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Justice Scalia and Tonto Fistfight in Heaven

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Cover Page Footnote

The author is a rising third year law student at Columbia Law School, and a citizen of the Tolowa Deeni Nation of California.

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INTRODUCTION

In the last generation, the Supreme Court has changed the way that it interprets statutes that regulate Indian affairs.[1] The Court has moved away from using legislative history and the Indian law canons of construction to aid in its interpretation of Indian law statutes, to relying on textualism and plain meaning. Throughout the twentieth century, the Court used the Indian law canons of construction found in *Alaska Pacific Fisheries Co. v. United States*[2] and legislative history to analyze Indian law statutes. The Court used these tools of statutory interpretation to reach decisions in Indian law cases concerning a variety of issues ranging from tribal sovereignty, hunting and fishing rights, to tribal freedom from taxation by the state and local governments. The Court's use of the Indian law canons of construction along with legislative history allowed it to craft opinions that were in harmony with the trust relationship that exists between the United States and Indian tribes.

In cases that involve interpreting statutes that regulate Indian affairs, the Court has now opted to ignore the Indian law canons of construction and legislative history. Instead the Court halts its statutory interpretation in Indian law cases at the plain text

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[1] The title of this note reflects the ongoing battle in Indian law between textualism and the Indian canons of construction and legislative history that occurs when the Supreme Court must engage in statutory interpretation in an Indian law case. The title of the note also owes an assist to the incomparable Sherman Alexie, and his book The Lone Ranger and Tonto Fistfight in Heaven. The author would like to thank Professor and note adviser Steven P. McSloy for his help and patience. A huge thank you to the following people who helped with this note: the staff at the *American Indian Law Journal*, Kelsey Leonard, Joseph Webster, Lael Echo-Hawk, Judy Gallardo, Curtis Berkey, Dan Lewerenz, and David Moran. Last, but not least, a huge thank you to Charlie Hobbs for tirelessly advocating for Indian tribes and inspiring so many people, the author included, to pursue the study of Indian law.

[2] Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 86 (1918).

contained in the statutes. This use of textualism ignores the vital purpose that the Indian law canons of construction and legislative history play in statutory interpretation in Indian law; that of providing context and full meaning to the words in the statute, and the intent(s) of Congress in passing the legislation, while also paying respect to the sacred trust relationship that exists between the United States and tribes.

This note begins by concentrating on the trust relationship between the United States and Indian tribes. In part one the note will focus on how the Indian law canons of construction were born out of the trust relationship and the relationship between Congress and the plenary power that it holds over Indian tribes. The unique relationship and power dynamic between Congress and Indian tribes will demonstrate the importance of using the Indian law canons of construction and legislative history when interpreting Indian law statutes.

Part two will examine three Indian law cases decided before 1986, when Justice Antonin Scalia replaced Justice William Rehnquist who was elevated to Chief Justice upon the death of Chief Justice Warren Burger. These three cases used the Indian law canons of construction and legislative history to reach a positive outcome for tribal interests in cases that involved questions of statutory interpretation and an opinion that is in harmony with the trust relationship between the United States and the Blackfeet Tribe. It is the framework used by the Court to reach its decision in *Montana v. Blackfeet*, as well as the two other cases, that should be readopted by the Court in interpreting statutes in Indian law cases.

Part three explores how the use of textualism has allowed the Court to render decisions in cases involving statutory interpretation in Indian law that have largely ignored the trust relationship, the intent of Congress in passing the statute, and the Indian law canons of construction.

Part four examines several Indian law cases from the Rehnquist and Roberts Courts. These latter cases cover a number of areas of Indian law, yet they share a common theme: the Court avoided using the Indian law canons of construction and legislative history in statutory interpretation. Instead, in these cases, the Court opted to engage in a selective analysis that places a paramount importance on textualism to divine the meaning of the statute. In

each of these cases, the Court uses textualism to interpret a statute in a manner that results in the Court rendering a decision that has a negative impact for a tribe or a tribal individual. Further, in each of these cases the Court's use of textualism results in a decision that is not in harmony with the trust relationship. By using legislative history and the Indian law canons of construction to interpret these cases, the Court could have interpreted the statute at issue in each case so it that there is no conflict with the trust relationship between the United States and Indian tribes.

I. THE TRUST RELATIONSHIP

The Court has long recognized that a trust relationship exists between the United States and Indian tribes.[3] The trust relationship is frequently acknowledged and reaffirmed by Congress as: "Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the United States."[4] The trust relationship was created through the treaties that the United States entered into with Indian tribes during the eighteenth and nineteenth centuries.[5]

From the birth of the Republic until 1871, when Congress passed the Indian Appropriations Act of 1871[6], which prohibited future treaty making between Indian nations and the United States, the United States entered into hundreds of treaties with various tribal nations.[7] During the eighteenth and nineteenth centuries, Congress and the President sent emissaries to the various tribes that the United States encountered during its westward expansion.[8]

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[3] United States v. Navajo Nation, 537 U.S. 488, 493 (2003).
[4] FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 420-421 (Neil J. Newton et al., eds., 2012 ed., 2012).
[5] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33 (1942) ("The chief foundation [of federal power over Indian affairs] appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made. And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate from them to carry out the purpose of the treaties.").
[6] *See* Indian Appropriation Act of Mar. 3, 1871, Ch. 120, §1, 41 Cong.; 16 Stat. 544 (codified at 25 U.S.C. §71) ("no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.").
[7] COHEN, *supra* note 6, at 46-66.
[8] COHEN, *supra* note 6, at 51.

These emissaries entered into treaties with tribes that were then ratified by the United States Senate.[9] In these treaties, the Indian tribes ceded land to the United States and, in exchange, the United States made promises to Indian tribes to protect them, provide them with certain services, and respect the territorial integrity of their newly formed reservations in perpetuity.[10] These treaties created a moral obligation between the United States government and Indian tribes. In many treaties the United States promised to look after the tribe, protect them, and manage the affairs of the tribe.[11]The Court in *Cherokee Nation v. Georgia* analogized the trust relationship to that that exists between a ward and their guardian.[12] The trust relationship be thought of as an affirmation that the United States holds a moral obligation to Indian tribes to protect their interests.[13]Out of the trust relationship that was established by the signing of treaties between Indian nations and the United States the Court would create the Indian law canons of construction.

A. The Origins of the Indian Law Canons of Construction

The Indian law canons of construction are two closely related rules of treaty and statutory interpretation. The Indian law canon of construction that deal with treaties states that ambiguities in treaties should be construed in the favor of Indian tribes and that treaties should be read as the Indians would have understood them.[14] The Indian law canon of construction that pertains to

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[9] *See* Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, 11 Stat. 749 [hereinafter Treaty of Fort Laramie].

[10] *See, e.g.*, Treaty of Fort Laramie, 11 Stat. 749; Treaty with the Ottowa, Etc., 1807, art. 7, Nov. 17, 1807, 7 Stat. 105 ("The said nations of Indians acknowledge themselves to be under the protection of the United States, and no other power, and will prove by their conduct that they are worthy of so great a blessing.").

[11]*See* Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 295 (1886) ("By this treaty the Cherokees were recognized as one people, composing one nation, but subject, however, to the jurisdiction and authority of the government of the United States, which could regulate their trade and manage all their affairs.").

[12] Cherokee Nation v. Georgia, 30 U.S. 1, 11 (1831) ("Their relations to the United States resemble that of a ward to his guardian.")

[13] *Id.* ("They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants; and address the President as their great father.").

[14] Worcester v. Georgia, 31 U.S. 515, 582 (1832).

statutory interpretation states that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in the favor of the Indians."[15] Both of the rules that comprise the Indian law canons of construction allow the Court to place the proper weight on the trust relationship between the United States and Indian tribes when engaging in treaty and statutory interpretation.

