DEFER YOUR DEference: HOW COURTS SHOULD APPROACH THE INTERSECTION OF THE INDIAN CANONS OF CONSTRUCTION AND CHEVRON DEference

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INTRODUCTION

Within the complex landscape of statutory interpretation, many guiding pillars stand tall, each providing the judiciary with unique directives. However, these pillars occasionally cast contrasting shadows. The intersection of the Indian canons of construction and Chevron deference illuminates this inherent tension in statutory interpretation, presenting judges with contradictory guidance when interpreting an ambiguous statute. Historically, circuit courts have taken a black-and-white approach to decide whether to apply the Indian canons or Chevron deference, championing one doctrine while bolstering competing policy considerations. The Supreme Court has previously declined to resolve this circuit split. However, it should clarify this issue as soon as possible because leaving this conflict unsettled

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1 Note on terminology: Using the term “Indian” to denote a person of Native American descent is disrespectful. However, since statutes, judges, and secondary sources uniformly use the term “Indian law,” the same term will be used only when referencing this general body of law.


3 See Scotts Valley Band of Pomo Indians v. U.S. Dep’t of the Interior, 633 F. Supp. 3d 132, 146 (D.D.C. 2022) (stating when doctrines clash “the Court is legally bound to apply the Indian canon of construction to the task before it”).


fosters uncertainty for significant issues impacting Native tribes. This Comment contends the proper resolution to this issue does not lie in rigid adherence to one doctrine over the other but rather in a nuanced case-by-case approach.

Federal Indian law mediates the legal interplay between the United States and Native American tribes, grounded in a history of treaties, statutes, and judgments. Within this context, the Indian canons of construction operate, serving as interpretive principles which require courts to liberally construe ambiguous laws in favor of protecting Native rights and sovereignty. These canons arise from the unique “trust” relationship between tribes and the federal government.

The principle of Chevron deference instructs courts to defer to administrative agencies’ interpretations of ambiguous statutes, assuming the agency’s interpretation is reasonable and in line with the statute’s text. While criticized for over-empowering agencies, Chevron deference ensures consistent, adaptable decision-making within agencies’ areas of expertise.

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6 See infra Section I.B for examples of where this conflict arises.
7 See FELIX COHEN, 1 HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (2019).
8 See Russel Lawrence Barsh & James Youngblood Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States, 56 WASH. L. REV. 627, 654 (1981) ("The doctrine of liberal construction was, in practical effect, the tribes' tenth amendment.").
9 As further discussed in Section I.B infra, the “trust” doctrine is a source of federal responsibility to Native tribes requiring the federal government to support tribal self-government and economic well-being, duties that stem from the government’s treaty guarantees to protect Native tribes and respect their sovereignty. See Morton v. Mancari, 417 U.S. 535, 542 n.10 (1974) ("We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection.") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 8 (1934)).
11 Compare City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("Chevron thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").
Given the unique legal and cultural contexts of Indian law, courts should apply a case-by-case approach to resolve the tension between the Indian canons of construction and *Chevron* deference.\(^{12}\) First, the broad range of scenarios in which these doctrines can clash and the delicate interests at stake warrant a more thorough analysis.\(^{13}\) Second, courts have already signaled support for a case-by-case analysis in Indian law cases.\(^{14}\) Third, both doctrines have inherent limitations and exceptions, suggesting that giving one doctrine absolute precedence over the other is unnecessary.\(^{15}\) Fourth, courts have demonstrated flexibility and competence in dealing with situations of

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\(^{12}\) Indeed, courts conduct case-by-case balancing tests in other contexts when sensitive interests are at odds. See McAdams v. Ladner, 608 F. Supp. 3d 416, 428 (S.D. Miss. 2022) (applying case-by-case analysis to determine whether an employee’s interest in commenting upon matters of public concern outweighs the interest of the employer in promoting the efficient delivery of public service in the context of the political patronage dismissal exception to the First Amendment’s prohibition on terminating public employees for political reasons); O’Connor v. Ortega, 480 U.S. 709, 718 (1987) (“Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.”); Gogel v. Kia Motors Mfg. of Ga., Inc., 904 F.3d 1226, 1234 (11th Cir. 2018) (“This Court applies a balancing test on a case-by-case basis to determine whether the manner in which an employee expresses her opposition is reasonable. We balance ‘the purpose of the statute and the need to protect individuals asserting their rights against an employer’s legitimate demands for loyalty, cooperation and a generally productive work environment.’”) (internal citations omitted) (quoting Rolllins v. State of Fla. Dep’t of Law Enf’t, 868 F.2d 397, 401 (11th Cir. 1989)); McDermott v. Dougherty, 385 Md. 320, 428 (2005) (noting child custody issues should be decided on a case-by-case basis); Vander Jagt v. O’Neill, 699 F.2d 1166, 1174 (D.C. Cir. 1982) (“[I]t is far more useful to examine ‘case-by-case’ whether we would be unwise to intrude in ‘political’ controversies.”); State v. Torres, 587 A.2d 582, 585 (Md. Ct. Spec. App. 1991) (“The determination of whether a particular right is such a fundamental right that an intelligent and knowing waiver must be proved and cannot be presumed or deemed must be decided on a case-by-case basis.”).

