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Alex Tallchief Skibine
University of Utah S.J. Quinney College of Law

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TEXTUALISM AND THE INDIAN CANONS OF STATUTORY CONSTRUCTION

Alex Tallchief Skibine*

ABSTRACT

When interpreting statutes enacted for the benefit or regulation of Indians or construing treaties signed with Indian nations, courts are supposed to apply any of five specific canons of construction relating to Indian Affairs. Through examining the modern line of Supreme Court cases involving statutory or treaty interpretation relating to Indian nations, this Article demonstrates that the Court has generally been faithful in applying canons relating to treaty interpretation or abrogation. The Court has also respected the canon requiring unequivocal expression of congressional intent before finding an abrogation of tribal sovereign immunity. However, there are two other canons that the Court almost never applies. One, the tribal sovereignty canon, requires clear intent to interfere with tribal sovereign rights; the other, the Indian ambiguity canon, requires statutes to be construed liberally with ambiguities resolved to the benefit of Indians. After reviewing the possible reasons why textualist jurists might be opposed to the use of substantive canons, this Article makes two arguments to remedy any reluctance to using the tribal sovereignty and Indian ambiguity canons. First, these canons have constitutional roots, and as such, even textualists on the Court should not be reluctant to use them. Second, the more established canon concerning abrogation of tribal sovereign immunity should also extend to statutes interfering with tribal sovereign rights. There are no normative reasons to treat abrogation of sovereign immunity differently than other statutory interference with tribal sovereignty.

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* S.J. Quinney Professor of Law, University of Utah S.J. Quinney College of Law. This research was made possible, in part, through generous support from the Albert & Elaine Borchard Fund for Faculty Excellence.

INTRODUCTION

When interpreting treaties signed between the United States and Indian nations or statutes enacted for the regulation or benefit of Indians and Indian nations,[1] courts are supposed to apply the Indian canons of treaty and statutory construction.[2] There are arguably five such canons, which this Article will refer to as the canons of treaty interpretation, treaty abrogation, tribal sovereign immunity, tribal sovereignty, and Indian ambiguity. First, there is the treaty interpretation canon: when a court interprets an Indian treaty, the treaty "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians . . . and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians."[3] The second canon can be described as the treaty abrogation canon: when the issue is whether a subsequent Act of Congress abrogated or modified an Indian treaty, the test is whether there is clear evidence that Congress actually considered the treaty right and decided to abrogate that right.[4] This canon could be considered a

1. This Article uses the term Indian nations and Indian tribes interchangeably. Same for the terms Indians, Native Americans, or American Indians. There is no legal significance associated with these different terms.

2. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1140–56 (1990).

3. *See* Herrera v. Wyoming, 139 S. Ct 1686, 1699 (2019) (citations and internal quotation marks omitted).

4. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986) ("[W]here the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the

quasi-clear statement rule. Clear statement rules require specific language announcing congressional intent to interfere with a valued norm, such as abrogating the sovereign immunity of the states.[5] I describe the treaty abrogation rule as "quasi" because the search for "actual consideration" can be derived not only from the text of the statute but also from its legislative history, as was the case in *United States v. Dion*.[6]

Third, there is what this Article refers to as the tribal sovereign immunity canon, since it has basically been used by the Court only for congressional abrogation of tribal sovereign immunity from suit.[7] That test was first applied in *Santa Clara Pueblo v. Martinez*, where the Court stated: "without congressional authorization, the Indian Nations are exempt from suit. It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[8] When it comes to interfering with tribal self-government outside of abrogating sovereign immunity, such as allowing suit against tribal officials, the *Santa Clara* Court phrased the test differently, refusing to allow such suits "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent."[9] So, the abrogation of sovereign immunity requires "unequivocal expression of congressional intent" while the abrogation of tribal sovereignty requires only "clear" indication of congressional intent. This Article will refer to this latter canon as the tribal sovereignty canon.

Finally, there is what can be called the Indian ambiguity canon, applicable to all statutes enacted for the benefit or regulation of Indians.[10] As the Court put it, "[w]hen we are faced with two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions

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legislative history of a statute.' What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty.").

5. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). On clear statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 636–40 (1992).

6. *See Dion*, 476 U.S. at 740–44 (examining in detail the legislative history of the Eagle Protection Act in holding that Congress had actually considered the treaty hunting rights of Indians and decided to abrogate them).

7. For the evolution of the tribal sovereign immunity doctrine, see William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587 (2013).

8. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

9. *Id.* at 72.

10. *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

interpreted to their benefit.'"[11] Note that this last canon has two components: first, that the statute must be "liberally construed,"[12] and second, that ambiguous provisions are to be interpreted for the benefit of the Indians.

While the Court is inclined to apply the first two treaty-related cannons,[13] as well as the tribal sovereign immunity canon,[14] it has rarely applied, or even discussed, the canons of tribal sovereignty and Indian ambiguity. Thus, in the last thirty-five years (since 1987), the Court has decided at least twenty-six cases involving Federal Indian law where the holding depended exclusively on statutory or treaty interpretation.[15] Yet, in that time period, only four cases discussed the Indian ambiguity canon, and only one invoked it in its holding.[16] Professor Matthew Fletcher recently spoke on this state of affairs:

> The reality is that when it comes to interpreting Indian affairs statutes, the judiciary too often treats these canons as voluntary. And if a court relies on these canons, they often do so in support of an outcome favoring tribal interests reached on other grounds, sort of like frosting on top.[17]

This Article analyzes some of these twenty-six Supreme Court cases to understand the reasons for the Court's reluctance to invoke the Indian ambiguity canon, including the interconnection between the canon and textualism—the ascendant interpretive methodology.[18]

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11. *Id.*

12. The term "liberally construed" should be understood to mean that the statute should be interpreted broadly to fully effectuate its purpose.

13. Although, as noted by Professor Richard Collins, this is not always the case. *See* Richard Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 2 (2013) ("[T]he Supreme Court has ignored the canon in recent rulings . . . ."); *see also* South Dakota v. Bourland, 508 U.S. 679 (1993).

14. As the Court recently stated: "The baseline position, we have often held, is tribal immunity; and '[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose.'" Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (quoting C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411, 418 (2001)) (alterations in original).

15. *See* Alexander T. Skibine, *The Supreme Court's Last Thirty Years of Federal Indian Law: Looking for Equilibrium or Supremacy*, 8 COLUM. J. RACE & L. 277 (2018). Not taken into account are cases involving the Indian preemption doctrine discussing whether federal law has preempted state jurisdiction in Indian Country or the cases involving divestment of tribal jurisdiction over non-members. These cases are not included because they were not decided exclusively on statutory grounds, although statutory and treaty construction was, obviously, a factor. *See* Collins, *supra* note 13, at 50–55; *see also* Frickey, *supra* note 2, at 1160–66.

16. The cases are Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992), Negonsott v. Samuels, 507 U.S. 99 (1993), Chickasaw Nation v. United States, 534 U.S. 84 (2001), and Carcieri v. Salazar, 555 U.S. 379 (2009).

17. Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 138 (2020).

18. For the ascendancy of textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). For textualist methodology, see John F. Manning, *Second Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

There is no question that one of the reasons for the Court's failure to invoke the Indian ambiguity canon is that it can be easily avoided by finding no ambiguity in the statute.[19] Thus, it may be that judges who are faithful to textualism, which focuses on the statutory text and the plain meaning of the words, are less likely to find ambiguities in statutes.[20]

Some scholars have correctly noted that there is no current test for determining whether an ambiguity exists.[21] The problem created by this lack of agreement on what constitutes an ambiguity could have been partially attenuated if the courts had more scrupulously applied the "liberally construed" requirement or the tribal sovereignty canon. But the Court basically ignores these two rules of construction. This Article argues that although there may be a pragmatic reason for treating sovereign immunity differently than other interferences with tribal sovereignty, in that "sovereign immunity" is a discrete and well-defined area while tribal sovereignty is not, there are no normative reasons for doing so. In other words, congressional intent to interfere with tribal sovereignty should also be, in the words of the *Santa Clara* Court, "unequivocally expressed." The difference between "clear indication" and "unequivocal expression" may sound like a matter of semantics, but the fact remains that the tribal sovereign immunity canon is being applied while the tribal sovereignty canon is not.[22] If there is a difference, it may be that "unequivocal expression" of congressional intent has more of a textualist bent than "clear indication"—theoretically, looking for "unequivocal expression" will make judges focus on the text of the statute, and not on extratextual material, to find

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19. *See* discussion *infra* Subsection I.B.3.

20. Justice Scalia, when speaking of another doctrine that also requires a finding of ambiguity before application, reflected:

> How clear is clear? . . . In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron*. . . . The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21. In the same article, Scalia continued: "Contrariwise, one who abhors a 'plain meaning' rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of 'reasonable' interpretation." *Id.* at 521.

21. *See* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity in the Administrative State*, 69 MD. L. REV. 791, 794–95, 799–800 (2010).

22. *See* discussion *infra* Section II.C.

such clear indication of congressional intent to abrogate tribal sovereign rights.

Part I begins by explaining why the Indian canons are normative canons that should be applied in the interpretation of statutes enacted for the benefit or regulation of Indians. Next, this Article surveys Supreme Court cases decided on statutory or treaty interpretation grounds since 1987. After arguing that the reservation disestablishment cases should be considered treaty abrogation cases, this Part concludes by identifying some of the cases that should have been decided differently had the Court applied the Indian ambiguity canon.

In Part II, this Article delves into the textualist perspective on applying substantive canons. This theme was more recently taken up by Justice Kavanaugh in an article written before he joined the Court.[23] Justice Kavanaugh argued that judges should, as much as possible, shy away from making determinations that statutes are ambiguous because a finding of ambiguity allows judges to "resort to a variety of canons of construction," which Kavanaugh finds troubling.[24] Coincidentally, the idea that textualist judges should be reluctant to use "substantive" or "normative" canons was also considered by another future Supreme Court Justice, Amy Coney Barrett. In a 2010 article, she explained that textualist judges are reluctant to use these substantive canons because they conflict with the role of judges as "faithful agents" of the legislature by reflecting extratextual norms which the drafters of the legislation were not likely considering.[25] This Article explains why, when it comes to the Indian canons, such reluctance is misplaced. I argue that the Indian canons have constitutional roots, and that their legitimacy is similar to that of federalist canons.[26]

Finally, I present an argument that the test applicable to abrogation of tribal sovereign immunity should be applicable to any statute abrogating tribal sovereign rights. This Article concludes by discussing the limits of the Indian canons' applicability.

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23. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

24. *Id*. at 2134–35.

25. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

26. In a noted article, Professors Eskridge and Frickey identified five such federalist canons: "1. Rule Against Federal Conditions on State Administration of Federal/State Programs with Federal Funding," "2. Super-Strong Rule Against Congressional Waiver of States' Eleventh Amendment Immunity from Suit in Federal Court," "3. Super-Strong Rule Against Congressional Regulation of Core State Functions," "4. Presumption Against Statutory Regulation of Intergovernmental Taxation," and "5. Presumption Against Applicability of Federal Statutes to State and Local Political Processes." *See* Eskridge & Frickey, *supra* note 5, at 619–28.

