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

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THE CANONS OF INDIAN TREATY AND STATUTORY CONSTRUCTION: A PROPOSAL FOR CODIFICATION

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.[1] 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.[2] Courts later extended the canons of construction to apply to federal statutes affecting Indians.[3]

Supreme Court decisions in recent years, however, represent a retreat from the use of the canons in construing ambiguous treaties or statutes.[4] 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.[5]

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.[6]

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1. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (1982 ed.); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213 (1975); *see also* Treaty at Hopewell, Nov. 28, 1785, 7 Stat. 18 ("the Commissioners . . . of the United States . . . receive [the Cherokees] into the favour and protection of the United States of America . . ."), *quoted in Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 550 (1832). *See also infra* notes 9-37 and accompanying text.

2. *E.g.,* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Arizona v. California, 373 U.S. 546 (1963); Squire v. Capoeman, 351 U.S. 1 (1956); Winters v. United States, 207 U.S. 564 (1908); Jones v. Meehan, 175 U.S. 1 (1899).

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.

5. *See, e.g.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 675 (1981); Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine,* 26 S.D.L. REV. 434, 444 n.37 (1981).

6. For example, Congress passed the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543

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,[7] the courts created unique construction principles that ensured the fulfillment of federal promises while preserving the substance of agreements made under coercive conditions.[8]

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[9] and legally protected Indian title of occupancy was usually extinguished by agreement and purchase rather than war.[10] The first treaties between the United States and Indian na-

(1982), to aid the development of physical and human Indian resources. Strict judicial construction of ambiguous treaties or statutes can impair valuable Indian property interests. *See* Mitchell v. United States, 445 U.S. 535 (1980) [hereinafter cited as Mitchell I].

7. *See, e.g.*, Jones v. Meehan, 175 U.S. 1, 11 (1899).

8. *See* G. FOREMAN, INDIAN REMOVAL 198, 236 (1953).

9. The United States adhered to the European discovery doctrine allocating fee title to new world land to the discovering nation. The federal government inherited this fee title subject to a title of occupancy in the Indian nations actually possessing the land. Indian title of occupancy was extinguishable by agreement, conquest, or purchase. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); 1 E. DEVATTEL, THE LAW OF NATIONS 99-100 (J. Chitty ed. 1893); D. JONES, LICENSE FOR EMPIRE (1982); M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 531-41 (2d ed. 1983); Cohen, *The Spanish Origin of Indian Rights in the Law of the United States,* 31 GEO. L.J. 1 (1942).

10. The first Secretary of War, Henry Knox, advised President Washington to support a law recognizing Indian title and prohibiting the transfer of land possessed by Indians without payment and federal approval. This led to the enactment of the Trade and Intercourse Act of 1790, ch. 33, Sec. 4, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (1982)). W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 55 (1971).

Cultural differences regarding the concept of land "ownership" complicated Indian-non-Indian relations. AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., TASK FORCE TWO,

tions resembled the European-Indian agreements concluded between sovereign nations.[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.[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.[13] These principles stemmed from the Supreme Court's characterization of the political tie between the United

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REPORT ON TRIBAL GOVERNMENT 77-78 (1976) [hereinafter cited as TASK FORCE TWO]; *see* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589-90 (1823); V. DELORIA, JR., GOD IS RED (1973); D. JONES, *supra* note 9, at 84; Eisinger, *The Puritans' Justification for Taking the Land,* 84 ESSEX INST. HIST. COLLECTION 131 (1948).

Differences regarding the concept and value of land remain a problem today, particularly when a tribe claims compensation for lands taken by the federal government. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979, 1040-44 (1981); *see also* V. DELORIA, JR., *supra* at 7-9.

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 teritoreal [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 Wiandots, 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).

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

For an understanding of the history of federal Indian law, see A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1970); V. DELORIA, JR., & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983); F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962); W. WASHBURN, THE INDIAN IN AMERICA (1975). *See generally* R. BARSH & J. HENDERSON, THE ROAD (1980); F. COHEN, *supra* note 1, at 47-201; M. PRICE & R. CLINTON, *supra* note 9 at 68-91; W. WASHBURN, *supra* note 10; V. DELORIA, JR., *supra* note 10; D. JONES, *supra* note 9; K. KICKINGBIRD & K. DUCHENEAUX, ONE HUNDRED MILLION ACRES (1973); Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling With Ape on Tropical Landscape: An Afterword,* 31 MAINE L. REV. 213-21 (1979).

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. DUCHENEAUX, *supra,* at 23-24.

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.[14] 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.[15] The Court did not, however, elaborate the duties of the federal trustee.[16] Two distinct views of the

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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.

Another possible source of the federal-Indian trust lies in the Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137 (codified as amended at 25 U.S.C. 177 (1982)). *See* AMERICAN INDIAN POLICY REVIEW COMM'N TASK FORCE NINE, 94TH CONG., 2D SESS., REPORT ON FEDERAL INDIAN LAW CONSOLIDATION, REVISION, AND CODIFICATION 22 (1976) [hereinafter cited as TASK FORCE NINE].