\(^{13}\) See Scott C. Hall, *The Indian Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495, 543–559 (2004) for extensive discussion of scenarios in which intersection of Indian canons and *Chevron* deference arises. Hall argues the Indian canons should always trump when interpreting ambiguous statutes because only clear Congressional intent can infringe Native sovereignty. *Id.* at 497. However, in the modern administrative state, Congress frequently and explicitly delegates authority to agencies to interpret ambiguous statutes, suggesting deference may be appropriate absent clear statutory clarity. See United States v. Mead Corp., 533 U.S. 218, 226–227 (2001) (emphasis added) (*Chevron* is warranted “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”). See also infra Part III for further discussion of why a black-and-white approach is not the best approach.

\(^{14}\) See infra note 98 for examples.

\(^{15}\) See infra Part II for discussion of the doctrines’ exceptions limitations.
legal impasse, balancing seemingly antithetical doctrines or principles.\textsuperscript{16} Given the United States’ trust relationship with Native tribes and controversial history of infringing on Native rights, courts should harness this dynamism to conduct nuanced analyses when administrative agencies—arms of the executive branch—threaten to infringe upon tribal sovereignty.\textsuperscript{17}

By considering each case’s specific facts, circumstances, and interests, courts can most effectively balance respect for tribal sovereignty with the desire to defer to administrative agencies’ expertise. Under this approach, courts should consider various factors when deciding what principle to apply, affording the need to preserve tribal sovereignty special consideration while also balancing the need for agency expertise and uniformity.\textsuperscript{18} Courts should


\textsuperscript{17}See infra Section I.B for discussion of this trust relationship and why it is essential to understand the justification for the Indian canons.

\textsuperscript{18}Despite the Tenth Circuit stating the Indian canons should always trump Chevron deference, one commentator has described the Tenth Circuit’s approach as a case-by-case approach. See Fatima Mansour, Chevron and Blackfeet: The Battle for Deference in the Sixth Circuit, 61 WAYNE L. REV. 169, 174–75 (2015) (stating the Tenth Circuit has applied a case-by-case approach. “[I]n cases where ambiguity exists . . . and there is no clear indication of Congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.” (quoting EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989)). However, this quote from Cherokee Nation is not evidence of a case-by-case approach for resolving the intersection of the Indian canons and Chevron deference. The quotation is merely dicta and, taken together with the Tenth Circuit’s categorical application of the Indian canons over Chevron deference, cannot be said to establish a case-by-case test. Strangely enough, however, in one case where Chevron deference infringed upon Native sovereignty in the context of gambling laws, the Tenth Circuit applied Chevron deference without even mentioning the Indian canons. See Seneca Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n, 327 F. 3d 1019, 1036–39 (10th Cir. 2003) (“Underlying this judicial deference to administrative agencies is the notion that the ‘rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny.’ With regard to classifying devices under IGRA, the NIGC’s specialization warrants such deference.” (quoting Archison, Topeka, and Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 442 (7th Cir. 1994))). Under a case-by-case approach, this result is sensible because the rationale behind the Indian canons of construction is implicated to a lesser degree in situations involving gambling as opposed to healthcare services, for example. See discussion infra Part IV.
inquire whether and to what extent the facts implicate the rationales for each doctrine and consider factors including, but not limited to, the scope of the agency’s expertise and delegated authority, the degree of infringement on tribal sovereignty, the extent to which the tribe has historically relied on the existence of the right or resource at issue, whether health/welfare is implicated, the clarity of statutory text/legislative history.19

Before presenting this approach and discussing its contours, Section II of this Comment will first introduce the Indian canons of construction. Section III will introduce *Chevron* deference, and Section IV will lay out situations where the doctrines intersect. After examining the rationales and justifications behind these doctrines and the conflicts caused by their intersection, Section V of this Comment argues that courts, when deciding which doctrine to apply, should defer their deference until reviewing each case’s specific facts and circumstances, conducting a careful analysis to resolve issues in this delicate area of the law.

I. FEDERAL INDIAN LAW & THE INDIAN CANONS OF CONSTRUCTION

This section will first introduce federal Indian law and then discuss the federal government’s trust responsibility to Native American tribes. Understanding this trust responsibility is essential because it is the concept by which the Indian canons find their justification. Finally, this section will discuss the Indian canons and provide examples of their application.

