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COLLECTIVE RIGHTS TO INDIGENOUS LAND IN *CARCIERI v. SALAZAR*

Melanie Riccobene Jarboe*

Abstract: Since settlers set foot in the Americas, tension has existed between American Indian tribes and European settlers over tribal rights to land. When the Narragansett Tribe of Rhode Island proposed to build low-income housing on a thirty-one acre parcel of land, it became involved in years of litigation with the State of Rhode Island, its governor, and the town of Charlestown, RI. Throughout the litigation, the debate over collective ownership of land, cultural differences in property rights and the intentions behind the United States government's policy positions regarding American Indians simmered below the surface. This comment focuses on those issues and argues that the Supreme Court's decision in *Carcieri v. Salazar*, by refusing to grant collective rights to the Narragansett Tribe, violates the Indian Reorganization Act and constitutes an unjust imposition of the western view of individual rights to tribal land ownership.

Introduction

All over the world, indigenous peoples struggle to maintain or reclaim their ancestral lands from governments, private citizens, or corporations.[1] In 2005, a group of scholars and professionals assembled at Oxford University to discuss the cultural, social, political and legal dimensions of land rights among indigenous peoples around the world.[2]

* Staff Writer, Boston College Third World Law Journal (2009–2010).

[1] *See, e.g.*, Frank Brennan, *Standing in Deep Time; Standing in the Law: A Non-Indigenous Australian Perspective on Land Rights, Land Wrongs, and Self-Determination*, *in* Land Rights: Oxford Amnesty Lectures 77, 90 [hereinafter "Land Rights"] (Timothy Chesters ed., 2009) (discussing the Gurindji in Australia); Ken Wiwa, *If This Is Your Land, Where Are Your Stories?*, *in* Land Rights, *supra*, at 124, 137–44 (discussing the Ogoni in Nigeria).

[2] *See* Timothy Chesters, *Introduction* to Land Rights, *supra* note 1, at 1, 1. Indigenous peoples are descended from the pre-colonial inhabitants of particular territories, are often marginalized in society, have distinct traditions, identities, customs and beliefs, and define themselves as indigenous. *See* Lotte Hughes, *Response to Richard Leakey, "Whose World Is It Anyway?," in* Land Rights, *supra* note 1, at 166, 169–71. The idea of indigenousness is, in large part, the invention of colonial anthropologists, whose definitions made it easier for colonial governments to classify, control, divide, and rule native peoples. *See id.* at 171. Despite that fact, the definition helps those who seek rights and protections for indigenous

Five of the presented speeches and six essays in response make up *Land Rights: Oxford Amnesty Lectures*.[3] Although each presenter and respondent discussed land rights in a different country and evidenced a different perspective, a few core themes run throughout the lectures and throughout the international debate on indigenous rights.[4] One theme in particular, the tension between individual and collective rights to land among indigenous peoples, resurfaced again and again.[5]

In the United States, Congress has used its plenary power over Indian affairs to enact laws that limit or eradicate tribal land rights, making the tribes ever-more dependent on the U.S. government for aid.[6] Meaningful judicial review of Congressional acts has not been forthcoming, and the Supreme Court has set many harmful precedents it-

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peoples across the globe. *See* Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 543 (2009).

[3] Chesters, *supra* note 2, at 1.

[4] *See id.* at 11.

[5] *See* William Beinart, *Stategies of the Poor and Some Problems of Land Reform in the Eastern Cape, South Africa: An Argument Against Recommunalization*, *in* LAND RIGHTS, *supra* note 1, at 177, 200 (suggesting that land reform policies should exclude communal forms of ownership); Brennan, *supra* note 1, at 77, 78–80 (noting that with collective land rights and self-determination, indigenous people must reconcile their membership in society at large with membership in the collective, and must understand the clash that occurs when an individual asserts rights against the collective); Richard Leakey, *Whose World Is It Anyway?*, *in* LAND RIGHTS, *supra* note 1, at 153, 156–57 (discussing the tension between European and indigenous concepts of land rights); Romeo Saganash, *Indigenous Peoples and Human Rights*, *in* LAND RIGHTS, *supra* note 1, at 47, 56, 60–61 (discussing the tension between individual and collective rights while urging the recognition of collective rights to land); *see also* James Anaya, *Indigenous Law and Its Contribution to Global Pluralism*, 6 INDIGENOUS L.J. 3, 6–7 (2007); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 63–64 (2008); Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 309 (2006–2007).

[6] *See* United States v. Kagama, 118 U.S. 375, 383–84 (1886). Congress bases this authority on its power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3. Congress formerly claimed power under the Treaty Clause, but after abolishing treaty-making powers with Indian tribes in 1871, Congress relied entirely on the Commerce Clause. *See* STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 58 (3rd ed., S. Ill. Univ. Press 2002) (1983). In several instances, Congressional legislation made tribes more dependent on the federal government and/or removed benefits from tribes. *See* Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1886) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341, 342, 348, 349, 354, 381 (2006)); Act of July 27, 1866, ch. 278, 14 Stat. 292 ("The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."); Act of May 29, 1830, ch. 148, 4 Stat. 411 ("To provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi.").

self, often withdrawing federal benefits that tribes need most and leaving few resources behind.[7] In *Carcieri v. Salazar*, the Supreme Court denied the Narragansett Tribe of Rhode Island ("the Tribe" or "the Narragansett"), and any tribe not under federal jurisdiction in 1934, the benefits of The Indian Reorganization Act (IRA), which Congress passed during the New Deal era.[8] The IRA, which came after centuries of whittling away tribal rights and preceded many more years of the same, is a rare bright spot in the history of federal Indian law.[9] Nevertheless, the majority in *Carcieri* held that the definition of "tribe" in the IRA was dependent on the definition of "Indian," therefore denying that a tribe had any collective rights that transcended the individual

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[7] *See, e.g.*, Carcieri v. Salazar (*Carcieri III*), 129 S. Ct. 1058, 1068 (2009) (holding that the Narragansett Tribe of Rhode Island could not claim benefits under the Indian Reorganization Act of 1934 because they were not under federal jurisdiction in 1934); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425 (1989) (holding that Indian tribes cannot regulate land held in fee by non-Indians); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451, 453 (1988) (holding that, despite the "devastating" impact on traditional religious practices that a Forest Service logging road through sacred Native American land would have, "[w]hatever rights the Indians may have to the use of the area . . . do not divest the Government of its right to use what is, after all, *its* land"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 205–06, 212 (1978) (holding that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians, reducing tribes' ability to enforce the norms of their community against non-Indians who commit crimes on reservations and, especially, against corporations); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (holding that Congress has the power to abrogate Indian treaties in favor of "considerations of governmental policy"); *Kagama*, 118 U.S. at 384 ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that tribes have the right of possession and use of land, which could be extinguished at any time by the federal government through discovery). For a general discussion of Congressional plenary power over Indian affairs and the lack of meaningful judicial review, see Robert J. Miller, Native America, Discovered and Conquered 163–64 (2006); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 Hastings L.J. 579, 580–81 (2007) (arguing the existence of a "reduction in Indian law cases decided on the basis of established precedent, an increase in cases decided without a guiding legal theory, and an increase in cases that appear to be decided on the basis of the gut reaction of the Justices").

