The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification

Jill De La Hunt
University of Michigan Law School

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The United States expanded in the eighteenth and nineteenth centuries principally by acquiring lands from North American Indians. In exchange for such lands, federal-Indian treaties often promised United States' protection of Indian autonomy and rights. These treaties established a trust relationship between the United States and Indians. The judiciary, recognizing both the trust relationship and bargaining inequities between Indian tribes and the federal government, developed canons of construction construing treaty ambiguities in favor of Indians. Courts later extended the canons of construction to apply to federal statutes affecting Indians.

Supreme Court decisions in recent years, however, represent a retreat from the use of the canons in construing ambiguous treaties or statutes. The Court has declined to apply the canons when interpreting unclear treaty and statutory language and has interpreted ambiguities in favor of the parties opposing the claimed Indian interest.

Inconsistent use of the canons of construction in interpreting Indian treaties and statutes jeopardizes Indian rights, Indian interests, and the federal-Indian trust. Vacillating application also frustrates federal policies promoting Indian self-government and economic development.


3. See Antoine v. Washington, 420 U.S. 194 (1975); see also infra notes 65-73 and accompanying text.

4. During the 1970s, the Supreme Court heard 33 Indian law cases. LEGAL SERVICES CORPORATION, FUNDAMENTALS OF AMERICAN INDIAN LAW: THE HISTORY OF FEDERAL-INDIAN POLICY 14 (1981). The Court decided over 20 cases favorably to Indians in the first part of that decade. Israel, The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development, 47 COLO. L. REV. 617, 630 (1976). In the latter half of the 1970s, however, Court decisions demonstrate "something of a 'backlash'" against Indian interests. LEGAL SERVICES CORPORATION, supra, at 14.


This Note argues that the canons of construction should play a central role in the interpretation of Indian treaties and statutes. The Note proposes revitalization of the canons through congressional action codifying the rules of construction into federal law. Part I traces the historical development of the canons to further the federal-Indian trust relationship. Part II analyzes recent Supreme Court decisions that demonstrate decreased use of the canons. Part III argues that strong canons of construction are necessary to the development of self-determining Indian tribes and proposes federal legislation to ensure the continued vitality and importance of the canons of construction.

I. DEVELOPMENT OF THE CANONS OF INDIAN TREATY AND STATUTORY CONSTRUCTION

The canons of Indian treaty and statutory construction evolved judicially as a component of the federal fiduciary duty to protect Indian culture and resource rights. Citing language barriers and disparate bargaining positions, the courts created unique construction principles that ensured the fulfillment of federal promises while preserving the substance of agreements made under coercive conditions.

A. The Federal-Indian Trust Relationship

After the American Revolution, the federal government of the United States succeeded to an established system within which tribes had a recognized sovereign status and legally protected Indian title of occupancy was usually extinguished by agreement and purchase rather than war. The first treaties between the United States and Indian na-
tions resembled the European-Indian agreements concluded between sovereign nations.\textsuperscript{11}

By the early nineteenth century, however, federal-Indian treaties began to reflect the growing power of the United States, and the concomitant waning position of Indian tribes.\textsuperscript{12} Increasing dominance of the federal government over Indian tribes led to the development of a set of moral and legal principles designed to promote fair dealings and preserve Indian sovereignty.\textsuperscript{13} These principles stemmed from the Supreme Court's characterization of the political tie between the United States and an Indian nation, and recognized "all their territorial [sic] rights in the fullest and most ample manner . . . ." Treaty with the Delawares, Sept. 17, 1778, art. 6, 7 Stat. 13. The Supreme Court described this treaty as formed on the model of treaties between European nations. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 550-52, 560 (1832); see generally 2 INDIAN AFFAIRS: LAWS AND TREATIES: INDIANS OF NORTH AMERICA-TREATIES (C. Kappler ed. 1904) (compiling all federal-Indian treaties); INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INC., A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES (1973).

\textsuperscript{11} The first treaty between the United States and an Indian nation denied any designs on the Delaware Tribe's territory, and recognized "all their territorial [sic] rights in the fullest and most ample manner . . . ." Treaty with the Delawares, Sept. 17, 1778, art. 6, 7 Stat. 13. The Supreme Court described this treaty as formed on the model of treaties between European nations. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 550-52, 560 (1832); see F. COHEN, supra note 1, at 111; see also, Treaty with the Sachems and Warriors of the Six Nations, Oct. 22, 1784, 7 Stat. 15; Treaty with the Wyandots, Delawares, Chippewas, and Ottowas, Jan. 21, 1785, 7 Stat. 16. See generally 2 INDIAN AFFAIRS: LAWS AND TREATIES: INDIANS OF NORTH AMERICA-TREATIES (C. Kappler ed. 1904) (compiling all federal-Indian treaties); INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INC., A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES (1973).

\textsuperscript{12} See AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., 1ST SESS., FINAL REPORT 47 (1977) [hereinafter cited as FINAL REPORT].


As the United States expanded, pressures increased to assimilate Indians into the dominant non-Indian society. The first federal policy period emphasizing such goals began with the passage of the Indian General Allotment Act or Dawes Act in 1887, 25 U.S.C. §§ 331-358 (1982). The Act, designed to discourage Indian hunting cultures, divided reservations into 160 acre farming plots which were allotted to individual Indians. The Indian became fee owner after a 25-year period of inalienability. Assimilated Indians also became United States citizens. Reservation land in excess of the allotted plots, deemed "surplus," was opened to non-Indian settlement. M. PRICE & R. CLINTON, supra note 9 at 77-81. The Dawes Act remained in effect for over forty years before Congress recognized its failure. A total of 40,848,172 acres of land allotted to individual Indians was removed from tribal ownership. Approximately 49,000,000 additional "surplus" acres were sold to non-Indians. K. KICKINGBIRD & K. DUCHENEAX, supra, at 23-24.

\textsuperscript{13} Indian law principles are grounded in the concept of an Indian tribe as a sovereign political body, able to make and enforce its own laws within its boundaries. FINAL REPORT, supra note 12, at 4; see Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
States and Indian tribes as a fiduciary relationship. The trust theory developed by the Supreme Court imposed an obligation on all three branches of the federal government to insulate Indian tribes from non-Indian, state, and foreign encroachment. The Court did not, however, elaborate the duties of the federal trustee. Two distinct views of the

14. Federal Indian law is often described as "sui generis" because of the unique federal-Indian trust relationship, the obligations arising from the trust, and the extraordinary power of Congress over Indians. See F. COHEN, supra note 1, at 1; Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 CALIF. L. REV. 601, 612 (1975). See infra notes 17-37 and accompanying text. The origin of the federal-Indian trust relationship is usually attributed to two early Marshall Court decisions. See generally Burke, The Cherokee Cases: A Study In Law, Politics, and Morality, 21 STAN. L. REV. 500 (1969). Both cases involved Georgia's claim of legislative jurisdiction over Cherokee lands within the state's boundaries, and the Supreme Court's power to determine the issues.

In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Court held it did not have jurisdiction to hear an original action brought by the Cherokee Nation to restrain Georgia from imposing state laws on the tribe in violation of treaties made with the United States. The Court found that the tribe was neither a state nor a foreign nation, and thus was without standing. Id. at 15-19. In the Court's view, the Indian tribes were "[d]omestic dependent nations," id. at 16, whose relationship to the United States resembled "[t]hat of a ward to his guardian." Id. This view established the federal-Indian trust relationship. See also id. at 1, 20-49, 53 (concurring and dissenting opinions offering differing views of the federal-Indian relationship). In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) the Court found Georgia statutes exerting control over Cherokee territory preempted by federal treaties and statutes. To determine the extent of retained Cherokee sovereignty, the Supreme Court interpreted relevant treaty clauses professing dependence on the United States as creating treaties of protection. Id. at 552, 560. The Court also analyzed the federal Trade and Intercourse Acts, 25 U.S.C. § 177 (1982), to find congressional recognition of Indian nations as separate sovereign political communities, "[h]aving a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States." 31 U.S. (6 Pet.) at 556 (1832) (emphasis added). The Court's treatment of federal-Indian ties and analysis of the Cherokee treaties as contracts of mutual obligation confirmed the federal-Indian trust relationship.


