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A CASE FOR DEFERENCE IN AMERICAN INDIAN HEALTH LAW

Ashley Murphy*

I. Introduction

Landing on the sandy shores of Tabasco, Hernan Cortez embarked on his mission. As a Spanish conquistador, he was to explore and conquer the newly discovered Mexico and convert its indigenous inhabitants to Christianity.¹ After a brief stint in the Yucatan Peninsula, Cortez's party began to push west, eventually arriving in Tenochtitlan.² There he discovered a bustling metropolis with large public squares and markets, apothecaries, complex dams to regulate tides, and hundreds of thousands who inhabited the great city.³ Just seventy days later, tens of thousands were dead, not at the swords of the Spaniards, but by the breath of the conquistadors—through a disease called smallpox.⁴

A century later, in modern-day Massachusetts, the Wampanoag people caught the same horrific disease from French captors.⁵ The pandemic ravished native villages in the area for four years, decimating the local

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1. Jessie Szalay, *Hernán Cortés: Conqueror of the Aztecs*, LIVE SCIENCE (Sept. 28, 2017), <https://www.livescience.com/39238-hernan-cortes-conqueror-of-the-aztecs.html>.

2. *Id.*

3. *Cortes Describes Tenochtitlan*, AM. HIST. ASS'N, <https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age/the-history-of-the-americas/the-conquest-of-mexico/letters-from-hernan-cortes/cortes-describes-tenochtitlan> (last visited Oct. 27, 2021) (excerpting a letter from Cortés to Emperor Charles V).

4. Richard Gunderman, *How Smallpox Devastated the Aztecs – and Helped Spain Conquer an American Civilization 500 Years Ago*, PBS NEWS HOUR (Feb. 23, 2019), <https://www.pbs.org/newshour/science/how-smallpox-devastated-the-aztecs-and-helped-spain-conquer-an-american-civilization-500-years-ago>.

5. *Of Plague and Pilgrims: The Grim Story Behind the First Thanksgiving*, IN THE PAST LANE (Nov. 19, 2012), <http://inthepastlane.com/of-plague-and-pilgrims-how-a-devastating-epidemic-shaped-the-first-thanksgiving-nov-18-2012/>; see also U.S. COMM'N ON C.R., *BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM 2* (2004) (“From the earliest days of colonization, the diseases brought from the Old World proved far more lethal than any weapon in the European arsenal. Infectious diseases, including measles, smallpox, and plague among others, ‘annihilated entire communities even before they had seen a single European.’”).

Native population.⁶ In the end, three-quarters of the Wampanoag people died from smallpox.⁷ Ever since explorers and settlers introduced European diseases to Native America, Native peoples have been more susceptible to medical ailments.⁸ While smallpox may not be of concern today, Native Americans struggle to combat higher rates of diabetes, liver and heart disease, and obesity than non-Native ethnicities.⁹

At multiple points throughout its 230-year history, Congress has endeavored to address the health needs of Native Americans.¹⁰ To do this, Congress often made specific resources available to members of Indian tribes.¹¹ Whether those resources were, and continue to be, sufficient is largely subject to debate among legal scholars and health professionals.¹² However, an unmistakably evident fact, derived from statistical analysis, is that Native Americans are disproportionately affected by adverse health conditions as compared to other ethnic groups.¹³ In light of these vast health disparities affecting Indigenous Peoples, Congress now focuses on strengthening the health of the Indigenous by promulgating health laws, creating administrative agencies, and developing health programs that serve Indian tribes.¹⁴ Created for the sole purpose of providing healthcare for tribes, these statutorily prescribed services aim to combat the disparities that exist in Indian Country.¹⁵

To analyze the agencies that serve Native Americans, one must understand the broad power that agencies exercise when interpreting federal

6. *Of Plague and Pilgrims: The Grim Story Behind the First Thanksgiving*, *supra* note 5.

7. *Id.*

8. *Id.*

9. U.S. COMM'N ON C.R., *supra* note 5, at 2 (“It has long been recognized in Native American and medical communities that Native Americans are dying of diabetes, alcoholism, tuberculosis, suicide, unintentional injuries, and other health conditions at shocking rates.”); *Disparities*, INDIAN HEALTH SERV. (Oct. 2019), <https://www.ihs.gov/newsroom/factsheets/disparities/>.

10. See U.S. COMM'N ON C.R., *supra* note 5, at 2–4; see also *AIPRC's Report on Indian Health*, AM. INDIAN J., Feb. 1977, at 17, 17–18.

11. See *AIPRC's Report on Indian Health*, *supra* note 10, at 17–18; see also *Legislative History*, INDIAN HEALTH SERV., <https://www.ihs.gov/ihcia/history/> (last visited Oct. 27, 2021); Donald Warne & Linda Bane Frizzell, *American Indian Health Policy: Historical Trends and Contemporary Issues*, 104 AM. J. PUB. HEALTH 263, 263–67 (2014).

12. Warne & Frizzell, *supra* note 11, at 263–67; see also William Boyum, *Health Care: An Overview of the Indian Health Service*, 14 AM. INDIAN L. REV. 241, 241–42 (1988-1989).

13. See U.S. COMM'N ON C.R., *supra* note 5, at 7–8.

14. See Boyum, *supra* note 12, at 243–46.

15. *Id.*

statutes. The courts generally grant broad deference to administrative agencies to determine the meaning of ambiguous statutes promulgated by Congress.¹⁶ The rationale supporting such deference rests upon the inference that agencies, which Congress designates as the experts in a particular field, have the expertise necessary to handle a specific issue in a more detailed, effective, and adequate manner as compared to other entities or individuals.¹⁷ The landmark case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* solidified this policy rationale and prescribed the scope of deference that agencies should be afforded.¹⁸

On the other hand, courts have also adopted a nuanced approach to statutory interpretation when analyzing a statute involving Indian tribes. Specifically, when a matter before a court involves an Indian tribe, the courts generally agree that the judiciary should defer to the interpretation of an applicable statute advanced in favor of the tribe. The Indian Canons of Construction cemented this principle, and provide, in relevant part, that “ambiguous provisions must be resolved in favor of the Indian parties concerned”¹⁹ These two conflicting tools of statutory interpretation—broad agency deference and the Indian Canons of Construction—raise several potential issues, which this Note will analyze.