[8] *See* Indian Reorganization Act (IRA), 25 U.S.C. §§ 461–479 (2006); *Carcieri III*, 129 S. Ct. at 1068. For a discussion of the policy underpinnings of the IRA, see Pevar, *supra* note 6, at 10.

[9] *See* Ward Churchill, Perversions of Justice: Indigenous Peoples and Angloamerican Law 16 (2003); Pevar, *supra* note 6, at 10. Although the IRA affords significant benefits to tribes, the Act also further increases tribal dependence on the federal government and, in some ways, decreases sovereignty. *See* Churchill, *supra*. Despite these caveats, it is still appropriate to characterize the IRA as more positive than other legislation, such as the Dawes Act. *See* Larry W. Burt, Tribalism in Crisis: Federal Indian Policy, 1953–1961, at 3 (1982).

rights of its members.[10] By limiting the ability of tribes to assert collective rights and to exercise sovereignty over their land under the IRA, the Supreme Court removed some of the most important federal benefits that tribes may claim.[11]

Part I of this Comment introduces the tension between individual and collective rights and the United Nation's resolution of this tension. Part II traces the evolution of American legislative and judicial policy as it pertains to American Indians.[12] Part III addresses *Carcieri v. Salazar* as an example of the Court's refusal to recognize collective rights to land under the IRA. Finally, Part IV discusses the proposed Congressional action to reverse the holding in *Carcieri* by amending the IRA to extend benefits to any federally recognized tribe. Part IV urges the Court to use the Declaration on the Rights of Indigenous Peoples as a template to recognize collective rights without endangering individual rights.

I. The Debate over Collective Rights for Indigenous Peoples

As the debate over collective rights for indigenous peoples has unfolded, multiple perspectives have emerged.[13] Some scholars believe that collective rights for indigenous peoples are tantamount to human rights and should be protected at the international level.[14] In this view, indigenous peoples should have the ability to assert collective rights against those who attempt to undermine their beliefs, cultures and traditions.[15] Although many nations are prepared to recognize the *individual* rights of indigenous people to own property, to be free from discrimination, and so forth, very few countries recognize the *collective* rights of groups to the same.[16] Nevertheless, "To restrict international

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[10] *See Carcieri III*, 129 S. Ct. at 1067.

[11] *See id.*; Pevar, *supra* note 6, at 89–90 (discussing the positive effects of the IRA on tribal abilities to control land among other benefits such as the ability to collect taxes, borrow money, enter into buisiness contracts and operate federally funded programs).

[12] American Indian is the current census term used by the federal government. Alex M. Johnson, *The Re-emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 Iowa L. Rev. 1547, 1558 n.42 (2009).

[13] *See* Chesters, *supra* note 2, at 1–11.

[14] *See* Marcus Colchester, *Response to Frank Brennan, Standing Deep in Time; Standing in the Law: A Non-Indigenous Australian Perspective on Land Rights, Land Wrongs, and Self-Determination, in* Land Rights, *supra* note 1, at 117, 122–23; Saganash, *supra* note 5, at 61.

[15] *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex 22, U.N. Doc. A/Res/61/295 (Sept. 13, 2007); Saganash, *supra* note 5, at 52–57.

[16] *See, e.g.*, Colchester, *supra* note 14, at 121 ("[The UK does] not accept the concept of collective human rights . . . . [H]uman rights are calls upon states to treat individuals in accordance with international standards. As a result, the UK is unwilling to accept use of

human rights to individual rights would only serve to assimilate or otherwise undermine [indigenous] cultures, traditions, legal systems, and world views."[17] For those who hold this view, recognizing only individual rights leaves indigenous peoples without any effective means of self-preservation and practically ensures extinction.[18]

Others believe that recognizing collective rights will endanger the individual rights of indigenous persons.[19] In this view, the danger in recognizing collective rights is that individual rights (for women and children or for minorities within the collective, for example) will suffer under collective leadership and the State's ability to protect those individuals' rights will diminish.[20] Still others believe that indigenous peoples should not seek recognition from the international community, preferring that they organize to change their circumstances inside their own countries.[21] Proponents of this view argue that indigenous claims to collective rights "are often seen as threats to the unity of the . . . nation, instead of opportunities to make all groups feel included and to ensure that their needs are recognized."[22] Although protection of individual rights is of paramount importance both internationally and domestically, one has to question the unilateral denial of collective rights on this basis.[23]

The debate over the collective rights of indigenous people has been especially fierce where land rights are concerned.[24] For many in-

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the term *rights of indigenous peoples* in a human rights context." (quoting Foreign & Commonwealth Office, Human Rights, Annual Report of 2004, Cm. 6364, at 212)).

[17] Saganash, *supra* note 5, at 61.

[18] *See id.*

[19] *See* Brennan, *supra* note 1, at 80; Colchester, *supra* note 14, at 121.

[20] *See, e.g.*, Seyla Benhabib, The Claims of Culture: Equality and Diversity in the Global Era 59 (2002); Ronald Dworkin, Taking Rights Seriously 194 (1978); Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights 2 (2001). *But see* S. James Anaya, *Superpower Attitudes Towards Indigenous Peoples and Group Rights*, 93 Am. Soc'y. Int'l L. Proc. 251, 257 (1999) (calling the United States opposition to collective rights the result of a lingering Cold War distrust of group rights and asserting that the potential conflict between individual and group rights is a "nonissue"); Dwight G. Newman, *Theorizing Collective Indigenous Rights*, 31 Am. Indian L. Rev. 273, 279 (2006–2007) (stating that Anaya's argument that collective rights are a "nonissue" will not be persuasive to those with concerns about individual rights).

[21] *See* Leakey, *supra* note 5, at 162 ("If you haven't got your rights in Kenya, if you want to change your members of parliament, if you want to change the Kenyan constitution, these are not questions for the international community. This is not a problem that you can address in the capitals of North and South.").

[22] Maurice Odhiambo Makoloo, Kenya: Minorities, Indigenous Peoples and Ethnic Diversity 2 (2005).

[23] *See* Anaya, *supra* note 20, at 257; Hughes, *supra* note 2, at 176.