A. What is Federal Indian Law?

Federal Indian law is a catchall term encompassing several sources of law regarding Native American tribes and their relationship to the federal

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19These factors seek to measure how strongly the facts implicate the rationale for both doctrines. If courts identify other factors that go to this measurement, those factors should also be considered. This test comports with the logic of the test for determining whether a state can assert authority over the conduct of non-Natives on a reservation as articulated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980) (emphasis added) (“[Where] a State asserts authority over the conduct of non-Indians engaging in activity on the reservation, we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”).
government. The tapestry of federal Indian law is woven from threads of a rich and intricate historical narrative. Before the formation of the Union, hundreds of Native American tribes with distinct governance systems occupied the land that is now the United States. The emergence of the United States and the ensuing colonial process unfolded a complex and controversial intergovernmental relationship between the Native tribes, the United States federal government, and the states of the Union. Consequently, the sources of federal Indian law range from the United States Constitution, principles of international law, treaties with Native tribes, federal statutes and regulations, executive orders, and judicial opinions.

The legal status of Native tribes under United States law is distinct, referred to as “domestic, dependent nations.” This term reflects a unique tripartite relationship between tribes, the United States, and individual states. The descriptor “domestic” signifies their existence within the territorial bounds of the United States, while “dependent” alludes to their subjection to federal power. Yet, the tribes are recognized as “nations” because they retain inherent sovereign powers over their people, property, and events within their territories.

A crucial component of understanding Indian law is appreciating this unique relationship each tribe shares with the United States. Three core principles spring from these relationships. First, the principle of retained tribal sovereignty establishes that tribes possess all the powers of a sovereign state, which persist unless specifically diminished by treaty, statute, or in

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20William C. Canby, American Indian Law in a Nutshell 1 (5th ed. 2009).
21See Cohen, supra note 7, at § 1.01 (discussing six eras of Indian law, including: “(1) Post-Contact and Pre-Constitutional Development (1492–1789); (2) The Formative Years (1789–1871); (3) Allotment and Assimilation (1871–1928); (4) Indian Reorganization (1928–1942); (5) Termination (1943–1961); and (6) Self-Determination and Self-Governance (1961–present)”, noting “[g]reat fluctuations [in Indian law policy] occur from era to era”).
22Cohen, supra note 7, at What is Federal Indian Law?
23See Cherokee Nation v. Georgia., 30 U.S. 1, 2 (1831) (Chief Justice Marshall stating “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist nowhere else.”).
24Cohen, supra note 7, at What is Federal Indian Law?
25Cherokee Nation, 30 U.S. at 17.
26Id.
27Id.
28Cohen, supra note 7, at What is Federal Indian Law?
certain instances, federal common law. Second, state authority in tribal affairs is limited due to federal supremacy. Third, the federal government, while endowed with broad powers in regulating Native affairs, is bound by constitutional restraints and a unique trust relationship, which places affirmative obligations on the United States. This trust relationship ushers in special rules of construction—the Indian canons of construction—courts apply when interpreting ambiguous laws that presume the retention of tribal sovereignty and property rights.

B. The Federal Trust Responsibility & The Indian Canons of Construction

Rooted in the unique intergovernmental relationship between the United States and Native tribes is the federal trust responsibility. This doctrine represents a commitment on behalf of the federal government to protect the tribal sovereignty and property rights of Native American tribes. The federal trust responsibility arises from the status of tribes as domestic,

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30 Williams v. Lee, 358 U.S. 217, 220 (1959) (stating Congress usually acts “upon the assumption that the States have no power to regulate the affairs of Indians on a reservation”).

31 United States v. Creek Nation, 295 U.S. 103, 109–10 (1935) (“[P]ower to [regulate tribes is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.”).


33 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

34 See, e.g., 25 U.S.C. §§ 5601–02 (recognizing and reaffirming the federal trust responsibility); 25 U.S.C. § 3101 (“[T]he United States has a trust responsibility toward Indian forest lands . . .”); 25 U.S.C. § 3701 (“[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes . . .”); 25 U.S.C. § 4043 (Special Trustee for American Indians must prepare comprehensive strategic plan to “ensure proper and efficient discharge of the Secretary’s trust responsibilities to Indian tribes and individual Indians”); 20 U.S.C. § 7401 (“It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”).
dependent nations.  Though sovereign, tribes became dependent on the federal government through their reliance on services and benefits guaranteed by treaties and statutes, triggering responsibilities akin to a fiduciary obligation in private law. This obligation compels the United States to uphold and protect the rights and interests of Native tribes, particularly concerning their lands, resources, and self-governance.

The Indian canons emerged from federal trust responsibility to uphold the government’s unique commitments to tribes. For instance, in Montana v. Blackfeet Tribe of Indians, Montana attempted to tax Native royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the Mineral Leasing Act of 1938. The Supreme Court, applying the Indian canons that “the States may tax Indians only when Congress has manifested clearly its consent to such taxation [and] statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” affirmed the circuit court’s holding that, while an earlier statute authorized the state taxes, they were repealed by the Mineral Leasing Act. While other canons may guide statutory interpretation generally, the Indian canons arise specifically from the federal-tribal relationship and principles of inherent tribal sovereignty.


