 Conn. L. Rev. 495 (2004).

[64] I am not the first to make this argument. For a well developed argument see, for instance, Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie,* 35 Tulsa L. J. 73 (1999).

[65] See for instance, Chickasaw Nation v. United States, 534 U.S. 84 (2001).

system of governance.[66]

As eloquently explained by professor Philip Frickey, Chief Justice Marshall treated treaties made between the United States and the Cherokees as quasi constitutional documents and interpreted them the way he would interpret a Constitution.[67] Treaties made with Indian tribes can be viewed as documents incorporating the Indian nations into the United States political system as domestic dependent sovereigns. Marshall recognized that because of the commerce power, the treaty power and the war power, Congress had plenary authority over Indian tribes. As such, the United States was able to bargain with the tribes from a position of strength. Marshall also knew that the actions of the United States in this domain could not be judicially challenged. In order to counter the plenary power of Congress in this area, he devised rules of treaty interpretation which favored this under-enforced norm, incorporation of tribes as domestic dependent sovereigns through treaty-making. Eventually, the treaty power and the war power were no longer used by Congress to assume power over Indian tribes. However, the power remained plenary because of the trust doctrine.[68] Pursuant to this trust power, Congress began to assert power over Indian tribes through regular legislation rather than through treaties. This explains why certain rules applicable to the interpretation of Indian treaties should also be applicable to Indian legislation.

At times, the Court has stated that the Indian canon are "rooted in the unique trust relationship between the United States and the Indians."[69] That is true enough but, unfortunately, some Justices also misunderstand the trust doctrine and think that the doctrine was created just because Indians are weak and defenseless. Where does the trust doctrine come from?[70] Some have traced its origin to Marshall's famous reference in

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[66] Cohen's Handbook of Federal Indian Law, 2005 Edition, at 123.

[67] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 Harv. L. Rev. 381, at 408-411 (1993).

[68] See United States v. Kagama, 118 U.S. 375 (1884).

[69] See Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

[70] For an excellent exposition of the trust doctrine and its evolution, see Reid Chambers, *Compatibility of the Federal Trust Responsibility with Self Determination of Indian Tribes: Reflections and Development of the Federal Trust Responsibility in the 21st Century,* Rocky Mountain Min. L. Found. Paper No. 13A (2005)(hereinafter Trust Responsibility.)

Cherokee Nation v. Georgia,[71] that the relationship between the United States and the tribes resembled that "of a Guardian to a Ward." Others have stated that it comes from the huge amount of land transfers from the tribes to the United States.[72] Under that theory, the trust doctrine is really derived from treaties and acts of Congress since that is the way such land transfers were effected. Other Scholars take the position that the trust doctrine originates from the Court's use of the doctrine of discovery according to which, the United States obtained "ultimate" title to all Indian lands within the United States.[73] Under that theory, since the doctrine of discovery was a doctrine of international law, the trust doctrine can be considered as derived from international law, at least as conceived by Chief Justice John Marshall.

I think all these scholars are correct. The trust doctrine is of course a judicially created doctrine. However, the trust also did arise from both the treaties signed with the Indian tribes and doctrines of international law, such as the doctrine of discovery. Acts of Congress, while not creating the doctrine, have added specific trust duties and thus further refined the trust doctrine and defined its contours. It is my position that properly understood, the trust doctrine is a doctrine of "incorporation." It is the legal doctrine that succeeded to treaty making in politically and legally incorporating Indian tribes as quasi sovereign political entities within the federal system.

The trust doctrine and therefore the Indian canon of statutory construction are closely connected to the constitutional power of Congress to enact statutes in Indian Affairs. Although the power of Congress over Indian Affairs is said to be plenary, the Court has given different reasons for such power. During the Allotment era (1880's-1934), the power was thought to come from two sources: first, the Congress was the trustee for the Indian tribes, and secondly, under the doctrine of discovery, the United States had "ultimate title" to all Indian lands.[74] Starting in the 1970's, the Court took the position that the power of Congress was really derived from the Indian Commerce clause

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[71] 30 U.S. 1, at 54 (1831).

[72] See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L. Rev. 1471 (1994).

[73] See Robert J. Miller, Native America, Discovered and Conquered, (2006) at 166 (Stating "The trust doctrine plainly had its genesis in the discovery Doctrine.")