[24] *See* Declaration on the Rights of Indigenous Peoples, *supra* note 15, at Annex, art. 26; Wiwa, *supra* note 1, at 124.

digenous communities the right to occupy their ancestral lands is a precondition to survival as a people.[25] Though indigenous peoples have, by definition, inhabited their lands for many years, remaining on the land and defending or regaining that land from colonizing forces has proven difficult, especially when colonizing forces assert the belief that land ownership is not about connection to the land, but rather about "owning" or using the land in accordance with colonial beliefs.[26]

The Declaration on the Rights of Indigenous Peoples ("the Declaration"), passed by the United Nations General Assembly on September 13, 2007, champions the collective rights of indigenous peoples.[27] Although the Declaration extends collective rights to indigenous groups, it also includes provisions that protect women, elders, children and minorities within indigenous communities.[28] These provisions encourage States to aid indigenous peoples in educating, protecting, and promoting the development of all members, both as individuals and as members of the collective.[29] Multiple provisions in the Declaration relate specifically to land use and recognize that many of the injustices perpetrated against indigenous peoples worldwide have involved land.[30] The Declaration recognizes the right of indigenous people to exercise or regain control over their ancestral lands, to develop their lands in accordance with their own priorities and according to their own strate-

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[25] *See* Brennan, *supra* note 1, at 90 (discussing the Gurindji people's reclamation of their traditional lands in the Watti Creek ("Dagaragu") in Australia); Wiwa, *supra* note 1, at 137–44 (discussing the Ogoni's struggle for rights to their ancestral land in the Niger River Delta, which has been exploited by oil companies to the detriment of the Ogoni since 1958).

[26] Daniel K. Richter, Facing East from Indian Country 54 (2001). European claims of sovereignty over indigenous peoples were grounded in the legal fiction of *terra nullius*, the principle that sovereignty could be acquired over unoccupied territory by discovery, and the belief that land occupied by indigenous peoples was not occupied in a legal sense. Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 Mich. J. Int'l L. 177, 184 (2008). Early American colonists also participated in land acquisition by discovery, which the Supreme Court sanctioned in *Johnson v. M'Intosh*. *See* 21 U.S. (8 Wheat.) 543, 573 (1823).

[27] Declaration on the Rights of Indigenous Peoples, *supra* note 15. The final vote was 143 nations in favor of the Declaration, 11 nations abstaining and 4 nations opposed (the United States, Canada, New Zealand, and Australia). Press Release, United Nations, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES61/295 (Sept. 13, 2007). The Declaration represents a fundamental sea-change in the international community's view on indigenous peoples. *See* Coulter, *supra* note 2, at 545 (discussing the lengthy process of drafting the Declaration and gaining approval).

[28] *See* Declaration on the Rights of Indigenous Peoples, *supra* note 15, at arts. 14–15, 17, 21–22, 33, 44.

[29] *See id.*

[30] *See id.* at Annex, arts. 8(2)(b), 10, 25–26, 28–30, 32.

gies, and provides redress if such rights are not recognized.[31] The Declaration also includes the right to restitution of lands confiscated, occupied, or otherwise taken without free and informed consent, with the option of providing just and fair compensation wherever such return is not possible.[32] Despite this broad grant of sovereignty over ancestral lands, indigenous peoples cannot rely on the Declaration to change the way governments view their rights because the Declaration lacks an enforcement device and is therefore a mere statement of principle.[33]

II. The Evolution of Indian Law and Policy in the United States

> *The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.*
>
> —The Northwest Ordinance of 1787[34]

Both globally and domestically, the arrival of colonists fundamentally changed the relationship of indigenous peoples to one another and to their land.[35] The arrival of white settlers in the New World changed life dramatically for American Indians, especially in regards to land rights.[36] The colonists viewed land as a commodity, and ownership of land included permanent rights of usage (or non-usage) and the right to profit from its fruits.[37] On the other hand, American Indians viewed the land as a resource, "which could not in itself be owned any more than could the air or the sea."[38] In tribal culture, people owned the right to use the land for a particular purpose, and these rights were vested in kin groups or villages rather than in individuals.[39] These conflicting views of land ownership led Europeans to view American Indians as mere occupants of the land, which was ready for acquisition by "productive people."[40] It was nevertheless in the colonists' interest to

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[31] *See id.*

[32] *See id.* at art. 28.

[33] *See* Ellen L. Lutz, *Response to Romeo Saganash, "Indigenous Peoples and International, Human Rights," in* Land Rights, *supra* note 1, at 69, 71 ("[D]eclarations are not treaties, and they are not offered to states to ratify and thereby bind themselves as a matter of international law. Nor do they create new enforcement machinery to which victims can turn if their rights are violated.").

[34] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

[35] *See* Richter, *supra* note 26, at 54.

[36] *See id.*

[37] Frank Pommersheim, Broken Landscape 14 (2009); Richter, *supra* note 26, at 54; John H. Vinzant, The Supreme Court's Role in American Indian Policy 39 (2009).

[38] Richter, *supra* note 26, at 54.

[39] *Id.*

[40] Pommersheim, *supra* note 37, at 17. In 1810, Justice John Marshall stated:

keep the peace with the militarily powerful tribes on the East coast for purposes of trade, land, and protection, and colonists and the early government signed treaties to this effect with tribes.[41] After hostilities between states and the tribes within their borders became problematic, the framers made relations with tribes the exclusive province of the federal government, and Congress passed multiple laws assuring tribes that they had nothing to fear.[42]

Despite this early brokered peace, subsequent federal policy towards American Indian tribes has been marked by various policies of removal, allotment and termination.[43] The tribal practice of holding

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> What is the Indian title? It is a mere occupancy for the purposes of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be *transferred* but to be *extinguished*.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810) (citations omitted). *But see* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 150–51 (2005) (arguing that the English thought the American Indians owned the land, a view which persisted until the 1820s when colonists viewed the tribes as occupying land owned by the United States).

[41] *See* PEVAR, *supra* note 6, at 6 (characterizing early federal policy towards tribes as conciliatory, meant to avoid further hostilities after war with England, despite the fact that these laws were rarely enforced against settlers); VINZANT, *supra* note 37, at 42–45 (highlighting the market forces of the fur trade, government disdain for private land deals between colonists and settlers, and the desire for peace with tribes as the controlling factors in relations between tribes and the government).

[42] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."); Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790) (prohibiting whites from obtaining Indian land without government consent, restricting trade with Indians except in compliance with federal standards, authorized the prosecution of whites who committed crimes against Indians). According to Vinzant, this implies a consensual, not dominant, relationship with tribes designed to protect tribes from the states. VINZANT, *supra* note 37, at 46–47.