36 See Am. Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981) (“[t]he standard of duty as trustee for Indians is not mere reasonableness, but the highest fiduciary standards”); Menominee Tribe v. United States, 101 Ct. Cl. 10, 19–20 (1944) (Although jurisdictional statute required application of private trust law principles, application of these principles “add[s] little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee.”).

37 See, e.g., State v. Ambro, 123 P.3d 710, 716 (Idaho Ct. App. 2005) (holding state statute assuming jurisdiction over “operation and management” of vehicles on state highways must be construed to “minimize erosion of tribal sovereignty” and so could not be construed to permit jurisdiction over possession of drugs while driving, especially because tribe criminalized such conduct).


39 471 U.S. at 761.

40 Id. at 766 (citations omitted).

41 Oneida Cnty., 470 U.S. at 247 (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).
The Indian canons are flexible interpretive tools that instruct courts to
generously interpret treaties, agreements, statutes, and executive orders in
favor of the Native tribes. Moreover, courts should resolve any ambiguities
in these instruments in favor of the tribes. Additionally, the canons call for
courts to interpret treaties and agreements from the Natives’ perspective,
preserving their property rights and sovereignty unless explicitly
contradicted by a clear congressional intent. Another notable application of
the Indian canons was in *Minnesota v. Mille Lacs Band of Chippewa Indians*,
where the Supreme Court applied the canon of resolving ambiguities in favor
of tribes to a treaty, an executive order, and a statute, affirming the canons’
fundamental and varied role in Indian law.

However, the Indian canons are subject to three primary limitations. First,
they only apply when interpreting statutes involving distinct tribal rights.
Second, they can only be overcome by clear congressional intent. Third, they
sometimes conflict with and are trumped by other canons. For example, these

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consistently admonished that federal statutes and regulations relating to tribes and tribal activities
must be ‘construed generously in order to comport with . . . traditional notions of [Indian]
sovereignty and with the federal policy of encouraging tribal independence.’” (quoting White
373, 392 (1976) (“We must be guided by that ‘eminently sound and vital canon’ . . . that ‘statutes
passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions
being resolved in favor of the Indians.’” (quoting N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649,
655 n.7 (1976); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1912)); Choctaw Nation
v. United States, 318 U.S. 423, 431–432 (1943) (“Treaties are construed more liberally than
private agreements . . . . Especially is this true in interpreting treaties and agreements with the
Indians [which are to be construed] ‘in a spirit which generously recognizes the full obligation of
this nation to protect the interests of [the Indians].’” (quoting Tulee v. Washington, 315 U.S. 681,
684–685 (1942))).

expressions [in treaties] are to be resolved in favor of the [Indians].” (quoting Carpenter v. Shaw,
380 U.S. 363, 367 (1930))); Winters v. United States, 207 U.S. 564, 576 (1908) (“By a rule of
interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved
from the standpoint of the Indians.”).

44 See, e.g., Wash. State Dep’t of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011 (2019)
(“[T]he language of the treaty should be understood as bearing the meaning that the Yakamas
understood it to have in 1855.”); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172,
196 (1999) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves
would have understood them.”); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (“[T]his
Court has often held that treaties with the Indians must be interpreted as they would have understood
them.”).

45 526 U.S. at 189–95.
interpretative rules are not used in all cases involving tribal affairs but only when the statutory issue implicates the distinct rights of the tribes in question. 46 Thus, if an ordinary litigant could raise the issue and the issue does not directly involve the unique rights of Native tribes, the canons might not apply. 47 Further, even when a statute implicates distinct tribal rights, there is no automatic presumption in favor of the tribes, as general statutes can adversely affect tribal sovereignty when there is clear evidence of congressional intent. 48

The Indian canons also sometimes clash with competing canons of construction rooted in other values. 49 In these situations, the Indian canons, grounded in structural and normative values, generally take precedence. 50 But in other cases, courts have disregarded the Indian canons. 51

II. CHEVRON DEFERENCE—A BRIEF OVERVIEW

Chevron deference originated from the 1984 Supreme Court case, Chevron USA Inc. v. Natural Resources Defense Council, Inc., and has since become a cornerstone in guiding the parsing of statutes interpreted by administrative agencies. 52 The doctrine instructs courts to defer to federal