With regard to deferential treatment towards governmental agencies and their interpretations of their originating statutes, one might argue that deference should almost always be granted to the agency itself. After all, Congress vests the power to interpret an organic statute in governmental agencies because agencies are best equipped to handle the specified fields they oversee. In a similar way, when cases involve a statute that affects Indian tribes and their members, granting deference to the tribe’s interpretation of that statute is equally imperative. Such deference tends to promote Congress’s intention to draft legislation that enhances the health and well-being of Indian tribes and their members.²⁰ Thus, despite a well-

16. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”); see also VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 1–4 (2017), <https://sgp.fas.org/crs/misc/R44954.pdf>.

17. *Chevron*, 467 U.S. at 865.

18. *Id.*

19. DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 155–56 (7th ed. 2017).

20. BRANNON & COLE, *supra* note 16, at 3–4.

intentioned rationale for granting deference to agencies, when these two canons of construction collide, specifically in the healthcare sphere, the judiciary necessarily should grant deference to the Indian tribes' interpretation of that legislation.

This Note will analyze the Indian Canons of Construction as they relate to health law. It will do so by examining the conflict between the doctrines that grant broad deference to agencies and the canons that grants deference to tribes. More specifically, this Note will explain how courts should decide issues when these two doctrines clash, as well as which standard courts should consider when analyzing the policy rationales that support a particular judgment.

Part II will address the history of disparate treatment toward Native American tribes by the federal government and how the federal government's historical dealings with the Natives affected their relationship with the tribes. Part II will also explain the troubling health disparities apparent among Native Americans today, as well as Congress's attempts to promote health and wellness amongst the tribes through the establishment of agencies within the administrative state.

Part III will then briefly explain the case precedents set forth by the courts with regard to administrative law and the levels of deference that courts typically give to agencies in interpretive disputes.

Finally, Part IV will examine the ways in which the doctrines supporting agency deference and tribal deference conflict with each other. The analysis in Part IV will explain the policy rationale behind deferring to an agency's interpretation of its own statutes, as well as the importance of construing statutes in favor of Native American tribes. When these principles are in conflict, an important decision must be made as to which interpretation should prevail. In this respect, Part IV aims to determine what courts will do in the future and presents an argument that it is imperative to construe, whenever possible, statutory language in favor of Native American.

II. Background

A. History of Native American Tribes and Culture

The relationship between the Indian tribes and federal government is unique, resulting in complex legal issues that seem to constantly evolve.²¹ In order to understand the legal intricacies embedded in federal Indian law, one must first understand the history of Native American tribes, as well as

21. U.S. COMM'N ON C.R., *supra* note 5, at 21–24.

the actions of the federal government that led to the current relationship. Gloria Valencia-Weber, Professor of Indian Law at the University of New Mexico, appropriately described federal Indian law as presenting “perhaps the most direct challenge to the way that federal jurisprudence accommodates or reflects multicultural interests within national boundaries.”²²

In the 1800s, led by the desire of the newly independent United States to settle the New World (i.e., tribal land), a struggle for power commenced between the tribes and federal government.²³ In 1830, Congress passed the Indian Removal Act,²⁴ which conveyed to President Andrew Jackson the power to establish large tracts of land—later known as Indian reservations—to relocate Indian tribes and their members.²⁵ In exchange for their land, Native Americans were promised perpetual ownership of all land west of the Mississippi.²⁶ This act of removal gave rise to the “Trail of Tears,” wherein tens of thousands of Native Americans made the long trek from their homelands to modern-day Oklahoma.²⁷

Half a century later, in 1887, Congress passed the General Allotment Act (GAA).²⁸ The GAA ostensibly aimed to assimilate members of Indian tribes into American society, but resulted in the cultural and communal destruction of the tribes.²⁹ It divided land that each tribe held collectively into small parcels, which were then transferred to members of the tribe to be held individually.³⁰ Importantly, the land that remained unallotted to tribal members was left for European colonizers to settle.³¹ Prior to the GAA, tribal land amounted to about 138 million acres; by 1934, after all tribal land was allotted, that number was reduced to a mere forty-eight million acres.³²

22. Gloria Valencia-Weber, *American Indian Law and History: Instructional Mirrors*, 44 J. LEGAL EDUC. 251, 251 (1994).

23. Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 51–52 (2008-2010).

24. Ch. 148, 4 Stat. 411 (1830).

25. Davis, *supra* note 23, at 51–52.

26. *Id.*

27. *Trail of Tears*, HISTORY, <https://www.history.com/topics/native-american-history/trail-of-tears> (July 7, 2020).

28. Ch. 119, 24 Stat. 388 (1887), *discussed in* Keith Harper, Cobell v. Norton: *Redressing a Century of Malfeasance*, HUM. RTS., Spring 2006, at 5, 5.

