CANONS OF CONSTRUCTION, *STARE DECISIS* AND DEPENDENT INDIAN COMMUNITIES: A TEST OF JUDICIAL INTEGRITY

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This Article discusses the U.S. Supreme Court's failure to incorporate the Federal Indian law canons of construction into its recent decision in Alaska v. Native Village of Venetie Tribal Gov't. *Although these canons have factored frequently into the Court's decisions on Indian law issues, and direct that courts treat Indian claims favorably in a number of situations, the Court does not consider such precedent in its* Venetie *decision. After tracing the development of the canons, this Article argues that stare decisis principles mandated that the Court refer to the canons when it was interpreting two statutes crucial to the* Venetie *decision. The Article concludes that the Court's Venetie decision violated the canons of construction, and that its failure to mention the canons in its decision leaves the Court open to accusations that its opinion was politically motivated.*

I. INTRODUCTION

In February 1998, a unanimous United States Supreme Court held that lands received by the Native Village of Venetie pursuant to the Alaska Native Claims Settlement Act ("ANCSA") do not constitute "Indian country" within the meaning of 18 U.S.C. § 1151(b).[1] A highly politicized case, the ultimate issue of whether the Venetie Tribal Government could exercise regulatory

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1. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 523, 526-27 (1998); *see also* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629a (1994); 18 U.S.C. § 1151(b) (1994).

(taxation) jurisdiction over the ANCSA lands depended on the Court's determination of whether the lands were Indian country. The politically charged nature of the case is evident from the *amici curiae* briefs submitted with regard to it. In support of the State's appeal of the decision by the United States Court of Appeal for the Ninth Circuit, twenty-five states joined together in filing an *amicus curiae* brief.[2] In turn, many Alaska Native organizations filed briefs in support of Venetie's position, and an *amicus curiae* brief was submitted jointly by the Navajo Nation, the Pueblo of Laguna, the Santa Ana Pueblo, the Shoshone Tribe of the Wind River Reservation, the Lummi Nation, the Rosebud Sioux Tribe, the Crow Tribe of Indians, and the Ute Indian Tribe.[3] Clearly, the ramifications of this decision extend beyond the territorial boundaries of the State of Alaska, and other state and tribal governments outside of Alaska see it as having significant political importance.

In arriving at a decision, the Court had to interpret two federal statutes dealing specifically with Indians.[4] The first, ANCSA, set aside forty-four million acres for Alaska Native corporations.[5] The second, 18 U.S.C. § 1151, defines Indian country for criminal jurisdiction purposes and has been interpreted by the Court to pertain to civil jurisdiction as well.[6] Even though the decision revolves around the interpretation of these two statutes, the *Venetie* opinion does not invoke a single canon of statutory construction in interpreting the statutes in favor of the state.[7]

This absence of canons of statutory construction is perplexing since the statutes involve Indian law concepts, and federal Indian law includes several notable canons of construction.[8] These canons tend to lead to statutory interpretation in favor of Indian interests,

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2. *See* Brief of Amici Curiae States, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577).

3. Telephone Interview with Staff from the Native American Rights Fund's Anchorage office (Mar. 3, 1999).

4. In this article, the terms "Indian" and "Native" will be used interchangeably. Throughout United States history, an extensive body of law has developed with regard to the rights of Native American groups. Because the vast majority of this law developed with regard to Native Americans in the contiguous 48 states, it has become known as federal Indian law. Alaska's indigenous groups fall into two general classifications, Indians and Eskimos. Consequently, in Alaska, rather than referring to the rights of Indians, the rights of indigenous groups are referred to as Native rights and are equally applied to Indian and Eskimo groups.

5. *See* 43 U.S.C. §§ 1607, 1613 (1994).

6. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

7. *See Venetie*, 522 U.S. at 526-34.

8. *See infra* notes 18 to 63 and accompanying text.

as Indian law scholar Charles F. Wilkinson advises students of Indian law:

> 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. If the first reading does not produce a result in favor of the Indians, you should read the document again. And once again – with an inventive mind.[9]

Justice Thomas's opinion takes quite the opposite approach in arriving at a decision favorable to the State's interests, and appears deserving of the criticism leveled at the Court: "The Court's written opinions in statutory cases are often wooden or one-sided: The Court unrealistically asserts that all of the interpretive factors support the Court's interpretation or are at least neutral; very often the Court simply ignores those considerations that point in a different direction."[10] The Court's relatively recent tendency to ignore, in particular, Indian law canons of statutory construction has been noted and has caused one Indian law scholar to comment, "[W]ith the warning that it is always difficult to tell the degree to which canons of construction are being ignored, we might conclude that future statutory construction will tilt less towards the interests of the Indians and the tribes than it has in the past."[11]

It is very tempting to suggest that the Court's silence regarding Indian law canons of construction indicates that it has concluded the canons are no longer appropriate and should be discarded. However, since 1990 the Court has invoked or acknowledged the application of Indian law canons of construction a number of times.[12] Consequently, it is bewildering that the *Vene-*

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9. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 52 (1987).

10. William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 365 (1990). For an interpretation of ANCSA and 18 U.S.C. § 1151 that relies heavily upon Indian law canons of statutory construction, *see* David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211 (1996).

11. William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 21 (1987).

12. *See* Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) ("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 construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (quoting Hagen v. Utah, 510 U.S. 399, 412-13 (1994) ("Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." (citations omitted)); South Da-

tie opinion does not address the canons; especially since briefs for both petitioners and respondents addressed them,[13] and the canons were an integral part of the Ninth Circuit decision that the opinion reverses.[14]

The Court's failure to note federal Indian law canons of construction which it has applied repeatedly over a 150-year period, combined with the case's highly politicized nature raises the specter that the Court's decision was based on political rather than legal considerations.[15] When a minority tribal group's interests compete with the interests of a state, the principle of *stare decisis* should be adhered to scrupulously by the Court.[16] The Court should not deviate from principles of Indian law that it consistently has applied in the past.