46 COHEN, supra note 7, at § 2.03.
47 El Paso Nat. Gas Co. v. United States, 632 F.3d 1272, 1278 (D.C. Cir. 2011) (holding that canons do not apply in considering scope of unreasonable discretion under the Uranium Mill Tailings Radiation Control Act, even when the litigant seeking review is an Indian tribe).
48 Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (“[A] general statute in terms applying to all persons includes Indians and their property interests.”). Because this statement was mere dicta, the proposition stands on shaky foundation and courts have been divergent in articulating the extent to which general statutes may interfere with Native rights. COHEN, supra note 7, at § 2.03.
49 COHEN, supra note 7, at § 2.02.
50 See, e.g., Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (holding despite “strong presumption against repeals by implication” the Indian canons apply because “the standard principles of statutory construction do not have their usual force in cases involving Indian law”); Choctaw Nation v. Oklahoma, 397 U.S. 620, 634 (holding Indian canons apply despite confliction presumption based on equal footing doctrine).
51 See, e.g., Montana v. United States, 450 U.S. 544, 552 (1981) (holding navigable waters doctrine directed analysis, not the Indian canons). The majority in Montana did not discuss the Indian canons. But see id. at 569 (Blackmun, J., dissenting) (discussing the Indian canons). Cf. Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) (while the Court only suggested in dicta the tax canon might offset the Indian canon, the Court did not apply the canons because it found no ambiguity present).
52 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 8425 (2d ed. 2022).
agencies’ interpretations of statutes if they are reasonable and tied to the statutory text.\textsuperscript{53}

In application, \textit{Chevron} deference follows a two-step process.\textsuperscript{54} First, courts must determine whether the statute under review is clear or ambiguous.\textsuperscript{55} Courts grant no deference to the agency’s interpretation if the statute is clear.\textsuperscript{56} However, if the statute is ambiguous, courts must defer to the agency’s interpretation if it is reasonable and aligns with the statute’s text, purpose, and legislative history.\textsuperscript{57}

The rationale for \textit{Chevron} deference is rooted in agencies’ specialized knowledge and expertise, better positioning them to interpret the statutes they oversee.\textsuperscript{58} Moreover, the doctrine theoretically increases political accountability because agencies are an arm of the executive branch, and the executive is directly accountable to the people.\textsuperscript{59}

Despite its merits, the doctrine is not without its limitations and exceptions. These limitations include the “\textit{Chevron step zero}” doctrines courts apply to decide whether a case is appropriate for \textit{Chevron} deference.\textsuperscript{60} Most notably, \textit{Chevron} deference is inappropriate for “extraordinary cases” or “major questions” because Congress should address such cases and questions.\textsuperscript{61} Further, \textit{Chevron} deference does not apply where an agency violates procedural requirements, asserts statutory interpretations solely for the purpose of the case at hand rather than through regulation or established practice, nor the interpretation of criminal statutes.\textsuperscript{62}

\textsuperscript{54}Id.
\textsuperscript{55}Id.
\textsuperscript{56}Id.
\textsuperscript{57}Id.
\textsuperscript{58}Id. at 865.
\textsuperscript{59}Id. at 865–66.

\textsuperscript{60}33 WRIGHT & MILLER, supra note 52, at § 8426.

\textsuperscript{62}See Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 220–21 (2016) (holding \textit{Chevron} was not applicable where agency had failed the procedural requirement of offering reasoned justification for interpretive shift), on remand, Navarro v. Encino Motorcars, LLC, 845 F.3d 925 (9th Cir. 2017), judgment rev’d on other grounds, 138 S. Ct. 1134 (2018); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (explaining \textit{Chevron} does not apply “to agency litigating positions that are
Chevron deference has been criticized for concentrating excessive power in administrative agencies, undermining the constitutionally mandated separation of powers. Critics argue Chevron deference weakens the judiciary’s role in interpreting laws and enables political shifts within administrations to cause drastic policy changes. Given these concerns, ongoing debates exist about reevaluating or even abandoning the Chevron deference doctrine in contemporary jurisprudence.

III. THE INTERSECTION OF THE INDIAN CANONS & CHEVRON DEFERENCE

When the Indian canons and Chevron deference clash, courts have taken a black-and-white approach in deciding which doctrine should apply. This section will analyze cases from two circuit courts that reach opposite conclusions. Examining the contexts where the Indian canons and Chevron deference conflict, and the policy arguments on each side, underscores the need for courts to carefully conduct a nuanced, case-by-case analysis when faced with this intersection.

63 See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power.”).

64 See Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (criticizing Chevron for taking from the courts “the ultimate authority to ‘say what the law is’” (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803))); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch J., concurring) (stating Chevron deference allows agencies to “reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail [in court]”).

65 Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 CONN. L. REV. 779, 850–851 (2010) (“[Chevron] has not accomplished its apparent goals of simplifying judicial review and increasing deference to agencies, and has instead spawned an incredibly complicated regime that serves only to waste litigant and judicial resources.”).