29. Harper, *supra* note 28, at 5.

30. *Id.*

31. *Id.*

32. *Id.*

Under the GAA, the federal government held allotment land in trust.³³ And, pursuant to the trust relationship, “the United States appointed itself trustee, with all the powers to sell and lease Indian assets—oil, gas, timber, rights-of-way, etc.—without obtaining the landowners’ permission.”³⁴ Not only did Native Americans oppose the allotment plan, but many tribes vehemently rejected it, as most Indian tribes’ cultural values were rooted in communal lifestyles.³⁵ With many tribal members declining to accept allotments, the federal government resorted to forcefully dividing tribal land.³⁶

The trust relationship also conferred a fiduciary duty onto the federal government for the benefit of the tribes. This fiduciary duty required that the United States provide generally for the tribes³⁷—a relationship that John Marshall explained as resembling that of a guardian and a ward.³⁸ In other words, the United States took on the responsibility of supporting the Indian tribes when the government undertook to create the trust relationship,³⁹ and this relationship continues to be uniquely important in the way the federal government deals with the tribes. Unfortunately, however, in the decades following the initial attempts to assimilate tribes via allotment, evidence surfaced that the federal government abused its trust responsibilities throughout the entirety of the allotment process.⁴⁰

33. *Id.*

34. *Id.*

35. Richard B. Collins, *A Brief History of the U.S.-American Indian Nations Relationship*, HUM. RTS., Spring 2006, at 3, 4.

36. *Id.*

37. Matthew L.M. Fletcher, *The Iron Cold Marshall Trilogy*, 82 N.D. L. REV. 627, 659 (2006) (“[T]he federal government owes a duty—moral, ethical, or political—to Indians and Indian tribes in all of its actions. This may be a guardian-ward relationship, a trustee-beneficiary relationship, or theoretically (according to Justice Johnson) a master-conqueror relationship.”)

38. *Id.*

39. *Id.*

40. See Harper, *supra* note 28, at 5 (citing S. REP. NO. 101-216, at 4–5 (1989)). The author offers several examples, including:

The trustee routinely enters into leases on behalf of Indians for 5 to 10 percent of what non-Indians receive for the exact same type of transaction. In other words, a Navajo Indian receives \$9 to \$25 per rod for a pipeline right-of-way lease. A non-Indian receives no less than \$140 and often \$575 per rod for the same lease.

Id. In another example, “[t]he trustee does not have an accounts receivable system So the trustee is unaware when a beneficiary is owed a payment. If no payment is made, that is usually the end of it.” *Id.*

B. Health Disparities Among Native American Tribes

Health disparities that existed among Native Americans during the earliest period of colonialism continue to persist today.⁴¹ In 2006, David Jones, MD, wrote about the general health of Natives during the year 1955—the year Congress established the Indian Health Service⁴² (IHS):

Indian populations living in rural poverty suffered terribly from disease. Tuberculosis continued to thrive, and infant mortality reached 4 times the national average. During the past 50 years, the IHS has improved health conditions dramatically, but disparities persist—American Indians continue to experience some of the worst health conditions in the United States. Although this persistence is striking, it is even more striking that the disparities have existed not for 50 years but for 500 years. From the earliest years of colonization, American Indians have suffered more severely whether the prevailing diseases were smallpox, tuberculosis, alcoholism, or other chronic afflictions of modern society.⁴³

Notwithstanding the creation of programs like the IHS, disparities among tribal members remain alarmingly high when compared to the general populous of the United States.⁴⁴ The most recent data gathered by the IHS, published in October 2019, reported that the average life expectancy of Native Americans is five and a half years shorter than the average life expectancy of all U.S. races combined.⁴⁵ In the same report, the IHS published data on sixteen separate health-related causes of mortality, including heart disease, diabetes, unintentional injuries, influenza or pneumonia, and stroke.⁴⁶ In almost every area concerning health-related causes of mortality, Native Americans suffer at a rate higher than the average of all U.S. race populations.⁴⁷ For example, Native Americans, when compared to the average of all U.S. races, develop heart disease at a

41. David S. Jones, *The Persistence of American Indian Health Disparities*, 96 AM. J. PUB. HEALTH 2122, 2122 (2006); see also U.S. COMM'N ON C.R., *supra* note 5, at 2.

42. Jones, *supra* note 41, at 2122.

43. *Id.*

44. *Disparities*, *supra* note 9.

45. *Id.* (finding that the average life expectancy of all U.S. race populations in 2010 was 78.5 years, while that of the average American Indian in 2009-2011 was seventy-three years).

46. *Id.*

47. *Id.*

ratio of 1.1:1,⁴⁸ influenza/pneumonia at a rate of 1.8:1, unintentional injuries at a ratio of 2.5:1, and diabetes at a ratio of 3.2:1.⁴⁹ Moreover, Indigenous Americans are far more likely to face poor health conditions as a result of alcohol abuse; the IHS reports that American Indians and Alaska Natives experience alcohol-induced diseases at a ratio of 6.6:1 and chronic liver disease/cirrhosis at a ratio of 4.6:1.⁵⁰

On a broad scale, studies show that there are “persistent disparities in infant mortality, life expectancy, and mortality from a variety of conditions.”⁵¹ The American Public Health Association stated, “There is also sufficient evidence of disparities in health care financing, access to care, and quality of care to conclude that American Indians and Alaska Natives are disadvantaged in the health care system.”⁵² Perhaps most concerning is the fact that this issue is not minor in that it does not impact only a small number of Americans; rather, the health disparities that afflict Natives constitute a widespread problem affecting the nearly 4.1 million people who identify as Native American or Alaska Native.⁵³ The fact that the Native American and Alaska Native populations comprise about 1.5% of the United States population bolsters the urgency with which these issues must be addressed.⁵⁴

C. Health Law Administrative Structure

One avenue that Congress has used in its attempt to combat the alarming health disparities among Indian tribes involves the administrative state.⁵⁵ Therefore, understanding the structure of the administrative state, which provides health-related resources to Native Americans, is the foundation for understanding the statutory interpretation questions.

