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Textualism and the Indian Canons of Statutory Construction

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INTRODUCTION

When interpreting treaties signed between the United States and Indian nations or statutes enacted for the regulations or the benefit of Indians and Indian nations, courts are supposed to apply the Indian canons of treaty and statutory construction.[1] There are arguably five such canons. First, there is the treaty interpretation canon: When a court is interpreting 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."[2] 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.[3]

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[1] See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1144-1156 (1990).

[2] See Herrera v. Wyoming, 139 S. Ct 1686, 1699 (2019) (internal quotation marks omitted).

[3] See United States v. Dion, 476 U.S. 734, 739-40 (1986), stating "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

This canon could be considered a quasi-clear statement rule. Clear statement rules are rules requiring specific language announcing the intent of Congress to interfere with a valued norm, such as abrogating the sovereign immunity of the States.[4] 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 *Dion*.[5]

Third: There is what could be referred to as the tribal sovereign immunity canon, since it has basically been used by the Court only when it comes to congressional abrogation of tribal sovereign immunity from suit.[6] That test seemed to have been first applied by the Court 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.'[7] When it comes to interfering with tribal self-government other than abrogation of 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."[8] So, one test requires "unequivocal expression of congressional intent" while the other requires only "clear" indication of congressional intent. This Article will refer to this last 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. As the Court put it "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.'"[9] Note that this last canon has 2 components, the first one is that the statute has to be "liberally construed" while the second part requires ambiguous provisions to be interpreted for the benefit of the Indians." The usual meaning of a statute "being liberally construed" is that the statute has to be interpreted to fulfil or effectuate its purpose fully.

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evidence in the 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."

[4] See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). On clear statement rules, see William N. Eskridge Jr and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev 593, 636-40 (1992).

[5] See 476 U.S. 734, 740-744 (examining in details the legislative history of the Eagle Protection Act.)

[6] On the evolution of the tribal sovereign immunity doctrine see William Wood, *It wasn't an Accident: Tribal Sovereign Immunity Story*, 62 Am. U. Law. Rev 1587 (2013).

[7] 436 U.S. 49, 58 (1978).

[8] Id., at 72.

[9] County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

While the Court is inclined to apply the first two treaty related cannons, [10] as well as the tribal sovereign immunity canon,[11] it has rarely applied the last two or even discussed them. Thus, since 1987, the Court has decided at least 26 cases involving Federal Indian law where the holding depended exclusively on statutory or treaty interpretation.[12] Yet, in that time period, only four cases discussed the basic Indian canon requiring ambiguities to be resolved in the Indians' favor and only one invoked it in its holding.[13]

This Article analyzes some of these 26 Supreme Court cases to understand the reasons for the Court's reluctance to invoke the "ambiguity" canon of statutory construction, including the interconnection between the canon and textualism, the ascendant interpretive methodology.[14] 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. Thus, it may be that judges who are faithful to textualism, with its focus on the statutory text and the plain meaning of the words, are less likely to find ambiguities in statutes.[15]

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[10] 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)(stating that the Court "has ignored the canon in recent rulings"). See also South Dakota v. Bourland, 508 U.S. 679 (1993) and discussion infra at notes…..

[11] 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 Community, 572 U.S. 782, 790 (2014).

[12] See, Alexander Tallchief 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 at n. 11, *Never Construed to their Prejudice*, at pp. 50-55. See also Frickey, supra at n.1, at 1160-66.

[13] This state of affairs made Professor Matthew Fletcher to recently state "[T]he 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." See Matthew L. M. Fletcher, *Textualism's Gaze*, 25 Mich. J. Race & L. 111, 138 (2020).

[14] On the ascendancy of Textualism, see William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621 (1990). On Textualist methodology, see John F. Manning, *Second Generation Textualism*, 98 Calif. L. Rev. 1287 (2010).

[15] Justice Scalia when speaking of another doctrine also requiring the finding of ambiguity before being applied, stated

> 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 *les*s often that the triggering requirement for *Chevron* deference

While I agree with those scholars who have noted that there is no current test for determining whether an ambiguity exists and have argued that the focus on ambiguity before the use of substantive canons is misplaced,[16] this ambiguity dilemma could have been partially attenuated if the courts had more scrupulously applied the "liberally construed" requirement or the "Tribal sovereignty" canon. Because 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 or self-government,[17] 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 Sovereign Immunity canon is being applied while the Sovereignty canon is not. If there is a difference, it may be that "unequivocal expression" of congressional intent has more of a textualist bend than "clear indication." Hopefully, looking for "unequivocal expression" will make judges focus on the text of the statute and not on extra textual material to find such clear indication of congressional intent to abrogate tribal sovereign rights.[18]

In PART I, after 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, I survey some cases decided by the Supreme Court 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 canon of statutory construction under which statutes enacted for the benefit of Indians should be liberally construed with ambiguous provisions resolved to the benefit of the Indians.

In Part II, I delve into the textualist perspective on applying substantive canons. This theme was more recently taken up by Justice Cavanaugh in an article written

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> exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

1989 Duke L.J. 511, 520–21. In the same article, Scalia goes on stating "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.

[16] 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 (2010).

[17] The pragmatic reason is that "sovereign immunity" is a discrete and well-defined area while tribal sovereignty is not.

[18] It should be noted that there is a current debate on 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. E-Supplement II-156 (2020).

before he joined the Court.[19] Justice Cavanaugh 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"[20] which Kavanaugh finds troubling. 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 in that these canons reflect extra textual norms which in all likelihood were not in the mind of those who drafted the legislation at issue.[21] In this article, I explain why, when it comes to the Indian canons, such reluctance is misplaced. Thus, I argue that the Indian canons have constitutional roots and have the same legitimacy as federalist canons.[22]

Finally, I conclude by presenting 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.

PART 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 of Congress in interpreting a text,[23] courts use canons of statutory construction to determine what Congress meant or had in mind when it used a specific term or phrase. Substantive or normative canons create background norms to help the interpreter decide the meaning that should be given to the words of a statute. As Professor Frickey noted, normative canons "[G]o 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

[19] Brett M. Kavanaugh, reviewing Robert Katzmann's book, *Fixing Statutory Interpretation, Judging Statutes*, 129 Harv. L. Rev. 2118 (2016).

[20] Id., at 2134-2135.

[21] See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010).