66 But two circuits avoided answering the question altogether. See Shakopee Mdewakanton Sioux Cmty. v. Hope, 16 F.3d 261, 264 (8th Cir. 1994) (holding agency interpretation controls but also that it was interpreted in favor of the tribe, thereby avoiding answering the question); Thompson v. Cherokee Nation, 334 F.3d 1075, 1090 n.15 (Fed. Cir. 2003) (holding provision was unambiguous despite other circuits holding the opposite, thus avoiding answering the question).
The Ninth Circuit has held that when the Indian canons clash with *Chevron* deference, *Chevron* deference controls. In *Rancheria*, the question was whether the “restored lands” exception to the Indian Gaming Regulatory Act (IGRA) applied and whether the Native American tribe was entitled to operate gaming on its land. The IGRA placed a ban on tribes using land acquired after the act was passed for gaming, but the restored lands exception allowed “restored tribes” to game on any land taken in trust as part of a “restoration of lands.” There was no dispute that the tribe was a restored tribe, but the parties disagreed over the meaning of “restored land.”

The Secretary of the Interior promulgated a series of rules to limit the scope of the restored lands exception and stated lands “qualify as ‘restored’ and can thus be used for gaming purposes only if the tribe establishes a sufficient relationship to the land in what the regulations term ‘modern,’ ‘historical,’ and ‘temporal’ connections to the Tribe’s original land.” The Tribe applied to the Secretary to open a new casino, but the Secretary denied the application because the Tribe could not establish a temporal connection under the regulations. The Tribe then sued, challenging the rejection, urging the Court to apply the Indian canon construing ambiguities in favor of the Tribe.

The Court applied *Chevron* deference and rejected the Indian canon. In doing so, the Court stated the Ninth Circuit has repeatedly declined to apply the Indian canons in light of a competing agency interpretation because “the [canons are] merely a ‘guideline,’ whereas ‘*Chevron* is a substantive rule of law.’” The Court further stated that applying an Indian canon is inappropriate in this case because not all tribal interests are aligned, as this tribe’s new casino could harm another tribe’s commercial interests.
Courts in the Sixth, Tenth, and D.C. Circuits have held the contrary, stating the Indian canons take precedence over an agency interpretation.\(^77\) The Tenth Circuit addressed this issue in *Southern Ute Indian Tribe v. Sebelius*.\(^78\) The appeal arose from the Secretary of Health and Human Services’ (HHS) decision not to enter a self-determination contract for health services with the Tribe.\(^79\) Under the Indian Self-Determination and Education Assistance Act (ISDEA), the HHS must approve a tribe’s contract unless the HHS can meet specific grounds.\(^80\) The parties disagreed on whether an “availability clause” allowed the HHS to decline a contract because available appropriations were insufficient to fund the contract.\(^81\)

In deciding whether to apply the agency’s interpretation or an Indian canon of construction, the Court summarily concluded, “[the Indian] canon of construction controls over more general rules of deference to an agency’s interpretation of an ambiguous statute.”\(^82\) While this court did not discuss policy justifications for favoring the Indian canons, others have:

This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but “from principles of equitable obligations and normative rules of behavior,” applicable to the trust relationship between the United States and the Native American people.\(^83\)

The contrasting decisions of *Rancheria* and *Sebelius* showcase the competing policy concerns when the Indian canons intersect with Chevron deference. The Ninth Circuit’s decision—in a situation impacting a Tribe’s commercial interests—highlights agency interpretations’ utility by considering economic and inter-tribal complexities, ensuring that one tribe’s commercial gain does not unjustly affect other tribes.\(^84\) However, this

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\(^{78}\) 657 F.3d 1071, 1078 (10th Cir. 2011).

\(^{79}\) *Id.* at 1076.

\(^{80}\) *Id.* at 1074–75.

\(^{81}\) *Id.* at 1076.

\(^{82}\) *Id.* at 1078.


\(^{84}\) See Rancheria v. Jewell, 776 F.3d 706, 713 (9th Cir. 2015).
approach limits tribal autonomy and may not always adequately address tribal interests.85 Conversely, the Tenth Circuit’s decision—in a situation impacting a tribe’s receipt of health services—illuminated the strength of the Indian canons in protecting tribal welfare and maintaining the trust relationship between the United States government and Native American tribes.86 Yet, this approach risks overriding legitimate agency interpretations and regulations necessary for broader policy objectives.87

The differing fact patterns and the pros and cons of the Indian canons and Chevron deference underscore the need for a more nuanced and flexible adjudication process. Therefore, courts should apply a case-by-case approach to determine which canon of construction controls. This approach would allow courts to evaluate the specific tribal interests at stake, the potential impact of agency regulations, and the broader socio-political context, thereby ensuring a more balanced and just outcome that respects tribal sovereignty and agency authority.