Part II of this Article examines the development of the federal Indian law canons of construction and their appropriate application. Part III briefly considers the principle of *stare decisis*, and Part IV applies these concepts to *State of Alaska v. Native Village of Venetie Tribal Government* and argues that these principles mandated that the *Venetie* Court consider the Indian law canons of construction when making its decision. Part V concludes that the Court's failure to invoke these canons suggests that *Venetie* was a poorly decided case.

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kota v. Bourland, 508 U.S. 679, 687 (1993) (quoting *Yakima*, 502 U.S. at 269); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

13. *See* Brief for Respondents at 39-40, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577); Brief for Petitioner at 27 n.16, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577).

14. *See* Alaska v. Native Village of Venetie Tribal Gov't., 101 F.3d 1286, 1294-95 (9th Cir. 1996) (citing the canons and stressing their importance).

15. Justice M'Lean, apparently, first articulated the U.S. Supreme Court's recognition of federal Indian law canons of construction in his concurring opinion to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). However, the application of such canons appears to have predated Justice M'Lean's pronouncement. In *Choate v. Trapp* the Court noted with regard to interpreting doubtful expressions in favor of the Indians that "[t]his rule of construction has been recognized, without exception, for more than a hundred years . . . ." 224 U.S. 665, 675 (1912).

16. The Court has continued to recognize that an important reason for employing the principle of *stare decisis* is to foster the actual and perceived integrity of the Court. *See, e.g.*, State Oil Company v. Khan, 522 U.S. 3, 11 (1997) ("*Stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." (quotations omitted)); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because . . . [it] fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (citations omitted)).

II. FEDERAL INDIAN LAW CANONS OF CONSTRUCTION

Worcester v. Georgia[17] generally is accepted as the genesis of the canons of construction for federal Indian law.[18] In his concurring opinion in that case, Justice M'Lean wrote that "[t]he language used in treaties with the Indians should never be construed to their prejudice," and "[h]ow the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."[19] Although Justice M'Lean did not elaborate on these statements, it is apparent from their context that he believed the canon's basis was the disadvantaged bargaining position of the "unlettered" Indians in negotiating treaties with the United States.[20]

The Court voiced this justification in subsequent opinions, and clearly expressed it in 1899 in *Jones v. Meehan*[21] when it noted that with regard to construing treaties between the United States and Indian tribes, it must be kept in mind that

> the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed . . . in the sense in which they would naturally be understood by the Indians.[22]

Although the Court's emphasis in *Jones* is upon the disadvantaged negotiating position of the Indians, its reference to Indians as "dependent people" represents an additional or alternative reason for developing the canons of construction favoring the Indians.[23] The trust or fiduciary relationship of the federal government with Indian tribes requires fairness in interpreting treaty terms.

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17. 31 U.S. (6 Pet.) 515 (1832).

18. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222 n.42 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982).

19. *Worcester*, 31 U.S. at 582 (M'Lean, J., concurring).

20. *See id*. at 581 ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").

21. 175 U.S. 1 (1899).

22. *Id*. at 11.

23. *See id*.

In 1905, the Court noted in *United States v. Winans*[24] that the treaty is to be interpreted as the unlettered Indians understood it, and that "justice and reason" demand such when "power is exerted by the strong over those to whom they owe care and protection."[25] Similarly, the Court noted seven years later in *Choate v. Trapp*[26] that in the federal government's dealings with Indians, terms are to be liberally construed in favor of the Indians and "doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."[27]

While the Indian law canons of construction initially were based on a policy of compensation for the unequal bargaining conditions under which Indian treaties were executed, the canons' policy underpinnings evolved to rely increasingly upon the trust and fiduciary relationship the federal government has with Indians. It should be noted that although these canons were enunciated in the context of interpreting Indian treaties, in *Choate* the Court began applying these canons when interpreting federal statutes, as well.[28] When a question of statutory interpretation in connection with Indian rights reached the Court in 1918,[29] the Court recognized as a general rule "that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[30]

While at first it may appear that the Court's leap in applying Indian law canons to federal statutes should have involved further policy development, in fact the Court made the leap as a matter of parity.[31] The Court first applied the canons to statutes ratifying agreements between the executive branch of the federal government and Indian tribes.[32] Such statutes could be viewed as functional equivalents to treaties between the United States and Indian

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24. 198 U.S. 371 (1905)

25. *Id*. at 380 (citing *Choctaw Nation v. United States*, 119 U.S. 1 (1886)).

26. 224 U.S. 665 (1912).

27. *Id*. at 675.

28. At issue in *Choate* was a federal statute which incorporated an agreement between the federal government and the Choctaw and Chickasaw tribes. The statute, among other things, provided for tribal lands to be allotted to individual tribal members, and for the allotments to be non-taxable. When Oklahoma attempted to impose a tax on the allotments, tribal members filed a suit asking for an injunction. *See id*. at 667-69.

29. Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78 (1918)

30. *Id*. at 89 (citing *Choate*, 224 U.S. at 675).

31. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 231 (3d ed. 1991).

32. *See id*.

tribes; functional equivalents which became necessary when Congress proscribed treaty-making with Indian tribes.[33] The transfer of canons of interpretation from a treaty to statutory context also transferred untouched the following two tenets: (1) terms should be liberally construed for the benefit of Indians; and (2) ambiguities should be resolved in favor of the Indians.[34] However, a third tenet, that terms should be interpreted as the Indians would have understood them, has not been applied to the statutory context.[35]

After making the leap from applying the Indian law canons of construction to treaties to applying many of them to treaty substitutes, the Court apparently had little concern with extending them to any federal statute dealing with Indian affairs. When applying the canons to statutes, the Court construed the canons to "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited."[36] This new canon became pivotal in the Court's decisions regarding whether federal statutes may implicitly diminish established Indian rights.[37] The canon, which has been referred to as the rule against implied repeal, has been applied to federal statutes purportedly diminishing or extinguishing certain rights: Aboriginal title and associated rights; treaty rights; reservations; individual Indians' immunities from state governance; and inherent tribal sovereign powers.[38]

A seminal case for this rule was *United States v. Santa Fe Pacific Railroad Co.*,[39] in which a federal statute creating the Colorado River Reservation, but not specifically requiring the Walapais Tribe to relocate to the reservation, was held not to have extinguished the Tribe's aboriginal title and associated rights to their

33. Enacted as a rider to the Indian Appropriations Act of 1871, 25 U.S.C. § 71 (1994) renounced formal treaty-making with Indian tribes. Federal agents continued to negotiate treaties with tribes, and agreements were approved through the legislative process involving both houses of Congress rather than through the treaty process involving only the Senate. *See* WILKINSON, *supra* note 9, at 8.