[22] On Federalist canons, see John F. Manning, *Clear Statement Rules and the Constitution*,110 Colum. L. Rev. 399 (2010).

[23] As stated by now Justice Coney Barret, "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." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 112 (2010). See also John F. Manning, *What Divides Textualist from Purposivists?* 106 Colum. L. Rev. 70 (2006).

basic interpretive analysis or as rebuttable presumptions at the outset of the interpretive process."[24]

When it comes to federal Indian law, the first canons were developed in connection with interpreting treaties signed between the United States and Indian nations. According to Professor Philip 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 that Indian Nation into the United States.[25] 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. [26] 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."[27]

Although *Worcester* involved the interpretation of a treaty, the Court in *Choate v. Trapp*,[28] extended the reasoning of *Worcester* to the interpretation of statutes enacted specifically for the benefit of Indians. The issue in *Choate* was whether the State of Oklahoma could tax Indian lands, and the ambiguity derived from what appeared to be conflicting statutes. Acknowledging the "general rule that tax exemptions are to be strictly construed," the Court nevertheless ruled in favor of the Indians because "[I]n 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."[29] The Choate Court claimed that "This rule of construction has been recognized, without exception, for more than a hundred years," [30] although it did not provide any citations for this claim.

While *Choate* and some other early cases rely on similarly outdated "weak and defenseless" rationales to explain the canon, scholars have shown that the Court

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[24] See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 414 (1993).

[25] See Frickey, *Marshalling Past and Present*, at 408-411. The major issue in Worcester was whether Georgia could assert jurisdiction over Cherokee territory because the Cherokee Nation had, in treaties with the United States, ceded all of its sovereign power. The Court refused to allow Georgia jurisdiction, holding that the Cherokee Nation was still a sovereign Indian Nation.

[26] The first mention that ambiguous provisions should be construed in favor of the Indians was articulated by Justice McLean in *Worcester v. Georgia*, 6 Pet. 515, 582, (1832) (concurring opinion) ("The language used in treaties with the Indians should never be construed to their prejudice").

[27] Herrera v. Wyoming, 139 S. Ct. 1686, 1698–99

[28] 224 U.S. 655 (1912)

[29] Id. at 674-75; See also, Alaskan Pac. Fisheries v. U.S., 248 U.S. 78, 89 (1918).

[30] 224 U.S. 655 at 675.

eventually used the same kind of reasoning initially applied to treaty abrogation to make sure that statutes did not unintentionally abrogate tribal rights in non-treaty interpretation contexts.[31] Many commentators refer to the Indian canon as the *Blackfeet* canon or the Blackfeet presumption. In *Montana v. Blackfeet Tribe*,[32] which concerned whether the State could tax tribal royalties from oil and gas leases under the Indian Mineral Leasing Act of 1938, [33] the State invoked the presumption against implied repeals to argue that its taxation power remained intact. The Court disagreed, stating: "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."[34] A few years later, in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* the Court followed the Blackfeet canon when stating "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."[35]

In an article written before she joined the Supreme Court, Justice Connie Barrett mentioned that although the Indian canon started with interpretation of Indian treaties, it migrated to statutes without any real explanations.[36] She noted that only one lower court had at the time stated that the treaty rule became applicable to statutes because Congress stopped making treaties with Indian tribes and instead started regulating them through statutes.[37] The problem here is that, although she cited to Professor Frickey's scholarship in this area, Coney Barrett attributed the origin of the Indian canon of treaty interpretation to contract law principles under which the benefit of the doubt is given to the less sophisticated party.[38] In effect, Professor Frickey reached the opposite conclusion, stating that "A theory of sovereignty, then, rather than contract, better explains Chief Justice Marshall's interpretation in *Worcester*."[39]

This Article endorses Professor Frickey's argument that Marshall's treaty interpretation methodology was similar to constitutional interpretation because

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[31] See, Frickey Marshalling Past and Present, supra at note… at 416-417. See also, Collins, *Never Construed to their Prejudice*, supra at note 11, 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, 538-543 (2004).

[32] 471 U.S. 759 (1985).

[33] 25 U.S.C §§ 396a-396g

[34] Id. at 766 (quoting Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985))

[35] 502 U.S. 251, 269 (1992).

[36] Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. Rev. 109, 151-152 (2010).

[37] Id., citing Conway v. United States 149 F. 261, 265-66 (C.C.D. Nev. 1907).

[38] Id., at 152.

[39] Frickey, *Marshalling Past and Present*, at 407.

Chief Justice Marshall considered the treaties as documents incorporating Indian tribes into the United States political system,[40] although Justice Cony Barrett is correct that contract interpretation theory also played a role in the origin of the canon.[41] The objection that could be raised, however, is that while treaties are documents of incorporation, statutes are not, so the rules of interpretations applying to treaties should not apply to Indian statutes. Yet, as stated by Justice O'Connor "'[R]ooted 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."[42] 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.[43]

It is because the Indian canons of statutory construction are "rooted in the unique trust relationship between the United States and the Indians," that it can be considered a normative or substantive canon. The Indian canon is normative because it 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. 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 canon fulfills this function by presuming that when enacting statutes for the benefit of Indians, Congress acted pursuant to this trust relationship and would not want such a statute to be construed to the detriment of Indian tribes. In that manner, applying the canon is necessary to the Court's role as a "faithful agent" of Congress.[44] Thus, because

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[40] Id., at 408-411. For justifying treaty interpretation favoring Indians on a slightly different theory, see Note, *Indian Canon Originalism*, 126 Harv. L. Rev. 1100 (2013).

[41] For another scholar acknowledging that fact See Collins, *Never Construed to their Prejudice*, supra at n. 11 at p. 5-9.

[42] 534 U.S. 84, 99–100 (2001).

[43] For an argument attempting to justify the Indian statutory canons on a theory of democratic deficit, see Collins, *Never construed to their Prejudice*, supra at note 11 at pp.25-26, (stating "[d]emocratic 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.) For a normative argument tying statutory interpretation in Indian cases to the fact that Indian tribes never consented to come under the plenary power of Congress, see David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 Va. L. Rev. 403 (1994) (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." Id., at 415.

[44] On courts being the faithful agents of Congress, see generally Coney Barrett, *Substantive Canons*, supra at note… stating "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

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.