Yet another constitutional source of the trust relationship may be found in the Property Clause, which authorizes Congress to "regulate commerce ... with the Indian Tribes," U.S. CONST. art. IV, § 3, cl. 2. See F. COHEN, supra note 1, at 207-12.


16. See Chambers, supra note 1. The uncertain scope of the federal trust responsibility has often led the Supreme Court to ground trust duties on specific statutes rather than general fiduciary principles. Compare United States v. Mitchell, 103 S. Ct. 2961 (1983) (recognizing a cause of action against the United States based on breach of a fiduciary duty arising from forestry manage-
trust subsequently emerged, one promoted by the courts and another supported by Indian law scholars and Indian leaders.

1. **The Ward-Guardian Relationship**— Most courts have limited the federal-Indian fiduciary relationship to some version of the "ward-guardian" trust. Under the "ward-guardian" or "passive" trust model, the federal fiduciary duty is limited to specific provisions of treaties or statutes; no legally enforceable trust covers all aspects of federal-Indian interaction. For example, a tribe cannot sue the federal government for mismanagement of reservation resources unless a statute or treaty specifically demonstrates a federal duty to manage tribal assets. Because Congress can also vary the trust as it applies to all tribes, or change the trust relationship with a particular tribe by statute, tribes have little influence over the nature of their relationship to the federal government under the passive trust model.

A corollary version of the passive trust defines the federal obligation in moral terms. This model requires only that the federal government act in good faith when dealing with Indians.

2. **The Trustee-Beneficiary Relationship**— The "trustee-beneficiary" or "active" trust model of the federal-Indian relationship has been

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1. See, e.g., Nevada v. United States, 103 S. Ct. 2906, 2916-17 (1983) (rejecting application of equitable fiduciary principles to impose duty on Secretary of Interior to favor Indian interests over a conflicting government project); see also Chambers, supra note 1, at 1227.


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advocated by scholars, senators, and Indians but has not been accepted by the courts. In the active trust paradigm, the Indian tribes would be recognized as inherently sovereign entities that have exchanged land and certain attributes of sovereignty in return for federal protection of internal autonomy on recognized Indian lands, and federal economic aid. The federal government would have a legally enforceable duty to provide services, protect Indian sovereign rights, and aid Indian development.

The active trust relationship complements current federal policies that seek to further Indian self-sufficiency. This trust model would be flexible enough to encompass changing Indian needs. Further, Indians would play a significant role in tribal resource development decisions. Neither the federal government nor the courts have treated the alternative trust paradigms equally. The trust relationship has in practice


27. The Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), envisioned this model of the trust. See generally F. Cohen, supra note 1, at 180-206; Chambers, supra note 1 at 1221; Clinton, supra note 10; Task Force One, supra note 23, at 180.


31. See Israel, supra note 4; Final Report, supra note 12, at 127; see also Clinton, supra note 10, 1044-50.
frequently served as a justification for expanding federal control over internal Indian affairs. Judicial decisions, for example, have employed the ward-guardian model\textsuperscript{32} to give Congress great discretion in regulating all aspects of Indian life.\textsuperscript{33} Further, "plenary"\textsuperscript{34} congressional control over Indians allows Congress to abrogate treaties unilaterally,\textsuperscript{35} to "limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess,"\textsuperscript{36} and to eliminate the trust relationship itself.\textsuperscript{37}

B. The Canons of Indian Treaty and Statutory Construction: Unique Principles of Interpretation

Uncertainty over the scope of the federal-Indian trust relationship resulted in conflicts between the fiduciary duty to Indians and national land acquisition and development goals.\textsuperscript{38} Treaties and agreements transferred millions of acres\textsuperscript{39} of Indian lands to the United States without adequate translators to overcome language and cultural barriers\textsuperscript{40} and without government acknowledgement of instances of questionable federal dealings.\textsuperscript{41} Although the courts did not use the


\textsuperscript{35} Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Thomas v. Gay, 169 U.S. 264, 271 (1898); Wilkinson & Volkman, supra note 14, at 604.


\textsuperscript{38} See Nevada v. United States, 103 S Ct. 2906 (1983); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). "It is impossible to avoid the conclusion . . . that the young nation's ideals were often subservient to its ambitions . . . ." Wilkinson & Volkman, supra note 14, at 611.

\textsuperscript{39} The United States covers approximately 2.2 billion acres. TASK FORCE ONE, supra note 23, at 37. In 1887, natives held almost 2 billion acres; in 1924, 150 million acres, and in 1975, 50 million acres. FINAL REPORT, supra note 12, at 305.

\textsuperscript{40} Treaty negotiations between tribes of the Pacific Northwest and the United States, for example, were conducted in Chinook, a commercial jargon consisting of 300 words. In comparison, the average child has nearly a 300 word vocabulary by the age of two. Comment, Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study, 51 WASH. L. REV. 61, 62 n.11 (1975).

\textsuperscript{41} See Final Report, supra note 12, at 109.
trust relationship to void such agreements in their entirety\textsuperscript{42}, the judiciary did establish principles to lessen the effects of the unequal bargaining positions.\textsuperscript{43}

Implicitly acknowledging that federal territorial expansion was irreversible,\textsuperscript{44} the Supreme Court developed unique treaty construction canons that regulate specific federal-Indian transactions. These canons of construction embody the federal equitable fiduciary duties\textsuperscript{45} imposed on the United States through the federal-Indian trust.\textsuperscript{46} The canons of construction are more than discretionary rules of interpretation.\textsuperscript{47} These principles are substantive components of the trust relationship, limiting plenary congressional power over Indians.\textsuperscript{48}

The canons of construction divide into two general categories: those which apply to bilateral federal acts concluded between Indians and the United States,\textsuperscript{49} and those which apply to unilateral federal acts affecting Indians.\textsuperscript{50} Although the canons of construction evolved to protect Indian rights in the context of coercive treaty negotiations, trust responsibilities require the United States to safeguard Indian interests in all dealings with Indians. The Supreme Court therefore extended the canons to ensure that Congress and the executive would uphold their fiduciary responsibilities when unilaterally affecting Indian rights.\textsuperscript{51}

\textsuperscript{42} See Seminole Nation v. United States, 316 U.S. 286, 297 (1942).
\textsuperscript{43} In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court formulated the first canon of Indian treaty construction in conjunction with its discussions of the protection obligation to Indians. 31 U.S. 1, at 552, 581. See F. COHEN, supra note 1, at 221; Chambers, supra note 1, at 1214-15.
\textsuperscript{44} See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589, 591-92 (1823).
\textsuperscript{46} These include federal-Indian treaties, and congressionally-ratified federal Indian agreements. See F. COHEN, supra note 1, at 223-24.
\textsuperscript{47} General interpretation principles are often contradictory, and are applied at the court's discretion. See Llewellyn, Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395 (1950).
\textsuperscript{48} See, e.g., Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977); F. COHEN, supra note 1, at 221-25; M. PRICE & R. CLINTON, supra note 9, at 137; see also Barsh & Henderson, supra note 5, at 654.
\textsuperscript{50} See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Final Report, supra note 12, at 111; Barsh & Henderson, supra note 5, at 653 (noting that the canons provided perhaps "the only check on Congress that Indians could invoke").
1. **The Reserved Rights Doctrine**— The reserved rights doctrine posits that Indian treaties "[are] not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."^{52} A basic principle of federal Indian law,^{53} the reserved rights of "inherent powers"^{54} doctrine ensures that tribes, as inherent sovereigns, retain all rights not expressly granted.^{55} The doctrine complements the canons of construction as a guide to the interpretation of ambiguities that could result in the loss of sovereign tribal rights.^{56}

2. **The basic canons of Indian treaty construction**— The original canon of construction derives from an 1832 Supreme Court case^{57} that focused on the Indian tribe's understanding of ambiguous treaty provisions.^{58} Finding that the Indians did not understand the treaties to surrender internal tribal sovereignty, the Court construed the ambiguous provisions to favor that understanding.^{59}

The Supreme Court did not expressly formulate a succinct principle of construction. Rather, it determined probable Indian understanding and interpreted ambiguities from Indian perspectives. The Court subsequently refined the original construction method into a requirement that treaties be construed as the participating Indians understood them.^{60}

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^{52} United States v. Winans, 198 U.S. 371, 381 (1905).
^{53} See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.).
^{54} TASK FORCE NINE, supra note 14, at 41.
^{55} The doctrine has, for example, protected Indian intentions to reserve fishing rights, see United States v. Winans, 198 U.S. 371 (1905), and ensured adequate water supplies for reservation lands. See Arizona v. California, 373 U.S. 546, 598-601 (1963); Winters v. United States, 207 U.S. 564 (1908). The reserved rights doctrine also protects internal tribal sovereignty. See Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); V. DELORIA, Jr. & C. LYTLLE, supra note 12, at 48-50; FINAL REPORT, supra note 12, at 110.
^{58} The Court was interpreting the Treaty at Hopewell, Nov. 28, 1785, 7 Stat. 18, and the Treaty at Holston, July 2, 1791, 7 Stat. 39. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832). In reading the treaty provisions, the Court stated:

Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language should distinguish the word "allotted" from the words "marked out." . . . [I]t may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think be taken in the sense in which it was most obviously used.