34. *See* COHEN, *supra* note 18, at 222-24.

35. *See id*. at 224 n.60.

36. *Id*. at 225 (citing to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Bryan v. Itasca County*, 426 U.S. 373 (1976), as examples of cases "in which the canons of construction operate in cases where treaty rights are not involved").

37. *See* COHEN, *supra* note 18, at 222.

38. *See* WILKINSON, *supra* note 9, at 46-52 ("The furthest that the Court can go in protecting Indian rights procedurally against implied repeals by modern statutes is to require that the repeal be expressed on the face of the statute, a position I have advocated and continue to hold." *Id*. at 51-52.).

39. 314 U.S. 339 (1941).

ancestral lands.[40] In reaching its decision, the Court relied upon the federal government's fiduciary relationship with Indians. Speaking out against implied diminishment of Indian rights, the Court stated that "[a]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."[41] In a much more recent case, *County of Oneida v. Oneida Indian Nation*,[42] the Court again protected aboriginal title from implied extinguishment, and noted that "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."[43] With this decision, the Court appears to have made a complete transition from basing the canons of construction upon a policy recognizing the unequal negotiating positions of tribes and the federal government to basing the canons of construction solely upon the trust relationship.

Menominee Tribe of Indians v. United States[44] is a case that has been credited with coalescing somewhat disparate decisions regarding implied repeals of Indian rights.[45] There the Court held that the Menominee Termination Act[46] did not extinguish the Tribe's hunting and fishing rights established previously by treaty.[47] In arriving at its decision, the Court noted that the intent to abrogate or modify a treaty should not be lightly imputed to Congress, and federal statutes should not be used as a "backhanded way of abrogating . . . rights of these Indians."[48]

With regard to diminishing or extinguishing reservation lands, the Court frequently has been asked to interpret statutes allowing non-Indians to acquire land in regions previously designated as Indian reservations.[49] While the Court's ultimate determinations

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40. *See id.* at 353-56.

41. *Id*. at 354.

42. 470 U.S. 226 (1985).

43. *Id*. at 247.

44. 391 U.S. 404 (1968).

45. *See* WILKINSON, *supra* note 9, at 47-48.

46. Menominee Indian Termination Act of 1954 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891-902 (1970)).

47. *See Menominee Tribe*, 391 U.S. at 412-13.

48. *Id*. at 412.

49. In what Indian law scholars refer to as the "allotment and assimilation" period of federal Indian law policy, Congress frequently passed statutes by which Indian reservations were carved up into individual Indian allotments, and once the allotments were parceled out to eligible Indians, parts of the remaining reservation lands were made available to non-Indians as "surplus lands." This process was intended to break up tribal organization on the reservations and to encourage Indians to assimilate to a western civilization way of life. As a result of such statutes, the Court found itself having to determine whether Congress, with regard to

have varied, it uniformly has required that congressional intent to extinguish or diminish a reservation be clear from the statute or from the statute's legislative history.[50]

At times, the Court has relied on the rule against implied repeal of Indian rights to protect Indian activity from state jurisdiction. Absent congressional legislation to the contrary, such activity is generally not subject to state jurisdiction.[51] For example, in *McClanahan v. Arizona State Tax Commission*,[52] the Court related the rule to the "Indian sovereignty doctrine" by noting that "[t]he Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read."[53]

Another significant decision in which the rule against implied diminishment or extinguishment was applied to protect Indian activity from state jurisdiction was *Bryan v. Itasca County*.[54] In holding that a grant of civil jurisdiction over "Indian country" to Minnesota did not include regulatory jurisdiction, *Bryan* recognized that an "omission has significance in the applications of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government . . . had been contemplated by Congress."[55]

While *McClanahan* and *Bryan* narrowly interpreted federal statutes to protect the immunities of individual Indians from state laws and regulations, the Court also has protected tribes from detrimental interpretations of federal statutes. In *Santa Clara Pueblo v. Martinez*,[56] the Court narrowly interpreted the Indian Civil

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one of the specific statutes, intended to diminish in size or completely eliminate the reservation. *See generally* CLINTON ET AL., *supra* note 31, at 147-52.

50. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 472 (1984) ("When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place . . . ."); DeCoteau v. District County Court, 420 U.S. 425, 447 (1975) (holding an Act declaring reservation lands "'subject to settlement, entry, and purchase' under the homestead laws of the United States" did not terminate reservation status itself because such status was not inconsistent with opening reservation lands for settlement).

51. For an historical analysis of the protection from state jurisdiction of Indian activities in "Indian country," *see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168-73 (1973).

52. 411 U.S. at 164.

53. *Id*. at 172.

54. 426 U.S. 373 (1976).

55. *Id*. at 381.

56. 436 U.S. 49 (1978).

Rights Act[57] to hold that it did not waive tribal sovereign immunity from lawsuits except for with regard to a writ of habeas corpus. In narrowly interpreting the Act, the Court approvingly cited *McClanahan*'s establishment of tribal sovereignty as the proper backdrop against which applicable federal statutes must be read.[58] In particular, the Court noted that with regard to federal statutes undermining tribal authority, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[59] Furthermore, the Court indicated that "judicially sanctioned intrusion[s] into tribal sovereignty" should be avoided unless required to fulfill the purpose of a statute.[60]

The development of the canons of construction for federal Indian law began in the context of interpreting treaties, reflecting a policy of recognizing the tribes' disadvantage in negotiating treaties with the United States. The application of these canons to federal statutes dealing with Indian rights was a natural evolution, as federal statutes, ratifying executive agreements with tribes, replaced treaties as the primary means of dealing with tribes. These canons hold that the terms of federal statutes should be liberally construed for the benefit of Indians, and that ambiguities should be resolved in favor of the Indians.