[43] *See, e.g.*, 25 U.S.C. § 71 (2006) ("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."); Act of May 29, 1830, ch. 148, 4 Stat. 411. The policy of removal was followed by the policy of allotment under the General Allotment Act, which was motivated to end federal dealings with tribes and to force individuals to assimilate into white society. Nicole C. Salamander, *Half a Full Circle: The Reserved Rights Doctrine and Tribal Reacquired Lands*, 12 U. DENV. WATER L. REV. 333, 336, 339 (2009); *see* Dawes Act, 25 U.S.C. §§ 331–381 (2006). Under the termination policy, tribes' relationship with and benefits from the federal government were ended abruptly, leaving tribes without any resources. *See* PEVAR, *supra* note 6, at 11; VINZANT, *supra* note 37, at 61. In assessing tribal readiness for termination, tribes were divided into groups based on several criteria such as percentage of members with European ancestry, literacy rate, business knowledge, acceptance of white institutions, and acceptance by neighboring white communities. VINZANT, *supra* note 37, at 60. Congress began termination in 1954, and by the early 1960s, had terminated federal relationships with 109 tribes. *Id.* at 61. A

land in common stood as an impediment to the federal goal of "civilizing" American Indians once they had been removed to reservations in the west.[44] As Senator Henry Dawes said of collective land ownership:

> [T]he defect of the system [is] apparent. They have got as far as they can go, because they own their land in common . . . there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people consent to give up their lands . . . so that each can own the land he cultivates, they will not make much more progress.[45]

The General Allotment Act, also known as the Dawes Act, was sponsored by Senator Dawes and "forced the division of the tribal domain amongst the individual citizens of the tribe to be held by the United States 'in trust' for the individual allottee, and thereby created a fictitious 'surplus' of tribal land that the tribe could be forced to sell."[46] Although some members of Congress saw the Dawes Act as a land-grab that would benefit land speculators and not tribe members, this opposition did not impede the passage of the Act.[47] The consequences of the

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"terminated" tribe lost the protection of any trust relationship with the federal government and gave the state in which the tribal lands sat civil and criminal jurisdiction over tribe members. *Id.* When it became clear that termination caused grave social, economic and health problems on reservations, which would require even more federal money to fix, Congress abandoned termination in the early 1960s in favor of a policy emphasizing self-determination and a return to the idealistic views of the New Deal era. *See* PEVAR, *supra* note 6, at 12–13; VINZANT, *supra* note 37, at 61–62 (discussing the Menominee of Wisconsin and noting particularly that the federal government spent $162,000 in 1962 on the tribe and another two million dollars in 1972 to fix the effects of termination).

[44] SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 77 (1993).

[45] *Id.*

[46] G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 576 (2009); *see* PEVAR, *supra* note 6, at 8. Several American Indian rights groups, largely composed of non-Indians, supported the enactment of the Dawes Act because they believed that the tribes' only hope for continued existence was to abandon collective ownership of land and to substitute white "civilization" for their traditional customs. POMMERSHEIM, *supra* note 37, at 126. In addition to these self-proclaimed friends, land speculators also supported passage of the Dawes Act, which would free up land for purchase, sale and profit. *Id.* at 127.

[47] POMMERSHEIM, *supra* note 37, at 127–28. Regarding the Dawes Act, Senator Henry M. Teller from Colorado said:

> If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when 30 or 40 years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation . . . .

Dawes Act on tribes across the country were devastating and persist to the present.[48]

One of the few pieces of legislation passed that positively impacted tribal land rights was the Wheeler-Howard Indian Reorganization Act; it was passed in 1934 with the goals of increasing tribal landholdings and providing statutory authority for tribal home rule.[49] Congress enacted the IRA with the "overriding purpose of . . . establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[50] Under the IRA, tribes "under federal jurisdiction" could claim a multitude of benefits, including the ability to petition the Secretary of the Interior (the Secretary) to take land into trust on their behalf (the trust land provision).[51] The trust land provision allows tribes to exercise near–

Lands in Severalty to Indians: Hearing before the H. Comm. on Indian Affairs, 46th Cong. 783 (1881) (statement of Sen. Teller).

[48] *See* Rice, *supra* note 46, at 577. Before the passage of the Dawes Act, tribes held 138 million acres of land nationwide but by 1934, tribal landholdings had decreased to 48 million acres, nearly half of which were desert or semi-desert. *See id.* Moreover, the Dawes Act resulted in fractionated ownership among tribal members, increasing the administrative costs associated with land management to the detriment of beneficial programs and services. *See* VINZANT, *supra* note 37, at 53–54; Rice, *supra* note 46, at 578. In fact, the Supreme Court has discussed the impoverished condition of American Indian tribes as giving rise to a Congressional duty to protect and to care for tribes, and that a broad grant of legislative power was necessary in order for Congress to carry out these duties. *See* MILLER, *supra* note 7, at 165.

[49] *See* 25 U.S.C. §§ 461–479; Rice, *supra* note 46, at 578–80. Other provisions of the IRA also further this purpose. *See* 25 U.S.C. § 461 ("[N]o land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."); *id.* § 462 ("The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress."); *id.* § 463 (the Secretary of the Interior may "restore to tribal ownership" any "surplus" land that had not yet passed into private hands); *id.* § 476 (tribes may "prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe").

[50] Morton v. Mancari, 417 U.S. 535, 542 (1974).

[51] 25 U.S.C. § 465 (allowing the Secretary to "acquire . . . lands . . . for the purpose of providing land to Indians."). Section 479 defines the term "Indian" as:

> [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Id. § 479. Section 479 defines the term "tribe" as "any Indian tribe, organized band, pueblo, of the Indians residing on one reservation." *Id.* The IRA also prohibited further allotment of tribal land. *Id.* § 461. It authorized the Secretary of the Interior to add land to reservations, to create new reservations for tribes that had lost all of their land, and to

sovereignty over their land, free from state and local taxation, regulations, and civil and criminal jurisdiction.[52]

The Supreme Court has played a central role in shaping the principles of Indian law and exercises an unusual degree of power in changing it at will.[53] Although the Supreme Court has never viewed tribal governments as equal to our own or as worthy of deference, the its early principles of Indian law at least begrudgingly recognize a duty towards American Indians and tribes.[54] These include holdings that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," that tribes are "distinct, independent political communities," and that federal law and Indian treaties preempt the laws of the state in which the tribal land sits.[55] The relationship between the federal governments and the tribes was originally likened to that between a guardian and his ward, and subsequently has been described as a trustee–beneficiary relationship.[56] Even the language of the IRA itself imposes such a relationship.[57]

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restore to tribal ownership any lands declared "surplus" under the Dawes Act that were still held by the federal government. *Id.* §§ 463, 465. It also established a twenty-million dollar credit fund from which loans could be made to incorporated tribes. *Id.* § 470.

[52] PEVAR, *supra* note 6, at 98.

[53] *See* Fletcher, *supra* note 7, at 585 ("Nothing stops the court—no constitutional provision, common law principle, or anything else—from working radical transformations of federal Indian law at any moment."). For an extensive history of Indian law and the Supreme Court, see generally DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 1–310 (1997). Wilkins argues that "'the law' as developed, articulated, and manipulated by the High Court has actually contributed to the diminution of the sovereign status of tribes and has placed tribes and their citizens/members in a virtually destabilized state." *Id.* at viii.

[54] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 24 (1987). Many of the critical foundations of Indian law originated with the Supreme Court's decisions in three cases that have come to be known as the Marshall Trilogy. *See* Worcester v. Georgia, 31 U.S.(6 Pet.) 515, 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 543 (1823); WILKINSON, *supra*, at 54; Fletcher, *supra* note 7, at 592–96.