I. THE INDIAN CANONS OF STATUTORY CONSTRUCTION

A. *Background Principles and Normative Reasons for the Indian Canons*

Whether one is a textualist looking for the meaning of a text or a purposivist/intentionalist looking for the purpose or intent behind Congress's words,[27] courts use canons of statutory construction to resolve ambiguities in statutory text.[28] Substantive or normative canons create background norms to help the interpreter decide the meaning that the words of a statute should be given.[29] As Professor Frickey noted, normative canons "go outside the document and create an exception to the basic interpretive approach for cases that implicate certain important values. In most instances, these policy-based canons operate either as tiebreakers at the end of the basic interpretive analysis or as rebuttable presumptions at the outset of the interpretive process."[30]

The first Indian canons were developed in connection with interpreting treaties between the United States and Indian nations.[31] According to Professor Frickey, Justice Marshall in *Worcester v. Georgia* grounded the Court's interpretation of the treaty with the Cherokees in the value of structural sovereignty, viewing the Cherokee treaties as organic documents integrating Cherokee Nation into the United States as domestic but still sovereign nations.[32] The major issue in *Worcester* was the validity of Georgia's claim that it could assert jurisdiction over Cherokee territory given that the Cherokee Nation had, in treaties with the United States, ceded all of its sovereignty.[33] The Court refused to allow Georgia jurisdiction, holding that the Cherokee Nation was still a

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27. As stated by now-Justice Coney Barrett: "Purposivism, the classical approach to statutory interpretation, claims that a judge should be faithful to Congress's presumed intent rather than to the statutory text when the two appear to diverge. Textualism, by contrast, maintains that the statutory text is the only reliable indication of congressional intent." Coney Barrett, *supra* note 25, at 112. *See generally* John F. Manning, *What Divides Textualist from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

28. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 11–14 (2016).

29. *Id.* at 14–17.

30. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 414 (1993).

31. The first canons of Indian treaty interpretations were developed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

32. *See* Frickey, *supra* note 30, at 408–11.

33. *Worcester*, 31 U.S. (6 Pet.) at 553–56 ("This treaty, thus explicitly recognizing the national character of the Cherokees and their right of self-government, thus guarantying their lands, assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.").

sovereign Indian Nation.[34] From that original case, the Court eventually adopted the rule that treaty terms had to be construed the way the Indians would have naturally understood them at the time of the signing.[35] As recently stated by the Court, Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians."[36]

Although *Worcester* involved the interpretation of a treaty, the Court in *Choate v. Trapp* extended *Worcester*'s reasoning to the interpretation of statutes enacted specifically for the benefit of Indians.[37] The issue in *Choate*—whether the State of Oklahoma could tax Indian lands—required resolving ambiguity that derived from two apparently conflicting statutes.[38] Acknowledging the "general rule that tax exemptions are to be strictly construed," the Court nevertheless ruled in favor of the Indians because

> in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation.[39]

The *Choate* Court claimed that "[t]his rule of construction has been recognized, without exception, for more than a hundred years," although it did not provide any citations for this claim.[40] While *Choate* and other early cases relied on similarly outdated "weak and defenseless" wording to justify the canon, the Court eventually used the same kind of reasoning initially applied to treaty abrogation to make

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34. *Id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .").

35. The first mention that ambiguous provisions should be construed in favor of the Indians was articulated by Justice McLean in *Worcester*, 31 U.S. (6 Pet.) at 582 (McLean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice.").

36. Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019).

37. Choate v. Trapp, 224 U.S. 665, 674–75 (1912).

38. *See id.* at 667–72. The first statute at issue was the Curtis Act of 1898, 30 Stat. 505, which allotted the reservation but imposed many restrictions on the sale of such allotments. The second statute was the Act of May 27, 1908, ch. 199, 35 Stat. 312, which removed many of these restrictions and which the state argued made the land taxable.

39. *Choate*, 224 U.S. at 674–75; *see also* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

40. *Choate*, 224 U.S. at 675.

sure that statutes did not unintentionally abrogate tribal rights in non-treaty interpretation contexts.[41]

In *Montana v. Blackfeet Tribe of Indians*, which concerned whether the State could tax tribal royalties from oil and gas leases under the Indian Mineral Leasing Act of 1938, the State invoked the presumption against implied repeals to argue that its taxation power remained intact.[42] The Court disagreed, finding:

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."[43]

A few years later, in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Court followed the *Blackfeet* canon, finding: "When we are faced with two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"[44]

In an article written before she joined the Supreme Court, Justice Coney Barrett mentioned that although the Indian ambiguity canon started with interpreting Indian treaties, it migrated to interpreting statutes without any real explanation.[45] She noted that only one lower court at the time had stated that the treaty rule became applicable to statutes because Congress stopped making treaties with Indian tribes and instead started regulating them through statutes.[46] Although she cited to Professor Frickey's scholarship in this area, Justice Coney Barrett attributed the origin of the Indian ambiguity canon of treaty interpretation to contract law principles under which the benefit of the doubt is given to the less sophisticated party.[47] In effect, Professor Frickey reached the opposite conclusion, stating that "[a] theory of

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41. *See* Frickey, *supra* note 30, at 416–17; *see also* Collins, *supra* note 13, at 21–25; 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, 538–43 (2004).

42. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); 25 U.S.C §§ 396a–396g.

43. *Blackfeet Tribe*, 471 U.S. at 766 (quoting Cnty. of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985)). On the trust relationship, see *infra* Section II.B.

44. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (alteration in original).

45. Coney Barrett, *supra* note 25, at 151–52.

46. *Id.* (citing Conway v. United States, 149 F. 261, 265–66 (C.C.D. Neb. 1907)).

47. *Cnty. of Yakima*, 502 U.S. at 152.

sovereignty, then, rather than contract, better explains Chief Justice Marshall's interpretation in *Worcester*."[48] Although sovereignty may better explain Marshall's theory, contract interpretation theory can also provide theoretical justifications for the Indian ambiguity canon.[49]

This Article endorses Professor Frickey's argument that Marshall's treaty interpretation methodology was similar to constitutional interpretation because Chief Justice Marshall considered the treaties as documents incorporating Indian tribes into the U.S. political system.[50] The objection could be raised, however, that while treaties are documents of incorporation, statutes are not, so the rules of interpretation applying to treaties should not apply to Indian statutes. Yet, as Justice O'Connor noted:

> "rooted in the unique trust relationship between the United States and the Indians," the Indian canon presumes congressional intent to assist its wards to overcome the disadvantages our country has placed upon them. Consistent with this purpose, the Indian canon applies to statutes as well as treaties: The form of the enactment does not change the presumption.[51]

The Indian ambiguity canon of statutory construction can be considered a normative canon because it is "rooted in the unique trust relationship between the United States and the Indians."[52] This canon recognizes that the trust relationship constitutes a background norm that should be respected when interpreting statutes enacted pursuant to Congress's role as trustee for the tribes. Most scholars agree that the first official indication of the existence of a trust relationship with Indian nations was Chief Justice Marshall's famous description of the federal-tribal relationship in *Cherokee Nation v. Georgia* as being akin to that of a guardian to its ward.[53]

Thus, if the purpose of using a canon is to determine what Congress meant when it used particular words or phrasing in a statute, the Indian ambiguity canon fulfills this function by presuming that when Congress enacts statutes for the benefit of Indians, it acts pursuant to the trust relationship and would not want a statute to be construed to the detriment of Indian tribes. In that manner, applying the Indian

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48. Frickey, *supra* note 30, at 407.

49. *See* Collins, *supra* note 13, at 5–9.

50. *Id.* at 408–11. For an argument that interpreting treaties the way Indians would have understood them at the time of the signing conforms to originalist theories of constitutional interpretation, see Jacob Schuman, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1115–19 (2013).

51. Chickasaw Nation v. United States, 534 U.S. 84, 99–100 (2001) (O'Connor, J., dissenting).

52. *Id.*

53. Cherokee Nation v. Georgia, 30 U.S. 1, 2(1831).

ambiguity canon is necessary to the Court's role as a "faithful agent" of Congress.[54] Thus, when Congress is acting pursuant to the trust relationship in enacting Indian-related legislation, it would naturally expect the statute to be interpreted to the benefit of the Indians.

Scholars have proposed other arguments concerning the normativity of the Indian canons. Professor Richard Collins, for instance, justified the Indian statutory canons on a theory of democratic deficit, arguing:

> Democratic deficit is a strong reason for courts to insist that Congress spell out legislative impairments of Indian rights . . . during most of our history, Congress acted with virtually no Indian influence and often in response to Indians' powerful enemies. Thus, when courts interpret statutes adopted under those conditions, the democratic deficit ought to support a strong statutory canon.[55]

Professor David Williams, on the other hand, tied statutory interpretation in Indian cases to the fact that Indian tribes never consented to come under the plenary power of Congress, stating "[e]ven if the courts accept congressional power as a brute fact imposed on them by the Constitution or institutional necessity, they must still seek a reason justifying that power in order to provide themselves with a lodestar to guide interpretation."[56] Although many scholars view the trust doctrine as beneficial to Indian nations,[57] it has had a complicated and mixed history. Although the doctrine can be a source of protection and duties owed by the United States to Indian nations, it was also, at some point in time, viewed as a source of federal power allowing the United States to exercise plenary governmental control over Indian tribes.[58]

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54. On courts being the faithful agents of Congress, see generally Coney Barrett, *supra* note 25, at 112 ("The view that federal courts function as the faithful agents of Congress is a conventional one. Throughout most of the twentieth century, participants in debates about statutory interpretation largely subscribed to it; the disputes centered around how best to implement it. The rival theories in this regard were—and remain—purposivism and textualism.").

55. *See* Collins, *supra* note 13, at 25–26.

56. *See* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 415 (1994).

57. *See, e.g.*, Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century* (Rocky Mountain Min. L. Found., Working Paper No. 13A, 2005).

58. Thus, in *United States v. Kagama*, 118 U.S. 375 (1886), the Court held that the United States could assert criminal jurisdiction over crimes committed among tribal members and famously declared "[t]he power of the [g]eneral [g]overnment over these remnants of a race once powerful . . . is necessary to their protection. . . . It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the

As explained in Part II, this Article takes the position that the Indian canons of construction are constitutionally based because the trust relationship has constitutional roots.