The trust relationship may also have a constitutional foundation in the Indian Commerce Clause, which authorizes Congress to "regulate commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2. *See* Morton v. Mancari, 417 U.S. 535, 551-52, (1974); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

Yet another constitutional source of the trust relationship may be found in the Property Clause. U.S. CONST. art. IV, § 3, cl. 2. *See* F. COHEN, *supra* note 1, at 207-12.

15. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Seminole Nation v. United States, 316 U.S. 286 (1942); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Clinton, *supra* note 10, at 1001.

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.[17] 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.[18] 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.[19] Because Congress can also vary the trust as it applies to all tribes, or change the trust relationship with a particular tribe by statute,[20] tribes have little influence over the nature of their relationship to the federal government under the passive trust model.[21]

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.[22]

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

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ment statutes) [hereinafter cited as Mitchell II] *with* Mitchell I, 445 U.S. 535 (1980) (denying the same tribe a cause of action for the same injury based on the Dawes Act which created no general fiduciary duty).

Congress has expressed its understanding of federal obligations under the trust. Article III of the Northwest Ordinance of 1787 provided:

> The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (Ordinance of 1787 recodified by the First Congress).

17. *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.

18. A common law guardianship denies the ward any right to control its property. 39 C.J.S. *Guardian & Ward* § 72 (1976). *See* FINAL REPORT, *supra* note 12, at 126-27; AMERICAN INDIAN POLICY REVIEW COMM'N TASK FORCE THREE, 94TH CONG., 2D SESS., REPORT ON FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS 27-28 (1976) [hereinafter cited as TASK FORCE THREE].

19. *See* Mitchell II, 103 S. Ct. 2961 (1983); Mitchell I, 445 U.S. 535 (1980); *see also* Chambers, *supra* note 1, at 1220-21. *See generally* Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980), *aff'd sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

20. *See, e.g.*, Act of June 17, 1954, ch. 303, 68 Stat. 250 (terminating the Menominee tribe from the trust, ending its eligibility for federal benefits, and excluding it from protection under federal Indian laws).

21. *See* FINAL REPORT, *supra* note 12, at 126-27.

22. *See* Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) ("Under a humane and self-imposed policy . . . [Congress] has charged itself with moral obligations . . ."); Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (presuming Congress acted in good faith in ratifying a federal-Indian agreement).

advocated by scholars,[23] senators,[24] and Indians[25] but has not been accepted by the courts.[26] 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.[27] The federal government would have a legally enforceable duty to provide services, protect Indian sovereign rights, and aid Indian development.[28]

The active trust relationship complements current federal policies that seek to further Indian self-sufficiency.[29] This trust model would be flexible enough to encompass changing Indian needs.[30] Further, Indians would play a significant role in tribal resource development decisions.[31]

Neither the federal government nor the courts have treated the alternative trust paradigms equally. The trust relationship has in practice

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23. *See, e.g.,* Barsh & Henderson, *supra* note 5, at 685; Clinton, *supra* note 10; FINAL REPORT, *supra* note 12; Israel, *supra* note 4; AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., TASK FORCE ONE, REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP; INCLUDING TREATY REVIEW 179-80 (1976) [hereinafter cited as TASK FORCE ONE]. *See also* Chambers, *supra* note 1; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970) [hereinafter cited as MESSAGE FROM THE PRESIDENT].

24. *See Federal Protection of Indian Resources: Hearings Before the Subcomm. on Ad. Prac. and Proc. of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971) [hereinafter cited as *Kennedy Hearings*]; S. REP. NO. 92-561, 92d Cong., 1st Sess. (1971).

25. *See* FINAL REPORT, *supra* note 12, at 127. *See generally Kennedy Hearings, supra* note 24; TASK FORCE ONE, *supra* note 23.

26. *See, e.g.,* Nevada v. United States, 103 S. Ct. 2906 (1983); Menominee Tribe of Indians v. United States, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied,* 445 U.S. 950 (1980). *But see* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (requiring Secretary of Interior, on basis of fiduciary duties, to formulate a regulation preserving water for the litigating tribe), *rev'd on other grounds,* 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 962 (1975). Courts have accepted the active trust paradigm in other areas. The natural resources public trust doctrine, for example, requires land held in trust by state governments for the public to be used for beneficial public purposes. Legislative action to restrict public uses, or to remove public land from the trust are viewed with "considerable skepticism" by the courts. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473, 490 (1970).

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.

28. *See* FINAL REPORT, *supra* note 12, at 136; TASK FORCE NINE, *supra* note 14, at 28-30; *see generally* the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(a) (1982); *Kennedy Hearings, supra* note 24.

29. *See infra* notes 161-63 and accompanying text; *see generally* S. REP. NO. 561, 92d Cong., 1st Sess. (1971).

30. The public trust has proven to be a common law and statutory doctrine flexible enough to meet contemporary demands. *See* Sax, *supra* note 26. *See generally* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); Wilkinson & Volkman, *supra* note 14, at 650-59.

