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INTERPRETING INDIAN COUNTRY IN *STATE OF ALASKA v. NATIVE VILLAGE OF VENETIE*

Kristen A. Carpenter*

I. INTRODUCTION

I think that the [Alaska Native Claims Settlement Act] will never fully to the extent advocate and stand individually for the real Native part of us. I think that ANCSA is not totally Native. It is written in the Western-adopted ways, and that it has that business nature where the land is collateral, just like a car or anything. Anyone, in one way or another, gambles with it, and Western laws apply to it. We have a limited say on it. ANCSA -- if it has to be there -- it should be for the good, to help us but not take away our way of life.

This is the Native personal part of us. Talking about land is about our everyday, individual part of us. Our ancestors survived because of the land. A large portion of our diet still comes from the land. What if, sometime in the future, the food is still on the land, but the land is taken away and in the hands of others who wouldn't permit us to go out and hunt for the game, etc. With no money to pay to hunt, if that was the only way. I think, in this modern day and age, you have to pay for everything. What would we do?¹

A large body of statutory law of the United States affects American Indians and Alaska Natives² in many aspects of their tribal and individual lives.³ Statutes come to life under various conditions. In some instances, tribes influence the enactment of statutes affecting them, but often the legislative process is deaf to Indian input.

*. Judicial Clerk, Judge John C. Porfilio, U.S. Court of Appeals for the 10th Circuit, J.D., *cum laude*, 1998, Harvard Law School; A.B., *cum laude*, 1994, Dartmouth College

1. Virginia Commack, Ambler, Alaska, in THOMAS BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 92 (1985) [hereinafter "BERGER"].

2. Like many Indian law articles, this one uses the terms "Indian" "native" and "indigenous" somewhat interchangeably. "Alaska Natives" include Tlingit, Eyak, Haida, Tsimshian and Athabaskan Indians, Aleuts, Inupiat, and Yupiks. These cultural and linguistic groups are represented in 220 federally recognized Alaska Native tribes. *See generally*, DAVID CASE, *ALASKA NATIVES AND AMERICAN LAWS* 333 (1997) [hereinafter "CASE"].

3. *See* Rennard Strickland and Glora Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. REV. 153, 167 (1996) [Federal law affects] over 550 federally recognized tribes and 200 plus in the process of qualifying for such a nation-to-nation relationship. Through [Title 25 of the U.S. Code and Code of Federal Regulations], individual Indians also have a unique relationship with the federal government, which reaches into everyday life to affect occupations, family relations, land title, probate and other matters in ways that no other citizens experience.)

Congress sometimes makes its intent clear, but other times drafts vague or incomplete statutes. Fortunately for the courts, agencies, public, and Congress itself, certain canons guide interpretation of statutory law. According to federal Indian law's canons of construction: (1) laws enacted for the benefit of Indians are construed liberally in favor of the Indians;⁴ (2) drafting language is interpreted as the Indians would have understood it;⁵ and (3) ambiguities cannot diminish existing Indian rights because Congress must do so explicitly.⁶ These canons have developed over hundreds of years of legal interactions between Indians and Euro-Americans and can offer clarity, stability, and harmony in an otherwise confusing maze of federal Indian law.

A doctrine of statutory interpretation presently challenges certain applications of the Indian canons. Announced by the Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*,⁷ the doctrine requires that courts defer to administrative agency interpretations of ambiguous language in statutes they are authorized to administer. Federal administrative agencies must often interpret statutes affecting Indians. In instances where agencies have construed vague statutory language against Indian interests, not as Indians would have understood it, or as abrogating reserved rights, *Chevron* deference and the Indian canons dictate opposite results for a reviewing court. This conflict muddles Indian law jurisprudence, produces uncertainty among affected individuals and communities, and weakens the relationship between the federal government and Indian tribes.

The federal courts of appeal have split on the question of whether *Chevron* deference trumps the Indian canons. The Supreme Court has avoided opportunities, including the recent case of *State of Alaska v. Native Village of Venetie* to resolve the issue.⁸ In *Venetie* the Court considered whether land owned in fee simple by Alaska Native tribes,⁹ pursuant to the Alaska Native Claims Settlement Act (ANCSA),¹⁰ constituted "Indian Country."¹¹ If the tribal lands were Indian Country, the tribe would retain its authority to tax non-Indians doing business there. ANCSA itself did not describe whether such lands were Indian Country; the tribe urged the Court to

4. See *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943).

5. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631-32 (1970).

6. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973).

7. 467 U.S. 837, 843-44 (1984).

8. 522 U.S. 520 (1998).

9. The Native Village of Venetie, a federally recognized Indian tribe, owns the lands at issue in Venetie, but generally, Alaska Native corporations own land pursuant to ANCSA. See Martha Hirshfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331 (1992) for a discussion of ANCSA's creation of state chartered village and regional corporations, comprised of Alaska Native village members, to receive federal benefits.

10. 43 U.S.C. § 1601 et seq. (West 1994).

11. 18 U.S.C. § 1151 (1994) (defining Indian Country as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.) *Id.*

interpret this silence as leaving tribal jurisdiction intact while the State argued the opposite. Although the United States did not appear in the litigation, the State cited a Department of the Interior Solicitor's Opinion expressing the view ANCSA had abrogated Indian Country. Thus the case involved both an ambiguous statute affecting Indians *and* an agency interpretation contrary to Indian interests and thereby presented the question of whether the Indian canons trump *Chevron* deference. The Supreme Court, however, did not answer, or even discuss, this question when it held the ANCSA had generally extinguished Indian Country in Alaska, including in the Native Village of Venetie.¹²

Examining the problem under three jurisprudential frameworks, I argue the Court should have rejected the Solicitor's Opinion on Indian Country's existence in Alaska, if it had reached the issue.¹³ First, as a matter of administrative law, the Solicitor's Opinion was an unauthorized, unpublished and informal agency interpretation. The Opinion, therefore, lacked the weight of law and could and was not binding on the courts: it had no claim to *Chevron* deference. Second, as a matter of federal Indian law, because the ANCSA is a statute enacted for the benefit of Indians and contains ambiguous language, courts must interpret it with the aid of the Indian canons. Under the Indian canons, Congressional silence could not have extinguished Indian Country, and the Solicitor's belief to the contrary was incorrect. Third, as a matter of indigenous Indian law,¹⁴ indigenous peoples must be meaningfully involved in lawmaking affecting them. Because the Solicitor's Opinion deeply affected Alaska Natives but failed to incorporate Alaska Native interpretations of Indian Country under ANCSA, it violated indigenous Indian law, and should not have informed the Court's decision.

Justice Thomas' thirteen-page opinion in *Venetie* did not mention the Solicitor's Opinion. The Court thereby avoided the administrative law, federal Indian law, and indigenous Indian law analyses under which the Indian canons would have trumped the Solicitor's Opinion. This article undertakes these analyses because each suggests important problems in interpreting the ANCSA and other statutes enacted for the benefit of Indians. Although the decision to write about what was *not* in a Supreme Court decision may seem peculiar, in *Venetie*, like in many Indian law cases, the untold story is the one most revealing.

12. See *Venetie* 522 U.S. 520.

13. This article deliberately takes a narrow focus on *Venetie*; I highlight the Solicitor's Opinion because the Supreme Court totally ignored it and because it raises the *Chevron* deference—Indian canons conflict. Other articles, published before and after the Supreme Court's decision, have considered the case more broadly. See generally, Dean B. Suagee, *Cruel Irony in the Quest of an Alaska Native Tribe For Self-Determination*, 13-WTR Nat. Resources & Env't 495 (1999); Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283 (1997); Donald Craig Mitchell, (*Alaska v. Native Village of Venetie*): *Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353 (1997); Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA*, 14 ALASKA L. REV. 443 (1997).

14. "Indigenous Indian law" is a term I have created for the purpose of this paper. As described in Section V, indigenous Indian law is an alternative approach to the legal problems of American Indians and Alaska Natives. Instead of relying exclusively, or heavily, on non-Indian sources and institutions, indigenous Indian law looks to traditional tribal custom to encounter-era relations between Indians and non-Indians and to international law to identify indigenous legal theories and practices.

II. VENETIE¹⁵

Nearly 800 miles north of Alaska's capital -- above the Arctic Circle at the foot of the Brooks range in a land as wild as any area in America -- is the homeland of the Venetie Tribe of Neets'aii Gwich'in Indians. The Venetie people have governed, hunted and fished their land since time immemorial according to ancient tribal customs and traditions, in a society where children still speak Gwich'in as a first language and life still largely follows the migratory rhythms of caribou and salmon.¹⁶ Presently, the Venetie lands are owned in communal fee simple by the Native Village of Venetie, a federally recognized Athabascan Indian tribe including 350 enrolled members in 99 households who reside primarily in the villages of Venetie and Arctic Village.¹⁷ Traditionally, Neets'aii Gwich'in people lived, hunted and fished, raised their children, governed themselves, and moved seasonally in "vast aboriginal lands."¹⁸ One tribal member and resident of Arctic Village explained:

According to legends, our story's location is at the source of the Porcupine River -- at least that is where our legendary hero CH'TEEHAAKWAII presumably starts. Our people, the NEETS'AII and NEETS'IGWITCH'IN, being a nomadic tribe, were not always restricted to this valley. Some elders believe our kinship extends throughout interior Alaska, that some of our relatives are still living in Bettles, Stevens Village, and other places in Alaska and Canada.¹⁹

Russian, English, Spanish and American explorers explored and occupied various regions of Native Alaska between the 1750's and 1900's. Pursuant to the Treaty of Purchase of 1867, the U.S. purchased Alaska from Russia and began to administer it as a territory. "In 1938, the Neets'aii petitioned the Secretary of the Interior to set aside a portion of their vast aboriginal lands in Alaska as a reservation to protect their exclusive use and occupancy of the land."²⁰ Under the Indian Reorganization Act of 1934 (IRA), the Neets'aii Gwich'in ratified a constitution in 1940, and in 1943 the Secretary designated 1.8 million acres of land as the Venetie Reservation.²¹ Alaska joined the United States under the Alaska Statehood Act 1958.

Many Alaska Native groups had unresolved land claims stretching into the 1960's when oil companies sought to exploit oil reserves in Alaska. In 1966 Secretary of the Department of the Interior Stewart Udall froze land transactions so that Alaska Native title could be settled before he issued a permit for the Trans-

15. The name of the village is pronounced "vee-neh-tie." Since 1998 "the *Venetie* case" has been cited often, but both courts and litigants seem to have trouble referencing it orally.

16. Respondent's Brief, *Alaska v. Venetie*, 522 U.S. 520 (1998), [hereinafter "Resp. Br."].

17. *See Id.* at 3.

18. *Id.*

19. Lincoln Tritt, *A Glimpse of the Aboriginal Society*, in *RAVEN TELLS STORIES*, JOSEPH BRUCHAC, ED., 214 (1991) (capitalization in original).

20. Resp. Br., *supra* note 16 at 3.

21. *See id.*

Alaska Pipeline.²² Congress enacted the Alaska Native Claims Settlement Act (ANCSA) of 1971²³ to settle the land claims of Alaska Natives and pave the way for the oil industry.²⁴

ANCSA created state-chartered regional and village corporations, including the village corporations of Venetie and Arctic Village, comprised of the Neets'ait Gwich'in occupants of the Venetie Reservation. ANCSA²⁵ permitted conveyance of 44 million acres of land to the Native corporations, along with a cash settlement just under \$1 billion, "in exchange for the purported extinguishment" of Native land claims in Alaska.²⁶ The statute revoked the reservations of Alaska Natives,²⁷ but gave village corporations the option of taking fee title to their former reservation lands in lieu of sharing in the monetary, land, regional corporation, and other provisions and obligations of the Act.²⁸ In 1974, the Neets'ait Gwich'in took advantage of this option.²⁹ The United States conveyed to the Venetie and Arctic Village corporations, as tenants in common, fee simple title to the reservation lands. In 1979 tribal members, acting through the two village corporations, reconveyed their reservation lands to the Native Village of Venetie, IRA, and then the two village corporations dissolved.³⁰

Although ANCSA was a statute focused on Alaska native lands, it did not reference "Indian Country,"³¹ the statutory term of art for Indian lands where federal

22. See Guy Martin, *The Politics of Passage, The Native Land Claims*, Alaska Department of Education, 4 (1975), <http://www.ankn.uaf.edu/passage.html> [hereinafter "Martin"]

23. 43 U.S.C. § 1618(a) (1994).

24. See Martin, *supra* note 22 at 4.

25. This is not an article on the Alaska Native Claims Settlement Act which has a complex structure and legacy. See generally, Hirschfield, 101 YALE L. J. 1331, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form* (1992); Patricia Thompson, *Comment, Recognizing Sovereignty in Alaska Native Villages After the Passage of ANCSA*, 68 WASH. L. REV. 373 (1993); Shannon D. Work, *Comment, The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 OR. L. REV. 195 (1987). It is important to state, however, that people in Alaska have mixed feelings on the ANCSA. Many would describe ANCSA as the most generous and fair native claim settlement act in the history of the United States. See, e.g., COHENS HANDBOOK OF FEDERAL INDIAN LAW 197 (1982 ed.) [hereinafter "COHEN"] ("[ANCSA was] a major victory for Alaska Natives who had been seeking a settlement of their aboriginal land claims for many years."). Others argue ANCSA was passed without attention to many Native needs and real circumstances, imposed a corporate system that did not protect Native resources, was predestined to fail economically, and sought to dismantle Native institutions and cultures. See generally, THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985) (providing critical analysis and first hand testimony from Alaska Native villagers). For one example of contemporary economic consequences of the ANCSA, see David Whitney, ANCHORAGE DAILY NEWS, *Senate Approves Calista Land Deal*, October 9, 1998 (The U.S. Senate approved a "financial lifesaver" exchange of 218,585 acres inside the Yukon Delta National Wildlife Refuge owned by Calista, the Native corporation for Southwestern Yupik Eskimos, for \$39.4 million in recapitalization. The land-for-dollars-deal was prompted by the corporation's "financial losses, stemming from a spate of bad investments with its \$80 million from the 1971 Alaska Native Claims Settlement Act [which] have prevented any payments of stock dividends for the last 13 years.").

26. See CASE, *supra* note 2 at 17.

27. See 43 U.S.C. § 1618(a) (1994).

28. See 43 U.S.C. § 1618(b) (1994).

29. See *State of Alaska v. Native Village of Venetie*, 522 U.S. 520.

30. See *Id.*; see also, *Resp. Br.*, *supra* note 16 at 5 ("The Venetie Tribe was one of only six Alaska tribes to select the option afforded by § 1618(b) to retain its former Reservation, and it is the only tribe which used its village corporations solely as a vehicle to retain communal fee title to the Reservation in the tribal government.") *Id.* (italics added).

31. ANCSA lacked language on the broad category of "Indian Country." It did reference two of the subsets of Indian Country – leaving in place "allotments," see 43 U.S.C. § 1617 (1994), and revoking "reservations," see 43 U.S.C. § 1618(a) (1994) – but took no action with respect to "dependent Indian communities." Thus, ANCSA can be

and tribal, rather than state, jurisdiction exists. The Indian Country statute, 18 U.S.C. §1151, was first enacted to define the scope of federal jurisdiction over major crimes between Indians occurring on Indian lands.³² It provides that Indian Country includes reservations, allotments, and dependent Indian communities. Because the Indian Country statute is now used to delineate Indian lands for both civil and criminal purposes,³³ "[t]he designation of an area as Indian country has become extremely important to Native Americans."³⁴

[Designation of Indian Country] recognizes [Native] rights to control their own lives and affairs within that area. In Indian country, Natives enjoy inherent sovereignty, i.e., the right to self-government and self-determination. Specifically, in Indian country, a tribal government has the following powers: to enact and impose taxes; to adopt and enforce its own internal tribal laws; to adjudicate civil and criminal disputes and minor criminal offenses that occur on tribal lands; to issue marriage licenses; to buy and sell real property; to regulate land use; to provide essential and non-essential governmental services; and to regulate affairs of non-Natives on tribal land. Also in Indian country, Native Alaskan tribal governments enjoy the same sovereign immunity possessed by federal and state governments. They can be sued only if they consent or if they engage in acts beyond the scope of their authority.³⁵

most precisely described as being silent on the dependent Indian community category of Indian Country. However, this article follows the parties and courts' lead by describing the issues as whether, generally, ANCSA abrogated Indian Country in Alaska and whether, specifically, the Native Village of Venetie was a "dependent Indian community." Thus, ANCSA can be most precisely described as being silent on the dependent Indian community category of Indian Country. However, I have followed the parties and courts' lead by describing the issues as whether, generally, ANCSA abrogated Indian Country in Alaska and whether, specifically, the Native Village of Venetie was a "dependent Indian community."

32. See 18 U.S.C. § 1151; 1153 (1994). In 1885, Congress enacted the Major Crimes Act, codified as amended, 18 U.S.C. 1153, in response to *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883). In *Crow Dog*, the Court held the Dakota Territorial court was without jurisdiction to impose a death sentence on Crow Dog, who had murdered Spotted Tail on tribal lands. Instead, the tribe's traditional restitutionary sentence would stand. "The Court's sanction of 'red man's revenge' [in *Crow Dog*] caused popular outrage among Americans and prompted the passage of the Major Crimes Act" to extend federal jurisdiction over murder and other crimes committed by one Indian against another in Indian Country. Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. REV 507, 527 (1987).

33. 18 U.S.C. § 1151 (1994); see also, Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County*, 23 AM. IND. L. REV. 55, 71-72 (1998): "Federal courts have recently started using §1151 to define Indian country when deciding the reach of state taxing power over Indian lands. The Supreme Court's first explicit use of §1151 to limit state taxing power was in *Oklahoma Tax Comm'n. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). . . Why the Supreme Court has decided to use the section 1151 definition of Indian Country in state tax cases is unclear. . . The purpose of section 1151 is to establish the jurisdiction of federal courts over major crimes that Native Americans commit within Indian country . . . [S]ection 1151 reflects the federal policy that Congress, in the absence of state criminal jurisdiction, has taken the power to prosecute major crimes from tribes and taken over the responsibility itself. . . Indian country, as defined in section 1151 could vary well be too broad or narrow in establishing the limits of state taxing power." *Id.* (emphasis added) (citation added).

34. See Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 451 (1997).

35. *Id.* Beyond its jurisdictional meaning, "Indian Country" is "a place that marks the endurance of Indian communities against the onslaught of marauding European societies; it is also a place that holds the promise of fulfillment. As Lakota people say, "Hecel lena Oyate nipikte" (That these people may live)." FRANK POMMERSHEIM,

Beyond its jurisdictional meaning, Indian Country is "a place that marks the endurance of Indian communities against the onslaught of marauding European societies; it is also a place that holds the promise of fulfillment."³⁶

Alaska natives and others believed ANSCA's settlement of land claims left intact Alaska native jurisdiction over the lands they retained.³⁷ Prior to ANCSA, Alaska Native tribes had exercised civil regulatory jurisdiction over their lands and, in Federal Indian law, Indian rights are reserved unless Congress explicitly terminates them.³⁸ Congress had made no statement abrogating Indian Country in ANSCA. Further, ANSCA had been enacted during the "self-determination without termination" policy-era, during which the federal government recognized the importance of tribal government and other institutions, without abating federal responsibilities to tribes or rescinding tribal rights under federal law.³⁹ But others believed Congress sought to treat Alaska Natives differently from Indians in the lower 48 states who did retain jurisdiction over their lands;⁴⁰ and thus in ANSCA, Congress abrogated Indian Country by implication, if not by express language. Congress' 1987 Amendments to ANCSA were explicit in not making law on the Indian Country issue. Section 17 of the Amendments Act provides:

(a) No provision of this Act (the Alaska Native Claims Settlement Act amendments of 1987). . . shall be construed to validate or invalidate or in any way affect. . . any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska."⁴¹

In these amendments, Congress revealed both its own uncertainty on just what, if anything, ANSCA had done to Indian Country and the fact that competing

BRAID OF FEATHERS, 11-36 (1995) [hereinafter "POMMERSHEIM"] (describing Lakota reservations particularly and the meaning of reservation as place more generally).

36. FRANK POMMERSHEIM, BRAID OF FEATHERS, 11-36 (1995) [hereinafter "POMMERSHEIM"] (describing Lakota reservations particularly and the meaning of reservation as place more generally. Observing, "As Lakota people say, "Hecel lena Oyate nipikte" (That these people may live)").

37. See CASE, *supra* note 2, at 458.

38. Alaska Natives also retained and exercised civil adjudicatory jurisdiction to the extent possible under Public Law 280. P.L. 280, codified as 18 U.S.C. § 1162(a) (1984), conferred on the courts of several states, including Alaska, jurisdiction over civil matters in Indian Country, but did not abolish tribal court jurisdiction over the same matters, creating a framework of concurrent jurisdiction. See generally, Suzanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska*, 10 ALASKA L. REV. 335 (1993) (discussing the contours of civil and criminal jurisdiction under Public Law 280).

39. In the 1960's, the executive and legislative branches denounced earlier federal policy of "terminating" the relationship between the federal government and Indian tribes. "The new policy advocated "self-determination without termination" for Indian tribes, and was most clearly articulated in President Nixon's 1970 Special Message to Congress on Indian Affairs, PUB. PAPERS 564-76 calling upon the federal government to "explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska Native governments." *Id.* at 567.

40. See generally Mitchell, *supra* note 13, at 377-78.

41. Pub. L. No. 100-241, § 17(a), 101 Stat. 1814, Feb. 3, 1988.

interpretations were brewing in Alaska.⁴² In 1993, the Solicitor of the Department of Interior attempted to ascertain what ANCSA meant for tribal status and Indian Country in Alaska. Summing up his research and legal analysis, the Solicitor released, "Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members," the Solicitor's Opinion was released on January 11, 1993, in the closing days of the Bush Administration. After detailing the federal perspective on Alaska Native history and law, the opinion finally, "rejected the notion that there are no tribes in Alaska" and concluded "Native Corporation lands do not qualify as Indian Country."⁴³ The second conclusion is relevant to the *Venetie* case.⁴⁴

The Solicitor acknowledged that the question of Indian Country was politically sensitive, and stated, "in our effort, we have consulted with Governor and Attorney General of Alaska; numerous Native leaders in Alaska and the contiguous states, as well as their counsel; the Alaska congressional delegation and other congressional leaders; and the members of the Joint-Federal State Commission on Policies and Programs Affecting Alaska Natives. . . We have received numerous comments, including several detailed briefs."⁴⁵ Further, "this opinion has been one of the most difficult to prepare during my tenure at the Department of the Interior."⁴⁶ Despite the important and difficult nature of the issues therein, the Solicitor's Opinion was neither published, nor subjected to public scrutiny, and has been under reconsideration since the Clinton administration assumed power.⁴⁷ Nonetheless, it was a very significant voice in the debate over what ANCSA meant for Indian Country.

With the question of Indian Country still looming, the State of Alaska entered into a joint venture with a private contractor to construct a public school in Venetie in 1986. After the contractor and the State refused the Tribe's demand for approximately \$161,000 in taxes for conducting business on tribal land, the Tribe brought a collection action in tribal court. The state then sought an injunction in federal district court, arguing Venetie lacked authority to tax nonmembers of the tribe because Venetie's ANCSA lands were not Indian Country. The district court evaluated Indian Country with respect to four factors:

- (1) the nature of the area;
- (2) the relationship of the area inhabitants to one another, to Indian tribes, and the federal government;
- (3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government;
- and (4) the extent to which the area was set aside for the use

42. Unlike most other administrative decisions, this Solicitor's Opinion is unavailable to anyone doing legal research in the bounded volumes of Solicitor's Opinions or in electronic databases such as Westlaw and Lexis. A hard copy exists for public use at the National Indian Law Library, Boulder, Colorado.

43. Vol. 2, Op. Sol. Gen. at 132.

44. This article does not focus on the contents of the Solicitor's Opinion. Instead, it discusses what was left out of the Solicitor's Opinion – Alaska Native perspectives on Indian Country and how the omission conflicts with administrative law, federal Indian law, and indigenous Indian law. For an analysis of what is in the Solicitor's Opinion, see Mitchell *supra* note 13, 14 ALASKA L. REV. at 405-07.

45. Vol. 3, Op. Sol. Gen. at 3.

46. *Id.* at 131.

47. Vol. 2, Op. Sol. Gen. at 132.

and occupancy of Indians as such.⁴⁸

Finding the "lands of the Neets'aii Gwich'in had not been set aside for Alaska Natives, as such, under the superintendence of the federal government,"⁴⁹ the district court concluded, "the lands of the Neets'aii Gwich'in are not Indian Country; and, therefore, the Tribal Government does not have the power to impose a tax among non-members of the tribe."⁵⁰

The Ninth Circuit disagreed.⁵¹ Addressing three issues on appeal -- (1) the appropriate test for determining Indian Country; (2) whether ANCSA extinguished Indian Country; (3) whether Venetie occupies Indian Country,⁵² the court began by explaining that the canons of federal Indian law derive from the federal government's trust responsibility to Indians.⁵³ The canons require that "statutes affecting Indians are to be liberally construed, doubtful expressions being resolved in favor of the Indians."⁵⁴ Further, Congress must clearly and plainly state its intent to abrogate Indian rights.⁵⁵ ANCSA is a statute enacted for the benefit of Indians; therefore, the canons apply in interpreting its meaning and "congressional intent to extinguish Indian Country must be reflected by 'clear and plain' language."⁵⁶ Because ANCSA lacked such language, the Ninth Circuit applied the Indian canons, and found no abrogation of Indian Country in ANCSA.⁵⁷ The existence of the informal, nonpublic Solicitor's Opinion did not lead the court to abandon this result.

Then the Ninth Circuit applied a six-factor test, previously used by the Ninth and several other circuits, to determine whether the Venetie lands constituted a dependent Indian community under the Indian Country statute.⁵⁸ Considering

48. *State of Alaska, ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 1995 WL 462232, at *10 (D.Alaska August 2, 1995) (not reported in F.Supp.).

49. *Id.* at *20.

50. *Id.*

51. *See State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1302 (9th Cir. 1996).

52. *See id.* at 1290.

53. *See id.* at 1294 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Petition) 1, 17, 8 L.Ed. 25 (1831)).

54. *Id.* (citing *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918)).

55. *See id.*

56. *State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Gov't* 101 F.3d 1286, 1295 (citing *U.S. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353 (1941)).

57. *See id.* at 1302.

58. The court acknowledged the First, Eighth, and Tenth Circuits applied a slightly different test, substituting the factor of whether the United States retains title to the land for the Ninth's Circuit's inquiry into degree of federal ownership and control. *See id.* at 1292-93 (quoting *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995)). *Pittsburg* considered: (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 laws respecting this territory; (2) the nature of the area in question; (3) the relationship of the inhabitants to Indian tribes and to the federal government; (4) the established practice of government agencies toward the area; (5) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (6) whether such lands have been set apart for the use, occupancy, and protection of dependent Indian peoples. 52 F.3d at 1545; *see also United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981) (adopting a four-factor test considering: (1) whether the United States has retained title and authority over the land; (2) the nature of the area, the relationship of the inhabitants to the tribe and to the federal government, and the practices of governmental agencies toward the area; (3) whether there is cohesive community based on common pursuits, common interests or needs of the inhabitants; and (4) whether that land has been set apart for the use of Indian peoples), *cert. denied*, 459 U.S. 823 (1982); *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 917-22 (1st Cir.

(1) the nature of the area, (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples, the court concluded the Venetie lands were a dependent Indian community and the Native Village of Venetie retained the authority to levy the tax.⁵⁹

The Supreme Court reversed, holding that "approximately 1.8 million acres of land in northern Alaska, owned in fee simple by the Native Village of Venetie Tribal Government pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601" did not constitute "Indian Country."⁶⁰ Acknowledging the three statutory categories of Indian country: reservations, dependent Indian communities, and allotments under 18 U.S.C. § 1151 (1994), Justice Thomas noted ANCSA was to be accomplished:

[W]ithout litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship.⁶¹

Congress "revoked 'the various reserves set aside . . . for Native use' by legislative or executive action," with one exception, "and completely extinguished all aboriginal claims to Alaska land."⁶²

Thus, the lands transferred to Alaska Native corporations were clearly not "reservations," and no "allotments" were at issue in the case.⁶³ The remaining possibility under the Indian Country statute was that the lands were "dependent Indian communities."⁶⁴ The Court recognized that, "since 18 U.S.C. § 1151 was enacted in 1948, they had not had an occasion to interpret the term 'dependent Indian communities.'⁶⁵ To derive a test for "dependent Indian communities," the Court looked at previous cases,⁶⁶ in which it had previously held "Indian lands that were not reservations could be Indian Country and that the Federal Government could

1996) (same); *cf.* *United State v. Cook*, 992 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991) (applying a three-factor test that considers: (1) the nature of the area; (2) the relationship of the inhabitants to the tribe and the federal government; and (3) the established practices of governmental agencies toward the area).

59. *See* *State of Alask ex rel. Yukon Flats School District v. Venetie Tribal Gov't*, 101 F.3d 1286 at 1292 (9th Cir. 1996).

60. *Venetie*, 118 S.Ct. at 955-57.

61. *Id.* at 951 (quoting 43 U.S.C. § 1601(b) (1994)).

62. *Id.* (citing 43 U.S.C. §§1603, 1618(b) (1994)).

63. *Id.* at 953.

64.

65.

66. *Id.* at 953-955 (citing *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Pelican*, 232 U.S. 442 (1914), and *United States v. McGowan*, 302 U.S. 535 (1938)).

therefore exercise jurisdiction over them."⁶⁷ The Pueblos involved in the Court's earlier cases possessed their land in fee simple,⁶⁸ like the Native Village of Venetie. But Justice Thomas noted that "in each of those cases . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them."⁶⁹

The Court concluded that when Congress enacted ANCSA it intended (1) neither to set aside Venetie's lands for the use of Indians as Indian lands, (2) nor to create federal supervision of these lands.⁷⁰ As a result, Venetie was not a dependent Indian community. This holding was consistent with the Solicitor's Opinion that ANCSA had abrogated Indian Country. Although the Opinion had received much attention in the briefs and at oral argument,⁷¹ the *Venetie* decision did not mention it.

III. ADMINISTRATIVE LAW

Land is very important to our tribe and no quick decisions are ever made about it. Last summer the Tribal Government interviewed contractors who wanted to get hired to improve some of our culvert system in Arctic Village. Because their presence and activity would affect the tribal members and the land, we made sure that they protected the environment and observed tribal rules respecting the ban on drug and alcohol use. They were also not allowed to hunt game. They were encouraged to follow our tribal member employment preference.⁷²

Many important decisions about Indian tribes, their lands, and resources are made by federal administrative agencies. The Bureau of Indian Affairs, first created in 1832 and soon transferred to the Department of the Interior, carries out the majority of federal responsibilities to Indians.⁷³ The Departments of Health and Human Services, Education, Housing and Urban Development, Labor, Commerce, and Justice also administer federal programs for Indians.⁷⁴ While Congress sets standards for agencies to follow, it delegates to the agencies a great deal of discretion over program administration.⁷⁵ As a result, agencies have significant latitude implementing, and interpreting, laws affecting Indians.⁷⁶ Judicial review acts as

67. *Id.* at 953.

68. *See also*, Taylor, *supra* note 33, at 75.

69. *Id.* at 953.

70. *See id.* at 955-56, expressing the test in terms of what *Congress* intended "to set aside" or "create," Justice Thomas did not explain how he changed the federal Indian law inquiry from "what rights did Indians retain?" to "what rights did Congress confer?" *Id.*

71. State's Petition for Certiorari, *Alaska v. Native Village of Venetie Tribal Gov't* (U.S. 1997) 1997 WL 523883, at *22 [hereinafter *Pet. Br.*] (The State also criticized the Ninth Circuit for declining to accord any deference and ignoring the Solicitor's Opinion altogether.).

72. *See* Testimony of Gideon James, Respondent's Brief, Appendix I at 68aa - 69aa.

73. *See* Cohen, *supra* note 25, at 673.

74. *See id.* at 674.