The Indian law canons of construction are born out of the trust relationship. When the Court uses the Indian law canons to interpret a treaty or statute, they are affirming the trust relationship[16]. The Indian law canons of construction affirm the moral obligation between the United States and Indian tribes because they recognize the imbalance that exists in the relationship between tribes and the United States, thus moving the needle towards a more equal relationship. Indian tribes have always been at a disadvantage in dealing with the United States within the context of the trust relationship.[17] During the treaty-making period, tribes often times did not understand the terms of the treaties that they were entering into because they were written in English, which many tribal leaders did not speak.[18]Treaties are essentially contracts between nations. Using the Indian law canons of construction, to interpret an ambiguity in a treaty in favor of Indian tribes, is analogous to applying the rule in contract law that ambiguities in a contract should be construed in favor of the party that did not draft the contract language.[19] This rule recognizes the position of power that a party holds when drafting a contract. The rule that ambiguous terms in a treaty should be construed in the favor of the non-drafting Indian tribe recognizes the power

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[15] *Alaska Pacific Fisheries Co.*, 248 U.S. at 89-90.

[16] *See, e.g., Worcester*, 31 U.S. at 581 (where the Court created the Indian canon of construction); *Cherokee Nation*, 30 U.S. at 2 (recognizing the trust relationship between the United States and Indian tribes).

[17] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 52 (1987) ("If Indians are involved, you should infuse all federal laws, old and new, with the policy of the special Indian trust relationship and read those laws with a heavy bias in favor of Indian and tribal prerogatives.").

[18] *See Worcester*, 31 U.S. at 582 ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").

[19] United States v. Seckinger, 397 U.S. 203, 210 (1970).

dynamic that existed between Indian tribes and the United States during the treaty-making period.[20]

Chief Justice John Marshall and Justice John McLean constructed the rule about ambiguities in treaties between the United States and Indian tribes should be construed in the favor of the Indians.[21] In 1832, in *Worcester v. State of Georgia*, Justice McLean[22] wrote, "The language used in treaties with the Indians should never be construed to their prejudice."[23] The Supreme Court cited Justice McLean's rule of treaty interpretation in numerous cases throughout the nineteenth and twentieth centuries to support their application of the Indian law canons of construction.

In 1866, *In re Kansas Indians*, the Court held that the State of Kansas had no right to tax the lands held by individual members of the Shawnee, Miami, and Wea Tribes.[24] The sought a narrow construction of a provision in the treaty at issue. The particular provision exempted the tribal lands from "levy, sale, execution, and forfeiture."[25] The State tried to argue that this provision only applied to a levy or a sale under judicial proceedings.[26] However, the Court interpreted the treaty provision in favor of the tribes.[27]

In 1886, the Court held in *Choctaw Nation v. United States* that the Choctaw nation was entitled to a judgment against the United States for lands that were taken from it and for annuities the United States had failed to pay.[28] The Nation had sued, alleging that the United States had breached the treaty of September 27, 1830,

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[20] Jones v. Meehan, 175 U.S. 1, 10-12 (1899) (for an explanation of why an imbalance in negotiating position matters in interpreting Indian treaties).

[21] *See Worcester*, 31 U.S. at 582 ("The language used in treaties with the Indians should never be construed to their prejudice. … "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule construction.").

[22] John McLean (1785-1861) was a United States Representative, Postmaster General, and Associate Justice of the Supreme Court (1829-1861). He was one of the two dissenting justices in *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[23] *Worcester*, 31 U.S. at 582.

[24] In re Kansas Indians, 72 U.S. 737, 760-61 (1866).

[25] *Id.*

[26] *Id.*

[27] *Id.* ("[E]nlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: 'The language used in treaties with the Indians shall never be construed to their prejudice, if words be made us of which are susceptible of a more extended meaning that the tenor of their treaty.'")(quoting *Worcester*, 31 U.S. at 582).

[28] Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886).

between the Choctaw and the United States.[29] The United States argued that the Choctaw were not entitled to the proceeds from the sale of their lands. The Court interpreted the phrase "shall be allowed" in the treaty to award the Choctaw the proceeds of the sale of the lands which the United States sold that had been ceded by the Tribe under the treaty of 1830.[30] To support its construction of "shall be allowed" in favor of the Choctaw the Court cited *Worcester*.[31]

In 1930, in *Carpenter v. Shaw*, the Court held that the State of Oklahoma could not tax the petroleum and natural gas royalties of members of the Choctaw nation that stemmed from fossil fuel extraction on their allotments.[32] The tribal members alleged that the State had assessed taxes on their petroleum royalties.[33] The State argued that the royalties were not exempt because the tribal members could alienate their allotted lands. If the lands were able to be alienated then they were subject to State taxation.[34] To the State, the leasing of the petroleum rights by the tribal members was an alienation of the tribal member's allotments that was subject to state taxation.[35] The Court held that the tribal members were exempt from taxation on their petroleum royalties because an exemption had been secured by the tribe in its agreement with the United States. Even though this exemption did not expressly say that the royalties in particular were exempt from State taxation, the Court applied the Indian law canons of construction, and construed both the Allotment Act and the treaty at issue in favor of the tribe and its members.[36]

In 1973, in *McClanahan v. State Tax Commission of Arizona*, the Court held that the Arizona state individual income tax was unlawful when applied to a Navajo tribal member living on the reservation, who derived their income solely from work on the reservation.[37] In *McClanahan*, a member of the Navajo Nation

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[29] *Id*.
[30] *Id.* at 33.
[31] *Id.* at 27-28 (quoting *Worcester*, 31 U.S. at 582) ("The language used in treaties with the Indians shall never be construed to their prejudice.").
[32] Carpenter v. Shaw, 280 U.S. 363, 367 (1930).
[33] *Id*. at 365.
[34] *Id*. at 366.
[35] *Id.*
[36] *Id*. at 366-367.
[37] McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 174 (1973).

who worked solely on the Navajo reservation brought suit when $16.20 was held out of her paycheck by the state of Arizona.[38] The Arizona Supreme Court ruled that the tribal member was not exempt from state taxation and was not entitled to a tax refund.[39] The Court cited to *Carpenter*, in ruling for the tribal member, noting that though the 1868 treaty between the United States and the Navajo nation did not explicitly state that the Navajo were to be free from state taxes, the fact that the lands of the Navajo reservation were reserved for the exclusive use and occupancy established the exclusive sovereignty of the Navajo under federal supervision.[40]

It should be noted too that Congress itself, which holds "plenary and exclusive powers to legislate in respect to Indian Tribes," essentially followed the language given by Justice McLean in *Worcester*, when it wrote and enacted 25 U.S.C. §194 in 1834.[41] §194 states that, in a dispute over property involving an Indian and a non-Indian party, the burden of proof rests with the non-Indian party whenever an Indian makes out a presumption of title from the fact of a previous possession or ownership.[42] §194 has been cited by the courts in several decisions concerning disputes over lands between Indians and non-Indians.[43] The statute's most notable recitation by the Court was in *Oneida County v. Oneida Indian Nation of New York State*, finding that the tribe could maintain its action for the violation of their possessory rights of land that they had held aboriginal title to in New York State.[44]

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[38] *Id*. at 166.
[39] *Id*.
[40] *Id*. at 174 (quoting *Carpenter*, 280 U.S. at 367) ("(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").
[41] U.S. v. Lara, 541 U.S. 193, 196 (2004).
[42] 25 U.S.C § 194 (2012).
[43] *See, e.g., U.S. v. Trujillo*, 853 F.2d 800 (10th Cir. 1988); *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986); *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983).
[44] Oneida County v. Oneida Indian Nation of New York State, 470 U.S. 226, 239 (1985).