Id. at 552-53. See also id. at 581.
^{60} See Jones v. Meehan, 175 U.S. 1, 11 (1899). The Court stated that "the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they [sic] would naturally be understood by the Indians." Id. This canon was patterned after the concurring opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (McLean, J., concurring).
A related canon requires ambiguous expressions in treaties to be resolved in favor of the Indians, and a final canon mandates that treaties be construed liberally to favor Indians.

Congress ended treaty-making between the United States and Indian nations in 1871. The Supreme Court extended the canons of construction to apply to the congressionally ratified federal-Indian "agreements" that replaced formal treaties. The Court thus ensured that the principles embodied in the canons would not be avoided by changing the form of federal-Indian land transfers.

3. The canons of construction applicable to unilateral federal acts—
The origin and breadth of the canons of statutory construction are less clear than those of the basic treaty canons. The first case to apply the canons to a unilateral congressional act did so on the basis of a prior Supreme Court case that actually involved a bilateral agreement incorporated into federal legislation.

Not all the basic canons of construction apply to unilateral federal acts. Congressional legislation and executive orders are not construed as Indians would understand them, for Indian understanding did not influence the formulation of the federal acts. The government’s trust obligations, however, mandate the resolution of ambiguities to favor Indians. Legislation favoring Indian interests is thus construed broadly, while legislation impairing Indian interests is construed narrowly.

The extent to which the canons of construction apply to unilateral federal acts either expressly or implicitly affecting Indians is not well defined. Some commentators argue that the canons of construction apply to statutes whenever they conflict with a treaty. Others, however,

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64. Agreements were ratified by both the Senate and the House of Representatives. See Choate v. Trapp, 224 U.S. 665 (1912); In re Heff, 197 U.S. 488, 499 (1905); Act of Mar. 1, 1901, ch. 675, 31 Stat. 848; M. Price & R. Clinton, supra note 9, at 78.
68. Wilkinson & Volkman, supra note 14, at 626.
limit the canons of statutory construction to statutes "dealing with Indian affairs." Yet, this second theory of the canons may be quite broad, as Indians or Indian affairs can be "affected" by statutes of general applicability.

The Supreme Court, applying the canons to a unilateral federal act in a recent decision, described the canons as "applicable to statutes affecting Indian immunities." The Court also required statutes "passed for the benefit" of Indians to be construed liberally.

Whatever their exact latitude, the canons of statutory construction certainly apply to statutes specifically concerning Indians. The canons probably apply further to statutes of general applicability that impair Indian interests.

4. The Indian treaty abrogation canon—Congress has the authority to abrogate or modify federal-Indian treaties or the trust itself. Nonetheless, courts construe legislation abrogating treaty rights very narrowly, for the extinguishment of treaty rights has a highly destructive effect on Indian culture and tribal sovereignty.

The treaty abrogation canon differs from the canons of treaty and statutory construction. The abrogation canon determines whether an acknowledged treaty right still exists, while the construction canons determine whether a right will be acknowledged, and what the scope of that right is.

69. See F. Cohen, supra note 1, at 224.
72. Id. at 392.
73. See generally United States v. White, 508 F.2d 453 (8th Cir. 1974); Brecher, supra note 70, at 293. But see Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (holding that costly NEPA requirements apply to tribal leases).
76. See Clinton, supra note 10, at 1040-41; Chambers, supra note 1, at 1235-36; Task Force Two, supra note 10, at 77; Wilkinson & Volkman, supra note 14, at 604-05; see also MESSAGE FROM THE PRESIDENT, supra note 23.
C. Judicial Tradition of Applying the Canons of Construction

The canons of construction operate as trust principles rather than as political techniques accommodating treaties to government policy. The principles underlying the canons are not abandoned with policy changes. Since the first formulation of the canons of construction, the federal policy towards Indians has vacillated between attempts to assimilate Indians into mainstream American society, and efforts to promote the autonomy of Indian Nations. When assimilation policies conflicted with treaty provisions guaranteeing Indian autonomy, the courts continued nevertheless to construe treaty provisions in favor of Indian understanding. The reserved rights doctrine, for example, was formulated during a period in which federal legislative policy deliberately fostered the erosion of tribal sovereignty.

The assimilation period from 1871-1934 witnessed a decrease in bilateral negotiations and an increase in unilateral federal acts affecting Indians. The courts continued to enforce federal trust obligations by extending the canons of treaty construction to congressional legislation. For over 150 years, these principles of interpretation have

77. During the first assimilation period (1871-1934), the Supreme Court upheld a federal promise rendering Indian land allotments non-taxable despite a congressional act removing the promised tax immunity. Choate v. Trapp, 224 U.S. 665 (1912); see also Winters v. United States, 207 U.S. 564 (1908) (using canons to find that Congress intended to include water rights when setting aside Indian reservations); Jones v. Meehan, 175 U.S. 1 (1899) (formulating the canon requiring treaties to be construed as Indians understood them).


79. E.g., Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34 (Choctaw). These treaties conveyed land to the tribes in fee simple, pledging that “no part of the land granted shall ever be embraced in any territory or state.” Such provisions assume continued Indian autonomy.

80. In United States v. Winans, 198 U.S. 371 (1903), the Court read a treaty phrase guaranteeing “the right of taking fish at all usual and accustomed places” as imposing a servitude on all the land granted to the United States by the signatory Indians. Id. at 381. Using the principles of treaty construction as the basis for determining the contested Indian-non-Indian rights, the Court elevated federal recognition of inherent tribal autonomy to doctrinal status. See generally Comment, Pacific Northwest Indian Treaty Fishing Rights, 5 U. Puget Sound L. REV. 99, 103-04 (1981).

81. M. PRICE & R. CLINTON, supra note 9, at 77.

82. In Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918), the Supreme Court construed an 1891 statute establishing a reservation to include surrounding navigable waters and beds despite a strong general presumption against federal conveyance of such submerged lands. See Shively v. Bowby, 152 U.S. 1 (1894) (announcing the equal-footing doctrine). The Court
been applied to construe treaty provisions conveying land "to be held as Indian lands are held" as insulating Indian hunting and fishing from state regulation, to combine general treaty promises and historical circumstances into a conveyance of submerged riverbeds, and to ensure valuable water rights to otherwise "lifeless" Indian reservation lands.

II. RECENT SUPREME COURT RETREAT FROM USE OF THE CANONS OF CONSTRUCTION

Since the late 1970s, the Supreme Court's use of the canons of construction has become haphazard. The Court has given little weight to Indian understanding in construing treaties. In interpreting ambiguous statutory provisions, the Court has often given no special consideration to Indian interests.

applied the canons to require that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed." 248 U.S. at 79.

Application of the equal-footing doctrine to Indian treaty cases has been severely criticized. See Barsh & Henderson, supra note 5; Note, Montana v. United States - Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters, 57 Notre Dame Law. 689 (1982) [hereinafter cited as Note, Effects on Treaty Rights]; Note, Riverbed Ownership Law Metamorphosed Into A Determinant of Tribal Regulatory Authority - Montana v. United States, 1982 Wis. L. Rev. 264 [hereinafter cited as Note, Riverbed Ownership].