B. The Court's Treaty and Statutory Interpretation Cases Since 1987

1. The Treaty Cases

There are two types of treaty cases: the treaty interpretation cases, and the treaty abrogation cases. Treaty abrogation cases are controlled by the test enunciated in *United States v. Dion.*[45] That test requires clear evidence that Congress actually considered the treaty right in question and opted to abrogate or modify it.[46] Tribal interests won four of the treaty cases decided in the last thirty years, all won by tribal interests in 5-4 decisions. The tribal position lost one case, *South Dakota v. Bourland,*[47] a treaty abrogation case involving a tribal attempt to control non-members hunting and fishing within the exterior boundaries of the reservation.

The issue in *Bourland* was whether the Cheyenne River Sioux Tribe had kept its treaty right to exclude non-members on land that was within the reservation but had been taken from the tribe for a federal dam and reservoir project.[48] The Court in an opinion authored by Justice Thomas 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 the use of the general public.[49]

Justice Thomas insisted that his analysis was not in conflict with *United States v. Dion.*[50] Thomas concluded, however, that he could not explain Section 10 of the Cheyenne River Act and section 4 of the Flood Control Act except as "indications that Congress sought to divest the Tribe of its right to "absolute use and occupation."[51] 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

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centered around how best to implement it. The rival theories in this regard were - and remain - purposivism and textualism. Id., at 112

[45] 476 U.S. 734 (1986).

[46] Id., at 738-40. Stating that there has to 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."

[47] 508 U.S. 679 (1993).

[48] Id., at 681-682.

[49] Id., at 690.

[50] 476 U.S. 734 (1986).

[51] 508 U.S. at 693.

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."[52] The Dissent also remarked that although the Court acknowledged the application of cases like *Dion* to this case, "the majority adopts precisely the sort of reasoning-by-implication that those cases reject."[53]

In *Minnesota v. Mille Lacs Band of Chippewa*,[54] one important issue was whether certain hunting, fishing, and gathering rights guaranteed to the Chippewas in a 1837 treaty were terminated either by an 1850 Executive Order, a subsequent treaty signed with the Tribe in 1855, or when Minnesota entered the Union in 1858. The Court ruled that none of these actions abrogated or terminated the Tribe's treaty rights. The Court followed *Dion* and held that there was no "'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."[55]

Herrera v. Wyoming,[56] was both a treaty abrogation and a treaty interpretation case. Concerning treaty abrogation, the major issue was whether in enacting the Wyoming Statehood Act, Congress intended to end the Crow Tribe's hunting rights guaranteed in a 1868 Treaty. 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."[57] The Court noted that the Wyoming Statehood Act made no mention of Indian treaty rights and provides no clue that Congress considered the Tribe's rights and decided to abrogate them when enacting the law. As the Court put it, "There 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."[58] 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. 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… and the words of a treaty must be construed "'in the sense in which they would naturally be understood by the Indians.'[59] The Court concluded that there was nothing in the text of the 1868 Treaty

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[52] Id., at 700 (Blackmun and Souter dissenting.)
[53] Id.
[54] 526 U.S. 172 (1999).
[55] *Id*., at 202–203, (quoting *Dion*, 476 U.S. at 740).
[56] 139 S. Ct 1686 (2019).
[57] 15 Stat. 650.
[58] 139 S. Ct at 1698.
[59] Id., at 1699.

with the Crow Tribe that even suggested that the parties intended the hunting right to expire at statehood.[60]

Washington State Department of Licensing v. Cougar Den,[61] was another 5-4 decision, this one involving a matter of treaty interpretation. 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 licensees for each gallon of motor vehicle fuel that the licensee brings into the State. Cougar Den argued that the state fuel tax was preempted by a clause in the Yakama Treaty of 1855 that reserved to tribal members "the right, in common with citizens of the United States, to travel upon all public highways."[62]

In upholding Cougar Den's claim, Justice Breyer for the Court followed the Indian canons of treaty interpretation, stating "When we're dealing with a tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them."[63] Breyer then gave his reasons for the canon by noting that it was the United States who wrote this "contract," and any ambiguities in contracts are usually construed against the drafter.[64]

There was one unusual case decided in 2001 that fell in between treaty and statutory interpretation. The issue in *Idaho v. United States*,[65] was whether the United States intended the land underneath Lake Coeur d'Alene to transfer to the State of Idaho upon Statehood. Pursuant to former "agreements" with the Lac Coeur d'Alene Tribe, the lake had been originally included as part of the tribal reservation.[66] Because this involved land underneath navigable waters that are presumed to transfer to the state upon statehood, slightly different rules of interpretation applied. Thus the Court in this 5 to 4 decision never mentioned any canons in favor of Indians or brought in rules of treaty interpretation and stated

> 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

[60] Id.

[61] 139 S. Ct. 1000 (2020).

[62] Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951, at 953.

[63] Id., at 1021.

[64] Id., Breyer also mentioned that "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.

[65] 533 U.S. 262 (2001)

[66] Id., at 266.

> intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands. [67]

In the end, the Court found that Congress never intended to modify the agreement negotiated with the Tribe, stating "Any 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."[68]

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

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

These cases ask whether subsequent legislation enacted pursuant to the General Allotment Act of 1884,[69] and allowing non-Indians to purchase "surplus" land within an allotted Indian reservation, disestablished the borders of that reservation. There has been four of these cases since 1987: *Hagen v. Utah,*[70] *South Dakota v. Yankton Sioux Tribe,*[71] *Nebraska v. Parker,*[72] *and McGirt v. Oklahoma*.[73] Officially, all four cases applied the test the Court had established in *Solem v. Bartlett,*[74] a 1984 case. The Court in *Solem* stated "Diminishment… 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."[75] Although the Court seemed to adopt a "clear evidence" standard similar to the one adopted in *Dion*, that was far from the case. Thus, 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...."[76] 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." [77] Finally, if these "subsequent events" did not show clear congressional intent, a court could look at

[67] Id., at 280.
[68] Id., at 281.
[69] Pub. L. 49-105.
[70] 510 U.S. 399 (1994).
[71] 522 U.S. 329 (1998)
[72] 136 S. Ct. 1072 (2016).
[73] 140 S. Ct. 2452, 2462 (2020).
[74] 465 U.S. 463 (1984)
[75] Id., at 470.
[76] Id., at 471
[77] Id.