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[32] to give Congress great discretion in regulating all aspects of Indian life.[33] Further, "plenary"[34] congressional control over Indians allows Congress to abrogate treaties unilaterally,[35] to "limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess,"[36] and to eliminate the trust relationship itself.[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.[38] Treaties and agreements transferred millions of acres[39] of Indian lands to the United States without adequate translators to overcome language and cultural barriers[40] and without government acknowledgement of instances of questionable federal dealings.[41] Although the courts did not use the

32. *See, e.g.,* United States v. Sandoval, 231 U.S. 28 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); *see generally* United States v. Wheeler, 435 U.S. 313, 331 (1978).

33. The Supreme Court has, for example, upheld congressional extension of criminal jurisdiction over Indians on the basis of the trust relationship, after finding that the statute exceeded legislative powers authorized by the Indian Commerce Clause of the Constitution. United States v. Kagama, 118 U.S. 375 (1886). Nonetheless, the trust relationship has not served as an independent source of congressional power since 1926. United States v. Candelaria, 271 U.S. 432 (1926). LEGAL SERVICES CORPORATION, FUNDAMENTALS OF AMERICAN INDIAN LAW: THE FEDERAL-INDIAN TRUST RELATIONSHIP 8 (1981); *see also* United States v. John, 437 U.S. 634 (1978); *See generally* Laurance, *The Indian Commerce Clause,* 23 ARIZ. L. REV. 203 (1981).

34. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); *see also* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). At one time, the Court intimated that congressional control over Indian affairs constituted a political question, precluding judicial review. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902). This position has been repudiated. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-85 (1977); Baker v. Carr, 369 U.S. 186, 215-17 (1962).

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.

36. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *see also* United States v. Antelope, 430 U.S. 641 (1977); Morton v. Mancari, 417 U.S. 535 (1974).

37. *See* United States v. Seminole Nation, 299 U.S. 417, 428-29 (1937); 25 U.S.C. § 564 (1982). *See generally* F. COHEN, *supra* note 1, at 215.

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.

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.

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).

41. *See* FINAL REPORT, *supra* note 12, at 109.

trust relationship to void such agreements in their entirety[42], the judiciary did establish principles to lessen the effects of the unequal bargaining positions.[43]

Implicitly acknowledging that federal territorial expansion was irreversible,[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[45] imposed on the United States through the federal-Indian trust.[46] The canons of construction are more than discretionary rules of interpretation.[47] These principles are substantive components of the trust relationship, limiting plenary congressional power over Indians.[48]

The canons of construction divide into two general categories: those which apply to bilateral federal acts concluded between Indians and the United States,[49] and those which apply to unilateral federal acts affecting Indians.[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.[51]

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42. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

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.

44. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589, 591-92 (1823).

45. *See* United States v. Mason, 412 U.S. 391, 398 (1973); St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1411 (D. Minn. 1983); Eric v. Secretary of Hous. & Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978).

46. *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.

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).

48. *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 665, 660 (10th Cir. 1975), *cert. denied*, 492 U.S. 1038 (1977); V. DELORIA, JR. & C. LYTLE, *supra* note 12, at 46-50, 57.

49. These include federal-Indian treaties, and congressionally-ratified federal Indian agreements. *See* F. COHEN, *supra* note 1, at 223-24.

50. Unilateral acts encompass both federal statutes and executive orders. Numerous statutes regulate Indians, and reservations were created by executive order until 1919. *See* 43 U.S.C. § 150 (1982). *See* Bryan v. Itasca County, 426 U.S. 373 (1976); Antoine v. Washington, 420 U.S. 195 (1975); Arizona v. California, 373 U.S. 546, 598-601 (1963); *see generally* 25 U.S.C. (1982) (regulation of Indians); F. COHEN, *supra* note 1, at 127-28, 224, 493; 1 C. KAPPLER, *supra* note 11 (compiling executive orders creating reservations).

51. *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. LYTLE, *supra* note 12, at 48-50; FINAL REPORT, *supra* note 12, at 110.

56. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *See generally* TASK FORCE NINE, *supra* note 14 at 28, 41 (Proposed Congressional Findings and Declaration of Policy § 3, recognizing inherent sovereign status of tribes limited only by treaty or federal statute).

57. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

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.

59. 31 U.S. (6 Pet.) 515, 546, 550-52 (1832).

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,[61] and a final canon mandates that treaties be construed liberally to favor Indians.[62]

Congress ended treaty-making between the United States and Indian nations in 1871.[63] The Supreme Court extended the canons of construction to apply to the congressionally ratified federal-Indian "agreements" that replaced formal treaties.[64] 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[65] did so on the basis of a prior Supreme Court case[66] 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.[67]

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.[68] Others, however,

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61. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Winters v. United States, 207 U.S. 564, 576-77 (1908).

62. *See, e.g.*, Antoine v. Washington, 420 U.S. 194, 200 (1975); Choate v. Trapp, 224 U.S. 665, 675 (1912).