There have been exceptions to the overall strength of the canons in interpretation of Indian treaties and statutes. For example, in Ward v. Race Horse, 163 U.S. 504 (1896), the Court construed a treaty provision guaranteeing "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon" as temporary, ending when a territory became a state. This construction violated the canon requiring the treaty to be construed as the Indians would have understood it. See also United States v. Holt State Bank, 270 U.S. 49 (1926). See generally Barsh & Henderson, supra note 5, at 666-69; Comment, supra note 40, at 76.

86. See infra notes 150-60 and accompanying text.

Although the Court has failed to use the canons in some cases, it has never expressly repudiated them. Instead, the Court has effectively redefined the purpose and importance of the canons by ignoring or superficially employing the principles.

1. Neglect of the canons results in the limitation of tribal sovereignty—The Supreme Court first indicated a change of attitude towards the canons of construction in 1978. In *Oliphant v. Suquamish Indian Tribe*\(^88\) the Court rejected the claim that an Indian tribe had criminal jurisdiction over non-Indians on the reservation. The claim was based on inherent sovereignty rather than on statutory or treaty rights.\(^89\) The Court reasoned from early congressional acts that Congress never considered the possibility of inherent tribal jurisdiction.\(^90\) The Court then concluded that Congress would not have passed acts limiting state jurisdiction over Indians while allowing tribal jurisdiction over non-Indians. In looking to such an "unspoken [congressional] assumption,"\(^91\) the Court wholly failed to give effect to the canon of statutory construction requiring ambiguous statutory language to be construed in favor of Indians.\(^92\)

The Court in *Oliphant* also disregarded the basic canons of treaty construction. Stating that federal treaties with the tribes "can be read"\(^93\) as an implicit proscription of criminal jurisdiction over non-Indians, the Court failed to apply the principle requiring ambiguous treaties to be construed in favor of Indians.\(^94\)

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89. 435 U.S. at 195-96. At least 30 tribes were exercising criminal jurisdiction powers over non-Indians at the time of the *Oliphant* decisions. See M. PRICE & R. CLINTON, supra note 9, at 275. *Oliphant* dealt a severe blow to tribal government and to the federal policy of Indian self-determination. Note, *supra* note 88, at 75.

90. 435 U.S. at 197, 201. The Court further reasoned that because the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1982), conferred exclusive jurisdiction in the federal courts over Indians committing certain criminal acts, it would be illogical for Congress to have left jurisdiction over non-Indians in the tribe. 435 U.S. at 203. The Court concluded that Congress assumed that Indians never had jurisdiction over non-Indians. *Id.* at 204.

91. *Id.* at 203.

92. See Barsh & Henderson, *supra* note 5, at 675.

93. 435 U.S. at 197 n.8.

94. Early treaties provided that "[i]f any citizen of the United States . . . shall attempt to settle on any of the land hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." Treaty with the Choctaws, Jan. 3, 1786, art. IV, 7 Stat. 21, *quoted in* 435 U.S. at 197 n.8. Such treaty provisions, drawn when parity in power still marked Indian-federal
The Court’s clearest withdrawal from the canons lay in its statement that Indian treaties must be interpreted “in light of . . . the assumptions of those who drafted them.” The drafter was, according to the Court, “the Executive Branch” of the federal government. The Court’s rule of interpretation conflicts directly with well-established authority that treaties be construed as the Indians would have understood them. Finally, the Court ignored the reserved rights doctrine by assuming that the tribe had no inherent sovereign criminal jurisdiction over non-Indians on the reservation.

2. Piecemeal application of the canons invites non-Indian intrusion and results in uncertainty over Indian fishing rights—The Supreme Court in 1979 signaled further uncertainty over the status of the canons in Washington v. Washington State Commercial Passenger Fishing Vessel Association. In construing a treaty phrase reserving to tribes of the Pacific Northwest the right to fish at “all usual and accustomed grounds and stations . . . in common with all citizens of the territory,” the Court first analyzed the intent of both parties, and applied the canons of construction to interpret the treaty provision as the Indians understood it.

The Court recognized that the purpose and language of the treaty provision clearly secured the Indians’ rights to a portion of salmon and steelhead running through tribal fishing areas. The Court did not, however, apply the canons in determining the actual percentage of fish the Indians could take. Rather the Court created a variable standard for calculating the percentage. This standard infringes on
Indian sovereignty by encouraging continued attempts by non-Indians to decrease the tribes' share. The Court's variable standard for determining fishing rights conflicted with the very canon it had used to interpret the ambiguous treaty provision guaranteeing those rights. The Court's holding also undermined the reserved rights doctrine. Except for the initial treaty construction that the Court considered to be mandated by precedent, the canons played but a nominal role in the actual decision.

3. Disregarding the canons results in unwanted extension of state jurisdiction over Indian Country—The Supreme Court in 1979 also retreated from application of the canons to statutory provisions. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation* the Court held that the state of Washington had fulfilled all the federal statutory requirements necessary to assert state jurisdiction over the Yakima Reservation. The Yakima Nation argued that

The measurement used by the Court to allocate rights was designed to ensure the Indians a "moderate living." 443 U.S. at 686. The Supreme Court extrapolated this standard from water rights cases such as Arizona v. California, 373 U.S. 546, 596-601 (1963). Non-Indian pressures to change the portions of fish can result in federal intrusion into tribal affairs to determine whether less fish are needed to maintain the moderate living standard. See Clinton, supra note 5, at 444-45; Comment, supra note 80, at 118-20. But see Vessels, supra note 98, at 132-34. Further, the unstable nature of the standard contravenes documented Indian concern during treaty negotiations to preserve religious and subsistence fishing needs. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1076 (1976).

Indian understanding would have included neither the agreement to close federal monitoring of internal tribal affairs nor the agreement that religious fishing depend on a moderate living standard. The reserved rights doctrine should have required the Court to develop a plan for fishing rights allocation which would have better preserved the tribes' reserved sovereignty and cultural-religious needs. The resulting conflict over Indian and non-Indian fishing rights has led to violence against the fishing tribes. See E. CAHN, OUR BROTHER'S KEEPER 76-77 (1969); V. DELORIA, JR., supra note 10, at 25-29.


Section 6 of Pub. L. No. 83-280, Act of Aug. 15, 1953, 67 Stat. 590, allows states with statutory or constitutional provisions disclaiming jurisdiction over Indian country to assume jurisdiction provided that "the people thereof have appropriately amended their State constitution or statutes as the case may be." Section 7 of Pub. L. 280, empowered states without constitutional or statutory disclaimers to assert jurisdiction "at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." See 439 U.S. at 472-74. Section 7 was repealed by Title IV of the Act of April 11, 1968, Pub. L. No. 90-284, § 406(b), 82 Stat. 79. The repeal did not affect any cession of jurisdiction made under § 7 prior to its repeal. The Washington State Constitution contained a disclaimer of authority over Indian Country. WASH. CONSTR. ART. XXVI, § 2. Washington enacted a statute obligating the state to assume jurisdiction over any tribe requesting it, without amending its constitution. WASH. REV. CODE, ch. 37.12 (1976). Jurisdiction was upheld by the Washington Supreme Court, which construed § 6 as not
the relevant federal statute established a distinct procedure requiring state constitutional amendment before the state asserted jurisdiction over Indian Country.

Although the Court recognized the canon that legislative ambiguities affecting retained tribal sovereignty must be construed in favor of the tribe, the Court rendered the canon meaningless by requiring the federal statute unambiguously to affect the state’s amendment procedure before invoking the canon. In holding for the state of Washington, the Court ignored the canon of statutory construction that Congress acts to benefit Indians. Instead, the Court interpreted congressional silence to favor state interests in limiting federal intrusion into state government procedures.

4. Ignoring canons of construction results in the bankruptcy of Indian-owned businesses—In 1980, the Supreme Court in Andrus v. Glover Construction Company retreated further from application of the canons of construction and substituted ordinary construction rules to interpret a general federal statute adversely affecting Indian interests. The Court construed the Buy Indian Act (the Act) to requiring the state to amend its constitution where its legislature had passed a statute accepting jurisdiction. State v. Paul, 53 Wash. 2d 789, 337 P.2d 33 (1959). Washington later enacted a statute automatically extending state jurisdiction in eight categories to all parts of every reservation, whether requested by the tribe or not. WASH. REV. CODE § 37.12.010 (1976). The Yakima Nation did not request state jurisdiction, and challenged the Washington legislation on three grounds: that Washington was required by § 6 of Pub. L. 280 to amend its Constitution by action of “the people,” 439 U.S. at 476, before assuming jurisdiction, that Pub. L. 280 did not authorize assumption of partial jurisdiction, and that the Washington legislation violated the Fourteenth Amendment. See 439 U.S. at 474-78. The Court held against the Yakima Nation on all three issues. Id. at 493, 499, 502. See generally Goldberg, supra note 78.