B. Alaska Pacific Fisheries and the Birth of the Statutory Canon

From Justice McLean's rule, the Court then created the Indian law canon, that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in the favor of the Indians."[45]This proposition first appeared in 1918, in the Court's opinion in *Alaska Pacific Fisheries Co. v. United States*. Justice Willis Van Devanter wrote the Court's opinion and used this language to uphold the fishing rights of the residents of the Native Alaskan village of Metlakatla. The rule pronounced by the Court protected the fishing rights of Metlakatla by filling in the gaps in the statute that established the reservation on the Annette Islands in modern-day Alaska.[46] In 1916, the Alaska Pacific Fisheries Company built a fish trap near one of the reservation's islands. The company intended to catch approximately six hundred thousand salmon every season.[47] Congress had failed to explicitly state in the statute whether the waters around the islands were part of the reservation. The question before the Court was therefore one of construction: What was Congress' intention when it set aside the Annette Islands for the Metlakatla Indians?[48] Since the islands had little arable land, the Court concluded that Congress must have intended to set aside the waters surrounding the islands as well as the islands themselves; otherwise, the Metlakatla Indians would have been unable to sustain themselves.[49]

There is no doubt that the statute creating the Metlakatla reservation was passed for the village's benefit. The Court's Rule, derived from Justice McLean's earlier formulation, that ambiguous language in treaties should be construed in the favor of Indians allowed him to write a favorable opinion for the Metlakatla Indians. The Court was able to make the connection between the statute and the treaty canon because the statute was very similar to a treaty between the United States and the Metlakatla Indians. The

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[45] *Alaska Pacific Fisheries*, 248 U.S. at 89-90 (1918).
[46] Indian Appropriation Act of March 3, 1891, ch. 561, 26 Stat. 1101 (as codified at Comp St. 1916 § 5096a.).
[47] *Alaska Pacific Fisheries Co*., 248 U.S. at 87.
[48] *Id*.
[49] *Id*. at 87-89

statute, similar to prior treaties between the United States and other Indian tribes, promised the Metlakatla the Annette Islands and the use of the Annette Islands to sustain their community.[50] Because of the similarities between the statute and the many treaties, which the United States had entered into with Indian tribes, the Court was able to create the Indian law canon of construction that statutes must be construed liberally in favor of Indians.[51] A statute that regulated Indian affairs, like a treaty, is an exercise of the trust relationship that exists between a tribe and Congress.[52] Thus, a maxim that ambiguities, in statutes that regulate Indian affairs, should be construed in favor of tribes affirms the trust relationship by tilting the relationship towards tribal interests because they did not write the statutes and are likely to have little to no voice in their creation and enactment.

C. Legislative History: The Trust Relationship Necessitates the use of Legislative History when Interpreting Statutes that Regulate Indian Affairs

Legislative history can assist a judge in cases that deal with statutory interpretation. Attorneys and judges can look to the legislative history of a statute in order to determine the legislative intent behind Congress' enactment of the statute[53]. Additionally, the Court can consult the legislative history of the statute to clarify any ambiguous language in the statute. The materials that make up legislative history are the bills, committee hearings, congressional debates, and other documents. These materials are compiled while

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[50] *Id.* at 86-87

[51] *Id.* at 86

[52] See Section 15 of the Act of March 3, 1891, C. 561, 26 Stat. 1101 ("That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan Native s as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior.")

[53] KATE M. MANUEL, BRANDON J. MURRILL & ANDREW NOLAN, CONG. RESEARCH SERV., R 44419, JUSTICE ANTONIN SCALIA: HIS JURISPRUDENCE AND HIS IMPACT ON THE COURT 6-7 (2016).

a bill still resides within Congress, and before it is signed into law by the President.[54]

Legislative history is vitally important to statutory interpretation in Indian law because of the trust relationship between the United States and Indian tribes, and the authority that Congress has over Indian affairs. Every statute that Congress enacts, in terms of Indian policy, is Congress exerting its plenary power over Indian tribes.

The Court has long recognized that Congress has plenary power over Indian tribes that is nearly omnipotent in nature.[55] The Court has never held as unconstitutional a statute enacted by Congress that regulates Indian affairs.[56] Thus, Indian tribes are truly at the mercy of any statute that Congress enacts that regulates Indian affairs. This unequal relationship shows the importance of using legislative history to aid in statutory interpretation in Indian law, and the positive effect that the Indian law canons of construction can have in ensuring that the trust relationship is respected by the Court. The nearly unchecked power that Congress holds to regulate Indian affairs calls for the Court to consider the legislative history of the statute and the intent of Congress in enacting the statute when the statute regulates Indian affairs. The nearly supreme position that Congress holds over regulating Indian affairs and the nature of the trust relationship calls for the Court to use the Indian law canons of construction in interpreting treaties and statutes because Congress has a moral obligation to tribes to protect their interests. The use of the Indian law canons of construction helps to ensure that ambiguous statutes are interpreted in the favor of Indian tribes. This is a fulfillment of the trust relationship because, on its face, any statute that Congress enacts

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[54] *Id.*

[55] *See, e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139 n.10 (1990) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); *Rice v. Rehner*, 463 U.S. 713, 719 (1983) ("'The sovereignty that the Indian Tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is *subject to complete defeasance*.'") (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis in *Rice*)); *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984)).

[56] Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139 (1990).

that regulates Indian affairs should benefit the Indian tribe impacted by the statute, due to the trust responsibility and moral obligation that Congress has to look after Indian interests. The use of legislative history and respect for congressional intent has played a role in several cases where the Court was able to craft an opinion that respected the trust relationship between tribes and the United States.

II. STATUTORY INTERPRETATION IN INDIAN LAW AND THE COURT BEFORE JUSTICE SCALIA: AN APPROACH ROOTED IN HISTORY AND THE TRUST RELATIONSHIP

Before Justice Scalia was appointed to the Court in 1986, the Court used legislative history, as well as the Indian law canons of construction in a series of cases that limited the power of state governments as they sought to intrude into the sphere of tribal sovereignty. In particular, three cases show how the Court used the Indian law canons of construction and legislative history to craft decisions in harmony with congressional intent and the moral obligation that the trust relationship imposes upon Congress, to act in the best interests of Indian tribes in enacting statutes that regulate Indian affairs.

In 1968, in *Menominee Tribe of Indians v. United States*, the Court held that the hunting and fishing rights of the Menominee Tribe of Wisconsin were preserved by the Wolf River Treaty of 1854.[57] The Court ruled in favor of the Tribe, even though the Tribe's status as a federally recognized Tribe had been terminated by Congress in 1954[58]. In 1976, in *Bryan v. Itasca County*, the petitioner Russell Bryan was an enrolled member of the Minnesota Chippewa Tribe. Bryan lived in a mobile home located on trust lands on the Leech Lake Reservation in Minnesota.[59] Bryan asked for a declaratory judgment from the Court, preventing Itasca County and the state of Minnesota from taxing him because Itasca County, where the reservation is located, had sought to collect personal property tax on the mobile home for $147.95.[60] The Court

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[57] Menominee Tribe of Indians v. United States, 391 U.S. 404, 405-406 (1968).
[58] *Id.* at 405-406
[59] Bryan v. Itasca County, 426 U.S. 373, 375 (1976).
[60] *Id.* at 375.

held for Bryan, ruling against the efforts of the [61]State and County to tax Bryan. In 1985, the Court decided *Montana v. Blackfeet*. The case concerned the taxing of mineral royalties by the State of Montana on the Blackfeet Indian Reservation. The Court had to interpret between two different statutes. The Court used the Indian law canons of construction to interpret the statutes and ultimately held for the Tribe.

A. Menominee Tribe of Indians v. United States

In 1968, the Court held that the Menominee Tribe retained its hunting and fishing rights; despite the fact that its status as a federally recognized Indian Tribe had been terminated by Congress in 1954.[62] The State of Wisconsin argued that the hunting and fishing rights of the Menominee had been abrogated by the passage of the Termination Act of 1954, which terminated the Menominee's status as a federally recognized Indian Tribe.[63] Justice William Douglas, ruling in favor of the Tribe, used the Indian canons of construction and legislative history to find that the Tribe retained its hunting and fishing rights despite being terminated.[64] Though the 1854 treaty between the United States and the Tribe did not explicitly state that the Menominee were to keep their hunting and fishing rights, the Court interpreted the ambiguities in the treaty in favor of the Tribe and held that they had retained their hunting and fishing rights by entering into the treaty with the United States.[65] In examining the legislative history in an effort to seek out Congressional intent, the Court looked at the Termination Act of 1954, and other Indian related legislation passed during the same Congress, and statements by legislators.[66] In examining the Termination Act of 1954, the Court found that there was no explicit mention of preserving the hunting and fishing rights of the Tribe.[67] Though there was not an explicit mention of

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[61] Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).
[62] *Menominee Tribe*, 391 U.S. at 405-406.
[63] *Id.* at 408-410.
[64] *Id.* at 412-413.
[65] *Id.* at 406 ("The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.").
[66] *Id.* at 409-411, 413.
[67] *Id.* at 408.

preserving the hunting and fishing rights of the Tribe, the Court did not find this ambiguity to be an implied repeal of the Tribe's hunting and fishing rights. Instead, the Court looked at 18 U.S.C. §1162, which was passed only two months after the Termination Act of 1854. Though, §1162 granted Wisconsin and other states jurisdiction over criminal and civil offenses committed on Indian reservations, the statute still preserved the treaty rights of tribes.[68]To Justice Douglas, this meant that "although federal supervision of the Tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954."[69]

To decide that Congress never had the intent to abrogate the Wolf River Treaty of 1854, the Court looked at the words of the Senate Indian Affairs Committee Chairman, Arthur Watkins of Utah, who said upon the passage of the Termination Act of 1954 that it "in no way violates any treaty obligation with this Tribe."[70]By using the Indian law canons of Construction along with the legislative history surrounding the Termination Act of 1954, the Court was able to write an opinion in *Menominee* that upheld the trust responsibility between the United States and the Tribe, even though the Tribe had been terminated by Congress.