75. *See generally* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREACRACY (1990) [hereinafter "EDLEY"]

76. *See generally* Cohen, *supra* note 25, at 673-77 (describing administrative duties to Indians).

check on agency discretion.⁷⁷

“The Administrative Procedure Act, 5 U.S.C. § 553 et seq (“APA” establishes a strong presumption in favor of reviewability of agency action.”⁷⁸ Professor Edley has surmised that “existing ‘law’ (agency rules, the agency’s organic statute, the APA, the Constitution, common law) constrains administrative decisions and how deferential the court should be when settled ‘law’ is absolutely determinative – which is almost never.”⁷⁹ In “rare circumstances,” a statute “is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”⁸⁰ Review is also precluded where Congress has so indicated in the agency enabling statute.⁸¹ Otherwise courts can review agency actions, paying careful attention to the proper standard of review.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁸² the Supreme Court decision set the standard for judicial review of statutory interpretation undertaken by administrative agencies. The case required the Court to consider the proper interpretation of the term “source” under the Clear Air Act Amendments of 1977.⁸³ Finding that the language and legislative history of the statute did not conclusively provide a definition, the Court held that the Environmental Protection Agency (EPA) legislative ruling defining the term was a pure policy decision.⁸⁴ Because Congress had delegated to the EPA the power to make pure policy decisions, the EPA’s definition was affirmed.⁸⁵

Under *Chevron*, a reviewing court must first determine “whether Congress has directly spoken to the precise question at issue.”⁸⁶ “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁸⁷ If the statute is silent or ambiguous with respect to the specific issue, the court must evaluate whether the agency’s construction has rendered a “permissible construction of the statute.”⁸⁸ The

77. See *id.* at 678 (providing examples of cases reviewing of administrative actions pertaining to Indians); see also EDLEY, *supra* note 75, at 96-130 (describing scope of judicial review in administrative law).

78. *Ramah Navajo School Bd. v. Babbit*, 87 F.3d 1338, 1343 (D.C. Cir. 1996).

79. EDLEY, *supra* note 75, at 107.

80. *Navajo*, 87 F.3d at 1343 (citing *Lincoln v. Vigil*, 508 U.S. 182, 189-93 (1993)).

81. See 5 U.S.C. § 701(a) (1) (1994).

82. 467 U.S. 837.

83. See *id.*

84. See *id.*

85. *Id.* at 864-865.

86. *Id.* at 842.

87. *Id.* at 842-843; see also *U.S. v. LaBonte*, 520 U.S. 751, 757 (1997) (“We do not start from the premise that th[e] [statutory] language is imprecise. Instead we assume that in drafting this legislation, Congress said what it meant... Inasmuch as we find the statute at issue here unambiguous, we need not decide whether the Commission is owed deference under *Chevron*”); *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 470 (1997) (“Absent any indication that doing so would frustrate Congress’s [sic] clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.”); *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’”). See also, Philip P. Frickey, *Congressional Intent, Practical Reasoning and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1141 (1990) (“In the realm of Indian law...clear Congressional intent controls, no matter how harsh the result.”).

88. *Chevron Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984).

court does not “simply impose its own construction on the statute.”⁸⁹

Courts defer to agency constructions in cases where the statute is silent or ambiguous because “the power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁹⁰ Where Congress has explicitly left a gap to fill, it has expressly delegated to the agency the authority to make regulations that clarify the provision. When made under express delegation, “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute.”⁹¹ In instances where Congress has given the agency an implicit delegation of authority, the court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”⁹²

Several factors support deference to agency interpretations:

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.⁹³

For these reasons, if an agency interpretation indicates a reasonable accommodation of conflicting policies that were committed to the agency’s discretion by statute, courts should not overturn the interpretation unless it is contrary to Congressional intent.⁹⁴

A. *Chevron Deference*

Some reject the idea that every type of agency interpretation merits full and automatic *Chevron* deference. *Chevron* deference may only apply where the agency has received an explicit delegation of authority to resolve policy issues and has used a formal rulemaking format to announce the interpretation. Scholars generally reject the notion that Congress’ vague or ambiguous statutory drafting in itself confers full

89. *Id.*

90. *Id.* at 843 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

91. *Id.* at 844.

92. *Id.*; *See also Southern Ute Indian Tribe v. Amoco Production Company*, 119 F.3d 816, 831 (10th Cir. 1997) (discussing scope of Department of the Interior’s “express” delegation of authority over public lands, this and subsequent cites to “*Southern Ute*” refer to section of opinion neither disturbed nor revisited in *en banc* opinion, 151 F.3d 1251 (1998)).

93. *Chevron Inc. v. National Resources Defense Council*. 467 U.S. 837, 845 (1984).

94. *Id.* The Supreme Court has further explained that a reviewing court may “‘hold unlawful and set aside’ agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386, 512 U.S. 504, 512 (1994).

authority to make policy decisions meriting *Chevron* deference,⁹⁵ and courts, too, have required an agency seeking *Chevron* deference to “show that it has been delegated authority to address the question.”⁹⁶ Administrative law scholar Robert A. Anthony argues courts to accord *Chevron* deference to informal agency interpretations including interpretive rules, policy statements, manuals, guidelines, staff instructions, opinion letters, and litigating positions.⁹⁷ Kenneth Davis and Richard Pierce agree that *Chevron* applies only to adjudications and legislative rulings, although the Supreme Court has sometimes applied it to less formal formats.⁹⁸ The rationale for refusing deference is “Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals guidelines, and briefs.”⁹⁹ Certainly reasonable interpretations appearing in formal adjudications or legislative rulings do bind the courts. But if the agency lacks an express delegation of authority or has used an informal decision making format, its interpretation does not merit full *Chevron* deference.¹⁰⁰

After determining that an agency interpretation does not merit *Chevron* deference,¹⁰¹ a reviewing court instead applies “*Skidmore* consideration.”¹⁰²

We consider that the rulings, interpretations and opinions of the [agency], . . . while not controlling upon the courts by reason of their authority, do constitute a

95. See Breyer, *supra* note 89 at 376-379

96. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“a precondition to deference under *Chevron* is a congressional delegation of administrative authority”)

97. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 YALE J. ON REG. 1, 60 (1990). It is hard to conceive that an interpretation put forward in argument, without previously having been laid down in a form bearing the force of law, could bind the court to which it is presented. An agency may not simply declaim, “this is our interpretation - under *Chevron* you must accept it,” and prevail. It would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which may properly carry bias, to control the judicial outcome. *Id.*

98. See also *Auer v. Robins*, 518 U.S. 452, 462 (1997) (an amicus brief containing the Secretary’s position is not rendered unworthy of deference because it is neither a position adopted in litigation nor a “post hoc rationalization advanced by an agency seeking to defend past agency action against attack.”) (citing *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212 (1988)); *cf.*, *Bowen*, 488 U.S. at 212 (1988) “We have never applied the principle of those cases [*Chevron* etc.] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency’s counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.” *Id.*

99. See DAVIS & PIERCE, *supra* note 90 at § 3.5 (“Statements of agency lawyers in briefs and oral arguments are particularly unreliable evidence of an agency’s position, given the powerful incentive for lawyers to take any position that is likely to further their clients’ interests in a case and the uneven level of supervision of agency lawyers.”) (citations omitted).

100. See also, Anthony, 7 YALE J. ON REG. at 45 (Another issue within the delegation of authority rubric is whether an express delegation “must be a delegation specific to the portion of the statute at issue.”)

101. See also, DAVIS AND PIERCE § 3.6 (citations omitted) (“If an agency to which Congress has delegated the power to make a binding policy through an appropriate procedure - rulemaking or adjudication - attempts instead to make policy through a less formal vehicle Congress has not authorized - a brief, staff letter or manual - a reviewing court should not give the agency’s pronouncement binding effect under *Chevron* step 2. Neither, however, should the court reverse the agency’s pronouncement. The court should treat such a pronouncement the same way it treats general statements of policy. The policy may bind agency staff and provide helpful guidance to citizens potentially affected by the agency’s policy views, but it has no binding effect on courts or citizens.”)

102. *Skidmore v. Swift & Co* 323 U.S. 124 (1944).

body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.¹⁰³

The courts have often applied the *Skidmore* in cases where the interpretation lacks power to control.¹⁰⁴ In an opinion examining the interplay between *Chevron* and *Skidmore*, *Southern Ute Indian Tribe v. Amoco Production Company*, the Tenth Circuit held Congress did not intend to exclude CBM, a gaseous substance contained in coal, when it enacted statutory reservations of certain coals.¹⁰⁵ To reach that decision, the court evaluated whether deference was owed to an informally issued Solicitor's Opinion wherein the Department of the Interior interpreted the 1909 and 1910 Coal Acts as not reserving CBM. This Solicitor's Opinion conflicted with the canon that land grants are construed in favor of reserved rights to the government, with nothing passing in the absence of clear language.¹⁰⁶ In setting out the relevant canon, looking for plain meaning and specific general congressional intent, the court discovered no evidence of congressional intent clear enough to overcome the interpretation dictated by the canon.¹⁰⁷

Although the district court deferred to the Solicitor's Opinion under *Chevron*, the Tenth Circuit panel did not agree that *Chevron* deference was automatic. Chief Judge Seymour explained, "When Congress has not addressed 'the precise question at issue,' an agency requesting *Chevron* deference to its statutory interpretation must show that it has been delegated authority to address the question."¹⁰⁸ Further "to satisfy *Chevron*, the delegation of authority to form binding policy must include not only discretion to formulate interpretations but also discretion to utilize the particular format selected."¹⁰⁹ The court stated that only agency policies formulated in legislative rulings or adjudications merit *Chevron* deference.¹¹⁰ Because agencies can only make law through those two formats, the court concluded "*Chevron* does not

103. *Id.* at 140.

104. *See, e.g.,* Metropolitan Stevedore Company v. Rambo, 521 U.S. 121, (1997); Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

105. 119 F.3d 816 (1997), *rev'd en banc*, 151 F.3d 1251 (1998), *cert. granted*, ___ S.Ct. ___ (1999). The en banc court held, in accordance with the panel opinion, that the Coal Land Acts of 1909 and 1910 were ambiguous, and under the longstanding principle that property grants are construed favorably to the sovereign, reservation of coal to the United States in those acts must be construed to include CBM. The en banc court did not reconsider the question of deference to the 1981 Solicitor's opinion and did not disturb the panel's disposition on that issues. Therefore, this article cite to the panel opinion on that issue.

106. *See* Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 821 (10th Cir. 1997).

107. *See id.* at 821-29; *see also* EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). "We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested e.g. by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefits of Indian interests . . . We conclude, that, in this case, the bases for inferring congressional intent were not so clear as to overcome the burden which the EEOC was required to carry" [to show Age Discrimination in Employment Act applied to Indian tribes.] (internal quotations and citations omitted).

108. *Southern Ute*, 119 F.3d at 831.

109. *Id.* at 832.

110. *Id.* at 832-43.

mandate that we give deference to the [Department of the Interior] Solicitor's Opinion."¹¹¹ The court instead considered the Solicitor's Opinion under *Skidmore*, and found that it lacked the power to persuade.¹¹² Although subsequently overruled on other grounds, *Southern Ute* is a model for evaluating an agency interpretation that is informally promulgated under a questionable delegation of authority, and is particularly applicable to cases like *Venetie* where an interpretive canon and other statutory tools dictate a result contrary to the agency interpretation.

B. Chevron Deference for the Solicitor's Opinion in Venetie?

In its petition for certiorari to the Supreme Court, the State argued the Solicitor's Opinion merited "considerable deference" because it came from "the federal agency charged with implementing ANCSA, 43 U.S.C. § 1624 - and, indeed, with overseeing all Indian affairs, 25 U.S.C. § 2."¹¹³ However, these statutes do not authorize the Department of the Interior to make binding law on Indian Country through the issuance of an informal Solicitor's Opinion.

The cited portion of ANCSA, 43 U.S.C. § 1624, does confer upon the Secretary certain interpretive authority. The exact and complete language, conspicuously absent from the State's petition, is: "The Secretary is authorized to issue and publish in the Federal Register, pursuant to subchapter II of chapter 5 of Title 5, such regulations as may be necessary to carry out the purpose of this chapter."¹¹⁴ Subchapter II of chapter 5 of Title 5 is the Administrative Procedure Act which provides for rule making subject to a notice and comment period, of which publication in the Federal Register is a crucial part.¹¹⁵

In short, through the ANCSA, Congress authorized the Secretary to promulgate regulations though the formal APA process. If the Secretary had followed the ANCSA and APA, affected tribes and individuals would have had an opportunity to read the proposed findings on Indian Country in the Federal Register and participate in the Notice and Comment procedure.¹¹⁶ ANCSA did not delegate to the

111. *Id.* at 833.

112. *See id.* at 834-36.

113. Pet. Br., *supra* note 71 at 22. The State did not cite to *Chevron*, but rather to *Andrus v. Idaho*, 445 U.S. at 729 and *Accord National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) for the proposition that "considerable deference" to the Solicitor's Opinion is merited. *Andrus* pre-dates *Chevron*, but pertains specifically to deference accorded to the Department of the Interior. *National R.R.* cites *Chevron* at the page referenced by the State. This article treats these cases in detail below.

114. 43 U.S.C. § 1625 (1994) (emphasis supplied).

115. 5 U.S.C. § 551 (1994).

116. Publication in the Federal Register allows individuals, groups, industries, and others to read a proposed rulemaking and the Notice and Comment period allows them to submit letters, reports, and other statements to the agency for consideration. *See* Arnold Rochvarg, *Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act-- When Should a Second Round of Notice and Comment be Provided*, 31 A.U.L. REV. 1, 2-3: "Rulemaking is viewed as more responsive than adjudication to the needs of a democratic system because it opens the administrative process to a broad spectrum of interests, including those of regulated industry and consumers . . . The . . . APA requires an agency to publish a notice of proposed rulemaking including 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' Interested parties are then given the opportunity to comment before the agency adopts the final rule. The agency must publish the final rule and give a 'concise general statement of its basis and purpose' in the Federal Register."

Secretary authority to make law by issuing informal agency opinions in circumvention of the procedural safeguards of the APA.¹¹⁷ Because the Secretary did not subject his Solicitor's Opinion to the APA rulemaking procedure, it remains an *opinion* nonbinding on the public or the courts.

The 1987 Amendments to ANCSA further clarified that Congress did not delegate to the Secretary authority to make law on the Indian Country issue. In particular, Section 17 of the Amendments Act provides: "(a) No provision of this Act (Alaska Native Claims Settlement Act amendments of 1987). . . shall be construed to validate or invalidate or in any way affect. . . any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska."¹¹⁸ As the District Court noted;

"The published history on the amendments of 1987 further underscore [sic] the intent of Congress that, "this is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions."¹¹⁹

Beyond 43 U.S.C. §1624, the State relied on *Aleknagik Natives Ltd. v. United States*,¹²⁰ for the proposition that a Secretary Memorandum interpreting ANCSA was entitled "considerable deference" because it was "reasonable."¹²¹ *Aleknagik* held the Secretary of the Interior had correctly determined that a federal townsite segregated, but not yet subdivided and distributed, was within the "valid existing rights exception" of the ANCSA.¹²² In deciding to accord considerable deference to the unpublished Secretary's memorandum discussing the process for land to come within the existing rights exception, the court found that the publication requirements of the APA, ANCSA, and Freedom of Information Act did not apply because the interpretation in question was not "substantive."¹²³

117. The Solicitor seemed aware of the problems he was creating in failing to subject the Opinion to notice and comment. The Solicitor's Opinion pertains to thousands of Native and non-Native people who were denied the opportunity to criticize or influence the content through the formal means provided by the APA. Handpicking, at the Solicitor's own discretion, certain individuals with whom to confer on this issue is not the same as exposing the Proposed Opinion to the Federal Register process for nationwide public comment. See Anthony *supra* note 97 at 57-58, n. 275: "[R]outine acceptance for interpretations expressed in these [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with the force of law where Congress did not intend them to have such force. . . And since these formats are exempt from APA public participation requirements, an especially odious frustration is visited upon the affected private parties: they are bound by a proposition that they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them. . . ." [Further] "[a]gencies may yield to temptation and seek to shield their regulations from the scrutiny occasioned by notice-and-comment procedures, choosing instead to cast would-be regulations as interpretative rules." (quoting *Community Nutrition Instr. v. Young*, 818 F.2d 943, 953 (D.C. Cir. 1987).

118. Pub. L. No. 100-241, § 17(a), Feb. 3, 1988, 101 Stat. 1814.

119. *Alaska ex rel. v. Native Village Venetie Tribal Gov't*, 1995 WL 462232, at *20 n.33 (D. Alaska 1995) (emphasis supplied) (citing S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3274).

120. 806 F.2d 924, 926 (9th Cir. 1986)

121. See Resp. Br., *supra* note 16 at 8.

122. *Aleknagik*, 806 F.2d at 926.

123. *Id.* at 927 (citing 5 U.S.C. §§ 552(a) (1) (D) (1994), 553; *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984); *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983)).

The question of whether a rule is “substantive” raises the distinction between legislative and interpretive rules - another administrative law factor weighing against deference to the Solicitor’s opinion in *Venetie*. The APA requires:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public. . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.¹²⁴

Substantive rules “effect a change in existing law or policy. These are rules which create law [and are] usually implementary to an existing law.”¹²⁵ In *Shalala v. Guernsey Memorial Hospital*,¹²⁶ the Court explained “interpretive rules” do not effect a change in the law and are not inconsistent with an agency’s prior existing regulations.¹²⁷ Therefore, they do not require APA rulemaking. However, such interpretive rules which are not subject to notice and comment “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.”¹²⁸ In *Venetie*, the substantive/interpretive distinction should only have hurt the State’s case for deference. Whereas the conclusion in *Aleknagik* was that the Secretary’s interpretation of “existing rights” exception for distribution of public lands was not “substantive” under *Alcaraz* and *Powderly*,¹²⁹ the Opinion in *Venetie* was a substantive interpretation, effecting substantial change in Alaska Native jurisdiction, and requiring publication in the Federal Register. Finally, although courts are bound to give substantial deference to agency interpretations of an agency’s own regulations, in this case the Secretary was not interpreting any regulations it promulgated pursuant to ANCSA. The very point of this argument is that the Secretary has failed to issue regulations under § 1624 of ANCSA.

The Native Village of Venetie did not challenge the general authority of the Secretary to make interpretive rulings or policy statements. An agency charged with

124. 5 U.S.C. § 552 (a) (1) (D) (1994).

125. *Alcaraz*, 746 F.2d at 613; (citing to *Powderly*, 704 F.2d at 1098).

126. 514 U.S. 87, 99, 102 (1995).

127. Courts acknowledge that the difference between a legislative and interpretive rule is sometimes unclear. See *Zhang v. Slattery*, 55 F.3d 732, 745 (2d Cir. 1995). A “legislative rule” is characterized as irreconcilable with a prior rule, or representing a nonobvious and unanticipated reading of a previous regulation, effecting a change in existing law or policy. See *National Family Planning and Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 235-37 (D.C. Cir. 1992); see also, *Miami Nation of Indians, Inc. v. Babbit*, 887 F.Supp. 1158, 1164 (N. D. Indiana 1995) (“Legislative rules have effects completely independent of the statute [and] create law, usually implementary to an existing law.”). By contrast, interpretive rules clarify statutory terms and remind parties of their duties. See *National Family Planning*, 979 F.2d at 235. A rule is interpretive where it seeks to clarify an exiting rule but does not change existing law, policy, or practice. See *Metropolitan Sch. Dist. Of Wayne Township v. Davila*, 969 F.2d 485, 488 (7th Cir. 1992), cert. denied, 507 U.S. 949 (1993). Some courts have held that an agency action having a substantial impact on the public is legislative, regardless of whether the agency itself characterizes the rule as interpretive or legislative. See *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C.Cir. 1974), rev’d on other grounds, 426 U.S. 26 (1976). Others take the agency label into account. See *Miami Nation of Indians*, 887 F.Supp. 1158. Under most of these formulations, the Solicitor’s Opinion in *Venetie* appears to be an attempted legislative, rather than interpretive, rule.

128. *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995)

129. *Aleknagik Natives Ltd. v. United States*, 806 F.2d 924, 927 (9th Cir. 1986).

implementing a statute may do so by issuing interpretations of that statute.¹³⁰ The Secretary can, of course, issue a Solicitor's Opinion without adhering to APA procedure; he just cannot expect it to bind courts because it does not carry the weight of law.¹³¹

The State also cited to 25 U.S.C. § 2 in support of its position that the Solicitor's Opinion merited considerable deference. Section 2 provides:

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.¹³²

The State apparently sought for the Court to infer that any action pertaining to Indians, undertaken by any individual charged by the Secretary of the Interior, is insulated from judicial review because it merits considerable deference. The delegation under section 2 does appear broader than that under ANCSA. However, case law demonstrates that the courts have not unilaterally bowed to the will of the Secretary as a result of section 2's grant of authority, but rather have been willing to review the scope of that authority.

In *Organized Village of Kake v. Egan*,¹³³ the Supreme Court held, in part, the Secretary of the Interior was not authorized to issue regulations permitting Indian communities to use fish traps in Alaska waters in violation of Alaska state law.¹³⁴ The Court explained that "sole authority conferred by [25 U.S.C. § 2] is that to implement specific laws, and by [25 U.S.C. § 9] is that over relations between the United States and Indians -- not a general power to make rules governing Indian conduct."¹³⁵ *Kake* does not stand for the proposition that Secretarial actions pursuant to Sections 2 and 9 are unreviewable.¹³⁶ In *Metlakatla Indian Community, Annette Islands Reserve v. Egan*, a lengthy search by the Court for Secretarial authority to promulgate certain rules did not even consider 2 U.S.C. § 2 or § 9.¹³⁷ Further, in *Garfield v. United States ex rel. Goldsby*,¹³⁸ an erroneous order of the Secretary of the Interior was canceled when, without statutory authority, the Secretary struck the

130. See *Guernsey Mem. Hosp.*, 514 U.S. 87 (1995) (Secretary of Health guideline is a prototypical example of an interpretive rule issued by an agency to advise the public of its construction of the statutes and rules it administers).

131. See *id.*

132. 25 U.S.C. § 2 (1994).

133. 369 U.S. 60 (1962).

134. See *id.*

135. *Id.* at 65.

136. 369 U.S. 45, 58 (1962) (An 1891 federal statute setting apart Annette Islands in southeastern Alaska as a reservation for Metlakatla Indians under rules and regulations prescribed by Secretary of the Interior would have authorized Secretary to promulgate regulations according the Metlakatla Community the right to erect and operate salmon traps in the waters surrounding the Annette Islands, and the regulations would have trumped Alaska Anti-Fish Trap Conservation Law. Because the Secretary promulgated the regulations under the White Act and the Alaska Statehood Act, neither of which authorized his action, the Court remanded the case to give the Secretary an opportunity to determine what, if any, authority he might choose to exercise.)

137. *Metlakatla*, 369 U.S. at 58.

138. 211 U.S. 249 (1908).

name of an enrollee from the rolls of an Indian nation. The Supreme Court explained:

In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon Indian lands, and previous decisions of this court have shown its refusal to sanction a judgement interfering with the Secretary where he acts within the powers conferred by law. But . . . there is no place in our constitutional system for the exercise of arbitrary power and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.¹³⁹

Under this reasoning, courts are to be expected to take restorative action if the Secretarial action exceeded the agency's authority or was an arbitrary exercise of power, as in the Solicitor's Opinion in *Venetie*.

The question of limits on the Secretary's authority under 25 U.S.C. § 2 is not well-settled, or even addressed in the case law. The Secretary claims authority to take all sorts of actions affecting Indians, and few courts or scholars have critiqued this practice in any context.¹⁴⁰ Sparse precedent, however, should not have rendered the Secretary's action beyond judicial review in *Venetie*. Even Section 2, which has been characterized as "essentially a grant of managerial authority,"¹⁴¹ does not clearly confer authority to make binding law through informal interpretations. Further, 25 U.S.C. § 9, often cited along with Section 2 and notably absent from the State's Petition, delegates authority to the Executive Branch to prescribe regulations to carry into effect any statute pertaining to Indians. It resembles the ANCSA provision allowing the Secretary to implement ANCSA through regulations. As stated numerous times, the Secretary did not issue any regulations on the Indian Country question. *Venetie* did not argue the Secretary lacked broad managerial authority under § 2, or broad rulemaking authority under § 9. Rather, the particular Secretarial action in question did not use any of the procedures necessary to make binding law.

ANCSA itself required that the Secretary use the formal rule making format, expressly limiting the Secretary's interpretive power to the publication of regulations

139. *Id.* at 262.

140. *Cf.*, William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and CFR § 83*, 17 AM. INDIAN L. REV. 37, 51-52 (1992) (Evaluating the extent of Secretarial authority to federally acknowledge tribes under 25 U.S.C. §§ 2, 9: "[Th]e nebulous basis for and exercise of authority by the Secretary to acknowledge Indian tribes was reflected in [several letters and memoranda between Congress, the Department of the Interior, and the Secretary] . . . Most of these memoranda and building-block attempts at establishing the Secretary's authority to acknowledge Indian tribes by exhuming obscure legal precedents skirted the principle reason for such authority — perhaps because the reason was too obvious . . . The simple fact is that the Secretary has this authority because he has always exercised it, irrespective of proper delegation from Congress . . . This administrative exercise of power is not a case of the Secretary expropriating or usurping the plenary power of Congress . . . Rather the issue is a matter of the Secretary's historically exercising such authority where a vacuum of responsibility existed over decades, resulting in a gradual and unchallenged accretion of this authority.") (emphasis supplied).

141. Quinn, *supra* note 140, at 48.

in the Federal Register subject to the APA. Congress' amendments to ANCSA then explicitly left the legal question of the existence of Indian Country to the judiciary. No other statute conferred on the Department of the Interior authority to make law on Indian Country by means of informal rule making. Federal courts may "hold unlawful and set aside agency actions, findings, and conclusions found to be without observance of procedure required by law."¹⁴² Further, if the Secretary was attempting to make "substantive" changes in the law by eradicating Indian Country in Alaska without adhering to APA procedures, such action is null and void as a matter of law.¹⁴³ If the Secretary did not seek to make substantive changes in the law and only expressed a policy or opinion, than his opinion is merely an interpretive rule and not binding on court.¹⁴⁴ Under these circumstances, the Solicitor's Opinion did not merit *Chevron* deference.¹⁴⁵

C. Skidmore Consideration

Because *Chevron* deference was not appropriate, the Supreme Court should have considered the Solicitor's Opinion under *Skidmore*. The *Skidmore* analysis would have revealed several factors diminishing the Opinion's power to persuade.¹⁴⁶ First, the Solicitor's Opinion completely ignored the federal Indian law canons requiring that statutes passed for the benefit of Indians be liberally construed in the Indians favor and that divestiture of Indian rights must be plainly stated by Congress.¹⁴⁷ Second, the Solicitor's Opinion conflicted with long-standing interpretations of the Department of the Interior.¹⁴⁸ Third, its conclusions were arbitrary, and overlooked the critical fact that ANCSA was a land claims statute, not a jurisdictional statute.¹⁴⁹

Lacking the power to persuade even under *Skidmore*, the Solicitor's Opinion in *Venetie* should not have influenced the Court.¹⁵⁰ Because the Supreme

142. 5 U.S.C. § 706(2) (1994); see also *Zhang v. Slattery*, 55 F.3d 732, 743 (2d Cir. 1995).

143. See *Prows v. United States Department of Justice*, 704 F.Supp. 272, 278 (D.D.C. 1988), *aff'd*, 938 F.2d 273 (D.C. Cir. 1991).

144. See *Guernsey Memorial Hosp.*, 514 U.S. 87, 101-102 (9th Cir. 1986).

145. See Resp. Br. *supra* note 16 at 29 n. 25.

146. See *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 834 (10th Cir. 1997).

147. The *Venetie* opinion did nothing to correct these errors. In fact, Justice Thomas came close to announcing an exact opposite to the canon that Indian rights are reserved unless Congress explicitly states otherwise when he wrote: "The federal set-aside requirement also reflects the fact that because Congress has plenary power over Indian affairs, see U.S. Const. Art. I, § 8, cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or recognize Indian Country." *Venetie*, 118 S.Ct. at 954 n.6. Under this (new) theory, Indians seem to have no rights unless Congress creates them.

148. See, e.g., the Status of Alaska Natives, 53 I.D. 593, 605 (1932); Status of Alaska Natives – Tide Lands, 1 Op. So. 104, 105 (1924); Custom Marriage – Validity – Alaska, 1 Op. Sol. 329, 220 (1932); Liquor Traffic – Alaska, 1 Op. Sol. 749, 750 (1937); Fishing Rights of Alaskan Indians, 1 Op. Sol. 1096, 1097 (1942); Alaskan Natives Subject to Territorial School Tax, II Op. Sol. 1196, 1197 (1943); Organization of School Districts on Indian Reservations In Alaska, II Op. Sol. 1755, 1756 (1956); See also *Petition of McCord*, 151 F. Supp. 132 (D.C. Alaska 1957)

149. See NATIONAL INDIAN POLICY CENTER ANALYSIS at 19 (the Opinion concludes that ANCSA terminated all tribal territorial jurisdiction, "despite having twice concluded that ANCSA is not terminationist legislation.")

150. Although Justice Thomas' thirteen page opinion in *Venetie* made no mention of the Solicitor's Opinion, it was discussed at length at oral arguments before the Supreme Court. Justices O'Connor and Scalia appeared to dismiss the Solicitor's Opinion precisely because it had not been formally published. However, because the United States did not appear on either side of the case, the Solicitor's Opinion was the government's only statement available to the Court on the issue and this fact did not escape notice of the Court. The relevant section of the oral arguments is excerpted here.

Court did not comment on the Opinion but issued a holding expressing the same conclusions of the Opinion, we are left to wonder to what extent the Court afforded the Native Village of Venetie the usual standards and protections of administrative law.¹⁵¹

D. The Basic Administrative Law Lessons of Venetie

Before moving on to the special protections afforded tribes by Federal Indian

See United States Supreme Court Official Transcript, Oral Arguments, *State of Alaska v. Native Village of Venetie*, 1997 WL 762053, at *23-26 (December 10, 1997):

QUESTION (Ginsburg): Do we have a – any statement in this case of the current views of the United States?

ROBERTS [Counsel for the State]: Well, not – I think the current view of the United States is in the 1993 opinion (by the Interior Department solicitor general), which has not been withdrawn. It is as final as any of these opinions get. It's been under review for almost five years now but hasn't been withdrawn. It represents the last statement of-

QUESTION (O'Connor): Well, it's never been issued, either. I mean, it just was put in limbo.

ROBERTS: It was signed by the acting secretary. It hasn't been published.

QUESTION (O'Connor): No, it hasn't.

ROBERTS: It hasn't been published, but it is the final statement of the agency charged with the responsibility for implementing ANCSA, charged with responsibility for Indian affairs in general, and charged with responsibility for.

..

QUESTION (O'Connor): Yes but I don't see how you can give any weight to that, when the Department of Interior and the BIA has never let it be published, and it's just sitting there. I mean, it makes interesting reading. You can understand it's logic, but I don't know that we're entitled to . . .

ROBERTS: Well, I think it's entitled to significant weight for a variety of reasons. It hasn't been included in the published volumes of solicitor opinions, but it's been signed by the Acting . . . secretary . . . It's also consistent with prior Department of the Interior interpretations both, for example, when Venetie brought the lands back and said, take it in trust, Interior said "no we can't." Later, it had an oil and gas lease it wanted to have approved, and Interior said, basically, "we're not in the business of approving things now. You're on your own."

That was the departure from prior Indian policy that ANCSA represented. In the lower 48, the history had been, in settling Native land claims in conflict with white settlers, setting the Natives apart on reservations, which also had the effect of setting them apart from the state government. Alaska provided an opportunity for a fresh start, and Congress seized it in ANCSA. It said, "we are not going to set this land aside for your use under our superintendence. It's to settle these claims, these serious claims, this is your land, and you can do with it as you see fit." ANCSA set the Natives free to manage their own property without the federal government looking over their shoulder, subject, like all property owners in Alaska are, to State law, but not subject to any Federal superintendence, and that's what makes the settlement lands incapable of constituting Indian country, because Indian country . . .