63. 25 U.S.C. § 71 (1982).

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.

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

66. Choate v. Trapp, 224 U.S. 665 (1912). *See generally* Decker, *The Construction of Indian Treaties, Agreements, and Statutes*, 5 AM. IND. L. REV. 299, 300 (1977).

67. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (construing Pub. L. No. 280 narrowly to uphold Indian immunity from state tax); Morton v. Mancari, 417 U.S. 535 (1974) (upholding hiring preference statute against equal rights challenge); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (holding that the Termination Act did not extinguish treaty hunting rights); Squire v. Capoeman, 351 U.S. 1 (1956) (construing Indian General Allotment Act to confer a federal income tax immunity on allotment property); United States v. White, 508 F.2d 453 (8th Cir. 1974) (finding traditional on-reservation eagle hunting not illegal under Bald Eagle Protection Act); F. COHEN, *supra* note 1, at 225; LEGAL SERVICES CORPORATION, *supra* note 33, at 9, 16-17.

68. Wilkinson & Volkman, *supra* note 14, at 626.

limit the canons of statutory construction to statutes "dealing with Indian affairs."[69] Yet, this second theory of the canons may be quite broad, as Indians or Indian affairs can be "affected" by statutes of general applicability.[70]

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."[71] The Court also required statutes "passed for the benefit" of Indians to be construed liberally.[72]

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.[73]

4. The Indian treaty abrogation canon— Congress has the authority to abrogate or modify federal-Indian treaties or the trust itself.[74] Nonetheless, courts construe legislation abrogating treaty rights very narrowly,[75] for the extinguishment of treaty rights has a highly destructive effect on Indian culture and tribal sovereignty.[76]

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.

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69. *See* F. COHEN, *supra* note 1, at 224.

70. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); *see generally* Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Some Proposed Legislative Solutions,* 19 ARIZ. L. REV. 285 (1977).

71. Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

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).

74. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); H.R. Con. Res. 108, 67 Stat. B132 (1953). For a comprehensive treatment of the treaty abrogation power and canon, see Wilkinson & Volkman, *supra* note 14. Congress' unilateral power to abrogate treaties is one reason why the federal-Indian trust is often referred to as a moral rather than legal obligation. *See* Chambers, *supra* note 1, at 1227.

75. The exact standard varies. *Compare* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (stating that congressional intent to abrogate federal-Indian treaties "is not lightly imputed") *with* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 118 (1938) (asserting that courts will uphold abrogation only upon a "clear showing" of congressional intent). Leading commentators advocate a canon requiring courts to uphold federal-Indian treaties unless Congress expressly states its intention to abrogate, and specifies which treaty rights are involved. *See* Wilkinson & Volkman, *supra* note 14, at 645; *see generally* Note, *Statutory Construction-Wildlife Protection Versus Indian Treaty Hunting Rights: United States v. Fryberg, 622 F.2d 1010 (9th Cir.), cert. denied, 449 U.S. 1004 (1980,* 57 WASH. L. REV. 225 (1981).

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.[77] 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.[78] When assimilation policies conflicted with treaty provisions guaranteeing Indian autonomy,[79] 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.[80]

The assimilation period from 1871-1934[81] 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.[82] For over 150 years, these principles of interpretation have

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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).

78. *See generally* 18 U.S.C. § 1162 (1976); 25 U.S.C. §§ 331-358 (1982); 25 U.S.C. §§ 450-450n (1982); H.R. Con. Res. 108, 67 Stat. B132 (1953); S. REP. No. 561, 92d Cong., 1st Sess. (1972); FINAL REPORT, *supra* note 12, at 51-82; MESSAGE FROM THE PRESIDENT, *supra* note 23; R. BARSH & J. HENDERSON, *supra* note 12; V. DELORIA, JR. & C. LYTLE, *supra* note 12, at 9-10; W. WASHBURN, *supra* note 10, at 240; Clinton, *supra* note 10, at 1020-27; Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L. REV. 535 (1975); Wilkinson & Biggs, *The Evolution of the Termination Policy,* AM. IND. L. REV. 139 (1978); Comment, *Tribal Self-Goverment and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955 (1972).

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 (1905), 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. Bowlby, 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,[83] to combine general treaty promises and historical circumstances into a conveyance of submerged riverbeds,[84] and to ensure valuable water rights to otherwise "lifeless" Indian reservation lands.[85]

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.[86] In interpreting ambiguous statutory provisions, the Court has often given no special consideration to Indian interests.[87]

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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*].

83. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

84. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

85. Arizona v. California, 373 U.S. 546, 598-601 (1963); Winters v. United States, 207 U.S. 564 (1908).

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.

87. *See, e.g.,* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). The Court now balances state, federal, and tribal interests, an approach which sometimes neglects inherent tribal powers in violation of the reserved rights doctrine. *See* Rice v. Rehner, 103 S. Ct. 3291 (1983). *See generally* Pelcyger, *Justices and Indians: Back to Basics,* 62 OR. L. REV. 29 (1983).