[74] See United States v. Kagama, 118 U.S. 375 (1886), Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

and the treaty clause.[75] The power was still plenary, except that Congress could no longer violate the constitutional rights of Indians,[76] unless it was truly for their benefit.[77] In other words, the trust doctrine still played a role in augmenting the power that Congress possessed over Indian affairs. This led me to argue elsewhere that somehow the trust doctrine had been incorporated into the Commerce clause.[78] Since the United States no longer enters into treaties with Indian tribes, how else can the Court still claimed that the power of Congress was plenary while only relying on the Indian Commerce clause?

The Indian Canon is a substantive rule of statutory construction because it is derived from the trust doctrine and therefore connected to the plenary power of Congress over Indian Affairs, itself derived from the Constitution's Commerce clause. In other words, the Court is willing to give Congress power to enact legislation going beyond regulation of Commerce with Indian tribes, however, in such cases, the legislation should be tied to the trust doctrine.[79] Since such legislation by definition has to be for the benefit of Indians, this explains why such legislation has to be liberally construed with ambiguities resolved to the benefit of Indians. The example of the Osage allotment Act of 1906 provides a good example showing the interrelationship between the Indian canon, the plenary power, and the trust doctrine.

Abrogating a treaty and terminating a reservation should not be lightly inferred. One could even legitimately ask: how can Congress do this constitutionally. At the time the Osage reservation was allegedly terminated, unilateral congressional abrogation of Indian treaties was considered a political question.[80] The power of Congress to allot Indian reservations was considered to be derived from the trust doctrine but because of the political question doctrine, it was "assumed" that allotment was for the benefit of

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[75] See Morton v. Mancari, 417 U.S. 535 (1974).

[76] See Delaware v. Weeks, 430 U.S. 73 (1977).

[77] See United States v. Sioux Nation, 448 U.S. 371 (1980),

[78] See Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution,* 39 Tulsa L. Rev. 247 (2003-2004).

[79] See Chambers, *Trust Responsibility,* supra at n. 70 (arguing that the power of Congress under the trust doctrine limits Congress to enact legislation rationally tied to its trust responsibilities.)

[80] See Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

Indian tribes. In other words, the plenary power of Congress to abrogate treaties, allot, and terminate reservations, was initially derived at least partially from the trust doctrine. This is the reason that statutes enacted allegedly for the benefit of Indians, such as the Osage 1906 Allotment Act, have to be liberally construed and ambiguities resolved in favor of the Indians.

I have also argued elsewhere that this did not mean that every ambiguous statute affecting Indians has to be construed to their benefit.[81] In effect, when enacting legislation affecting Indians, Congress can wear two hats, albeit not at the same time. It can either act as a regulator, pursuant to its normal power to regulate commerce with Indian tribes, or it can legislate in its capacity of trustee (as protector if you will) for the Indian tribes. When acting as a protector, congress can enact legislation going beyond the regulation of "commerce," but the law has to be truly for the benefit of the tribes. When acting as a trustee/protector, the Indian canon should apply. When Congress is only acting as a regulator, the Indian canon does not have to apply.

In the two cases being discussed presently, the answers are clear: the Indian canon is applicable. In the *Osage* case, the Allotment Act is assumed to be for the benefit of the tribe. Otherwise, Congress in fact would have no power to abrogate such treaties since in effect, it took tribal property rights in violation of constitutional protection.[82] In the *HRI* case, the definition of Indian Country was originally included in 1948 as part of the Major Crimes Act.[83] The Court in *United States v. Kagama* had held that although the Major Crimes Act was beyond Congress's Commerce power, it could be enacted pursuant to the trust doctrine.[84] Thus, the Indian Canon should be applied to such legislation and to the definition of Indian Country contained within it.

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[81] See Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*. 42 Ariz. St. L. J. 253 (2010), at 265-269.

[82] Id. In the article referred to in the previous footnote, I also took the position that if the regulation went beyond commerce and was not truly to the benefit of the Indians, Congress should be seen as acting as a conqueror and such regulations should be held unconstitutional. At the time of the Osage Allotment Act in 1906, the Court avoided this question by using the political question doctrine to "assume" or presume that such legislation was to the benefit of the Indians, see Lonewolf v. Hitchcock, 187 U.S. 553 (1903). Today, the Court is just assuming that such laws are within the commerce power unless they violate a specific constitutional right in which case the law is declared unconstitutional. See Hodel v. Irving, 481 U.S. 704 (1987).

[83] 18 U.S.C. 1153, 3242,

[84] 118 U.S. 375 (1886).