QUESTION (Ginsburg): Mr. Roberts, this is the first time that I participated in a case involving tribal lands where we haven't heard from the from the United States, and I thought that that was extraordinary, but maybe they sometimes appear and at sometimes don't.

ROBERTS: Well, obviously it would be speculation, but we do have a thorough exposition of the Department of the Interior's views, which hasn't been withdrawn, and I do note that in the three other cases so far this term where the Solicitor General has appeared, it has been on the side of the Indians. The fact that he hasn't appeared in this case suggests to me that he didn't think that that position could be taken. I'd like to reserve the remainder of my time for rebuttal.

...

ROBERTS: Thank you, Your Honor. Respondents' position confuses the question of tribal status and the question of Indian country. They are two separate questions.

The Department of Interior made that clear in 1993 when it published for the first time the list of federally recognized tribes in Alaska. It said inclusion on the list does not resolve the scope of powers of any particular tribe over land and non-members, and it footnoted the solicitor opinion that we have referenced in our briefs. Nothing about the state's position calls into question Venetie's status as a tribe.

QUESTION (Scalia): How could it footnote that if it wasn't published? That's not very useful, is it?

ROBERTS: It's not technically been published in the collected volumes, but it's not a secret. It's been made public.

QUESTION (Scalia): I see, sort of been smuggled out.

(Laughter.)

151. If, in fact, the Solicitor's Opinion was subjected to a less stringent administrative law analysis than is usually employed by the Supreme Court, it would not be the first time Indians received unequal protection under the laws of the United States. See, e.g., Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 27 (1991).

law and Indigenous Indian law, it may be helpful to recap the administrative law lessons of *Venetie*. Courts reviewing an agency interpretation of a statute affecting Indians will ask whether Congress spoke clearly in the statute. If so, Congressional intent prevails under *Chevron* Step One. If Congress has not spoken clearly, and an agency has interpreted the statute, but when Congress enacts vague or ambiguous statutes affecting Indians, agencies often issue interpretations and courts review them. Like any agency action, these interpretations can be reversed if they are unlawful.¹⁵² If the authorizing statute required the agency action to be formal and on the record, it "must be supported by substantial evidence," and in "rare circumstances, a reviewing court can consider some or all factual issues *de novo*."¹⁵³

The APA generally requires publication of proposed rulemaking in the Federal Register and public notice and comment period. Further, a court must look to any additional procedural requirements imposed by the specific enabling statute. Adherence to these procedures gives the resulting interpretation a chance of reflecting political accountability, gained through public participation, and expertise, gained through informational exchange. Therefore, evidence the agency followed the procedural requirements of the APA and other statutes weighs in favor of deference.¹⁵⁴ Non-adherence suggests no *Chevron* deference and the resulting agency interpretation merits only *Skidmore* consideration. Like corporations, industries, and non-Indian citizens, tribes and individual Indians should be confident courts will review statutory interpretation undertaken by agencies within this administrative law framework. In the next sections I will discuss how, beyond administrative law, the special history and ongoing relationship between tribes and the federal government urge additional protections when agencies interpret statutes affecting Indian.

IV. FEDERAL INDIAN LAW

What we started out to try to do, was we would rather have had just our territory up there.... [T]he state wasn't even hardly a presence in rural Alaska.... Well, what we wanted to do was to try to work our way into the 20th century with control of our own territory. We primarily wanted the land. We didn't want to disturb any inherent rights to govern or powers that the communities may have had and the tribes may have had.... But we didn't have the power to clarify things and so, if you don't have the power to get what you want in negotiation, then you keep it fuzzy. Maybe you win it in court. And that's where we're at.¹⁵⁵

152. See EDLEY, *supra* note 75, at 107.

153. *Id.*

154. See generally *id.*

155. *Indian Country Forum*, http://www.and.com/features/indian_country/ICFtranscript.html at 6 (emphasis supplied) (On October 23, 1997, the Anchorage Daily News and local KTUU-Channel 2 produced a two-hour forum on Indian country and tribal-rights broadcast statewide television and radio. The program was moderated by Professor Charles Ogletree, Jr. of Harvard Law School, and included tribal leaders, state politicians, attorneys and others. Mr. Hensley statement and others cited below are taken from this source.) [hereinafter "*Indian Country Forum*"].

If the Supreme Court had reached the issue, administrative law, alone, should have led the Court to reject the Solicitor's Opinion that ANCSA extinguished Indian Country in Alaska. In addition, because ANCSA was enacted for the benefit of Indians, it should have been considered within the parameters of federal Indian law. The canons of federal Indian law generally require liberal statutory interpretation¹⁵⁶ in the Indians' favor and prohibit courts from reading Congressional silence as abrogating of tribal rights. In this case, it was undisputed ANCSA was silent on the Indian Country question, but the Solicitor had nonetheless issued his Opinion ANCSA extinguished Indian Country and the State urged judicial deference to that interpretation. The circuit courts are split on whether the Indian canons trump *Chevron* deference to agency interpretations, but the federal Indian law, in particular its trust doctrine, requires courts to interpret statutes enacted for the benefit of Indians consistent with the Indian canons even when *Chevron* would suggest an opposite result.¹⁵⁷

A. *The Federal Indian Law Trust Relationship*

Although federal Indian law is replete with casual references to the "trust doctrine," the doctrine is elusive and confusing. Its first judicial expression came in *Cherokee Nation v. Georgia* (1832) where the tribe filed an original action in the Supreme Court to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties.¹⁵⁸ Chief Justice Marshall decided the Court lacked original jurisdiction because the tribe was neither a state nor a foreign government.¹⁵⁹ Rather it was a "distinct political society," whose status "may, more correctly, perhaps, be denominated domestic dependent nations. . . in a state of pupilage" and "their relation

156. Although my three topics of discussion - administrative law, federal Indian law, and indigenous Indian law - all cross paths with statutory interpretation, examination of the general methods and goals of statutory interpretation is well beyond the scope of this article. However, it is worth noting Professor Frickey's description: "statutory interpretation is a specialized endeavor with the concept of 'faithful interpretation at its heart," and that "such interpretation attempts simultaneously to reach contextual and functional yet predictable and nonsubjective conclusions." Philip P. Frickey, *Faithful Interpretation*, 73 WASH.U. L. Q. 1085, 1090 (1995). Under this formulation, I understand that statutory interpretation looks for a meaning that is consistent with the text and is also practical and workable. Those involved in drafting legislation might shed light on the text (thus explaining why courts often turn to legislative history) and those affected by the legislation might reveal what is practical and workable (thus explaining why courts look to the status quo or contemporary affairs). The question of "to whom legal interpreters should turn for assistance in examining the law's normativity," *id.* at 1094, is important, and will merit additional study with attention to which tribal members, leaders, and others are best situated or authorized to provide tribal versions of statutory interpretation.

157. Certain statutes incorporate the Indian canons as substantive provisions. The Indian Self-Determination Act explicitly states that "each provision of the Indian Self-Determination Act shall be liberally construed for the benefit of the contractor." 25 U.S.C. §450(I)(a)(2)(1994). The Secretary's own implementing regulations adopt the same Indian canon. 25 C.F.R. §§ 900.3(a)(5), 900.3(b) (11). "If the Act can reasonably be construed as the Tribes would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461; *see also* Jill De la Hunt, Note: *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L.REF. 681, 686 n. 26 (1984) (Advocating codification of the Indian canons to reaffirm their centrality in federal-Indian relations and to "require their application as a matter of substantive law.")

158. 30 U.S. (5 Pet.) 1 (1831).

159. *See id.* at 16, 19-20.

to the United States resembles that of a ward to his guardian."¹⁶⁰

In *United States v. Kagama* (1886), the Supreme Court relied on the guardianship theory as a basis for Congressional "plenary" power over Indians.¹⁶¹ The case required the Court to decide the constitutionality of the Major Crimes Act which conferred federal jurisdiction over crimes between Indians occurring in Indian Country.¹⁶² Although there was no explicit constitutional justification for the Major Crimes Act, the Court believed either the states or federal government *must* have authority over Indian tribes. Relying on the doctrine of "discovery," ensuing Indian "wardship," and traditional "wisdom," the Court chose the federal government:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. . . From their very their weakness and helplessness, so largely due to the course of dealing of the federal government with them. . . there arises the duty of protection, and with it the power. . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government. . . because it has never been denied, and because it alone can enforce its laws on all the tribes.¹⁶³

The Indian wards, deemed incapable of carrying out criminal justice in their lands and among members, were thus subjected to Congressional supervision over certain internal criminal affairs. And into the mid-Twentieth Century, the concept of Indians as weak, defenseless, and/or savage wards continued to influence Supreme Court decisions.¹⁶⁴

Notwithstanding these origins, Felix Cohen's Handbook of Federal Indian Law described in 1982 that the federal trust responsibility has "evolved judicially"¹⁶⁵ Although in the past, it was used to justify Congressional power over Indians, in post-*Kagama* era it "establish[es] and protect rights of Indian tribes and individuals."¹⁶⁶ In particular: (1) Congressional statutes affecting Indians must be tied rationally to the fulfillment of Congress' unique obligations to Indians, (2) courts should apply the Indian canons in interpreting treaties, statutes and other lawmaking affecting Indians,

160. *Id.* at 17.

161. 188 U.S. 375 (1886).

162. In 1885, Congress enacted the Major Crimes Act, codified as amended, 18 U.S.C. 1153, in response to *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883) wherein the Supreme Court upheld a traditional tribal restitutionary sentence in a case where one Indian murdered another in Indian Country. "The Court's sanction of 'red man's revenge' [in *Crow Dog*] caused popular outrage among Americans and prompted the passage of the Major Crimes Act." Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. REV 507, 527 (1987).

163. *Kagama*, 188 U.S. at 383-84.

164. In *Tee-Hit-Ton v. U.S.*, 348 U.S. 272 (1955), for example, the Supreme Court described origins of the relationship between "savage" Indians and their "conquerors. . . Every schoolboy knows that the savage tribes of the 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 conqueror's will that deprived them of their land." *Id.*

165. COHEN at 220.

166. *Id.*

and (3) the conduct of executive agencies must meet strict fiduciary standards enforceable by the judiciary.¹⁶⁷

Beyond Cohen, federal Indian law provides a full spectrum of trust relationship articulations. Advancing a "social contract" theory of trusteeship, Janice Aiken explains:

[T]reaties between the United States and the various Indian tribes, like constitutions, are the formalization of an implied contract by which the Indians accepted the authority of the federal government, giving up their right to defend themselves from intrusions on their sovereignty in return for the United States Government's promise to protect their sovereignty.... When ... [tribal] acquiescence [to federal authority] is taken together with the United States' promise to protect the tribe against incursions on tribal territory, the treaty becomes a formalization of a social contract. The implied contract, as the basis of the legitimacy of the government authority over the tribe, exists whether or not it is formalized in a treaty. This means that ... the government's obligation to protect the tribal right to self-government exists even in the absence of a treaty with a tribe.¹⁶⁸

Under this social contract version of the trust relationship. The tribal right to self-government is analogous to constitutional rights of individual citizens: "it is the contractual limitation on the legitimate power of the government of the United States over the Indians. The United States Government has, therefore, an obligation to protect the tribal rights of self-government to the same degree as constitutional rights."¹⁶⁹ Because the tribe's ability to effectively govern itself depends on maintaining a land base and economic security, "the government also has a trust responsibility with regard to any tribal property it undertakes to hold in trust or manage on behalf of the tribe."¹⁷⁰ Finally, the federal "trust obligations under the implied contract paradigm differ from the trust obligations in the context of the 'guardian-ward' paradigm. Unlike obligations based in treaties, they cannot be unilaterally abrogated because they are part of an ongoing contract."¹⁷¹

Perhaps more focused on the pragmatic, Frank Pommersheim insists the federal government must uphold its fiduciary duties to protect tribal property and treaty promises to provide teachers, doctors, food and supplies.¹⁷² Pommersheim recognizes, however, the trust relationship:

167. See COHEN *supra* note 25, at 220-228; see also, *Morton v. Mancari*, 417 U.S. 535 (1974); cf., Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227 (1975) ("[W]hile courts recognize that Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement.")

168. Janice Aiken, *The Trust Doctrine in Federal Indian Law: A Look at its Development and at How its Analysis Under Social Contract Theory Might Expand its Scope*, 18 N. ILL. U. L. REV. 115, 147-48 (1997).

169. *Id.* at 147.

170. *Id.* at 149.

171. *Id.* at 152.

172. See POMMERSHEIM, *supra* note 35, at 44.

is a classical colonizing doctrine that seeks, advertently or inadvertently, to enshrine a relationship of superiority and inferiority [and] needs to be reconceptualized both theoretically and operationally in order to establish more clearly the relationship between the federal trustee and beneficiary as a relationship between equals.¹⁷³

Resisting any reconceptualization, others merely put a contemporary spin on *Kagama*: "the trust doctrine defines the powers and responsibilities that accrue to Congress and the executive branch as a result of the *wardship* relation."¹⁷⁴ This formulation implies the federal government has responsibilities to tribes only as long as they are in a state of wardship; the government continues this relationship to the extent that it wants to protect "vulnerable" Indians from "exploitation by individual, state, and executive intrusions"¹⁷⁵

B. *The Indian Canons*

As Cohen stated, one of the federal government's trust responsibilities is to apply the Indian canons in interpreting vague or ambiguous laws enacted for the benefit of Indians.¹⁷⁶ The Indian canons emerged to aid in interpreting the treaties signed between Indian tribes and European nations, and later, the United States government. The United States Constitution provides "all Treaties made. . . shall be the Supreme Law of the Land,"¹⁷⁷ reflecting their importance as "political compacts"¹⁷⁸ between Indian tribes and the United States. In particular:

Treaties were signed as an alternative to a war of attrition that would prove even more devastating to Native American nations than the cession of most of their land bases. Provisions in the 371 treaties negotiated with Indian bands and nations varied widely,¹⁷⁹ but most of them contained similar elements: a guarantee that both sides would keep the peace, a marking of boundaries between Indian and non-Indian land, a statement that the signatory nations were placing themselves under the "protection" of the United States, and a definition of Indian fishing and hunting

173. *Id.* at 45.

174. Peter S. Heinecke, *Comment, Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1030 (1993) [hereinafter "Heinecke"].

175. *Id.* at 1042.

176. See COHEN, *supra* note 25, at 220-28; *but see*, Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1209 (1989) (book review) (criticizing COHEN's handbook for "mak[ing] the sympathetic canons of construction one of the cornerstones of federal Indian law . . . [as] exaggerat[ing] them beyond their practical significance.")

177. U.S. CONST., art. VI, § 2.

178. See BRUCE ELLIOT JOHANSEN, ED., *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 331 (1998) [hereinafter "JOHANSEN"] (citing RUSSELL BARSH AND JAMES HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 270-71 (1980) [hereinafter "BARSH AND HENDERSON"]).

179. See *id.* at 331 (The United States entered into over 800 treaties with Indian nations between 1789 and 1871, but only 300 were ratified by the Senate. Congress ended formal treaty making with tribes in 1871, but the Executive Branch continued to sign treaties or "agreements" with tribes through 1914.).

rights (often applied to ceded land).¹⁸⁰

The treaties were often concluded in unequal conditions where Indians tried to negotiate terms under duress, in a foreign language, and across cultural barriers.¹⁸¹ And although the Supreme Court has characterized treaties as "essentially a contract between two sovereign nations," after 1800 "the treaty process was allowed to deteriorate from a sacred pledge of faith between nations to a series of quasi-fraudulent real estate transactions."¹⁸²

Recognizing the circumstances of treaty drafting and signing, Justice McLean opined in 1832, "[t]he 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."¹⁸³ More recently, the Supreme Court has stated in construing an ambiguous statute, it must be guided by that "eminently sound and vital canon,"¹⁸⁴ that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians."¹⁸⁵ In general, to facilitate the trust or (wardship) relationship "courts presume that Congress' intent toward [Indians] is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians."¹⁸⁶

Reviewing the case law, commentators have described the Indian canons in several ways.¹⁸⁷ For example Judge Canby discusses "rules of sympathetic construction such that treaties are to be construed as they were understood by the tribal representatives who participated in their negotiation."¹⁸⁸ Getches and Wilkinson explain that the canons require: "(1) very liberal construction to determine whether Indian rights exist and (2) very strict construction to determine whether Indian rights are to be abridged or abrogated."¹⁸⁹ According to Wilkinson and Volkman there are three primary rules: "ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have interpreted them; and Indian treaties must be liberally

180. *Id.* at 330-31 ("Many treaties also regulated travel by non-Indians on Indian land, as well as containing provisions to punish non-Indians who committed crimes on Indian land and Indians who committed offenses against non-Indians.")

181. *See id.* at 332-33.

182. *Id.* at 331-32 (quoting VINE DELORIA JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 110 (1985)).

183. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring).

184. *Northern Cheyenne Tribe v. Hollowbrest*, 425 U.S. 649, 655 n.7, (1976).

185. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, (1918); *see also*, *Choate v. Trapp*, 224 U.S. 665, (1912).

186. COHEN, *supra* note 25, at 221; *but see* Frickey, 107 HARV. L. REV. at 425 (disagreeing with the principle that the canons were "designed to protect disadvantaged minorities," and contending, "the Indian law canon is essentially structural and institutional and was not established to promote equality or to combat political powerlessness.")

187. Ronald Steiner, *THE INTERPRETATION OF TREATIES AND THE CONSTRUCTION OF NATIVE AMERICAN IDENTITY* at 25 (1993).

188. WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 90 (1988).

189. DAVID H. GETCHES & CHARLES F. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 217 (1986).

construed in favor of the Indians."¹⁹⁰ Deloria and Lytle elaborate four rules as being particularly important:

- (1) Ambiguities in treaties are to be constructed in favor of the Indian claimants
- (2) Indian treaties are to be interpreted as the Indians would have understood them
- (3) Indian treaties are to be liberally construed in favor of the Indians and (4) Treaties reserve to Indians all rights that have not been granted away (reserved rights doctrine).¹⁹¹

Aiken states because Indians would likely not have entered the social contract with the intent to divest themselves of self-government, the Indian canons "adopting the Indians' understanding of the obligation undertaken by the United States in its early treaties with the Indians" must prevail.¹⁹² Drawing on these articulations, this article presumes three canons: (1) Indian treaties, statutes, settlements, and regulations are construed liberally in favor of the Indians; (2) drafting language is interpreted as the Indians would have understood understand it; (3) ambiguous or vague language cannot diminish existing Indian rights.

The Supreme Court generally applies the Indian canons in cases of statutory ambiguity. In *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, Justice Scalia wrote "when we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[s]tatutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"¹⁹³ In *Menominee Tribe of Indians v. United States*, the Court held the Termination Act of 1954, terminating all federal supervision of the tribe and extending State law to the tribe and its members "did not mention hunting and fishing rights."¹⁹⁴ The Court, therefore, declined "to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of [those] Indians. While the power to abrogate those rights exists, the 'intention to abrogate or modify a treaty is not to be lightly imputed to Congress.'"¹⁹⁵ The Court has even privileged the Indian canons over other canons of statutory interpretation. In *Montana v. Blackfeet Tribe of Indians*, for example, the Court explained, "in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact. The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law."¹⁹⁶

In recent history, however, the Supreme Court has deviated several times from its long-standing precedents applying the Indian canons. In *Hagen v. Utah*, the

190. Charles F. Wilkinson and 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. LAW REV. 601, 608-19 (1975).

191. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE*, 48 (1983); cf. De la Hunt, *supra* note 154, at 689 (postulating that reserved rights doctrine is not a canon; rather it "complements the canons of construction as a guide to the interpretation of ambiguities that could result in the loss of sovereign tribal rights.).

192. Aiken, *supra* note 168, at 149.

193. 502 U.S. 251 (1992)(quoting *Montana v. Blackfeet Tribe*, 471 U.S. 754, 7 (1985).

194. 391 U.S. 404, 408-412 (1968).

195. *Id.* at 412-13 (citations omitted).

196. 471 U.S. 759, 766 (1985).

Court held that Congress had diminished the Ute Reservation in 1905 despite the absence of explicit statutory language or evidence of clear Congressional intent to diminish.¹⁹⁷ In *Oliphant v. Suquamish Indian Tribe*, the Court held, "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."¹⁹⁸

Commentators have been quick to criticize these and other cases where the Court has failed to apply the Indian canons. Lauren Natasha Soll has written:

As a result of its *Hagen* decision, the Court has wreaked both jurisprudential and practical havoc on the all-important Indian legal issue of jurisdiction. Not only has the Court diluted its traditional strict standard of statutory construction, but it has also generated unimaginable jurisdictional chaos in Utah that will hamper and frustrate the efforts of the federal, state, and tribal governments charged with local responsibility to exercise valid criminal and civil jurisdiction.¹⁹⁹

David E. Wilkins has explained that in *Oliphant*, Justice Rehnquist enunciated "a formulation of a novel and logically insupportable principle of federal Indian law -- implicit divestiture [of reserved rights]."²⁰⁰ Failing to require an explicit congressional statement, "the Supreme Court judicially usurped an inherent tribal power [to impose criminal penalties on non-Indians] that had existed since time immemorial or, certainly, since the whites settled in Indian country."²⁰¹ In both cases, the Court's willingness to overlook the Indian canons muddled centuries of legal precedent and created contemporary problems for the maintenance of law and order in Indian Country. Where the Court has not given a satisfactory explanation for its deviation from its precedent on the Indian canons, it is difficult to accept the troubling jurisprudential and practical results.²⁰² The Supreme Court's failure to apply the Indian canons in certain cases may be best described as anomalistic, if not simply wrong.²⁰³

197. 510 U.S. 399 (1994).

198. 435 U.S. 191, 204 (1978).

199. Lauren Natasha Soll, *The Only Good Indian Reservation is a Diminished Reservation? The New and Diluted Canons of Construction in Indian Law*, 41 FED. B. NEWS & J. 544, 544 (1994) (italics added).

200. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 208 (1997) [hereinafter "WILKINS"].

201. *Id.*

202. See Soll, *supra* note 199, at 544 (*Hagen* seems to be based on "the disturbing attention" the Court paid "to the modern-day racial-political makeup of the reservation to discern the expectations of [the 1905] Congress.")

203. See WILKINS *supra* note 200, at 86 (The Supreme Court's inconsistent approach to the Indian canons reveals the "Court is not wedded to constitutional, treaty, or legal principles so much as it is to ad hoc decision-making based on issues, players, and political circumstances."); see also *id.* at 342 n.141 (Supreme Court inconsistency manifests in older cases, too. The Court applied the Indian canons in *Worcester v. Georgia*, 31 U.S. 515 (6 Pet.) (1832), *The Kansas Indians*, 5 WALL. 737 (1866); *Wau-Pe-Man-Qua v. Aldrich*, 28 Fed. 489 (1886); *Jones v. Meehan*, 175 U.S. 1 (1899); *United States v. Winans*, 198 U.S. 371 (1905) and *Seufert Brothers Company v. U.S.*, 249 U.S. 194 (1919), but did not apply the Indian canons in *Ward v. Race Horse*, 163 U.S. 504 (1886) and the *Cherokee Tobacco Case*, 11 Wall. 616 (1872)); Heinecke, *supra* note 174, at 1031 (surveying evolution of the Indian canons in the Supreme Court to the present day).

C. *Circuit Split on the Indian Canons - Chevron Deference Issue*

A split has been created among several federal circuit courts of appeal, with the D.C. and Tenth Circuits consistently applying the Indian canons over *Chevron* deference, and the Ninth Circuit sometimes going the other way. The D.C. Circuit has expressly upheld application of the Indian canons, even in cases where *Chevron* would otherwise apply. Explaining how statutory ambiguity may be limited by "traditional presumptions" about the parties or topics at issue, Judge Sentelle recently wrote in *Commonwealth of Massachusetts v. States Department of Transportation*:

In Native American law . . . statutes must be 'construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' As a result of this presumption, we have rejected agency interpretations of statutes that may have been reasonable in other contexts because the agency interpretation would not favor the Indians. Other time-honored canons of construction may similarly constrain the possible number of reasonable ways to read an ambiguity in a statute, though the application of the canon alone may not suffice to make the intent of the statute sufficiently clear for the court to pronounce what Congress intended.²⁰⁴

In *Ramah Navajo Chapter v. Lujan*, the 10th Circuit explained:

When faced with an ambiguous federal statute, we typically defer to the administering agency's interpretation as long as it is based on a permissible construction of the statute at issue [citing *Chevron*]. In cases involving Native Americans, however, we have taken a different approach to statutory interpretation, holding that "normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue." Instead we have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.²⁰⁵

Declining to defer to the Department of the Interior's interpretation of the Indian Self-Determination Act, the court explained its rationale for adopting a special approach:

[T]he policy of self-determination, which is the driving purpose behind the Act, is derived from the same source as the canon of construction favoring Native Americans. We believe it would be entirely inconsistent with the purpose of the Act, as well as with the federal policy of Native American self-determination in general, to allow the canon favoring Native Americans to be trumped in this case.

204. 93 F.3d 890, 893 (citing *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985), *cert denied*, 488 U.S. 1010 (1989)).

205. 112 F.3d 1455, 1461 (10th Cir. 1997) (citations omitted); *see also*, *Sohappy v. Hodel*, 911 F.2d 1313 (9th Cir. 1990) (special principles govern the interpretation of Indian treaties).

We therefore conclude, for purposes of this case, that the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes.²⁰⁶

From these cases emerges the reasoning that the trust relationship gives rise to the Indian canons which in turn perform equitable and normative functions important in fulfillment of the federal government's ongoing responsibilities to Indian tribes.

In *Venetie*, the Ninth Circuit avoided the *Chevron* deference-Indian canons issue. In other cases, such as *Haynes v. United States*, the Ninth Circuit has allowed *Chevron* deference to trump the Indian canons.²⁰⁷ In *Haynes*, the court held that the Secretary of the Interior had discretion to convey to an Alaska Native less than the maximum one hundred sixty acres provided for by ANCSA where the land was located in a national wildlife preserve.²⁰⁸ Considering the opposite results urged by *Chevron* and the Indian canons, Judge Trott observed, "while this court has recognized this canon of construction [requiring interpretation of ambiguous statutes in favors of the Indians], it has also declined to apply it in light of competing deference given to an agency charged with the statute's administration."²⁰⁹

In *Williams v. Babbit*, the Ninth Circuit reversed an Interior Board of Indian Affairs (IBIA) decision prohibiting non-Native entry into the reindeer industry under the Reindeer Industry Act.²¹⁰ In this case the agency interpretation and the Indian canons urged the same pro-Alaska Native interpretation. However, in weighing the agency/Indian canons interpretation against an equal protection claim, Judge Kozinski noted, "It is a close question whether -- even giving the agency the full measure of deference to which it is entitled under *Chevron* and adding in the special solicitude to which that interpretation is entitled because it favors natives -- we -- could uphold the agency's interpretation."²¹¹ Undertaking his own survey of the circuits, Judge Kozinski further explained:

The IBIA's interpretation gains little extra weight from the rule that statutes must be construed liberally in favor of natives. While at least one of our sister circuits regard this liberal construction rule as a substantive principle of law . . . , we regard it as a mere guideline and not a substantive law. . . . We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law. As a result, if the IBIA's interpretation does not prevail despite *Chevron's* help, the less powerful liberal construction guideline will not save the day.²¹²

Judge Kozinski notwithstanding, the Ninth Circuit accepts the supremacy of Indian

206. 112 F.3d 1455, 1462 (10th Cir. 1997).

207. 891 F.2d 235 (9th Cir. 1989).

208. *Id.* at 240.

209. *Id.* at 239 (citations omitted)

210.

211. 115 F.3d 657, 660-61. (9th Cir. 1997) (italics added).

212. *Id.* at 663 n.5 (internal quotations and citations omitted) (italics added).

canons in cases where the agency interpretation is consistent with the Indian canons. In *State of Washington Dep't of Ecology v. United States Environmental Protection*, for example, the Ninth Circuit held the EPA regional administrator adopted a reasonable interpretation of the Resource Conservation and Recovery Act in conformity with the interpretive canon that state jurisdiction over Indians will not be easily implied.²¹³ Upholding the agency interpretation which protected tribes from state environmental regulation, this court stated:

Our conclusion that the EPA construction is a reasonable one is buttressed by well-settled principles of federal Indian law. States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it. This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs. Accompanying the broad congressional power [over Indian affairs] is the concomitant federal trust responsibility toward the Indian tribe. That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. We must presume that Congress intended to exercise its power in a manner consistent with the federal trust obligation.²¹⁴

Here, the Ninth Circuit willingly assumed that the trust responsibility appropriately informed congressional intent, and that the trust responsibility required express, rather than vague or ambiguous intent to limit Indian statutory rights. However, in *Haynes*, the existence of an agency action inconsistent with the trust responsibility rendered the Ninth Circuit unwilling to make the same assumptions about congressional intent or statutory interpretation.²¹⁵

Few courts have provided a decisive precedent in a case where the agency interpretation is informally promulgated, under a questionable delegation of authority, and where the interpretation urges a result opposite to the Indian canons – factors present in *Venetie*. In *Albuquerque Indian Rights v. Lujan*, plaintiffs sued the Department of the Interior for failing to extend Indian preference to hiring practices in various offices.²¹⁶ Although affirming summary judgment against the plaintiffs for lack of standing, the D.C. Circuit did consider in dicta a recent Department of the Interior Solicitor's Opinion stating that Indian preference under the Indian Reorganization Act applied only to hiring in the Bureau of Indian Affairs.²¹⁷ That informally

213. 752 F.2d 1465, 1470, 1472 (9th Cir. 1984).

214. *Id.* at 1469-1470 (citations omitted).

215. The Ninth Circuit may rely on federal Indian law -- *except* when it is reviewing an agency action which has transgressed federal Indian law. In these cases, the Ninth Circuit abandons the well-settled principles of federal Indian law and defers to the agency interpretation. The rationales advanced by the D.C. Circuit, including the trust responsibility, the principle of self-determination, and the interest in equitable relations between the federal government and Indians, suggest a certain irony in according judicial deference to an agency interpretation which violates these fundamental principles. To the contrary, it would seem that such an unlawful agency action is exactly the kind that merits judicial review. *See generally*, Chambers, *supra* note 156, at 1213 (Evaluating actions for equitable and legal relief in actions alleging violation by Congress and the Executive Branch of fiduciary and other duties created by the trust responsibility).

216. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49 (D.C. Cir. 1991)

217. *See id.*

issued opinion departed from the Department's long history of broadly interpreting Act to require Indian preference in all Department units providing services to Indians. The court first commented on the propriety of issuing a new interpretation in an informal format:

[W]e note that if we were evaluating the merits, it would pose a difficult task because of the scant agency record available. . . Should DOI choose to reevaluate its present interpretation of the Indian preference provision, it may wish to conduct a rulemaking process, thereby providing a reviewing court with a more informative record. . . The departure might be especially problematic in the area of regulations applicable to American Indian affairs. Federal law has long recognized that the United States government, in view of "a distinctive obligation of trust incumbent upon [it] in its dealings with [the] dependent and sometimes exploited" Indian nations, "has charged itself with moral obligations of the highest responsibility and trust." The Supreme Court has recognized that this "overriding duty" requires that where the Department of the Interior (specifically the BIA) had traditionally expressed one position to Congress and the Indian tribes, "it is essential that the legitimate expectation of Indians not be extinguished by what amounts to an unpublished ad hoc determination."²¹⁸

In addition to the format problem, the court noted the Solicitor's Opinion might also be flawed because it advanced an interpretation contrary to the Indian canons:

The same special relationship of trust and enhanced obligation of moral dealing could create a further problem in any future review of the Department's decision to narrow its definition of terms and its application of the hiring preference. Notably, certain canons of construction may apply with greater force in the area of American Indian law than do other canons in other areas of law. More specifically, DOI's interpretation may compel it to confront the longstanding canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."²¹⁹

Even though *Chevron* might nevertheless urge deference to the Solicitor's Opinion's new and informal interpretation, the court recalled similar situations where it had declined to defer to an agency interpretation that violated the Indian canons.²²⁰ The D.C. Circuit's rationale directly disagreed with Judge Kozinski's reason for allowing *Chevron* to trump the Indian canons:

[I]n the area of American Indian law, the Department may wish to consider that the liberality rule applied in *Blackfoot Indians* and other cases involving native

218. *Id.* at 58 (internal quotations and citations omitted) (emphasis supplied).