B. *The Court's Modern Treaty and Statutory Interpretation Cases*

1. The Treaty Cases

There are two types of treaty cases: treaty interpretation cases and treaty abrogation cases.[59] Treaty abrogation cases are controlled by the test enunciated in *United States v. Dion*.[60] The issue in *Dion* was whether an Act of Congress, the Eagle Protection Act, abrogated the treaty hunting rights of a Sioux tribe on its reservation.[61] In holding that the treaty right was abrogated, the Court articulated a test requiring clear evidence that Congress actually considered the treaty right in question and opted to abrogate or modify it.[62] In *Dion*, such clear evidence was "strongly suggested on the face of the Eagle Protection Act" since there was a provision allowing Indians to take eagles for religious purposes pursuant to a federally issued permit.[63] Although the Court relied on legislative history only to support its textual interpretation, it unfortunately prefaced its clear evidence of congressional consideration test by announcing in dicta that "where the evidence of congressional intent to abrogate is sufficiently compelling, the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute."[64]

Tribal interests won four treaty cases decided in the last thirty years, all in 5-4 decisions.[65] The tribal position lost one case, *South Dakota v. Bourland*, a treaty abrogation case involving a tribal attempt to control non-members hunting and fishing within the exterior

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United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* at 384–85.

59. Treaty abrogation cases involve interpreting whether subsequent Acts of Congress modified or terminated a treaty right. Treaty interpretation cases involve interpreting the words of a treaty.

60. United States v. Dion, 476 U.S. 734 (1986).

61. *Id.* at 734–36.

62. *Id.* at 738–40. There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740.

63. *Id.* at 740.

64. *Id.* at 734, 739.

65. Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999); Herrera v. Wyoming, 139 S. Ct 1686 (2019); Wash. State Dep't of Licensing v. Cougar Den, 139 S. Ct. 1000 (2019); Idaho v. United States, 533 U.S. 262 (2001).

boundaries of the reservation.[66] The issue in *Bourland* was whether the Cheyenne River Sioux Tribe preserved its treaty right to exclude non-members on land that was within the reservation but taken by the federal government for a dam and reservoir project.[67] In an opinion authored by Justice Thomas, the Court held that the Tribe's treaty right to exclude non-members from the reservation, implicit in its rights of "absolute and undisturbed use and occupation" of such lands, as well as its derivative right to regulate non-members while on these lands, was implicitly abrogated when the United States took the lands from the Tribe, assumed control over such lands, and opened them for general public use.[68]

Justice Thomas insisted that his analysis was not in conflict with *Dion*.[69] Thomas concluded, however, that he could only explain the relevant provisions of the Cheyenne River Act and the Flood Control Act as "indications that Congress sought to divest the Tribe of its right to 'absolute use and occupation.'"[70] That conclusion was strongly objected to by the dissent, which stated that the majority "points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land."[71] The dissent also remarked that although the Court acknowledged the application of cases like *Dion* to the instant case, "the majority adopts precisely the sort of reasoning-by-implication that those cases reject."[72]

In *Minnesota v. Mille Lacs Band of Chippewa*, one important issue was whether certain hunting, fishing, and gathering rights, guaranteed to the Chippewas in an 1837 treaty, were terminated by an 1850 Executive Order, by a subsequent treaty signed with the Tribe in 1855, or by Minnesota entering the Union in 1858.[73] The Court ruled that none of these actions abrogated or terminated the Tribe's treaty rights.[74] The Court followed *Dion* and held there was no "clear evidence that Congress actually considered the conflict between its intended action

66. South Dakota v. Bourland, 508 U.S. 679, 681–82, 693-94 (1993).

67. *Id.*

68. *Id.* at 690.

69. *Id.* at 693–94.

70. *Bourland*, 508 U.S. at 693. The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified as amended in scattered sections of 16 U.S.C.), authorized the establishment of a comprehensive flood control plan along the Missouri River. In the 1954 Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191, the Tribe ceded 104,420 acres of former trust land to the United States for implementation of a flood control project authorized under the Flood Control Act.

71. *Bourland*, 508 U.S. at 700 (Blackmun, J. & Souter, J., dissenting).

72. *Id.*

73. Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172, 175–76 (1999).

74. *Id.* at 176 ("After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.").

on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[75]

Herrera v. Wyoming was both a treaty abrogation and a treaty interpretation case.[76] Concerning treaty abrogation, the major issue was whether Congress intended to end the Crow Tribe's hunting rights, guaranteed in a 1868 Treaty, by enacting the Wyoming Statehood Act.[77] The treaty had a clause authorizing tribal members to continue hunting "on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts."[78] The Court noted that the Wyoming Statehood Act made no mention of Indian treaty rights and provided no clue that Congress considered the Tribe's rights and decided to abrogate them when enacting the law.[79] As the Court put it, "[t]here simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the 'clear evidence' this Court's precedent requires."[80] In other words, the Court again performed a straightforward application of the *Dion* test.

On the treaty interpretation matter, the issue was whether the Crow Tribe, at the time of signing the treaty, understood the 1868 treaty to expire at statehood.[81] Taking the position that a treaty is a contract between two sovereign nations, the Court stated that Indian treaties "'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians'[82] . . . and the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'"[83] The Court concluded that there was nothing in the text of the 1868 Treaty with the Crow Tribe that even suggested that the parties intended the hunting right to expire at statehood.[84]

Washington State Department of Licensing v. Cougar Den was another 5-4 decision, this one involving a matter of treaty interpretation.[85] The issue was whether the State could impose on Cougar Den, a Yakama tribal entity, a fuel tax levied and imposed upon motor vehicle fuel

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75. *Id.* at 202–03 (quoting United States v. Dion, 476 U.S. 734, 740 (1986)).

76. Herrera v. Wyoming, 139 S. Ct 1686 (2019).

77. *Id.* at 1691–92.

78. Treaty Between the United States and the Crow Tribe of Indians, Crow-U.S., art. 6, May 7, 1868, 15 Stat. 649, 650; 25 U.S.C.A. §§ 348, 381.

79. *Herrera*, 139 S. Ct. at 1698.

80. *Id.* at 1698–99.

81. *Id.* at 1699–1700.

82. *Id.* at 1699 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999)).

83. *Id.* at 1699 (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979), *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979)).

84. *Id.*

85. Wash. State Dep't of Licensing v. Cougar Den, 139 S. Ct. 1000 (2019).

licensees for each gallon of fuel that the licensee brings into the State.[86] Cougar Den argued that the state fuel tax was preempted by a clause in the Yakama Treaty of 1855 that reserved for tribal members "the right, in common with citizens of the United States, to travel upon all public highways."[87]

In upholding Cougar Den's claim, Justice Gorsuch, in concurrence, followed the Indian canons of treaty interpretation, stating "[w]hen we're dealing with a tribal treaty, too, we must 'give effect to the terms as the Indians themselves would have understood them.'"[88] Gorsuch then gave his reasons for applying the canon, noting that it was the United States who wrote this "contract," and any ambiguities in contracts are usually construed against the drafter.[89]

There was one unusual case decided in 2001 that fell in between treaty and statutory interpretation. The issue in *Idaho v. United States* was whether the United States intended the land underneath Lake Coeur d'Alene to transfer to the State of Idaho upon statehood.[90] Pursuant to former "agreements" with the Lac Coeur d'Alene Tribe, the lake was originally included as part of the tribal reservation.[91] Because the case involved land underneath navigable waters, which are presumed to transfer to the state upon statehood, slightly different rules of interpretation applied.[92] Thus, the Court in this 5-4 decision never mentioned any canons in favor of Indians or brought in rules of treaty interpretation and instead found:

> The issue of congressional intent is refined somewhat when submerged lands are located within a tract that the National Government has dealt with in some special way before statehood, as by reserving lands for a particular national purpose such as a wildlife refuge or, as here, an Indian reservation. Because reserving submerged lands does not necessarily imply the intent "to defeat a future State's title to the land," we undertake a two-step enquiry in reservation cases. We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether

86. *Id.* at 1006.

87. Treaty Between the United States and the Yakama Nation of Indians, Yakima-U.S., June 9, 1855, 12 Stat. 951, 953.

88. *Cougar Den*, 139 S. Ct. at 1116 (Gorsuch, J., concurring) (citation omitted).

89. *Id.* Gorsuch also mentioned: "Nor is there any question that the government employed that power to its advantage in this case. During the negotiations 'English words were translated into Chinook jargon . . . although that was not the primary language' of the Tribe. After the parties reached agreement, the U.S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write." *Id.* (Gorsuch, J., concurring) (citation omitted).

90. Idaho v. United States, 533 U.S. 262, 278–81 (2001).

91. *Id.* at 266.

92. *Id.* at 273–74.

> Congress intended to defeat the future State's title to the submerged lands.[93]

In the end, the Court found that Congress never intended to modify the agreement negotiated with the Tribe, stating that "[a]ny imputation to Congress either of bad faith or of secrecy in dropping its express objective of consensual dealing with the Tribe is at odds with the evidence."[94]

Except for *Bourland*, the tribes won all these treaty or quasi-treaty cases, and the Court faithfully applied the appropriate canons. This was not always true for the types of cases analyzed in the next Subsection of this Article.

2. The Reservation Disestablishment Cases: Treaty Abrogation Cases or Something Else?

The following cases ask whether subsequent legislation enacted pursuant to the General Allotment Act of 1884,[95] and allowing non-Indians to purchase "surplus" land within an allotted Indian reservation,[96] disestablished the borders of the reservations at issue.[97] There have been four of these cases since 1987: *Hagen v. Utah*,[98] *South Dakota v. Yankton Sioux Tribe*,[99] *Nebraska v. Parker*,[100] *and McGirt v. Oklahoma*.[101] Officially, all four cases applied the test the Court established in *Solem v. Bartlett*.[102] The issue in *Solem* was whether South Dakota had jurisdiction over a crime committed by a tribal member on land within the exterior boundaries of a reservation created under a treaty with the Cheyenne River Sioux.[103] South Dakota argued that the treaty reservation was disestablished, and therefore the State, and not

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93. *Id.* at 280.
94. *Id.* at 281.
95. General Allotment Act of 1884, Pub. L. No. 49-105, 24 Stat. 388 (1887).
96. Under the General Allotment Act, tribal members surrendered their undivided interests in tribally owned lands and in return received an individual allotment of a certain acreage, usually around eighty acres, which would be held in trust by the United States for the benefit of that individual Indian. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1, 9–10 (1995). The goal of the Allotment policy was to transform Indians into farmers. *Id.* at 6–7.
97. In almost all cases, substantial tribal land remained unallotted after each tribal member had received their allotment. *See id.* at 13–14. Usually, these lands were declared surplus and opened for sale to non-Indians. *Id.*
98. Hagen v. Utah, 510 U.S. 399 (1994).
99. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
100. Nebraska v. Parker, 577 U.S. 481 (2016).
101. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).
102. Solem v. Bartlett, 465 U.S. 463 (1984).
103. *Id.* at 465–66.

the federal government or the tribe, had jurisdiction over the crime.[104] The Court held that the reservation was not diminished, and therefore the State had no jurisdiction.[105] The Court in *Solem* declared that "[d]iminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found."[106]