Consistent with the administrative state’s purpose, Congress frequently delegates its legislative power to administrative agencies in the interest of efficiency, expertise, and bureaucratic neutrality.⁵⁶ Within this

48. *Id.*

49. *Id.*

50. *Id.*

51. Marsha Lillie-Blanton & Yvette Roubideaux, *Understanding and Addressing the Health Care Needs of American Indians and Alaska Natives*, 95 AM. J. PUB. HEALTH 759, 759 (2005).

52. *Id.*

53. *Id.*

54. *Id.*

55. See Boyum, *supra* note 12, at 241–42.

56. ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 8 (Saul Levmore et al. eds., 3d ed. 2020); *Delegation of*

administrative structure, agencies, through their officers and members, promulgate rules that regulate the implementation of statutory schemes.⁵⁷ Pursuant to agency regulations, programs are created and resources are made available to those who qualify under certain enumerated requirements.⁵⁸

For health law, the highest level of the administrative structure is the Department of Health and Human Services (HHS), a cabinet-level department within the executive branch of the United States government that implements federal health programs.⁵⁹ The HHS aims to “enhance the health and well-being of all Americans,”⁶⁰ and it oversees various agencies, such as the Indian Health Services (IHS) that serve to effectuate the mission of the HHS.⁶¹

While the HHS oversees health programs for all American citizens, the IHS provides health services specifically to American Indians and Alaska Natives.⁶² The overarching purpose of the IHS is to enhance the health of Native Americans to the highest level possible.⁶³ Among its responsibilities are the administration of congressional statutory schemes promulgated to advance Native health.⁶⁴ For example, in 1976 Congress passed the Indian Health Care Improvement Act (IHCA)⁶⁵ to address the health needs of American Indians and Alaska Natives “pursuant to the treaty and trust obligations of the United States government.”⁶⁶ Accordingly, the IHCA

Legislative Power, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-1/delegation-of-legislative-power> (last visited Oct. 26, 2021).

57. GLICKSMAN & LEVY, *supra* note 56, at 29.

58. *Id.*

59. *About HHS*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/about/index.html> (last visited Oct. 26, 2021).

60. *Id.*; see also *U.S. Department of Health & Human Services (HHS)*, GRANTS.GOV, <https://www.grants.gov/learn-grants/grant-making-agencies/department-of-health-and-human-services.html> (last visited Oct. 26, 2021).

61. *HHS Agencies & Offices*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (last visited Oct. 26, 2021).

62. *Agency Overview*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/overview/> (last visited Oct. 26, 2021).

63. *Id.*

64. *Id.*

65. Pub. L. No. 94-437, 90 Stat. 1400 (1976).

66. *Brief History of the Indian Health Care Improvement Act*, NAT’L INDIAN HEALTH BD.: TRIBAL HEALTH REFORM RES. CTR., <https://www.nihb.org/tribalhealthreform/ihcia-history/> (last visited Oct. 26, 2021).

appointed the IHS to effectuate Congress's intent in establishing the IHCA.⁶⁷

When Congress enacted the IHCA, adverse health outcomes were much higher in Indian Country than those of the general population.⁶⁸ As such, the health status of tribal members was of major concern to Congress.⁶⁹ Those concerns led to the promulgation of the IHCA, in which Congress described its policy rationale: "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique relationship with, and resulting responsibility to, the American Indian people."⁷⁰ The IHCA is one of two main sources of legislative authority for the IHS,⁷¹ along with the Snyder Act.⁷²

In 2010, after Congress endorsed the IHCA four consecutive times, the Affordable Care Act (ACA) permanently codified and expanded the IHCA.⁷³ The ACA actually amended the IHCA by actualizing the payer of last resort provision.⁷⁴ This provision essentially solidified the IHS as the "payor of last resort for all services provided;" whereas, "[p]rior to the ACA, IHS was the payor of last resort only for contract health services."⁷⁵

Playing a more supportive role under the umbrella of Indian health is the Contract Health Service (CHS). Although Congress funds the CHS, the IHS allocates funds to the CHS for health services and care that are not covered directly by the IHS or a tribal healthcare facility.⁷⁶ In order to qualify for CHS-funded services, an individual must "(1) Reside within the United States and on a reservation located within a contract health service delivery area; or (2) . . . not reside on a reservation but reside within a contract

67. *Id.*; Boyum, *supra* note 12, at 244.

68. *Brief History of the Indian Health Care Improvement Act*, *supra* note 66.

69. Boyum, *supra* note 12, at 243–45.

70. 25 U.S.C. § 1601(1).

71. *Id.*; *Legislation*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/legislation/> (last visited Oct. 29, 2021).

72. 25 U.S.C. § 13; *see also Legislation*, *supra* note 71 (stating that the Snyder Act "[p]rovides authority for the expenditure of such funds as Congress may appropriate for the benefit, care and assistance to Indians throughout the United States").

73. *Brief History of the Indian Health Care Improvement Act*, *supra* note 66; *see also Indian Health Care Improvement Act*, INDIAN HEALTH SERV., <https://www.ihs.gov/ihsca/> (last visited Oct. 29, 2021).

74. *See* 42 C.F.R. § 136.61 (2021).

75. ELAYNE J. HEISLER, CONG. RESEARCH SERV., R41152, INDIAN HEALTH CARE: IMPACT OF THE AFFORDABLE CARE ACT (ACA) 5 (2014).