Justice Potter Stewart wrote the dissent in Menominee, in which he was joined by Justice Hugo Black.[71]The dissent's argument is a textual argument that relies upon the plain meaning of the text in the Termination Act of 1954 and §1162. The dissent begins by acknowledging that the language of the Wolf River Treaty of 1854 unambiguously conferred special hunting and fishing rights to the Menominee within the boundaries of their reservation.[72]The dissent then uses textualism to argue that the Menominee have not maintained their hunting and fishing rights because those rights have been abrogated by the passage of statutes by Congress.[73]

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[68] *Id.* at 408.
[69] *Id.* at 411.
[70] *Id.* at 413.
[71] *Id.* at 413.
[72] *Id.* at 413-414.
[73] *Id.* at 414-416.

The dissent's textual argument relies upon two points. First that the Termination Act of 1954 contains no explicit language that pertains to the hunting and fishing rights of the Menominee.[74] The dissent writes "The statute is plain on its face: after termination, the Menominee are fully subject to state laws just are other citizens are, and no exception is made for hunting and fishing laws."[75]The dissent is correct, there is no exception made in the Termination Act of 1954 for the hunting and fishing rights of the Menominee. The dissent does not however consider that because the Termination Act of 1954 fails to explicitly deal with the hunting and fishing rights of the Menominee that an ambiguity then exists. The majority solves the problem of this ambiguity by the use of stare decisis, relying upon the principle that the abrogation of an Indian treaty by Congress must be explicitly, and by looking at the legislative history, in particular the statements of the legislator responsible for the Termination Act of 1954, Senator Watkins.[76]The second textual argument that the dissent makes is that the majority falsely relies upon the principle of in pari materia[77], because the text of §1162 stated that the continuation of special hunting and fishing rights were to be maintained in Indian Country and the Termination Act of 1954 abolished the Menominee reservation, the dissent saw no need to apply §1162 to the Menominee.

The fatal flaw in the dissent's argument here is that §1162 was passed two months after the passage of the Termination Act of 1954, both statutes went through the same committees, and same Congress, and were signed into law by the same President, and §1162 became effective seven years before the Termination Act of 1854, meaning that when §1162 was enacted the Menominee reservation was still Indian Country within the definition of §1162.[78] Clearly Congress intended for §1162 to apply to the Menominee Reservation or it would have said something to exclude the Menominee. By looking at the legislative history of the two statutes, and considering the two statutes in pari materia, the

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[74] *Id*. at 415-416.
[75] *Id*. at 415.
[76] *Id*. at 413.
[77] In pari materia, in which statutes that are enacted at different times but concern the same subject matter are interpreted in light of each other.
[78] *Id*. at 410-411.

majority succeeds where the dissent fails, and crafts an opinion in Menominee that considers Congressional intent, upholds treaty rights, and interprets the ambiguities in both statutes in favor of the Menominee, thus adhering to the Indian law canons of construction.

B. Bryan v. Itasca County

In *Bryan v. Itasca County*, Justice William Brennan follows the framework that this note suggests is the ideal framework for the Court to use in Indian law cases that involve questions of statutory interpretation. The Court uses legislative history and congressional intent, as well as, the Indian law canons of construction to write an opinion in *Bryan* that is in harmony with the trust relationship.[79]

In *Bryan*, the state of Minnesota and Itasca County sought to use 18 U.S.C. § 1160 and 18 U.S.C. § 1360 to justify their taxation of Bryan.[80] The State argued that, in passing PL.280, Congress placed the Leech Lake Indian Reservation under the civil jurisdiction of the state.[81] The State then argued that, since the reservation was subject to Minnesota's civil jurisdiction, Bryan was also subject to the taxing powers of the state and local government.[82]

Writing for the majority, Justice Brennan used legislative history to show that Congress did not intend to make the Leech Lake Indian Reservation and Bryan subject to the taxing powers of the state and local governments by passing PL. 280.[83] One of the ways that the Court did this was by considering, not only the text of PL. 280; but also, the intervening legislative enactments of

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[79] *Bryan*, 426 U.S. at 381.
[80] 18 U.S.C. § 1160 (2006) and 18 U.S.C. § 1360 (2006) together compose Public Law 280, hereinafter they will collectively be referred to as PL. 280. PL. 280 was passed by Congress in response to what it saw as lawlessness on some Indian reservations. PL. 280 granted the states authority over some civil and criminal matters on some Indian reservations. PL. 280 was passed in 1953 when Congress was pursuing the goal of further assimilating Indians into the larger non-Indian society. *See Bryan v. Itasca County*, 426 U.S. 373 379-386 (1976) for a discussion of the legislative history and congressional intent behind PL. 280.
[81] *Bryan*, 426 U.S. at 378-379.
[82] *Id.* at 375.
[83] *Id.* at 381.

Congress since the statute was first passed in 1953.[84] For example, the Court notes that the passage of 28 U.S.C. §1360(c) by Congress "contemplates the continuing vitality of tribal government."[85] The position that the State and the County seeks to subordinate the Leech Lake Reservation Tribal Council to both the state and the local county government.[86] This position would strip the tribal government of its sovereignty and lessen its viability. The Court seeks for the intent of Congress when it cites the testimony of Senator Sam Ervin of North Carolina, who was involved in the passage of PL. 280, who said "Public Law 280 relates primarily to the application of state civil and criminal law in court proceedings" to show that Congress did not intend to extend to states the taxing authority over tribes when it passed PL. 280; but rather sought only to extend criminal and civil authority to states over some tribes.[87] Lastly, the Court notes that, though there is some ambiguity in the statute, the Indian law canons of construction call upon the Court to construe these ambiguities in favor of the Tribe.[88] The Court looks at the legislative history behind the statute to discern the intent of Congress; and, where an ambiguity still exists, it then applies the Indian law canons of construction. By applying this framework, the Court is able to construct an opinion that is mindful of the trust relationship that exists between the Tribe and the United States.

C. Montana v. Blackfeet Tribe of Indians

The Court's 1985 decision in *Blackfeet Tribe*[89] powerfully reaffirmed Indian law canons of construction found in a line of cases stretching back for over 150 years. The question in *Blackfeet* was whether the State of Montana could tax the royalty interests of the Tribe made from oil and gas produced on the reservation.[90] To decide whether the State could tax the oil and gas royalties of the

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[84] *Id.* at 387-389.
[85] *Id.* at 376; *see also* 28 U.S.C. § 1360(c) (2012) (provides for the full force and effect of tribal ordinances and customs that do not conflict with any applicable civil laws of a state).
[86] *Bryan*, 426 U.S. at 375.
[87] *Id.* at 387.
[88] *Id.* at 392 (citing *Alaska Pacific Fisheries v. U.S.* 248 U.S. 78 (1918)).
[89] *Montana*, 471 U.S. at 761.
[90] *Id.* at 761.