CONCLUSION:

One of the purpose of this paper has been to compare *HRI* and *Osage Nation*. In one case, *Osage Nation*, it seems that the real problem was that the reservation was now populated 96.5% by non-Osages and the land within the reservation overwhelming owned by non-Indians. This fact seemed to have driven the decision in the case. Yet in *HRI*, the area was 98% populated by Navajos and 90% controlled by the federal government or the tribe. Yet this was not good enough for the area to be considered Indian Country.

Another interesting point of comparison is that the *HRI* majority insisted that allowing the creation of Indian Country would show disrespect towards the plenary power of Congress over Indian affairs in that it would allow the creation of Indian Country without specific congressional action. Yet in *Osage Nation*, the Tenth Circuit paid more attention to what some remote historians, obscure federal officials, and the state of Oklahoma, were thinking than what Congress had ever said about the case. What is judicial activism and when is it occurring is of course a subjective thing. It all seems to be in eyes of the beholder. No doubt, the *HRI* majority seemed to be accusing those willing to use the Community of Reference test of judicial activism in that they were creating Indian country without specific congressional approval. Yet, from an Osage perspective, the Tenth Circuit's decision in *Osage Nation* seems to be the pinnacle of judicial activism. It created non-Indian country right in the middle of an Indian reservation without any indication of congressional intent or the support of the Executive branch.

Yet, it seems that such judicial opinions are immune from further judicial scrutiny because the Supreme Court is reluctant to grant *cert* to any such cases,[85] let alone reverse them. The question is why? Why is the Supreme Court ruling so disproportionately against tribal positions. Three influential scholars have suggested different explanations. I hope I can be forgiven for greatly simplifying their thesis in the interest of brevity: David Getches took the position that this trend was consistent with the Court's general support for state rights and mainstream values, and its aversion to racial classifications.[86] Implied in this position is that the Court sees much of Indian law as racial legislation and

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[85] See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009). It is my understanding that the EPA decided not to file a *cert* petition in *HRI*. As of this writing, the petition of the *Osage Nation* was still pending at the Supreme Court.

[86] See 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 (2001).

tribes as racially based institutions rather than quasi sovereign governmental actors. Robert Williams thinks that most if not all of federal Indian law cases are full of racist imagery and are, at bottom, racist decisions.[87] Moreover, almost none of these cases have been overturned. As a result, courts can pull them back from their historical shadows and, "like a loaded weapon," use such racist precedents against tribal interests. Certainly, Justice Thomas use of *Sandoval* in the *Venetie* case suggests that Williams has a valid point. Finally Philip Frickey has argued that the Court has moved away from the *"exceptionalism*" that has characterized federal Indian law since the time of Chief Justice Marshall.[88] Under his theory, the Court is basically pulverizing Federal Indian Law by mainstreaming it into the rest of American public law. He has a valid point. His theory would explain why the Court is abandoning traditional principles that have been the cornerstones and foundation of federal Indian law. Principles such as the Indian canon of statutory construction, the trust doctrine, or the doctrine of inherent tribal sovereignty, have made federal Indian law special and different than the rest of American public law.

But why is the Court abandoning these traditional principles of federal Indian law? I have in previous writings suggested that it has to do with the Court's misconception about the trust doctrine, and its refusing to include Indian tribes under a third sphere of sovereignty within our federalist system.[89] As tribes become more politically sophisticated, more economically self-sufficient, and as Indians become more educated, it has become hard to view them as weak and defenseless. If the Court takes the position that the trust doctrine, and all the legal principles derived from it, only exists to protect weak and defenseless Indians, then no wonder it has become reluctant to apply such legal principles. If Tribes are not viewed as quasi sovereign governmental entities within our Federalist system, then there is a real danger that the Court will view them as regular economic actors. Why then, should the tribes benefit from special rules, such as the Indian Canon of statutory interpretation, that may place them at a competitive advantage vis-a-vis non-Indian corporations? The real challenge for tribal advocates in this twenty first century will be to convince courts that the venerable and traditional legal principles

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[87] Robert Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005),* (arguing that the Court should repudiate most of its previous Indian law decisions and should, instead, use emerging norms of international human rights law to decide Indian cases.)

[88] Philip P Frickey, *(Native) American Exceptionalism in Federal Public Law,* 119 Harv. L. Rev. 431 (2005).

[89] See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm,* 38 Conn. L. Rev. 667 (2006).

that have shaped American *Exceptionalism* in Federal Indian law should still be applied even though Indian tribes are no longer weak, defenseless, or even dependent.