110. See 439 U.S. at 484.

111. The Court stated that “[the canons] will not stretch so far as to permit us to find a federal requirement affecting the manner in which the States are to modify their organic legislation . . . ." Id. at 485.

112. Erosion of the canons of construction was also apparent in the Court’s construction of the federal law to favor partial state jurisdiction over Indian country. The Court failed to mention the canons of construction even superficially and ignored authority that the relevant statute was not intended to allow partial state jurisdiction. See 439 U.S. at 502-07 (Marshall, J., dissenting); see generally Goldberg, supra note 78.


114. General legislation can significantly impair Indian interests. See, e.g., Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977).

115. The Buy Indian Act, 25 U.S.C. § 47 (1982), provides that, “[s]o far as may be prac-
determine whether the Act conferred authority on the Bureau of Indian Affairs (BIA) to engage in preferential road-contracting practices without first advertising for bids as required by the Federal Property and Administrative Services Act of 1949 (FPASA).\textsuperscript{116}

The BIA procurement policy\textsuperscript{117} conflicted with a 1965 general amendment to FPASA requiring the BIA to advertise publicly for bids when making purchases or contracting for supplies and services.\textsuperscript{118} Prior to the 1965 FPASA amendment, the Act exempted the BIA from such general bidding requirements,\textsuperscript{119} thus promoting Indian employment and decreasing Indian economic dependence on the federal government.\textsuperscript{120} The BIA argued that the Act also exempted the agency policy for FPASA requirements.\textsuperscript{121}

Applying ordinary rules of statutory construction, the Court concluded that the BIA procurement policy was not exempt from bid advertising requirements.\textsuperscript{122} The FPASA amendment did provide an exemption for the Act's authorization to purchase "product[s] of Indian industry."\textsuperscript{123} The Court, however, was uncertain whether roads built by Indian-owned companies could be considered "products" under the Act. The canons of construction were not applied to resolve that issue. Instead, the Court focused on another provision of FPASA requiring bid advertising for all road construction contract negotiations with certain expressed exceptions which did not include the Act.\textsuperscript{124} The Court concluded that FPASA provisions included the BIA and thus required advertisement for road contracting services.\textsuperscript{125}

\begin{itemize}
  \item 117. The BIA policy required it to determine that there were "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement" before dealing with non-Indians. 446 U.S. at 609.
  \item 118. 41 U.S.C. § 252(c) (1976).
  \item 121. See 446 U.S. at 617.
  \item 122. The Court used general interpretation rules presuming that absent contrary legislative intent, additional exceptions are not implied where Congress has explicitly enumerated exceptions to a general prohibition, 446 U.S. at 616-17, and that courts must reconcile conflicting statutes to make each effective, unless Congress indicates otherwise. 446 U.S. at 618-19.
  \item 124. 41 U.S.C. § 252(e) (1976). The Buy Indian Act was exempted under FPASA § 252(c)(15) as a law authorizing unadvertised purchases. This would have allowed the BIA to award road contracts to Indian-owned companies without advertising if road construction were an "Indian product." The Court found it unnecessary to interpret the scope of the "Indian product" authorization because FPASA § 252(c) expressly required advertising for road construction contracts. Section 252(e) provided exceptions, but § 252(c)(15) was not among them. See 446 U.S. at 615-19.
  \item 125. 446 U.S. at 616.
\end{itemize}
Making only a passing reference to the canons of construction, the Court found them unnecessary because the meaning of the legislation conflicting with the Buy Indian Act was "plain."126 The Court's use of general interpretive rules indicated, however, that there was indeed some ambiguity. The decision represented a significant failure of the federal-Indian trust relationship by elevating federal interests in limiting "high cost" construction127 above aid to Indian economic development and independence.128

5. Failure to apply the canons limits government accountability for Indian resources mismanagement—In a second opinion in 1980 the Court displaced the canons of construction by general legal presumptions. In Mitchell v. United States (Mitchell I),129 an Indian tribe and tribal members130 brought suit against the federal government for damages arising from alleged mismanagement of reservation timberlands. The Indians argued that the Indian General Allotment Act of 1887, or Dawes Act,131 created a trust relationship between the Indians and the federal government that implied a cause of action for fiduciary breach. Focusing on the government's sovereign immunity defense132 rather than the tribe's breach of trust claim, the Court invoked a rule of interpretation requiring strict construction in favor of preserving immunity.133

126. 446 U.S. at 618.
127. 446 U.S. at 612 (quoting Andrus v. Glover Constr. Co., 591 F.2d 554, 562 (10th Cir. 1979)).
130. The Quinault respondents included 1465 individuals owning interests in Quinault Reservation allotments, an unincorporated association of Quinault Reservation allottees, and the Quinault Tribe. 445 U.S. 535, 537 (1980).
131. 25 U.S.C. § 331-358 (1982). The lands were allotted under the Dawes Act with a twenty-five year trust restriction. The Indian Reorganization Act of 1934 extended the trust status indefinitely. 25 U.S.C. § 462 (1982). See generally F. Cohen, supra note 1, at 148; Comment, supra, note 78. The Quinaults argued that the Dawes Act created a trust relationship between the Indians and the federal government which was breached by the Secretary of Interior's failure to perform several management acts adequately.
132. See 445 U.S. at 538; see also Mitchell II, 103 S. Ct. 2961 (1983) (rejecting language in Mitchell I suggesting that the Tucker Act does not effect a waiver of sovereign immunity).
133. See 445 U.S. at 538; M. Price & R. Clinton, supra note 9, at 202; Newton, supra
Although the Court acknowledged that the Dawes Act "did not unambiguously" impose full fiduciary responsibilities on the federal government,\(^{134}\) it did not apply the canons of Indian statutory construction.\(^{135}\) The Court instead interpreted language in the Dawes Act that required the United States to "hold the land... in trust"\(^{136}\) merely to restrain alienation and prevent state taxation, and not to create a broad fiduciary duty.\(^{137}\) The Court concluded that "[a]ny right of the [Indians] to recover money damages... must be found in some source other than [the Dawes] Act."\(^{138}\) Replacing the canons of construction in favor of Indians with a presumption against waiver of sovereign immunity, the Court denied the Indians their chance to argue the merits of the breach of trust claim.\(^{139}\)

6. **Comparing use of the canons to enforce and non-use of the canons to deny Indian treaty claims**— Two Supreme Court cases decided ten years apart graphically illustrate the changing influence of the canons of construction. Both cases required the construction of treaty provisions to determine ownership of navigable riverbeds in the face of a strong presumption against federal conveyance of submerged lands. *Choctaw Nation v. Oklahoma*,\(^ {140}\) decided in 1970, framed the issue with the canons of construction and found tribal ownership of a portion of the Arkansas riverbed. *Montana v. United States*,\(^ {141}\) decided in 1981, neglected even to mention the canons and found that the tribe did not own the contested portion of the Big Horn riverbed.

In *Choctaw*, three tribes sued the state of Oklahoma to recover royalty payments made to the state under mineral and gas leases in the riverbed and to enjoin future interference with tribal property rights.

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\(^{134}\) 445 U.S. at 542.


\(^{137}\) 445 U.S. at 540-46. Commentators criticizing the Court's narrow reading of the Indian General Allotment Act as limiting the federal-Indian trusteeship, e.g., Newton, *supra* note 129, at 680-81, have suggested two possible reasons for the Court's refusal to recognize a waiver of sovereign immunity. First, the Indian General Allotment Act was designed to assimilate the Indians and thus end the trust relationship. See M. Price & R. Clinton, *supra* note 9, at 202. Second, courts narrowly construe waivers of sovereign immunity. Comment, *supra* note 129, at 620.