Tribe, the Court had to interpret the Indian Mineral and Leasing Act of 1938.[91] In 1924, Congress amended the 1891 statute that permitted mineral leasing on Indian lands.[92] The amended 1924 Act explicitly allowed states like Montana to tax oil, gas, and mineral production on tribally held lands, stating that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located."[93] In 1938, Congress passed the Indian Mineral and Leasing Act of 1938 (IMLA). The IMLA did not explicitly repeal the tax found in the 1924 statute, nor did it authorize such a tax.[94] The Indian Mineral and Leasing Act of 1938 did include a general repeal clause, which read, "all Acts or parts of Acts inconsistent here with are hereby repealed."[95] The state of Montana imposed taxes on the mineral royalties of the Tribe and its members citing the ability to do so under the 1924 statute.[96]

Writing for the Court, Justice Byron White held that the State of Montana was unable to tax the mineral royalties of the Tribe. The Court noted that the standard principles of statutory construction do not have the same weight in Indian law that they do in other fields of the law, writing "the canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."[97] In light of the unique trust relationship between the Tribe and the United States, the canon of statutory construction the Court found did apply was the Indian law canons of construction that, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[98]

By applying the Indian law canons of construction to the 1924 and 1938 statutes, the Court found that the State's interpretation of the statutes did not meet the rule requiring that the statutes be construed liberally in favor of the Tribe.[99] The Court specifically cites that the trust relationship requires that the Court apply the

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[91] *Id.* at 762; *see also* 25 U.S.C. § 396 (2012).
[92] *Id.* at 763.
[93] *Id.* at 763.
[94] *Id.* at 764.
[95] *Id.* at 764.
[96] *Id*.
[97] *Id.* at 766.
[98] *Id*.
[99] *Id*.

Indian law canons of construction to its interpretation of the 1924 and 1938 statutes.[100] The Court did not stop simply at using the Indian law canons of construction to write an opinion that is in harmony with the trust relationship and fulfills the moral obligation that exists between the United States and the Blackfeet Tribe. The Court also looked to the legislative history of the 1938 Act to find what the intent of Congress was in enacting the statute. The Court wrote:

> Nothing in either the text, or legislative history of the 1938 Act, suggests that Congress intended to permit States to tax Tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 act.[101]

The Court's consideration of the legislative history of the 1938 act is important because, by examining the legislative history of the act, the Court is seeking out the intent that Congress had when it passed the statute. Congressional intent matters greatly in interpreting statutes that regulate Indian affairs because of the plenary power that Congress has to regulate Indian affairs. The Court, in crafting its opinion, has examined all of the elements that the Court should consider in crafting an opinion that is at harmony with the trust relationship and the moral obligation that the United States owes to a tribe. The Court considers the trust relationship, keeping it in the back of its mind as it moves through its statutory interpretation, concluding that the trust relationship compels the Court to use the Indian law canons of construction to interpret the statute then, to ensure that the government to government relationship between the Tribe and Congress is respected, the Court then examines the legislative history of the statute in

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[100] *Id.* at 767.
[101] *Id.*

question. By using this three-part framework, the Court is able to weave an opinion that is in harmony with the trust relationship and fulfills the moral obligation that Congress has to the Tribe.

III. TEXTUALISM ALLOWS THE COURT TO IGNORE THE TRUST RELATIONSHIP

Since the dawn of the Rehnquist Court in 1986, and proceeding into the Roberts Court in 2005, Justice Antonin Scalia, Justice Clarence Thomas, Justice Stephen Breyer and Justice Samuel Alito have all used textualism to render decisions in cases involving statutory interpretation in Indian law that have largely ignored the trust relationship, the intent of Congress in passing the statute, and the Indian law canons of construction. These decisions have all had a negative impact on Indian tribes on a number of different issues ranging from criminal justice, tax, child custody, Indian gaming, and land into trust.

Justice Scalia looked only to the plain meaning of the words in the context within, which they are found in a statute.[102] Justice Scalia was not a proponent of using extrinsic evidence to provide definitions for the words in a statute. He held in particular disdain the practice of using legislative history to show that a word meant a specific definition.[103] He stated, "I don't care what the legislators intended. I care what the fair meaning of this word is."[104] Justice Scalia did not care to use legislative history to interpret the meaning of a statute because he believed that doing so was unconstitutional. In discussing the use of committee reports and floor speeches to define the meaning of a statute he stated, "[I]t is an unconstitutional practice to say that the meaning of statute which the full Congress adopted is going to be determined by a committee or, indeed by a single individual speaking on the floor of Congress."[105] As previously discussed, because Congress has an almost supreme authority over Indian affairs, the intent of

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[102] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1616 (2012).
[103] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651 (1990) ("After his elevation to the Supreme Court, Justice Scalia has authored a number of specially concurring or dissenting opinions arguing that the Court should ignore legislative history.").
[104] Scalia, *supra* note 103, at 1616.
[105] Scalia, *supra* note 103, at 1617.

Congress in enacting a statute is extremely important. Using the plain meaning of a word in statute can lead to the Court interpreting a statute in a case involving a statute that regulates Indian affairs in a way that renders a decision at odds with both the trust relationship and the original intent that Congress had in enacting the statute.

To a strict textualist like Justice Scalia, a rule of statutory construction like the Indian law canons of construction was irksome. In his treatise on statutory interpretation, *A Matter of Interpretation,* Justice Scalia directly addressed the Indian law canons of construction and other rules of statutory construction. Justice Scalia wrote that "these preferential rules and presumptions are a lot of trouble."[106] Of the Indian law canons of construction, specifically, Justice Scalia said, "Every statute that comes into litigation is to some degree 'ambiguous'; how ambiguous does ambiguity have to be before the rule in favor of Indians applies?"[107] Justice Scalia then asked whether the Court even possessed the authority to create such a rule of statutory construction. Justice Scalia stated that, "[t]here is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than they fairly say? I doubt it."[108] The brand of textualism that Justice Scalia espoused that has been adopted by the Court makes no exception for the use of legislative history or the Indian law canons of construction when engaging in statutory interpretation in Indian law. The emergence of the use of textualism as the leading tool for statutory interpretation in regard to statutes that regulate Indian affairs has effectively rendered the Indian law canons of construction obsolete.

Each Justice has had their own approach to using textualism to interpret ambiguities in statutes that regulated Indian affairs. However, the approach embraced by the Court's former foremost proponent of textualism, Justice Scalia, is particularly problematic for the trust relationship. Justice Scalia's textualism is emblematic of the problem that using textualism in reading a statute that regulates Indian affairs poses to the trust relationship because it

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[106] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (Amy Gutmann, ed., 1997).
[107] *Id.* at 28.
[108] *Id.* at 28-29.

ignores legislative history and the Indian law canons of construction. The use of textualism by the Rehnquist and Roberts Courts to interpret statutes that regulate Indian affairs is different than the approach that was previously embraced by the Court.

IV. THE INDIAN LAW CANONS OF CONSTRUCTION AND THE REHNQUIST AND ROBERTS COURTS: THE VITIATING OF THE INDIAN LAW CANONS OF CONSTRUCTION

As we will see from the cases that follow the adoption of the use of textualism for statutory interpretation by the Court is in many of the Indian law decisions that the Court has decided since Chief Justice Burger left the Court in 1986.[109] The consistent thread throughout Indian law cases that involve statutory interpretation is that the Indian interest, more often than not, loses when textualism is used to interpret a statute rather than the Indian law canons of construction. In these cases, the majority pays little to no attention to the trust relationship and shows a total disregard for the moral obligation that the United States has to the Tribe. The Court has come to treat questions of statutory interpretation in Indian law as simple binary problems that elicit a simple "yes" or "no" answer that can only be found in the text of the statute. Indian law is simply not binary like criminal law, where a person is only guilty or not guilty, because of the intricacies and complexities brought to Indian law by the unique trust relationship between the United States and tribes, Indian law cannot be simply binary. There are five hundred and sixty-six federally recognized tribes in the United States, and the trust relationship and moral obligation that the United States has with each tribe is unique to that Tribe.[110] The Indian law canons of construction allow for and respect how unique the trust relationship is. Each statute is liberally construed in favor of the Indian tribe involved in the case. The Indian law canons of construction are not beholden to the simple black and white text of a statute.

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[109] Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1.4.

[110] Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019-5021 (Jan. 29, 2016).