76. *Contract Health Services Fund Control*, INDIAN HEALTH SERV., <https://www.ihs.gov/ihsca/circulars/1991/contract-health-services-fund-control/> (last visited Oct. 29, 2021).

health service delivery area” (CHSDA) and be considered a member of the tribe(s) located on that reservation or “maintain close economic and social ties with that tribe or tribes.”⁷⁷ Accordingly, the CHSDA “consist[s] of a county which includes all or part of a reservation, and any county or counties which have a common boundary with the reservation.”⁷⁸ CHS funds can also be supplemented by the Catastrophic Health Emergency Fund (CHEF), which Congress created to assist with excessive medical costs due to catastrophes, to the extent that they are within the purview of the IHS or Indian tribes.⁷⁹ CHEF funds are used primarily for high-cost illnesses, procedures, and diseases.⁸⁰

Recently, many Indian tribes began to offer self-insurance programs, more commonly known as “tribal self-insured plans.” These programs permit a tribe to pay claims directly, allowing the tribe to provide medical coverage for its tribal members at lower costs while also granting the tribe the ability to exercise greater sovereignty.⁸¹ While utilizing tribal self-insured plans is popular amongst the tribes, alternative insurance options are available to tribal members too: these include programs include, for example, the Marketplace Health Insurance, Medicaid, and Children’s Health Insurance Program (CHIP).⁸²

Relatedly, in 1975, Congress also enacted the Indian Self-Determination and Education Assistance Act (ISEAA), which grants Indian tribes more autonomy to govern their own programs.⁸³ Essentially, “[u]nder a self-determination contract, the federal government supplies funding to a tribal organization, allowing [the tribe] to plan, conduct and administer a program or service that the federal government otherwise would have provided

77. 42 C.F.R. § 136.23(a).

78. *Requirements: Purchased/Referred Care [PRC] Delivery Areas*, INDIAN HEALTH SERV., <https://www.ihs.gov/prc/eligibility/requirements-purchased-referred-care-prc-delivery-areas/> (last visited Oct. 29, 2021).

79. *Contract Health Services Fund Control*, *supra* note 76.

80. *Id.*

81. Letter from Chief Lynn Malerba, Chairwoman of IHS Tribal Self-Governance Advisory Comm., to Mary Smith, Principal Deputy Dir. of Indian Health Serv. 3 (May 10, 2016), https://www.tribalselfgov.org/wp-content/uploads/2016/06/2016.5.10_TSGAC-comments-on-CHEF-letter.pdf.

82. *Health Care Coverage for American Indians & Alaska Natives*, HEALTHCARE.GOV, <https://www.healthcare.gov/american-indians-alaska-natives/coverage/> (last visited Oct. 29, 2021).

83. See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 3–4 (2014-2015) (citing Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203).

directly.”⁸⁴ ISEAA services include educational, social, and health-related programs.⁸⁵

As applied to Native American tribes and their members, this overarching structure of the health law administrative state becomes increasingly important when considering the implications of health care laws on Native Americans and, even more importantly, the basis upon which those laws are adjudicated.

III. Historical Precedent and Jurisprudence

A. Deference to Administrative Agency Action

Chevron guides the courts on the principle of judicial deference within the administrative state.⁸⁶ In *Chevron*, the Supreme Court created a test to determine when judicial deference should be given to an agency action if the language of the empowering statute is ambiguous.⁸⁷ This doctrine—known as “*Chevron* deference”—is one of the most important and widely used tests in modern administrative law.⁸⁸ Under *Chevron*, the reviewing court will defer to an agency’s interpretation of a statute if the agency’s action is reasonable.⁸⁹ Furthermore, where *Chevron* deference is given, “[t]he scope of the *Chevron* deference doctrine is that when a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency.”⁹⁰ Stated another way, the reasonableness standard applies regardless of whether the court finds another reasonable—or even more favorable—interpretation of a statute than that of the agency.

Ultimately, when applying *Chevron* to a dispute, “a very low threshold” is required to allow the court to defer to an agency’s construction of a statute.⁹¹ Thus, an agency’s interpretation of a statute is generally

84. *Rancheria v. Hargan*, 296 F. Supp. 3d 256, 260 (2017) (quoting *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995)).

85. *Strommer & Osborne*, *supra* note 83, at 4.

86. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

87. *Chevron Deference*, CORNELL L. SCH.: LEGAL INFO. INST. (Dec. 2017), https://www.law.cornell.edu/wex/chevron_deference.

88. *Id.*

89. *Id.*

90. *Id.*

91. David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today’s SCOTUS Decisions*, JUSTIA L. BLOG (May 21, 2012), <https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions>.

considered reasonable so long as it is unambiguous as pertaining to the specific issue being addressed.⁹² On the other hand, where the intent of the statute is clear, a court need not resort to *Chevron* but can instead simply apply the statute's plain meaning.⁹³

Notably, the Supreme Court took measures to narrow *Chevron* deference in the decades following the decision. In more recent cases, the Court outlined exceptions and alternative tests to apply under limited circumstances. And due to this narrowing of the *Chevron* doctrine, at least one additional test surfaced to control the analysis where certain conditions are met: *Skidmore* deference.⁹⁴ The Court applied *Skidmore* deference in the case of *Christensen v. Harris County*.⁹⁵ Using the factors in *Skidmore v. Swift*,⁹⁶ the *Christensen* Court held that, when considering whether to defer to an agency's construction of the agency's organic statute, the Court will consider these factors⁹⁷: "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁹⁸ The following year, the Court upheld *Skidmore* deference in *United States v. Mead Corp.*⁹⁹

The judiciary continues to rely largely upon the doctrines of deference in order to give broad effect to agency interpretations of statutes. The application of *Chevron*¹⁰⁰ and *Skidmore*¹⁰¹ is the driving force behind this broad deference.

B. Canon of Construction Favoring Indian Tribes

While the precedent set by *Chevron* and its progeny generally apply to most adjudicatory actions involving administrative agencies, the Court carved out contrary doctrines of interpretation for the statutes that regulate resources and programs involving Native American tribes. For example, in *Maniilaq Ass'n v. Burwell*, the Court discussed the ISDEAA and Congress's intentions surrounding the promulgation of the law, specifically

92. *Id.*; *Chevron Deference*, *supra* note 87.