Although applying these canons of construction to statutes affecting Indian or tribal rights can have a dramatic effect on the Court's interpretation of the statutes in question, there may be recognized instances when the canons should not be applied. For example, because the canons have been characterized as requiring a construction favoring the Indians, they arguably provide no guidance when one of the litigating parties is a tribe and the other party consists of a class of individuals who are tribal members.[61] Simi-

57. Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-03 (1994).

58. *See Santa Clara Pueblo*, 436 U.S. at 60.

59. *Id*.

60. *Id*. at 61.

61. *See, e.g.*, Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976). In *Hollowbreast*, the Court had to determine whether the tribe or allottees (tribal members holding allotment lands within the reservation) held an interest in the coal underlying the allottees' lands. In reversing the Ninth Circuit's decision in favor of the allottees, the Court found the Ninth Circuit's application of the canons of construction inappropriate because of the competing Indian interests. *See id*. It should be noted that in this case the Court ultimately held in favor of the tribe, and perhaps found the canon's application inappropriate because it subordinated tribal interests to the interests of individual tribal members. *See id*. at 650. This theory is supported by the fact that in *Santa Clara Pueblo*, the Court applied the canons of construction in a decision which upheld the tribe's sovereign immunity from lawsuits by tribal members. *See* 436 U.S. at 60-61.

larly, the application of the canons may be subordinated to, or at least neutralized by, competing canons of construction, especially if the competing canon is based upon a competing trust relationship of the United States.[62] Finally, the canons should not be used to interpret statutes when the statutory language is unambiguous.[63]

III. *STARE DECISIS*

Stare decisis is intended to promote evenhanded, predictable, and consistent development of legal principles.[64] It embodies the notion that the law should furnish a guide for the conduct of individuals and enable persons to plan their affairs accordingly.[65] The *stare decisis* doctrine serves to further fair and expeditious adjudications, and aids in maintaining the public's faith in the judiciary as a source of impersonal and reasoned judgments.[66] Beyond furthering the public's faith that a particular decision was based upon a reasoned application of the law, *stare decisis* allows society to "presume that bedrock principles are founded in the law rather than in the proclivities of individuals"[67] and to feel assured that the judiciary is not above the law.[68]

Consistent with the doctrine's purpose of providing guidance for the conduct of individuals, *stare decisis* carries considerable weight where a number of people have relied upon a judicial holding, such as might be the case regarding rules pertaining to commercial transactions.[69] Similarly, the courts are more apt to follow the doctrine strictly in cases involving the rights of the pub-

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62. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981). At issue was ownership and control of the bed and banks of Big Horn River where it ran through an Indian reservation. *See id*. at 547. In deciding the issue in favor of the State of Montana rather than the tribe, the Court relied on the doctrine that the bed and banks of navigable waters belongs to the states. Significantly, that doctrine is framed in terms of a trust duty to the states. *See id*. at 551.

63. *See, e.g.*, Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) (holding that the outer continental shelf is not included within the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120 (1982)); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (interpreting U.S. sovereign immunity waiver with regard to Indian water rights held in trust by the United States by the McCarran Amendment of 1952, 43 U.S.C. § 666 (1982)); De Coteau v. District County Court, 420 U.S. 425 (1975) (finding clear expression of congressional intent to disestablish the Lake Traverse Reservation).

64. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

65. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

66. *See id*.

67. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

68. *See* 20 AM. JUR. 2D *Courts* § 147 (1995).

69. *See id*.

lic.[70] The Court has acknowledged that "*stare decisis* concerns are at their acme in cases involving property and contract rights,"[71] and this is particularly true if the property rights involved are real property rights.[72] Aside from the nature of the case involved, another important factor in weighing *stare decisis* is the number of times precedent has endorsed a particular principle of law. The more numerous the precedent supporting a principle of law, the greater effect *stare decisis* should have with regard to the principle.[73]

In general, a court should not "disregard a former holding conformable to legal principles" and supported by "plentiful authority."[74] Nevertheless, courts may depart from following the *stare decisis* doctrine when the reasons underlying the earlier holdings no longer exist, are clearly wrong, or will cause more harm than good.[75]

IV. APPLYING *STARE DECISIS* AND THE CANONS OF CONSTRUCTION OF FEDERAL INDIAN LAW TO *STATE OF ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT*

The *Venetie* opinion authored by Justice Thomas contains no references to the canons of statutory construction, even though the interpretation of two federal statutes is critical to the decision. Because both of the statutes at issue directly affect the rights of Indians and Indian tribes, the Indian law canons of construction and the doctrine of *stare decisis* should have required the Court to apply rules of statutory construction strongly favoring the Venetie Tribal Government.

The nature of the *Venetie* case argues for strict adherence to the doctrine of *stare decisis*. The *Venetie* case can be viewed as involving real property rights, contract rights and public rights. First, the predominant issue in the case was whether real property owned by the tribal government constituted Indian country.[76] Second, Venetie can be seen as involving issues of contract law, because *Venetie* involved the interpretation of ANCSA, a federal statute which has been characterized as a "treaty substitute."[77] Treaties are like contracts in that they represent negotiated agreements between two or more parties, and hence arguably can

70. *See id*.
71. *Khan*, 522 U.S. at 20.
72. *See* 20 AM. JUR. 2D *Courts* § 160 (1995).
73. *See id*. § 158.
74. 14 AM. JUR. *Courts* § 61 (1938).
75. *See id*.
76. *See Venetie*, 522 U.S. at 525.
77. *See* CLINTON ET AL., *supra* note 31, at 1063.

be considered contract equivalents when determining how to apply *stare decisis*. Third, the *Venetie* decision also implicates public rights, because whether the Venetie Tribal Government's lands are Indian country determines the extent of state jurisdiction over the lands and activities upon them.[78] These three areas of law require careful consideration of prior decisional law.