IV. DEFER DEFERENCE—PROPOSING A CASE-BY-CASE APPROACH TO RESOLVING THE TENSION

This section proposes a case-by-case approach for courts to apply when determining whether to apply the Indian canons or Chevron deference. Under this approach, courts should consider factors discerning whether and to what degree the case implicates the rationales for each doctrine. These factors include but are not limited to: the scope of the agency’s expertise and delegated authority, the degree of infringement on tribal sovereignty, the extent to which the tribe has historically relied on the existence of the right or resource at issue, whether health or welfare is implicated, and the clarity of statutory text and legislative history.88 While not an absolute rule, courts should view the balancing test with a thumb on the scale favoring tribal

85 See, e.g., Navajo Health Found.—Sage Mem’l Hosp., Inc. v. Burwell, 263 F. Supp. 3d 1083, 1163 (D.N.M., 2016) (rejecting an agency interpretation excusing Secretary of Department of Health and Human Services from obligation to pay Tribal contractor full contract support costs).
86 Id. at 1118–19 (quoting Cobell, 240 F.3d at 1101).
87 Gila River Indian Cmty. v. United States, 729 F.3d 1139, 1151 n.12 (9th Cir. 2013) (stating that where applying Indian canon would cause inter-tribal conflict, “[t]he Secretary is best positioned to take stock initially of whether and how to weigh the competing interests”).
88 See supra note 19 for a discussion as to why courts should apply these factors.
rights, given the federal trust relationship and historical abuses against the tribes. 89

This approach is preferable to unilaterally applying one doctrine over the other for four main reasons. First, a black-and-white, one-size-fits-all approach is inappropriate given the delicate interests at stake and the wide variety of factual situations in which this intersection arises. Second, courts have consistently signaled support for a more nuanced analysis of competing interests within Indian law cases. Third, nothing inherent about the two doctrines suggests one should categorically trump the other. Fourth, courts already conduct case-by-case analyses in situations when two unreconcilable doctrines clash, especially in the context of statutory interpretation.

First, the Rancheria and Sebelius cases demonstrate the factual situations in which the Indian canons and Chevron deference arise vary widely. On the one hand, Rancheria involved commercial interests in the context of casinos. 90 Given the complex intersection between intertribal commerce and varying laws of general applicability regarding gambling, there is a strong argument that agency expertise is valuable, if not necessary, to resolve such cases. 91 On the other hand, Sebelius involves an agency trying to deny a tribe health care services because the proposed contract exceeded available “appropriations.” 92 The federal trust responsibility explicitly addresses this situation in which an agency threatens to harm Native welfare. 93

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89See Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (“[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.” (quoting Pigeon River Improvement, Slide & Broom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934))); Squire v. Capoeman, 351 U.S. 1, 6–7 (1956) (“Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall: ‘The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.’” (quoting Worcester v. Georgia, 31 U.S. 515, 582 (1832))).

90See 776 F.3d 706, 710–11 (9th Cir. 2015).

91See id. at 713 (noting that application of Indian canon in this case could result in harm to other tribes).

92657 F.3d 1071, 1078 (10th Cir. 2011).

93See Treaty with the Cherokees, Cherokee-U.S., art. 9, Nov. 28, 1785, 7 Stat. 18 (acknowledging government’s role in managing “all” signatory tribes’ affairs). But see Worcester, 31 U.S. at 553 (“To construe the expression ‘managing all their affairs,’ into a surrender of self-government would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that congress should possess it.”).
States government owes accommodation to Native American tribes, given how damaging the colonial process was to the Natives and how fruitful it was for the United States. But an agency action targeting casinos—while still restricting Native sovereignty—implicates the rationale behind the Indian canons to a lesser degree and the rationale behind *Chevron* deference to a higher degree. Thus, a one-size-fits-all approach favoring consistency over substance is inappropriate, given the variety of situations where this tension may arise.

Second, courts have repeatedly signaled support for a more nuanced approach when handling Indian law issues. Indeed, courts apply case-by-case approaches in other contexts involving Indian law. Moreover, while the Tenth Circuit states the Indian canons should categorically trump *Chevron* deference, it effectively conducted a case-by-case inquiry when it applied *Chevron* deference without mentioning the Indian canons in a case where agency action infringed upon a tribe’s power to regulate casinos. Considering the complex history and unique relationship between the United States and Native tribes, it makes sense for courts to engage in a nuanced, fact-specific analysis when evaluating Indian law issues, such as whether to apply the Indian canons or *Chevron* deference.

Third, nothing is inherent about the Indian canons of construction and *Chevron* deference to suggest one should categorically trump the other. Both doctrines are limited and subject to several exceptions. Considering *Chevron* deference’s “major questions” exception—which reserves certain matters for Congress—in conjunction with the principle that Indian property rights and sovereignty should not be infringed upon without clear

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95 See *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015).

96 See supra note 19.

97 *Brackeen v. Haaland*, 994 F.3d 249, 306–07 (5th Cir. 2021) (stating Congress does not derive plenary power from Indian Commerce Clause but instead from the holistic interplay between the constitutional powers vested in congress to deal with native tribes).