93. *Chevron Deference*, *supra* note 87.

94. *Skidmore Deference*, *BALLOTPEDIA*, https://ballotpedia.org/Skidmore_deference (last visited Oct. 29, 2021); *see Chevron Deference*, *supra* note 87.

95. 529 U.S. 576 (2000).

96. 323 U.S. 134 (1944).

97. *Christensen*, 529 U.S. at 587.

98. *Skidmore*, 323 U.S. at 140, *cited in Christensen*, 529 U.S. at 587.

99. 533 U.S. 218 (2001).

100. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

101. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

stating, “In enacting the ISDEAA, Congress explicitly codified the rule of construction in favor of Indian tribes.”¹⁰² The canon of construction to which the Court made reference describes the broad standard of deference given to Native tribes, which is parallel to the deference given to agency action under *Chevron*.¹⁰³ This creates a potential conflict between the deference afforded under the *Chevron* doctrine and the canon of construction in favor of Indian tribes.

The United States District Court for the District of Columbia acknowledged this conflict in *Rancheria v. Hargan*,¹⁰⁴ where it explained that courts are generally “guided by ‘the principles of *Chevron*’” when considering “an agency’s interpretation of its enabling statute and the laws it administers.”¹⁰⁵ However, “[i]n cases involving American Indians . . . courts have applied the canon of construction that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”¹⁰⁶ The Court then explained the conflict presented by the competing standards, stating that “the canon of construction in favor of Indian tribes can trump the deference to agencies’ interpretations courts ordinarily give under *Chevron* and its progeny.”¹⁰⁷

Later, the United States Court of Appeals for the D.C. Circuit further clarified the canon of construction favoring Indian tribes. In *Muscogee (Creek) Nation v. Hodel*, the court decided between two competing interpretations of a statute where both an agency and a Native tribe were parties to the litigation.¹⁰⁸ The court held:

If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA *must* be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it *must* be construed that way.¹⁰⁹

102. 72 F. Supp. 3d 227, 232–33 (D.D.C. 2014).

103. *Id.*

104. 296 F. Supp. 3d 256 (D.D.C. 2017).

105. *Id.* at 266 (quoting *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007)).

106. *Id.* (quoting *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985)).

107. *Id.* at 267 (citing *Manilaq Ass’n*, 72 F. Supp. 3d at 232).

108. 851 F.2d 1439 (D.C. Cir. 1988).

109. *Id.* at 1445.

The Supreme Court previously described the policy rationale for this tribal standard of deference in *Blatchford v. Alaska Native Tribal Health Consortium*.¹¹⁰ There, the Court held that, “[i]n enacting the Indian Health Care Improvement Act, Congress found that ‘[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.’”¹¹¹ Furthermore, the Court explained, “Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians . . . to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to affect that policy.”¹¹²

IV. Analysis

A. Competing Standards of Deference and Statutory Interpretation

The arguments surrounding the level of deference that courts grant to agencies within the scope of administrative law are complex and necessarily implicate various other areas of law and policy. For example, *Chevron* deference recently gave rise to arguments of potential violations of the non-delegation doctrine.¹¹³ As a result, it is very possible that the Court will revisit *Chevron* in the future to question the validity of the broad level of deference granted to agency action and interpretation.¹¹⁴

What remains clear is that there are, and presumably will continue to be, many instances in which the deferential administrative law standards of *Chevron* and *Skidmore* conflict with the Indian Canons of Construction. Until the Supreme Court has the opportunity to make a final determination on the matter, the lower courts will likely disagree as to which doctrine of statutory interpretation controls in instances where the two doctrines clash. The central question becomes: which legal construct is appropriate when they clash? Which one wins when the two square up? Not surprisingly, lower courts differ on this issue.¹¹⁵

110. 645 F.3d 1089 (9th Cir. 2011).

111. *Id.* at 1090 (alteration in original) (citing 25 U.S.C. § 1601(1)).

112. *Id.*

113. GLICKSMAN & LEVY, *supra* note 56, at 8.

114. *Id.*

115. *Id.* (“When an agency’s interpretation of a statute conflicts with that of an American Indian tribe, Circuits are split on which canon controls.”).

B. Arguments in Favor of Agency Interpretation of Statutes

Inevitably, cases will arise where courts must to choose to defer to either an interpretation construed by an administrative agency or one construed by a Native American tribe.

Admittedly, there are policy interests that support the use of administrative agencies to aid in executing the laws of the government. First, administrative agencies provide a more efficient avenue for lawmaking and executive action.¹¹⁶ The delegation of power to agencies allows Congress to redirect its focus to more pressing issues; this complements an increased ability on the part of Congress to work more effectively and efficiently, as opposed to overseeing all federal regulations and policies on its own.¹¹⁷ Similarly, administrative agencies are generally led by personnel or board members who are experts in a particular field—typically the area being regulated by the statutes at issue in the relevant court proceedings.¹¹⁸ Presumably, this means that agencies are better equipped with the knowledge, data, and resources necessary to effectuate legitimate and appropriate regulations.¹¹⁹

For those reasons, interpreting a statute in favor of Indian tribes could, hypothetically, undermine the policy interests served by Congressional delegations to administrative agencies. It is possible that interpreting statutory language in favor of the tribes, and in direct conflict with agency interpretations, could effectively remove a degree of congressionally delegated power from administrative agencies—the same agencies who are tasked with creating and executing the laws on behalf of, and in the best interest of, the Indian Nations. More specifically, construing statutes in a way that is contradictory to the IHS's understanding thereof could hinder the IHS and its regulatory scheme, thereby defeating the whole purpose of the IHS's existence.