Although the Court seemed to adopt a "clear evidence of congressional intent" test similar to the one the Court would adopt in *Dion* a couple years later,[107] that was far from the reality. Under *Solem*, If the words of the statute failed to demonstrate such clear intent, a court could also look at events surrounding the passage of the Act to see if they "unequivocally reveal a widely held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[108] If "contemporaneous events" were not enough to reveal a clear indication of congressional intent, a court could analyze "events that occurred after the passage of a surplus land Act to decipher congressional intent."[109] Finally, if these "subsequent events" did not show clear congressional intent, a court could look at "who actually moved onto opened reservation lands" since this "is also relevant in deciding whether a surplus land act diminished a reservation."[110]

Among the four cases, *Yankton* was the only one that mentioned *Dion* but did not elaborate further.[111] Nor did it follow *Dion*'s methodology. In *Yankton*, the Yankton tribe was attempting to regulate a solid waste disposal facility owned by a non-Indian.[112] The non-Indian argued that the tribe did not have jurisdiction because the waste facility was not within the reservation.[113] The Court agreed, finding that congressional intent to diminish the part of the reservation where the facility was located was clear from the "plain statutory language."[114] Key to the Court's finding of clarity was that the legislation provided that the Tribe shall "cede, sell, relinquish, and convey to the United States all

104. *Id.* at 464–65.
105. *Id.* at 481.
106. *Id.* at 470.
107. United States v. Dion, 476 U.S. 734 (1986).
108. *Solem*, 465 U.S. at 471.
109. *Id.*
110. *Id.*
111. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 ("Only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be 'clear and plain.'" (citing United States v. Dion, 476 U.S. 734, 738–39 (1986))).
112. *Id.*, 522 U.S. at 340–41.
113. *Id.* at 340.
114. *Id.* at 351.

their claim, right, and interest to all the unallotted lands within the limits of the reservation" for a sum of $600,000.[115]

In *Hagen*, the State of Utah was trying to prosecute an Indian for distributing a controlled substance.[116] The Indian argued that the State had no jurisdiction over him because the crime was committed within the reservation.[117] The Court disagreed, finding that the part of the reservation at issue had been disestablished.[118] Just as in *Yankton*, the Court found clear indication of congressional intent because the statute at issue used certain key words, such as having the lands relinquished by the Tribe "restored to the public domain."[119] The *Hagen* dissent eloquently summarized the applicable law in disagreeing with the majority's methodology:

> Two rules of construction govern our interpretation of Indian surplus-land statutes: we must find clear and unequivocal evidence of congressional intent to reduce reservation boundaries, and ambiguities must be construed broadly in favor of the Indians. . . . In diminishment cases, the rule that "legal ambiguities are resolved to the benefit of the Indians" also must be given "the broadest possible scope". . . . Although the majority purports to apply these canons in principle, it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.[120]

Both *Hagen* and *Yankton* claimed to look for clear evidence of congressional intent but found such clarity by arbitrarily claiming that some "magic words" such as "cede, sell, and relinquish" or "lands returned to the public domain" were code for "the reservation is hereby diminished, reduced, or terminated."

Parker and *McGirt*, both finding no disestablishment, could be interpreted as moving away from the *Solem* methodology, although both pretended to follow it.[121] Professor Matthew Fletcher noted that

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115. *Id.* at 344.
116. Hagen v. Utah, 510 U.S. 399, 408 (1994).
117. *Id.*
118. *Id.* at 421–22.
119. *Id.* at 414–15.
120. *Id.* at 422–24 (Blackmun, J., dissenting).
121. In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the majority opinion referred approvingly to *Solem* no less than seven times. In *Nebraska v. Parker*, 577 U.S. 481 (2016), the Court cited to *Solem* when it stated that "[t]he framework we employ to determine whether an Indian reservation has been diminished is well settled." *Id.* at 487.

Parker reflected closer fidelity to textualism by engaging only with the text of the statutes and putting "an end to much of that nonsense" that had been generated under the *Solem* extratextual methodology.[122] Indeed, in *Parker*, Justice Thomas rejected sole reliance on extratextual materials in federal cases, stating that while the Court could consider such treatment, "[o]ur cases suggest that such evidence might 'reinforc[e]' a finding of diminishment or nondiminishment based on the text. . . . But this Court has never relied solely on this third consideration to find diminishment."[123] As to the subsequent demographic history of the reservation, Thomas concluded that it "cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history."[124]

McGirt v. Oklahoma continued the trend away from the *Solem* methodology.[125] Justice Gorsuch for the majority reaffirmed *Parker*'s position that extratextual evidence could not be conclusive when it came to holding a reservation was disestablished, stating:

> To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning.[126]

Nor are there any past Supreme Court cases that support the State's position in *McGirt*.[127]

While both *Parker* and *McGirt* can be viewed as decisions applying textualism to the tribes' advantage, the disestablishment cases should have been viewed as treaty abrogation cases from the beginning, and

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122. Fletcher, *supra* note 17, at 121–22.

123. *Parker*, 577 U.S. at 492 (alterations in original).

124. *Id.* at 493.

125. As the *McGirt* dissenters stated: "Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional 'intent,' but the Court then declines to examine the categories of evidence that our precedents demand we consider." *McGirt*, 140 S. Ct. at 2486–87 (internal citation omitted). For a thorough background, analysis, and discussion of the case's consequences, see Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, B.U. L. REV. (forthcoming 2021).

126. *McGirt*, 140 S. Ct. at 2469.

127. *Id.* at 2470 ("Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others.").

not just as statutory interpretation cases, as these cases all involve disestablishment of treaty-created reservations. As with treaty abrogation, statutes affecting reservation boundaries should require clear evidence that Congress actually considered modifying the original reservation boundaries and opted to diminish the reservation. In effect, *Parker* and *McGir*t can be viewed as cases re-establishing *Dion*—instead of *Solem*—as the controlling authority, with the important caveat that both *Parker* and *McGirt* disregarded *Dion*'s dicta that clear evidence of actual consideration could also be derived from legislative history and surrounding circumstances.[128]

The reason for the initial error in not considering such cases treaty abrogation cases could be traced to the fact that although many reservations were established by treaties, the statutes opening the reservations to non-Indians did not "directly" abrogate treaties, because the treaty-established borders had already been modified by other Acts of Congress that reduced the original size of the treaty reservations. These Acts of Congress were in turn further modified by subsequent legislation opening up the reservations for non-Indian settlement pursuant to the General Allotment Act of 1887.[129]

For instance, the first two cases considering disestablishment were non-treaty cases, in that the reservations were established by acts of Congress and not by treaties.[130] The third case, *DeCoteau v. District Court*, was different in that even though the original reservation was set up by treaty, the Act held to disestablish the reservation was enacted to implement an 1889 agreement with the Tribe.[131] The Court mentioned the Indian canon under which "legal ambiguities are resolved to the benefit of the Indians,"[132] but not the treaty abrogation canon requiring clear evidence of actual consideration to abrogate the treaty.

The fourth case, *Rosebud Sioux Tribe v. Kneip*, also involved amendments to the 1889 Act,[133] even though the reservation of the Rosebud Sioux was originally established in an 1868 treaty.[134] Justice Rehnquist, speaking for the Court, noted that the resolution of the case hinged on congressional intent, but that such intent can be derived from "'the face of the Act,' the 'surrounding circumstances,' and the

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128. *See supra* notes 60–64 and accompanying text.

129. 25 U.S.C. § 331 (1887).

130. *See* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 354 (1962) (noting that the reservation was created by an Executive Order in 1872); *see also* Mattz v. Arnett, 412 U.S. 481, 485–87 (1973) (noting that Congress authorized the President to create the reservation by the Act of March 3, 1853, ch. 104, 10 Stat. 238, and that the President issued his order creating the reservation on November 16, 1855).

131. DeCoteau v. District Cnty. Ct. for the Tenth Jud. Dist., 420 U.S. 425, 445 (1975).

132. *Id.* at 447.

133. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 585–86 (1977).

134. Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 635.3.

'legislative history.'"[135] Although Rehnquist found such clear evidence of congressional intent to disestablish the reservation, the dissent criticized the majority, noting that the Court held the reservation disestablished "when the evidence concerning congressional intent is palpably ambiguous."[136]

In conclusion, it seems that the *Solem* methodology was in effect not applied in *Parker* and *McGirt*. Both cases emphasized finding clear evidence of congressional intent from the text of the statutes and not from extratextual evidence.

3. Non-Treaty Cases Mentioning the Indian Ambiguity Canon

Although there are four cases mentioning the Indian ambiguity canon, only one, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, actually applied the canon.[137] Another mentioned it, but only for the purpose of discarding it.[138] The other two cases involved dissenting opinions.[139]

County of Yakima involved state taxation of land inside the Yakima Indian reservation that had been initially assigned to individual Indians during the Allotment process but was subsequently taken out of trust status and now owned in fee simple.[140] The Court, per Justice Scalia, held that while the General Allotment Act permitted the County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act, it did not allow the County to enforce its excise tax on sales of such land.[141] On that issue, the Court noted that while "taxation of land" could be construed to include "taxation of the proceeds from sale of land," this was not the phrase's "unambiguous meaning."[142] Finding ambiguity, the Court said that "[w]hen we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"[143]

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135. *Rosebud*, 430 U.S. at 587.

136. *Id.* at 618.

137. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

138. Negonsott v. Samuels, 507 U.S. 99, 110 (1993).

139. Chickasaw Nation v. United States, 534 U.S. 84 (2001); Carcieri v. Salazar, 555 U.S. 379 (2009).

140. *Cnty. of Yakima*, 502 U.S. at 253–54.

141. *Id.* at 268–70.

142. *Id.* at 268–269. The Court remarked that it had once before taken the position that "a tax upon the sale of property is not a tax upon the subject matter of that sale." *Id.* (citing Mahler v. Tremper, 243 P.2d 627, 629 (1952)).

143. *Cnty. of Yakima*, 502 U.S. at 269 (alteration in original).

The *County of Yakima* Court did not consider the Indian ambiguity canon when it came to taxation of the land itself, because the Indian General Allotment Act authorized taxation of fee-patented land, and such taxing power was explicitly confirmed in the 1906 Burke Act which amended the General Allotment Act.[144] The Burke Act provided that upon issuance of the fee patent by the Secretary of the Interior, all restrictions as to taxation of said land shall be removed.[145] Thus, the Court found unmistakably clear expression of congressional intent to authorize state taxation of Indian lands.[146]

Justice Blackmun disagreed with that part of the majority opinion, arguing: "To be sure, the proviso could be read to suggest that Congress *possibly* intended taxation of allotted lands other than those lands patented prematurely. But a possibility, or even a likelihood, does not meet this Court's demanding standard of 'unmistakably clear' intent."[147]

In *Negonsott v. Samuels*, a tribal member accused of a crime argued that a federal law did not give the State of Kansas jurisdiction over reservation Indians and that any ambiguity in the legislation should be resolved in his favor.[148] The Court rejected his argument. Concerning the Indian ambiguity canon, the Court said:

> It is not entirely clear to us that the Kansas Act is a statute "passed for the benefit of dependent Indian tribes." But if it does fall into that category. . . . We see no reason to equate "benefit of dependent Indian tribes," . . . with "benefit of accused Indian criminals."[149]

The Court went on to hold that since the statute was unambiguous in conferring Kansas jurisdiction over major offenses committed by or against Indians on Indian reservations, this case did not call for the application of the Indian ambiguity canon of construction.[150]

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144. *Id.* at 263–64 ("[W]hen § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.").