Until the late 1970s the canons of construction enjoyed considerable judicial respect in the Supreme Court. *See, e.g.,* Bryan v. Itasca County, 426 U.S. 373 (1976) (using canons to uphold on-reservation Indian immunity from state tax); Antoine v. Washington, 420 U.S. 195 (1975) (using canons to uphold Indian hunting rights); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (using canons to uphold on-reservation Indian immunity from state tax); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (using canons to uphold Indian treaty fishing and hunting rights); Squire v. Capoeman, 351 U.S. 1 (1956) (using canons to immunize Indian allotment property from federal taxation); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938) (using canons to find federal recognition of beneficial Indian rights to land); Northern Pac. Ry. Co. v. United States, 227 U.S. 355 (1913) (using canons to determine boundary); Winters v. United States, 207 U.S. 564 (1908) (using canons to create reserved water rights doctrine).

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 possiblity 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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88. 435 U.S. 191 (1978). Oliphant and Belgarde, two non-Indian residents arrested by tribal officers, were charged with committing tribal offenses. Both petitioned for writs of habeas corpus to the federal district court, pleading that the tribal court had no jurisdiction over non-Indians. The court of appeals affirmed the district court's denial of Oliphant's petition. The court reasoned that no federal statute or treaty had deprived the tribe of its power to punish tribal law offenders. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Belgarde's petition for certiorari was granted before the court of appeals had reviewed his case. 435 U.S. at 195 n.5. *See* Note, *Indian Rights - What's Left?* Oliphant, *Tribal Courts, and Non-Indians*, 41 U. PITT. L. REV. 75, 79 (1979).

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.*"[95] The drafter was, according to the Court, "the Executive Branch"[96] 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.[97] 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.*[98] 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,"[99] 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.[100]

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.[101] The Court did not, however, apply the canons in determining the actual percentage of fish the Indians could take.[102] Rather the Court created a variable standard for calculating the percentage.[103] This standard infringes on

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relations, were unambiguous acknowledgement of the mutual sovereignty of the bargaining nations. *See supra*, part I. Overlooking the canon requiring treaties to be construed liberally in favor of Indians, the Court interpreted these treaty passages as merely an attempt to discourage non-Indian settlement.

95. 435 U.S. at 206 (emphasis added).

96. *Id.*

97. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *see supra* note 57-64 and accompanying text.

98. 443 U.S. 658 (1979). *See generally* Vessels, *Treaties: Fishing Rights in the Pacific Northwest - The Supreme Court "Legislates" an Equitable Solution,* 8 AM. IND. L. REV. 117 (1980); Comment, *supra* note 80; Comment, *supra* note 40.

99. Treaty of Medicine Creek, Dec. 26, 1854, art. III, 10 Stat. 1132, 1134 (emphasis added).

100. *See* 443 U.S. at 675-79.

101. *See id.* at 662, 667-69.

102. The Court did not use the canons at least in part because it concluded that "neither party realized or intended that their agreement would determine whether, and if so how, [the fish] would be allocated . . . when [they] later became scarce." *Id.* at 669.

103. The Court determined Indian fishing rights to be a maximum of 50%, subject to decrease, of the annual anadromous fish runs. This included non-commercial subsistence and religious fishing. *Id.* at 685-89. The district court formula allocated both Indians and non-Indians up to 50% of the harvestable run; Indian religious and subsistence fishing would not be included as part of the tribes' "up to" 50% portion. United States v. Washington, 384 F. Supp. 312, 342-43 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

Indian sovereignty by encouraging continued attempts by non-Indians to decrease the tribes' share.[104]

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.[105] Except for the initial treaty construction that the Court considered to be mandated by precedent,[106] 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*[107] the Court held that the state of Washington had fulfilled all the federal statutory requirements necessary to assert state jurisdiction over the Yakima Reservation.[108] The Yakima Nation argued that

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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, 598-601 (1963).

104. 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).

105. 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.

106. Ironically, the reserved rights doctrine was announced in the first of the seven Pacific Northwest fishing rights cases. *See* United States v. Winans, 198 U.S. 371 (1905); *see also* Puyallup Tribe Inc. v. Washington Game Dep't, 433 U.S. 165 (1977); Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 391 (1968); Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919).

107. 439 U.S. 463 (1979).

108. 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. CONST. 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.[109] Although the Court recognized the canon that legislative ambiguities affecting retained tribal sovereignty must be construed in favor of the tribe,[110] the Court rendered the canon meaningless by requiring the federal statute unambiguously to affect the state's amendment procedure before invoking the canon.[111] 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.[112]

4. Ignoring canons of construction results in the bankruptcy of Indian-owned businesses— In 1980, the Supreme Court in *Andrus v. Glover Construction Company*[113] retreated further from application of the canons of construction and substituted ordinary construction rules to interpret a general federal statute adversely affecting Indian interests.[114] The Court construed the Buy Indian Act (the Act)[115] to

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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.

109. *See* 439 U.S. at 466-67.

"Indian Country" is defined as:

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

18 U.S.C. § 1151 (1976).

110. 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.