A final consideration regarding *stare decisis* is the significant number of times the U.S. Supreme Court has applied the canons over the last 150 years. Repeated invocations of the principles over a period of time exceeding a century invoke strict adherence to *stare decisis*.[79]

A. The Continuing Validity of the Canons

While the nature of the case and historical application of the canons argue for strict adherence to the *stare decisis* doctrine in the *Venetie* decision, it must be asked whether the reasons underlying the past applications of the canons either no longer exist, are clearly wrong, or will cause more harm than good. Perhaps the best way to answer the question is to note that although the Court apparently has chosen to ignore the canons at times, it has still recognized the canons in recent cases, and has not questioned their appropriateness.[80]

Although the Supreme Court has not questioned the canons' continued appropriateness, at least one lower court has.[81] In *United States v. Atlantic Richfield Co.*, the Ninth Circuit held that the canons were diminished in force when applied in the context of ANCSA because Alaska Natives had been represented by unquestionably competent attorneys and had not been at a disadvantage in negotiating ANCSA as a treaty substitute.[82] However, the *At-*

78. *See* 20 AM. JUR. 2D *Courts* § 156 (1995).

79. *See id.* § 158.

80. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 411 (1994) (noting ambiguities will be resolved by the Court to favor the Indians); *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (holding that, while Congress may abolish rights of Indians, the Court generally prefers Congress's express intent); *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 269 (1992) (quoting "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" from *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

81. In fact, the Brief for Petitioner suggests the canons should operate with less force in the context of ANCSA and cites *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir. 1980) for the proposition. *See* Brief for Petitioner at 27 n.16, *Venetie* (No. 96-1577). Thus the Petitioners were inviting the Court to find that the reasons underlying the canons did not apply in the ANCSA context. The Court's failure to take up the invitation suggests it still sees the reasons underlying the canons as pertinent.

82. *Atlantic Richfield*, 612 F.2d at 1139.

lantic Richfield decision ignores the canons' evolution from a focus on the disadvantaged bargaining position of Indians to a focus on their trust relationship with the federal government and notions of tribal sovereignty. In other words, the *Atlantic Richfield* decision focused on a basis for the canons that the Court has moved away from, instead of a basis whose pertinence has not been diminished. Thus the *Atlantic Richfield* Court's rationale for diminishing the force of the canons seems flawed.

Although the reasons underlying the canons remain valid, and it has not been shown that the reasons are wrong or that they will cause more harm than good, this is not to say the canons automatically should be applied to the statutes. As indicated previously, the canons may not be applicable when litigating parties consist of tribes or classes of individuals who are tribal members, when the canons are neutralized by a competing canon of construction, or when the statutory language does not contain ambiguities.[83] With regard to the litigating parties both representing Indian interests, the Petitioners in *Venetie* asserted that the canons of construction of federal Indian law should not be applied because Indian interests were represented by both litigants, and cited the arguments presented in the Brief of *Amicus Curiae* Shee Atika, Inc.[84] However, the Court's decision in *Venetie* does not allude to the conflicting Indian interests, and the state argument stretches the definition of "litigants." Furthermore, even if Shee Atika might be construed loosely as a litigant, it constitutes an ANCSA corporation and not a tribal member. Consequently, *Venetie* does not involve a circumstance in which both parties are tribes or classes of individuals who are tribal members.

With regard to the canons of construction of federal Indian law being subordinated to or neutralized by a competing canon of construction, neither the Petitioner nor the Court raises any such concern. The statutes at issue, 18 U.S.C. § 1151(b) and ANCSA, do not appear to raise any competing special canons of construction or trust interests.

This leads to the final consideration for when the canons of construction of federal Indian law might not be applicable to federal statutes dealing with Indians, and that is whether any ambiguities or doubtful expressions exist within the statutes to which the

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83. *See* CLINTON, *supra* note 31, at 231.

84. *See* Brief for Petitioner at 27 n.16, *Venetie* (No. 96-1577) (citing Brief of Amicus Curiae Shee Atika, Inc. at 25-28, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577)). Shee Atika is one of the larger ANCSA corporations located in Sitka, Alaska, and consisting principally of Tlingit, Tsimshian and Haida Indians. *See* Brief of Amicus Curiae Shee Atika, *Venetie* (No. 96-1577).

canons may be applied. The two statutes at issue provide a loose and ambiguous definition of Indian country as including "dependent Indian communities." To determine whether the land is Indian country, the *Venetie* opinion analyzes 18 U.S.C. § 1151(b) and ANCSA to determine what is required for land to constitute a "dependent Indian community."[85]

18 U.S.C. § 1151(b) defines Indian country as including "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state."[86] The statute does not provide a definition for a "dependent Indian community." However, as noted by the Court,[87] the language of the statute is taken almost verbatim from *United States v. Sandoval*.[88] The statute's Historical and Revision Notes indicate the definition of Indian country is based upon the Court's construction of the term in *United States v. McGowan*,[89] following the principles announced in *Sandoval* as well as *Donnelly v. United States*[90] and *United States v. Pelican*.[91] The definition emerging from *McGowan*, and consequently endorsed by 18 U.S.C. § 1151(b), is land that "had been validly set apart for the use of the Indians as such, under the superintendence of the Government."[92] The assertion that the above is the "dependent Indian community" test recognized by *McGowan* and adopted by 18 U.S.C. § 1151(b) is supported by the Court's reiteration of these criteria in relatively recent cases involving the determination of whether certain lands constitute Indian country.[93]

Two points must be recognized with regard to determining the proper definition of "dependent Indian community." First, when a definition must be drawn from multiple case law decisions, it is self-evident that the statute does not clearly express a congressional intent regarding the proper definition. Second, assuming

85. *Venetie*, 522 U.S. at 526-31.

86. 18 U.S.C. § 1151(b) (1994).

87. *See Venetie*, 522 U.S. at 530.

88. 231 U.S. 28 (1913).

89. 302 U.S. 535 (1938).

90. 228 U.S. 243 (1913).

91. 232 U.S. 442 (1914).

