In an article written in 1998, I set forth contradictory pronouncements by the Supreme Court in the field of federal Indian law. See Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 University of Dayton Law Review 437 (1998). The quotes are organized in a "thrust" and "parry" format, in the same way that Karl Llewellyn organized the canons of statutory construction to show that there are opposing canons on almost every point. See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950). The unfortunate consequence of the "thrust and parry" of federal Indian law is doctrinal incoherence and a tendency toward judicial subjectivism which threatens to undermine foundational principles of tribal political status and tribal governmental authority.

DOCTRINE OF DISCOVERY:

THRUST: "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, . . . or that the discovery of either by the other should give the discoverer rights in the country discovered...." *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

PARRY: "[D]iscovery [of the new world] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. M'Intosh*, 21 U.S. 543, 573 (1823).

FEDERAL ACQUISITION OF INDIAN LANDS AND RECOGNITION OF INDIAN PROPERTY RIGHTS:

THRUST: "[The colonial charters] were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. . . . The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated." *Worcester v. Georgia*, 31 U.S. 515, 545 (1832).

PARRY: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." *Tee-Hit- Ton Indians v. United States*, 348 U.S. 272, 289-290 (1955).

THRUST: "The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. . . . Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938).

PARRY: "[Indian title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally

enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

THE GUARDIAN-WARD RELATIONSHIP AND TRUST DOCTRINE:

THRUST: "[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

PARRY: "[Because the statute] was adopted by Congress in the exercise of its control over [Indians] . . . [t]he wish of the ward had to yield to the will of the guardian." *United States v. Rowell*, 243 U.S. 464, 468 (1917).

THE PLENARY POWER DOCTRINE:

THRUST: "[The] power to control and manage [tribal affairs is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

PARRY: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

THRUST: "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).

PARRY: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

THE INDIAN CANONS OF CONSTRUCTION:

THRUST: "[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

PARRY: "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or achieve the asserted understanding of the parties." *Choctaw Nation v. United*
States, 318 U.S. 423, 432 (1943).

THRUST: "The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than

their critical meaning, should form the rule of construction." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean, J., concurring).

PARRY: "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments . . . must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

STATE AUTHORITY IN INDIAN COUNTRY:

THRUST: "Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive . . . . The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force...." *Worcester v. Georgia*, 31 U.S. 515, 557, 561 (1832).

PARRY: "[E]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

THRUST: "Congress can authorize the imposition of state taxes on Indian tribes . . . . [but] the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

THRUST: "Our conclusion that the [Act at issue] does not expressly authorize direct [state] taxation of Indian tribes does not entail the further step that the Act impliedly prohibits taxation of nonmembers doing business on a reservation." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183 n.14 (1989).

THRUST: "[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

THRUST: "Mere subjection of Indian rights to legal challenge in state court . . . would no more imperil those rights than would a suit brought by the Government in district court . . . . Indian interests may be satisfactorily protected under regimes of state law." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812 (1976).

POLITICAL STATUS OF TRIBAL GOVERNMENTS:

THRUST: "The Cherokees are in many respects a foreign and independent nation." *Parks v. Ross*, 52 U.S. 362, 374 (1850).

PARRY: "In no respect can [the Cherokees] be considered a foreign State or territory...." *United States v. Coxe*, 59 U.S. 100, 104 (1855).

THRUST: “The Indians [t]ribes . . . were . . . [n]ations, distinct political communities, with whom the United States might and habitually did deal . . . either through treaties . . . or through Acts of Congress in the ordinary forms of legislation.” *Elk v. Wilkins,* 112 U.S. 94, 99 (1884).

PARRY: “The North American Indians do not and never have constituted 'nations' . . . . In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.” *Montoya v. United States*, 180 U.S. 261, 265 (1901).

THRUST: “The numerous treaties made with [the Cherokee] by the United States recognize them as a people capable of maintaining the relations of peace and war [and] of being responsible in their political character for any violation of their engagements . . . . The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.” *Cherokee Nation v. Georgia,* 30 U.S. 1, 16 (1831).

PARRY: “The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign . . . finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States.” *Cherokee Nation v. Southern Kansas Railway Co.,* 135 U.S. 641, 653 (1890).

INHERENT SOVEREIGNTY AS A SOURCE OF TRIBAL POWER:

THRUST: “The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.” *United States v. Wheeler,* 435 U.S. 313, 323 (1978).

PARRY: “Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of . . . the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.” *United States v. Kagama,* 118 U.S. 375, 379 (1886).

THRUST: “[T]he Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government....” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

PARRY: “[T]ribal sovereignty over nonmembers ‘cannot survive without express congressional delegation,’ and is therefore not inherent.” *South Dakota v. Bourland,* 508 U.S. 679, 695 n.15 (1993).

THRUST: “Tribal powers are not implicitly divested by virtue of the tribes dependent status.” *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 153 (1980).

PARRY: “Indian tribes are prohibited from exercising . . . those powers . . . that are . . . ‘inconsistent with their status.’" *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978).

TRIBAL AUTHORITY OVER NON-MEMBERS:

THRUST: "Civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

PARRY: "[T]he general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981).

THRUST: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *United States v. Martinez*, 436 U.S. 49, 65 (1978).

PARRY: "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. Ct. 438, 445 (1997).

THRUST: "[T]ribes have the power to manage the use of its territory and resources by both members and nonmembers." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

PARRY: "The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members." *Duro v. Reina*, 495 U.S. 676, 693 (1990).