\(^{138}\) 445 U.S. at 546.

\(^{139}\) The Quinaults' claim against the federal government was for approximately $100 million. Mitchell II, 103 S.Ct. 2961, 2965 n.7 (1983). On remand, the Court of Claims found the Quinaults had a cause of action against the United States based on fiduciary duties imposed by federal statutes governing timber management, road building, and rights-of-way; statutes governing Indian funds and government fees; and various regulations. United States v. Mitchell, 664 F.2d 265 (Ct. Cl. 1981) (en banc), *aff'd and remanded*, 103 S. Ct. 2961 (1983).


\(^{141}\) 450 U.S. 544 (1981).
tribes claimed ownership of the leased riverbeds under treaties concluded in the 1830s. 142

Two relevant treaties conveyed land to the tribes in fee simple, pledging that "no part of the land granted shall ever be embraced in any territory or state." 143 Land boundaries in one treaty encompassed a portion of the Arkansas River without expressly including it, and described the southern line as "down the Arkansas." 144 The second treaty also expressly used the Arkansas to delineate the boundaries of the land grant. 145 Neither party disputed that if the United States owned the Arkansas riverbed, title to the riverbed inured to Oklahoma upon statehood in 1904. 146

The Indian claims conflicted with a strong presumption that riverbeds were held in federal trust for future states. 147 The Court, however, applied the canons of construction and emphasized the broken federal promises leading to the tribes' forced removal to Oklahoma to overcome the presumption and find that the tribes owned the contested riverbed. 148 The Choctaw message was clear; treaty and fiduciary obligations would be enforced through the construction canons. 149

In contrast, ten years later in Montana the Court disregarded the canons in determining ownership of a portion of the bed of the Big Horn River. 150 The Montana dispute arose from a Crow tribal council attempt to regulate non-Indian fishing and hunting on lands within the reservation, including those owned in fee simple by non-Indians. 151 Asking declaratory relief, the tribe claimed regulatory authority on the


The tribes disagreed on the portion of the riverbed each tribe owned under the treaties. The court declined to resolve that dispute. 397 U.S. at 630 n.7.


144. Treaty of New Echota, 7 Stat. at 480; see 397 U.S. at 628-30.

145. Treaty of Dancing Rabbit Creek, 7 Stat. at 333; Treaty of Doak's Stand, 7 Stat. at 211; see 397 U.S. at 629.

146. See 397 U.S. at 628; see generally Barsh & Henderson, supra note 5; Hanna, Equal Footing In the Admission of States, 3 BAYLOR L. REV. 519 (1951).


150. Montana v. United States, 450 U.S. 544 (1981). This decision has been heavily criticized. See generally Barsh & Henderson, supra note 5; Bloxham, Tribal Sovereignty: An Analysis of Montana v. United States, 8 AM. IND. L. REV. 175 (1980); Clinton, supra note 5; Note, Indian Law—Ownership of Riverbeds and Limits to Tribal Sovereignty, 17 LAND AND WATER L. REV. 189 (1982); Note, Effects on Treaty Rights, supra note 82; Note, Riverbed Ownership, supra note 82.

151. Crow Tribal Council Resolution 74-05, quoted in Note, Riverbed Ownership, supra note 82, at 283 n.118.
basis of its inherent sovereignty and ownership by treaty of the bed and banks of the Big Horn River running through the reservation.\footnote{152}

The Court held that the United States had not conveyed beneficial ownership to the tribe by treaty, and thus retained ownership for the state.\footnote{153} Because the tribe in \textit{Montana} did not receive land from the United States in exchange for the tribe's original land,\footnote{154} but rather had conveyed original title to the United States,\footnote{155} the Court effectively violated the reserved rights doctrine by characterizing the treaty as a grant from the United States.

Further, the Court's analysis in \textit{Montana} failed to consider whether the signatory tribe intended to give up ownership of the Big Horn riverbed and banks.\footnote{156} Without applying the canons, the Court found that treaty language reserving to the tribe "the absolute and undisturbed use and occupation"\footnote{157} of the land surrounding the river was insufficient to signify Indian ownership of the riverbed. Finally, the Court required the tribe to overcome the presumption against conveyance of the riverbed.\footnote{158} Such a presumption departs from both the letter and the spirit of the canons which require that treaties be read to favor Indians.\footnote{159} Following the post-1978 cases retreating from the canons, the Court allowed considerations of federal and state policy to prevail in construing ambiguities affecting important Indian rights and interests.\footnote{160}

\footnote{152. As in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), the treaty described the reservation by metes and bounds. See Second Treaty of Fort Laramie, May 7, 1868, art. II, 15 Stat. 650.}
\footnote{153. 450 U.S. at 550-51; see Barsh & Henderson, \textit{supra} note 5, at 675.}
\footnote{155. See 450 U.S. at 547-48.}
\footnote{156. In his dissenting opinion, Justice Blackmun employed the canons of construction and concluded that the Crow Tribe would have understood the treaties to include the bed and banks of the Big Horn River. 450 U.S. at 569-81 (Blackmun, J., dissenting).}
\footnote{157. Second Treaty of Fort Laramie, May 7, 1868, art. II, 15 Stat. 649 (1868), \textit{quoted in Montana} v. United States, 450 U.S. at 548.}
\footnote{158. 450 U.S. at 553.}
\footnote{159. The Court reasoned that the treaty language could not mean what it appeared to mean, for the navigation easement retained by the United States in all navigable waters meant that "exclusive occupancy" could not literally be exclusive. Because no express language conveyed the riverbed, the Court concluded that "whatever property rights the language of the 1868 treaty created, ... its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." 450 U.S. at 554.}
\footnote{160. The Court attempted to minimize the striking differences between \textit{Choctaw} v. Oklahoma, 397 U.S. 620 (1970) and \textit{Montana} v. United States, 450 U.S. 544 (1981), by distinguishing \textit{Choctaw} in a footnote as an exception based on peculiar circumstances. 450 U.S. at 555 n.5. The differing results are better understood as the consequence of the diminishing role of the canons of construction. \textit{See also} 450 U.S. at 457-69 (Stevens, J., concurring). \textit{See generally} Barsh & Henderson, \textit{supra} note 5, at 678-81.
Recent Supreme Court decisions indicate that the judiciary no longer considers application of the canons of construction to be a critical aspect of the federal-Indian trust relationship. Codification of the canons would reaffirm the canons’ central importance in federal-Indian relations and would require their application as a matter of substantive law.

A. The Canons of Construction: Contemporary Justification

Judicial reluctance to employ the canons of construction conflicts with current federal goals that emphasize aid to strengthen Indian cultures and standards of living. In the 1960s, Congress and the executive branch began to advocate a policy combining recognition of Indian autonomy with federal assistance to develop viable reservation economies.161 Entitled, “self-determination,” this federal policy encourages Indians and tribes to strengthen tribal autonomy, develop self-sufficient economies, and determine their own future actions.162 In the last two decades, Congress has enacted legislation designed to give tribes a more decisive role in matters affecting Indians and to provide the financial means to achieve economic self-sufficiency.163


Former President Nixon was an especially vocal advocate of Indian self-determination policies. “[T]he United States government acts as a legal trustee for the land and water rights of American Indians [and has] a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill.” MESSAGE FROM THE PRESIDENT, supra note 23, at 9-10. President Ford also supported a policy of encouraging Indian autonomy while preserving the federal-Indian trust. See 12 WEEKLY COMP. PRES. DOC. 1171 (July 16, 1976), quoted in Israel, supra note 4, at 628.

162. “Self-determination” goals give Indians “the right to make choices; to decide . . . as individuals and as tribes, how to adapt to the modes of the general society without destroying the values they cherish.” FINAL REPORT, supra note 12, at 80.