92. *McGowan*, 302 U.S. at 539 (quoting *Pelican*, 232 U.S. at 449). For a discussion of the historical development of the "dependent Indian community," *see* Blurton, *supra* note 10, at 220-29.

93. *See, e.g.*, United States v. John, 437 U.S. 634, 649 n.18 (1978) (explaining that the expansive definition of Indian country in *McGowan* was incorporated in the statute); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) (rejecting application of a test for Indian country requiring a formal designation as a reservation in favor of the *McGowan* test).

the proper definition intended by Congress is land that "has been validly set apart for the use of the Indians as such, under superintendence of the Government," then it is not unambiguously clear the definition requires the lands to be "set aside by the Federal Government" as concluded by the Court,[94] or that it requires the lands "must be under federal superintendence" as concluded by the Court.[95] While the *McGowan* case involved land set aside for Indians by the federal government,[96] *Sandoval*, from which the statutory language was taken and which was followed by *McGowan*, involved land set aside for the Indians by a Spanish land grant which subsequently was confirmed by Congress.[97] Similarly, while *McGowan* involved land held in trust by the United States for the benefit of Indians,[98] *Sandoval* involved land held by a tribe in fee simple ownership.[99] Thus with regard to 18 U.S.C. § 1151(b), there is not a clear, unambiguous intent expressed that would prevent the application of the canons of construction of federal Indian law to the statute.

With regard to the tribe's ANCSA claim, the issue is whether the statute unambiguously expresses an intent that lands received by the ANCSA corporations be considered neither "validly set apart for the use of the Indians as such"[100] nor "under the superintendence of the Federal Government."[101] In concluding that ANCSA lands do not qualify as lands "validly set apart for the use of the Indians as such," the Court relies heavily upon the statute's revocation of all reservations in Alaska except for the Annette Island Reserve.[102] While the provision clearly revokes all but one of the existing reservations in Alaska, and demonstrates Congress intended departure "from its traditional practice of setting aside Indian lands,"[103] the provision does not demonstrate clear congressional intent for the Venetie Tribe's ANCSA lands not to be "validly set aside for Indians." As the Court recognized, Congress intended to "end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy."[104] However,

94. *Venetie*, 522 U.S. at 527.
95. *See id*.
96. *See McGowan*, 302 U.S. at 537.
97. *See Sandoval*, 231 U.S. at 39.
98. *See McGowan*, 302 U.S. at 539.
99. *See Sandoval*, 231 U.S. at 48.
100. *Venetie*, 522 U.S. at 532.
101. *Id*.
102. *See id*.
103. *Id*.
104. *Venetie*, 522 U.S. at 523-24.

that does not preclude land from being set aside for Indians in a manner that would reduce federal supervision over Indian affairs.

The Court also relies upon the statute's conveyance of fee simple title to ANCSA corporations for divining congressional intent that ANCSA lands do not constitute lands "validly set apart for Indians."[105] The conveyance in fee simple of ANCSA lands could just as conceivably be an expression of congressional intent to allow Alaska Natives the freedom to manage as they wish the lands set apart for them, including the ability to alienate such lands to non-Natives. The fact the lands may pass out of Indian ownership does not always preclude them from being Indian country.[106] Hence, the fact that ANCSA lands conceivably can pass into non-Indian ownership does not necessitate a conclusion that ANCSA lands are not "validly set apart for Indians."

Finally, the Court cites the statute's goal of not "establishing any permanent racially defined institutions, rights, privileges or obligations"[107] as indicative of Congress's intent that the lands not constitute lands "validly set apart for Indians."[108] The intent of this provision is not clear in the context of the statute itself. While the statute professes the goal of not establishing racially defined institutions, it created corporations in which only Alaska Natives could be shareholders,[109] and in an amendment to the statute, in 1987, extended a proscription on alienation of ANCSA corporation shares unless a majority of shareholders voted to lift such restrictions.[110] Furthermore, the statute expresses a somewhat contrary goal of allowing Alaska Natives maximum participation in decisions affecting their rights and property.[111] For Alaska Natives to have maximum participation in decisions about their rights and property, it is necessary for ANCSA corporation lands to be Indian country. Consequently, ANCSA does not express an unambiguous intent that ANCSA lands are not "validly set apart for Indians."

In determining that ANCSA lands are not "under the superintendence of the Federal Government," the Court dismisses the

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105. *Id*. at 532.

106. In the contiguous United States, it is not uncommon on Indian reservations for a significant portion of the reservation lands to be owned by non-Indians. Such circumstances do not preclude the non-Indian owned lands from being Indian country. *See* Seymour v. Superintendent, 368 U.S. 351, 357-59 (1962).

107. *Venetie*, 522 U.S. at 524 (quoting 43 U.S.C. § 1601(b) (1994)).

108. *Id*. at 532.

109. *See* 43 U.S.C. § 1606(g)(1) (1994).

110. *See id*. § 1629(b).

111. *See id*. § 1601(b).

protection of ANCSA lands from taxation, adverse possession claims, and certain judgments as minimal protections not sufficient to qualify as superintendence.[112] It also dismisses the provision of federal social programs to ANCSA corporations shareholders as not being the type of federal government supervision which qualifies as superintendence.[113] The Court's basis for these conclusions is that the Native groups involved in *Sandoval, Pelican* and *McGowan* were subject to much greater federal control over their lives.[114]

B. The *Venetie* Opinion Violates the Canons in its Interpretation of 18 U.S.C. § 1151(b).

Any rigorous legal analysis of the statutes involved in the *Venetie* decision should have applied the canons of construction of federal Indian law. In light of Justice Thomas's failure to mention any canons of construction, let alone the canons of construction for Indian law, his opinion must be considered a poor decision unless his conclusions appear to comport with the canons of construction of federal Indian law, despite his failure to invoke them.