113. 446 U.S. 608 (1980); *see generally* Casenote, *United States Supreme Court Review of Tenth Circuit Decisions* - Andrus v. Glover Construction Co. 58 DEN. L.J. 531, 538-39 (1981).

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).[116]

The BIA procurement policy[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.[118] Prior to the 1965 FPASA amendment, the Act exempted the BIA from such general bidding requirements,[119] thus promoting Indian employment and decreasing Indian economic dependence on the federal government.[120] The BIA argued that the Act also exempted the agency policy for FPASA requirements.[121]

Applying ordinary rules of statutory construction, the Court concluded that the BIA procurement policy was not exempt from bid advertising requirements.[122] The FPASA amendment did provide an exemption for the Act's authorization to purchase "product[s] of Indian industry."[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.[124] The Court concluded that FPASA provisions included the BIA and thus required advertisement for road contracting services.[125]

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ticable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

116. 41 U.S.C. §§ 251-260 (1976).

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.

118. 41 U.S.C. § 252(c) (1976).

119. Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861, *quoted and construed in* 446 U.S. 608, 612 n.8, 613 n.11 (1980).

120. *See* 446 U.S. 608, 618 (1980); *see generally* Morton v. Mancari 417 U.S. 535, 549-551 (1974); Chambers, Brief for Amici Curiae at 7, Andrus v. Glover Constr. Co., 446 U.S. 608 (1980).

121. *See* 446 U.S. at 617.

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.

123. 25 U.S.C. § 47 (1982).

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(e) 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.

125. 446 U.S. at 616.

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' construction"[127] 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 members[130] 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 defense[132] 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]

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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)).

128. The holding in *Glover Construction Co.* led to the bankruptcy of numerous Indian-owned companies dependent on Buy Indian Act contracts, resulting in increased Indian unemployment. *See* Brief for Petitioner, Andrus v. Glover Constr. Co., 446 U.S. 608 (1980); Van Ness, Jr., Brief for Amicus Curiae at 33, Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) (reporting that after the Court of Appeals decision, BIA road construction contracts to Indian firms dropped $9 million although total BIA road construction increased $10 million).

129. 445 U.S. 535 (1980). For analysis and criticism of Mitchell I, *see* M. PRICE & R. CLINTON, *supra* note 9, at 202; Hughes, *Can the Trustee Be Sued For Its Breach? The Sad Saga of* United States v. Mitchell, 26 S.D.L. REV. 447 (1981); Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U.L. REV. 635 (1982); Comment, *Indian Law - Remedies - Statutory Construction - Trusts* - United States v. Mitchell, 27 N.Y.L. SCH. L. REV. 610 (1981).

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 nonuse 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. The

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note 129, at 656-57; Comment, *supra* note 129, at 620; *see also*, Hughes, *supra* note 129, at 473, 481, 487.

134. 445 U.S. at 542.

135. *See id.* at 542-46. Imposition of the presumption against waiver of sovereign immunity resulted in an "unusually" strict construction of the legislation. Hughes, *supra* note 129, at 481; *see* M. PRICE & R. CLINTON, *supra* note 9, at 202.

136. 24 Stat. 389 (codified as amended at 25 U.S.C. § 348 (1982)), *quoted in* 445 U.S. at 541.

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).

140. 397 U.S. 620 (1970).

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

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142. *See* Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (Choctaw); Treaty of Doak's Stand, Oct. 18, 1820, 7 Stat. 210 (Choctaw).

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.

143. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34 (Choctaw).

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).

147. *See* Shively v. Bowlby, 152 U.S. 1 (1894). *See generally* Hanna, *supra* note 146.

148. *See* 397 U.S. at 622-27, 634-36.

149. 450 U.S. 544 (1981).

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.[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.[153] Because the tribe in *Montana* did not receive land from the United States in exchange for the tribe's original land,[154] but rather had conveyed original title to the United States,[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 *Montana* failed to consider whether the signatory tribe intended to give up ownership of the Big Horn riverbed and banks.[156] Without applying the canons, the Court found that treaty language reserving to the tribe "the absolute and undisturbed use and occupation"[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.[158] Such a presumption departs from both the letter and the spirit of the canons which require that treaties be read to favor Indians.[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.[160]

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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.

153. 450 U.S. at 550-51; *see* Barsh & Henderson, *supra* note 5, at 675.

154. The tribes in *Choctaw* had been forcibly removed from their original land in Southeastern United States and given land in present-day Oklahoma. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 622-27 (1970); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

155. *See* 450 U.S. at 547-48.

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).

157. Second Treaty of Fort Laramie, May 7, 1868, art. II, 15 Stat. 649 (1868), *quoted in* Montana v. United States, 450 U.S. at 548.

158. 450 U.S. at 553.

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.

160. The Court attempted to minimize the striking differences between Choctaw v. Oklahoma, 397 U.S. 620 (1970) and Montana v. United States, 450 U.S. 544 (1981), by distinguishing *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. *See also* 450 U.S. at 457-69 (Stevens, J., concurring). *See generally* Barsh & Henderson, *supra* note 5, at 678-81.