Accordingly, some would argue, that while the legislature promulgates and executes the laws, the courts or the tribes could have a high degree of influence in determining statutory meaning, even if the tribal interpretation is in direct conflict with that of the administrative agency to whom Congress delegated its power. Some would argue that the potential for the courts to determine the meaning of a congressional statute raises constitutional concerns regarding the inherent separation of powers

116. *Id.*; *Delegation of Legislative Power*, *supra* note 56.

117. GLICKSMAN & LEVY, *supra* note 56, at 8.

118. *Id.*

119. *Id.*

doctrine. Alternatively, some may express concerns that, by promoting a reading of statute in favor of those who benefit from it, agency action could be undermined—and the true intent of the statute may be misconstrued—effectively rendering the statute pointless. While these are valid concerns, they are also easily resolved when considering the responsibilities of Congress in its dealings with tribes and the very purpose of the statutes being interpreted.

C. The Necessity for Statutory Interpretation in Favor of Native Americans

On the other hand, in the area of health law especially, it is imperative that the courts yield to the tribes and interpret statutes in their favor. Such determinations are rooted in the unique relationship between the federal government and Native tribes. These canons serve Congress' overarching policy of promoting tribal self-determination. Stated differently, the canons further the central purpose of the administrative structure dealing with Native health, by helping tribal members to reach better health outcomes.

Notably, the main reason Congress delegates power to agencies to oversee Indian governmental services is to promote better health and welfare within Native American communities.¹²⁰ Subsequently, the agencies' intentions in promulgating regulations are for the primary purpose of providing services, resources, and health care to the tribal members.¹²¹

For these reason, the IHS created health services and drafted statutes in a way that would not only preserve tribal resources but enhance the overall health among the Indian Nations.¹²² This intention is reinforced by the trust relationship owed by the federal government to the Native peoples, and hinges on the duty of the government to provide for the tribes.¹²³ It therefore follows that, where a tribe's interpretation of a health-related statute conflicts with that of a governmental agency's, the tribe should be given deference to interpret the statute, because these health laws govern tribal medical programs and should thus be construed in a way that works for the benefit of the tribe. If the federal government wants to know what is best for the tribes and their overall health, it should pay attention to the ways in which the tribes decipher federal legislation pertaining to their specific situations. Or, better yet, ask them.

120. See Collins, *supra* note 35, at 24; see also Boyum, *supra* note 12, at 241.

121. Collins, *supra* note 35, at 24.

122. *Id.*

123. *Id.*

Furthermore, this deferential and patient-centered policy allows federal health services to begin to bridge the gap in health disparities for tribal members. Disparities in individual health and wellness among tribal members, specifically compared to the average American, can arguably be traced back to the lack of funding for health programs.¹²⁴ Notwithstanding a reformation of the laws that govern federally funded Indian health services and related programs, health statutes affecting Native Americans should be drafted and construed in favor of Natives in order to serve the very intentions of Congress in creating the agencies that oversee Indian services, as well as the agency's purpose in creating statutes and regulations in support of Indian tribes and their members. There is still an immense need for improvement in terms of resources, services, and funding; but construing statutes that affect Native Americans in a way that benefit Native Americans is just one step in promoting better health care access and quality among Indian tribes.

Recently, the Court of Appeals for the D.C. Circuit actually construed a health statute in favor of the Indian tribe in *Rancheria v. Hargan*.¹²⁵ There, the Redding Rancheria Tribe filed a civil action against the acting secretary of the United States Department of Health and Human Services (DHHS).¹²⁶ The Tribe attempted to create a tribal self-insurance plan that functioned in concordance with the resources provided by the IHS in order to maximize the benefits and resources available to its members.¹²⁷

The statutory provision at issue was § 1623(b) of the Indian Health Care Improvement Act, which outlined a payor of last resort provision, the terms of which were subject to differing interpretations by both the Redding Rancheria Tribe and the IHS.¹²⁸ As a preliminary matter, § 1623 of the applicable statute intended to “prevent . . . recovery . . . absent specific written authorization from the tribe.”¹²⁹ Significantly, the tribal self-insurance plan at issue in the case included an exclusionary clause, whereby the Redding Rancheria Tribe asserted that the payer of last resort provision would not apply to the tribal self-insurance plan.¹³⁰ To the contrary, the IHS argued that the payor of last resort provision should be interpreted “to

124. Boyum, *supra* note 12, at 244.

125. 296 F. Supp. 3d 256 (2017).

126. *Id.* at 260.

127. *Id.* at 261.

128. *Id.* at 267 (citing 25 U.S.C. § 1623(b)).

129. *Id.* at 271.

130. *Id.* at 270–71.

exclude tribal self-insurance programs.”¹³¹ Further, the significance of the interpretation of this provision is amplified by the fact that the CHS is the primary source of funding for services offered and covered by IHS, but the CHS is also a payor-of-last resort.¹³²

In *Rancheria*, the court declined to defer to the agency’s interpretation of the statutory language under *Chevron*, ultimately finding that the language was unambiguous.¹³³ Further, the court noted:

[I]n cases where it is unclear whether the payor of last resort is the Tribe’s self-funded insurance or CHS, funded by IHS, the IHCIA provides that the Tribe can decide which program is primary:

Absent specific written authorization by the governing body of an Indian tribe . . . the United States shall not have a right of recovery under this section if the injury, illness, or disability for which health services were provided is covered under a self-insurance plan funded by an Indian tribe, tribal organization, or urban Indian organization. Where such authorization is provided, the Service may receive and expend such amounts for the provision of additional health services consistent with such authorization.¹³⁴

In holding for the Redding Rancheria Tribe, the court explained that the agency’s interpretation contradicted Congress’s intent and that the Tribe had the ability to determine the primary payor in the present situation.¹³⁵ The *Rancheria* court did not answer the question concerning which doctrine of statutory interpretation would prevail—*Chevron* or the Indian Canons of Construction—if both were in conflict. Instead, *Chevron* plainly did not apply to the organic statute drafted by Congress, because it was found to be clear and unambiguous by its language and intent.¹³⁶ However, the court did note that the circuit courts are split on this exact issue.¹³⁷ Unless and until the Supreme Court addresses the conflict between these doctrines of statutory interpretation, lower courts will continue to apply the doctrines

131. *Id.* at 271.

