

American students “must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind.”

Conceptualizing Indian Canon Originalism: A Review

By Casey Gottlieb (Blair Academy)

Introduction:

A canon of construction operates as a principle which courts should look to when interpreting a given text.¹ Generally speaking, a canon is not meant to require a specific interpretation, but rather serves as a guide for judges at all levels to utilize when deciding cases. How different judges focus on, contextualize, and utilize different canons in practice may be different, especially when different canons can be read to stand for the opposite propositions in a given case. As the Supreme Court works to break new ground on Indian law doctrine, how different justices view canons of construction within the Indian law context, and where they differ, presents an emerging question. Intentionalists, who focus on the statutory purpose of the text in question, and textualists, who analyze text according to its plain meaning at the time of enactment, may differ on these questions.

This paper seeks to analyze the issue through the lens of originalism, drawing on the scholarship of Professors Jacob Schuman (Penn State) and Alex Tallchief Skibine (Utah) in the context of several important Supreme Court opinions on Indian law topics.

Clarifying Definitions:

The Indian Canon posits that courts should interpret tribal treaties such that “the language used in treaties with the Indians should never be construed to their prejudice.”² Historically, there has been a perception that no originalist justification can exist for the Indian Canon. However, according to Professor Schuman, the opposite proves true. In his article *Indian Canon Originalism*, Schuman claims that the text of the treaties must be interpreted according to the tribe's perspective rather than that of a typical English speaker.³

¹Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 38, (2012).

²*Worcester v. Georgia*, 31 U.S. at 582 (1832).

³Schuman, Jacob, *Indian Canon Originalism* (February 20, 2013). Note, *Harvard Law Review*, Vol. 126, No. 4, p. 1100, 2013, Available at SSRN: <https://ssrn.com/abstract=2222256>.

Schuman bases this proposition of Chief Justice John Marshall's 1832 opinion in *Worcester v. Georgia*.⁴ This watershed case required the Supreme Court to examine and interpret a Cherokee Treaty, the Treaty of Hopewell of 1785, to determine whether the tribe was independent or acted within the sovereignty of the United States. In his majority opinion, Chief Justice Marshall explained that the tribe did not speak English when the Treaty was signed. Thus, the treaty was translated to the Cherokee tribe.⁵ Accordingly, the Court could look not to the particular language but rather the broader concepts enacted.⁶ This comes into play in terms of how *Worcester* conceptualized the term "allotted" within the Treaty of Hopewell context. As Schuman writes, "Although the word "allotted" carried special significance in American legal discourse, Marshall explained that the Cherokee 'might not [have] underst[oo]d the term employed, as indicating that, instead of granting, they were receiving lands.' Therefore, he read the term from the tribe's perspective, as merely establishing a 'dividing line between the two nations.'" Because the Cherokee chiefs could not negotiate the language, the Justices must interpret the treaty as "unlettered people" would understand it.⁷ Marshall therefore concluded that the treaty referenced the Cherokee tribe as an independent sovereign from the United States. Marshall's interpretation of the Treaty of Hopewell has since developed into a fundamental principle of Indian law. Courts utilized the Indian Canon throughout the nineteenth and twentieth centuries and continue to apply it today.

Professor Felix Cohen at Harvard laid out the Indian Canon in 4 points: "(1) Interpret the treaties 'as the Indians would have understood them,' (2) construe them 'liberally ... in favor of the Indians,' (3) resolve all ambiguities in the Indians' favor, and (4) preserve tribal property rights and sovereignty unless a contrary intent is clearly stated."⁸ Although these four seem to coincide, in practice, Schuman argues that the Court seems to use the first and conflate the meanings of the rest. "In practice, the apparent multiplicity of 'Indian canons' is ultimately reducible to the single rule of construction, often emphasized by the Supreme Court, that Indian

⁴*Worcester v. Georgia*, 31 U.S. 515 (1832).

⁵Schuman, Jacob, Indian Canon Originalism (February 20, 2013). Note, Harvard Law Review, Vol. 126, No. 4, p. 1102, 2013, Available at SSRN: <https://ssrn.com/abstract=2222256>.

⁶*Id.*

⁷*Id.*, 1102.

⁸COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 119 (Nell Jessup Newton et al. eds., 2005).

treaties should be interpreted from the perspective of the signatory tribe.”⁹ Cultural differences may serve to limit the judges’ understanding as compared to that of Native Americans. Thus, the latter three canons of construction help judges interpret how the Natives understood the treaty. It can be reasonably assumed that Native Americans would bargain for favorable treaty terms that protected their sovereignty or land. Accordingly, judges must view ambiguities in a text with this favorable scope.

Hence, the Indian Canon furthers the trust relationship between the United States and the Native Americans. Professor Schuman contextualizes this idea in two ways. The United States first is obligated to protect the “weak and defenseless [Indians] who are wards of the nation, dependent upon its protection and good faith.”¹⁰ Courts must favor those who are disadvantaged to compensate for the prejudices, stereotypes and difficulties of organization that hinder them. Additionally, the Supreme Court must interpret treaties to protect the “quasi-constitutional, structural principle of ‘sovereignty and independence.’”¹¹ Just as judges favor a limited federalist structure when interpreting the Constitution, they must use the Indian Canon to favor those systematically oppressed.