III. PROPOSAL FOR CODIFICATION OF THE CANONS OF CONSTRUCTION

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]

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161. *See* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1982); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450a (1982); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1982); Act of Jan. 2, 1975, Pub. L. No. 93-280 (establishing the American Indian Policy Review Commission); 25 U.S.C. § 1326 (1982) (prohibiting, as part of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1982), states from assuming jurisdiction over Indian Country under Pub. L. 280 without tribal consent); 28 U.S.C. § 1362 (1982) (waiving the amount in controversy requirement for federal district court jurisdiction for recognized tribes); F. COHEN, *supra* note 1, at 180-206; V. DELORIA, JR., & C. LYTLE, *supra* note 12, at 21-25; S. LEVITAN & W. JOHNSTON, INDIAN GIVING FEDERAL PROGRAMS FOR NATIVE AMERICANS 72-80 (1975); M. PRICE & R. CLINTON, *supra* note 9, at 86-90; W. WASHBURN, *supra* note 10, at 243-45; Clinton, *supra* note 10; Israel, *supra* note 4; TASK FORCE NINE, *supra* note 14, at 22-23; Wilkinson, *Shall the Islands Be Preserved?*, 16 AM. W., June-July 1979, at 32. *See also* Ickes, *Tribal Economic Independence — The Means to Achieve True Tribal Self-Determination,* 26 S.D.L. REV. 494 (1981).

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.[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,[165] right to preferential hiring,[166] and tax-exempt status.[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.[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.[169] The court declined to employ the canons because it reasoned that other interests outweighed the supposed policy of "facilitating communications."[170] In another case that same court applied the canons of construction in interpreting a federal-Indian treaty.[171] The court reconciled the two cases by explaining that the interests outweighing

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See Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1982). Statutes allowing tribes to enforce rights independently of the United States' actions on the Indians' behalf, and protecting tribal members against arbitrary and capricious tribal government actions are further evidence of congressional recognition of tribal sovereignty and governing powers. *See* 28 U.S.C. § 1362 (1982) (providing means by which tribes can pursue claims when the United States fails to act); *see also* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1982). Tribes have criticized the Civil Rights Act as burdensome, and destructive to traditional tribal government. *See generally* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); M. PRICE & R. CLINTON, *supra* note 9, at 302; Israel, *supra* note 4, at 624-26; Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343 (1969).

164. *See* Wilkinson & Volkman, *supra* note 14.

165. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

166. *Compare* Morton v. Mancari, 417 U.S. 535 (1974) (upholding statutory Indian hiring preference) *with* Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) (eliminating BIA hiring preference policy).

167. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *See generally* Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). *See generally* Comment, *Indian Taxation: Underlying Policies and Present Problems,* 59 CALIF. L. REV. 1261 (1971); Note, *State Taxation of Indians,* 49 WASH. L. REV. 197 (1973).

168. *See generally Kennedy Hearings, supra* note 24; Clinton, *supra* note 10; Israel, *supra* note 4.

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

170. *Id.*

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.[172] 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.[173] Because the canons were judicially formulated, this approach would require little more than strict adherence to precedent.[174]

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.[175] Furthermore, judicial rules of construction may be ignored or distinguished in favor of conflicting rules of general interpretation or contrary precedent.[176] 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).

172. Wisconsin v. Baker, 698 F.2d 1323, 1334 n.12 (7th Cir.), *cert. denied*, 103 S. Ct. 3537 (1983).

173. *See generally* Wilkinson & Volkman, *supra* note 14, at 645 (advocating a judicial rule for use in treaty abrogation cases).

174. *See generally* R. BARSH & J. HENDERSON, *supra* note 12, at xi; V. DELORIA, JR. & C. LYTLE, *supra* note 12 at 48.

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-xv; V. DELORIA, JR. AND C. LYTLE, *supra* note 12, at 50.

176. *See* Montana v. United States, 450 U.S. 544 (1981); Mitchell I, 445 U.S. 535 (1980); *see generally* V. DELORIA, JR. & C. LYTLE, *supra* note 12, at 50.

(AIPRC) proposed federal legislation in 1976.[177] 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.[178] The work of the AIPRC has been largely forgotten. Congress took no substantive action on the AIPRC's 206 recommendations,[179] 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.[180] 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[181] ensures deference by both the Supreme Court and lower courts to a legislative expression of support for the canons of construction.[182] Codification of the canons would offer Indians an opportunity to participate in the drafting of the canons,[183] 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.[184] Clearly stated legislative presumptions in favor of Indian rights would ease the often prohibitive financial burdens of litigation.[185] The canons require courts to both presume Congress

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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.

179. V. DELORIA, JR. & C. LYTLE, *supra* note 12, at 24.

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.