145. *See* Burke Act, ch. 2348, 34 Stat. 182 (1906).

146. *Cnty. of Yakima*, 502 U.S. at 259 ("[W]e agree with the Court of Appeals that by specifically mentioning immunity from land taxation 'as one of the restrictions that would be removed upon conveyance in fee,' Congress in the Burke Act proviso 'manifest[ed] a clear intention to permit the state to tax' such Indian lands."). For a critique of that part of Justice Scalia's opinion, see David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 430–41 (1994).

147. *Cnty. of Yakima*, 502 U.S. at 272.

148. Negonsott v. Samuels, 507 U.S. 99, 101, 110 (1993); *see* 18 U.S.C § 3243.

149. *Negonsott*, 507 U.S. at 110.

150. *Id.*

Another case where the Court discussed the Indian ambiguity canon was *Chickasaw Nation v. United States*.[151] At issue was a provision of the Indian Gaming Regulatory Act, which stated:

> The provisions of [the Internal Revenue Code of 1986] (including . . . chapter 35 of such [Code]) concerning the reporting and withholding of taxes . . . shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations.[152]

The problem was that Chapter 35 did not concern itself with *reporting* or *withholding* taxes but only *imposed* taxes related to gambling while exempting certain state-controlled gambling activities.[153]

The tribes argued that the Indian Gaming Act exempted them from paying those chapter 35 taxes from which states were exempted.[154] The Court disagreed, holding that the tribes' treatment like states ended with "reporting and withholding" activities.[155] Concerning the Indian ambiguity canon, the Court stated:

> The canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. Nor can one say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.[156]

The dissent, authored by Justice O'Connor, agreed that the statute contained some contradictions, but argued that since nothing in the text or legislative history resolved the ambiguity, it was appropriate to invoke the substantive canons of statutory construction.[157] These canons included "the Indian canon that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"[158] She concluded that "because Congress has chosen gaming as a means of enabling the Nations to achieve self-sufficiency, the Indian canon rightly dictates that Congress should be presumed to

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151. *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).
152. 25 U.S.C. § 2719(d)(1).
153. *Chickasaw Nation*, 534 U.S. at 87.
154. *Id.* at 88.
155. *Id.* at 89–90.
156. *Id.* at 95.
157. *Id.* at 96–99.
158. *Id.* at 99.

have intended the Nations to receive more, rather than less, revenue from this enterprise."[159]

Carcieri v. Salazar was another case where the majority purported to find a statute to be unambiguous,[160] while the dissent stated that the Court's "cramped reading of a statute intended to be sweeping in scope . . . ignores the 'principle deeply rooted in [our] Indian jurisprudence' that 'statutes are to be construed liberally in favor of the Indians.'"[161] This case is perhaps the most egregious example among Federal Indian law cases when it comes to arbitrarily declaring that a statute was unambiguously clear, when in fact, it was far from it. At issue in *Carcieri* was whether tribes that were not under federal jurisdiction as of 1934 could still benefit from Section 5 of the Indian Reorganization Act of 1934 (IRA),[162] which allowed the Secretary to take land in trust for Indians or Indian tribes.[163] Section 19 of the IRA defined "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction."[164]

For over fifty years, the Department of the Interior had taken the position that "now under federal jurisdiction" meant that the tribe had to be under federal jurisdiction at the time the land was being transferred in trust to the tribe.[165] The Court disagreed and held that "now" meant as of 1934, the year the Act was enacted into law.[166] This meant that many of today's federally acknowledged or recognized tribes, like the Narragansett Tribe (the applicant for a fee to trust transfer in *Carcieri*), would not qualify for the land transfer because they were not "under federal jurisdiction" as of 1934. In finding the law unambiguous, the Court managed to avoid both the Indian ambiguity canon of statutory construction and the *Chevron* doctrine under which an agency's interpretation of an ambiguous statutory term should be given deference and sustained as long as such interpretation is permissible or reasonable.[167]

Justice Thomas, speaking for the Court, first relied on the ordinary meaning of the word "now."[168] He then mentioned the context of the

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159. *Id.* at 100 (on resolving conflicts between canons); *see also* Hall, *supra* note 41, at 561–63.

160. Carcieri v. Salazar, 555 U.S. 379, 397 (2009) ("We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.").

161. *Id.* at 413–14 (alteration in original) (citations omitted).

162. 25 U.S.C. § 5101.

163. *Carcieri*, 555 U.S. at 381–82.

164. *Id.* at 382.

165. In his dissent, Justice Stevens noted that the Secretary had taken this position since 1937. *See Carcieri*, 555 U.S. at 406–07 (Stevens, J., dissenting).

166. *Id.* at 382–83 (majority opinion).

167. *Id.* at 388–92; *see generally* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

168. *Carcieri*, 555 U.S. at 388.

IRA and thought it very meaningful that in another section of the IRA, Congress had used the words "now existing or established hereafter" when referring to an Indian reservation, yet did not adopt this phrasing in the section authorizing the Secretary to take land into trust for Indians.[169] Finally, he mentioned one departmental letter which indicated that the Executive Department had a different construction of the Act at the time of enactment than it had at the time of the case.[170]

The rest of this Section will explore three cases where there was no discussion of the Indian ambiguity canon but applying the canon would have made a difference.

4. Cases Where the Indian Ambiguity Canon Should Have Been Used

In addition to *Carcieri*, Justice Thomas wrote two other majority opinions that totally ignored the Indian canons. In *Cass County v. Leech Lake Band of Chippewa Indians*, the issue was whether the County could tax fee land owned by tribal members within the Leech Lake Band's reservation.[171] The Leech Lake reservation had been allotted by the Nelson Act of 1889.[172] That Act did not contain any language explicitly authorizing state or local taxation of such allotted lands. Nevertheless, Justice Thomas, writing for a unanimous Court, held that the County could impose the tax because Congress had made its intent to allow such tax "unmistakably clear."[173] Justice Thomas came to this conclusion by interpreting precedents as endorsing the principle that whenever Congress allows Indians to alienate their lands, it corresponds to an explicit endorsement of state taxation of such lands.[174]

One would have expected Thomas, as an avowed textualist, to derive this "unmistakably clear" meaning from the words of the statute or at least from its structure. Instead, his conclusion relied on two cases that dealt with other Acts of Congress: *Goudy v. Meath*, a 1906 case,[175] and *Yakima v. Confederated Tribes*, a 1993 case.[176] Justice Thomas's reasoning can be summarized as follows. First, *Goudy* held that Section

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169. *Id.* at 389–90 (quoting 25 U.S.C. § 468).

170. This 1936 letter mentioned that the term "Indian" referred to all Indians "who are members of any recognized tribe *that was under federal jurisdiction at the date of the Act*." *Carcieri*, 555 U.S. at 390 (quoting Letter from John Collier, Comm'r of Indian Affs., to Superintendents (Mar. 7, 1936)).

171. Cass Cnty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 106 (1998).

172. *See* Nelson Act of 1889, ch. 24, 25 Stat. 642.

173. *See Cass Cnty.*, 524 U.S. at 110–11.

174. *Id.* ("We have determined that Congress has manifested such an intent when it has authorized reservation lands to be allotted in fee to individual Indians, thus making the lands freely alienable and withdrawing them from federal protection.").

175. Goudy v. Meath, 203 U.S. 146 (1906).

176. Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251 (1993).

5 of the General Allotment Act (GAA) allowed state taxation of Indian fee land because of its alienability.[177] Second, in *Yakima*, the Court held that the GAA was amended by the Burke Act to specifically allow state taxation.[178] Therefore, congressional intent to allow similar taxation in the 1889 Nelson Act could be inferred by importing a purpose borrowed from the 1906 Burke Act.[179] As one scholar noted, in his *Cass County* opinion, Thomas the textualist had become Thomas the purposivist.[180] The problem with Thomas's analysis is first, that the *Yakima* Court only found unmistakable intent to allow taxation from the Burke Act.[181] That Act is not applicable in *Cass County*, as the Leech Lake reservation was allotted pursuant to the 1889 Nelson Act.[182] Second, as one federal circuit noted, the *Yakima* Court actually rejected the position adopted in *Goudy* that alienability automatically means taxability.[183]

The last of the three Thomas opinions surveyed in this Subsection also reflects a stubborn refusal to acknowledge ambiguities. The issue in *Alaska v. Native Village of Venetie Tribal Government* was whether the Venetie Indian Community could tax a non-Indian entity for work done on tribal lands.[184] The State argued that because such lands were owned by the tribe in fee simple, they did not qualify as being in "Indian Country" for the purpose of allowing tribal tax jurisdiction over nonmembers.[185] The Court, through Justice Thomas, held that lands set aside for Alaska Natives pursuant to the Alaska Native Claims Settlement Act (ANCSA)[186] could not qualify as "Indian Country" because such lands were not set aside for a "dependent Indian

177. *Cass Cnty.*, 524 U.S. at 112–13.

178. *Id.*

179. *See id.*; Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349).

180. Michael Dorf, Foreword, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 6 n.9 (1998).

181. *Cnty. of Yakima*, 502 U.S. at 264.

182. Cass County v. Leech Lake, 524 U.S. 103, 108.

183. As the Sixth Circuit stated in *United States ex rel. Saginaw Chippewa Tribe v. Michigan*:

> The defendants argue that in *Goudy v. Meath* when faced with a treaty similar to the one in this case that did not explicitly permit taxation, the Supreme Court appears to have held that alienability is tantamount to taxability. As the Ninth Circuit has recognized, however, "[t]his proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." Lummi Indian Tribe v. Whatcom Cty., 5 F.3d 1355, 1358 (9th Cir. 1993). We believe that this doubt by the *Lummi* court is superior to its ultimate holding that alienability implies taxability. The *Yakima* Court chose not to follow Goudy's holding with respect to the taxability of treaty lands. The Ninth Circuit improperly relied on the 1906 *Goudy* decision, instead of following *Yakima*.

United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan, 106 F.3d 130, 134 (6th Cir. 1997), *cert. granted, judgment vacated sub nom.* Michigan v. United States, 524 U.S. 923 (1998).

184. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 525 (1998).

185. *Id.*

186. 43 U.S.C. §§ 1601–1628.