"who actually moved onto opened reservation lands" since this "is also relevant in deciding whether a surplus land act diminished a reservation."[78]

Among the four cases, *Yankton* was the only one that mentioned *Dion* but did not further elaborate.[79] 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. The non-Indian argued that the tribe did not have jurisdiction because the waste facility was not within the reservation. 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."[80] Key to the Court's finding of clarity was that the legislation provided that the Tribe shall "cede, sell, and relinquish to the United States all their claim, right, and interest to all the unallotted lands within the limits of the reservation," for a sum certain which was $600,000.[81]

In *Hagen*,[82] the State of Utah was trying to prosecute an Indian for distributing a controlled substance. The Indian argued the State had no jurisdiction over him because the crime had been committed within the reservation. The Court disagreed finding that this part of the reservation had been disestablished. Just as in *Yankton*, the Court found clear indication of congressional intent because the statute at issue had used certain key words such as having the lands relinquished by the Tribe "returned to the public domain." 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.[83]

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 reservations is hereby diminished, reduced, or terminated."

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[78] Id.

[79] 522 U.S. 329, 343. The Court just stated "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," *United States v. Dion,* 476 U.S. 734, 738–739.

[80] Id., at 344-45.

[81] 522 U.S. at 351

[82] 510 U.S. 399 (1994).

[83] Hagen v. Utah, 510 U.S. 399, 422–24 (1994)(Justice Blackmun dissenting).

Parker and *McGirt*, both finding no disestablishments, could be interpreted as moving away from the *Solem* methodology although both pretended to follow it. Professor Matthew Fletcher in a recent Article noted that *Parker* reflected closer fidelity to textualism by only engaging with the text of the statutes and putting "an end to much of that nonsense" that had been generated under the *Solem* methodology.[84] For sure, Justice Thomas rejected sole reliance on extra textual materials. Thus, on the subsequent treatment of the area by the federal government, he stated that while the Court could consider such treatment "our 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…" [85] 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."[86]

McGirt v. Oklahoma continued the trend away from the *Solem* methodology. [87] Justice Gorsuch for the majority reaffirmed the *Parker's* position that extratextual evidence could not be conclusive when it came to holding a reservation disestablished, stating

> 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.[88]

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 not just statutory interpretation cases. As is the case with treaty abrogation, statutes affecting reservation boundaries should have required clear evidence that Congress actually considered modifying the original reservation boundaries and opted to diminish such reservation. Perhaps the *McGirt* textualist methodology will amount to the same thing. Time will tell.

The reason for the initial error in not considering such cases treaty abrogation cases could be traced to the fact that although most reservations were established by

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[84] Fletcher, *Textualism's Gaze*, 25 Mich. J. Race & Law 111, at 121-122.

[85] 136 S. Ct. 1072, 1081.

[86] Id., at 1081-1082.

[87] 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 v. Oklahoma, 140 S.Ct. 2452, 2486–87(2020).

[88] Id., at 2470.

treaties, the statutes opening the reservations to non-Indians did not "directly" abrogate treaties because such treaty established borders had already been modified by other Acts of Congress that had reduced the original size of the treaty reservations. These Acts of Congress in turn were further modified by subsequent legislation opening-up the reservations for non-Indian settlement pursuant to the General Allotment Act.

For instance, the first two cases considering disestablishment were non-treaty cases in that the reservations were established by Acts of Congress and not treaties.[89] The third case, *DeCoteau v. District Court*,[90] was different in that even though the original reservation was set up by treaty, the Act that was held to disestablish the reservation was enacted to implement a 1889 agreement with the Tribe.[91] The Court mentioned the Indian canon under which 'legal ambiguities are resolved to the benefit of the Indians,"[92] 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,[93] even though the reservation of the Rosebud Sioux was originally established in a 1868 treaty.[94] 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 'legislative history,'" [95] 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."[96]

In conclusion, it seems that the *Solem* methodology was in effect not applied in *Parker* and *McGirt* which emphasized finding clear evidence of congressional intent from the text of the statutes and not from extra textual evidence. Hopefully, Professor Flether's assessment that these two cases put an end to much of the nonsense generated by the previous decisions in this area will prove correct.[97]

3. Non-Treaty Cases Mentioning (or Not) the Indian Ambiguity Canon of Statutory Construction

Although there are four cases mentioning this Indian canon, only one, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* actually

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[89] See Seymour v. Superintendent, 368 U.S. 351 (1962), Mattz v. Arnett, 412 U.S. 481, 505 (1973).

[90] 420 U.S. 425 (1975).

[91] 24 Stat. 896.

[92] Id., at 447.

[93] 430 U.S. 584.

[94] Treaty of April 29, 1868, 15 Stat. 635.3

[95] 430 U.S. at 587.

[96] Id., at 618.

[97] See discussion supra at note 74.

applied the canon.[98] Another one mentioned it but only for the purpose of discarding it.[99] The other two cases involved dissenting opinions.[100]

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 had subsequently been taken out of trust status and were now owned in fee simple.[101] 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. On that issue, the Court stated 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."[102] Finding ambiguity, the Court stated "When 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." [103]

The *County of Yakima* Court did not consider the Indian 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 had been explicitly confirmed in the 1906 Burke Act which amended the General Allotment Act.[104] 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."[105] Thus, the Court found unmistakably clear expression of congressional intent to authorize state taxation of Indian lands.[106]

Justice Blackmun disagreed with that part of the majority opinion, stating "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

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[98] 502 U.S. 251 (1992).

[99] Negonsott v. Samuels, 507 U.S. 99 (1993),

[100] Chickasaw Nation v. United States, 534 U.S. 84 (2001), Carcieri v. Salazar. 555 U.S. 379 (2009).

[101] The General Allotment Act of 1887, Pub. L. 49-105. See discussion at note 63.

[102] 502 U.S. at 268-269 (Remarking that the Supreme Court 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," Citing to *Mahler v. Tremper,* 243 P.2d 627, 629 (1952).

[103] 502 U.S. 251, at 269.

[104] Id., at 263-264, stating "Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes."

[105] See 24 Stat. 388 as amended.