The Court concludes that to qualify as a "dependent Indian community" the land must have been "set aside by the Federal Government for the use of the Indians as Indian land . . . ."[115] This requirement apparently is derived from *McGowan's* requirement that for lands to qualify as "dependent Indian communities" they need to have been "validly set apart for the use of Indians as such."[116] Comparing the language used by this Court with that used in *McGowan* suggests that the Court has narrowed the classification of "dependent Indian communities" by adding the restriction that the land must have been set apart by the "Federal Government." Not only does the Court's requirement violate the canon that a broad construction should be applied when the issue is whether Indian rights are reserved or established,[117] the requirement is inconsistent with *Sandoval*, the seminal case establishing the "dependent Indian community" classification of Indian country.[118]

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112. *See Venetie*, 522 U.S. at 533-34.

113. *See id*.

114. *See id*.

115. *Id.* at 527.

116. *See supra* notes 89-96 and accompanying text.

117. *See* COHEN, *supra* note 19, at 225. In *Sandoval*, the land had been set apart for the Pueblo Indians by a Spanish land grant, which Congress subsequently confirmed. *See supra* note 98 and accompanying text.

118. *See supra* notes 97-99 and accompanying text.

Having narrowed the *McGowan* criteria, the *Venetie* opinion compounds matters by applying an extremely narrow construction to the phrase "set apart for the use of Indians as such." In applying this phrase to ANCSA lands, the Court's opinion interprets the statute to require restrictions on alienation of the lands so as to preclude non-Natives from acquiring the lands.[119] This again violates the canon requiring broad construction when the establishment of Indian rights is at issue, as well as the doctrine of *John* and *Potawatami Indian Tribe*.[120]

The Court's analysis of 18 U.S.C. § 1151(b) concludes that to qualify as a "dependent Indian community" the land "must be under federal superintendence."[121] This definition serves to narrow the scope of the "dependent Indian country" classification. The Court relied on *McGowan's* requirement that land "has been validly set apart for the use of the Indians as such, under the superintendence of the government" for this definition. However, *McGowan*'s language is ambiguous with regard to whether it is the land or the Indians or both that must be "under the superintendence of the government." Applying the canon "ambiguities should be resolved in favor of the Indians"[122] suggests it is only the Indians that must be under superintendence.

The *Venetie* opinion aggravates this violation of the canons by further narrowing the construction of the "superintendence" clause to require a finding that the "Federal Government actively controlled the lands in question."[123] Thus, the Court in this instance has violated at least two canons of construction of federal Indian law: Applying a broad construction when the issue is whether Indian rights are reserved or established; and resolving ambiguities in favor of the Indians. This is inconsistent with the *John* and *Potawatami Indian Tribe* decisions.

C. The Court's Erroneous Interpretation of ANCSA Violates the Canons

While the Court's interpretation of 18 U.S.C. § 1151(b) does not comport with the canons of construction of federal Indian law and results in a more restrictive interpretation of "dependent Indian country" than is appropriate, its interpretation of 43 U.S.C. § 1601 [ANCSA] is an insult to the canons and the principles upon which they are based. 43 U.S.C. § 1601 represents a compromise

119. *See Venetie*, 522 U.S. at 532-33.
120. *See supra* note 93.
121. *Id*. at 527.
122. *See supra* note 34 and accompanying text.
123. *Venetie*, 522 U.S. at 533.

of diverse views and interests.[124] It is intended to reconcile the needs of the State of Alaska with the needs of Alaska Natives.[125] Consequently, 43 U.S.C. § 1601 contains conflicting statements of policy and somewhat ambiguous provisions intended not to offend competing interests. It is under such circumstances that the canons of construction of federal Indian law may have their greatest impact, and the failure of the *Venetie* opinion to apply the canons represents a severe breach of the trust relationship the federal government has with Native Americans.

The Court places great significance on the statute's revocation of all reservations in Alaska (except for the Annette Island Reserve) and therefore views ANCSA lands as the antithesis of lands "set apart for the use of Indians as such."[126] In essence, its opinion equates the revocation of reservations with a revocation of Indian country. The analysis takes a provision which has the potential for diminishing Natives' rights and gives it the broadest interpretation possible. This amounts to a violation of several canons of construction: Congressional intent to extinguish Indian rights associated with their lands must be plain and unambiguous;[127] a narrow construction should be applied when Indian rights are to be diminished;[128] omissions are significant in interpreting the statutes affecting Indian immunities because some mention is expected for sweeping changes in the status of tribal government;[129] Indian sovereignty provides the backdrop against which the statutes must be read;[130] and terms should be liberally construed for the benefit of Indians.[131] In enacting 43 U.S.C. § 1601, Congress should have been well aware of the existence in Alaska of Indian country other than reservations. Just over a decade before 43 U.S.C. § 1601 was enacted, Congress amended 18 U.S.C. § 1162 and 28 U.S.C. § 1360 specifically to give the State of Alaska criminal and regulatory jurisdiction over Indian country within its boundaries.[132] The amendment granting the state jurisdiction was in response to a court decision finding that the Native Village of Tyonek consti-

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124. *See* H.R. REP. NO. 523, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 2192, 2196.

125. *See id*. at 2193.

126. *Venetie*, 522 U.S. at 532 (quoting *Pelican*, 232 U.S. at 449).

127. *See supra* note 50 and accompanying text.

128. *See supra* note 36 and accompanying text.

129. *See supra* note 59 and accompanying text.

130. *See supra* note 58 and accompanying text.

131. *See supra* notes 24-30 and accompanying text.

132. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

tuted Indian country.[133] The Senate viewed the holding as applicable to a large number of Native villages which in the past had not been recognized as Indian country.[134]

When a court interprets 43 U.S.C. § 1601, it should hold Congress accountable for knowing there were a significant number of Native villages in Alaska, not possessing reservations, that nevertheless constituted Indian country. Congress has demonstrated that when it wishes to extinguish Native rights it knows how to do so in clear, express provisions, and congressional failure to express an extinguishment clearly should prevent the Court from imputing one.[135] Consequently, the 43 U.S.C. § 1601 provision revoking reservations should not be used to imply a revocation or proscription against "dependent Indian communities."