Exploring the Indian Canon in Practice:

Although the canon has been recognized by many, scholars have critiqued whether judges properly utilize the framework. Some judges may view Native Americans to not be oppressed, or rather see them as too “normative.”¹² This specific approach to interpret Indian Law would not seem to be utilized by tribe leaders. Other scholars argue that the Indian Canon has too “strong purposivism” that goes far beyond the text.¹³ While justifying the Indian Canon using originalism may seem far-fetched, Schuman argues that the Canon is not only originalist, but specifically an originalist approach to the specific nature of the treaties. This is supported by the method of interpretation advised by the Indian Canon, which calls for the meaning of the treaty at the time

⁹Schuman, Jacob, Indian Canon Originalism (February 20, 2013). Note, Harvard Law Review, Vol. 126, No. 4, p. 1104, 2013, Available at SSRN: <https://ssrn.com/abstract=2222256>.

¹⁰*Id.*, 1105.

¹¹*Id.*

¹²*Id.*

¹³*Id.*, 1106.

signed, and for the treaty to be understood from the Indian perspective keeping in mind the cultural differences. Both methods instruct judges to view the text for its original meaning rather than applying a contemporary interpretation.

Washington State Commercial Passenger Fishing Vessel as a Case Study:

In the 1979 case *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court notably applied the Indian Canon.¹⁴ The crux of the case involved the meaning of a fishing treaty established in 1856 between different tribes who traded monetary payments in exchange for parcels of land. The question the Supreme Court wrestled with was whether the treaty granted access for Native Americans to fish across the entire territory or solely on the border between Native American land and non-Indian fishing land. This question dealt with some ambiguity insofar as the text granted Indians access to fish in areas “in common with all citizens of the territory.” Furthermore, the United States entered into agreements with Canada enforced by the International Pacific Salmon Fisheries Commission, splitting specific breeds of caught fish. This brought into question whether fish caught by Natives is exempt or included from the agreement.

By a 6-3 vote, the Supreme Court ruled in favor of Washington. The justices determined that the Indians likely would not have negotiated to share land that they would have access to regardless, but rather to share additional land off of Native territory. Further, the majority held the treaty “was not intended merely to guarantee the Indians access to usual and accustomed fishing sites and an ‘equal opportunity’ for individual Indians, along with non-Indians, to try to catch fish, but instead secures to the Indian tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. This conclusion is mandated by a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and, particularly, this Court's prior decisions construing the treaties.”¹⁵ The court also denied that the IPSFC pre-empted the treaty negotiations, and should therefore not affect the treaty’s interpretation. This case is a significant example of Indian Canon application. The majority found that the treaty

¹⁴*Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979).

¹⁵*Washington v. Fishing Vessel Assn.*

must be interpreted for its broader meaning rather than its particular language. Other canons of interpretation might urge judges to focus on the exact wording instead.

Exploring Further Application:

There is a difference between applying the Indian Canon to all tribal relations and applying it only to sovereignty and to land disputes. We can assume that when applying the canon, the Supreme Court would generally favor the Indians. However, in *Carcieri vs. Salazar* (2009), the Supreme Court evaluated the Indian Reorganization Act, which gives native land and property rights to Indian tribes.¹⁶ The case concerned the ambiguity of the word “Indian” as used in this particular statute. The majority ruled that only those groups on the list of federally recognized Indian tribes in 1934 when the IRA was enacted are recognized. As a result, this created ambiguities with respect to sovereignty and property rights for tribes not governmentally recognized at the time. In this ruling, Skibine believes that the Indian Canon of construction was clearly not applied as the ruling did not favor the ambiguities for the Native people. Skibine further argues that Justice Clarence Thomas, a textualist who wrote the majority opinion on the case, seems to consistently disregard the Indian Canon.

Skibine points to many additional cases that follow this trend. *Cass County vs. Leech Lake Band of Chippewa Indians* (1998) dealt with whether states have the right to tax land sold by Indians to non Indians, and later sold back to the tribe.¹⁷ The court ruled against the Tribe and stated the States retain the right to tax Indians residing upon land which was owned by non-tribal members at one time. In *Alaska v. Native Village of Venetie Tribal Government* (1998), the Supreme Court heard a dispute over whether a tribe could tax non-members. The Court ruled that the Tribe’s land was not “Indian Country” and, thus, could not tax non-tribal members.¹⁸

A decade ago, in *Adoptive Couple v. Baby Girl* (2013), the Supreme Court dealt with the Indian Child Welfare Act (ICWA).¹⁹ The Act dictates that in adoption cases for children with

¹⁶*Carcieri v. Salazar*, 555 U.S. 379 (2009).

¹⁷*Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

¹⁸*Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

¹⁹*Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013)

Native American descent, members of the child's family, tribe, or other tribes must be prioritized before placing the child in a non-tribe affiliated household. In this case, a couple separated while the biological mom was pregnant. The father lost contact and soon after the mother put the daughter up for adoption. A non-Indian family adopted the girl and roughly two years later the biological father filed a claim for custody. He had never been in contact with his daughter, and thus the court ruled against granting custody. Again, Skibine believes in this case the Indian Canon was not applied in favor of the ICWA.²⁰ Although the framework for the Indian canon exists, how the Supreme Court has chosen to use it presents a separate question.

Conclusion:

The Indian Canon and its history is vital whenever the Supreme Court interprets laws and treaties concerning Native American tribes within the United States. Having an established framework allows justices to interpret such disputes with a consistent and effective framework. Whether this specific canon is the correct framework of interpretation is a heavily controversial topic that this paper does not fully address in detail. The paper ends with the same question it began with: Originalists attempt to interpret law according to its original public meaning. But from whose perspective should it be interpreted? Understanding this question and the function of the Indian Canon in both theory and practice is a vital prerequisite to exploring litigation surrounding U.S. tribal sovereignty insofar as courts are frequently tasked with interpreting a textual provision in these cases.

²⁰Alex T. Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J. L. REFORM 267 (2022).