A. Blatchford v. Native Village of Noatak and Circle Village

In 1991, Justice Scalia wrote the opinion in *Blatchford v. Native Village of Noatak and Circle Village*.[111] The case involved a question of statutory interpretation centered around whether the enactment of 28 U.S.C. §1362 by Congress was an abrogation of Eleventh Amendment immunity from the state of Alaska by Congress. This allowed the Native villages involved in the case to sue the state of Alaska.[112]
The text of 28 U.S.C. § 1362 reads:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.[113]

In 1980, the State of Alaska passed a statute which, provided twenty five thousand dollars annually to Native village governments located, in the state that were not part of a state municipally-chartered community.[114] Due to concerns from the state's Attorney General, the state repealed and replaced the statute and expanded the program to all communities.[115] The expansion of the program reduced the funds that the Native villages would receive.[116] The Native villages sued seeking an order requiring the state to pay them the full $25,000.00 that they were entitled to under the original statute.[117] In order to be able to sue the state of

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[111] Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 777 (1991).
[112] *Id.* at 779; *see also* 28 U.S.C. § 1362 (2012).
[113] 28 U.S.C. § 1362 (2012).
[114] *Blatchford*, 501 U.S. at 778.
[115] *Id*.
[116] *Id*.
[117] *Id*. at 778.

Alaska, the Native villages argued that 28 U.S.C. §1362 allowed their suit to move forward.[118]

The Court held that §1362 did not expressly contain an abrogation of the sovereign immunity of the states against Native American tribes.[119] The Court wrote that if Congress were to waive the sovereign immunity of the states from suit by Native American tribes, then such a waiver needed to be made with an "unmistakably clear intent to abrogate immunity, made plain in the language of the statute.[120] The Court did not find in §1362 a plain and unambiguous waiver of Alaska's immunity from suit under the Eleventh Amendment, and so ruled against the Native villages.[121]

The Court used textualism to rule against the Native villages in *Blatchford*. In contrast to the majority, Justice Blackmun instead used the Indian canons of construction in his dissent to argue against the conclusion that the Court reached. Specifically, Justice Blackmun cited the Indian law canon of construction "that statutes passed for the benefit of Indian tribes are to be liberally construed, with doubtful expressions resolved in the favor of the Indians."[122] On its face, §1362 may appear to only be a procedural statute; but if it is interpreted using the Indian law canons of construction in a way that is in harmony with the trust relationship, then the benefit to Indian tribes is obvious. Interpreted in the favor of Indian tribes, §1362 allows Indian tribes to sue states, effectively giving them the same power that states possess—the power to sue another state. Both the state of Alaska and Justice Scalia did not make the argument that §1362 was not passed for the benefit of Indian tribes. In order to rule against the Native villages on the question of whether or not §1362 had abrogated the sovereign immunity of the state of Alaska from suit from Indian tribes, Justice Scalia completely ignored both the Indian law canons of construction and the trust relationship that exists between the United States and the Native villages. Instead, had the Court crafted an opinion in *Blatchford* that was in harmony with the trust relationship, and used the Indian law canons of construction to interpret §1362. The

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[118] *Id.* at 782-783.
[119] *Id*. at 787-788.
[120] *Id*. at 787.
[121] *Id.* at 788-789.
[122] *Id*. at 795.

Court would have furthered tribal sovereignty by placing tribes and states on a more equal legal footing.

B. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation

In 1992, Justice Scalia used the plain text of the General Allotment Act[123] to rule against the Confederated Tribes and Bands of Yakima Indian Nation in a dispute over the State of Washington's ability to tax fee lands owned by the Tribe and its members on the Tribe's reservation.[124] The Allotment Act was signed into law by President Grover Cleveland in 1887.[125] The supreme aim of the Act was to substitute white civilization for tribal culture by making farmers out of individual Indians. To achieve this aim, the Act granted one hundred and sixty acres to the head of each Indian household and, after twenty five years, the land would be issued to the individual Indian landowners in fee, then it could be alienated and encumbered.[126] It was hoped that the individual Indian land owners would farm their individual allotments; and embrace the principles of individual ownership of land and capitalism embraced by white civilization, and move away from the principle of collective tribal ownership of land long adhered to by Indian tribes.[127]

Both the Tribe and the United States argued that the Tribe was not subject to taxation because §6 of the General Allotment Act was defunct; even though, it had not been explicitly repealed by Congress.[128] The Tribe argued that, since Congress shifted Indian policy away from the policy of allotment when it enacted the Indian Reorganization Act,[129] that this shift was effectively an

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[123] Also known as the Dawes Act, named after its primary author Senator Henry Dawes of Massachusetts.
[124] County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 253 (1992); *see also* 25 U.S.C. § 388 (1929).
[125] *History of the Allotment Policy*: *Hearings on H.R. 7902 Before the House Comm. On Indian Affairs*, 73d Cong. 428-85 (1934) (statement of Delos Sacket Otis, Historian, employed by the Bureau of Indian Affairs to write a history of allotment under Dawes Act.)
[126] *Id.*
[127] *Id.*
[128] *County of Yakima*, 502 U.S. at 259-260.
[129] Also known as the Wheeler-Howard Indian Rights Bill.

implied repeal of the General Allotment Act and §6.[130] The legislative history of the Indian Reorganization Act supports the Tribe's position.[131] In a memorandum to the Senate and House Committees on Indian Affairs, John Collier, the architect of the Indian Reorganization Act, wrote of the woes brought onto tribes by the Allotment Act and the need for the reform offered by the passage of the Indian Reorganization Act. Mr. Collier wrote that the Act "creates between the Indians and the Government a relationship barren, embittered, full of contempt and despair," and that it was apparent that the Allotment Act had created an "administrative impossibility."[132] After receiving Mr. Collier's memorandum regarding the negative impact that the Allotment Act had on Indian tribes, Congress passed the Indian Reorganization Act in 1934 by a resounding margin.[133] As further evidence that Congress had repealed §6 by implication, the Tribe pointed to the fact that in 1948 Congress had defined Indian country to "include all fee land within the boundaries of an existing reservation, whether or not held by an Indian."[134]

The Court rebutted the Tribe's argument that the actions of Congress in passing the Indian Reorganization Act, and other legislative enactments, amounted to an implied repeal of §6. The Court examined the text of §6 and found no explicit language that exempted the lands in question from state and local taxation. The Court then stated that it was a "cardinal rule that repeals by implication are not favored," and proceeded to rule against the Tribe. The plain language of §6 states that once an allottee is granted a patent in fee simple that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."[135] Justice Scalia argued that in Congress' 1934 enactment of 25 U.S.C. § 461, Congress chose to not return allotted land to its pre-Allotment Act status. He found this to be further proof that §6 was

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[130] *County of Yakima*, 502 U.S. at 260-261.
[131] *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill*: Hearings on *H.R. 7902 Before the Senate and Indian House Committees on Indian Affairs*, 73d. Cong. 15-18 (1934) (statement of John Collier, Commissioner, Bureau of Indian Affairs).
[132] *Id.*
[133] For example, the Indian Reorganization Act passed the House by a margin of 258-88.
[134] *County of Yakima*, 502 U.S. at 260.
[135] 25 U.S.C. §349 (2012).

not repealed by implication.[136] The decision that the Court rendered in *Yakima* ignored the Indian law canons of construction, the intent of Congress behind changes in Indian policy after the passage of the Allotment Act, and the trust relationship.