Community" as defined in 18 U.S.C. § 1151.[187] The Court emphasized that to qualify as land set aside for a dependent Indian Community under Section 1151, such lands must be "validly set apart for the use of the Indians as such" and "under the superntendence of the Federal Government."[188] In finding that these lands were not under federal superintendence, Justice Thomas relied heavily on ANCSA's congressional findings, according to which "the [ANCSA] settlement should be accomplished rapidly, with certainty, . . . without establishing any permanent racially defined institutions [and] without creating a reservation system or lengthy wardship or trusteeship."[189] As other scholars have argued, there is nothing in ANCSA indicating that Congress unequivocally intended that these Native fee lands not be considered Indian Country for the purpose of Section 1151.[190] Justice Thomas derived that intent not as much from ANCSA as from his understanding of much older pre-ANCSA cases indicating that all lands set aside for dependent Indian communities had historically been under federal supervision.[191]

The final case where the Indian ambiguity canon should have been used to reach the opposite conclusion is *Adoptive Couple v. Baby Girl*.[192] The major issue was whether the unmarried genetic Indian father of an

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187. The term "Indian Country" as defined in 18 U.S.C. § 1151 was originally codified in 1948. However, the wording is derived primarily from the Indian Major Crimes Act, 18 U.S.C. § 1153, first enacted in 1885. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04(2)(c)(i)–(ii) (2019). Section 1151 now reads:

> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

§ 1151.

188. *Native Vill. of Venetie*, 522 U.S. at 530–32.

189. 43 U.S.C.A. § 1601 (Congressional findings and declaration of policy); *see Native Vill. of Venetie*, 522 U.S. at 532–33.

190. *See* David M. Blurton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 52–53 (1999) ("[ANCSA] does not demonstrate clear congressional intent for the Venetie Tribe's ANCSA lands not to be 'validly set aside for Indians.' As the Court recognized, Congress intended to 'end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy.' However, that does not preclude land from being set aside for Indians in a manner that would reduce federal supervision over Indian affairs.").

191. *See Native Vill. of Venetie*, 522 U.S. at 528–30 (relying on United States v. Sandoval, 231 U.S. 28 (1913); United States v. Pelican, 232 U.S. 442 (1914); and United States v. McGowan, 302 U.S. 535 (1938)).

192. Adoptive Couple v. Baby Girl, 570 U.S. 637, 649 (2013) (noting that the general purpose of the 1978 Indian Child Welfare Act was to prevent the break-up of Indian families through the unwarranted removal of Indian children by over-zealous state social workers).

Indian child could challenge the adoption of his child under Section 1912 (f) and (d) of the Indian Child Welfare Act (ICWA).[193] *Adoptive Couple* should have been a good candidate for applying the Indian ambiguity canon. Yet, in this 5-4 decision, the majority concluded that the "plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context."[194] Section 1912(f) provides that:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[195]

Relying heavily on dictionary definitions of the words "continued custody," the Court held that Section 1912(f) did not apply because the father in this case *never* had custody of the Indian child.[196] The Court also stated that this interpretation conformed with the "primary mischief" the Act was intended to prevent, which was "the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts."[197] The dissent, on the other hand, accused the majority of beginning "its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it."[198] The dissent also criticized the majority for openly professing "its aversion to Congress' explicitly stated purpose in enacting the statute."[199] Justice Sotomayor concluded the dissent by stating that the majority

> asserts baldly that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]' . . . by the termination of the Indian parent's rights." Says who? Certainly not the statute. . . . In the face of these broad definitions, the majority has no warrant to

193. *Id.* at 641; 25 U.S.C. §§ 1901–1963.

194. *Adoptive Couple*, 570 U.S. at 656.

195. *Id.* at 647 (quoting § 1912(f)) (emphasis added).

196. *Adoptive Couple*, 570 U.S. at 647–48.

197. *Id.* at 649. The Court also added that the legislative history of ICWA "further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families." *Id.*

198. *Id.* at 669 (Sotomayor, J., dissenting).

199. *Id.*

> substitute its own policy views for Congress' by saying that "no 'relationship'" exists between Birth Father and Baby Girl.[200]

In conclusion, since 1987, the Indian ambiguity canon of statutory construction, calling for a liberal construction with ambiguities resolved in the Indians' favor, has been mentioned only once in a majority opinion. Yet many cases, including *Chickasaw*, *Carcieri*, *Cass County*, *Venetie*, and *Adoptive Couple*, should have reached contrary results had the Court acknowledged that the statutes involved were ambiguous and applied the Indian ambiguity canon.

II. THE LEGITIMACY OF THE INDIAN CANONS AND THEIR PROPER APPLICATION

In this Part, after first exploring the potential textualist objections to the use of normative canons, I argue that these objections are not legitimate because the Indian canons have a constitutional basis. I then provide arguments to enhance the use of such canons and conclude by discussing the extent of their applicability.

A. *The Textualist Perspective*

This Article has already mentioned how Justice Scalia's unwillingness to find ambiguities has posed a problem for the use of the Indian ambiguity canon.[201] An additional issue is that the first part of the canon calling for statutes to be "liberally" construed is bound to be problematic for a textualist if "liberally" is understood as construing a statute so as to give the maximum effect to the purpose of the statute.[202] Almost by definition, textualists dislike considering a statute's "purpose" in order to derive the meaning of a text. Yet, as Professor John Manning noted, "although textualists find it appropriate in cases of ambiguity to consult a statute's apparent purpose or policy (provided, that it is derived from sources other than legislative history), they resist

200. *Id*. at 675 (second alteration in original) (citations omitted).

201. *See supra* note 20.

202. Black's Law Dictionary defines "liberal construction" as "taking a document's deemed or stated purpose into account when interpreting a document in addition to the actual words and phrases used in it." *Liberal Construction*, BLACK'S LAW DICTIONARY (2d ed. 1910). Lawinsider.com defines liberal construction to mean that a statute is to be given "an expansive meaning to terms and provisions within the statute. The goal of liberal construction is to give full effect in implementing a statute's requirements." *Liberal Construction Definition*, LAWINSIDER.COM, https://www.lawinsider.com/dictionary/liberal-construction [https://perma.cc/6VKV-UBPU] (citing WASH. REV. CODE § 90.58.900 (2021)).

altering a statute's clear semantic import in order to make the text more congruent with its apparent background purpose."[203]

One theme running throughout many of the Indian canons is a search, whether clear or unequivocal, for congressional intent. One could think that this would pose a problem for textualists since they allegedly oppose interpreting statutes by looking for congressional intent.[204] Textualist scholars like John Manning, however, have taken the position that the very concept of legislative intent is just "a metaphor that invites interpreters to think about how to attribute a decision to a complex, multiparty body that does not have a mental state."[205] Although textualists do not believe in an actual or subjective congressional intent, they do believe in "objectified intent," which is "the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words."[206] So, the fact that the Indian canons are phrased in terms of a search for clear or unequivocal congressional intent should not be a problem *per se* for textualists. To the extent that there is a problem, it seems to come from the Justices' reluctance to find ambiguities in cases such as *Carcieri*, *Cass County*, *Venetie*, and *Adoptive Couple*.

Another potential problem for textualists is the use of substantive canons.[207] As Justice Coney Barrett stated in an article written before she joined the Court:

> Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute. Textualists cannot justify the application of substantive canons on the ground that they represent what Congress would have wanted. . . . A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one.[208]

On the other hand, Justice Coney Barrett does not object to the use of substantive canons when there are two equally plausible

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203. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 439–40 (2005).

204. *See id.*

205. John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1913 (2015).

206. Manning, *supra* note 203, at 424.

207. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 829–30 (2017) (empirically demonstrating that textualist justices use substantive canons no more often than their purposivist counterparts).

208. *See* Coney Barrett, *supra* note 25, at 123–24. On the other hand, some leading textualists have acknowledged that textualists "apply sufficiently well-settled canons of construction, including substantive canons." Manning, *supra* note 203, at 436.

interpretations.[209] Her concern is with the use of substantive canons to allow courts to depart from the most natural interpretation of the text.[210] Thus, she identified as a major concern for textualists the need to find the authority for a court to adopt an interpretation that is contrary to the faithful agent model.[211] However, Coney Barrett takes the position that canons derived from the Constitution should be acceptable to textualists[212] because "[t]he duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms. The Judge need not serve exclusively as Congress's faithful agent because she serves a higher law."[213] In the next Section, I argue that the Indian canons could be viewed as constitutionally inspired canons.

B. *The Indian Canons' Constitutional Connection*

What does it mean for the Indian canons to be rooted in the trust relationship, and what does this fact imply for the canons' application? Here, I show that the Indian canons have a constitutional lineage because the trust doctrine has constitutional roots. As Professor Carole Goldberg eloquently stated:

> [T]he concept of a federal trust does draw on the text of the Constitution. . . . The textual source in the Constitution is article I, which differentiates Indian tribes both from foreign nations and from states. This text required the Marshall Court to identify precisely what kind of political bodies the tribes were; and the conclusion—that they were "domestic dependent nations"—encompasses both the ideas of a trust and of sovereignty.[214]

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209. Coney Barrett, *supra* note 25, at 123 ("Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute. Textualists have no difficulty taking policy into account when language is ambiguous.").

210. *Id.* at 110

211. *Id.*

212. *Id.* at 111 ("[T]o the extent a canon is constitutionally inspired, its application does not necessarily conflict with the structural norms that constrain judges from engaging in broad, equitable interpretation. Instead of pursuing undifferentiated social values—however sound and desirable they may be—constitutionally inspired canons draw from an identifiable, closed set of norms. As such, their effect on the legislative bargain is more predictable.").

213. *Id.* at 169.

214. Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 179 n.54 (1991).

The existence of a trust relationship between the United States and the Indian nations can be traced to Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*.[215] In his opinion, Chief Justice Marshall relied principally on three arguments to formulate his description of tribes as "domestic, dependent nations."[216] First, "[t]he Indian territory is admitted to compose a part of the United States."[217] This assertion derives from the Court's earlier case *Johnson v. M'Intosh* where the Court held that the doctrine of discovery applied to Indian nations.[218] Second, "[t]hey acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper."[219] Finally, the Chief Justice mentioned that the Commerce Clause, which empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," makes a distinction between foreign nations and Indian tribes because "[i]n this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation."[220]

As explained earlier, the trust doctrine was used to justify the congressional plenary power over Indian nations.[221] In more modern times, however, the source of congressional power over Indian tribes has migrated from the trust doctrine to the Constitution.[222] Thus, while comparing the Interstate Commerce Clause with the Indian Commerce Clause, the Court mentioned that "while the Interstate Commerce Clause is concerned with maintaining free trade among the States . . . the central function of the Indian Commerce Clause is to

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215. *See supra* text accompanying note 53.

216. Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831).

217. *Id.* at 12.

218. Johnson v. M'Intosh, 21 U.S. 543, 592 (1823) (interpreting and applying the doctrine of discovery, the Court held that the United States acquired "ultimate" title to the lands of Indian nations); *see* ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED 166 (2006) (tracing the roots of the trust relationship to the doctrine of discovery).

219. *Cherokee Nation*, 30 U.S. at 12. Scholar Mary Christina Wood agreed that the treaties are at the origin of the trust relationship but took the position that the trust relationship comes more from the huge transfer of land from the tribes to the United States that was made through those treaties. *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471.

220. *Cherokee Nation*, 30 U.S. at 13, 18 (quoting U.S. CONST. art. I, § 8, cl. 3).

221. *See supra* notes 57–58 and accompanying text.