219. *Id.* at 59 (emphasis supplied).

220. *See Id.* (citing *Muscogee Creek Nation* at 1445 n.8)

Americans derives from principles of equitable obligations and normative rules of behavior, rather than from ordinary statutory exegesis. It is true that at least one of our sister circuits has treated this rule of liberal construction in favor of Indians as it would treat other canons, "deferring to the agency charged with [the statute's] administration". However, it is also true that we have not.²²¹

The D.C. and Tenth Circuit cases suggest, as a general matter, where an overarching canon governs construction of a particular statute²²² or entire area of law,²²³ courts should use that canon in interpreting vague or ambiguous statutory language, even when an informal agency interpretation urges an opposite result. The Indian canons are even more powerful than other canons because they are a component of the trust relationship between tribes and the government.²²⁴ But, as Judge Kozinski's opinions reveal, not all courts agree with the approaches of the Tenth and D.C. Circuits.

D. Federal Indian Law Attempts at Reconciling the Indian Canons and Chevron

Commentators have discussed several federal Indian law justifications for applying the Indian canons over *Chevron* deference.²²⁵ According to Peter S. Heinecke, *Chevron* and the Indian canons are both judicial inventions for effectuating congressional intent.²²⁶ *Chevron* step one reflects that congressional intent is supreme and canons of interpretation "are assumed to effectuate congressional intent by protecting certain values."²²⁷ Congress itself may expect that its statutes will be interpreted under certain canons that have become standard, such as the plain meaning rule of statutory interpretation.²²⁸ Substantive canons such as those reading statutes to protect constitutional rights, to avoid retroactive application, and to protect Indian interest reflect Congressional intent in a certain policy areas.²²⁹ In Indian law,

221. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59. (D.C. Cir. 1991).

222. *See, e.g.*, Indian Self-Determination Act, 25 U.S.C. § 450(l)(a) (2) (1994) (contracts shall be construed for the benefit of the contractor).

223. *See Crandon v. United States*, 494 U.S. 152, 168 (1990) "[W]e are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of [the statute] remains, it should be resolved in the petitioners' favor unless and until Congress plainly states that we have misconstrued its intent."

224. *See Ramah Navajo*, 112 F.3d at 1461.

225. *See Heinecke, supra* note 174, at 1015; Soll, *supra* note 196 at 544 (1994); Raymond Cross, *When Brendale Met Chevron: The Role of Federal Courts in the Construction of an Indian Environmental Law*, 1 GREATER N. CENT. NAT. RESOURCES J. 1 (1996); *see also See e.g.*, Max Minzer, Case Note, *Construction Work: the Canons of Indian Law, Alaska v. Native Village of Venetie*, 107 YALE L. J. 863 (1997) (A two page note which does not discuss *Chevron* but argues the canons should not apply in *Venetie* because Congress did not act as trustee when it enacted ANCSA).

226. *See Heinecke, supra* note 174, at 1015-17.

227. *Id.* at 1022.

228. *See Id.* at 1023. This is consistent with the Ninth Circuit's position in *State of Washington* that it must presume that Congress intended to exercise its power in manner consistent with the trust responsibility. *State of Washington v. United States Env. Protection Agency*, 752 F.2d 1465, 1470 -72. It follows that Congress expects its statutes to be interpreted in light of the Indian canons, consistent with the trust responsibility.

229. *See Heinecke, supra* note 174, at 1025. The canon holding that "courts should interpret ambiguous treaties and statutes broadly in favor of Indians" originates out of the wardship doctrine. The trust doctrine also originates in this wardship doctrine which "covers a different facet of this [wardship] relation. Rather than supplying an interpretive principle for the Court, the trust doctrine defines the power and responsibilities that accrue to Congress and the executive

"wardship" is "the best justification for continued application of the canon favoring Indians," because it reflects continuing congressional policy.²³⁰ Further, "history and evolution of the wardship relation" create a presumption that "Congress would not want agencies to have the power to administer any element of the relationship."²³¹ In addition, Heinecke contends two of the usual rationales for *Chevron* deference -- political accountability and agency expertise -- do not apply in cases involving Indians. He notes:

Because Native Americans were, and still are, powerless politically, they benefit little from the greater political accountability of the agencies. Furthermore because so much of the legislation that affects Native Americans is directed solely at them, they cannot depend on other affected groups to change agency behavior.²³²

And on the subject of agency expertise:

Agency competence cuts both ways. Agencies may be better able to discern and implement congressional policy, but they may not also give Native American interests sufficient weight. In the administrative state, one of the functions of agencies is to balance competing policy goals. . . [A]gencies should give stronger credence to Indian interests: as the Court has repeatedly noted, the executive has strict fiduciary obligations toward Native Americans. But when faced with competing goals, agencies may well disregard the legitimate claims of Native Americans.²³³

Heinecke surmises that because: (1) congressional policy protects the "wardship relationship" between Indians and the federal government and judicial monitoring of executive agency action is crucial to that relationship and (2) the rationales for *Chevron* deference may be missing in Indian law cases, it is unlikely that Congress intended to delegate to agencies power to negate the canons favoring Indians.²³⁴ The Indian canons can be useful at both steps of *Chevron*: "in some cases [the canon's] application will give a definitive answer to the first step. . . [T]he canon can be applied in the second step to narrow the range of possible interpretations."²³⁵ But because the application of interpretive canons could obviate the need for deference to agency interpretation in *every* case, Heinecke argues that "a court,

branch as a result of the wardship notion." Heinecke's useful, although not entirely accurate, analysis of the Supreme Court cases that gave rise to the Indian canons, is detailed in Section III *infra*.

230. *Id.* at 1036; see also Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far*, 20 HARV. ENVTL. L. REV. 199, 328 n.504 (YEAR) ("Sunstein contends that substantive canons, such as the Indian canons should not be overridden simply because the agency wants them to be [because] judicial application of Indian canons will better effectuate trust relationship between federal government and Indians than application of *Chevron* principle") (internal quotations omitted).

231. Heinecke, *supra* note 174, at 1036.

232. *Id.* at 1038.

233. *Id.*

234. See *id.* at 1040.

235. *Id.* at 1040-41.

therefore, should invoke a canon only if, after considering the factors motivating *Chevron* deference, it concludes that judicial application of the canon is still the best way to protect the values underlying the canon."²³⁶

E. Evaluating and Improving Federal Indian Law's Approach to Chevron and the Indian Canons

Heinecke rightly raises the issue of whether the main rationales for *Chevron* deference -- expertise and accountability -- do not apply in cases involving Indians. And he correctly states courts should protect and uphold the special relationship between Indians and the federal government, and they may do so by applying the Indian canons instead of *Chevron* deference.²³⁷ On several levels, however, Heinecke's analysis is flawed.

First, it is doubtful that Congress would like to keep agencies completely excluded from the relationship between Indians and the federal government. After all, Congress has passed statutes giving the Department of the Interior general and specific authority in administering Indian affairs. And if agencies amass and exercise real expertise, deference to agency interpretations may be in Indian interests. Second, in invoking an anachronistic and inaccurate analysis of the cases that gave rise to the Indian canons, Heinecke perpetuates a paternalistic "wardship" relation between Indian and the federal government. Although the wardship problem requires a new conception of Indian law, detailed below in Section IV, here I discuss an improved federal Indian law approach to agency involvement in Indian affairs.

Heinecke's arguments ignore some realities in Indian law and politics. Although the Department of the Interior's Bureau of Indian Affairs is not well-known for its competence,²³⁸ it is the agency authorized to have expertise in Indian affairs.²³⁹ Similarly, while the fact that Indians comprise less than one percent of the United States population makes it extremely difficult to influence politics, Indians do take advantage of political processes. These processes include voting, running for political office, lobbying legislators, negotiating with federal, state, and local governments, and, when given the opportunity, participating in notice and comment procedures afforded by the APA. This is not to suggest that the representation of Indian interests in the federal government is sufficient,²⁴⁰ but rather to point out the error in assuming

236. Heinecke *supra* note 174, at 1024 (italics added).

237. *See, e.g.*, 25 USC §§ 2, 9; 43 U.S.C. § 1624 (1994).

238. Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 MICH. J. L. REF. 899, 942 (1998) (discussing the BIA's "long and undistinguished record in managing the federal government's relationship with the Indians").

239. *See* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1624 (1994). The BIA has specific statutory authority to administer hundreds of statutes pertaining to Indians

240. The Native American population comprises 1% of the total US population, thus achieving accountability through the democratic process is unlikely. *See* BARSH AND HENDERSON, *supra* note 178, at 233 ("We have argued that Indian representation is inadequate because of federal electoral policy and apportionment. A second and possible more powerful argument is that Indian representation fails because of Indian poverty. Poverty results in an inability to collect information, disseminate information, and monitor the political processes, all apart from the fact that wealth is the wherewithal of political corruption."). In Alaska state politics, Heather Kendall-Miller, attorney for the

that the rationales underlying *Chevron* are always completely absent in Indian law.

F. Mediating the Chevron Deference Versus Indian Canons Problem

Neither Heinecke's treatment of the *Chevron* deference Indian canons problem, nor the above critique provides a resolution to the problem – what is a court to do when an agency interprets a statute enacted for the benefit of Indians contrary to Indian interests? Without forgetting the real conflict that the competing doctrines create for courts, perhaps it would be more useful, from a practical standpoint, to address the problem in a preventive fashion. That is, encourage agencies to act within the dictates of both administrative law and federal Indian law when they deal with Indians, and to understand how these bodies of law complement one another. Ideally, courts will less often be presented with an agency interpretation that forces a choice between *Chevron* and the Indian canons.

Federal Indian law puts a special burden on agencies to comply with the APA. Transgression of APA procedure may trigger a violation of the trust responsibility. Reid Peyton Chambers notes:

Morton v. Ruiz, 415 U.S. 199 (1974), considered whether the Bureau of Indian Affairs was obligated to provide welfare benefits to unemployed Indians living off the reservation. . . The Court [states] that the BIA's failure to publish its eligibility requirements for general assistance, as required by its internal procedures and the Administrative Procedure Act is inconsistent with its "distinctive obligation of trust incumbent upon the Government in its dealings with" Indians."²⁴¹

Because the statutes and regulations at issue in the case themselves required publication, Chambers finds it "odd" that the trust relationship was invoked in *Morton*. However:

[W]hat the Court may be saying is that federal agencies must administer general statutory schemes with scrupulous regard in dealing with the Indians. In this sense, the trust responsibility would be sort of a broad "fairness doctrine" rather than a more precise doctrine that can be used to enforce particular rights.²⁴²

Native Village of *Venetie*, has pointed out that representation in state politics is inadequate. *See Indian Country Forum* supra note 146 at 14. ("Out of 40 legislators, only 10 represent rural Alaska... there are only 10 legislators that represent Bush Alaska and that have any say whatsoever in state laws. And take, for example, Irene Nicholai. One representative represents 75 communities within her district. Is that representation?"). Still, Heinecke is misinformed if he thinks Native Americans are completely powerless in the political realm. *See, e.g., CASE* supra note 3 at 412 (discussing Alaska Native local and regional political organizations and accomplishments). The problem of underrepresentation in the democratic majoritarian system is complex and beyond the scope of this article, but it is important not to overlook Native political work, such as that undertaken by the AFN, the Alaska Native Brotherhood and Sisterhood, the United Tribes of Alaska, as well as by grassroots organizations and village members.

241. Chambers, *supra* note 162 at 1245-46.

242. *Id.* at 1246.

Consistent with the trust relationship, federal agencies entrusted with administering Indian statutes should be held accountable for failing to follow the procedures which provide for public participation in lawmaking which directly affects them. The federal trust relationship and its Indian canons enhances the agency's responsibility to follow APA procedure. The canons were announced, in part, to remedy inequitable lawmaking,²⁴³ and it is incumbent on executive agencies to avoid perpetuating these inequities in contemporary settings.

At the very least agencies should publish proposed rulemakings in the Federal Register so Indian communities will have opportunities to make comments.²⁴⁴ In light of the marginalization of Indians in the democratic process, agencies must also consider going above and beyond the minimal requirements for public participation in rulemaking.²⁴⁵ President Clinton has described additional measures Bureau of Indian Affairs and other agencies should take to involve Indian tribes and individuals in the administrative law process. His 1998 Executive Order calls for agencies "to establish regulatory and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities. . . ."²⁴⁶

In formulating policies significantly or uniquely affecting Indian tribal governments, agencies shall be guided, to the extent permitted by law, by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique relationship between the Federal Government and Indian tribal governments. . . . *Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or*

243. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Consitutionalism and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 397 (1993): "Chief Justice Marshall was not eager to conclude that the Cherokee had abandoned it [tribal sovereignty] through subsequent treaty negotiations. . . His sense of the treaty negotiations between the British crown and later the United States on the one hand, and tribes on the other, strongly suggested that the former had not sought and the latter would not have desired any loss of internal tribal sovereignty. . . He also emphasized another reason to be suspicious of any argument that the Cherokee had agreed to relinquish internal sovereignty: the treaties in question had been negotiated in a language foreign to the Cherokee, and therefore the tribe could not be held strictly accountable for any nuances of treaty text."

244. See Exec. Order No 13,084, 63 C.F.R. 27655 (1988), § 5. To involve Indians in the administration of Indian affairs, the Order provides: Further, "on issues relation to tribal self-government, trust resources, or treaty and other rights, each agency should explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."

245. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidelines, Manuals and the Like -- Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1376 (1992) [hereinafter *Interp. Rules*] reprinted in THOMAS O. SARGENTICH, ED., *ADMINISTRATIVE LAW ANTHOLOGY* 136 (1994). "It would champion the worthy precepts of the APA. . . if in certain circumstances agencies would voluntarily make use of notice-and-comment rulemaking procedures to develop interpretive rules. Implicit in the doctrine that notice-and-comment procedures are not required for interpretations is a notion that affected parties are in some sense continuously on notice of any imaginable interpretation, and that it is their business (or their counsel's) to anticipate and guard against all possibilities. But when substantial interpretive changes are afoot, the values of fair notice and public participation and agency accountability demand something better."

246. See Exec. Order No. 13084 of May 14, 1998, "Consultation and Coordination with Indian Tribal Governments."

uniquely affect their communities."²⁴⁷

If the BIA, or other agencies, fail to involve affected Indians, courts should question their expertise at the procedural level.²⁴⁸ Although the above-and-beyond approach may be costly, one commentator has stated:

It must be remembered that agencies exist solely to serve the public in accordance with the law. The costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply because an agency might lack adequate resources or prefer to direct them elsewhere. At worst, they are a price to be paid for lawfulness and openness and accountability.²⁴⁹

If the agency has failed to abide by procedural requirements, its interpretation does not merit *Chevron* deference.

If the reviewing court finds that the agency *has* satisfied its procedural duties, it can then turn to the substantive aspect of the agency interpretation. In the case of vague or ambiguous language, a court can recognize a range of permissible agency interpretations consistent with application of the Indian canons. That is, several interpretations of a statute might be in the Indians' interests, reflect Indian understanding of statutory language, and preserve existing Indian rights. If so, the reviewing court will accord *Chevron* deference to the agency's choice among these interpretations. It is not up to the court to choose among several reasonable interpretations. But if the interpretation is inconsistent with the canons, it automatically violates the trust responsibility and is outside the range of permissible interpretations and the reviewing court should not defer to the interpretation.

To facilitate the job of the reviewing court, certain presumptions about agency expertise can inform an analysis of the interpretation before it. The BIA would be expected to have greater expertise on Indian issues, gained through historical

247. The order provides, in part: (b) "To the extent practicable and permitted by law, no agency shall promulgate any regulation that is not required by statute, that significantly or uniquely affects the communities of the Indian tribal government, and that imposes substantial direct compliance costs on such communities, unless: funds necessary to pay the direct costs incurred by the Indian tribal government in complying with the regulation are provided by the Federal Government; or the agency, prior to the formal promulgation of the regulation, in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget (OMB) a description of the extent of the agency's prior consultation with representatives of affected Indian tribal governments, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation; and makes available to the Director of the [OMB] any written communications submitted to the agency by such Indian tribal governments. *Id.* (emphasis supplied) Further, "on issues relations to tribal self-government, trust resources, or treaty and other rights, each agency should explore and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." *Id.* at § 5.

248. See, e.g., EDLEY *supra* note 75, at 48. ("In spite of common observations by commentators that agencies may not be so expert and that expertise is oversold, courts commonly rule that deference is due the agency's action because of expertise."). In the Indian law context, courts might consider whether a lack of expertise obscured the necessity of translating a proposed regulation into a Native language? Overlooked that an affected Indian tribe had no access to the Federal Register? Ignore funding limitations prohibiting Natives leaders from communicating proposed rulemakings to their constituents?

249. Anthony, *supra* note 97, at 137.

experience, field offices in Indian Country, and employee specialists, than would an agency with little contact with Indian tribes. The presumption of expertise held by agencies with experience in Indian affairs would be rebuttable in cases where it was shown that the agency had not actually applied expertise.²⁵⁰ Failure to apply the Indian canons in accordance with federal Indian law would be clear evidence of an agency's failure to exercise expertise in the area of Indian affairs. Similarly, failure to ascertain how to involve affected Indians in the proper administrative procedure would rebut the presumption of expertise.²⁵¹

Unless they dismantle the BIA²⁵² and recall other agencies' authority in Indian affairs, they should seek to *improve* agencies' expertise, accountability, and responsiveness in these matters. Therefore, it is premature and at odds with the wellbeing of Indians to deny *Chevron* deference to all agency interpretation of statutes affecting Indians. Above are suggestions for just a few ways agencies and courts can fulfill their APA duties as heightened by the trust responsibility. Generally, if courts announce that when a statute affects Indians, agency interpretations must obey APA requirements and trust responsibilities, agencies will work toward meeting their procedural and substantive duties to Indians. Indians will also have incentive to participate in the procedural and substantive aspects of lawmaking that affect them. Ideally, courts will only apply *Chevron* deference to agency interpretations that incorporate the Indian canons and these interpretations will be more in-touch with affected communities by virtue of their participation.

Under how Federal Indian law complements administrative law strengthens the case against deference for the Solicitor's Opinion on Indian Country in *Venetie*. As detailed in Section II, the Solicitor failed to abide by the bare APA procedural requirements; most Alaska Natives and other affected parties did not have the opportunity to read a proposed version of the Solicitor's Opinion in the Federal Register and they could not participate in notice and comment. The Solicitor did not employ any of the above-and-beyond procedural options which might have increased accountability, such as translation of the Opinion into Native languages, dissemination of the Opinion in village Alaska, or education for leaders and village members as to its legal, social, and economic implications.

There is also much evidence to rebut the presumption of the Department of the Interior's expertise in this area. In ignorance of or disregard for federal Indian law, the Solicitor failed to apply the Indian canons in interpreting ANCSA's silence on the

250. My call for increased scrutiny of expertise is applicable beyond Indian affairs. See, e.g., EDLEY, *supra* note 75, at 50-51 (As opposed to "hard look" judicial review, "[t]he far more common judicial stance is to presume expertise rather than to probe its genuineness. . . . And it is rarer still to see aggressive judicial inquiry into questions of political representativeness or adjudicatory neutrality. . . . What assurance is given by administrative law, including judicial review, that the agency has in fact acquired and deployed the capital stock of expertise, professional skills, and insights (or judgment) that justify the delegations and deference the agencies receive?").

251. As in other areas of administrative law, expertise could be judged by ability to garner scientific and empirical evidence, capacity to analyze data effectively, and tendency to implement successful solutions to problems.

252. Of course, the idea of dismantling the BIA has some merit. See, e.g., Porter, *supra* note 238, at 991 ("The decolonization of federal Indian control law cannot occur unless the federal government's colonial administrative infrastructure, the BIA, is dismantled and a new institution for handling relations with the Indian nations is established.") Professor Porter envisions that "the BIA would be transformed into a kind of tribal Department of State." *Id.* at 1003.

Indian Country issue.²⁵³ Beyond minimal efforts to garner the opinions of some Native leaders, the Solicitor did not incorporate Alaska Native knowledge into his interpretation.²⁵⁴ This failure exposed the Solicitor's lack of expertise in communicating with, or achieving political representativeness among, the Alaska Native community. It also diminished the informational content and accuracy of the Opinion. The Solicitor's qualification that "should the outcome of this opinion be at variance with what lawmakers believe is the proper view of Native village jurisdiction, Congress is free to legislate again in this area to provide certainty," does not excuse the Opinion's many flaws.²⁵⁵ *Chevron* deference is inapplicable when an agency has failed to interpret a statute enacted for the benefit of Indians consistent with the Indian canons, or where deference would not accomplish the goals of promoting expertise and accountability in the administration of Indian affairs. For both of these reasons, an interpretation like the Solicitor's Opinion in *Venetie* would merit no deference under an administrative law analysis informed by federal Indian law.

V. INDIGENOUS INDIAN LAW

When they were lucky, they harvested lots of animals and everyone would share the meat equally, storing most of it for future survival. This food would last until the middle of the winter and when it began to run out, they moved to another location to hunt for food again. This is what we call the nomadic life and this is where we come from.²⁵⁶

"Thé Native people of America had these governments thousands of years before... I mean, when Caesar was conquering Britain for pete's sake, and they were, you know, worshipping rocks, I mean the Native nations of Alaska had governments."²⁵⁷

"Indigenous Indian Law" is my attempt to identify existing and developing theories and practices which indigenous peoples can use to address their legal problems. Several problems with more conventional legal frameworks inspire me to

253. For a general analysis of the ANCSA that conforms to the Indian canons, see *CASE supra* note 2 at 16-18.

254. See *EDLEY supra* note 175, at 49 ("So in reality the agency may have... tried to accommodate competing interests but forgot to listen to some important voices... Judicial review is most likely to catch and act on a failing of expertise...but this cases are in the minority... and it is still rarer to see aggressive judicial inquiry into questions of political representativeness...")

255. See *id.* at 98-99 ("It is odd to justify abdication of deference by asserting that Congress will fix things: the broad delegations and modern administrative law) arose because everyone conceded Congress' institutional inability to get involved in the details.")

256. *Resp. Br., supra* note 16, Testimony of Moses Sam, Appendix at 31aa-33aa.

257. Will Mayo, President, Tanana Chiefs Council, in *Indian Country Forum, supra* note 154, at 13.

do so.²⁵⁸ In recent years, federal Indian law, alone or in combination with other jurisprudence, has failed in almost every case before the Supreme Court.²⁵⁹ *Venetie* is an example where tribal arguments based on conventional legal doctrine (in this case administrative law) and bolstered by Federal Indian law failed to win the vote of even a single Supreme Court justice. Thus, the first problem is that, no matter how strong the advocacy, Indian litigants propelled through the federal courts very often lose at the Supreme Court on federal Indian law arguments.²⁶⁰

Second, existing federal Indian law is fatally flawed because it often leaves out the Indians.²⁶¹ Rennard Strickland has described, "a sound contemporary Indian

258. I am hardly the first person to point out that something serious must be done to federal Indian law. Professor Porter, for example, has advocated a complete decolonization of federal Indian law, and a radical change of the relationship between Indian tribes and the United States. See Porter, *supra* note 238, at 903 (calling for (1) defining all aspects of the federal-tribal relationship by agreement; (2) reforming the BIA; (3) repealing colonial federal Indian law; and (4) abandoning the colonial foundation of federal Indian control doctrine).

259. In most cases involving an Indian tribe as a party, the Supreme Court currently applies the rule: "the Indians lose." See *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 118 S.Ct. 1904 (1998) (Deciding against tribe in action for declaratory and injunctive relief and refund of taxes, interest, and penalties paid on land the Band acquired in fee simple after allotment to members or conveyance to non-members. Because Congress clearly intends to subject to state and local taxation reservation land made alienable, the repurchase by an Indian tribe does not cause the land to reassume tax-exempt status.); *Montana v. Crow Tribe*, 118 S.Ct. 1650 (1998) (Deciding against tribe in claim to recover Montana severance and gross proceeds taxes paid on coal extracted from mines held in trust for the tribe. Because Secretary had not approved tribal tax before 1983, and tribe should not receive excessive restitution, tribe was not entitled to disgorgement of taxes improperly assessed by state against mineral lessee before 1983.); *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) (Deciding against tribe's action for declaratory judgment to enforce right to regulate landfill site claimed to be within exterior boundaries of reservation. Because the land surplus act did not preserve opened tract's reservation status, it resulted in diminishment of reservation such that State acquired primary jurisdiction over disputed lands, and State's environmental laws applied.); *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997) (Deciding against tribe in claim of ownership of submerged lands and bed of lake which were within 1873 reservation boundaries and seeking declaratory and injunctive relief against state. Because the quiet title action did not fall within *Ex parte Young* exception, state maintained 11th Amendment sovereign immunity from suit.); *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) (Deciding against tribe in its attempt to assert jurisdiction over insurance case arising out of car accident between non-Indians on state highway running through reservation. Because the accident occurred on portion of highway maintained by state under federally granted right-of-way, tribal courts had no jurisdiction absent a statute or treaty authorizing tribe to govern conduct of nonmembers on the highway.); *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996) (Deciding against tribe in its suit to compel Florida to engage in negotiations under Indian Gaming Regulatory Act. Because doctrine of *Ex parte Young* did not apply in light of intricate remedial provisions of IGRA, and Congress lacked authority under Indian commerce clause to abrogate 11th Amendment, state retained sovereign immunity from suit.). In the past three years, one Indian party has prevailed before the Supreme Court. See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 118 S.Ct. 1700 (1998) (Deciding in favor of tribe in its assertion of sovereign immunity against state court action by payee to recover on promissory note executed by tribe. Because Congress has not abrogated sovereign immunity, it applies regardless of whether the note was signed on or off the reservation, and whether the note related to commercial activities.). Amazingly, in this *single* recent Supreme Court case, decided in 1996-98, where the Court held in favor of the tribe, Justice Kennedy devoted two pages to a critique of the "accident[al]" judicial origins of tribal sovereign immunity, expressing doubt about perpetuating the doctrine when Indians act "well beyond traditional tribal customs and activities" and "take part in the Nation's commerce ... [which includes] ski resorts, gambling, and sales of cigarettes to non-Indians". *Id.* at 1704. In this Supreme Court, federal Indian law and other conventional legal approaches do not work for Indian tribes.

260. A very recent case indicates tribes may still have a chance when the case involves treaty rights to hunt and fish on traditional lands. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, ___ S.Ct. 1187, (Chippewa retain usufructory rights guaranteed to them in an 1837 Treaty.)

261. See ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600-1800 6 (1997) [hereinafter "WILLIAMS"] ("As Vine DeLoria, Jr., ...once instructed me, a major problem with the way that most non-Indian scholars have discussed the law governing relations between the United States and Indian tribes is that there are no Indians in the story.")

policy must recognize that the Indian way is very much alive and well."²⁶² But today's legal institutions do not recognize Indian ways at all. Courts produce "anglocentric" jurisprudence;²⁶³ legislatures believe they can pass Indian statutes without consulting Indians.²⁶⁴ As a result, federal law generally alienated Indian constituents and does not meet their needs.²⁶⁵ In Alaska, lawmaking events that severely underrepresent Alaska Native perspectives include the issuance of the Solicitor's Opinion on Indian Country²⁶⁶ and Justice Thomas' *Venetie* opinion.²⁶⁷ Federal Indian law rarely reflects Indian visions of law.

Finally, federal Indian law oppresses Indians by applying outdated, harmful theories, including the ward/guardian version of the trust relationship. As I discuss below, the Native Village of Venetie faced an impossible position before the Supreme Court – in order to establish its authority to govern tribal lands, Venetie had to show

262. RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 112 (1997) [hereinafter STRICKLAND]; see also JOHANSEN, *supra* note 178, at 1 (quoting Joyotoaul Chauduri, *American Indian Policy: An Overview*, in VINE DELORIA, JR. ED., AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 15 (1995) ("The field of American Law and Policy, historically and systematically, has had little to do conceptually with American Indian law or methods of conflict resolution.... Rather than being a branch of comparative law, the formal field of American Indian law is a very special, complex, and often contradictory and confusing branch of Anglo-American legal thinking.")).

263. See Philip P. Frickey, *Divestiture of Indian Tribal Authority*, 109 YALE L.J. 1, 78 (1999) (The [Supreme] Court's analogical exercises seem more ad hoc than adept, more Anglocentric than analytical. In the diminishment cases, the Court seems to have jettisoned the canonical approach [to statutory and treaty interpretation] in favor of a fact-based analogical process.... To put it bluntly, the Court seems to be asking, 'is this area like the rest of South Dakota, or is it truly Indian in nature.' One might question the objectivity of this analysis from a group of jurists who may know little about South Dakota, much less about Indian reservations found there.).

264. See Porter, *supra* note 238, at 939 (One reason Indian policy has been a failure is that it "has been based upon a paternalistic ethnocentrism that has never viewed Indigenous people as capable of determining our own future. American policymakers have assumed that their way of life was superior and worth emulating, that their society was in a superior position to safeguard Indian interests, and that their opinions about the future of Indian people were the correct ones."); see also STRICKLAND, *supra* note 262, at 100 (detailing 19th and 20th Century historical, political, and legal events supporting that "The 'Indian question' is a question most often viewed in the final analysis from a non-Indian perspective. I am not saying that this view is villainous simply because it is non-Indian – in truth, almost all Indian policy has been urged by its advocates as a policy for the 'benefit' of the Indians. But policy regularly emanates from non-Indian sources which may not be entirely sensitive to or understanding of the complex problems involved. A recurring fact is that Indian policymakers have believed, or acted as if they believed Indians themselves could not know what was good Indian policy.")).

265. Although many commentators have noted the pattern wherein the federal government announces a broad Indian policy, watches it fail, then replaces it with another policy, and watches it fail, see, e.g., Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 486-91 (1998), federal lawmakers have not realized one of the elements dooming these policies is the lack of Indian involvement in their formulation.

266. Alaska Natives were very likely underrepresented in the passage of ANCSA itself, although this issue is debatable and beyond the scope of this Article. In the Solicitor's Opinion, the Solicitor himself described how he formulated his Opinion based on federal, and not Native, perspectives, even while recognizing the huge effects it would have on Alaska Natives. See Op. Sol. Gen., *supra* note 40, at 131 ("I understand the significant impact of this decision. To conclude that areas are not Indian courts greatly limits the powers those Native Villages may exercise with respect to the establishment of courts, police powers and other sovereign attributes that attach to jurisdiction over land. Yet, this opinion reflects what we believe is the best reading of the law. Our decision on this matter is very much based on what Congress did in ANCSA, and subsequent amendments and other legislation do not change this conclusion.").

267. Justice Thomas' 13-page opinion reflects nothing about the perspectives of the Neets'aii Gwich'in peoples despite the Venetie's lawyers attempts to be knowledgeable about and present these perspectives to the Court. The lawyers travelled to the villages and visited with members before arguments; submitted villagers' narratives as appendices to the Supreme Court briefs; and answered questions at oral arguments with information about the way villagers live and govern. Were the justices even listening? Had they ever been to rural Alaska? Had they ever seen an Alaska Native before Ms. Kendall-Miller appeared before them? Professor Frickey's questions about the Court's ability to analyze a South Dakota Indian reservation come to mind. See *supra* note 260.

its complete dependence on the federal government. The Court so framed the issue in these terms, making for a case that was both counter-intuitive and unwinnable. With its explicit and implicit vestiges of "wardship," federal Indian law fails to offer Indians effective, empowering ways of asserting their rights.²⁶⁸

Despite these legal deterrents, many indigenous peoples intend to thrive as independent communities and in relation with their non-Indian neighbors. Recognizing that several hundred years of exploitation and colonization have created contemporary problems, and that the federal government must continue to meet its obligations to tribes, indigenous peoples nevertheless "accept that the burden of safeguarding [their] future rests on [their] shoulders."²⁶⁹ Thus, instead of relying on oppressive relics of federal Indian law, they look to their own traditional and contemporary visions of community health and diplomacy – they are practicing indigenous Indian law.