183. Indian participation could lessen the effects of strong anti-Indian lobbies. *See generally* M. PRICE & R. CLINTON, *supra* note 9, at 90. Indians are American citizens, with full voting rights. 8 U.S.C. § 1401(b) (1982). Despite financial and numerical handicaps, certain Indian lobbying efforts have achieved considerable success. *See* Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (restoring the Sacred Blue Lake to the Taos Pueblos of New Mexico); *see also* R. BARSH & J. HENDERSON, *supra* note 12, at 218-20, 251-52; V. DELORIA, JR., *supra* note 10, at 7-11; Wilkinson & Volkman, *supra* note 14 at 660 n.339.

184. *See* 28 U.S.C. § 1362 (1982).

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

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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.

186. The analogous Michigan Environmental Protection Act of 1970 (MEPA) effected a similar reduction of evidentiary burdens. MICH. COMP. LAWS §§ 691.1201-1207 (1979). The statute lessens the requirement for a prima facie case. *See* MICH. COMP. LAWS §§ 691.1203 (1979). This avoids protracted discovery and makes litigation available to individual citizens. *See also* Federal Coal Mine Health and Safety Act of 1969 (codified as amended at 30 U.S.C. §§ 901-941, 951, 958 (1982); Federal Longshoremans' and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982). *See generally* Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law From Citizen Suits* 53 J. URB. L. 589 (1976); Trauberman, *Compensating Victims of Toxic Substances Pollution: An Analysis of Existing Federal Statutes,* 5 HARV. ENVTL. L. REV. 1, 11-14, 23-25 (1981).

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.

188. *E.g.* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

189. *See* TASK FORCE NINE, *supra* note 14, at 62-3.

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

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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.

193. *See* Arizona v. California, 373 U.S. 546, 598-601 (1963) (protecting reserved rights to water); Winters v. United States, 207 U.S. 564 (1908) (recognizing reserved rights to water); United States v. Winans, 198 U.S. 371 (1905) (protecting reserved rights of fishing); V. DELORIA, JR. & C. LYTLE, *supra* note 12, at 49. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (recognizing inherent sovereignty of Indian tribes).

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

195. *See infra* notes 196-98.

196. *E.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622-23 (1913);

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 lisited separately: (1) statutes and executive orders must be liberally construed to the benefit of the affected Indians or tribes;[203]

United States v. Winans, 198 U.S. 371, 380-81 (1905); Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832).

197. *E.g.,* Antoine v. Washington, 420 U.S. 194, 200 (1975); Morton v. Ruiz, 415 U.S. 199, 236 (1974); Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943); Seminole Nation v. United States, 316 U.S. 286, 296 (1942); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Walker River Irrig. Dist., 104 F.2d 334, 337 (9th Cir. 1939).

198. *E.g.,* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908).

199. *See* TASK FORCE NINE, *supra* note 14, at 73. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) provides a good example of this principle.

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.

203. E.g. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Choate v. Trapp, 224 U.S. 665, 675 (1912).

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-determination[206] 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,

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statutes); *see also* TASK FORCE NINE, *supra* note 14, at 106-24.

204. *E.g.* Menominee Tribe of Indians v. United States, 391 U.S. 404, 411-13 (1968); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918); *see* TASK FORCE NINE, *supra* note 14, at 73. *See supra* notes 65-73 and accompanying text.

205. *See generally* 25 U.S.C. § 450(a) (1982); S. REP. No. 561, 92d Cong., 1st Sess. (1971); TASK FORCE NINE, *supra* note 14, at 28-30.

This principle would probably require a different result in decisions such as Montana v. United States, 450 U.S. 544 (1981).

206. Codified canons would show a firm commitment by Congress to Indian autonomy, and reassure Indians that self-determination policies will not lead to termination of the trust itself. *See generally* Israel, *supra* note 4, at 628 n.40.

207. *See generally* FINAL REPORT, *supra* note 12, at 305-65; Ickes, *supra* note 161.

208. Congress has enacted a statute placing the burden of proof on "white person[s]" in litigation between Indians and whites over property rights. 25 U.S.C. § 194 (1982). This statute "clearly evidences a protectionist policy with regard to Indians." Omaha Indian Tribe v. Wilson, 575 F.2d 620, 632 (8th Cir. 1978), *vacated on other grounds,* 442 U.S. 653 (1979); *see* 34 Op. Att'y Gen. 439, 444 (1925) (recognizing the federal government's continuing policy of construing treaties and statutes to the Indians' benefit). A similar protectionist policy should require the party contesting an Indian interest to show that the federal trustee acted to impair the beneficiaries' rights.

209. *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975); F. COHEN, *supra* note 1, at 221- 25; M. PRICE & R. CLINTON, *supra* note 9, at 137; Barsh & Henderson, *supra* note 5, at 654.

210. *See* TASK FORCE NINE, *supra* note 14, at 73; *supra* notes 177-78 and accompanying text.

211. *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(a) (1982).

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;

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212. *See* 25 U.S.C. § 450b(b) (1982).

213. *See* United States v. Mason, 412 U.S. 391, 398 (1978); St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1411 (D. Minn. 1983); Eric v. Secretary of Hous. & Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978).

(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