[55] *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 767–68 (1985); *Worcester*, 36 U.S. (6 Pet.) at 557–58, 561.

[56] *See Cherokee Nation*, 30 U.S. at 2 ("[American Indian] relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 444 (1988) (citing the existence of governmental "trust responsibilities" to protect water and fishing rights reserved to the Hoopa Valley Indians).

[57] *See* 25 U.S.C. § 465 ("Title to any lands acquired pursuant to this Act . . . shall be taken in the name of the United States *in trust for the Indian tribe or individual Indian for which the land is acquired.*") (emphasis added).

The application of the protective principles enunciated in early Court decisions has decreased over time.[58] Between 1832 and 1959, the Court hardly announced any federal Indian law, and often cited to the political question doctrine when an Indian law question arose.[59] From 1959 until 1986, tribal interests won victories before the Supreme Court in approximately sixty percent of cases.[60] Prior to becoming Chief, Justice William Rehnquist played a prominent role in the losses sustained by tribal interests during this period.[61] Once Justice Rehnquist became the Chief Justice in 1986, the rate of tribal success dropped below twenty-five percent.[62] The Rehnquist Court reversed presumptions that tribes were not subject to state taxation, limited tribal criminal and civil jurisdiction over nonmembers, and limited both the federal trust responsibility toward Indian tribes and the canons of construing Indian treaties and statutes to the benefit of Indians and tribes.[63] Though Chief Justice Rehnquist no longer sits on the Court, his Court's legacy is apparent in decisions like *Carcieri*.[64]

III. *Carcieri v. Salazar* as an Example of the Supreme Court's Refusal to Recognize Collective Rights to Land

In *Carcieri*, the Supreme Court divested the Narragansett tribe of benefits under the IRA, including trust land benefits.[65] The majority's holding, that the Secretary's authority under the IRA to "provid[e] land for Indians" extended only to tribes that obtained federal recogni-

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[58] *See* Fletcher, *supra* note 7, at 597.

[59] *Id.* at 598.

[60] *Id.* at 598–99 (citing Alex Tallcheif Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. Rev. 777, 779–80) (2006)).

[61] *Id.* at 599 (citing Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

[62] David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 Minn. L. Rev. 267, 280–81 (2001). In contrast, convicted criminals achieved reversal in thirty-six percent of cases that reached the Supreme Court in the same period. *Id.*

[63] United States v. Cherokee Nation, 480 U.S. 700, 707–08 (1987) (limiting trust responsibility); Nevada v. United States, 463 U.S. 110, 128 (1983) (limiting trust responsibility); *Oliphant*, 435 U.S. at 205–06 (no criminal jurisdiction over non-tribal members); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587–88 (1977) (limiting practice of construing treaties and statutes to the benefit of tribes); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976) (subjecting tribes to state taxation).

[64] *See* Carcieri v. Salazar (*Carcieri III*), 129 S. Ct. 1058, 1068 (2009) (removing benefits from tribes); Getches, *supra* note 62, 280–81.

[65] Carcieri v. Salazar (*Carcieri III*), 129 S. Ct. 1058, 1068 (2009).

tion before 1934, spoke more to the individualized notions of land ownership present in the Dawes Act than to the revitalization policy behind the IRA.[66] Because the IRA was passed, in part, to return some of the collective benefits tribes had lost during centuries of assimilation, allocation and termination, the Court's decision was at odds with the spirit of the IRA.[67]

Formerly one of the most powerful tribes in New England, the Narragansett tribe of Rhode Island began to lose its land and its sovereignty when settlers came to Rhode Island in large numbers.[68] In 1675, the Narragansett Tribe attempted to defend its independence and autonomy in King Philip's War, but it was defeated by the colonists.[69] In 1880, "Rhode Island passed a 'detribalization' law that abolished tribal authority, ended the State's guardianship of the Tribe, and attempted to sell all tribal lands."[70] The Tribe initially agreed to cede all but two acres of its ancestral lands to the State in exchange for $5000.[71]

The Tribe regretted its decision almost immediately, and began an epic campaign to regain control of its ancestral lands.[72] One important step towards regaining sovereignty occurred in 1983 when the Tribe obtained federal recognition as an Indian Tribe, allowing it to seek "the protection, services, and benefits of the federal government," including

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[66] *See id.* at 1067–68.

[67] *See id.* at 1067.

[68] *See* Bryan J. Nowlin, *Conflicts in Sovereignty: The Narragansett Tribe in Rhode Island*, 30 Am. Ind. L. Rev. 151, 151 (2005–2006).

[69] *See* Kawashima, *supra* note 68, at 139–143.

[70] *Carcieri III*, 129 S. Ct. at 1072 (Stevens, J., dissenting).

[71] *See id.* at 1061 (majority opinion). Although Roger Williams' purchase was amicable, as the colonist population in Rhode Island grew, tensions between the colonists and the Tribe increased, culminating in 1675 and 1676 in King Philip's war which saw the Tribe defeated at the hands of the colonists. *See id.*; Yasuhide Kawashima, Igniting King Philip's War 131–43 (2001); Nowlin, *supra*, at 151

[72] *Carcieri III*, 129 S. Ct. at 1073. The Tribe claimed that the sale was invalid because it violated the Indian Non-Intercourse Act of June 30, 1830. *Id.* at 1073 n.3. In 1975, the Tribe initiated two lawsuits in the Federal District Court of Rhode Island, to regain title to 3200 acres of ancestral land in Charlestown, Rhode Island. Narragansett Tribe of Indians v. Murphy, 426 F. Supp. 132 (D.R.I. 1976); Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976). The parties settled the pending litigation by entering into a Joint Memorandum of Understanding, which provided for the Tribe's acquisition of 1800 acres of land in Charlestown ("the settlement lands"), held in trust for the benefit of the tribe by a state-chartered entity, The Narragansett Indian Land Management Corporation. Carcieri v. Norton (*Carcieri I*), 290 F. Supp. 2d 167, 170 (D.R.I. 2003), *aff'd sub nom.* Carcieri v. Kempthorne (*Carcieri II*), 497 F.3d 15 (1st Cir. 2007), *rev'd sub nom. Carcieri III*, 129 S. Ct. 1058 (2009). In exchange for the settlement lands, the Tribe agreed to the enactment of federal legislation that eliminated all Narragansett land claims in Rhode Island. *See* Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1716 (2006); R.I. Gen. Laws §§ 37–18–1 to 37–18–15 (2006).