163. One such act provided for the development of the human resources of the Indian peoples, see Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1982), while another act established a revolving loan fund to aid reservation economic development.
Because the canons of construction further the policy of Indian self-determination, they are today of greater utility than ever. Commentators have long recognized that the interpretative rule limiting treaty abrogation is central to tribal preservation.\textsuperscript{164} Of no less importance are the canons of construction confirming and enforcing Indian rights in ambiguous treaties and statutes. Issues that turn on the construction of treaties and statutes include ownership of minerals and oil-rich lands,\textsuperscript{165} right to preferential hiring,\textsuperscript{166} and tax-exempt status.\textsuperscript{167} In resolving ambiguities in favor of Indian rights and interests, courts can promote federal goals by protecting Indian rights and channeling resources to Indians in disputed cases.\textsuperscript{168}

The Supreme Court's reluctance to use the canons of Indian treaty and statutory construction has led to disarray in the lower courts. The resulting abdication of the judiciary's traditional role in enforcing federal trust duties has frustrated Indian self-sufficiency policies. For example, one lower court recently described the purpose of the canons as an encouragement to the United States to draft clear treaties.\textsuperscript{169} The court declined to employ the canons because it reasoned that other interests outweighed the supposed policy of "facilitating communications."\textsuperscript{170} In another case that same court applied the canons of construction in interpreting a federal-Indian treaty.\textsuperscript{171} The court reconciled the two cases by explaining that the interests outweighing

\textsuperscript{164} See Wilkinson & Volkman, supra note 14.


\textsuperscript{168} See generally Kennedy Hearings, supra note 24; Clinton, supra note 10; Israel, supra note 4.

\textsuperscript{169} Wisconsin v. Baker, 698 F.2d 1323, 1334 n.12 (7th Cir.), cert. denied, 103 S. Ct. 3537 (1983).

\textsuperscript{170} \textit{Id}.

\textsuperscript{171} See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d
the canons in the first decision were not present in the second. Such an approach neither safeguards Indian interests nor represents a coherent expression of federal policy towards Indians.

B. Codification or the Court? Revitalization of the Canons Through Federal Legislation

The canons of construction could regain their important position in the federal-Indian trust relationship either through a voluntary return by the judiciary to the application of the canons, or by congressional mandate.

1. Common Law Solution—The courts could themselves employ the canons in all cases involving ambiguous treaty or statutory language. Because the canons were judicially formulated, this approach would require little more than strict adherence to precedent.

Canons of construction elaborated by the courts can, however, have serious shortcomings. Judicial formulation and application of the canons has not always been uniform. Tied by stare decisis to different definitions of the canons, courts interpret similar treaty language differently. Furthermore, judicial rules of construction may be ignored or distinguished in favor of conflicting rules of general interpretation or contrary precedent. Finally, the trend in recent Supreme Court decisions suggests that the judiciary is not willing at present to adhere to the canons. In those cases where the Court has cited the interpretive principles their application has been disingenuous.

2. Codification of the Canons into Statute—Congressional action enacting the canons of construction is feasible and can avoid the weaknesses in judicial canon implementation. A task force of the congressionally-appointed American Indian Policy Review Commission

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341 (7th Cir.), cert. denied, 104 S. Ct. 53 (1983).
173. See generally Wilkinson & Volkman, supra note 14, at 645 (advocating a judicial rule for use in treaty abrogation cases).
175. See Task Force Nine, supra note 14, at 62. Compare Wisconsin v. Baker, 698 F.2d 1323, 1334 n.12 (7th Cir.), cert. denied, 103 S. Ct. 3537 (1983) (stating that the purpose of the canons is to encourage the United States “to express itself more plainly when it drafts a treaty [with Indians, thus ensuring the agreements are] voluntary in the sense that the Indians understood them”) with Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) (indicating that “[t]his principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall’s legal conscience for ensuring the discharge of the nation’s obligations to the conquered Indian tribes”). See generally R. Barsh & J. Henderson, supra note 12, at vii-xy; V. DeLoria, Jr. and C. Lytle, supra note 12, at 50.
(AIPRC) proposed federal legislation in 1976. The statutory canons drafted by the AIPRC task force, however, failed to include the reserved rights doctrine, and did not adequately separate the canons applicable to unilateral federal acts from those applying to treaties and agreements. The work of the AIPRC has been largely forgotten. Congress took no substantive action on the AIPRC’s 206 recommendations, and did not enact legislation codifying the canons of construction.

The 1976 AIPRC Task Force idea was sound and the need for federal legislation has grown more urgent in light of recent Supreme Court decisions withdrawing from use of the canons. A congressional directive to courts to apply the canons would reaffirm the importance of the canons as a component of the federal trust obligation. The plenary power of Congress in Indian affairs ensures deference by both the Supreme Court and lower courts to a legislative expression of support for the canons of construction. Codification of the canons would offer Indians an opportunity to participate in the drafting of the canons, and influence the development of the rules designed for their benefit.

Codification of the canons could also increase tribal access to federal courts. Although the United States’ Attorney’s office files suits on behalf of Indian tribes, tribes may bring suit themselves where the United States refuses to do so. Clearly stated legislative presumptions in favor of Indian rights would ease the often prohibitive financial burdens of litigation. The canons require courts to both presume Congress

177. See Task Force Nine, supra note 14, at 61-73. The Commission was given only two years to complete its study but compiled much information within that time. Criticism over the choice of Commission members, see V. DeLoria, Jr. & C. Lytle, supra note 12, at 23, and internal dissension, see Final Report, supra note 12, at 567-612 (dissenting views of Rep. Lloyd Meeds), reflected the ongoing conflict between assimilation and autonomy theorists. See also Clinton, supra note 10, at 979-80 n.2; Israel, supra note 4, at 627-28.

178. See Task Force Nine, supra note 14, at 73.


180. See supra Part II.

181. See supra notes 33-37 and accompanying text.

182. No court has ever held federal legislation concerning Indians to be outside the scope of congressional power. See generally United States v. John, 437 U.S. 634 (1978); United States v. Kagama, 118 U.S. 375 (1886); Wilkinson & Volkman, supra note 14, at 615 n.66.


185. Indian incomes are below the national average and more Indians are below the poverty level than non-Indians. Final Report, supra note 12, at 91. In 1969, 40-50% of Indians 16
intended to act for the benefit of Indians and to construe ambiguous language in favor of Indian interests. Indians could thus more easily establish a cause of action and meet their evidentiary burdens without presenting voluminous proof of congressional intent. 186

A set of well-defined statutory canons would ensure uniformity in application of the canons. This consistency would provide greater certainty in the interpretation of treaties and statutes and make comparisons between different treaties more relevant. 187

Finally, codification of the canons would not require Congress to create an elaborate new doctrine, or depart from current policies. Because the canons have been in use for 150 years, there is much material from which to draft a statute. 188

C. The Elements of A Model Statute

Legislative canons of construction should require the use of the canons in any issue involving the interpretation of ambiguous language in Indian treaties, statutes, agreements, and executive orders. 189 Federal enactment of the interpretive principles should adhere to basic principles of federal-Indian law. Definitions for terms such as “Indian” and “Indian tribe” should be taken from existing legislation to avoid judicial years or older were unemployed, in comparison to a 4% non-Indian unemployment average. Sonnenberg, The Role of the Federal Government in Present-Day Indian Industrial and Commercial Development: A Discussion in SUBCOMM. ON ECONOMICS IN GOVERNMENT OF THE JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES 310 (Comm. Print 1969); see generally National Congress of American Indians, Economic Development of the American Indian and His Lands, in SUBCOMM. ON ECONOMICS IN GOVERNMENT OF THE JOINT ECONOMIC COMMITTEE, 91ST CONG., 1ST SESS., supra, at 410, 411-12.


187. Two problems appear unavoidable. First, the definition of an ambiguity that triggers use of the codified canons is itself uncertain. See generally R. Dickerson, The Interpretation and Application of Statutes 43-48 (1975) (discussing ambiguities inherent in language). Thus, courts may circumvent the codified canons by determining that the questioned language is unambiguous. But see id. at 105 (finding ambiguities highly probable in cross-cultural communication).