222. *See infra* notes 231–32. Scholars have long debated the legitimacy and extent of the "plenary power" of Congress over Indian Affairs. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1082–88 (2015); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 73–94 (2012); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132–33 (2006); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 228–36 (1984); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. STATE L.J. 113 (2002).

provide Congress with plenary power to legislate in the field of Indian affairs."[223] However, the trust doctrine is still mentioned as a source of congressional plenary power. For instance, in a 1974 case, although the Court stated that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself,"[224] the Court also mentioned that Congress's broad powers over Indian tribes was "based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[225]

In mentioning Indian tribes in the Commerce Clause along with other sovereigns, the Constitution recognizes, implicitly at least, that Indian tribes possess a certain degree of sovereignty.[226] The Constitution does not, however, guarantee the extent of this sovereignty,[227] and the Court has undermined tribal sovereignty by holding that the purpose of the Commerce Clause was to give Congress plenary power over Indian tribes.[228] In that fashion, the trust relationship can be considered, just like federalism, an underenforced norm with constitutional roots.[229] For instance, although Indian tribes can sue the federal government for breach of specific statutes creating trust duties,[230] they have generally been denied the right to sue the

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223. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (noting also that U.S. CONST. art. I, § 8, cl. 3 provides Congress with the power to "regulate Commerce . . . with the Indian Tribes").

224. Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

225. *Id.* at 551.

226. *See, e.g.*, Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 662–63 (2009) ("[A]s a textual matter the Constitution does recognize tribal sovereignty in the Indian Commerce Clause and the Treaty Clause."); *see also* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 657–58 (2003); Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Indian Nations*, 5 U. PA. J. CONST. L. 318, 321 (2003) ("The most effective protection of tribal separateness and empowerment may be found in the acknowledgment, particularly the unclouded judicial acknowledgment, of tribal nations as constitutionally recognized sovereigns.").

227. *See* M. Alexander Pearl, *Originalism and Indians*, 93 TULANE L. REV. 269, 329–30 (2018) ("Indian tribes are mentioned in the Constitution, but the scope of their rights and authorities are notably absent.").

228. *See Cotton Petroleum Corp.*, 490 U.S. at 192. For an argument tying statutory interpretation to congressional overreach under the plenary power doctrine, see David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 415 (1994) ("[W]hile the Constitution may provide Congress with legislative authority over Indian affairs, it leaves unanswered how such statutes are to be interpreted. To answer that question, the Court must examine the nature, origin, and justification of Congress' power over Indian tribes.").

229. Eskridge & Frickey, *supra* note 5, at 597 ("[S]tructural constitutional protections, especially those of federalism, are underenforced constitutional norms. They are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values.").

230. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 226–27 (1983).

federal government for injunctive relief directing the government to enforce the trust responsibility.[231] Similarly, while tribes can sue the federal government for monetary damages for taking a vested property right without affording just compensation under the Fifth Amendment,[232] they have not been able to successfully challenge the power of Congress to regulate their tribal affairs or interfere with tribal self-government.[233]

In other words, while tribes can sue the United States for violations of other parts of the Constitution, they cannot allege that Congress has exceeded its power under the Indian Commerce Clause. Professor Clinton once critically observed that while there are external constitutional limits to congressional power over Indian tribes, there are no internal limits within the Indian Commerce Clause.[234] In conclusion, the Indian canons of statutory construction have a constitutional lineage because the status of Indian nations as sovereigns is implied in the Commerce Clause. However, that clause has also been construed as giving plenary power to Congress.

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231. *See* Curtis Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Law and Resources*, 83 DENVER L. REV. 1069, 1079 (2006) ("In the current hostile legal climate, arguments that the trust responsibility requires federal agencies to act in the best interests of tribes, independent of their statutory duties, are likely to be greeted with skepticism."). Besides Berkey, other scholars have also argued that Tribes should be able to force the government to defend tribal trust resources. *See, e.g.*, Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims for Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 364–68 (2003). There is, however, no final Supreme Court decision on this issue, and scholars are still pushing arguments requiring enforcement of the trust duties. *See* Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179 (2020).

232. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 407–08 (1980); Hodel v. Irving, 481 U.S. 704, 717–18 (1981).

233. The tribal claim would be that such congressional legislation would go beyond the power to regulate commerce with the Indian tribes. For recent efforts to define the extent of the Indian Commerce Clause, see Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182, 211 (2021); *see also* Lorianne Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021). Toler argues that in only mentioning a congressional power over Indian Commerce and leaving out a congressional power over Indian Affairs, the drafters made an unintentional mistake. However, later in the drafting process, they intentionally refused to cure this oversight. Toler, *supra*.

234. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 120 (1993) ("There is, of course, a considerable difference between managing affairs with the Indian tribes, as originally contemplated by the constitutional phrase 'commerce . . . with Indian tribes' and managing the affairs of the Indian tribes and their members as contemplated by the plenary power doctrine."); *see also* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 STAN. L. REV. 979 (1981).

C. *Searching for Congressional Intent to Interfere with Tribal Sovereignty: Review and a Proposed Test*

In a recent case involving tribal sovereign immunity, after stating that the tribal sovereign immunity canon represented a rule of construction reflecting "an enduring principle of Indian law," the Court added that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."[235] Similarly, in *Santa Clara Pueblo v. Martinez*, the Court stated that in construing Indian-related statutes, courts should look for "clear" indication of congressional intent before a statute is construed to intrude on tribal sovereignty.[236] The problem with looking for a "clear" intent to interfere with tribal self-government is that "clear intent" seems to be in the eyes of the beholder. This Article takes the position that the test to find an intent to interfere with tribal sovereignty should be the same as the test requiring "unequivocal" expression of congressional intent before tribal sovereign immunity can be abrogated by Congress. The tribal sovereign immunity test was phrased in this manner because the Court borrowed from cases deciding whether state sovereign immunity had been abrogated. Thus, in *Santa Clara Pueblo*,[237] the Court cited to two state sovereign immunity cases to justify its "unequivocal expression of congressional intent" test for abrogation of tribal sovereign immunity.[238]

While looking for clear indication of congressional intent may sound the same as looking for "unequivocal" expression, as is the case for abrogation of tribal sovereign immunity, the fact is that courts have taken the sovereign immunity canon more seriously.[239] Under my proposed methodology, a court interpreting a federal statute should first ask: Is our interpretation of the statute interfering with tribal sovereignty? If the answer is yes, the next step would be to look for unequivocal expression that Congress intended such interference. If the answer is no, the court should interpret the statute so as not to interfere with such sovereign rights.

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235. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014).

236. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

237. *Id*.

238. *Id*. at 58–59. The two cases cited by the Court were *United States v. Testan*, 424 U.S. 392, 399 (1976), and *United States v. King*, 395 U.S. 1, 4 (1969). Since *Santa Clara Pueblo* was decided, however, the test to find an abrogation of state sovereign immunity has transformed itself into a stronger "clear statement" rule. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

239. It should be noted that there is a current debate over what constitutes "unequivocal expression" to abrogate tribal sovereign immunity in the context of the Bankruptcy Act. *See* Michael Bevilacqua, *Silent Intent? Analyzing the Congressional Intent Required to Abrogate Tribal Sovereign Immunity*, 61 B.C. L. REV. ELEC. SUPPLEMENT II-156 (2020).

In requiring Congress to be clear when it uses its plenary power to interfere with tribes' sovereign rights, the Indian canons fulfill a similar role to the federalist canons in that those canons also aim to make sure that Congress clearly intends to interfere with state sovereignty.[240] In *United States v. Bond*, the Court stated that "it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides 'the usual constitutional balance of federal and state powers.'"[241] As explained by Professor Manning, federalist canons preserve this balance "by presuming that, absent a clear statement to the contrary, acts of Congress do not intrude upon the states either by regulating state functions or displacing state law."[242] The Indian canons play a similar role in ensuring that tribal rights are protected from congressional plenary power until there is a clear and manifest congressional intent to interfere with such rights.[243] This Article's proposed canon protecting tribal sovereignty attempts to protect underenforced norms such as tribal self-government and the trust relationship by ensuring that even though the Court declared that Congress has plenary power over Indian tribes, this power is only enforced sparingly and willfully.

To justify the proposed analogy to the federalist canons, the tribal sovereignty canon should apply only when federal statutes interfere with tribal sovereignty. The question, therefore, is what kind of statutes are those? The Indian Civil Rights Act,[244] at issue in *Santa Clara v. Martinez*,[245] provides a good example of such a statute since it imposes on tribal governments the duty to protect rights similar to those in the Bill of Rights.[246]

One test attempting to define what kind of government actions infringe on tribal sovereignty was initially devised by the Court with

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240. On Federalist canons, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010). For a list of these Federalist canons, see *supra* note 26.

241. Bond v. United States, 572 U.S. 844, 858 (2014).

242. Manning, *supra* note 240, at 407–08 (citing to *Gregory*, 501 U.S. at 460, for the proposition that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

243. *See* Hall, *supra* note 41, at 541–42; Philip P. Frickey, *Doctrines, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV 5, 29 (2002). Since Congress controlled Indian affairs, "the Court's role was simply to insure that preexisting tribal rights were not lost through inadvertent actions by Congress or by the tribes themselves." Frickey, *supra*.

244. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1303).

245. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

246. For more background on the Indian Civil Rights Act of 1968, see generally *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV L. REV. 1709 (2016), and Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L REV. 479 (2000).

respect to states' attempts to extend their jurisdiction in Indian Country. Thus, in 1959, the Court in *Williams v. Lee* formulated a test for deciding the extent of state jurisdiction in Indian Country, stating: "Essentially, absent governing Acts of Congress, the question has always been whether the state actions infringed on the right of reservation Indians to make their own laws and be ruled by them."[247] The problem with borrowing this test for this Article's purpose is that this test was soon modified in 1973 when the Court announced a new test:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead at the applicable treaties and statutes which define the limits of state power.[248]

Therefore, there are no examples where the Court has applied this test except for its application in *Williams v. Lee*.[249] The Court in *Williams* held that state jurisdiction could not be extended so as to allow a non-Indian to sue a tribal member in a state court over a debt contracted on the reservation because this would "undermine the authority of tribal courts over Reservation Affairs and hence would infringe on the right of the Indians to govern themselves."[250]

One could also borrow from the area of the law attempting to determine if a federal law of general applicability not mentioning Indian tribes should nevertheless be enforced on Indian reservations.[251] There is no controlling Supreme Court precedent on this issue.[252] Under the majority view, established by the Ninth Circuit, there is a presumption that general federal regulatory laws apply to Indian

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247. Williams v. Lee, 358 U.S. 217, 220 (1959).

248. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973). In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court clarified that it was adopting a balancing-of-the-interest test, holding that the Indian preemption 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.

Id. at 145; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983).

249. *See Williams*, 358 U.S. 217.

250. *Id.* at 223.

251. For a comprehensive summary of the law in this area, see generally Alex Tallchief Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. C.R. & SOC. JUST. 123 (2016).