(so it believed) those benefits available under the IRA.[73] Shortly thereafter, the Tribe made plans to build low-income housing for its members on a thirty-one acre parcel ("the parcel") that it had purchased in 1991.[74] When the Tribe began construction, however, the State sought injunctive relief prohibiting the Tribe from continuing without first obtaining state and/or local permits.[75] The Tribe contended that permits were not required because the development would be on tribal land, therefore precluding state jurisdiction.[76] The First Circuit Court of Appeals affirmed the District Court's decision in favor of the state and ordered an injunction prohibiting the tribe from occupying the lands until they complied with Charlestown's permitting process.[77]

To resolve the conflict and to escape potential regulations and exactions on the parcel, the Tribe petitioned the Secretary to take the parcel into trust on its behalf pursuant to the Secretary's authority under the IRA.[78] The Secretary consented and the Board of Indian Affairs (BIA) notified the town of Charlestown and the State of Rhode Island of the Secretary's intention to take the parcel into trust.[79] The State, town, and governor appealed the decision to the Interior Board of Indian Appeals (IBIA), which affirmed that the Secretary could take the parcel into trust for the benefit of the tribe.[80]

Governor Donald L. Carcieri, the State, and the town petitioned for review of the Secretary's decision in U.S. District Court for the Dis-

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[73] *Carcieri III*, 129 S.Ct at 1062; *see* Final Determination for Federal Acknowlegment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177–05 (Feb. 10, 1983). In granting federal recognition, the Bureau of Indian Affairs stated that the Tribe and its predecessors had a documented history stretching back to 1614 and that essentially every member of the Tribe could trace at least one ancestor back to the "detribalization" in 1880. 48 Fed. Reg. 6177–05.

[74] *Carcieri I*, 290 F. Supp. 2d at 170.

[75] *Id.* at 171; *see* Narragansett Indian Tribe v. Narragansett Elec. Co., 878 F. Supp. 349 (D.R.I. 1995), *rev'd in part, aff'd in part*, 89 F.3d 908 (1st Cir. 1996). It appears that the State was less concerned about low-income housing and more concerned that if the Tribe were able to build anything it wanted without first gaining State and local approval, the Tribe could build a gaming facility. *See* Nowlin, *supra* note 68, at 155. Because the State of Rhode Island did not want gaming within its borders, it responded fiercely to the Tribe's construction of low-income housing on the parcel. *See id.* There has been a backlash regarding the "special" rights that American Indians have, especially those related to gaming. *See* Jeffrey R. Dudas, The Cultivation of Resentment: Treaty Rights and the New Right 7–11, 98–112 (2008).

[76] *See Narragansett Elec. Co.*, 878 F. Supp. at 354.

[77] *See Carcieri I*, 290 F. Supp. 2d at 171.

[78] *See id.* at 171–72.

[79] *See id.* at 172.

[80] *See Carcieri II*, 497 F.3d at 24.

trict of Rhode Island.[81] The court held that § 479 of the IRA defined "Indian" to include members of all tribes in existence in 1934 but did not require tribes to be federally recognized at that time.[82] The court held that because the Narragansett Tribe existed in 1934 and subsequently obtained federal recognition, the Secretary was authorized to take land into trust on its behalf.[83] The First Circuit Court of Appeals affirmed, stating that because the word "now" was ambiguous, it would defer to the Secretary's construction of the provision.[84]

The United States Supreme Court granted certiorari and Justice Clarence Thomas, writing for the majority, reversed the decisions of the Secretary, the BIA, the IBIA, the District Court, and the First Circuit.[85] The Court held "that the term 'now under federal jurisdiction' in § 479 unambiguously refer[red] to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934[,]" which limited the Secretary's authority under § 465 to members of tribes that were under federal jurisdiction at that time.[86] Because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary could not take land into trust on its behalf.[87]

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[81] *Carcieri I*, 290 F. Supp. 2d at 169.

[82] *Id.* at 179.

[83] *Id.* at 181.

[84] *Carcieri II*, 497 F.3d at 26, 30. Two First Circuit Judges wrote dissenting opinions that hinted at what was to come. *See id.* at 48–51 (Howard, J., dissenting); *id.* at 51–52 (Selya, J., dissenting). Judge Jeffrey R. Howard asserted that the effect of the Rhode Island Indian Claims Settlement Act was to extinguish simultaneously all future claims raised by "Indians qua Indians" and to bring the Tribe under the civil and criminal jurisdiction of Rhode Island. *Id.* at 48–49 (Howard, J., dissenting). Moreover, Judge Howard noted, the parcel was within the land area the Tribe had claimed in 1975 and the Tribe was therefore estopped from invoking the benefits of the IRA with respect to it. *Id.* at 49. Judge Bruce Marshall Selya, in a separate dissent, concluded that "the Tribe's surrender of its right to an autonomous enclave, and the waiver of much of its sovereign immunity suggest[ed] with unmistakable clarity that the parties intended to . . . preserve[ ] the State's civil, criminal, and regulatory jurisdiction over any and all lands within its borders." *Id.* at 51 (Selya, J., dissenting) (citation omitted). Judge Selya went on to assert that "[w]hile 'hope' is the official motto of Rhode Island, the State should not be force-fed hope in place of rights for which it has bargained." *Id.* at 51–52.

[85] *Carcieri III*, 129 S. Ct. at 1068.

[86] *Id.*

[87] *See id.* Justice Thomas noted that none of the parties or *amici*, including the Tribe, argued that the Tribe was under federal jurisdiction in 1934. *Id.* Justice Stephen Breyer, however, cited examples of retroactive federal recognition and extension of IRA benefits to tribes that were in existence in 1934 but not yet federally recognized. *See id.* at 1069–70 (Breyer J., concurring). Justice David Souter suggested that the respondents did not pursue this line of reasoning because the Secretary believed that after the Tribe obtained Federal recognition in 1983, it was eligible for IRA benefits. *See id.* at 1071 (Souter, J., dissenting). Given the Secretary's understanding of Federal recognition, Justice Souter recommended remanding the

Although the majority listed each of the Secretary's arguments it disagreed with, three particular arguments in the holding deserve attention.[88] First, the majority rejected the Secretary's argument that the word "now" in § 479 was, in fact, ambiguous.[89] Second, they rejected the Secretary's argument that Congress' intent in passing the IRA was to benefit tribal communities regardless of their status in 1934, and that the ambiguity in the word "now" should therefore be interpreted in favor of the Tribe.[90] Instead, the Court held that "Congress' use of the word 'now' in § 479 speaks for itself," and therefore the Court did not need to consider policy at all.[91] Third, the majority rejected the Secretary's argument that the definition of "Indian" in § 479 was rendered irrelevant by the broader definition of "tribe" in § 479 and by the fact that § 465 authorized the Secretary to take title to lands "in the name of the United States in trust for the *Indian tribe* or individual Indian for which the land is acquired."[92] They asserted that because the § 479 definition of "tribe" referred to "any *Indian* tribe," the temporal restrictions that applied to the word "Indian" also applied to the word "tribe."[93]

The majority's conclusions that the definitions in § 479 are unambiguous and do not include the Narragansett tribe are erroneous.[94] In fact, Justice Stephen Breyer, in his concurrence, noted that although the phrase "now under federal jurisdiction" could refer to a tribe's jurisdictional status as of 1934, it could also refer to the time the Secre-

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case to give the respondents the chance to argue that the Tribe was under federal jurisdiction in 1934. *Id.*

[88] *Id.* at 1063–68 (majority opinion).