Indigenous Indian law can work as an alternative, or complement, to existing jurisprudence, depending on the situation. It does not require abandoning useful elements of federal Indian law, but does critique and reject the negative aspects. In this case, indigenous Indian law provides that, despite the inadequacy of administrative law, Alaska Natives must be able to participate in lawmaking affecting them, and despite the failings of federal Indian law, courts must interpret vague statutory language in the Indians' favor. Further, Alaska Native visions of Indian Country may illuminate the legal discussion in ways neither administrative law nor federal Indian law even suggests.

A. Sources of Indigenous Indian Law

Indigenous Indian law emanates from at least three overlapping sources: tribal law, Encounter-era law, and international law. These categories are not mutually exclusive. Indigenous peoples brought their traditional tribal customs to bear on their earliest relations with settlers; international law shaped treaties between Indians and Europeans; and indigenous peoples are now infusing international law with their own conceptions of justice. Here, I focus on Encounter-era law and international law, recognizing where they reflect tribal law.²⁷⁰

i. The Encounter-Era Law of Trust

268. See Porter, *supra* note 238, at 902 ("While [federal Indian] law may seem to have a neutral purpose, it would be more accurate to say that 'federal Indian law' is really 'federal Indian control law' because it has the twofold mission of establishing the legal bases for American colonization of the continent and perpetuating American power and control over the Indian nations.").

269. Porter, *supra* note 238, at 900.

270. In my view, internal tribal law is most appropriately discussed by those with immediate and specific knowledge – in this instance, members of the Native Village of Venetie. For a survey of traditional tribal laws, see JOHANSEN, *supra* note 178, at 1 ("The *Encyclopedia of Native American Legal Tradition* is the first attempt in book form to inject traditional Native American political and legal systems into the study of law in the United States. It includes detailed descriptions of several Native American Nations' legal and political systems, such as Iroquois, Cherokee, Choctaw, Cheyenne, Creek, Chickasaw, Comanche, Sioux, Pueblo, Mandan, Huron, Powhatan, and Mikmaq.").

When we look at laws created a year, decade, or century ago, we often inquire into the intent of the lawmakers. Thus, when federal Indian law scholars want to understand early legal agreements between Europeans and Indians, they study the legal traditions of the English, Spanish and French participants. But they rarely study the legal traditions of the Wampanoag, Iroquois, or Cherokee participants. Legal scholarship thus reflects what Europeans intended when they entered into agreements with Indians but it does not reveal what the Indians intended by their assent to the same agreements.

The result of this scholarship is the dominant theory that Indian tribes have survived only by the grace of European and Anglo-American law:

The story builds on a narrative theme, either expressed or implied, that the legal rules and principles adhered to in the course of this country's historical dealings with Indian peoples are the exclusive by-products of the Western legal tradition brought to America from the Old World. These by-products, so the familiar story goes, were then developed here by the courts and the policymaking institutions established by the dominant European-derived society into a redemptive force for perpetuating American Indian tribalism's survival. Without the European Law of Nations, without the English common law's recognition of fiduciary duties arising from a guardian-ward relationship, without the elasticity of feudalistic property law concepts to recognize and protect lesser rights of aboriginal occupancy on the land, without the precedent of the King's sovereign prerogatives of centralized control over colonial affairs, and so on – that is, without the white man's Indian law, as this story tells it – the Indian would no longer be among us.²⁷¹

This “White Man’s Indian law” story ignores that, like Europeans, Indians brought their own politics, diplomacy, and rituals to early encounters. From the earliest Indian-white encounters, Indians were influencing the law governing relations between the groups, and ensuring their survival. Although it is legitimate for scholars to look to European and Anglo-American legal traditions as they try to understand Encounter-era law, their study will reveal only one side of the legal history and theory.²⁷² Not content to perpetuate only half of the story, indigenous Indian law also analyzes the contributions of indigenous legal traditions to the formative relations between Indians and non-Indians.

Robert Williams, Jr. examined how various indigenous peoples brought their own practices sought to bear on early interactions with Europeans.²⁷³ Iroquois tribes, for example, insisted that condolence and mourning rituals, wampum exchange, story telling, and gift giving were appropriately conducted in their dealings with whites. These practices allowed Indians and whites to act in proper relation to one another

271. *Id.* at 6.

272. See generally, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).

273. See WILLIAMS, *supra* note 261. I am necessarily abbreviating Williams' detailed descriptions of indigenous legal traditions, the complexities and subtleties of which I cannot recreate here.

and with a good mind in numerous treaty negotiations.²⁷⁴ Creek delegates carried eagle wands, sang, and danced warrior songs before presenting delegates from the colony of Georgia, or England's King George, with white feathers as gifts as part of a complex ritual signaling peaceful intentions in entering into alliances with the English and colonists.²⁷⁵ Delaware, Shawnee, Fox, and Cherokee Indians extended kinship, clan terminology, and other practices that "organized tribal ceremonies, the central events of tribal life, and the reciprocal patterns of gifting and exchange that made relationships within the tribe strong and reliable" to their encounters with the white "communities at a distance."²⁷⁶ In this manner, tribal "connective systems" were used to establish relationships of obligation between Indians and whites. For example, during the French and Indian War, Maryland officials were designated "elder brothers" to their Cherokee "younger brothers." The designation reflected that Maryland had a duty to protect the Cherokees, as "an elder brother had the duty of primary protection of his younger siblings in Cherokee tribal life."²⁷⁷

"Rituals, precisely because of their communicative power, were used for all types of purposes connected with the task of achieving mutual understandings with treaty partners."²⁷⁸ By ritual diplomacy, Indians intended to establish peace and good thought, maintain harmonious relationships, and create trust.²⁷⁹ According to Williams, such diplomacy did establish real connections between the groups, provided sacred texts to govern relations, and constituted a body of emergent law. This law imposed obligations on both Indian and European (later, American) parties by virtue of customary expectations and contractual promises. In 1756, during the French and Indian War, for example, before the Cherokees would fulfill their "obligations of blood feud imposed by their symbolic kinship with the English" by attacking the French, the Cherokee leader Culloughculla insisted that the English fulfill promises made by the Governor of South Carolina in a treaty signed at Saludy (such as constructing forts and providing a safe haven for Cherokee women and children).²⁸⁰ This example, and many others, demonstrate that, during the Encounter era, "Indians helped create a legal world . . . a world made up of multicultural negotiations, treaties, and diplomatic relations with Europeans."²⁸¹

A recurring element of the Encounter-era legal relationship was "trust." Williams explains:

The theme of trust in the language of Encounter era Indian diplomacy teaches us many important lessons about American Indian visions of law and peace. For Indians of the Encounter era, relationships of trust with different peoples were essential to survival and flourishing in a multicultural world. The language of

274. See WILLIAMS, *supra* note 261, at 40-61.

275. See *id.* at 79-81.

276. *Id.* at 71-72.

277. *Id.* at 72.

278. *Id.* at 76.

279. See *id.* at 40-61.

280. WILLIAMS, *supra* note 261, at 104.

281. *Id.* at 8.

Indian forest diplomacy reflected this basic understanding in richly evocative vocabulary describing the paradigms for behavior for behavior that Indians believed nurtured trust and reliance in a treaty relationship.²⁸²

Evidence of *mutual trust* has often been ignored by scholars looking for *wardship* as the defining characteristic of the Indian role in the relationship. But Williams argues this mutual trust, also described as "putting our lives' in each others' hands" or "linking arms together" was operative and reflected indigenous visions of law and peace. This trust allowed treaty partners to meet each other's needs, engage in acts of forgiveness, bind future generations, meet to renew or alter treaty terms and "sustain the sacred bonds that, as a matter of constitutional principle, could be relied on for survival in a hostile and chaos-filled world."²⁸³

Examining an indigenous understanding of the trust relationship provides a counter to the ward/guardian version that dominates federal Indian law. By revisiting the seminal Indian law cases from an indigenous perspective:

We begin the complex process of rendering a more complete accounting of the importance of Indian ideas and values in protecting Indian rights under U.S. law. The trust doctrine was not the exclusive by-product of the Western legal tradition brought to North American from the Old World. This central protective principle of Indian tribal rights under our law has deep roots in Encounter era Indian visions of law and peace.²⁸⁴

Below, this article analyzes the seminal Cherokee Cases, wherein the Supreme Court acknowledged the trust relationship, in light of indigenous visions of "trust," as well as international legal principles.

Before moving on to international law, it is important to discuss the limitations of Encounter-era law as a source of indigenous Indian law. Above all, we know that many, if not most, treaty meetings and other encounters between Indians and non-Indians lacked "trust." As Rennard Strickland has rightly asserted, "I cannot be a consensus historian and willingly pretend that 'the Colombian Exchange' was a consensual experience. I am by training a legal historian, and I object to the concept of discovery and western settlement as a mutual or equitable exchange. In my view, Indians gave – Europeans took."²⁸⁵ Without pandering to White Man's Indian law, Strickland, Deloria, and others argue that encounters between Indians and whites were characterized by invasion, conquest, genocide, outright theft, and fraud – in short, the antithesis of "trust." I agree with them, as I imagine Professor Williams would. Treaty-making was often an act of overt deception, followed by an abrogation of ostensibly agreed upon terms. Tribal leaders were frequently forced to negotiate

282. *Id.* at 131; *Cf.*, STRICKLAND, *supra* note 262, at 204 ("I cannot be a consensus historian and willingly pretend that 'the Colombian Exchange' was a consensual experience. I am by training a legal historian, and I object to the concept of discovery and western settlement as a mutual or equitable exchange. In my view, Indians gave – Europeans took.").

283. WILLIAMS, *supra* note 261, at 113.

284. *Id.*

285. STRICKLAND, *supra* note 262, at 204.

under duress and in a foreign language.²⁸⁶ Sometimes Europeans and Americans secured signatures from individuals not authorized to sign on behalf of the tribe. Other times, there were no negotiations; Indians victims of white extermination missions, by firepower or disease warfare, were not successfully articulating traditional tribal custom to those killing them. However, it is time to acknowledge the difficult gray areas of Indian law and history. Despite outright destruction and deception at the hands of Europeans and Americans, Indians managed to shape numerous written treaties, oral agreements, and ongoing relations with whites. Not every encounter between the groups was a genocidal event where Indians were passive victims; to some extent, they dictated the contours of relations with non-Indians. This aspect of the legal history has been largely ignored by federal Indian law scholars and practitioners, and as a result, European and Anglo-American perspectives dominate the Indian law landscape. We can not forget that Europeans and Americans quite often deliberately harmed Indian peoples, but we must begin to examine how Indian legal ideas and values have been instrumental in protecting and promoting indigenous American tribalism's cultural survival over time.²⁸⁷

Second, Professor Williams' study of indigenous contributions to Encounter-era law pertains specifically to Eastern and Woodlands Indians through the 18th century. Further study will be needed to analyze the contributions of Indians to legal encounters with whites in other regions and after 1800. Indigenous peoples' had varied Encounter experiences; for example Alaska Natives never signed treaties, unlike the Eastern and Woodlands tribes. We need to examine what kinds of diplomacy Alaska Natives used in their early relations with non-Natives and what kind of customary law evolved from these interactions.²⁸⁸ Is federal Indian law the only law that grew out of the Alaska Native early encounters with whites? Balancing Indian law's current focus only on the "white man's" and/or "federal" side of the story,²⁸⁹ will require additional tribal-specific research, and we should resist the urge

286. See JOHANSEN, *supra* note 178, at 331-32 (citing VINE DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DELCARATION OF INDEPENDENCE 110 (1985)).

287. WILLIAMS, *supra* note 2621, at 132.

288. Although courts and commentators sometimes imply treaties comprise the only binding law resulting from early Indian-non-Indian encounters, it is possible, or even likely, diplomatic missions, oral agreements, and community expectations created a body of law governing relations (e.g. land use, trade networks, military engagements) between Indians and non-Indians. Professor Anaya's argument on the binding nature of customary international law, discussed in greater detail below, may have implications for early encounters between Europeans and indigenous peoples. See, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 50 (1996) [hereinafter ANAYA].

289. According to the Solicitor, for example, "Alaska Native groups did not have legal systems in the modern European sense, but all had systems of social and political control, some quite elaborate." Op. Sol., *supra* note 39, at 12. He later stated that the U.S. did not deal with Alaska Natives through treaties and the relationship was different than that with Indians in the Lower-48. See *id.* at 46-53. However, the Solicitor never considered what indigenous law contributed to the relationship. One academic source does begin to study Alaska Native traditional law and its contributions to their encounter-era dealings with non-Indians. See CASE, *supra* note 2, at 333-370. Case describes his analysis as only a "modest contribution" to a "fuller understanding of Alaska Native village histories and cultures [which] seems vital to an understanding of past successes and failures of the federal-Native relationship and to future improvement of that relationship for the benefit of all." *Id.* at 333. However, he does provide a useful starting point by discussing both pre-contact traditional governments and early contact political relations between Russian traders, missionaries and churches, individuals and later, representatives of the United States government. This discussion suggests that, like the Iroquois and Woodlands Indians described by Williams, Alaska Natives, too, had traditional laws governing their communities, and these legal systems influenced their interactions with non-Indians. For example:

to assume all Indians have had the same history.

Nevertheless, federal Indian law imposes on all Indians and Alaska Natives tribes the broad precedents established in the Cherokee Cases, and other Indian law jurisprudence. For these reasons, all tribes involved in litigation may have to develop indigenous responses to the foundational cases of federal Indian law – even when those cases pertained to very distant Indian peoples, land, and issues. *Venetie* is the perfect example. Although the dispute arose in the 1980's on Neets'aii Gwich'in lands near the Arctic Circle, the Supreme Court's decision relied heavily on definitions of "Indian Country" cases arising decades earlier in Southwestern Pueblos and a Nevada Indian Colony.²⁹⁰ Like almost every modern Indian law case, *Venetie* referenced *Cherokee Nation v. Georgia* and *Worcester v. Georgia*,²⁹¹ and throughout oral arguments, the justices asked questions based on the trust relationship enunciated in these cases.²⁹² The district court's opinion in *Venetie* surveyed every Indian Country precedent from King George III's Proclamation of 1763 establishing for the first time a boundary between Indian and white lands to 19th century federal liquor regulation in the Dakota territories.²⁹³ If federal courts subject tribes to their (federal) interpretation of history and case law involving any and all tribes, there is no reason why tribal advocates cannot respond with an (indigenous) interpretation of the same history and cases. In this article, therefore, I evaluate, with caution, relations between Alaska Natives and the federal government in light of the "mutual trust" suggested by Professor Williams.

"At contact, the Tlingit were divided between two large moieties, Raven and Wolf ... Each contained over twenty naa (matrilineal claims). These social groupings functioned to formally regulate the institution of marriage and to define ceremonial activities. Clans from opposite moieties often formed alliances. Claims and their local divisions, which were made up of one or more *hit* housegroups or houses, figured prominently in Tlingit political organization." *Id.* at 335. Clan and territorial groupings, *kwaans*, dictated geographic, military, hunting and fishing, family relations, economic, and other social elements of Tlingit community life. Further, Tlingit villages had a "peacemaker" who settled disputes. During the contact period: "Although economic and religious changes were very apparent by 1900, the clan organization remained intact. Clan leaders were important throughout the latter half of the nineteenth century as the contact points with agents of the American government. For example, in 1879, a U.S. Naval Commander solicited the help of two Tlingit claim leaders to form a council of chiefs to act as a judicial body responsible for local Indians. Similarly, in 1890, a Tlingit clan leader was hired by a local factory to keep order among its employees and in the nearby villages." *Id.* at 338-39. Case notes that Tlingits and other Indians learned parliamentary procedures and the principles of elective government from non-Indian peoples, and have been involved in mainstream politics. However "accomplishments within white society, however, have not detracted from many basic Tlingit beliefs." *Id.* at 339. As William Paul, Jr., the first Alaska Native elected to the territorial legislature, explained "Tlingits are their own governors, which is the purest democracy. Their link to their origins is one of respect; indeed that is the basis of Tlingit law." *Id.* More immediate to *Venetie* is Professor Case's description of traditional northern Athabaskan "band" organization which depended on family, linguistic, subsistence, and geographic elements. He describes how in the 1850's Russian trading managers and Orthodox priests appointed "chiefs," to facilitate their dealings with Athabascans, but that the "the chief had no power unless he was also a successful traditional leader, and the Indians always made a sharp linguistic distinction between the two roles (traditional leader, "qeshqa," and chief "tayen") as they still do today." *Id.* at 344. These examples from Case's work just begin to suggest how indigenous legal traditions shaped interactions with white settlers in Alaska.

290. See *Venetie*, 118 S.Ct. at 951, 953-955.

291. See *id.* at 954, fn. 5.

292. See, e.g., *infra* note 330.

293. *Alaska v. Native Village of Venetie Tribal Gov't*, No. F81-0051, 1995 WL 462262, at *2 (D. Alaska Aug. 2, 1995).

ii. The International Law Principle of Self-Determination

International law provides a second source of indigenous Indian law. Drawing from international law at this point is appropriate for three reasons. First, the Native Village of Venetie has exhausted its domestic remedies by litigating this case through the highest court of the land,²⁹⁴ and can consider bringing action in international forums.²⁹⁵ Second, the role of international law in the claims of indigenous peoples is generally expanding,²⁹⁶ as contemporary norms and principles of international law increasingly reflect indigenous interests.²⁹⁷ Third, the Cherokee Cases that provided the judicial foundation for the trust responsibility and canons of construction were based significantly in international law and should continue to be interpreted against that body of law.²⁹⁸

294. See *id.* at 151-182 (Exhaustion of domestic remedies is a common requirement in various international adjudicatory bodies.)

295. See also, Tom Kizzia, *Indian Country Claims Fails*, ANCHORAGE DAILY NEWS, Feb. 26, 1998, at A1. ("Tribal aspirations in Alaska could find several other directions to move in the aftermath of the *Venetie* decision. Native groups have talked of making appeals to international human rights organizations and the United Nations, Native leaders and their lawyers said Wednesday (the day the Supreme Court announced its decision).")

296. See generally, ANAYA, *supra* note 288, at 134-140. Both international and domestic legal bodies incorporate international legal principles in their decisions affecting indigenous peoples. Examples in the U.S. include the federal district courts. *E.g.*, U.S. v. Abeyta, 632 F.Supp. 1301, 1302 (D. N.M. 1986) (1848 Treaty of Guadalupe-Hidalgo between the U.S. and Mexico, along with the religious free exercise clause of the U.S. Constitution, were found to be the bases for dismissing a criminal proceeding against a Pueblo Indian who had killed an eagle for religious purposes without a federal permit.); *but see*, Jenny Manybeads v. U.S., 730 F. Supp. 1515, 1521 (D.Ariz. 1989) (International legal claims are "frivolous" where international law is relevant only in the absence, and where there is no controlling executive, legislative, or judicial decision; the U.N. Charter is not a self-executing international obligation on the U.S.; and the Navajo-Hopi Settlement Act did not violate plaintiff's rights under customary international law or the U.N. Charter.) . Executive statements, such as President Clinton's May 9, 1994 "Remarks to American Indian and Alaska Native Tribal Leaders," and legislative actions, such as the passage of the Native American Graves and Repatriation Act (1990), also reflect acceptance of the norm of self-determination, consistent with developing international law. Outside of the U.S., the international legal principle of self-determination is more readily incorporated into national constitutions, such as that of Colombia, *see* ANAYA, *supra* note 288, at 145 n.42, and the decisions of national high courts, *see, e.g.*, *Mabo v. Queensland*, [1992] 5 C.N.L.R. 1 (High Ct. of Australia). U.S. tribes have also brought claims in international settings, such as the Inter-American Commission on Human Rights, *See, e.g.*, *Cherokee Nation v. U.S.*, Case 11.071, Inter-Am. C.H.R., OEA/ser.LN/II.95 doc.7 rev 610 (1997).

297. See ANAYA, *supra* note 288, at 183 ("Over the last several years the development of international law has been influenced by indigenous peoples' efforts to secure a future in coexistence with all of humankind. Through the international human rights program, they and their supporters have been successful in moving states and other relevant actors to an ever closer accommodation of their demands. The traditional doctrine of state sovereignty and related, lingering strains of legal thought the originated in European or Western perspectives have tended to limit the capacity of the international legal order to affirm the integrity and survival of indigenous peoples as distinct units of human interaction. Nonetheless, the movement toward an ever greater international affirmation of indigenous peoples' rights – fueled by the world community's burgeoning commitment to human rights in general and its move away from Eurocentric bias – is apparent. Moreover, while the movement can be expected to continue as indigenous peoples continue to press their cause, international law has already developed in substantial measure to support their survival and flourishing.")

298. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 93 (1996) ("The Court currently uses canons to buffer congressional excesses in these other constitutionally sensitive structural areas, and the same strategy is evident in Chief Justice Marshall's creation and application of the Indian law canons. Because he modeled these canons against the backdrop of international law, they should be nurtured by international norms as well as domestic values.") (Citing Angela R. Hoelt, Note, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. J. 203, 212 (1995)) (stating Marshall incorporated international law into the domestic law of Indian affairs).

A fundamental international legal principle for indigenous peoples is self-determination. The United Nations Charter, perhaps the most widely accepted instrument of international law, affirms the principle of self-determination²⁹⁹ and accepts that nation-states have an obligation to promote non-self governing peoples within their borders.³⁰⁰ The U.S. is generally reluctant to sign the numerous international treaties confirming indigenous rights, but even the U.S. is a member of the U.N. and is bound by the charter.³⁰¹ The United Nations Draft Declaration on the Rights of Indigenous Peoples ("Draft Declaration") recognizes that indigenous peoples should enjoy human rights under the U.N. Charter and other elements of international law, and that indigenous peoples have the right to self-determination.³⁰² Under the U. N. Charter and other international documents, self-determination is "a principle of customary international law and even *jus cogens*, a peremptory norm."³⁰³

The principle of self-determination thus influences the body of conventional and customary international law involving indigenous peoples. This principle abhors empire building and conquest and instead requires that all peoples exercise control over their own existences. Self-determination means that indigenous peoples participate in lawmaking affecting them. The Draft Declaration states: "Indigenous people have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures."³⁰⁴

The Draft Declaration also calls on states to implement both prospective and remedial measures and to ensure that such measures also take into account the principle of self-determination, meaning that indigenous peoples must shape the remedies themselves.

S. James Anaya has identified two stages at which self-determination should prevail, and where, if it has not prevailed, remedial measures are in order. Constitutive self-determination occurs when institutions are conceived or significantly altered, and ongoing self-determination ensues in the relations between nations and

299. See U.N. CHARTER, art. 1, sec. 2.

300. U.N. CHARTER, art. 73.

301. Recognizing U.S. hesitance to delegate domestic lawmaking authority to the international community, Professor Frickey suggest international norms serve as a backdrop for constitutional and quasi-constitutional claims. Frickey, *supra* note 298, at 79.

302. See ANAYA, *supra* note 288, at Chs. 4-6 (Because the Declaration, in draft form, has been accepted by the U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities, but has not been passed as a Resolution by the Subcommittee or by the higher bodies of the U.N., it constitutes an element of customary international law. Customary international law may be less binding than formally ratified treaties and conventions, but nonetheless contributes to the expectations of the international community and supports indigenous rights in domestic settings. Several conventions assert specific rights for indigenous peoples. ILO 169, for example, has an entire part on "Land" and articles on indigenous participation in government actions which affect them. These aspects of ILO 169 could be used to support Alaska Native claims on Indian Country. The U.S. has not ratified ILO 169, but it, too, contributes to customary international law, and reflects certain principles such as self-determination, human equality, property and state responsibility, that are accepted by the international legal community.).

303. *Id.* at 79 nn.1 & 2, 89 nn.14-16.

304. U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/Sub.2/1994/56, at 105 (1994).

indigenous peoples. More specifically:

Constitutive self-determination ... corresponds with the provision common to the international human rights covenants... that state that peoples 'freely determine their political status' by virtue of the right self-determination. At a minimum, this means that "procedures toward the creation, alteration or territorial extension of governmental authority normally are regulated by self-determination precepts requiring minimum levels of participation on the part of all affected peoples commensurate with their respective interests."³⁰⁵

Ongoing self-determination "requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continual basis... [including] economic, social, and cultural development."³⁰⁶ In today's international law, "the principle [of the state's special duty to indigenous peoples] rests on widespread acknowledgement, in light of contemporary values, of the relatively disadvantaged condition of indigenous peoples."³⁰⁷ These contemporary values, including the principle of self-determination, cast new light on the trust relationship between the federal government and Indian tribes. International law recognizes that trusteeship toward indigenous peoples is grounded in centuries of Western jurisprudence and state activity and has included oppressive treatment of indigenous peoples in the past. However, "the idea of a guardianship or trusteeship relationship between the U.S. federal government and Indian nations is not itself objectionable, if the sources and objects of that relationship are adjusted to contemporary values of Indian self-determination and cultural integrity."³⁰⁸

B. Application of Indigenous Indian Law to Interpretation

Both Williams' work on Encounter-era Indian-white relations and Anaya's work on self-determination in international law allows us to look at indigenous legal problems in a new way. Here, I am prompted to re-examine the trust relationship in order to understand how the Indian canons work today. The fact that in *Venetie*, neither the Supreme Court nor the Solicitor felt compelled to apply the Indian canons to ANCSA suggests the federal Indian law framework is inadequate. Adding Indian

305. ANAYA, *supra* note 288, at 82.

306. *Id.*

307. S. James Anaya, *In the Supreme Court of the American Indian Nations Lone Wolf, Principal Chief of the Kiowas, et al.*, 7-WTR KAN. J. L. & PUB. POL'Y 117, 129 (1997).

308. *Id.* at 131. International law, in particular the *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 304, provides substance to the ideals of self-determination and cultural integrity. For example, Article 21 of Draft Declaration provides: "Indigenous peoples have rights to maintain and develop their own political, economic, and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have deprived of subsistence and development are entitled to just compensation."; *See also* Article 23 (right of indigenous peoples to pursue and determine economic development), Article 25 (indigenous rights to maintain and strengthen spiritual and material relationship with land and uphold land-based responsibilities to future generations), Article 27 (restitution of indigenous' lands, territories, and resources traditionally used and confiscated, used or damaged without free and informed indigenous consent), Article 28 (indigenous involvement in environmental management), Articles 31-36 (indigenous self-government), and Articles 37-41 (indigenous participation in domestic and international settings to enforce the Declaration).

visions of law and peace, as well as the principle of self-determination, will reveal a more complete and effective understanding of the trust relationship and Indian canons.

i. Critique of Federal Indian Law Wardship

The concept of "trust" as being confined to "wardship" derives from an oft-repeated tendency to cast Indians in the role of non-actors, incapable of managing their own affairs.³⁰⁹ When the federal government looks at Indian communities and see indicia of self-determination, including economic enterprise, revitalized governments, and thriving cultural practices, it does not see wards.³¹⁰ Wardship puts Indians seeking application of the Indian canons in a catch-22. If Indians are wards, the argument goes, agencies may be "the best administrators of the wardship relation." Therefore, if the agencies have elected not to apply the Indian canons in their administration of Indian statutes, the courts should not interfere.³¹¹ If Indians are not wards, "the premises of the canon are no longer valid" because they first evolved to recompense Indians for unfair bargaining positions in treaty negotiations, whereas many of today's interpretations involve Congressionally passed statutes in which "may or may not reflect consultation with Native Americans."³¹² Further, when Indians are not wards, the government is not a trustee, and when the government is not acting as trustee, the canons do not apply.³¹³

There are federal Indian law responses to these problems -- including that courts should apply the canons outside of treaty interpretations because Congressional statutes are passed in attempt to fulfill broader wardship obligations.³¹⁴ And, even though Indians are no longer "in a state of pupilage" or an "unlettered people," they are still "dependent on and live their lives controlled by the federal government."³¹⁵ Therefore application of the canons, which grew out of wardship, is still meaningful because Congress intends to treat Indians as wards and, in fact, Indians are still wards.

Beyond their circularity, these federal Indian law responses are unsatisfactory for several reasons. First, they perpetuate values and politics that are not acceptable

309. See Tadd M. Johnson and James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1253-54 (1995) ("When viewed as an addled, eccentric 'ward,' Indian tribes were definitionally incapable of making informed and intelligent choices for their own benefit. They, therefore, were not given choices nor required to make even the most fundamental decisions required for self-governance.") .

310. The Supreme Court pays attention when, from its perspective, Indians are not acting like Indians "traditionally" do. See, e.g., *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 118 S.Ct. 1700 (1998) (dicta) (expressing doubt about perpetuating the doctrine of sovereign immunity when Indians now act "well beyond traditional tribal customs and activities" and "take part in the Nation's commerce ... ski resorts, gambling, and sales of cigarettes to non-Indians").

311. Heinecke, *supra* note 174, at 1036.

312. *Id.*

313. See Max Minzer, Note, *Construction Work: the Canons of Indian Law, Alaska v. Native Village of Venetie*, 107 YALE L. J. 863 (1997).

314. See Heinecke, *supra* note 174, at 1037.

315. *Id.* at 1037.

in the 21st century. As I argued above, the "Indian as ward" concept is a moderate formulation of the myths of Indian inferiority and European superiority expressed more forcefully by the Supreme Court in *United States v. Kagama*,³¹⁶ and *Tee-Hit-Ton v. United States*,³¹⁷ the cases which established the plenary power of Congress over Indian tribes.³¹⁸ To talk about "wardship" today evokes the racist assumptions of those earlier cases. It is true that, in Chief Justice Marshall's time, international law "upheld imperial spheres of influence asserted by Western powers and deferred to their effective exercise of authority over lands inhabited by 'backward,' 'uncivilized,' or 'semi-civilized' people."³¹⁹ Modern lawyers are not bound to perpetuate reasoning which is now abhorrent because of racist or other immoral underpinnings.³²⁰

In addition to the moral concerns, "wardship" is not now, and may have never been, an accurate description of Indians' status in relation to the federal government. Williams argues that Marshall's use, in the 1830's, of the terms "guardian" and "ward" should be understood as an example of the "patriarchal terminology that white Americans of his generation typically used in translating the language of Indian forest diplomacy."³²¹ These terms, therefore, might not have correctly or objectively described the actual nature of relations between the groups even in Chief Justice Marshall's time. And during the past several centuries, the tribes and federal government have been dependent on one another in ways that "ward" and "guardian" do not capture. Consider several anecdotal examples. Until the 1800's the Iroquois tribes negotiated with Europeans and Americans in somewhat equitable conditions, but as their populations, community health, and land base declined, treaty-making increasingly favored greedy and opportunistic whites. After several centuries of changing circumstances, some Iroquois tribes now have revitalized economies, cultures, and ongoing traditional governments. In 1999, the Oneida Nation's self-sufficiency and self-determination prompted it to reject over two million dollars of BIA funding, asking these monies be redistributed among needier tribes.³²² In the 1670's, the Mashantucket Pequot Tribal Nation suffered heavily in warfare; subsequently, it declined in population and land base until only two sisters lived on its reservation by the 1970's. During this period, most non-Indians thought the

316. *U.S. v. Kagama*, 188 U.S. 375, 383-84 (1885) ("These Indian tribes are... communities dependent on the United States. Dependent largely for their daily food... their weakness and helplessness, so largely due to the course of dealing of the Federal government with them... The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.").

317. 348 U.S. 272 (1955) ("Every schoolboy knows that the savage tribes of the continent were deprived 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 conqueror's will that deprived them of their land.").

318. *See also*, *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

319. ANAYA, *supra* note 288, at 83.

320. *See Anaya, supra* note 307, at 133 ("The operative law in the United States should not be allowed to be infected by doctrine or theory [such as race discrimination] that is contrary to modern values, as reflected in international law.").

321. *Id.* at 183 n.44 (emphasis added).

322. *See Oneida Nation, Oneida Nation Rejects BIA Fund; Wants Them Redistributed to Other NY Nations*, USET, <http://204.168.77.2/press/BIA1.HTML>>.