Second, courts may develop precedent that narrowly limits situations to which the canons can be applied. See generally, R. Barsh & J. Henderson, supra note 12, at x-xii (discussing precedent as limiting courts). This could defeat the purpose of the canons, by requiring Indians to prove that the canons should be invoked. Congress could enact legislation to change such a practice, but a congressional check may work better in theory than in fact.


uncertainty as to which peoples may invoke the statutory presumptions. 190 The organization of the statute should separate the canons of construction applicable to bilateral treaties and agreements from those applicable to unilateral federal acts. A division between the differing types of government action affecting Indians would clarify which canons apply to each and emphasize the equal importance of the canons in construing unilateral federal acts. 191

The section enumerating the canons of construction applicable to federal-Indian treaties and agreements should incorporate the reserved rights doctrine, requiring treaties and agreements to be read as reserving to Indians all rights that were not expressly granted away. 192 The reserved rights principle expands Indian rights beyond the language of a treaty by reading its provisions in light of tribal sovereignty and exclusive land occupancy rights. 193 The doctrine is the guiding principle for all the canons of construction: in the absence of clear granting language the right in question remains in the tribe. 194 To clarify its importance, the reserved rights doctrine should be enumerated first.

The canons of construction developed by the courts 195 should follow the reserved rights doctrine. These rules could be formulated as refinements and applications of the reserved rights doctrine or as separate provisions. Either arrangement must express three policies: (1) federal-Indian treaties and agreements must be construed as the participating tribes understood them; 196 (2) treaties and agreements must

190. Definitions such as those in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(a), (b) (1982) are best, because they are political rather than racial. Such definitions, however, exclude Indians not members of tribes federally "recognized." 25 U.S.C. § 450b(a), (b) (1982).

Adding an alternative eligibility standard based on some quantum of Indian blood may be necessary to ensure inclusion of Indians from tribes whose federal recognition was terminated in the 1950's or from tribes that have never been federally recognized. See generally Final Report, supra note 12, at 107-09 (defining Indians), 447-56 (describing present conditions of terminated tribes).

191. Some commentators have criticized application of the canons to unilateral acts. See generally Decker, supra note 66. A separate provision devoted to the unilateral canons would eliminate doubt as to their validity. See infra note 200.

192. See United States v. Winans, 198 U.S. 371, 381 (1905). Although the reserved rights doctrine is not often categorized as a canon of construction, it should be. Compare F. Cohen, supra note 1, at 222 (not describing the reserved rights doctrine as a canon of construction) with V. Deloria, Jr. & C. Lytle, supra note 12, at 48 (including reserved rights doctrine as a canon of construction). See infra notes 200-01 and accompanying text.


194. See supra notes 52-56 and accompanying text.

195. See infra notes 196-98.

be read liberally to benefit the Indian parties; \(^{197}\) and (3) ambiguities in treaties and agreements must be interpreted in favor of the Indian claimants. \(^{198}\) The statute should expressly state that extrinsic evidence including historical circumstances and documents relating to the negotiations is relevant to determining the intent of the parties to a treaty or agreement unless Congress has clearly expressed otherwise on the face of the documents. \(^{199}\)

The section of the statute enumerating the canons applicable to unilateral federal acts should ensure that statutes and executive orders are read to benefit Indian rights and interests. \(^{200}\) The legislation should expressly apply the canons of construction to statutes of general applicability that infringe on Indian interests. \(^{201}\) The Act should also clarify that the construction favoring Indian interests can be overcome only by evidence of clearly expressed contrary congressional intent. \(^{202}\) The judicial canons of construction applicable to unilateral federal acts should be listed separately: (1) statutes and executive orders must be liberally construed to the benefit of the affected Indians or tribes; \(^{203}\)

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200. A major criticism of the canons as applied to statutes is that unilaterally enacted legislation does not involve questions of Indian understanding and unfair bargaining positions. *See* Decker, *supra* note 66. The canons serve, however, to further the federal trust responsibility, independent of their function as bargaining position equalizers. *See generally* Chambers, *supra* note 1, at 1214.

A second objection to application of the canons to statutes is that Indians are represented in Congress. *But see* Wilkinson & Volkman, *supra* note 14, at 660 n.339 (arguing that because of their small numbers and budgets, Indians cannot overcome powerful opposing lobbies). This argument does not lessen the government's obligation under the federal-Indian trust to act in the best interests of the Indians. The canons of construction, ensuring that ambiguities will not be resolved against the Indians, serve to enforce that obligation.

201. Because Congress may unknowingly pass a statute which in practice has a negative impact on an Indian right or interest, a presumption that Congress did not intend to impair such interests is necessary. *See* United States v. White, 508 F.2d 453 (8th Cir. 1974); Brecher, *supra* note 70. Under such a presumption, Andrus v. Glover Constr. Co., 446 U.S. 608 (1980), might have been decided differently. *See supra* notes 113-28 and accompanying text.

202. A "clear expression" standard is similar to the standard advocated by Wilkinson & Volkman, *supra* note 14, at 645, for determining congressional intent to abrogate an Indian treaty. Such a standard ensures that Congress has considered carefully legislation affecting Indian interests.


The statute should expressly include both tribes and Indian individuals because some statutes are tailored to benefit individual Indians. *See, e.g.*, 25 U.S.C. §§ 44-47 (1982) (hiring preference
and (2) ambiguities in such acts must be resolved in favor of the affected Indians or tribes.204

A third section should direct the courts to consider federal trust obligations and the federal policy of Indian self-determination when interpreting Indian treaties and statutes.205 Such a rule would reaffirm the viability of the federal-Indian trust in the era of self-determination206 and clarify congressional approval of the preservation of tribal autonomy through economic development using treaty guaranteed resources.207 A final rule should require the courts to place burdens of persuasion and proof on the non-Indian party to show clearly expressed congressional intent to impair Indian rights or property.208 This provision would clarify that Indian claimants cannot be required to prove that their fiduciary trustee did not intend to breach its duty. The canons are a presumption that the trustee intended to act in the beneficiaries’ best interest;209 the opposing party must rebut this presumption.

D. A Model Statute

The following statute is one model of codified canons of Indian treaty and statutory construction.210

(a) For the purposes of this Act, the term—
(1) “Indian” means a person who is a member of an Indian tribe;211
(2) “Indian tribe” means any Indian tribe, band, nation,
or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [Title 43 United States Code Sections 1601-1616] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; \(^{212}\) and,

(3) "Federal fiduciary obligation" means a federal equitable trust relationship in which the federal government is trustee and any Indian or Indian tribe is the beneficiary. \(^{213}\)

(b) All federal treaties, statutorily ratified agreements, statutes, and executive orders reserving, granting, or affecting rights to or of any Indian or Indian tribe shall be subject to the following principles:

(1) Any treaty or statutorily ratified agreement between the federal government and any Indian or Indian tribe:

(A) shall be read as a grant from the Indian or Indian tribe to the federal government;

(B) shall be read as reserving to the Indian or Indian tribe any right not expressly granted;

(C) shall be read as the Indian or Indian tribe participating in the relevant treaty or agreement negotiations would have understood the document;

(i) For purposes of this subsection Indian understanding shall be determined from the relevant treaty and agreement negotiations, and the historical context of and circumstances surrounding such negotiations;

(D) shall be read liberally in favor of the Indian or Indian tribe; and,

(E) shall be read to resolve any ambiguity within the document in favor of the Indian or Indian tribe.

(2) Any statute or executive order affecting any right or interest of any Indian or Indian tribe:

(A) shall be construed narrowly where such federal act harms such right or interest;


(B) shall be construed broadly where such federal act benefits such right or interest;

(C) shall be construed to avoid impairment of any such right or interest where the federal act is intended to have general applicability;

(D) shall be construed liberally in favor of the affected Indian or Indian tribe; and,

(E) shall be construed to resolve any ambiguity within the federal act in favor of the affected Indian or Indian tribe.

(3) Burdens of proof and persuasion shall be on the party contesting a right or interest claimed by an Indian or Indian tribe to show clearly expressed congressional intent to act contrary to such right or interest.

(4) All such treaties, statutorily ratified agreements, statutes, and executive orders shall be construed to further:

(A) fulfillment of the federal fiduciary obligation to any Indian or Indian tribe; and,

(B) federal policy to promote Indian self-government and Indian economic development.

Conclusion

Recent Supreme Court decisions interpreting Indian treaties or statutes affecting Indians have retreated from meaningful application of the canons of construction developed over the past 150 years. Courts created the canons to enforce trust obligations of the federal government and protect Indian rights.

The canons can further the contemporary federal policy of Indian autonomy. Courts apply the canons inconsistently; Congress should enact legislation requiring judicial use of the canons to resolve ambiguities in federal acts affecting Indians.

—Jill De La Hunt