[89] *Id.* at 1063–66 (citing the definition of "now," use of "now" in the rest of the IRA, the Commissioner of Indian Affairs' interpretation of the provision in 1934, and the lack of room to add beneficiaries to the statute despite use of the word "include" in the introductory clause of § 479).

[90] *Carcieri III*, 129 S. Ct. at 1066.

[91] *Id.*

[92] *Id.* at 1067 (quoting 25 U.S.C. §§ 465, 479 (2006)).

[93] *Id.* ("But the definition of 'tribe' in § 479 itself refers to 'any *Indian* tribe' . . . and therefore is limited by the temporal restrictions that apply to § 479's definition of 'Indian.'" (quoting 25 U.S.C. § 479 (emphasis added))).

[94] *See, e.g.*, *id.* at 1064, 1066 (discussing unambiguous nature of word "now"); *id.* at 1066 (refusing to consider policy views because the statute is unambiguous); *id.* at 1067 n.7 (refusing to consider petitioner's alternative arguments because the statutory language is unambiguous); *id.* at 1073. Moreover, there are sections of the IRA in which Congress used the term "Indians" and "Indian tribe" interchangeably, indicating that Congress was not as concerned with semantic clarity as the majority opinion suggests. *See id.* at 1073 (Stevens, J., dissenting). Justice John Paul Stevens discusses § 475 as an example: § 475 refers to "'any claim or suit of any *Indian tribe*' in the first sentence and 'any claim of such *Indians* against the United States' in the last sentence.'" *Id.* at 1076 (quoting 25 U.S.C. § 475 (emphasis added)).

tary exercises his trust authority.[95] Justice John Paul Stevens, in his dissent, asserted that "[w]ithout the benefit of context, a reasonable person could conclude that 'Indians' refers to multiple individuals who each qualify as 'Indian' under the IRA. An equally reasonable person could also conclude that 'Indians' is meant to refer to a collective, namely, an Indian tribe."[96] Even if the phrase "now under federal jurisdiction" is as unambiguous as the majority suggests, the rest of § 479 clearly extends benefits to the Tribe.[97]

Although the majority overlays the temporal restrictions of "Indian" onto the definition of "tribe," the IRA does not support this construction.[98] The original IRA provided that the trust land provision applied only to tribes and not to individuals at all.[99] A plain reading of § 465 supports the conclusion that there are individual beneficiaries of the IRA— "individual Indians"—as well as collective beneficiaries— "Indian tribes."[100] "The [IRA's] language could not be clearer," stated Justice Stevens, observing that "[t]o effectuate the Act's broad mandate to revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian."[101] Additionally, though the benefits available to individual "Indians" appear to be temporally limited in § 479, tribes do not appear to be similarly limited.[102] Justice Stevens noted that "[f]ederal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land" and not, as the majority holds, the 1934 date of the IRA's enact-

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[95] *Carcieri III*, 129 S. Ct. at 1068–69 (Breyer, J., concurring). *Compare* Difford v. Secretary of HHS, 910 F.2d 1316, 1320 (1990) ("now" refers to time of exercise of delegated authority), *with* Montana v. Kennedy, 366 U.S. 308, 311–312 (1960) ("now" refers to time of statutory enactment).

[96] *Carcieri III*, 129 S. Ct. at 1076 (Stevens, J., dissenting).

[97] *Id.* at 1072.

[98] *See id.* at 1072.

[99] *See id.* at 1074 (comparing the proposed language of the IRA, which read "[t]itle to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust *for the Indian tribe or community for whom the land is acquired*" with § 465, which states that "[t]itle to any lands or rights pursuant to this Act . . . shall be taken in the name of the United States in trust *for the Indian tribe or individual Indian for which the land was acquired*" (quoting 25 U.S.C. § 465 (2006); H.R. 7902, 73d Cong. (1934) (emphasis added in both extracts))).

[100] 25 U.S.C. § 465; *Carcieri III*, 129 S. Ct. at 1073.

[101] *See Carcieri III*, 129 S. Ct. at 1073.

[102] *See* 25 U.S.C. § 479 ("The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.").

ment.[103] Because no party to the litigation disputed that the Tribe was federally recognized at the time it requested that the Secretary take the parcel into trust, the Secretary lawfully exercised his authority.[104]

The majority's myopic focus on the individual at the expense of the collective serves not only to deny the Tribe benefits under the IRA, but also makes a clear statement that the Court does not respect the collective rights of tribes.[105] Though the word "tribe" may be defined with reference to the word "Indian," as the majority asserts, the word "Indian" is just as inextricably linked to the word "tribe."[106] In a collective society that historically did not recognize individual rights to land, an individual was first and foremost a member of a collective.[107] The majority's holding that only individuals may claim rights to land denies that, historically, American Indians had a collective view of ownership and imposes a colonial, individualized concept of land ownership onto tribes, to their detriment.[108]

Even a superficial look into the policy behind the IRA shows that it was the most influential part of the "Indian New Deal" of 1934, which Congress intended to restore tribal collective rights to land.[109] Congress adopted the IRA with the recognition that tribes were a permanent part of the American landscape and that tribes' continued existence depended on encouragement from the federal government to self-govern and to progress collectively as peoples.[110] Congress intended the IRA to be "sweeping in scope" which would seem to include all of the nation's tribes, and would certainly not exclude those who had obtained federal

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[103] *Carcieri III*, 129 S. Ct. at 1075 (Stevens, J., dissenting).

[104] *Id.*

[105] *See id.* at 1067 (majority opinion). The majority asserts that there is no way to define "tribe" without reference to the definition of "Indian." *See id.* The implication is that a tribe has no additional or special meaning beyond its status as a collection of individuals. *See id.*

[106] *See id.* at 1077 (Stevens, J., dissenting).

[107] *See* RICHTER, *supra* note 26, at 54.

[108] *See Carcieri III*, 129 S. Ct. at 1067.

[109] *See id.* at 1073 n.4 (Stevens, J., dissenting); *e.g.*, 25 U.S.C. § 477 (2006) (authorizing the Secretary to grant tribes the authority to acquire, manage, and dispose of lands and other property).