Justice Blackmun's dissent in *Yakima* crafts a result that is in harmony with the trust relationship and pays respect to the plenary power of Congress over Indian affairs by using the Indian law canons of construction and congressional intent. Justice Blackmun wrote:

> [T]he Court mistakenly assumes that it cannot give any effect to the many complex intervening statutes reflecting a complete turnabout in federal Indian policy—now aimed at preserving Tribal integrity and the Indian land base—since enactment at the turn of the century of the statutory provisions upon which the Court relies. These current and now longstanding federal policies weigh decisively against the Court's finding that Congress has intended the States to tax—and, as in these cases, to foreclose upon—Indian-held lands.[137]

Justice Blackmun went to the heart of the matter—the General Allotment Act was enacted more than 100 years before the Court heard *Yakima* and, since then, Congress and the goals that it had in passing statutes that regulate Indian affairs had changed. At the turn of the nineteenth century when the General Allotment Act was enacted, Congress had the goal of assimilating Indians into the dominant white society in order to make yeoman farmers out of as many Indians as possible.[138] These policies were a sharp contrast

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[136] *County of Yakima*, 502 U.S. at 261.
[137] *Id*.
[138] See *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *see also* United States Department of Agriculture, Definition of Indian Country, 2 (2016), *available at*

to the policies of the Indian Reorganization Act, which sought to strengthen tribal governments and encourage the development of tribal sovereignty.[139] Justice Blackmun's dissent acknowledges this total shift in Indian policy, as well as, the failure of the Allotment Act.[140] To Justice Blackmun, the intent that Congress had in passing the Indian Reorganization Act was, at least in part, to end the harm done to Indian tribes by the Allotment Act.[141] Given that Congress has a plenary power when it comes to enacting statutes that regulate Indian affairs, the congressional intent behind the passage of the statute, or subsequent statutes that alter the policy created by a preceding statute, should be given great weight by the Court. Justice Blackmun gives great weight to Congressional intent in his dissent, while Justice Scalia does not and, in doing so, Justice Scalia gives short shrift to the trust relationship between Congress and Indian tribes.

C. South Dakota v. Bourland

South Dakota v. Bourland was a 1993 case dealing with treaty and statutory interpretation centered on the Cheyenne River Act.[142] Justice Clarence Thomas authored the opinion of the Court. The question before the Court was whether the Cheyenne River Sioux Tribe had the power to regulate hunting and fishing by non-Indians on its former reservation lands that had been acquired by the United States for the operation of the Oahe dam and reservoir.[143]

The Fort Laramie Treaty of 1868 set aside the Great Sioux Reservation for several Sioux tribes, including the Cheyenne River Sioux Tribe.[144] The Fort Laramie Treaty provided for the "absolute and undisturbed use and occupation of Sioux Tribes and that no non-Indians (except authorized government agents) would ever be permitted to pass over, settle upon, or reside in the Great Sioux Reservation."[145] The Great Sioux Reservation was then divided

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https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf .

[139] 25 U.S.C. §§ 461-494 (2012).
[140] *County of Yakima*, 502 U.S. at 270-278 (1992).
[141] *Id.*
[142] South Dakota v. Bourland, 508 U.S. 679, 681 (1993).
[143] *Id*. at 681-682.
[144] *Id.* at 684.
[145] *Id*.

into several reservations by the Act of Mar. 2, 1889, ch. 405, 25 U.S.C. §888, which demarcated the Cheyenne River Sioux Reservation, located in South Dakota.[146] The 1889 statute contained language that explicitly preserved those rights of the Tribe held under the Fort Laramie Treaty as long as those rights did not conflict with the language of the newly passed statute.[147]

In the time period following the construction of the Lake Oahe dam, the Tribe and the State of South Dakota both regulated hunting and fishing in the fee land surrounding the dam and reservoir.[148] In 1988, the Tribe announced that it would not recognize hunting licenses issued by South Dakota, and that those found within the boundaries of the reservation with only a state hunting license would be subject to prosecution in Tribal court.[149] The State filed suit seeking to enjoin the Tribe from taking action against those hunting on non-trust lands within the boundary of the reservation.[150] The case turned on the interpretation of §10 of the Cheyenne River Act.

The Court ruled that Congress had abrogated the Tribe's rights to regulate hunting and fishing by non-Indians in the fee lands of the reservation that had been taken for the construction of the Lake Oahe dam.[151]The Court relied upon the plain text of the Cheyenne River Act as well as precedent from earlier decisions of the Court to reach the conclusion that Congress had abrogated the Tribe's right to exclude non-Indians. Although the Court acknowledges that statutes should be construed liberally in the favor of Indians, it found that the language of both the Flood Control Act and the Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from the fee lands within the boundaries of the reservation.[152] §4 of the Flood Control Act provides that projects such as the Oahe reservoir should be open to public use for recreational purposes.[153] Though no language in the Flood Control Act specifically acknowledged the Tribe or the Treaty of Fort Laramie, the Court chose to give more force to the language in the

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[146] *Id*.
[147] *Id*.
[148] *Id.*
[149] *Id*.
[150] *Id*.
[151] *Id*. at 687.
[152] *Id.* at 691.
[153] *Id*.; 16 U.S.C. § 460 (d) (2012).

statute promising recreational use of the reservoir and the lands adjacent to it than to the trust relationship and moral obligation to the Tribe that was created by Congress ratifying the Treaty of Fort Laramie.[154] The Court went on to point out that if Congress intended for the Tribe to be able to regulate hunting and fishing on the fee lands within the boundary of the reservation, it would have done so when it passed the Cheyenne River Act.[155]

Justice Blackmun's dissent found the majority's opinion and its reliance on the text of the Flood Control Act and the Cheyenne River Act to be misplaced.[156] Justice Blackmun noted that the majority found no explicit language granting the Tribe the authority to regulate hunting and fishing on the fee lands, and also found no language banning the Tribe from doing so. Rather, Justice Blackmun's dissent points out what the majority has done in looking at the text of both statutes—using the text of the two statutes to find an implied repeal of the Tribe's right to regulate hunting and fishing on the fee lands. Justice Blackmun's dissent advocated for the use of the Indian law canons of construction to affirm the decision of the Eighth Circuit Court of Appeals, which had held for the Tribe.

The majority's reliance on the ambiguities in the text of both the Cheyenne River Act and the Flood Control Act ignores both the Indian law canons of construction and the trust relationship. Ambiguities in statutes like the Cheyenne River Act and the Flood Control Act, that Congress passes that regulate Indian affairs are supposed to be construed liberally in the favor of Indian tribes. Interpreting both of these statutes in such a manner would have upheld the Tribe's authority to regulate hunting on the fee lands of the reservation. This would have enabled the Tribe to better ensure a food supply for its membership. The hunting rights of the Tribe were critically important to the Tribe and were promised to the Tribe in perpetuity in the Treaty of Fort Laramie. Thus, the majority's judicial dilution of the Tribe's ability to regulate hunting and fishing on their treaty lands ignores the moral obligation and trust relationship that was created between the Tribe and Congress by the Treaty of Fort Laramie. Had the Court used the approach of using the Indian law canons of construction to

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[154] *South Dakota*, 508 U.S. at 691.
[155] *Id.*
[156] *Id.* at 702.

construe the ambiguities in the Flood Control Act and the Cheyenne River Act in favor of the Tribe, he would have been able to craft an opinion that would have been in harmony with the trust relationship.

D. Chickasaw Nation v. United States

In 2001 in *Chickasaw Nation v. United States*, the Court used textualism in its statutory interpretation of the Indian Gaming and Regulatory Act (IGRA) to find that Tribes are required to pay federal taxes on pull tabs[157] used in gaming.[158] The Chickasaw Nation sued the United States seeking a refund of the federal wagering and occupational excise taxes that it had paid in conjunction with the Nation's pull tab gaming operations.[159] Writing for the majority, Justice Steven Breyer stated that specific canons of statutory interpretation like Indian law canons of construction can be countered by "some maxim pointing in a different direction."[160] Breyer went on to give more force to the maxim that "warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed."[161] The tax exemption that the Tribe sought to reclaim the taxes that it had paid on its pull tab gaming operations, was not expressly found in IGRA. Since the tax exemption that the Tribe hoped for was not explicitly found in the plain text of the statute, the Court did not find for the Tribe.