Pequots extinct. But in the 1980's and 1990's, the tribe began a rebirth,³²³ and in 1999, the Pequots' have stunning economic clout and are an active lobbying force on Capitol Hill. The Navajo Nation retains much of its traditional land base, language, and culture and successfully resists the federal governing model imposed on other tribes through the Indian Reorganization Act. Nevertheless, the Navajo Nation still relies on the federal government to meet its treaty obligations by supporting education, health and social programs. Following *Venetie*, the Native Village of Venetie is apparently "free" of federal supervision over tribal lands, but it continues to rely on federal Indian programs. These are just four examples; each of the 550 federally recognized tribes "depends" on the federal government in a unique, evolving manner.

The federal government's "dependency" has also changed with the times, and differs with respect to various tribes and regions. In the 18th and 19th centuries, the emergent government depended on the Indian tribes to relinquish the lands that became the United States. Today, the federal government is not necessarily seeking additional territory, but does depend on the coal, oil, and uranium below the surface of tribal lands, and also uses tribal lands to store nuclear waste.³²⁴ In the late 1700's, the government relied on Eastern tribes as military allies in wars against Indian and European nations. In 1999, the United States does not turn to Indian tribes, as such, when it needs military allies, but it does rely on the American Indian tribal members who have consistently enlisted in the military at a rate "far exceeding their percentage of the population" and served with unusual distinction.³²⁵

None of these scenarios represents a static "ward/guardian" relationship; rather, each illustrates the mutual and evolving dependency of the federal government and Indian tribes. The government and Indian tribes are not equally dependent on one another; to be sure, the federal government is the dominant power in the United States, as it is internationally, and Indian tribes are "specially disadvantaged groups."³²⁶ The federal government has often failed in its trust responsibili

323. See generally, Mashantucket Pequot Museum, and Research Center, *Building the Dream*, <http://www.mashantucket.com/update/home.html>.

324. See Arlene Hirschfelder and Martha Kreipe de Montano, THE NATIVE AMERICAN ALMANAC 214-15 (1993) (describing tribal oil, gas, coal, and mineral resources as important to U.S. energy needs); Winona LaDuke, ALL OUR RELATIONS: NATIEV STRUGGLES FORLAND AND LIFE 2-3 (1999) (describing "reservations as targets for nuclear waste" and the effects of uranium and coal mining on Navajo health). See also *U.S. land transfer to Utah tribe would be largest in 100 years*, <http://www.cnn.com/200/US/01/14/indian.lands/index.html> (describing plan to return title to 80,000 acres of land to the Whiteriver, Uintah, and Uncompahgre bands of Ute Indians with the "stipulation that the tribe return a percentage of revenue generated by oil and gas development on the land to the Energy Department" providing the Department with funds to clean up uranium tailings at an abandoned mine in Utah).

325. Arlene Hirschfelder and Martha Kreipe de Montano, THE NATIVE AMERICAN ALMANAC 227-36 (1993) (discussing high rates of Indian enlistment; detailing the contributions of Choctaw, Comanche, and Navajo "Code Talkers" in World Wars I and II; and listing Medals of Honor awarded to Indians).

326. William M. Bryner, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 333 (1995). "Mutual trust" does not mean the federal government and Indians are equally powerful; obviously they are not. Disparate positions of wealth, military strength, or land base should not automatically weaken the trust between the parties. As Williams explains, the Cherokees described the relationship as one between an elder and younger brother. See WILLIAMS, *supra* note 261, at 104: "Indians regarded the duty to provide aid and assistance to a treaty partner, like all of the customary bonds of a treaty relationship, as a constitutional obligation. Changes in circumstances or the original bargaining positions of the parties were therefore irrelevant as far

ties, sometimes deliberately harming tribes. And many tribes, suffering seriously the ongoing effects of colonialism,³²⁷ need the federal programs designed to alleviate problems of Indian health, poverty, and social ills. On the other hand self-determining tribes often work in partnership with the federal government to solve these problems in proactive, culturally meaningful, and effective ways.³²⁸ And, today's tribes regularly engage in negotiation and diplomacy with non-Indian neighbors to address conflicts, not unlike their ancestors did during the Encounter era.³²⁹

In short, the relationship between tribes and the federal government encompasses a wide-range of mutual "dependencies." By virtue of early diplomacy, the Constitution, treaty promises, statutes, judicial decisions, executive orders, negotiations and settlements, the tribes and the federal government are now, and will always be, engaged in a trust relationship.³³⁰ The relationship must not be viewed as a paternalistic federal "wardship," but rather as an ongoing mutual trust informed by indigenous legal traditions and the principle of self-determination.³³¹ The federal government's responsibilities are not going to evaporate at some magical moment when tribes "outgrow" their "ward" status. Nor will the federal government's past, present, or future transgressions of indigenous trust terminate the relationship.³³²

as Indians were concerned. Throughout the treaty literature, Indians can be found trying to educate their European-American treaty partners that they duty to provide aid and assistance under a treaty did not change simply because one party became weaker over time. If anything, because a treaty connected the two sides together as relatives, the treaty partner who grew stronger was under an increased obligation to protect its weaker partner."; *See also*, ANAYA, *supra* note 288, at 3 (describing the disadvantaged conditions of indigenous peoples worldwide and the corresponding duties of nation-states and the world community).

327. *See* Porter, *supra* note 238, at 903 ("We [indigenous nations] are weak from the efforts taken by American before you [President Clinton] to transform our tribal societies and way of life by force. Accordingly, your help is needed to make changes over those matters that are within your control."); *see also*, Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 NAT. RESOURCES J. 85 (1998) (describing how an Alaska Native attempts to ameliorate "persistent rural poverty in Alaska villages" necessarily involves factors including culture, geography, and subsistence patterns, as well as confronting difficulties imposed by ANCSA).

328. The present Self-Governance Policy restores to tribes the ability to govern themselves, reduces federal control over decision making, and allows tribes to assume all programming previously administered by the BIA. However, it leaves intact the federal trust relationship, indicating that tribal problem-solving is not completely incompatible with federal partnership. *See* Porter, *supra* note 238, at 969-81 (criticizing the Act but noting it, "authorizes Indian nations to 'redesign or consolidate programs, services, functions, and activities,' allowing each to tailor programs to suit tribal tradition, custom, and circumstances best").

329. *See* Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 100 HARV. L. REV. 1754, 1784 n.141 (1997).

330. *See* Kathleen M. O'Sullivan, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gaming Revenue?*, 84 GEO. L.J. 123, 131-32 (1995) ("On the other hand, [Chief Justice] Marshall might have meant that the trust concept exists independently as a legal doctrine – in other words that the "trust relationship is not so much created by the treaties as it is implicitly recognized by them.... [I]f the duty inheres in the relationship between the dominant European society and the less powerful Indian tribes, the term of the duty might be infinite, and tribes might be entitled to the same level of federal protection, regardless of a particular treaty or the tribe's level of self-government, assimilation, or wealth.").

331. *See* Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) ("The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection.").

332. Some argue Congress' "plenary power" over Indian affairs would allow it to terminate the relationship with all and any tribes; in fact, Congress "terminated" several tribes in the 1950's, although some have regained federal recognition, and Congress declared the policy a failure. A scholarly debate exists as to whether there are limits on plenary power – such as Congress' duty to enact statutes rationally related to the trust responsibility, the contemporary need to reject the doctrine's origins in late 19th/early 20th century theories of Euro-American cultural superiority, and

Both the Indian nations and federal government seem committed to jointly occupying the United States for a long time to come. The Supreme Court must stop waiting for the end of the relationship between them.³³³

The *Venetie* case itself is a poignant illustration of the lingering, harmful presence of wardship in federal Indian law. ANCSA called for a land claims settlement "with maximum participation by Natives in decisions affecting their rights and property ... without creating a ... lengthy wardship or trusteeship."³³⁴ But applying their earlier precedents, the Supreme Court justices indicated they could not find Indian Country absent proof the Native Village of Venetie was dependent on the federal government for services and supervision of Village affairs.³³⁵ They wanted

the Indian canons. See, e.g., Anaya, *supra* note 307, at 131-134 (citing Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984); see also Aiken, *supra* note 168, at 150 (under the implied social contract theory, the federal promise to protect tribal self-government is a limit on federal power, "equivalent to the constitutional rights foundational to the federal-citizen relationship"); Frickey, *supra* note 298, at 407-418 (discussing Indian treaties as "constitutive documents" with attendant "quasi-constitutional clear-statement rules "immunizing" them from "a construction that would violate [their] underlying nature and purposes). It is well beyond the scope of this article to analyze the tensions between sovereignty and plenary power, except to say that in a legal regime, informed by indigenous theory and practice, the unilateral eradication of tribes, as such, by the federal government could not occur.

333. In *Venetie*, Justice Thomas relied on *United States v. Sandoval*, 231 U.S. 23, 46 (1913) which explained: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. *It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.*" *Id.* at 46 (internal quotations and citations omitted).

334. 43 U.S.C. § 1601(b)(1994). See, e.g., Shannon Work, *The Alaska Native Claims Settlement Act: An Illusion In the Quest for Native Self-Determination*, 66 OR. L. REV. at 211-216 (ANCSA reveals the perceived tension in the "self-determination without termination" Indian policy of the Nixon-era.).

335. See *United States Supreme Court Official Transcript, Oral Arguments, State of Alaska v. Native Village of Venetie*, 1997 WL 762053, at *27-31 (December 10, 1997).

QUESTION (Scalia): Ms. Kendall, what do you do with section 1601(b), in which ANCSA said that its purpose was to convey the land to the Indian people with maximum participation by Natives in decisions affecting their rights and property without establishing any permanently racially defined institutions, rights, privileges or obligations and without creating a reservation system or lengthy wardship or trusteeship?

KENDALL-MILLER: Yes, Justice Scalia. That particular provision speaks to the creation of a wardship, but it doesn't speak to the ongoing relationship that existed, and it is true that Congress, through that particular provision, announcing its policy that it was going to adopt a new approach to Indian affairs through ANCSA, and that was one that would disavow the reservation system. The reservation system is one in which the federal government owns the lands and has ultimate control over the decisions with respect to development of those lands. Keep in mind at the time that ANCSA was passed the average income of Alaska Natives was less than \$1,200 per year. They lived in dire poverty, and it was viewed to be necessary to be able to develop some kind of economic vehicle to help the Native people come into the mainstream, economic mainstream. That was the purpose, to get the villages out from underneath the Bureau of Indian Affairs' control ...

QUESTION (Scalia): Well, you say to get them out of their control. That's the whole definition of what's Indian country, whether they're within the control, wardship, and trusteeship of the government. (emphasis supplied).

KENDALL-MILLER: I disagree.

QUESTION (Scalia): It seems to me incompatible to say that you want to get them out the control, and yet you still want it to be Indian country.

KENDALL-MILLER: Your honor, section ... 1151(b), the category that covers the Indian communities, that particular category does not turn on lands being in federal ownership. It turns on a community that under the protection and guardianship of the federal government, and that's what we have today with respect to Venetie.

QUESTION (Scalia): Dependency. Dependency to the federal government, which is what you're just telling me they were trying to eliminate.

KENDALL-MILLER: Not the dependency, the BIA control over development issues of their land. The dependency relationship stayed intact and in fact was confirmed by the Congress in the 1994 federally recognized, -Tribal List Act, where Congress expressly affirmed its ongoing relationship to all federally recognized tribes, including Venetie, and that fact fundamentally undermines all of petitioner's arguments, because from that was two important points, the first

Venetie to explain how it could be a ward when ANSCA ended wardship. Venetie acknowledged the federal government no longer owned held Venetie's lands in trust, but explained Venetie remains politically dependent on the federal government as evidenced by its status as a federally recognized Indian tribe, entitled to the political protections provided by that status.³³⁶ Further, the federal government exercises supervisory powers by providing to Venetie various monies and programs like the Indian Health Services, the Housing and Urban Development Indian Housing Project, and the Administration for Native Americans.³³⁷ When the State countered that Alaska Native communities were "well-off" and "not dependent on the federal or territorial government for their existence," Venetie responded:

Though legally irrelevant, this all too sadly is not true. When ANCSA was considered Alaska Natives lived in dire poverty. The median age of death was 34.5 and Native infant mortality for some age classifications was 12 times the rate for the general population. The median village cash income for working Natives was \$1,204 (a quarter of the white rate), Native unemployment stood at 60 percent, and only 8 percent of Natives completed high school. Unfortunately, today Native villages remain plagued by poor health, unemployment, welfare dependence, suicide, poor education, disproportionate incarceration, and substandard or nonexistent housing and basic water and sewer service. Estimated 1968 federal "Indian program" expenditures "chiefly" for Alaska Native villages were \$43 million, and today exceed 10 times that sum.³³⁸

But it was not enough to show Venetie relied on the federal agencies' provision of basic social services, or that Venetie was engaged in an ongoing political relationship with the United States.³³⁹ Rather Venetie had to show it was the ward and the federal government was the guardian. As Justice Scalia put it, "That's the whole definition of what's Indian country, whether they're within the control, wardship, and trusteeship of the government."³⁴⁰ For a native community that survived because of its self-sufficiency, owns its land in communal fee simple, and engages in self-government,

that the continuing guardianship means that Congress a trustee cannot terminate something as important as rights that Venetie possessed before 1971 without expressly saying so. Second, the guardianship relationship goes to two of the important components necessary to establish Venetie's character as a dependent Indian community. You need that the tribe that's under federal protection and you need an area that is occupied by tribe under federal guardianship....

336. See *Resp. Br.*, *supra* note 16, at 7-8 n.6. Alaska Native villages deal with the United States according to the nation-to-nation relationship in which the federal government protects and enhanced native self-governance and institutions.

337. See *id.* at 25-27.

338. *Id.* at 15 n.13.

339. See *Venetie*, 118 S.Ct. 954 n.5: "[T]he tribe asks us to adopt a different conception of the term 'dependent Indian communities.' Borrowing from Chief Justice Marshall's seminal opinions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, the Tribe argues that the term refers to its political dependence, and that Indian country exists wherever land is owned by a federally recognized tribe. Federally recognized tribes, the Tribe contends, are 'domestic dependent nations', and thus ipso facto under the superintendence of the Federal Government.... 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." (citations omitted).

340. United States Supreme Court Official Transcript, Oral Arguments, *State of Alaska v. Native Village of Venetie*, 1997 WL 762053, at *28 (December 10, 1997).

proving wardship presented an impossible task.³⁴¹ Unsurprisingly, the wardship argument did not prevail in Justice Thomas' disposition of the case. He wrote:

ANCSA ended federal superintendence over the Tribe's lands by revoking all existing Alaska reservations but one ... and by stating that ANCSA's settlement provisions were intended to avoid a 'lengthy wardship or trusteeship'.... The Tribe's contention that such superintendence is demonstrated by the Government's continuing provision of health, social, welfare, and economic programs to the Tribe is unpersuasive because those programs are merely forms of general federal aid, not indicia of active federal control. Moreover, the argument is severely undercut by the Tribe's view of ANCSA's primary purposes, namely, to effect Native self-determination and to end paternalism in federal Indian relations.³⁴²

Justice Thomas' belief that self-determination diminishes the trust relationship is itself "severely undercut" by the fact the Indian Self-Determination Act itself *preserves* the trust relationship³⁴³ and requires the Act be construed according to the canons of federal Indian law, in favor of Indian contractors.³⁴⁴ Congress did *not* envision that assertion of tribal rights, such as exercising jurisdiction over tribal lands, would be contingent on showing federal control. Neither did Congress preclude application of the Indian canons when a statute affects a tribe that is not totally dependent on the federal government. Only the wardship version of the trust relationship could lead to such conclusions.³⁴⁵

341. See *id.* (Despite the Justices' fixation on dependency, Ms. Kendall-Miller did not hide Venetie's strengths, distinctiveness, and non-ward-like qualities):

KENDALL-MILLER: But that [acting like a municipality] would be an act of assimilation. Venetie is a federally recognized tribe, and it has been governing its own community and its own affairs since time immemorial.

QUESTION (O'Connor): Well by becoming a municipality under state law would it give up control, or wouldn't it continue to exercise control?

KENDALL-MILLER: It would give up its culture. It would be assimilated into the state and it would for, it would relinquish, it would be forced to relinquish its viable Native governing entity that it has utilized and is an entity that has been recognized by the federal government as existing and that is entitled to all the same benefits and protections as other federally recognized tribes. A municipal government is not one that is necessarily compatible with decision-making of tribal governments. The Venetie people make their decisions by consensus- by looking to their tribal elders, by sitting down together and conferring upon the problems.

342. See *Venetie*, 118 S.Ct. at 950.

343. See H.R. Rep. No. 93-20 (1974), reprinted in 1974 U.S.S.C.A.N. 7775, 7781.

344. See 25 U.S.C. §450(l)(a)(2)(1994) ("each provision of the Indian Self-Determination Act shall be liberally construed for the benefit of the contractor.").

345. And the wardship version of the trust relationship certainly influenced Justice Thomas. Consider the characterization of Indian "dependency" in *United States v. Sandoval*, 231 U.S. 28 (1913), one of the main cases he relied on in defining "dependent Indian community." In *Sandoval*, at 38-41, the Court's decision as to "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 notwithstanding the admission of New Mexico into statehood, relied on "the reports of the super-intendents charged with guarding their interests [which] show that they are dependent upon the fostering care and protection of the government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants." The Court quoted *extensively* from the reports which are too lengthy to reproduce here. Reading the description of Indian dependency and federal "superintendence" in *Sandoval* makes me wonder if Venetie is not a "dependent Indian community" because, in the 1990's, no government official had described the tribe in the racist, derogatory, and xenophobic terms used by the superintendents to describe the Pueblos in the 1910's.

We must expose the ridiculous irony of requiring tribes to prove they are wards before they can exercise basic governmental powers. Tribes should not have to aspire to a certain degree of neediness, vulnerability, or poverty in order to assert jurisdiction over lands they occupy.³⁴⁶ On a policy level, the dependency scheme is blatantly at odds with the current Congress' goals of promoting tribal self-determination, self-governance, and economic recovery. From an evidentiary perspective, it is unreasonable to make tribes produce examples of their dependence on federal government supervision when, for hundreds of years, the federal government has shirked its responsibilities to tribes. Playing the wardship game is also dangerous in a political climate where some legislators are eager to reduce federal responsibilities to tribes deemed less "ward-like."³⁴⁷

Wardship is theoretically unsound, misrepresents historical and contemporary Indian experiences, and violates contemporary values. When tribes pander to wardship they suffer real legal, economic, and cultural consequences. It is time to kill wardship.

ii. Reconsidering Trust & the Indian Canons

For purposes of this article, the biggest problem with "wardship" is that it suggests the federal government's trust responsibilities, such as application of the Indian canons, may be terminated, or at least weakened, when and if the Indians escape their perceived state of incapacity.

The typical justification of the canons ... often reflects a sometimes hidden, sometimes overt ethnic and cultural paternalism. Principles of legal thought and practice that are based in a paradigm of wardship will have to be reconsidered in an era of resurgent political sovereignty on the part of Indian peoples. The canons of federal Indian law, if based in wardship, would be put at risk if that wardship

346. While acknowledging the real problems and conditions of Indian tribes, advocates cannot pander to such an unworkable scheme, particularly in a climate where lawmakers would like to reduce federal responsibilities to tribes that are less ward-like. The federal programs for Indians derive from treaty promises, statutory law, and other elements of the trust responsibility; the federal government cannot shirk its obligations simply because Indians are not poor, or otherwise "wards." See, e.g., William Claiborne, *At Indian Affairs, A Tough Act to Balance*, WASH. POST, November 17, 1998 (In 1998 there was "a controversial means-testing proposal by [U.S. Senator Slade] Gorton [R-WA] that would gut federal Priority Allocation funding to tribes that have become wealthy through casinos and other business enterprises, taking half the funds from the richest 10 percent of the tribes and giving it to the poorest 20 percent. The measure was aimed at reducing allocations to tribes such as the Mashantucket Pequot of Connecticut, whose Foxwoods Casino, the largest in the Western Hemisphere, earns more than \$1 billion a year.").

347. See, e.g., William Claiborne, *At Indian Affairs, A Tough Act to Balance*, WASH. POST, November 17, 1998 (In 1998 there was "a controversial means-testing proposal by [U.S. Senator Slade] Gorton [R-WA] that would gut federal Priority Allocation funding to tribes that have become wealthy through casinos and other business enterprises, taking half the funds from the richest 10 percent of the tribes and giving it to the poorest 20 percent. The measure was aimed at reducing allocations to tribes such as the Mashantucket Pequot of Connecticut, whose Foxwoods Casino, the largest in the Western Hemisphere, earns more than \$1 billion a year."). Such tactics and threats pit Indian peoples against each other in a dismal competition for resources and federal attention – it is not uncommon to hear some tribal peoples criticizing wealthier gaming tribes as being "less Indian" than other tribes, or to witness membership disputes wherein enrolled members keep out others who would share in resources. These tactics also provide obvious disincentives to tribal economic growth. Through such wardship policies, the federal government continues to divide and conquer tribes, and invidiously encourages tribes to divide and conquer themselves.

were repudiated in favor of less paternalistic relations between the tribes and other governmental institutions of the United States.³⁴⁸

Indigenous Indian law cannot tolerate that ongoing reliance on the wardship justification for the canons puts Indians and their advocates in the impossible position of having to prove enough Indian dependency/federal control every time they assert tribal rights. Although the canons are certainly applicable when tribes rely on federal Indian legislation and programs, there is no reason to *limit* application of the Indian canons to situations where tribes act as "wards" dependent on the United States as "guardian."³⁴⁹

The "appropriate justification for the canons is that they reflect the sovereign-sovereign relationship of tribes within the United States."³⁵⁰ With the benefit of indigenous Indian law our understanding of the sovereign-sovereign relationship is informed by the principles of trust and self-determination. *Cherokee Nation* and *Worcester* were the Supreme Court's first formulations of an ongoing relationship between Indian nations and the United States, and were also the cases that gave rise to the Indian canons. Revisiting these cases in light of the principles of trust and self-determination makes clear that application of the Indian canons does not depend on the wardship version of the trust relationship.

In *Cherokee Nation*, Justice Marshall concluded the Supreme Court did not have original jurisdiction over the action because the Cherokee Nation was not a "foreign nation" for purposes of Article 3 of the Constitution. The tribes were "distinct political communities" participating in "unique" relationship with the United States. This relationship "resembled" that of a "ward to his guardian." Marshall elaborated:

348. Steiner, *supra* note 187, at 16 (emphasis supplied). He notes the law of nations justification for the canons is not diminished when indigenous peoples are not wards and in fact may be more consistent with enhanced respect for Indian tribes on the part of those other governmental institutions. The "law of nations" refers to 18th century international law. Steiner argues that the Indian canons are based in this international law "and... are a reflection of the rights of the Indians as the original possessors and occupiers of the land and the obligations one sovereign owes to another. This argument "necessarily contributes to the resuscitation and reinvigoration of the notion of Indian sovereignty. It both recognizes and participates in the emergence of an alternative conception of Indian legal identity as indigenous peoples, subjects of international law and yet confederated the United States, an image that escapes the trap of pupillage and dependency." *Id.* at 17.

349. Looking like wards is particularly difficult in light of present Indian policy. In contrast to prior successive policies of conquest, relocation, assimilation, termination, and urbanization, the current policy of the federal government to Indian tribes is one of self-determination for tribal sovereigns engaged in a nation-to-nation relationship with the United States. *See, e.g.,* Resp. Br., *supra* note 16, at 16 ("Beginning in the 1960's, both Congress and successive Presidents moved Native American policy into the 'Self-Determination' era, a policy most clearly articulated by President Nixon's 1970 Special Message to Congress on Indian Affairs. The President's policy... called upon the Federal Government to 'explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska Native governments... The new congressional Self-Determination policy has consistently been to renounce federal paternalism, protect Native control over Native resources, promote Native economic development, strengthen tribal institutions, and expand federal Indian programs and the opportunity for tribes to operate and redesign those programs, all while preserving the federal-tribal trust relationship." (citations omitted). The current policy toward Indians, therefore, is inconsistent with a notion of trust in which Indians are wards. Rather, it insists on a continued trust in which tribes can act independently *and* in cooperation with the federal government to ensure their continued existence.

350. Philip P. Frickey, *Divestiture of Indian Tribal Authority*, 109 YALE L.J. 1, 78 n.362 (1999) (describing that the justification for the canons is not "application of a principle favoring discrete and insular racial minorities").

[The Cherokees] look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility.³⁵¹

Reflecting elements of both indigenous³⁵² and international law,³⁵³ this "protection" of Indian tribes by the federal government would not compromise tribes' inherent sovereignty. In *Worcester v. Georgia*, Chief Justice Marshall explained:

[Tribes are] distinct, independent political communities... and the settled doctrine of the law of nations, is that a weaker power does not surrender its independence – its right of 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.³⁵⁴

Marshall was guided by the responsibility of the federal government to protect the Cherokee Nation and by the ongoing sovereignty of the Cherokee Nation.

The Cherokee Cases continue to be cited as the source of the Indian canons.³⁵⁵ The question in *Cherokee Nation* required interpretation of the Treaty of Hopewell between the Cherokee Nation and the United States. Attempting to apply its laws over the Cherokee Nation on grounds the Cherokee Nation had surrendered its inherent sovereignty, the State pointed to the Treaty provision "allott[ing]" Cherokee Territory. Under the State's interpretation, "allotment" meant that the land had been given to the Cherokee Nation by the U.S., and was distinguishable from the term "marked out" which would mean that the Territory has been demarcated by a

351. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1,17-18 (1831).

352. See WILLIAMS, *supra* note 261, at 183 n.44 (Explaining Marshall was using the "patriarchal terminology that white Americans of his generation typically used in translating the language of Indian forest diplomacy" when he used terms like "ward" and "guardian."). As discussed earlier, Cherokee kinship terms translated as "elder brother" and "younger brother" were used in diplomacy to explain the relationship between the colonial governments and Cherokee Nation. It is interesting that Marshall used the term "father" here, perhaps another meaning lost in translation or a deliberate attempt to change the nature of the relationship.

353. Chief Justice Marshall relied on Swiss international law scholar Emmerich Vattel when he described this protectorate relationship. See *id.* at 561 ("Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and eign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.").

354. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-560 (1830).

355. Cf. JOHANSEN, *supra* note 178, at 5-6 ("The Constitution says nothing about "domestic dependent nations," "trust responsibility," or "wardship." ... When Justice Marshall laid the foundation for domestic dependent tribal status, he "may have intended neither 'wardship' or 'trust' as legal doctrines. He was trying to salvage a degree of sovereignty for the Cherokees and other peoples who were about to be removed to Indian territory....").

boundary separating it and another political boundary. Marshall disagreed, stating that it was not "reasonable to suppose, that the Indians, who could not write and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.'"³⁵⁶

In the concurring opinion, Justice McClean provided what has become the "classic formulation of the canon."³⁵⁷ According to McClean:

"The language used in treaties with Indian 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."³⁵⁸

Worcester, therefore, realized rules of statutory construction favoring Indians should serve as a tool when the federal government acts in fulfillment of its trust relationship.

True to their origins, the canons grow out of trust and reflect the roles of the federal government and Indian tribes in the trust relationship.³⁵⁹ Indigenous Indian law has expanded our understanding of that relationship. Historically, the Supreme Court has, at times, conceived of the trust relationship as a wardship, and the Court's formulation of the canons has sometimes reflected that notion. And whenever tribes *are* dependent on the federal government,³⁶⁰ the canons should certainly apply, consistent with federal Indian law. This does not mean, however, that the canons are *limited* to contexts in which the federal government perceives tribes are acting as wards. Indigenous Indian law shows the canons apply whenever Indian nations deal with the federal government pursuant to the trust relationship, no matter what degree of dependency happens to exist at a particular point in the course of that relationship.³⁶¹

356. See *Worcester*, 31 U.S. at 552.

357. Heinecke, *supra* note 174, at 1026.

358. *Worcester*, 31 U.S. at 582.

359. *But see* Steiner, *supra* note 187, at 34 ("Trusteeship cannot be the basis for the canons, since the canons predate the trusteeship doctrine... Though particular treaties, or an aggregation of treaties, might be read to establish a trustee relationship... it is not clear that a treaty must be read as if it were negotiated under the terms of a relationship that does not exist until after the treaty is ratified. Furthermore, why should a trustee relationship bind the guardian to the opinions of the ward... A trustee is given a fiduciary responsibility over the interests of a ward that cannot be disposed of simply due to the wishes, beliefs, or opinions of the ward."). Although I appreciate Steiner's critique of the trust responsibility, I think he fails to move trusteeship out of the 19th century. If the trust relationship is illuminated in terms of the contemporary principle of self-determination, and if the canons apply to statutes and regulations which grow out of the trust relationship, it is relevant today and avoids paternalism and other negative elements of "wardship."

360. As Professor Porter has argued "colonization has partially succeeded in destroying Indian nations." See Porter, *supra* note 238, at 953. Indigenous Indian law acknowledges all tribes are probably dependent on the federal government to some extent. States, corporations, and foreign nations, too, could all be described as "dependent" on the U.S. government. The challenge is to develop a real understanding of the tribal-federal relationship without relying on the wardship model.

361. See Aiken, *supra* note 168, at 149, 151: "Because, as recognized by Chief Justice Marshall, 'it is inconceivable that [the Indians] could have supposed themselves ... to have divested themselves of the right to self-government,' and because the reach of state laws and regulations into Indian Land is both a form of encroachment on the land and a divestiture of self-government, it is arguable that the right to self-government was included in the rights the Indians believed the United States to have undertaken to protect. The canon of construction requiring that treaties be interpreted

Some federal Indian law scholars debate whether the Indian canons apply beyond *treaty* interpretation. Felix Cohen's Handbook of Federal Indian Law recognizes:

[The Indian canons] have been applied to situations which do not involved treaties. The essential policy for the development of the canons in treaty cases was not based on the form of the transaction, a treaty, but rather was rooted in the special trust relationship between the United States and Indian tribes. In addition, in implementing the federal-tribal relationship Congress has not drawn distinctions between treaty tribes and nontreaty tribes. Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights.³⁶²

However, the Handbook then suggests at least one of the canons might not apply in instances where Indian participation in lawmaking is limited:

The only apparent exception to the extension of treaty rules of construction to nontreaty situations involved the rule that treaties should be construed as the Indians would have understood them. That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders and statutes, neither of which directly involve negotiations with the tribes.³⁶³

A contrasting model suggests that treaties, statutes, regulations, and executive orders are *all* elements of lawmaking that accommodate the interests of affected groups and individuals, most often the federal, state and tribal governments, as well as private individuals and corporations.³⁶⁴ Under this model, treaties and statutes are not completely different beasts, and indigenous peoples, as well as other affected parties, have legitimate interests in participating in both.

I have discussed that under indigenous Indian law, the trust relationship is informed by the principle of self-determination. And self-determination means Indians "should be in control of their own destiny, and that systems of government should be devised accordingly, and not imposed upon them by alien domination."³⁶⁵ The United States has recognized self-determination's importance for indigenous

as the Indians would have understood them, mandates adopting the Indians' understanding of the obligation undertaken by the United States in its early treaties with the Indians.... The tribal right to self-government, as foundational right in the federal-Indian relationship, is equivalent to the constitutional rights foundational to the federal-citizen relationship [where the right of a citizen to be secure in his home is like the right of a tribe to be secure on its reservation].... Because the government's trust obligation is not based on the individual treaties or on Congressional power, but rather on rights inherent in the federal-Indian implied social contract, that obligation binds all branches of government, imposing an obligation on the Court to enforce tribal rights" (emphasis added).

362. COHEN, *supra* note 25, at 223.

363. *Id.* at 224 n.60.

364. See Frickey, *supra* note 330, at 1757; see generally ANAYA at 134-150.

365. WILLIAMS, *supra* note 261, at 51.

peoples in international settings³⁶⁶ and expressed its basic support for the U.N. Draft Declaration on the Rights of Indigenous Peoples³⁶⁷ which states:

“Indigenous people have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.”³⁶⁸

Because Indian involvement will advance indigenous self-determination, it must occur in all lawmaking which affects Indians.