[106] Id., at 259 stating "we 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, 430-441 (1994).

possibility, or even a likelihood, does not meet this Court's demanding standard of "unmistakably clear" intent."[107]

In *Negonsott v. Samuels*,[108] a tribal member accused of a crime was arguing 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.[109] The Court rejected his argument. Concerning the Indian canon that laws passed for the benefit Tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians, the Court stated "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."[110] 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 was not a case calling for the application of the Indian canon of construction.[111]

Another case where the Indian Ambiguity canon was discussed by the Court was *Chickasaw Nation v. United States*.[112] At issue in the case was a provision of the Indian Gaming Regulatory Act stating "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."[113] The problem was that Chapter 35 did not concern itself with the *reporting* or the *withholding* of taxes but only *imposed* taxes related to gambling while exempting certain state-controlled gambling activities.

The Tribes argued that the Indian Gaming Act's subsection exempted them from paying those chapter 35 taxes from which States were exempted. The Court did not agree, holding that the Tribes treatment like States ended with "reporting and withholding" activities.[114] Concerning the Indian canon, the Court stated "[t]he 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."[115]

The dissent per Justice O'Connor agreed that there were some contradictions within the statute but argued that since nothing in the text or legislative history resolved the ambiguity, this made the case appropriate for the invocation of substantive canons of statutory construction, including "the Indian canon that

[107] 502 U.S. 251, 272 (1992).
[108] 507 U.S. 99 (1993).
[109] 18 U.S.C. 3243.
[110] 507 U.S. 99, 110 (1993).
[111] Id.
[112] 534 U.S. 84 (2001)
[113] 25 U.S.C. 2719(d)(1).
[114] 534 U.S. at 89-90.
[115] Id., at 95.

"statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[116] 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 have intended the Nations to receive more, rather than less, revenue from this enterprise."[117]

Carcieri v. Salazar [118] was another case where the majority purported to find a statute to be unambiguous,[119] 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."[120] This case is perhaps the most egregious example among federal Indian law cases when it comes to arbitrarily declaring that a statute is 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 a provision in the Indian Reorganization Act of 1934 allowing the Secretary to take land in trust for Indians or Indian tribes.[121] Section 479 defined "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction."

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 transferred in trust to the tribe. The Court disagreed and held that "now" meant as of 1934, the year the Act was enacted into law. This meant that many tribes, like the Narragansett tribe, the recipient of the trust land in the case, would not qualify for a fee to trust land transfer. In finding the law unambiguous, the Court managed to avoid both the Indian canon of statutory construction and the Chevron doctrine under which an Agency's interpretation of an ambiguous statutory term should be given deference and be sustained a long as such interpretation was permissible or reasonable.[122]

Justice Thomas, speaking for the Court first relied on the ordinary meaning of the word "now."[123] He then mentioned the context of the IRA and thought it very meaningful that in another section of the IRA, the Congress had used the words "now existing or and hereafter established" when referring to an Indian reservation."[124] Finally he mentioned one departmental letter which indicated that

[116] 534 U.S. 84, 99 (2001).
[117] Id., at 100.
[118] 555 U.S. 379 (2009).
[119] Id., at 397, stating "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."
[120] Id., at 413-414.
[121] 25 U.S.C 465.
[122] Chevron v. NRDC, 467 U.S. 837 (1984).
[123] 129 S. Ct. 1058, at 1064
[124] Id., at 1065.

the Executive Department had a different construction of the Act at the time of enactment than it has now.[125]

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

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*,[126] the issue was whether the county could tax fee land owned by tribal members within the Leech Lake Band's reservation. The Leech Lake reservation had been allotted by the Nelson Act of 1889.[127] That Act did not contain any language that could be interpreted as an express congressional authorization to tax such 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" because "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."[128]

Justice Thomas was able to come to this conclusion by misinterpreting 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. Thomas, as an avowed textualist, should have derived this "unmistakably clear" meaning from the words of the statute or at least, from its structure. Instead, he supported his conclusion by invoking a "rule" derived from another case that dealt with another Act of Congress. [129] Justice Thomas's reasoning can be summarized as follows: First, other legislation, section 5 of the GAA, had been interpreted in 1906 as allowing state taxation of Indian fee land because of its alienability. Secondly, section 6 of the GAA was eventually amended (by the Burke Act) to specifically allow state taxation. 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. As one scholar noted, in his *Cass County* opinion, Thomas the textualist had become Thomas, the purposivist.[130]

The issue in *Alaska v. Native Village of Venetie*,[131] was whether the Venetie Indian Community could tax a non-Indian entity for work done on tribal lands. 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

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[125] 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, 129 S. Ct. at 1065.

[126] 524 U.S. 103 (1998).

[127] 25 Stat. 642

[128] Id., at 110-11.

[129] That rule was that whenever Congress allows Indians to freely alienate their lands, it must intend the states to be able to tax such lands.

[130] See Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 6 n.9 (1998).

[131] 522 U.S. 520 (1998).

jurisdiction over non-members. The Court through Justice Thomas held that lands set aside for Alaska Natives pursuant to Alaska Native Claims Settlement Act (ANSCA),[132] could not qualify as "Indian country" because such lands were not set aside for a "dependent Indian Community" as that term is defined in 18 USC 1151.[133] The Court emphasized that to qualify as Indian Country under 1151, such lands have to be "validly set apart for the use of the Indians as such" and "under the superintendence of the Federal Government."[134] 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." [135] As other scholars have argued, there is nothing in ANCSA indicating that Congress unequivocally intended these Native fee lands not to be considered Indian Country for the purpose of 1151.[136] Justice Thomas derived that intent not as much from ANCSA as his understanding of much older pre-ANCSA cases that indicated that all lands set aside for dependent Indian communities had historically been under federal supervision.[137]

The final case being reviewed here where the Ambiguity canon should have been used to reach the opposite conclusion is *Adoptive Couple v, Baby Girl.*[138] The major issue was whether the unmarried genetic father of an Indian child could challenge the adoption of his child under section 1912 (f) and (d) of the Indian Child Welfare Act (ICWA).[139] *Adoptive Couple* represents the quintessential case

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[132] 43 U.S.C. 1601-1628.

[133] Section 1151 was originally enacted to define Indian Country for the purpose of establishing criminal jurisdiction on Indian lands. It now reads "the 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."

[134] 522 U.S. at 527.

[135] Congressional findings and declaration of policy, 43 USCA § 1601.

[136] see David M. Burton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A test of Judicial Integrity*, 16 Alaska L. Rev. 37, 52-53 (1999). (stating that while 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."