[110] *See* Rice, *supra* note 46, at 580. This is in contrast to the assumption driving the Dawes Act, namely that tribes would eventually disappear and that the federal government needed to make provisions for individual Indians to prepare them for "American" (that is, white American) society. *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY. U. L. REV. 379, 396 (1998) ("Nobody thought the Indians would survive very long so no provisions were made for long-term inheritance."); Salamander, *supra* note 43, at 339.

recognition.[111] The majority's decision to narrow the purview of the IRA defeats the sweeping intent of Congress and serves to deny the Narragansett and many other tribes the benefits meant to ensure their collective rights to land, to self-determination, and to basic existence.[112]

Not only did the majority refuse to look at the policy behind the IRA, it also refused to consider the foundational principles of Indian law, which would have given the Secretary and the Tribe a greater chance of success.[113] The Court did not abide by or even discuss the principles that, first, Indian treaties must be interpreted as tribal members would have understood them and second, that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[114] If the Narragansett Tribe believed that federal recognition would allow them to seek benefits under the IRA, the majority needed to defer to this belief. [115]

More importantly, the federal government owes American Indian tribes a fiduciary duty, which obligates the Court to act in the best interests of the Tribe.[116] Though the trustee-beneficiary relationship is predicated on the troublesome view that American Indians are too weak to act in their own best interests, the duty remains.[117] In *Carcieri*, the Court breached its fiduciary duty by unilaterally removing IRA benefits from the Narragansett and from many other tribes through strict construction of a statute that was meant to be sweeping and beneficial in nature.[118] If the intent behind the IRA was to redress the wrongs perpetrated against tribes and their members, the Court must, as a fiduciary, extend the benefits under the IRA to those tribes who

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[111] *See* Morton v. Mancari, 417 U.S. 535, 542 (1974). Testifying before the Senate Committee on Indian Affairs on May 21, 2009, Edward Lazarus stated "It makes no sense whatsoever to deny the benefits of the IRA, including the trust land provision, to tribes that, through no fault of their own, were left off the original IRA list or otherwise continuously existed . . . as an Indian tribe from historic times to the present." *Authority to Acquire Trust Lands for Indian Tribes: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 2 (2009) (statement of Edward P. Lazarus, Partner, Akin Gump Strauss Hauer & Feld, LLP).

[112] *See Carcieri III*, 129 S. Ct. at 1068.

[113] *See id.*; Montana v. Blackfeet Tribe, 471 U.S. 759, 766–67 (1984).

[114] *See Blackfeet Tribe*, 471 U.S. at 766–67.

[115] *See id.*

[116] *See id.* at 766–67; Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The trust land provision in the IRA is the perfect example of this concept. *See* 25 U.S.C. § 465 (2006). Instead of placing title to the land in the Tribe's control, the Secretary holds it on the Tribe's behalf. *See id.*; Rice, *supra* note 46, at 580. Though this is not an ideal arrangement, if the federal government has taken on a fiduciary duty, it is obligated to discharge that duty faithfully. *See* Rice, *supra* note 46, at 588.

[117] *See* Worcester v. Georgia, 36 U.S. (6 Pet.) 515, 520 (1832).

[118] *See Carcieri III*, 129 S. Ct. at 1068.

have been wronged.[119] The Narragansett Tribe, once powerful in New England, has been reduced to mere tenant on its land by centuries of war and difficult relations with the State.[120] The Tribe has been a victim of a multitude of wrongs and is therefore entitled to whatever benefits the IRA offers, benefits which a loyal fiduciary would not withhold.[121]

IV. Moving Forward: Recognizing Collective Tribal Rights

In response to the Court's decision in *Carcieri*, Congress has taken corrective action.[122] On September 24, 2009 a bill was introduced in the Senate to strike from § 479 the phrase "any recognized Indian tribe now under federal jurisdiction" and to replace it with "any federally recognized Indian tribe."[123] The bill also amends the definition of "tribe" to read "any Indian . . . tribe . . . that the Secretary of the Interior acknowledges to exist as an Indian tribe."[124] The same bill was introduced in the House of Representatives on October 1, 2009.[125] This amendment to the IRA, if it becomes effective, will reverse the Court's holding in *Carcieri* that the IRA only applies to tribes recognized in 1934 and instead, will extend benefits to any federally recognized tribe.[126]

Although the United States has expressed concern that recognizing collective rights will lead to the oppression of individuals within those collectives, the United Nations Declaration on the Rights of Indigenous Peoples provides a model for recognizing the collective without sacrificing the individual.[127] Recognizing the collective rights of American Indians within the framework provided by the Declaration would restore the Court's position as a trustee acting in the best interests of tribes.[128] In the midst of the international debate on the collec-

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[119] *See Morton*, 417 U.S. at 542; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

[120] *Carcieri III*, 129 S. Ct. at 1072 (Stevens, J., dissenting).

[121] *See id.*

[122] *See* S. 1703, 111th Cong. (2009); H.R. Res. 3697, 111th Cong. (2009).

[123] S. 1703 § 1(a)(*1*)(B).

[124] *Id.* § 1(a)(2).

[125] H.R. Res. 3697.

[126] *See id.*

[127] For a further discussion of the U.S. government's concern, see Benhabib, *supra* note 20, at 60; Dworkin, *supra* note 20, at 194; Shachar, *supra* note 20, at 2; Anaya, *supra* note 20, at 257; Newman, *supra* note 20, at 275–280. The Declaration provides multiple protections for individuals within indigenous collectives. *See* Declaration on the Rights of Indigenous Peoples, *supra* note 15, at arts. 14–15, 17, 21–22, 33, 44.

[128] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 444 (1988) (citing the existence of governmental "trust responsibilities" to protect water and fishing rights reserved to the Hoopa Valley Indians); Cherokee Nation v. Ga., 30 U.S. (5 Pet.) 1, 2 (1831)

tive rights of indigenous peoples, the Court could provide a model for the rest of the world to follow as the global community begins the long task of restoring indigenous rights to land.

Conclusion

Among indigenous peoples worldwide, the collective right to own and inhabit land is tantamount to survival, and yet, indigenous peoples across the globe face challenges to retaining or regaining their ancestral homelands. For centuries, the U.S. government and its colonial predecessors removed tribes from land and took land from tribes, consistently refusing to recognize collective rights to land. In *Carcieri v. Salazar,* the U.S. Supreme Court continued this longstanding tradition by withholding collective land rights from the Narraganset Tribe. Despite Congressional action to reverse the effects of the Court's decision, the damage has already been wrought for the Narragansett Tribe's low-income housing development. The Court's myopic focus on the word "now" made the Narragansett and many other tribes ineligible for some of the few benefits the federal government still offers to those who have suffered at its hands.

In the future, the Court must broaden its interpretation of statutes that confer benefits on tribes in order to reverse the land grabbing policies of the past and to restore collective tribal ownership of ancestral lands. The Declaration on the Rights of Indigenous Peoples provides a vision statement that could effectively guide the Court as it remedies the devastation of the Rehnquist era and returns to the principles behind the Indian New Deal and the fundamental canons of Indian law. Proceeding in this way will allow tribes to re-establish themselves as sovereign entities and to begin mitigating the effects of centuries of strife. If the Court acts as a guardian for the collective rights for tribes while still protecting the individual rights of tribe members, American Indians will be able to prosper in ways unheard of since the pre-colonial era. In contrast, failure to guard the collective rights of American Indians will ensure their continued marginalization and the ultimate destruction of the first inhabitants of this nation.

("[American Indian] relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.").