Self-determination requires "belated state-building" though negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups.³⁶⁹ As Professor Erica-Irene Daes, the chair of the United Nations Working Group on Indigenous Populations, has explained self-determination entails a lawmaking process:

. . . through which indigenous peoples are able to join with all the other peoples that make up the state on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the state, on agreed terms.³⁷⁰

Under the policy of self-determination, therefore, Indian tribes should participate in lawmaking without relinquishing their special status. If the resulting statutory enactment or negotiated settlement has vague or ambiguous terms,³⁷¹ there is no reason why the Indian canons should not govern interpretation of the document, consistent with the trust relationship.

If Indians and the federal government are engaged in an ongoing trust relationship informed by the principle of self-determination, Indian involvement in interpretation must occur in ways which are meaningful – culturally, socially, linguistically, spiritually, and economically. Perhaps the Indian canons, tools of judicial interpretation, can inspire direct involvement of Indians in Indian law.³⁷² The

366. ANAYA, *supra* note 288, at 86 (The United States government delegation to the 1994 session of the [United Nations] working group [on the rights of indigenous peoples] ... stated "since the 1970's, the U.S. Government has supported the concept of self-determination for Indian tribes and Alaska Natives within the United States.").

367. *See id.*

368. U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 304, at 105.

369. *See* ANAYA, *supra* note 288, at 87.

370. *Id.*

371. ANCSA itself is an example of a negotiated settlement, now enacted as a federal statute, which contains vague or ambiguous language.

372. Native involvement in interpretation is accepted by the Supreme Court of Canada. However, the Court seems to waffle on the degree to which that interpretation is involved. *See, e.g.,* John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 45-46 (1997) (observing that in *R v. Vanderpeet*, 137 D.L.R.4th 289, (Can. 1996), the Court "noted that it must consider the perspective of Aboriginal peoples themselves on the meaning of the rights at stake... [but] that the Aboriginal perspective must be 'framed in terms cognizable to the Canadian legal and constitutional structure.'" Borrows also points out that dissenting Justice

canons dictate that ambiguous laws be construed liberally in favor of the Indians, as the Indians would understand statutory language, and as reserving Indian rights. Why cannot judges and agency officials faced with construing a vague Indian statute actually *ask* tribal leaders and memberships what they would view as a liberal construction, how they actually understand statutory language, and what reserved rights mean according to historical and contemporary tribal perspectives.

In accordance with indigenous people's constitutive and ongoing self-determination, Indian participation should also occur at the points of statutory drafting and administration. Legislators drafting new statutes and administrators implementing them must solicit, address and encompass Indian knowledge. Several provisions of domestic and international law can be used to support increased Indian participation in law making consistent with self-determination. Statutes such as the Indian Self-Determination Act (1974),³⁷³ Indian Financing Act (1974),³⁷⁴ the Indian Child Welfare Act (1978),³⁷⁵ the Indian Tribal Justice Act (1993),³⁷⁶ and the Native American Graves and Repatriation Act (1995),³⁷⁷ and Executive Order 13084 (1998)³⁷⁸ have confirmed self-determination and tribal self-governance as a national policies. While helpful in certain substantive areas, these laws have not led to widespread efforts to involve Indians in lawmaking.³⁷⁹ Domestic policy may be reinforced by international law's call for indigenous participation in lawmaking, as expressly affirmed in documents such as the International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries (1989) and the Draft United Nations Declaration on the Rights of

L'Heureux-Dube stated, "I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the native when defining Aboriginal rights." *Id.* at n

373. The Indian Self-Determination Act, 25 U.S.C. § 450 (1994), provides: "(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." (emphasis added).

374. 25 U.S.C. §§ 1451-1534 (1994).

375. 25 U.S.C. §§ 1901-1963 (1994).

376. 25 U.S.C. §§ 3601-3631 (1994).

377. 25 U.S.C. §§ 3001-3013 (1994).

378. See Exec. Order 13084, *supra* note 332.

379. See Porter, *supra* note 238, at 981-84 (Some efforts to involve Indian tribes and individuals in lawmaking have been made by the Department of Justice, Environmental Protection Agency, Department of Health and Human Services, and Energy and Commerce Departments.). Professor Porter points out that administrative efforts to strengthen tribal sovereignty may be doomed from the beginning. "The problem with federally sponsored programs— even those that originate with tribal requests— is that the federal 'solutions' can only be conceived of in terms of activities in which the federal agency already engages, e.g., enforcing federal, laws commanding the states, and providing funding for federally-defined priority programs." *Id.* at 985. I agree with Professor Porter that "the federal government can[not] actually make the Indian nations more sovereign." *Id.* Nonetheless, I believe Indian involvement in lawmaking is still essential to prevent the unilateral imposition of laws that harm Indian communities, and possibly, to enact and implement laws, that, while federal in origin, reflect indigenous needs and cultures.

Indigenous Peoples (1993).³⁸⁰

Indigenous involvement in lawmaking is consistent with domestic and international law, and may lead to workable local solutions, trust between Indians and the federal government, and increased legitimacy of legal institutions in Indian communities – elements desperately needed to improve today's Indian affairs.³⁸¹

iii. Possible Criticisms of Indigenous Indian Law

Before moving on to practical applications of indigenous Indian law for the Indian Country in Alaska problem, I want to address several possible criticisms: First, the non-Indian legal community may not be trained to practice law from indigenous perspectives. Second, federal courts are even less likely to apply indigenous Indian law than federal Indian law. Third, indigenous Indian law leaves out the concerns of non-Indians. Fourth, indigenous Indian law is wildly strange and unlikely.

As to the first issue, there are many practical problems of interpreting Indian cultures in legal and other contexts, and lawyers must tread lightly in this area.³⁸² Under the principle of self-determination, indigenous community leaders should make choices about how to participate in lawmaking; the decision about whether and how to present indigenous interpretations of the law is one of those choices. Lawyers, courts, legislators, and executive agencies are generally unequipped and unprepared to properly *hear* indigenous interpretations of the laws that affect indigenous peoples,

380. Reproduced in ANAYA, *supra* note 288, at 193-204, 207-16. For a concrete discussion on the United States' position on these, and other documents of international law, *see generally*, Dean B. Suagee, *Human Rights of Indigenous People: Will the United States Rise to the Occasion?*, 21 AM. INDIAN. L. REV. 365 (1997).

381. For example, recent developments in the attempt to deal with the BIA's historic mismanagement of billions of dollars in Indian trust funds illustrate how federal-Indian relations are crying out, literally, for more "trust." First, the special trustee appointed to clean-up the accounts of 300,000 Indians quit, claiming Interior Secretary Bruce Babbitt reorganized the trustee's office and deprived him of authority and resources. Next a federal district court judge held in contempt Babbitt, Treasury Secretary Robert Rubin, and Assistant Secretary for Indian Affairs Kevin Gover for failure to produce certain documents in the suit alleging mismanagement, and Babbitt apologized to the court for the government's failures. Federal and tribal representatives then tried to engage in talks about the problems. But on March 3, 1999, Interior officials cancelled a meeting with tribal leaders after Indian leaders and members of Congress criticized their work. As reported in the Associated Press: "(You can't call me a liar in the morning and that afternoon ask me to trust you, said Gover, himself an Indian. We're not sure there is enough trust between the two parties to continue to negotiate without some kind of congressional involvement.) Tribal leaders say his response was childish. (I came 1,400 miles to give the testimony and meet with the Bureau of Indian Affairs. They told us their feelings were hurt and they didn't want to meet,) said Charles Tillman, chief of Oklahoma's Osage Nation." Philip Braser, *Interior Officials End Indian Talks*, 1999 WL 13837889 (March 12, 1999).

382. These include problems of language, context, culture, authority, legitimacy, and power, to name only a few. The act of offering Native perspectives raises questions such as: "Does the speaker want to be cited?" "What was lost in translation – whether from Native language to English, from oral to written stories, from Native to non-Native context?" "For what purpose is this testimony provided? Whose community is served?" "What are the short and long-term repercussions?" In cultures where spoken words are powerful and everything powerful is respected, it is crucial to treat testimony, stories, and interpretations carefully. These issues were considered at Yale University, in "Translating Native American Cultures: A Conference on Representation, Aesthetics, and Translation," February 6-8, 1998. The presentations of American Indian and Alaska Native scholars suggested that problems of interpretation must be addressed by indigenous communities themselves. If scholars are to be involved, they should engage in interdisciplinary efforts that include linguistics, history, anthropology, and religion. Lawyers should keep in mind the various types of "experts" who may bring wisdom to this subject.

and Native communities are sometimes reluctant, unable, or unwilling to provide these interpretations.³⁸³ In fact, Professor Frickey has argued that the problems involved in presenting indigenous perspectives to non-Indian legal institutions may be prohibitively large:

One obvious problem with theoretical reconceptualizations of federal Indian law that have practical impact as a goal is that they must appeal to the legal elite – which is, of course non-Indian. For example, Robert A. Williams, Jr. has demonstrated that indigenous practices and values have influenced federal Indian law, and under a broader conception of the field, should influence it more substantially in the future. But how can any transformation of the field occur when judges, cabined by the blinders of precedent, will dismiss such indigenous aspects as irrelevant, and when (largely non-Indian) scholars, though often sympathetic, will have difficulty identifying the Indian side of the story, much less integrating it into conceptual arguments for reform of the field? Scholars may exhort judges to hear the other side of the story, but may know too little about that side themselves, and thus may offer only abstract (and ultimately hollow) exhortations to think about things from the Indian perspective.³⁸⁴

Although the cautions are important, we should not throw in the towel too quickly here. Indian attorneys who may have the advantages of familiarity with tribal languages, community ties, and education in traditional worldviews and practices often *do* understand the other side of the story.³⁸⁵ They can and should address themselves to the difficult task of assisting clients who seek to present indigenous perspectives.³⁸⁶ Numerous Indian scholar-practitioners already incorporate indigenous perspectives in their work.³⁸⁷ And several non-Indian scholars have sensitively provided legal analyses that allows indigenous peoples to speak for themselves.³⁸⁸

383. See, e.g., Gerald Torres and Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628-30, 658 (1990); James Clifford, *Identity in Mashpee*, reprinted in JO CARILLO, ED., READINGS IN AMERICAN INDIAN LAW 19-26 (1998) [hereinafter CARILLO].

384. Frickey, *supra* note 330, at 1778 (emphasis added).

385. See STRICKLAND, *supra* note 262, at 115-118 (Although "being an Indian is also no guarantee of wisdom of legal policy or purity of motive, ... there is one area in which I think law-trained Indians can be of value. You, as an Indian lawyer, can convince both whites and Indians that the way of the statute book and the municipal court is in no way inherently superior to the way of the wampum belt and the warrior society; in fact, Indian ways may be superior in many respects."). However, Strickland also offers a warning: "Not only have Indian people been treated with indifference by governmental organizations, but the legal profession has too often behaved rather badly itself. On balance, the record of the relationship of lawyers and Indians has not been altogether an ennobling one."

386. See, Robert B. Porter, *Tribal Lawyers as Sovereignty Warriors*, 6-WTR KAN. J.L. & PUB. POL'Y 7, 9-11 (1997) (discussing the role of tribal lawyers as having "unique duties and responsibilities in comparison to non-tribal lawyers in private and governmental practice").

387. See, e.g., Borrows, *supra* note 372; Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIGATION 461 (1994); Chadwick Smith and Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 TULSA L.J. 263 (1993), and the works of S. James Anaya, Lorie M. Graham, Robert B. Porter, Rennard Strickland, Gloria Valencia-Weber, Robert A. Williams, Jr., Justice Robert Yazzie, and Christine Zuni, to name a few. Note also the effort of Venetie's lawyers to include Native testimony as appendices to their briefs to the Supreme Court of Alaska.

388. See, e.g., Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 1-2 (1996). Discussing tribal court jurisdiction, Professor Singer acknowledges the importance of Crazy Horse in terms of tribal culture and contemporary experience, stating, "Liquor has been a

Further, the closed-mindedness of attorneys and judges should not lead us to abandon the Indian perspective; rather it should suggest educating the ignorant to whatever extent possible. The question of professional responsibility in Indian law is a complex one, but it is wrong to excuse lawyers who ignore the legal traditions of their indigenous clients.³⁸⁹

Second, the best approach to dealing with the federal courts is to avoid them. Litigation over Indian law issues often ends up at the Supreme Court where the tribes usually lose. Even if tribes "win," the adversarial process may exacerbate, rather than mediate, relations with non-Indian neighbors. And finally, when they turn first to the federal courts,³⁹⁰ tribes perpetuate the fallacy of the white man's Indian law that federal, rather than indigenous, institutions offer the best answer to their problems.³⁹¹ Instead, tribes first should examine various forms of dispute resolution, including their own traditional methods, those of other tribes, and mainstream arbitration to see whether they might offer a more effective and less costly solution, in both human and economic terms. As Professor Frickey has pointed out, tribes are already choosing negotiation over litigation in many instances.³⁹²

On the other hand, if litigation becomes unavoidable, which it often does, tribes can take some assurance in the fact some domestic and international courts have begun to admit, analyze, and understand Native perspectives,³⁹³ including

scourge on Indian people. The devastating effects of alcoholism and fetal alcohol syndrome for Indian people are horrific. In the face of these facts, the Hornell Brewing Company has chosen to name one of its beers after Tasunke Witko, known in English as 'Crazy Horse.'... Tasunke Witko was one of the great spiritual and political leaders of the Sioux Nation. To allow the name of Crazy Horse to be used to sell liquor suggests that he has no 'relatives who can stand up for him.' Professor Singer cites the complaint brought by tribal members for the cultural relevance of "relatives" and the work of a leading Indian scholar on the problems of alcoholism — raising these crucial points without appropriating or silencing Indian voices.

389. The Model Rules of Professional Conduct provide, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997). The Comments to the Rules specify that when a lawyer lacks certain background knowledge or skills, s/he can still "accept representation where the requisite level of competence can be achieved by reasonable preparation." Making an effort to become reasonably knowledgeable about indigenous perspectives as they inform the representation of indigenous clients is consistent with the rules. See Porter, *supra* note 387, at 10: "Because of its important role in the lives of all native people, the tribal lawyer must have a mastery of this area [federal Indian] of the law. So, too, must the tribal lawyer master his or her client's tribal laws. This is often more of a challenge, because these laws may not be written down. Indeed, many of these laws may not even look like laws and may be in the form of custom, legend, story, and myth. Thus, a tribal lawyer presented with a problem while drafting his or her client's family law must look to the underlying legal tradition within the community, rather than, say, to the state code."

390. Tribal courts are a whole different story, not discussed here, except to acknowledge the Native Village of Venetie first tried to collect its tribal tax in tribal court — and look where it ended up. See generally, POMMERSHEIM, *supra* note 35, at 57-139, for a discussion of tribal courts and principles of comity that should inspire state and federal courts to defer to tribal adjudications.

391. See Frickey, *supra* note 330, at 1783 ("In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication.").

392. See *id.* at 1784 n.141.

393. See, e.g., *United States v. Abeyta*, 632 F. Supp. 1301, 1302, 1308 (D.N.M. 1986) (holding Abeyta's taking of eagle feathers in circumvention of the EPA "is a lawful and protected expression of religious liberty secured by the Treaty of Guadeloupe Hidalgo and by the first amendment to the United States Constitution" and the procedures required under the EPA "invade the private, even secret, province of Indian religious conviction and offend the ancient tradition of pueblo religious independence."). Judge Burciaga's reasoning relied heavily on Isleta tradition: "In its ritual and reverent use of eagles and their feathers in religious ceremony, the Katsina Society is indistinguishable from myriad pueblo religious fellowships. The central tenets of ancient Indian religious faith are shared among New Mexico's

traditional oral stories.³⁹⁴ Tribal advocates can advance an indigenous Indian law argument if their tribal clients believe this is a good approach and want to participate in preparations. I do not suggest abandoning a winning, mainstream legal position. In briefs and oral arguments to today's courts, lawyers should present indigenous Indian law *as additional support* for more conventional arguments; in this case, lawyers might first present the administrative law argument, then discuss how it is enhanced by federal Indian law, and how both are consistent with indigenous Indian law.

Third, I anticipate that states and non-Indian individuals may point out that they, too, are often affected directly or indirectly by laws enacted for the benefit of Indians. They may wonder why I do not discuss enhanced opportunities for their participation in the lawmaking process.³⁹⁵ Ideally, the representation of Indians in all legal processes will result in a more complete law making, not the disenfranchisement of other groups. Indians should reach out to marginalized peoples and local neighbors. But they should also remember that their legal arguments differ from other groups. Arguing for enhanced opportunities to affect the legal process, Indian nations rely on the federal trust relationship between Indian nations and the United States, not on racial or other minority status.³⁹⁶ Finally, Indian involvement in lawmaking might

pueblos and, of all birds, the eagle holds an exalted position in all pueblo religious societies. . . The ceremonial use of the feathers is especially important at the winter solstice. Then the Katsina, or spirit of life, and the eagle the embodiment of the overseer of life are the central forces in pueblo religious belief. . . Without such feathers, the religious purposes of the solstice ceremonies are defeated and a cardinal sacrament of the Isleta people is forfeited." *Id.*

394. See *Delgamuukw v. British Columbia*, 3 S.C.R. 1010, 1067, 1071 (1997), in which the Supreme Court of Canada considered: "The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one – and not necessarily the most important – element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time. . . The *adaawk* and *kungax* of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judges as a 'sacred official litany, or history, or recital of the most important laws, history, traditions and traditional territory of a house.'" (citations omitted). *Id.* This detailed evaluation of indigenous perspectives on oral tradition contributed to the conclusion: "A court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because the evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case." *Id.*

395. Anxiety that Indians will take over the legal systems seems real – no matter how remote as a practical reality. See *Singer*, 86 NW. U. L. REV. 1, 54 ("The Court's fear that Indian nations will oppress non-Indians in their midst is not matched by a similar understanding that American Indians are vulnerable to oppression at the hands of federal and state governments."). Those who feel contempt (or perhaps guilt) for the oppression suffered by Indians and a fear that Indians will claim what 'rightfully' belongs to whites may not support increased Indian rights. Even scholars, far removed from local politics and interactions, reveal their fear and contempt. See, e.g., Joseph D. Matal, *Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 351 (1997) ("Eventually the Supreme Court . . . will have to decide whether 18 U.S.C. § 1151 reverses the work of subsequent termination statutes, and if Indian housing projects really are sovereign nations. More immediately, it must decide whether Alaska is to lose control of forty-four million acres of territory.").

396. See e.g., *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (wherein the Supreme Court upheld the employment preference for Indians in the Bureau of Indian Affairs against a racial discrimination challenge, reasoning: "Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference. Rather it is designed to further the cause of Indian self-government and to make the BIA more

affect all citizens positively. In his foreward to the new Encyclopedia of Native American Legal Traditions, Charles Riley Cloud reminds us:

[I]t is out a rich Indian democratic tradition that the distinctive political ideals of American life emerged. Universal suffrage for women as for men, the pattern of states that we call federalism, the habit of treating chiefs as servants of the people instead of their masters, the insistence that the community must respect the diversity of men and the diversity of their dreams – all these things were part of the American way before Columbus landed.³⁹⁷

But U.S. citizens today have lost faith in their legislative, judicial, and executive branches of government. Cloud states:

An answer seems to be that we are straying from our Indian ideals and democratic tradition. Instead of striving for consensus, many political leaders seem to insult and only search for power. No longer do the people seem to have an equal opportunity to select their leaders. Campaigns are so costly and the need to raise money is so great that the rich gain what seems to be undue influence. Our leaders seem no longer to be our servants, and like masters, they often accumulate their greatest wealth while in office. As was the case in Europe, individual families and corporations seem to have become all-powerful. Inequality seems to be growing. To save our democracy, we need to return to our Indian democratic roots.³⁹⁸

Thus, to the extent indigenous peoples will share their knowledge, indigenous Indian law may offer all citizens better law and government. As Cloud points out, it is already happening to some extent. The General District Court of the City of Norfolk, Virginia, for example, has a peacemaking system of dispute resolution based on contemporary Navajo and Iroquois Peacemaker Courts. Participants find that this, and other methods of mediation, serve their interests better than adversarial litigation.³⁹⁹ Similarly, Anaya instructs that Iroquois Great Law of Peace in which "all are invited to follow the roots to the tree and join in peaceful coexistence and cooperation under its great long leaves," reflects a growing trend of international "linkages, commonalities, and interdependencies among people, economies, and spheres of power. When we try to fit today's institutions -- like the World Bank, Microsoft Corporation, or United Nations -- into the picture, this indigenous model may be a better fit than the present world order wherein the nation-state is all-

responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.... 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.' In this sense, the preference is political rather than racial in nature" (emphasis added).

397. JOHANSEN, *supra* note 178, at xi.

398. *Id.* at xii.

399. *But see* Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003 (1997).

powerful.”⁴⁰⁰ These are only two examples of how indigenous Indian law can provide all U.S. and world citizens with productive and harmonious lawmaking – progressive lawmakers could imagine and implement many more.⁴⁰¹

Finally, indigenous Indian law will appear strange and unlikely to anyone schooled in federal Indian law. Therein lies its value. It may seem beyond the realm of comprehension that Indians should be able to sit down with federal lawmakers and propose something along the lines of: "We, Indian nations, and you, federal government, are involved in an ongoing relationship. You – your ancestors, allies, and founders of the nation – entered into this relationship by coming to our lands, encountering us, and making promises. We are now going to tell you how we tried to extend our vision of peace to you and what "mutual trust" means to us. You have violated our trust numerous times. We are going to tell you how those violations have injured us and suggest how to remedy the situation. You hope we are going to disappear. We will explain our plans to exist on this continent forever. Some of what we tell you must now be incorporated into the federal laws of this land. The rest will exist in our own tribal laws and institutions. Shared storytelling, listening, and hard work will help us solve tribal problems and relate better to non-Indians, and we need your cooperation in this endeavor. Will you join us?" Indigenous Indian law is radical -- and essential.

C. Alaska Natives Interpreting Indian Country

Indigenous Indian law can evaluate to what extent Alaska Natives have been meaningfully involved at in various significant lawmaking events including the Treaty

400. ANAYA, *supra* note 288, at 79.

401. *See also*, Porter, *supra* note 238, at 986-87 ("To assist you in conceptualizing how the United States might decolonize its Indian control law, I would like to draw upon the teaching of the Gus-Wen-Tah, or the Two Row Wampum... These two rows will symbolize two paths or two vessels, travelling down the same river together. One a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, ship, will be for the white people and their laws, the customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.").

of Purchase (1967),⁴⁰² Statehood Act (1958),⁴⁰³ ANCSA (1971),⁴⁰⁴ and Solicitor's Opinion on Indian Country (1993). If Alaska Natives were able to significantly shape these laws, they can provide immediate insight into the intent of treaty and statutory drafters, thereby contributing to the process of statutory administration and interpretation. If Alaska Natives have not been able to participate in lawmaking at any of these stages,⁴⁰⁵ the federal government must recognize and remedy these violations of constitutive and ongoing self-determination.⁴⁰⁶ Whether Alaska Natives were or were not meaningfully involved in enacting the ANCSA and other laws, they can still explain how these laws affect them today.

Insufficient opportunities for Alaska Natives to explain the importance of retaining jurisdiction over their lands has led to the current situation where the Alaska Native interests, such as subsistence hunting, health and welfare, and cultural

402. See DONALD CRAIG MITCHELL, *THE STORY OF ALASKA NATIVES AND THEIR LAND* 382-383 (1997). In Mitchell's opinion, Inupiat only began to question formally the purchase of Alaska by the United States when one young Alaska Native man inadvertently and suddenly came across a certain historical volume: "At Edgcumbe (a Native boarding school), when [Charles Edwardsen, Jr., a young Inupiat from Barrow, Alaska] read Hubert Howe Bancroft's History of Alaska, Edwardsen had stumbled on a paragraph in which Bancroft attributed the army's problems in Southeast Alaska to the Tlingit and Haida Indians' resentment that the czar has sold their land to the United States "without their consent." Bancroft's spin on Alaska history caused the young Eskimo to ask himself whether the United States really "owned" the tens of millions of acres of tundra on which the Inupiat at Barrow and elsewhere on Alaska's north slope hunted and trapped and gathered. On December 1965 the idea had so piqued the twenty-two year-old Edwardsen's interest that he wrote a letter to each north slope village, soliciting support for creating an organization to file a land claim that would assert Inupiat aboriginal title to every acre of land north of the Brooks Mountain Range." According to Mitchell, Edwardsen's "stumb[ling]" across this historical "spin" led to the creating of the Arctic Slope Native Association and "set in motion" the land freeze leading to the entire Alaska Native land claims process. I wonder what is missing from this version of this story.

403. See CASE, *supra* note 2, at 67-70. Notably the Statehood Act protected aboriginal title from federal and state encroachment except to the extent Congress provided otherwise or individual natives owning their land in fee decided to alienate it.

404. The extent of Alaska Native involvement in drafting ANCSA is a contentious issue. See, e.g., Work, *supra* note 334, at 216. "Some might argue that the government's duty [under the policy of self-determination to facilitate Native Americans' contributions to law making] was fulfilled because Alaska Natives participated extensively in the legislative process and supported ANCSA's passage. To discontinue the analysis here, however, is to ignore the federally sanctioned actions that initially motivated the Alaska Natives to file land claims and to lobby in favor of a settlement. Pure self-determination was impossible because the Alaska Native's decision-making process was tainted by prior federal activity that virtually forced the Natives to act. Certain that they would lose most if not all of their aboriginal lands and rights, the Natives bargained only for what they felt was attainable, willingly giving up much that they might have sought to retain under more favorable circumstances. Overwhelming pressure to settle the land claims made arms-length negotiations impossible." *Id.*

405. Indigenous Indian law does not mean we pretend interactions between Indians and non-Indians have always, or ever, been consensual or fair if history shows otherwise.

406. If Indians have already missed an opportunity "to participate and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned," then remedial measures are in order for violation of the trust responsibility. ANAYA, *supra* note 288, at 82. Remedies might be appropriate for events stretching all the way back to Russian exploration and exploitation of Alaska Native lands and resources. These "remedies to redress historical violations of self-determination do not necessarily entail a revision to the status quo ante, but rather are to be developed in accordance with the present-day aspirations of the aggrieved groups, whose character may be substantially altered with the passage of time." *Id.* at 83; see also, Bryner, 12 ALASKA L. REV. at 333 (advancing three justifications remedies to Alaska Native groups: unlike some other minority groups, Alaska Natives have no other "homeland" in which to maintain culture; Alaska Natives did not voluntarily accept individualistic principles of liberalism by immigrating to the United States; Native Americans are a "specially disadvantaged group" protected under the equal protection claims.).

survival, are threatened.⁴⁰⁷ Although they have reached the end of litigating opportunities in the United States courts, Alaska Natives are considering addressing their Indian Country claims in other domestic and international forums. This section is provided with the immediate intent of contributing to the discussion of available options to pursue in the wake of the Supreme Court's decision in *Venetie*.⁴⁰⁸ There are both existing Alaska Native interpretations of Indian Country and legal forums where community members and their advocates might present these interpretations.

i. Alaska Native Opinions on Indian Country

I've listened to a variety of people talk about, you know, what the Congress intended and what ANCSA intended. It's funny, no one has ever asked me what my thoughts were about this. And I was there. I mean... my friend, the attorney general, never asked my opinion, nor has our counsel fighting on the Indian side.⁴⁰⁹

There has never been a need to write our laws down or write up descriptions of how we operate. But recently, more and more State government and federal government programs are causing us to do things more formally. We received a grant ... to interview our elders and write down traditional knowledge, customs and advice about how to preserve our land and tribe. We also plan to write down our traditional laws as part of our ANA project. The goal is to ensure future protection for our tribe and its membership and to make sure that our tribal government remains in control of all local matters.⁴¹⁰

We cannot look to ANCSA, the Solicitor's Opinion, or Justice Thomas' opinion in *Venetie* for the Alaska Native side of the story. The ability of Alaska Natives to voice their interpretations of ANCSA and opinions on Indian Country was severely impaired. Nonetheless, there are some Alaska Native statements, including affidavits provided for the *Venetie* litigation, that begin to shed light on what the Solicitor's Opinion left out.

From legal, academic, and traditional perspectives, there may be several types

407. On May 7, 1998, thousands of Alaska Natives joined in a march called "We the People – Alaska Tribes – Standing Our Ground." The March was a response to the *Venetie* decision and other federal and state actions that jeopardize Native human rights, subsistence rights, and civil rights. Thus, Alaska Natives are already "affirm[ing] the power of the people to stand their ground against a political agenda that would diminish the fundamental rights of Alaska Natives to forever live the Native way of life." *4,000 Alaska Natives March for Sovereignty*, 23 NATIVE AMERICAN RIGHTS FUND LEG. REV. 10,11 (Summer/Fall 1998).

408. Alaska Natives are clearly already considering a whole spectrum of options. See, e.g. Tom Kizzia, *Natives Rally for Self-Rule: AFN Summit May Mull Secession from Alaska*, Reprinted in INDIAN COUNTRY TODAY ONLINE, Week of Nov. 9-16, 1998, <http://www.indiancountry.com> ("Frustrated by what delegates say is the state's continuing resistance to tribal government's, Alaska Federation of Natives has called for state constitutional convention that would consider new governance possibilities for rural Alaska – including secession and formation of a new state or commonwealth in parts of the Bush.").

409. Willie Hensley, Co-chairman of Alaska Federation of Natives in *Indian Country Forum*, *supra* note 154, at 6.

410. Resp. Br., *supra* note 16, Testimony of Gideon James, Appendix I at 68aa – 69aa.

of Alaska Native interpretations of Indian Country.⁴¹¹ These may include formal statements made by community officials in the context of litigation and other legal processes, informal discussions among leaders and members, and written editorials and commentaries in the Alaska press. They may also include traditional oral stories related over time that are essential to cultural survival and community life. The various interpretations carry different legal weight. Courts have tended to ascribe to "expert" witnesses the most legitimacy, particularly when the expertise is based on Western sciences, such as anthropology, archaeology, linguistics, and economics. Courts have frequently failed to accord significant or appropriate evidentiary weight to traditional stories told by elders.⁴¹²

Some of the available, public Alaska Native interpretations on Indian Country are reproduced in an Appendix to this article.⁴¹³ Alaska Native leaders have articulated specific theories of statutory interpretation vis à vis ANCSA's silence on Indian Country.⁴¹⁴ In the context of the Indian Country question, leaders and villagers have also commented on the regulation of land use and ownership,⁴¹⁵ hunting and fishing,⁴¹⁶ alcohol regulation,⁴¹⁷ police powers and keeping the peace,⁴¹⁸ tribal courts,⁴¹⁹ childrearing practices,⁴²⁰ village government and community membership,⁴²¹ Native worldviews, subsistence, and identity,⁴²² and human rights and self-determination.⁴²³ Other issues may include protection of sacred sites, ceremonies and items, environmental regulations, and economic development.⁴²⁴ These Alaska Native

411. In any Indian law case, the types of interpretation available will be specific to the cultural, linguistic, social and historical aspects of the group. See, e.g., *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 [1997], wherein the Supreme Court of Canada recognized that Gitksan and Wet'suwet'en Natives had tried to introduce three types of oral testimony at trial: "(i) the adaawk of the Gitksan and the Kungax of the Wet'suwet'en; (ii) the personal recollections of members of the appellant nations, and (iii) the territorial affidavits of filed by the heads of the individual houses within each nation."

412. Cf. *id.*, where the Supreme Court of Canada held, "This appeal requires us... to adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past."

413. I try to undertake my comments on the past and present legal issues of Alaska Natives with a great deal of humility. See Matthew L.M. Fletcher, *Listen*, 3 MICH. J. RACE & L. 523, 538 (1998) (recounting personal experience in writing Indian law article for ostensible publication): "I have another story to tell. This piece, this poem, this monologue, at one time, was titled, 'The Half-Life of 'Radioactive Colonialism;' Tribal Sovereignty and A Case Study of the Mescalero Apache.' ... The piece was never finished. It was not a story I could tell. To fulfill the requirements of a student-written Note, I would need to draw conclusions and make judgments and recommendations in order to formulate a solution. To create a document worth publishing, I would have to twist the story to suit my purposes. I would have to make the story work for me. To be persuasive, I would have to hide the weaknesses in my argument, and there were many. In order to publish, I would have to use the story, destroy it, and remake it in my image, as if it were clay. This I did not do. The Mescalero Apache are not clay" (emphasis added).