[137] 522 U.S. at 528-530, 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).

[138] 570 U.S. 637 (2013).

[139] 92 Stat. 3069, 25 U.S.C. §§ 1901–1963.

for application of the Indian Ambiguity canon. Yet, in this 5 to 4 decision, the majority concluded that the "plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context."[140]

Section 1912(f) provides that "[n]o 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."[141] Relying heavily on dictionary definitions of the words "continued custody," the Court held that 1912(f) did not apply because the father in this case *never* had *custody* of the Indian child.[142] 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.[143] The dissent, on the pother hand, argued that the meaning of the words should be derived from the whole statute and the purpose of the law, not just plucked out of the statutory context. Justice Sotomayor concluded

> The majority, reaching the contrary conclusion, 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 substitute its own policy views for Congress' by saying that "no 'relationship' " exists between Birth Father and Baby Girl.[144]

In conclusion, since 1987, the Indian canon of statutory construction calling for a liberal construction with ambiguities resolved in the Indians favor has only been mentioned 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 canon.

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[140] Id., at 656.

[141] Section 1912 (f).

[142] Id., at 647-648.

[143] Id at 749. The Court also added that the legislative history of the ICWA "further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families." Id.

[144] 570 U.S. 637, 675 (2013) (Justice Sotomayor dissenting).

PART II: THE LEGITIMACY OF THE INDIAN CANONS AND BEYOND

A. The Textualist Perspective

I have already mentioned the Scalia perspective on rarely finding ambiguities as posing a problem for the use of the Indian ambiguity canon.[145] To this could be added the fact that the first part of the canon calling for statute to be "liberally" construed is bound to be a problem for textualist since the term is understood as construing a statute so as to give the maximum effect to the purpose of the statute. Almost by definition, textualists do not like to consider a statute's "purpose" in order to derive the "meaning" of the text. Yet, as Professor John Manning stated "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 altering a statute's clear semantic import in order to make the text more congruent with its apparent background purpose.[146]

One theme running in many of the Indian canons is a search, whether clear or unequivocal, for congressional intent. One could think this would pose a problem for textualists since they are allegedly opposed to interpreting statutes by looking for congressional intent.

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."[147] 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."[148] So, the fact that the Indian canons are phrased in term 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.[149] As Justice Connie 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 most textually plausible meaning of a statute. Textualists cannot justify the application of substantive canons on the ground that they represent what

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[145] See supra at note……..

[146] John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419 439-440 2005).

[147] John F. Manning, *Inside Congress's Mind*, 115 Colum L. Rev. 1911, 1913 (2015).

[148] Manning, *Textualism and Legislative Intent*, at 424.

[149] See Anita s. Krishnakumar, *Reconsidering substantive canons.* 84 U. Chi. L. Rev. 825. (Empirically demonstrating that textualist Justices use substantive canons less often than their purposivist counterparts.)

> Congress would have wanted… A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one.[150]

On the other hand, Justice Connie Barrett does not object to the use of substantive canons when there are two equally plausible interpretations. Her concern is with the use of substantive canons to allow courts to depart from the most normal interpretation of the text.[151] 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. However, Connie Barrett takes the position that canons derived from the Constitution should be acceptable to textualists,[152] 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."[153] 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 implies for the application of the canons? Here, I will show that the Indian Canon has a constitutional lineage because the trust doctrine has constitutional roots. As Professor Carole Goldberg eloquently stated

> The 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

[150] See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123-124 (2010). On the other hand, some leading textualists have acknowledged that textualists "apply sufficiently well-settled canons of construction, including substantive canons." See Manning, *Textualist and Legislative Intent*, 91 Va. L. Rev. at 436.

[151] Id at 123, stating "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."

[152] Id., at 111-112 (stating "to 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."

[153] Id., at 169.

> tribes were; and the conclusion—that they were "domestic dependent nations"—encompasses both the ideas of a trust and of sovereignty.[154]

Most scholars agree that the first official indication of the existence of a trust relationship is 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.[155] In this Opinion, Chief Justice Marshall relied principally on three arguments to come down with his description of tribes as being "domestic, dependent nations." First, "The Indian territory is admitted to compose a part of the United States."[156] This assertion derives from the Court's earlier case of *Johnson v. M'Intosh*,[157] where the Court held that the doctrine of discovery applied to Indian nations.[158] Second, "They 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."[159] 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 "In 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."[160]

Although the trust doctrine is currently viewed as beneficial by Indian Nations,[161] it has had a complicated and mixed history. That is because although it can be a source of protection and duties owed by the United States to the Indian nations, the doctrine 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. Thus, in United *States v. Kagama*, the Court held that the United States could assert criminal jurisdiction over crimes committed among tribal members and

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[154] 39 UCLA L. Rev. 169, 190.

[155] 30 U.S. 1, 54 (1832).

[156] Id., at 12.

[157] 21 U.S. 240, 253-54 (1823).

[158] Under the doctrine, as interpreted and applied in Johnson v. M 'Intosh, 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.)

[159] 30 U.S. at 12. One scholar 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 Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994).

[160] 30 U.S. at 13.

[161] See Reid 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*, 2005 No. 5 Rocky Mtn. Min. L. Found. Paper No. 13A (2005).

famously declared "The power of the general government 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 theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."[162]

In more modern times, the source of congressional power over Indian tribes has migrated from the trust doctrine to the Constitution.[163] Thus, while comparing the Interstate Commerce with the Indian Commerce Clauses, 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 provide Congress with plenary power to legislate in the field of Indian affairs."[164] However, the trust doctrine is still mentioned as s source of congressional plenary power. For instance, in a 1974 case, although the Court stated that "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself,[165] it 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."[166]

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. The Constitution does not, however, guarantee the extent of this sovereignty,[167] and the Court has undermined tribal sovereignty when it held that the purpose of the Commerce Clause was to give plenary power to the Congress over Indian tribes.[168] In that fashion, the trust relationship can be

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[162] 118 U.S. 375 (1886).

[163] Scholars have long debated the legitimacy and extent of the "plenary power" of Congress over Indian Affairs. See for instance, 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. St. L. J. 113 (2002).

[164] Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989). Article I, s 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes.'"

[165] Morton v. Mancari, 417 U.S. 535, 551-552 (1974).