The Court also places particular significance upon the fact that ANCSA lands were granted in fee simple to state-chartered Native corporations rather than to tribal governments, and that one of the goals of the statute was to avoid the establishment of racial institutions, rights or privileges.[136] In concluding that the aforementioned factors preclude the possibility of ANCSA lands, the *Venetie* Court ignores the competing primary goal of the statute to promote Alaska Native self-determination.[137] When a federal statute professes competing policies and goals, as does 43 U.S.C. § 1601, "courts must be more than usually hesitant to infer from its silence a cause of action that serving one legislative purpose will disserve the other."[138] Because the Court's conclusions frustrate the self-determination goal of the statute, the interpretation is inappropriate if an alternative interpretation could avoid such frustration.

An alternative interpretation does exist. Construing the grant of lands in fee simple to state-chartered Native corporations as setting lands apart for the use of Indians under superintendence promotes Alaska Native self-determination by allowing for tribal jurisdiction over the lands,[139] and provides Alaska Natives with the

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133. *See* S. REP. NO. 1872, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.C.C.A.N. 3347, 3347.

134. *See id*.

135. *See, e.g., Bryan*, 426 U.S. at 393 ("A congressional determination to terminate [Indian country] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (quoting *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973)).

136. *See Venetie*, 522 U.S. at 532-33.

137. *See* 43 U.S.C. § 1601(b) (1994).

138. *Santa Clara Pueblo*, 436 U.S. at 64.

139. Tribal authority is strongest when associated with Indian country, and the Court has noted in *United States v. Mazurie*, that "tribes within 'Indian country'

maximum flexibility in dealing with communally owned lands.[140] At the same time, this interpretation does not preclude eventual non-Native ownership of ANCSA lands, does not encumber the federal government nor Alaska Natives with the bureaucracy associated with lands held in a trust status, and provides some accommodation for state interests by providing that the Native corporations must be incorporated under state laws. Thus, this interpretation presents an accommodation of the competing interests represented in the statute, whereas the *Venetie* Court's interpretation accommodates the state and non-Native interests at a disservice to Alaska Native interests.

V. CONCLUSION

The historical development of the canons of construction of federal Indian law indicate the current justification for the canons is the federal government's trust relationship with Native Americans.[141] The historical application of the canons also reveals that they apply to federal statutes dealing with Natives' rights, as well as with treaty rights.[142] Consequently, the canons should be applied to statutes such as 18 U.S.C. § 1151(b) and 43 U.S.C. § 1601 unless the statutes involve competing tribal interests, competing canons of construction that subordinate the federal Indian law canons, or the statutes do not contain any ambiguities to which the canons can be applied.[143]

The doctrine of *stare decisis* has been recognized as having particular pertinence to cases involving property rights, contract rights and public rights.[144] Natives' rights litigation often involves these rights, and, consequently, the doctrine of *stare decisis* suggests that the canons of construction of federal Indian law should be invoked in these cases. The Court should adopt a policy of consistently applying the canons of construction of federal Indian law

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are a good deal more than 'private, voluntary organizations.'" 419 U.S. 544, 557 (1975). The implication of this statement is that outside of Indian country, tribes are little more than private, voluntary organizations.

140. It should be noted that corporate ownership of ANCSA lands is arguably a modern day method of communal ownership of land akin to the Pueblo's communal fee simple ownership of lands in *Sandoval*. The granting of the fee simple title to Native corporations rather than to Alaska Native tribal organizations maximizes Alaska Native flexibility regarding their lands because it frees the lands from alienation restrictions placed upon tribally owned lands. *See* CLINTON ET AL., *supra* note 31, at 762-63, with regard to the application of the "Nonintercourse Act" to tribal lands, even lands held in fee simple by tribes.

141. *See supra* note 43 and accompanying text.

142. *See supra* notes 56-60 and accompanying text.

143. *See supra* notes 61-63 and accompanying text.

144. *See supra* notes 70-73 and accompanying text.

unless it can articulate why a particular statute dealing with Natives' rights should be exempt from the canons' application.

The failure of the *Venetie* decision to address the canons of construction of federal Indian law seems particularly egregious. If the canons had been applied, it appears likely the ultimate outcome of the decision would have been different. Now, as a result of the decision, Indian country in Alaska appears to be relatively minimal, and, as a consequence, tribal governments in Alaska may be reduced to little more than "private, voluntary organizations."[145] This result is the antithesis of the professed goal of 43 U.S.C. § 1601 to maximize Alaska Natives' participation in decisions concerning their rights and property. If Congress had intended such a result, during the self-determination era of federal Indian policies, some mention of this intent would "normally be expected for sweeping changes in the status of tribal government."[146]

One cannot help but speculate that the *Venetie* decision was politically motivated. There were governmental powers at stake; the outcome of the case was pertinent to tribal sovereign powers across the nation; the canons could have had a tremendous impact upon a case like *Venetie*; and organizations were greatly interested in the case. All of these factors, in combination, highly suggest that the decision was based on politics rather than legal concepts. The Court seems to have taken it upon itself the task of altering federal Indian policy in a manner that Congress has not been able to muster a consensus.

On the other hand, the fact the *Venetie* decision was unanimous argues to the contrary. While the Court's nature, at any given point in time, may be characterized as conservative or liberal, the individual justices comprising the Court represent diverse political views. It is difficult to believe all the justices were so politically opposed to the Venetie Tribal Government's position that they would ignore legal precedent that had been presented in a manner demanding recognition. The unanimity of the Court suggests the justices did not feel legally constrained to apply the federal Indian law canons of construction.

Assuming this is so, it remains to be seen what steps must be taken by representatives of tribal interests to ensure that courts will apply the canons. In the future this is a particularly important question, considering the Court's inconsistent application of the canons and of *stare decisis*. In *Venetie*, the state, the Native Village, and the Court of Appeals all addressed the canons, and yet the Supreme Court's opinion does not hint at a consideration of the canons. Perhaps representatives of tribal interests should

145. *See supra* note 139.

146. *See supra* note 55 and accompanying text.

dedicate considerable portions of their briefs to establishing a poignant reason for the canons to be applied, and should make the canons a central issue in their briefs. In any event, the *Venetie* decision demonstrates how critical it is for the Court to adopt a consistent policy of interpreting Indian law.