414. See Appendix, Item 1.

415. See Appendix, Item 2.

416. See Appendix, Item 3.

417. See Appendix, Item 4.

418. See Appendix, Item 5.

419. See Appendix, Item 6.

420. See Appendix, Item 7.

421. See Appendix, Item 8.

422. See Appendix, Item 9.

423. See Appendix, Item 10.

424. See generally, *Special Section on Indian Country*, ANCHORAGE DAILY NEWS, June 29, 1997 – July 5, 1997.

perspectives, reflecting traditional knowledge and contemporary realities, have been largely ignored when the state and federal legislatures, courts, and agencies have made law on Indian Country.⁴²⁵ Alaska Native interpretations, then, may supply exactly the expertise that should guide legislative enactments, agency administration, and judicial review of Indian laws.

Although this selection of short quotations begins to suggest the subject matter and scope of Indian Country concerns, the statements I have chosen to quote here are likely not the same ones members of Arctic and Venetie villages might put into a formal statement on Indian Country.⁴²⁶ Administrators, legislators, judges, and others involved in Indian law, must realize their understanding of indigenous peoples will not be the same understanding held by community members. The experiential wisdom that comes from living in, and being a member of, a native community is not easily reproduced on paper.

Venetie tribal members *may* decide that legal and political pressures, such as Supreme Court litigation or international complaint procedures, do provide adequate grounds for explaining what Indian Country means to them; they may not. If they seek to share interpretations in a domestic or international legal setting, they might first evaluate the experiences of other native peoples who have made similar attempts,⁴²⁷ and they might turn to Alaska Native lawyers who may be aware of the problems of interpretation and of the rules that govern storytelling in the community.⁴²⁸ Alaska Native Opinions on Indian Country -- as the short excerpts in the appendix just begin to suggest-- could provide real substance to the ideal of reading and enacting Indian laws consistent with Indian understanding and rights.⁴²⁹

425. In the Appendices, I have primarily relied on formal testimony and affidavits provided in the course of litigation and contemporary recent media, including Alaska radio and newspaper. The traditional stories of Neets'aii Gwich'in people are best heard from members of the community, who may or may not want to share or translate them for outsiders. However, at least one such traditional story has been published in English for wide commercial dissemination. See VELMA WALLIS, *TWO OLD WOMEN* (1996). Another published work, a personal narrative, references some aspects of Neets'aii Gwich'in oral tradition as it relates to Venetie lands. See Lincoln Tritt, *A Glimpse of the Aboriginal Society*, in JOSEPH BRUCHAC, ED., *RAVEN TELLS STORIES* 213-216 (1991). Although they are not specific to Venetie, other printed sources for Alaska Native narratives and stories are: A.J. MCCLANAHAN, *OUR STORIES, OUR LIVES: A COLLECTION OF TWENTY-THREE TRANSCRIBED INTERVIEWS WITH ELDERS OF THE COOK INLET REGION* (1986); THOMAS BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985); SUSAN B. ANDREWS AND JOHN CREED, *AUTHENTIC ALASKA: VOICES OF ITS NATIVE WRITERS*; ROBERT HEDIN & GARY HOLTHAUS, EDS., *THE GREAT LAND: REFLECTIONS ON ALASKA* (1994).

426. Alaska Native Opinions on Indian Country might also be oral, village-specific, state-wide, in Native languages, in English -- generally, in any form that the people choose.

427. See, e.g., CARILLO, *supra* note 383, at 9-49 (discussing the Mashpee Tribe's land claims suits).

428. For a discussion of tribal members/lawyers engaging in interpretations for legal battles involving their own communities, See Edmund J. Ladd, *Achieving True Interpretation*, reprinted in CARILLO, *supra* note 383, at 324-27.

429. In addition to creating their own Opinion on Indian Country, Alaska Natives might consider making an indigenous historical-legal response to Donald Craig Mitchell's, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353 (1997) (arguing Indian Country cannot exist in Alaska because from the time of Russian exploration through Congressional enactment of ANCSA, white explorers, settlers, judges, administrators, governors, clergy, and legislators have never intended Alaska Natives to retain jurisdiction over their lands.). This article would be the most stunning example of "white man's Indian law" out there if not for DONALD CRAIG MITCHELL, *THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867-1959*, 9 (1997) (attempting to contribute to "the fight" for the "social and economic justice that is their [Alaska Natives] due as U.S. Citizens," the author deliberately details *non-Native* perspectives on Alaska Natives and their lands, rationalizes that Alaska Natives can write their own histories, and pronounces his product as a "clear understanding of Native involvement in ... history." Clearly one-sided, perhaps.).

ii. Domestic Actions

Although its appearance before the U.S. Supreme Court marked the exhaustion of Venetie's domestic litigation opportunities, other domestic institutions may be willing to listen to Alaska Native interpretations of Indian Country. In *Venetie*, Justice Thomas suggested that "modification" of Indian Country to include ANCSA lands is a matter for Congress. The Solicitor, too, indicated that if it was unhappy with its opinion on Indian Country, Congress could enact law to the contrary. The most obvious course of action for the Neets'aiti Gwich'in people of Venetie, then, is to seek domestic legislative redress in the form of amendments to ANCSA or the passage of another statute.

In the most optimistic scenario, Alaska Natives and their supporters would successfully lobby for Congressional amendments to ANCSA.⁴³⁰ Depending on the substance of Alaska Native input, these amendments might expressly state that Alaska Native lands had been Indian Country prior to ANCSA and that lands conveyed to village and regional corporations or tribal governments pursuant to ANCSA retained their Indian Country status. Such a law would be consistent with the doctrine of reserved rights in Indian law and with the trust responsibility to protect Indian interests. More specifically, findings supporting such a Congressional clarification could state that Alaska Natives must retain jurisdiction over their lands in order to protect their interests in land use and ownership, hunting and fishing, alcohol regulation, police powers and keeping the peace, tribal courts, childrearing practices, village government and community membership, Native worldviews, subsistence life ways and identities, human rights, protection of sacred sites, ceremonies and cultural patrimony, environmental regulations, economic development, and other interests. Alaska Native leaders and others with experience in these areas could work to bring their local, culturally-specific understandings of these issues to the attention of Congress.⁴³¹

The suggestion that Alaska Natives bring their post-*Venetie* concerns to Congress in the hope of achieving a legislative solution might ring hollow to some Alaska Natives, particularly because ANCSA itself was supposed to be "accomplished rapidly... in conformity with the real economic and social needs of Natives... with maximum participation by Natives in decisions affecting their rights and property,"⁴³² and many feel that ANCSA fell short of those goals. Further, the present Congress is entertaining legislation that would *constrict* tribal sovereign immunity, threaten tribal funds, and diminish tribal court jurisdiction. And the federal

430. See Work, *supra* note 334, at 217 ("Amendments to ANCSA should attempt to adhere to the spirit of self-determination, and Congress should seek the advice and counsel of the Alaska Natives. Self-determination cannot exist absent meaningful participation in the political process.") .

431. See Suagee, *supra* note 387, at 504: "In this land we now call America, we are blessed with continued presence of some of the indigenous cultures, and we are blessed to have among us, within some of these cultures, a relatively small number of elders who possess a great deal of traditional cultural knowledge. Sometimes what tribal elders have to say should carry more than the force of conscience; rather, it should carry the force of law."

432. 43 U.S.C. § 1601(b) (1994).

government has not been historically receptive to international law claims. In such a hostile climate, it is unlikely that the Congress would pass legislation explicitly protecting the sovereignty of Alaska Native tribes over their lands. However, some Native leaders have discussed lobbying Congress for limited authority over alcohol regulation and economic development.⁴³³

To date there have been no new amendments to ANCSA, but several state and federal proposals were announced just after the Supreme Court's decision in *Venette*. U.S. Senator Ted Stevens raised the possibility of enhancing local control over village law enforcement by calling on Attorney General Janet Reno to establish a federal-state plan for village law enforcement. Senators Stevens and Frank Murkowski also discussed crafting a solution to subsistence hunting and fishing problems. At the state level, a new Commission on Rural Alaska Governance and Empowerment was created to address state services and local governments.⁴³⁴ These measures must be undertaken in light of the principle of self-determination with opportunity for real Native participation in the process and substance of lawmaking. Then perhaps real improvement in relations between the State of Alaska and Alaska Natives - and workable solutions to their problems - will occur.

iii. International Actions

If the attempt to arrive at a domestic solution fails, looks unlikely, or comes too slowly,⁴³⁵ international institutions offer other alternatives.⁴³⁶ And the various provisions of international law cited above might be better received in the international forums. The U.N. Working Group on Indigenous Populations accepts requests for monitoring of domestic indigenous rights situations. States are not required to submit reports on particular indigenous issues, but they generally do in order to avoid a one-sided record or negative public press attention. The process of regular reporting to the most prestigious and influential international legal institution often has the effect of encouraging states to improve the condition in question.⁴³⁷ If Alaska Natives detailed their perspectives on the Indian Country issues in light of the

433. See Kizzia, *supra* note 295, at 2.

434. *Id.* at 3-4.

435. See Don Hunter, *Natives Put Rights in Writing*, ANCHORAGE DAILY NEWS, May 8, 1998 (In response to the *Venette* decision, "Tribal leaders from Alaska vowed Thursday to stand united as Alaska's "sovereign First Nations," and ratified a sweeping bill of rights that claims authority to decide what happens to lands, waters and fish and wildlife used by Natives ... The result of the talks is a bold statement of tribal independence. But the delegates said they understand it's one thing to assert their rights and another to get Congress and the state government to recognize them. They said they expect it to take years of effort and that they will need the help of non-Native Alaskans, tribes in the Lower 48 and effective lobbyists in Washington, D.C.").

436. Many indigenous communities and their lawyers in the U.S. see international procedures as distant, ineffective, or just farfetched. It may be helpful to look at the experiences of other tribes attempting to deal with the United States in front of international legal institutions. See Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 602-612 (1987) (surveying Hopi and Mohawk complaints to United Nations Commission on Human Rights). Although the United States is less responsive to international pressure than other nations, tribes may learn something indigenous peoples dealing with other nations. See, e.g., S. James Anaya, *The Awas Tingi Petition to the Inter-American Commission of Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996).

437. ANAYA, *supra* note 288, at 154.

international law provisions listed above and in terms of their own indigenous laws, the federal government might be compelled to submit a plan indicating how it will address these concerns. The U.N. Commission on Human Rights and its Subcommission also engage in monitoring and reporting procedures, but, unlike the UN Working Group, they only permit states and Non-Governmental Organizations (NGO's) to participate. In general, the monitoring and reporting procedures cannot result in binding obligations for states, but rather the creation of norms of expected behavior, as impelled by relations among the actors of the international community.

By contrast to the monitoring and reporting procedures, complaints and petitions can have more immediately tangible results. The complaints procedure before the U.N. Working Group also lacks direct enforcement measures but sometimes results in high level diplomatic acts addressing indigenous claims.⁴³⁸ Complaints before the U.N. Commission on Human Rights and its Subcommission can result in the adoption of resolutions regarding indigenous claims and can pressure states to answer specific allegations regarding human rights violations against indigenous peoples.⁴³⁹ Limited by the various standing, exhaustion, and other requirements, these complaints procedures have been utilized with some effectiveness with respect to the federal government's role in the Hopi-Navajo land dispute and in problems faced by traditional Seminoles, Haudenosaunee, Hopi, Western Shoshone, and Lakota Nation.⁴⁴⁰ The Inter-American Commission on Human Rights, of which the U.S. is a member, also has a petition procedure. Pursuant to the American Declaration on the Rights and Duties of Man,⁴⁴¹ which holds member states accountable to certain human rights norms, indigenous groups may bring a petition for advisement before the Inter-American Commission on Human Rights.⁴⁴² Indigenous groups such the Miskito in Nicaragua have used this process in arriving at friendly settlements between the Nicaraguan government and exiled Indian

438. *See id.* at 159 (detailing the process by which the Working Group Chair obtained the permission of the U.N. Secretary General to travel to Brazil to effectuate a solution of Yanomami problems raised before the Working Group).

439. *Id.* at 158-160.

440. *Id.* at 160, 177 n.60. The U.S. has not signed onto treaties with more stringent enforcement mechanisms such as the Optional Protocol of the Convention on the Elimination of All Forms of Racial Discrimination or the Optional Protocol to the International Covenant on Civil and Political Rights. These can lead to complaints and adjudications before the Committee on the Elimination of Racial Discrimination ("CERD") and the U.N. Human Rights Commission, respectively. However, Canada and other nations have been required to participate in adjudications of indigenous claims before the HRC, for example. *See id.* at 163 (discussing Ominayak, Chief of the Lubicon Lake Band v. Canada) Such actions may contribute to a climate in North America and internationally where it is not politically desirable or economically advantageous to violate the rights of indigenous peoples.

441. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The Declaration's substantive provisions on rights of equal protection, association, movement, religion, and family are more general than those expressed in some of the international law on indigenous rights, but still might be used effectively by Alaska Natives in expressing violations regarding the Indian Country issues.

442. *See ANAYA, supra* note 288, at 166-167. The Commission engages in fact-finding through the review of written submissions by the parties, hearings and on-site investigations. The fact-finding procedure itself can stimulate dialogue resulting in solutions, but the Commission can also act as mediator if needed. Initially, the Commission's findings and conclusions are not published so that parties have an opportunity (and incentive) to comply. In the event that its recommendations are not implemented or settlement is not achieved, the Commission can publish its findings and thereby bring international scrutiny to the offending nation. *See id.*

leaders.⁴⁴³

As Professor Anaya has suggested, the ultimate goal for indigenous peoples invoking international law is to encourage nations to meet their human rights obligations. International law may influence federal court decisions or assist in bringing about negotiated settlements, legislation, or executive action on the domestic level⁴⁴⁴ – in the alternative, it may provide international forums for complaints procedures. These options may or may not provide immediate relief, especially since many nations resist complying with international law, citing the principle of non-intervention. However, where indigenous peoples have exhausted other legal avenues: “Existing international procedures do provide limited means of coalescing international concern for the benefit of the world's indigenous peoples, and these procedures have functioned in numerous instances to promote remedies for the violation of indigenous people's rights in accordance with contemporary norms.”⁴⁴⁵

Alaska Native interpretations of Indian Country suggest several substantive claims under international law. International law also suggests that Alaska Native interpretations should both enter the lawmaking process and should influence the outcome. For these reasons, it may be appropriate for Alaska Natives to consider how international law could support efforts to retain control over their lands, cultures, and futures.

VI. CONCLUSION

On the day after the Supreme Court announced its decision in *Venetie*, people in Alaska offered several perspectives. Two of these stand out as particularly illustrative of the necessity of indigenous involvement in the lawmaking that affects indigenous peoples. Alaska Attorney General Bruce Botelho stated:

This decision should be a cause for introspection for all Alaskans who love this state. I think we need to be asking ourselves why it was that the *Venetie* case became a cause of hope for so many Alaskans... We also have to recognize that it was a fight because there are (people) in Alaska who believe our state government wasn't doing its job. We need to be talking about that, and we need to be doing something about it.⁴⁴⁶

Venetie tribal member Larry Williams stated:

It doesn't change a thing, the way I see it. It's always been Indian country and it will always be Indian country, no matter what the Supreme Court has to say about

443. *See id.* at 170.

444. Negotiated settlements or executive actions may be the preferable options, particularly in 1998, when the U.S. Supreme Court has been granting certiorari and deciding against tribal sovereignty with unusual frequency and zeal, and when the U.S. Congress is also notably hostile to Indians.

445. *Id.* at 184.

446. Kizzia, *supra* note 295, at 4.

it. I have a sense of belonging to this land.... I'm not going to ask the state if I can of fish over there. That's what Indian country means to me.⁴⁴⁷

As well meaning as the Attorney General may be, he lumps indigenous Alaskans into the category of "all Alaskans," does not call them "Alaska Natives," and indicates that the state can meet the needs of *all* of its citizens simply by pulling them into the system.⁴⁴⁸ Mr. Williams reiterates the indigenous sense of attachment to the land that predated any state or federal government and that will continue to exist. Attorney General Botelho fails to acknowledge that Alaska Natives seek to maintain a distinct and sovereign identity, and that they do not *want* the state to be the answer to their problems. Mr. Williams does not concede that the State of Alaska may tell him he *cannot* fish "over there" even if he does not ask.

After ten years of litigation and nearly thirty years of dealing with ANCSA, the affected parties have not come closer to understanding one another's worldviews. The distance between Natives and non-Natives in the wake of the *Venetie* litigation makes a workable solution to jurisdiction, subsistence, language and many other issues less and less likely.⁴⁴⁹ In the *Venetie* case, at least three kinds of law should have kept the relationship between the federal government and Neets'aai Gwich'in people in balance: administrative law, federal Indian law, and indigenous Indian law. Because administrators violated the procedural safeguards of administrative law, they created an agency interpretation lacking in expertise and accountability. Because courts ignored the Indian canons, they interpreted ANCSA contrary to federal Indian law. And because lawmakers at every stage turned a deaf ear to indigenous Indian law's call for Alaska Native participation in lawmaking, the current state of the law on Indian Country reflects only federal intent and power.

Administrative or federal Indian law alone should have provided a more correct, harmonious, and just result in this case. As has been the typical indigenous experience in the United States, however, the law did not protect the people or land of *Venetie*. Although cases like *Venetie* may cause indigenous peoples to question the legitimacy of western governmental institutions and lawmaking processes, they realize

447. Liz Ruskin, *Villagers Doubt Ruling Will Change Lives*, ANCHORAGE DAILY NEWS, Feb. 26, 1998, at 4.

448. See Tom Kizzia, *Natives Rally for Self-Rule: AFN Summit May Mull Secession from Alaska*, Reprinted in Indian Country Today Online, Week of Nov. 9-16, 1998, <http://www.indiancountry.com> ("When I hear the phrase 'We are all people,' I cringe," said Robert Keith of Elim, co-chairman of a state task force on rural governance alternatives. He went on to say such phrases are often used to attack Native rights.").

449. See Tom Kizzia, *Urban-rural Divide Widens in Juneau*, ANCHORAGE DAILY NEWS, May 3, 1998 ("When Gene Tagaban, a young Tlingit actor from Juneau, attended a hearing on subsistence in the state capital earlier this year, he was moved by the passionate voices from rural Alaska telling of their way of life via speakerphone. But as bored legislators flipped through magazines and wandered in and out of the committee room, Tagaban grew angry and stalked out, deciding not to testify. The next day, Tagaban mounted the Capitol steps with a traditional Indian hand drum and sang a Tlingit love song about his grandfather's land. Tagaban has been there at noon most days since, drumming and singing the same song of the Chilkat Lux'aadi clan, which he describes as a kind of prayer. 'Our presence wasn't being felt here,' he says. Four flights up, behind an office window above the Capitol steps. Re. Ramons Barnes, R-Anchorage, is upsets about plans for a Native protest in Anchorage ... accusing the Legislature of insensitivity, prejudice, even racism. The state government has been pouring money into the Bush for years, the redoubtable Muldoon legislator protests. 'In fact, most people in urban areas feel they have been discriminated against because of all the money that has gone into rural Alaska.'").

the law can sometimes be adapted to indigenous needs. Although the federal government has violated all of its treaties and most of its trust responsibilities to Indian tribes, it still makes an occasional attempt at upholding its relationship with Indian peoples. We must insist the federal government fairly apply its conventional legal doctrines and we must add a new framework, indigenous Indian law. Creating a place for indigenous interpretations of Indian law will help balance the relationship between the Indian nations and federal government, perhaps even restoring the mutual trust between them.

APPENDIX :SOME ALASKA NATIVE OPINIONS ON INDIAN COUNTRY

1. INDIAN COUNTRY, ANCSA & STATUTORY INTERPRETATION

What we started out to try to do, was we would rather have had just our territory up there. Because some of you might recall that the state wasn't even hardly a presence in rural Alaska. I mean, as far as the state was concerned... the rural areas were Uncle Sam's problem. I mean, hell, the state didn't have enough money to take care of the cities. So far as the state was concerned Great Uncle Sam will take care of the villages.

Well, what we wanted to do was to try to work our way into the 20th century with control of our own territory. We primarily wanted the land. We didn't want to disturb any inherent rights to govern or powers that the communities may have had and the tribes may have had. In fact, when the act was passed, we didn't... the only thing we lost was the Allotment Act. Everything else stayed the same. You know.

I mean they didn't eliminate the Indian Reorganization Act. They didn't eliminate whatever tribal powers the tribal councils may have had. Since then, they've, you know, provided monies for education. They provided monies for health. They provided all kinds of federal laws that apply, you know, to the tribal councils.

And so, to me, it was a real estate transaction. But we didn't have the power to clarify things and so, if you don't have the power to get what you want in negotiation, then you keep it fuzzy. Maybe you win it in court. And that's where we're at.⁴⁵⁰

2. INDIAN COUNTRY & LAND USE & OWNERSHIP

Land is very important for our tribe and no quick decisions are ever made about it. Last summer the Tribal Government interviewed contractors who wanted to get hired to improve our culvert system in Arctic Village. Because their presence and activity would affect the tribal members and the land, we made sure that they protected the environment and observed tribal rules respecting the ban on drug and alcohol use. They were also not allowed to hunt game. They were

450. Willie Hensley, Co-chairman of the Alaska Federation of Natives., in *Indian Country Forum*, *supra* note 155, at 6.

encouraged to follow our tribal member employment preference.⁴⁵¹

The other major issue we had to deal with (when Robert Frank was Chief) was the land claims settlement. We had many meetings in both villages educating ourselves about the settlement and what options we had. I traveled a lot in those days, even to Fort Yukon and Katsikh, trying to reach all of our members to let them know we had to decide about keeping our reservation land or choosing a smaller amount of land and getting some of the money from the land claims settlement. Some of the things people talked about at these meetings was how hard our ancestors had worked to get the land in the first place and to protect it from outsiders and how we had to keep protecting it for the future generations. It was no surprise to me that the vote was overwhelming in favor of keeping all of our reservation land instead of becoming Doyon shareholders and getting a part of the settlement money.⁴⁵²

3. INDIAN COUNTRY AND REGULATION OF HUNTING AND FISHING

If someone were to waste some part of the animal, the people would call a meeting of the authorities. They would ask for the person that left the wasted animal, talk to him and tell him not to do that again. If a person violates the rule again, his gun is taken away. The third time it happens, the person is banned from the village. If a person doesn't check his traps or fishnets, this is a waste and must not be allowed. The animal has worked hard to survive and it's not right to leave it stuck in a trap. We don't know how badly that animal might feel. It would also be a waste to let a wolverine get an animal that we have trapped. There is not big difference in wasting a big animal like a caribou or a small animal like a squirrel. Each one gives us nourishment so the result should be the same if someone wasted either of them. Jim Christian says that the Indian law is to take only what one needs; that there is no difference in killing bugs as killing caribou when it's not needed as some other animal might need those things.⁴⁵³

4. INDIAN COUNTRY AND ALCOHOL REGULATION

Two of the most important things ever done which I was involved with the Tribal Government in the 1960's and 1970's were the protecting of tribal ownership of the land and enforcing the ban on alcohol consumption and importation throughout the reservation. We began actively working on banning all alcohol in the 1960's after many incidents of violence and other problems caused by people bringing alcohol to our villages. In *Venetie* we had meetings of all the

451. Resp. Br., *supra* note 16, Appendix I at 68aa – 69aa. Testimony of Gideon James.

452. Resp. Br., *supra* note 16, Appendix I at 48aa. Testimony of Robert Frank.

453. Resp. Br., *supra* note 16, Appendix I at 32aa-33aa. Testimony of Moses Sam.

people that went on for many hours. We selected Christian Tritt as our tribal judge. Anyone that the Council believed had violated the alcohol and would have to go before Christian Tritt, whose job it was to pass sentence on the person- how much of a fine to pay or how much community service the person had to do. When I was Chief I never did like to use the "blue ticket," which causes a person to be banished from the reservation for a certain period of time. It was my belief that we needed all the tribal members right there on the reservation, but others after my time have used "blue tickets" and banished people who violate the alcohol ban. It is my belief that the reason we are successful in getting rid of alcohol on the reservation is that we had many, many meetings and talked a long time among ourselves. The rule to ban all alcohol was decided by all the people and they supported the Tribal Council and the local village councils in enforcing the ban. When I was Chief I also talked to FAA and pilots and people who owned the planes coming into Venetie and Arctic Village and tried to educate them about not bringing in alcohol. One of the jobs of tribal and village council members was to search all baggage of incoming planes. Any alcohol found was destroyed or sent back to Fort Yukon. The ban is still in force to this day.⁴⁵⁴

5. INDIAN COUNTRY & POLICE POWERS & KEEPING THE PEACE

The Alaska State Troopers are primary state law enforcement for the majority of the 226 villages in the state of Alaska, and we're not doing a very good job in delivering service to those villages because of the manpower shortage. We use the Village Public Safety Program to the best of our ability. We're training them... We have villages such as Kipnuk and Akiachak that are doing their own policing because we're not giving them the service they want or need. Along the same line, when they do need us and call us, we're there.

On one hand we're saying: We're going to get to you. And whether it's one or two or three days later. And on the other hand we say: Well, we're not going to be able to take care of your problem immediately, so on the other hand, they start taking care of their problems, like Kipnuk (where people entering the village are searched) ... The somebody comes around and says: Well, we wanted you to take care of your problem, but we didn't mean it this way. And so, they kind of throw their hands up and say: On one hand, you're telling us you can't deliver the services. You're saying we should help ourselves. And now, when we help ourselves, you're saying time out.⁴⁵⁵

In my village, I was woke up one morning, as an example (of the absence of state services in village Alaska) – and this is not a criticism on the troopers, it's

454. Resp. Br. *supra* note 16, Appendix I at 48aa. Testimony of Robert Frank.

455. Col. Glenn Godfrey, Alaska State Troopers & Chairman, Koniag Native Corporation in *Indian Country Forum*, *supra* note 155, at 8-9, 11.

just telling you the way it is. I woke up... a mother was calling me: "My son's shooting up his house. He's got his kids. The VSPO is out of town. The troopers said they can't make it for three days. I went over there and disarmed this guy and got his kids out and settled him down. And the next day, the family was back there. Everything was going good. Three days later, you know, peoples come in and haul him off in cuffs. I mean, the guy was, you know, completely at peace... I think the state services are way short, and the village tribal governments are there and they're doing the job."⁴⁵⁶

6. INDIAN COUNTRY & TRIBAL COURTS

Where's the justice? Our tribal courts are needed out there. The state court system, is begging us, asking us to help out.⁴⁵⁷

The Bethel D[istrict] A[ttorney] doesn't want to deal with small crimes here. We [the Quinhagak village court] address them in 24 hours.⁴⁵⁸

[In the Athabaskan village of Minto there are no judges or juries. A panel of four or five judges rules by consensus, often discussing things like extended family relationships that wouldn't be relevant in state court.] They consult with one another, or bang heads around, and look at the case.⁴⁵⁹

7. INDIAN COUNTRY & CHILD-REARING

When I was the IRA Tribal Government Chief I also had to deal with matters involving children of our members. I remember one time a state social worker went up to Arctic Village because someone had filed a complaint. I told the state not to come into our villages unless they heard from the Tribal Government first. After that, we never had any problems. In those days adoptions were done the "old way"- that is, by agreement between families or between family members. That has always been how we take care of our children.⁴⁶⁰

8. INDIAN COUNTRY, VILLAGE GOVERNMENT & COMMUNITY MEMBERSHIP

There has never been a need to write our laws down or write up descriptions

456. Will Mayo, President Tanana Chiefs Conference, in *Indian Country Forum*, *supra* note 155, at 10-11.

457. *Id.* at 11.

458. Anthony Caole, Tribal Administrator, Quinhagak, quoted in Tom Kizzia, *Whose Law and Order?*, ANCHORAGE DAILY NEWS, *Special Section on Indian Country*, July 3, 1997, at 18.

459. Charlie Titus, Jr., former judge, quoted in Tom Kizzia, *Whose Law and Order*, ANCHORAGE DAILY NEWS, *Special Section on Indian Country*, July 3, 1997, at 18.

460. Resp. Br, *supra* note 16, Appendix I at 49aa. Testimony of Robert Frank.

of how we operate. But recently, more and more State government and federal government programs are causing us to do things more formally. We received a grant from the Administration for Native Americans (ANA) self-governance project in the amount of \$158,000 to interview our elders and write down traditional knowledge, customs and advice about how to preserve our land and tribe. We also plan to write down our traditional laws as part of our ANA project. The goal is to ensure future protection for our tribe and its membership and to make sure that our tribal government remains in control of all local matters.⁴⁶¹

An outsider who marries into a family does not become Gwich'in and cannot be enrolled on the reservation list but the children can be enrolled. Gwich'in means community of people who live in a particular place. A non-member is not allowed to have business on our land. John Fredson has told us that this will not work. The non-member brings down our strength and destroys the land... Someone who lives here with us for 5, 10 or 20 years and takes care of things like we do, becomes like us but still cannot do business on the land. A non-member can rent space if he leaves something here but if a non-member operates a business on tribal land, I will claim all his belongings and make them leave.⁴⁶²

9. INDIAN COUNTRY AND NATIVE WORLDVIEWS, SUBSISTENCE LIFEWAYS & IDENTITY

The elders have taught us to waste nothing of the animal. When we first moved to Christian Village, I learned from Chief Christian to make sure that every part of the animal was brought back to camp. Back then, I didn't understand why we had to do all that. When I asked my mother about it, she said that once when she was young, there had been some very hard times. Because of these bad times, they were so grateful to get an animal that they would use every part of it. They would clean it, treat it, and preserve it with respect as best as they knew how. The most important part of their lives was preserving food for future survival. There was a fish trap to catch fish, then the fish would be dried so it can go with the people when they hunt sheep. A snare is set in the path of the sheep leading to natural soft grounds. When a sheep is snared, the people surrounded it and killed it with bow and arrows. After that is harvested, they cooked only a little for them to eat; the rest was dried and taken back down into the valley to be stored for the cold winter months. They might fish again when they returned from the sheep hunt but only until the time when the caribou would migrate this way. Then, they moved their caribou fences, set snares in the corrals and somehow would herd the animals into the openings in the fences. This was the best way to get the caribou because it would be too hard to get enough to survive the winter otherwise. When they were lucky, they harvested lots of animals and everyone would share the meat

461. *Id.* at 68aa-69aa.

462. *Id.* at 34aa-35aa.

equally, storing most of it for future survival. This food would last until the middle of the winter and when it began to run out, they moved to another location to hunt for food again. This is what we call the nomadic life and this is where we come from.⁴⁶³

10. INDIAN COUNTRY & HUMAN RIGHTS & SELF-DETERMINATION

My question is: The right of indigenous people to govern themselves in their own way and manner is, in my opinion, a basic human right. And I would like to ask the panelists (state & Native leaders) if they believe that the right of the first people to govern themselves in our own homelands is or is not a basic human right. And I would really appreciate it if it wouldn't be prefaced with a "but" and just came out straight with an answer.⁴⁶⁴

The Native people of America had these governments thousands of years before... I mean, when Caesar was conquering Britain for pete's sake, and they were, you know, worshipping rocks, I mean the Native nations of Alaska had governments. And they've had them ever since... they had them when Christopher Columbus was found on our beaches in the Lower 48, and they had it when Alaska became a state in 1959. And they still have it because it's never been revoked or taken away. And the fact is, that a basic human right is something that is beyond and above the state of Alaska, its constitution, the United States of American, it's constitution.⁴⁶⁵

463. *Id.* at 31aa-33aa.

464. Paul Swetzoff, Aleut Representative to the Alaska Inter-Tribal Council and alternate to the AFN Board of Directors, in *Indian Country Forum*, *supra* note 155, at 12.

465. Will Mayo, President, Tanana Chiefs Council, in *Indian Country Forum*, *supra* note 155, at 13.