[166] Id., at 551,

[167] See M. Alexander Pearl, *Originalism and Indians*, 93 Tulane L. Rev 269, 329-330 (2018) (stating, "Indian tribes are mentioned in the Constitution, but the scope of their rights and authorities are notably absent.")

[168] 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 (1994) (stating "While 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,

considered, just like federalism, an underenforced norm with constitutional roots.[169] For instance, although Indian tribes can sue the federal government for breach of specific statutes creating trust duties,[170] they have generally been denied the right to sue the federal government for injunctive relief directing the government to enforce the trust responsibility.[171] Similarly, while Tribes can sue the federal government for monetary damages for taking vested property right without affording just compensation under the Fifth Amendment to the Constitution, [172] they cannot challenge the power of Congress to regulate their tribal affairs or interfere with tribal self-government. In other words, while tribes can sue the United States for violation 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.[173]

C. Searching for Congressional Intent to Interfere with Tribal Sovereignty

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the Court must examine the nature, origin, and justification of Congress power over Indian tribes." Id., at 415.

[169] As stated by Professors Eskridge and Frickey, "[st]ructural 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." *Quasi Constitutional law*, supra note 3, 45 Vand. L. Rev. 593, 597.

[170] United States v. Mitchell (Mitchell II), 461 U.S. 206 (1983).

[171] See Curtis Berkey, *Rethinking the Role of the Federal Trust Responsibility in protecting Indian Law and Resources*, 83 Denver L. Rev. 1069, 1079 (2006) (stating that "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 for instance, 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, 364-368 (2003). There are, 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).

[172] See United States v. Sioux Nation, 448 U.S. 371, 407-408 (1980), Hodel v. Irving, 481 U.S. 704 (1981).

[173] Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993) (stating" 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." Id., at 120. See also, Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 Stan. L. Rev. 979 (1981).

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 "Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." [174] Similarly, the *Santa Clara* 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.[175] The problem with looking for a "clear" intent to interfere with tribal self-government is that "clear intent"" seems to be in 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 v. Martinez*,[176] the Court cited to two state sovereign immunity cases to justify its "unequivocal expression of congressional intent" test for abrogation of tribal sovereign immunity.[177]

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 seriously while basically ignoring the other.[178] 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.

In requiring Congress to be clear whenever it uses its plenary power to interfere with the tribes' sovereign rights, the Indian canons fulfill a role similar to the federalist canons in that these federalist canons also aim at making sure that Congress clearly intends to take action interfering with the states' sovereignty.[179]

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[174] Michigan v. Bay Mills Indian Community, 572 U.S. 782, 790 (2014).

[175] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[176] Id.

[177] Id., at 58. 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). However, since *Santa Clara Pueblo* was decided, the test to find an abrogation of state sovereign immunity has transformed itself into a super strong "clear Statement" rule. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

[178] One commentator recently argued that in order for tribal sovereign immunity to be abrogated, the text of the statute at issue should explicitly referred to Indian tribes and their sovereign immunity. See Justin W. Aimonetti, *Magic Words and original Understanding: An Amplified Clear Statement Rule to Abrogate Tribal Sovereign Immunity*, 2020 Pepperdine L. Rev. 1 (2020).

[179] In a noted article, Professors Eskridge and Frickey identified 5 such federalist canons: 1. Rule Against Federal Conditions on State Administration of Federal/State

The Court stated in *United States v. Bond*, "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."[180] 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."[181] The Indian canons provide a similar role in ensuring that tribal rights are protected from congressional plenary power until there is a clear and manifest intent from Congress to interferes with such rights.[182] My proposed canon protecting tribal sovereignty attempts to protect under-enforced norms such as tribal self-government and the trust relationship by making sure 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, statutes being subject to the tribal sovereignty canon should come into play only when federal statutes interfere with tribal sovereignty. The question is, therefore, what kind of statutes are those? The Indian Civil Rights Act,[183] at issue in *Santa Clara v. Martinez*,[184] provides a good example of such a statute since it imposed on tribal governments the duty to protect rights similar to those found in the Bill of Rights.[185]

One test attempting to define what kind of governmental actions infringe on tribal sovereignty was initially devised by the Court with respect to states' attempt to extend their jurisdiction in Indian Country. Thus, in 1959, the Court in *Williams*

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 5. Presumption Against Applicability of Federal Statutes to State and Local Political Processes. See Eskridge and Frickey, *Quasi Constitutional Law*, supra at note 3, 45 Vand. L. Rev. 593.

[180] 572 U.S. 844, 858–59 (2014).

[181] John Manning, 110 Colum. L. Rev. 399, 407–08. (citing to Gregory v. Ashcroft, 501 U.S. 452, 460 (1991), 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."

[182] See Scott Hall, supra at note 15, *The Indian Law Canon of Construction*, 37 Conn. L. Rev. at 541-542. 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) (stating that since Congress controlled Indian affairs, "the Court's role was simply to insure that pre-existing tribal rights were not lost through inadvertent actions by Congress or by the tribes themselves.")

[183] See Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1303.

[184] 436 U.S. 49 (1978)

[185] 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); *see also* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDH AM L. REV. 479 (2000).

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."[186] The problem with borrowing this test for our purpose is that this test was soon modified when the Court in 1973 announced a new test, stating:

> The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction, and toward the reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notion of Indian sovereignty and to look instead at the applicable treaties and statutes which defines the limits of state power.[187]

Therefore, there are no examples where the Supreme Court has applied this test except for its application in *Williams v. Lee*.[188] 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."[189]

One could also borough 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.[190] There are no controlling Supreme Court precedents on this issue. Under the majority view, established by the 9th Circuit, there is a presumption that general federal regulatory laws apply to Indian reservations.[191] This presumption can be rebutted, however, if application of the law would interfere with "exclusive rights of self-governance in purely intramural matters," or interfere with treaty rights.[192] If the presumption is rebutted, courts following this approach have required clear evidence of congressional intent to apply the law to the tribes.[193] Another approach, favored by the D.C. Circuit, would

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[186] Williams v. Lee, 358 U.S. 217 (1959).

[187] the Court eventually adopted 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.

[188] 358 U.S. 217 (1959).

[189] Id., at 220.

[190] For a comprehensive summary of the law in this area, see Alex Tallchief Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 Wash. & Lee J. of Civ. Rights and Soc. J. 123 (2016).

[191] Donovan v. Coeur d'Alene, 751 F.2d 1113 (9th Cir. 1985).