Justice Sandra Day O'Connor dissented in *Chickasaw.* Justice O'Connor believed that, on its face, IGRA was ambiguous as to whether or not tribes had to pay taxes on pull tabs and so she wrote, "Because I believe §2719(d) is subject to more than one interpretation, and because statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, I respectfully dissent."[162] Justice O'Connor concludes in her dissent that an ambiguity does exist in §2719(d) that cannot be

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[157] Note, a pull tab is a ticket game where one pulls a tab on the ticket to reveal if they have won a prize.
[158] Chickasaw Nation v. United States, 534 U.S. 84, 86 (2001); 25 U.S.C. § 2719 (d) (2012).
[159] *Id.*
[160] *Id.* at 94.
[161] *Id.* at 95.
[162] *Id.* at 96.

solved by looking at either the legislative history or the text of the statute.[163] Here then, Justice O'Connor argued that the Indian law canons of construction should be consulted by the Court.[164]

Further, Justice O'Connor's approach to interpreting §2719(d) is in harmony with the trust relationship. Justice O'Connor acknowledged the Indian law canons of construction and applied them to her interpretation of the statute. Justice O'Connor acknowledged that there are two competing canons at play in this case—the Indian law canons of construction and the canon that Justice Breyer uses that states that tax exemptions must be expressly given by Congress before the Court can grant them.[165] Justice O'Connor points out that the Court should give more weight to the Indian law canons of construction because the Court has held previously, in *Choate v. Trapp*, that when two canons conflict, the Indian law canon "predominates".[166] Justice O'Connor's dissent uses the Indian law canons of construction as well as stare decisis in regards to *Choate* to reach a decision that is in harmony with the trust relationship and acknowledges the moral obligation that the United States owes to the Chickasaw Tribe.

E. Carcieri v. Salazar

In 2009, in *Carcieri v. Salazar*, the Court used textualism to interpret the Indian Reorganization Act instead of applying the Indian law canons of construction.[167] The issue in *Carcieri* was the ability of the Department of the Interior (DOI) to take a parcel of land into trust for the Narragansett Tribe.[168] The federal government formally recognized the Narragansett Tribe in 1983.[169] After being recognized, the Tribe purchased thirty-one acres for housing and requested that the DOI take the land into trust for the Tribe.[170] The DOI accepted the land into trust. The State of Rhode Island and the local municipality sued to enjoin the Department's

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[163] *Id*.
[164] *Id.*
[165] *Id.*
[166] *Id*.
[167] *Ca*rcieri v. Salazar, 555 U.S. 379, 379 (2009).
[168] *Id*. at 379.
[169] *Id*.
[170] *Id*.

action.[171] The First Circuit Court of Appeals upheld the DOI's action in *Carcieri v. Kempthorne*.

The Court of Appeals found that the use of the word "now" in the statute was ambiguous.[172] As evidence for this ambiguity, the Court of Appeals cited two reasons—one, that Congress had used the word "now" in other statutes to refer to the time of the statute's application and not its enactment; and, two, that the text of §479 did not clarify the meaning of "now" within the context of the statute.[173] The Court then applied the rule from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and deferred to the DOI's understanding of the word "now" and ruled for the DOI and the Tribe."[174] The State of Rhode Island then petitioned the Supreme Court for certiorari.[175]

Justice Clarence Thomas wrote the opinion in *Carcieri v. Salazar*. The Court reversed the decision of the Court of Appeals. The Court wrote that the phrase "now under federal jurisdiction" in the Indian Reorganization Act, 25 U.S.C. §479[176] unambiguously referred only to those tribes under federal jurisdiction in 1934. Since the Narragansett Tribe was not, then the DOI could not legally take land into trust for the Tribe.[177]

The Court purported to look at the plain meaning of the words of §479. The Court interpreted "now" as meaning at the time of the statute's enactment.[178] Instead of interpreting "now" as the as such, the Court should have used the Indian law canons of construction that statutes are to be liberally construed in the favor of Indians. The Court could have read "now" as referring to 1998, when the DOI accepted the land into trust instead of 1934, when the statute was enacted. Instead of doing so, the Court applied the plain meaning rule against the DOI and the Tribe.

In writing its opinion, the Court included text from a letter from the Commissioner of Indian Affairs, John Collier.

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[171] *Id*. at 383.
[172] *Id*.
[173] *Id*. 384.
[174] *Id*. 384.
[175] Carcieri v. Kempthorne, 497 F.3d. 15, 20 (1st Cir. 2007).
[176] 25 U.S.C. § 479 (2012).
[177] *Carcieri*, 497 F.3d. at 22.
[178] *Id.* at 26-27.

> Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988) provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized Tribe that was under Federal jurisdiction at the date of the Act.

There are problems with including the text of the letter from Collier as justification to define "now" as meaning those tribes that were recognized by the federal government at the time of the enactment of the Indian Reorganization Act. As Justice Stevens points out in his dissent, there were tribes that were under federal jurisdiction at the time of the statutes enactment though the DOI did not know it at the time and thus, they were not formally recognized by the Bureau of Indian Affairs.[179] Three examples of tribes that were under federal jurisdiction in 1934, but who weren't officially recognized by the federal government that Justice Stevens cites are the Shoshone Indians of Nevada, the Mole Lake Chippewa Indians of Wisconsin, and the St. Croix Chippewa Indians of Wisconsin.[180] Justice Stevens also falls back on the Indian law canons of construction to point out the error in Justice Thomas' construction of the word "now," which "the Court ignores the principle deeply rooted in [our] Indian jurisprudence that statutes are to be construed liberally in the favor of the Indians."[181]

Carcieri has reverberated across Indian Country. Numerous tribes have faced challenges in putting their lands into trust. The Tribe's opponents have typically cited Justice Thomas' plain meaning interpretation of §479 to successfully defeat the Tribe's efforts. For example, in *Littlefield v. United States Department of the Interior*, the Court read §479 the same way as the Court did and ruled against the DOI and the Mashpee Wampanoag Tribe.[182]

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[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] Littlefield v. United States Dep't of Interior, 199 F. Supp. 3d 391, 392 (D. Mass. 2016).

The Court's opinion in *Carcieri*, and its use of an ordinary dictionary to define the words in a statute while engaging in statutory interpretation, ignores the trust relationship and the moral obligation that the United States has to the Tribe. It tilts a portion of the Indian Reorganization Act against any tribe formally recognized by the United States after 1934. As discussed in the portion of the note that dealt with *Yakima*, the Indian Reorganization Act was passed to help tribes, not to stymie them. The Court's construction ignores the Congressional intent in the passage of the Act in its narrow interpretation of the word "now." As Justice Brennan noted in *Bryan*, the trust relationship requires that the Court use the Indian law canons of construction when dealing with ambiguities in statutes that regulate Indian affairs. The Court does not do that here and it does not consider the overall Congressional intent of the Indian Reorganization Act either. By ignoring Congressional intent and the Indian law canons of construction, the Court crafts an opinion that is not in harmony with the trust relationship between the United States and the Tribe and any moral obligation that the United States has to the Tribe. The land in question was to be placed in trust for the Tribe so that it could build housing for its elderly members. The Court's opinion turns a blind eye to the fact that the United States may have an obligation to the Tribe to see its lands returned to it when possible, and to see that the Tribe is able to provide housing to its members that need housing.

CONCLUSION

The adoption by the Court of textualism to interpret a statute that regulates Indian affairs has rendered the Indian law canons of construction obsolete. It does not matter if the case involves a question of statutory or treaty interpretation, the Indian law canons of construction have no longer been applied. The lasting impact of this is that the trust relationship between Congress and tribes has been altered by the Court. The paradigm has changed. Statutory interpretation in Indian law has become a binary equation, when in reality it should be a jigsaw puzzle with many pieces that need to be correctly fitted together to form the entire completed puzzle.

The completed puzzle is one that is in harmony with the trust relationship between tribes and the United States, and that acknowledges and seeks to fulfill the unique moral obligations that the United States has to each of the 566 federally recognized tribes within its borders. The previous cases show that the Court no longer considers how the trust relationship impacts its interpretation of a statute, nor does it consider legislative intent or the Indian law canons of construction. Thus, Congress must be very careful whenever it drafts legislation that regulates Indian affairs. This language will not be examined from the context from which it was in, nor will the intent that Congress had in passing it be given weight. All that will matter for the foreseeable future will be the plain black and white text of the statute that rolls out of the Government Printing Office. Perhaps with the February 2016 passing of Justice Scalia, this will change and the Court will move back to using legislative history and the Indian law canons of construction in interpreting statutes that regulate Indian affairs, leaving Justice Scalia to fistfight in heaven with Tonto over the meaning of a word in a statute passed a long time ago.