98 See United States v. Rogers, 45 U.S. 567, 572–73 (1845) (establishing case-by-case test to determine whether a party falls within definition of term “Indian,” including (1) degree of Indian blood; and (2) tribal or governmental recognition as an Indian); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099, 1099 (1977) (applying the *Rogers* test); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980).

99 See supra note 18.

100 See supra Parts II, III for discussion of the doctrines’ limitations.
congressional intent, it is sensible to conduct a thorough factual inquiry before deciding where to apply deference.\footnote{See supra notes 44, 61.} For instance, cases may arise where an agency interpretation does not infringe upon Native sovereignty but limits a tribe’s commercial activity by reigniting its activity in with other laws of general applicability.\footnote{See FTC v. AMG Services, Inc., No. 2:12–CV–00536-GMN, 2014 WL 910302, at *6 (D. Nev. Mar. 7, 2014) (applying an agency interpretation in a situation where tribal actions violated federal loan issuing and debt collection laws).} While one may argue restricting commercial activity is infringing Native sovereignty, tribes are nevertheless domestic, dependent nations subject to federal law.\footnote{Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting United States v. Wheeler, 435 U.S. 313, 328 (1978)); see also Puerto Rico v. Sánchez Valley, 579 U.S. 59, 70 (2016) (“unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form” (citing United States v. Wheeler, 435 U.S. 313, 328 (1978))).} Put differently, notwithstanding the Indian canons of construction, Native sovereignty is limited.\footnote{Bay Mills Indian Cmty., 572 U.S. at 788.}

Yet, situations may arise where an agency interpretation genuinely does restrict native sovereignty or threatens to harm a tribe’s welfare.\footnote{See, e.g., Albuquerque Indian Rtss v. Lujan, 930 F.2d 49, 58 (D.C. Cir. 1991) (explaining that, while the Tribe lacked standing, their challenge to agency interpretation raised genuine issues of native sovereignty being infringed upon).} To be sure, American jurisprudence is brimming with cases of governmental action impacting Native well-being.\footnote{See COHEN, supra note 7, at § 1.04 (discussing how westward expansion and the ensuing conflicts impacted Indian law policy in the courts).} Therefore, courts should conduct a thorough, nuanced analysis, considering whether and to what degree the facts implicate the justifications for each doctrine, using this Comment’s suggested factors as guideposts for courts to decide which doctrine to apply.

Fourth, a case-by-case approach is not novel; courts conduct them in numerous situations.\footnote{Indeed, the foundation for much of the American legal system, the “reasonableness” standard, is a case-by-case inquiry. State v. Rooks, 674 S.E.2d 738, 740–41 (N.C. App. 2009) (“This is an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances.” (quoting State v. Jones, 570 S.E.2d 128, 134 (N.C. App. 2002))).} Especially in statutory interpretation, where litigants can often find canons of construction to support their position in nearly any
situation.\textsuperscript{108} While one may argue a case-by-case approach could burden courts and slow the litigation pipeline, it is worth noting cases where this tension arises are relatively rare.\textsuperscript{109} Moreover, the unique gravity of the rights at stake outweighs minor inefficiencies, as courts routinely conduct nuanced analyses when fundamental rights are involved.\textsuperscript{110} Courts conduct case-by-case analyses in these situations because bright line rules often lead to inequitable results, which courts should seek to avoid when dealing with an issue as sensitive as Native sovereignty.\textsuperscript{111}

Ultimately, this case-by-case approach asks courts to consider whether the facts presented invoke the rationales behind the Indian canons and \textit{Chevron} deference and, if so, to what degree. By looking at each case on its own merits, a case-by-case approach would ensure courts give the proper level of deference to agency interpretations while also safeguarding the rights and interests of Native tribes.

\textbf{CONCLUSION}

As one district court noted, “[t]he issue of whether the Indian canons should trump \textit{Chevron} deference is a difficult one.”\textsuperscript{112} If courts must decide which doctrine should trump the other in all cases, the issue becomes even more difficult. Given this issue’s complex and delicate nature, courts should defer their deference and carefully evaluate each case before deciding whether to apply an Indian canon of construction or \textit{Chevron} deference.


\textsuperscript{109} See Christine Bacon, \textit{Annotation, Indian Canon of Construction}, 76 A.L.R. Fed. 3d Art. 2 (2022).

\textsuperscript{110} See \textit{supra} note 12 for examples.

\textsuperscript{111} See Fulton Cnty. v. Ward-Poag, 849 S.E.2d 465, 477 (Ga. 2020) (“With an equitable doctrine such as judicial estoppel, bright-line rules can produce ‘at-least-inequitable results, if not manifestly unjust ones’ and thus are inappropriate for a ‘tool of equity,’ the goal of which is ‘to secure justice.’” (quoting Smith v. Haynes & Haynes P.C., 940 F.3d 635, 644, 646 (11th Cir. 2019))).