[192] Id., at 1116.

[193] This approach has been followed in the Second, Sixth, Seventh, and Eleventh Circuits. See Skibine, *Practical Reasoning*, at 126.

only require clear evidence of congressional intent if the general federal law interfered with the "traditional attributes of self-government."[194]

In *NLRB v. Pueblo of San Juan*,[195] The Tenth Circuit disagreed with an approach focusing on whether the general federal law interfered with strictly intramural aspects of tribal sovereignty. 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.[196] After stating that "in addition to broad authority over intramural maters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory,"[197] 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."[198]

The Tenth Circuit also announced that the burden to show such intent was on the federal agency and not the Pueblo,[199] and went on to explain why the burden to show a congressional intent to preempt tribal sovereignty fell on the Federal Agency. After asserting that although Congress can divest tribal powers, divestiture was disfavored as a matter of national policy, the Court 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."[200] Finally, the court mentioned the federal policy of encouraging tribal self-government.[201]

I believe 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 v. Lee* and *Pueblo of San Juan*, should be adopted. While there are some judicially imposed limits on tribal jurisdiction over non-members,[202] the Court has never restricted tribal sovereignty to "traditional attributes" of sovereignty, let alone to purely intramural aspects of self-government.

The final section of this Article will address the kind of statutes where the Indian canons should be applicable.

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[194] San Manuel Bingo v. NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007).

[195] 276 F.3d 1186 (10th Cir. 2002).

[196] Id., at 1191.

[197] Id., at 1192-93.

[198] Id., at 1195.

[199] Id., at 1190.

[200] Id., at 1195, (quoting from Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

[201] 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 reiterated 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 1191

[202] See Montana v. United States, 450 U.S. 544, 564 (1981), Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).

D. The Extent of the Indian Canons' Applicability

There were five Indian statutory interpretation cases at the Court since 1987 that did not involve Indian specific statutes.[203] The Tribal interests lost all five and the Court did not apply any of the Indian canons. For some, the Indian canons are only applicable to statutes enacted for the benefit of Indians. As stated earlier, the Court in *Negonsott v. Samuels* stated "It is not entirely clear to us that the Kansas Act is a statute "passed for the benefit of dependent Indian tribes."[204] The question this section addresses is how courts should determine the applicability of an Indian canon.

I think there is arguably a difference between applying the "ambiguity" canon to all statutes and applying that canon when the statute interferes with tribal sovereignty where the tribal sovereignty canon also comes into play. The ambiguity canon can be traced to the treaties but was first initially applied in the interpretation of statutes enacted pursuant to the trust relationship.[205] 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." I think this determination would be too subjective. Determining whether some statute was enacted "for the benefit" of the Indians could be problematic. Take the General Allotment Act (GAA) of 1887 for instance.[206] Just about all Indian tribes were against the policy of Allotment and thought the GAA would be detrimental to Indian tribes.[207] Yet, many white politicians of the times 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 be assimilated in the non-Indian mainstream society.[208]

Rather than determining whether the statute actually "benefit" the Indians or the tribes, the canon should be extended to all statutes that were enacted pursuant to congress under its Indian Commerce Clause power. As noted earlier in this article, the ambiguity canon has historically been tied to the trust relationship. 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 Sovereignty Canon, on the other hand, should not be limited to statutes snated solely pursuant to the Indian Commerce Power. Take for instance federal

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[203] These five cases are Mach-E-B-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. Southern Ute Tribe, 526 U.S. 865 (1999), and Amoco Prod. v. Gambell, 480 U.S. 531 (1987).

[204] 507 U.S. 99, 110 (1993). The Court went on not applying the Indian canon because it found the Kansas Act was clear in giving Kansas jurisdiction over the crime. See discussion supra, at n….

[205] See discussion supra at notes 33-43.

[206] 24 Stat. 388 (1887).

[207] See Kenneth H. Bobroff, *Retelling Allotment: Indian Property, Rights, and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1603-1608 (2001).

[208] On the General Allotment Act, see Judith V. Royster, *the Legacy of Allotment*, 27 Ariz. L. J. 1 (1995).

laws of general applicability. These laws are enacted pursuant to the interstate commerce power. Yet, application of such laws to Indian tribes may still interfere with tribal self-government or, in other words, with "the right of Indians to make their own laws and be ruled by them,."[209] Both the tribal sovereignty canon, a canon that asks whether there is a clear or unequivocal expression of congressional intent to interfere with tribal sovereign rights, as well as the ambiguity canon should be applicable to such statutes of general applicability.[210]

As the Supreme Court stated, "Ambiguities 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."[211] The Tribal sovereignty canon is based on Congress's relatively unchecked plenary power over Indian nations.[212] This plenary power can be exercised by Congress not only under the Indian Commerce Clause but pursuant to other powers given to Congress under the constitution. The normative reason for the sovereignty canon is to ensure that in using its plenary power, Congress has willfully and intentionally decided to abrogate tribal sovereign rights. It does not, therefore, matter whether Congress was acting pursuant to its Indian Commerce power or other more general constitutional power. Thus, several courts have applied the ambiguity canon along with the tribal sovereignty canon to federal laws of general applicability.[213]

CONCLUSION

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

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[209] See Williams v. Lee, 358 U.S. 217 (1958).

[210] Other scholars have also endorsed the view that the Indian canons should be applicable beyond laws enacted strictly to regulate or protect Indians. See, for instance, Bryan H. Widenthal, *Federal Labor Laws, Indian Sovereignty, and the Canons of Construction*, 86 Or. L. Rev. 413, 434-452 (2012)

[211] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

[212] See discussion at notes 168-177.

[213] See NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191 and discussion supra at note 193, See also Buchwald Capital Advisors v. Sault St. Marie Tribe (In re Greektown Holdings III), 917 F.3d at 451, at 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", and Meyers v. Oneida Tribe of Indians, 836 F.3d 818 (7th Cir. 2016) (considering whether the Fair and Accurate Credit Reporting Act (FACTA), had abrogated tribal sovereign immunity.

The Article has argued that these canons have constitutional roots and 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 only be derived from the text of the statute and not extra textual material. Finally, this Article has argued that the unequivocal expression of congressional intent test that has been applied to abrogation of tribal sovereign immunity should also be applied to intent to interfere with tribal sovereign rights.