132. *Id.* at 270.

133. *Id.*

134. *Id.* at 271 (quoting 25 U.S.C. § 1621e(f)).

135. *Id.*

136. *Id.*

137. *Id.* at 266.

inconsistently where a case involves conflicting interpretations of a statute by an administrative agency and an Indian tribe.

So, when this issue arises, which canon of construction should the Supreme Court apply? Based on the trust relationship that exists between the Indian tribes and the United States, the federal government owes a heightened level of responsibility to the tribes.¹³⁸ The federal government implicitly agreed to provide for the tribes through the formation of the trust relationship—and one of the services the government agreed to provide the members of Indian tribes is health care programs and services.¹³⁹

Presumably, the federal government's intent was to establish a system that would allow Native Americans to receive adequate healthcare. At a minimum, the federal government surely intended for Native Americans to have access to services that will allow them to reach health care outcomes equal to those of other American citizens. Yet, as previously discussed, the health care outcomes of Native Americans are consistently lower than those of other racial and political groups.¹⁴⁰ The natural response, therefore, is to question the system implemented by the United States. Similarly, the execution of the services put in place must be analyzed and the judiciary must consider its role.

Although the reason for these disparities is, seemingly, not studied thoroughly enough to determine one exact cause, it is clear that there are improvements to be made in the way that the federal government approaches providing healthcare to tribal members. One plausible alternative to the current system would involve asking tribes about their healthcare needs. By raising the level of communication between the federal government and the tribes, better statutes, services, and programs could be implemented to serve Congress's goal of promoting good health among the tribes. After all, those best positioned to determine what they need are the tribal members themselves.

This proposed solution is not unimaginable or unattainable. The Bureau of Indian Affairs (BIA) is comprised of varying offices, including the Division of Human Services (DHS).¹⁴¹ By creating a subcommittee within the DHS, the government could appoint personnel for the specific purpose

138. See Collins, *supra* note 35, at 4 (citing S. REP. NO. 101-216, at 4–5 (1989)); see also Fletcher, *supra* note 37.

139. Collins, *supra* note 35, at 24.

140. Jones, *supra* note 41; see also U.S. COMM'N ON C.R., *supra* note 5, at 2–4; *Disparities*, *supra* note 9.

141. *Bureau of Indian Affairs*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, <https://www.bia.gov/bia> (last visited Jan. 30, 2022)

of developing and enhancing tribal services. Communicating directly with the tribes and their members regarding health-related matters would improve transparency and generate more potential solutions to health issues faced by the tribes.

Similarly, another way the government could attempt to improve health outcomes among tribes is by deferring to tribes' interpretations of statutes pertaining to their healthcare in adjudication. If Congress's purpose in promulgating statutes is to promote good health among the Indian tribes, then it is important for the courts to defer to Indian tribes' interpretations of those statutes. After all, tribes understand better than anyone else how they will benefit from governmental services provided by statute.

Some might argue that following the interpretations that favor Native Americans over the interpretations of government agencies would yield too much power to the tribes. However, it's important to keep in mind that the Indian Canons of Construction only apply where a congressional statute is ambiguous. Thus, if Congress is concerned that an interpretation of a statute provides too much authority to Native American tribes, Congress can amend the statute. In doing so, Congress has the opportunity to provide clarity and override interpretive disputes.

Ultimately, in light of the trust relationship between the federal government and the Indian tribes, Congress's intent in creating an administrative structure to support healthcare within the tribes', and the tribes' superior understanding of their own health needs, the Indian Canons of Construction requiring courts to defer to the statutory interpretation in favor of a tribe play an important role in the judicial system. Based on the federal government's trust duty, the courts have an obligation to interpret healthcare statutes to provide the greatest benefit to the tribes, even if the interpretation that favors the tribes is in direct contradiction to that of an administrative agency. This is one area where the broad deference traditionally afforded to agencies should not prevail.

V. Conclusion

The history of the relationship between Native American tribes and the federal government is long and complex. The creation of the trust relationship established a unique association between the federal government and Indian tribes that accorded great responsibility to the government. And although the intentions of the federal government to provide healthcare services through administrative agencies and statutes to the tribes seem favorable, it has effectively failed to protect tribes. There is

no doubt that additional measures must be taken to assist Native Americans to achieve the same health outcomes as other citizens.

One way for the federal government to further promote better health among Indian tribes is to invoke the canon of construction that requires them to construe statutes in favor of Indian tribes, specifically in health law cases. Congress intentionally delegated responsibility for Indian law and health law to administrative agencies. Furthermore, Congress seemingly expanded these portions of the administrative state to address the point at which the two interests collide. Noting the disparities in health outcomes among Indian tribes, Congress's intention in creating the IHS and related agencies was to ensure that the health of Indian tribal members was not only considered, but encouraged, supported, and promoted.

For this reason, and all the reasons explained above, when the judiciary is tasked with interpreting a health law statute, deference should be given to the Indian tribes whenever possible. And where the canon of construction favoring the Indian tribes is at odds with the deference typically afforded to administrative agencies, the canon favoring Indian tribes should control. Such a practice would protect, at least in the area of health law, Congress's attempt to implement a statutory scheme promoting health among the Indian tribes. Deferring to tribes will safeguard the promises made, and duties assumed, by the federal government according to the trust-trustee relationship it holds with the tribes.