252. *See id.* at 125.

reservations.[253] This presumption can be rebutted, however, if applying the law would interfere with "exclusive rights of self-governance in purely intramural matters," or interfere with treaty rights.[254] If the presumption is rebutted, courts following this approach have required clear evidence of congressional intent to apply the law to the tribes.[255] Another approach, favored by the D.C. Circuit, would require only clear evidence of congressional intent if the general federal law interfered with the "traditional attributes of self-government."[256] This Article argues that when determining whether the Indian canons should apply to a federal statute, a more generous definition of tribal self-government, as was adopted in *Williams* and *Pueblo of San Juan*, should be used. While there are some judicially imposed limits on tribal jurisdiction over non-members,[257] the Court has never restricted tribal sovereignty to traditional attributes of sovereignty, let alone to purely intramural aspects of self-government.[258]

In *NLRB v. Pueblo of San Juan*, the Tenth Circuit disagreed with an approach focusing on whether the general federal law interfered with strictly intramural aspects of tribal sovereignty.[259] The Tenth Circuit viewed the central question as whether Congress, in enacting such laws of general applicability, had the intent to preempt tribal sovereign powers in the area covered by the general federal law at issue.[260] After stating that "in addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory,"[261] the *Pueblo of San Juan* court concluded that "[p]reempting tribal laws divests tribes of their retained sovereign authority. . . . In the absence of clear evidence of congressional intent, therefore, federal law will not be read as stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them."[262]

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253. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

254. *Id.*

255. *See* Skibine, *supra* note 251, at 126 (explaining that this approach has been followed in the Second, Sixth, Seventh, and Eleventh Circuits).

256. San Manuel Indian Bingo & Casino v. N.L.R.B., 475 F.3d 1306, 1315 (D.C. Cir. 2007).

257. *See* Montana v. United States, 450 U.S. 544, 564 (1981); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327–28 (2008).

258. *See* Skibine, *supra* note 251, at 137–38.

259. N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1192–93 (10th Cir. 2002) ("In addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory.").

260. *Id.* at 1191.

261. *Id.* at 1192–93.

262. *Id.* at 1195. Interestingly, the Tenth Circuit also raised the "ambiguity" canon, stating that "ambiguities in federal law have been construed generously in order to comport with tribal notions of sovereignty and with the federal policy of encouraging tribal independence," and reiterating that "a well-established canon of Indian law is that doubtful expressions of legislative intent must be resolved in favor of the Indians." *Id.* at 1190–91.

The Tenth Circuit also announced that the burden to show such intent was on the federal agency, not the Pueblo,[263] and went on to explain why the burden to show a congressional intent to preempt tribal sovereignty fell on the federal agency.[264] First, the court asserted that although Congress can divest tribal powers, divestiture was disfavored as a matter of national policy.[265] The court then mentioned that whenever tribal sovereignty was at stake, the trust relationship cautioned that "we tread lightly in the absence of clear indications of legislative intent."[266] Finally, the court invoked the federal policy of encouraging tribal self-government.[267]

The final Section of this Article addresses the kinds of statutes where the Indian canons should apply.

D. *The Extent of the Indian Canons' Applicability*

There have been five Indian statutory interpretation cases before the Court since 1987 that did not involve Indian-specific statutes.[268] The tribal interests lost all five, and the Court did not apply any of the Indian canons.[269] For some, the Indian canons are applicable only to statutes enacted for the benefit of Indians. As stated earlier, the Court in *Negonsott v. Samuels* said that "[i]t is not entirely clear to us that the Kansas Act is a statute 'passed for the benefit of dependent Indian tribes.'"[270] The question this Section addresses is how courts should determine the applicability of an Indian canon.

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263. *Id.* at 1192 ("The burden to show such congressional intent to divest the Pueblo of its power to enact its right-to-work ordinance and to enter into the lease agreement rests upon the Union and the NLRB.").

264. *Id.* at 1194–95.

265. *Id.* at 1194 ("[D]ivestiture is disfavored as a matter of national policy, and will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority.").

266. *Id.* at 1195 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

267. *Id.* ("[B]oth the legislative and executive branches have declared that federal Indian policy favors tribal self-government. On this point the Supreme Court has spoken clearly and emphatically.").

268. *See* Match-E-Be-Nash-She-Wish Band v. Patchak, 567 U.S. 209 (2012); Inyo Cty. v. Paiute-Shoshone Indians, 538 U.S. 701 (2003); El Paso Natural Gas v. Neztsosie, 526 U.S. 473 (1999); Amoco Prod. v. S. Ute Tribe, 526 U.S. 865 (1999); Amoco Prod. v. Gambell, 480 U.S. 531 (1987).

269. *See* Match-E-Be-Nash-She-Wish Band v. Patchak, 567 U.S. 209 (2012) (interpreting the Quiet Title Act); Inyo City v. Paiute-Shoshone Indians, 538 U.S. 701 (2003) (interpreting who is a "person" under Section 1983); El Paso Natural Gas v. Neztsosie, 526 U.S. 473 (1999) (interpreting the Price Anderson Act); Amoco Prod. v. Southern Ute Tribe, 526 U.S. 865 (1999) (interpreting the Coal Lands Acts of 1909 and 1910); Amoco Prod. v. Gambell, 480 U.S. 531 (1987) (interpreting the Alaska National Interest Lands Conservation Act (ANILCA)).

270. Negonsott v. Samuels, 507 U.S. 99, 110 (1993). The Court refused to apply the Indian canon because it found the Kansas Act was clear in giving Kansas jurisdiction over the crime. *See also* 18 U.S.C § 3243.

There is arguably a difference between applying the Indian ambiguity canon to all statutes and applying the canon when the statute interferes with tribal sovereignty such that the tribal sovereignty canon also comes into play. The ambiguity canon can be traced to the treaties, but it was first applied to interpret statutes enacted pursuant to the trust relationship.[271] The question here is whether the test should focus, as the *Negonsott* Court indicated, on whether a statute was enacted for the "benefit of tribes."[272] This Article takes the position that this determination would be too subjective. Determining whether some statute was enacted "for the benefit" of the Indians could be problematic. Take the GAA of 1887 for instance.[273] Just about all Indian tribes were against the policy of allotment and thought the GAA would be detrimental to Indian tribes.[274] Yet, many white politicians of the time argued that the Act was being enacted for the benefit of Indians because its goal was to transform Indians into farmers so that they could more quickly assimilate into the non-Indian mainstream society.[275]

Rather than determining whether the statute actually "benefits" the Indians or the tribes, the canon should be extended to all statutes that were enacted pursuant to Congress's Indian Commerce Clause power. As noted earlier in this Article, the ambiguity canon has historically been tied to the trust relationship.[276] It is therefore rational to assume that in cases containing ambiguities, Congress would have wanted the statute to be interpreted to the benefit of Indians.

The tribal sovereignty canon should not be limited to statutes enacted solely pursuant to the Indian Commerce Clause power. Take, for instance, federal laws of general applicability. These laws were not enacted with the Indian Commerce Clause power in mind but pursuant to other constitutional provisions, such as the Interstate Commerce Clause power.[277] Yet, application of such laws to Indian tribes may still interfere with tribal self-government or, in other words, with "the right of reservation Indians to make their own laws and be ruled by them."[278] Both the tribal sovereignty canon—a canon that asks whether there is a clear or unequivocal expression of congressional intent to interfere with

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271. *See supra* notes 33–43 and accompanying text.

272. *Negonsott*, 507 U.S. 99, 110 (1993) (quoting Bryan v. Itasca County, 426 U. S. 373, 392 (1976)).

273. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887).

274. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property, Rights, and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1603–08 (2001).

275. *See* Royster, *supra* note 96, at 8–9.

276. *See supra* notes 52–53 and accompanying text.

277. On the breadth of the Commerce Power generally, see Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

278. Williams v. Lee, 358 U.S. 217, 220 (1959).

tribal sovereign rights—and the Indian ambiguity canon should apply to such statutes of general applicability.[279]

The Supreme Court expounded that "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[280] The tribal sovereignty canon is based on Congress's relatively unchecked plenary power over Indian nations.[281] Congress can exercise this plenary power not only under the Indian Commerce Clause but also pursuant to other powers granted to Congress under the Constitution.[282] The normative reason for the tribal sovereignty canon is to ensure that in using its plenary power, Congress has willfully and intentionally decided to abrogate tribal sovereign rights.[283] It therefore does not matter whether Congress was acting pursuant to its Indian Commerce Clause power or other more general constitutional power. Thus, several courts have applied the Indian ambiguity canon along with the tribal sovereignty canon to federal laws of general applicability.[284]

CONCLUSION

Through an analysis of treaty and statutory interpretation cases decided in the last thirty-five years, this Article shows that the Court is generally inclined to apply the Indian canons of construction to treaty interpretation and treaty abrogation cases and cases involving abrogation of tribal sovereign immunity. However, the Court is much less willing to apply the tribal sovereignty canon, calling for clear legislative intent before a statute is construed to interfere with tribal sovereignty. Similarly, the Court almost never relies on the Indian ambiguity canon, requiring statutes enacted for the benefit of Indians

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279. Other scholars have also endorsed the view that the Indian canons should be applicable beyond laws enacted strictly to regulate or protect Indians. *See, e.g.*, Bryan H. Widenthal, *Federal Labor Laws, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 434–52 (2012).

280. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

281. *See supra* notes 226–29 and accompanying text.

282. For information regarding other parts of the Constitution giving Congress power over Indian nations, see generally Ablavsky, *supra* note 222.

283. *See* Frickey, *supra* note 30; *supra* notes 240–43 and accompanying text.

284. *See* N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1191 (10th Cir. 2002); *supra* text accompanying note 189; Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC), 917 F.3d 451, 463 (6th Cir. 2019) (considering whether the Bankruptcy Code had abrogated the sovereign immunity of Indian tribes in light of section 11 U.S.C § 101(27) abrogating sovereign immunity to "governmental unit"), *cert. dismissed sub nom.*, 140 S. Ct. 2638 (2020); Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 824 (7th Cir. 2016) (considering whether the Fair and Accurate Credit Reporting Act (FACTA) had abrogated tribal sovereign immunity).

to be liberally construed with ambiguities resolved to the benefit of the Indians.

This Article argues that these canons have constitutional roots, and as such, textualist jurists should not be reluctant to use them. Furthermore, textualism as a methodology could be helpful to tribal interests in that congressional intent to abrogate tribal rights should be derived from only the text of the statute and not extratextual material. This Article also argues that the tribal sovereignty canon has been underused. To remedy this problem, the Article suggests that the "unequivocal expression of congressional intent" test that has been applied to abrogation of tribal sovereign immunity should also be applied to cases involving interference with other tribal sovereign rights. Therefore, this Article argues that a court interpreting a federal statute should first ask whether a certain interpretation of the statute interferes with tribal sovereignty. If the answer is yes, the court should look for unequivocal expression of congressional intent to interfere with that sovereignty. Finding no such intent, a court should interpret the statute so as not to interfere with tribal sovereign rights.