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Analyzing the Implications of the Supreme Court's Application of the Canons of Construction in Recent Federal Indian Law Cases

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ANALYZING THE IMPLICATIONS OF THE SUPREME COURT'S APPLICATION OF THE CANONS OF CONSTRUCTION IN RECENT FEDERAL INDIAN LAW CASES

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Abstract: Federal Indian law in the United States has historically relied on application of the Indian Canons of Construction ("Canons"). The courts have relied on these principles since 1832. However, their application has not been consistent. Indeed, the Canons are discretionary which has led to judicial avoidance. Yet, recent Supreme Court opinions demonstrate a resurgence of the Canons and a trend towards a textualist approach, both of which involve greater deference to tribal understandings. Ultimately, the opinions in *United States v. Washington*, *Washington State Dept. of Licensing v. Cougar Den*, *Herrera v. Wyoming*, and *McGirt v. Oklahoma*, indicate the Supreme Court's intent to establish a strict framework for the application of the Canons to be used by all courts in this country going forward.

I. INTRODUCTION

"On the far end of the Trail of Tears was a promise . . . we hold the government to its word."[2] With these words, Justice Gorsuch poetically expressed the importance of federal compliance with Indian treaties. Notably, these words signified the Court's intent to enter a new era of faithful application of the Canons of Construction ("Canons") in federal Indian law.

The Supreme Court has long recognized the Canons as the foundational principles of federal Indian law.[3] In short, these Canons require that (1) treaties be interpreted as the Indians would have understood them; (2) treaties are liberally construed in favor of the Indians with all ambiguities resolved in their favor; and (3) abrogation of tribal sovereignty or property rights be expressed by Congress clearly and unambiguously. Despite a history of judicial avoidance of the Canons, a line of recent Supreme Court cases has demonstrated a decided resurgence of their application. With this renaissance, what is the standard applied, and has the standard been applied consistently through these cases? And perhaps more importantly, what can we take away from these cases that may be helpful in future litigation intended to protect treaty rights?

A trend of textualism has dominated recent judicial opinions in the area of federal Indian law.[4] The Court's textualist approach looks first to the language of the relevant treaty or statute, only then, and only in the face of ambiguity, the textualists on the Court turn to extratextual considerations. As a result, the Court is now placing significant value on the historic context of treaty negotiations, the promises made, and tribal understandings at the time of signing. Ultimately, it appears the Court is now prioritizing facts that assist in ascertaining the understanding of tribal

[2] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).
[3] *See* Worcester v. Georgia, 31 U.S. 515, 582 (1832) (McLean, J., concurring).
[4] Fletcher, Matthew L.M., *Muskrat Textualism*, 115 NORTHWESTERN UNIVERSITY L. REV. 45 (2020).

parties during treaty negotiations, in accordance with the Canons. This text-based, fact-specific approach indicates a shift back toward these vitally important foundational principles of federal Indian law, the Canons of Construction, and provides a framework for a more uniform application of the Canons in the future.[5]

Part A will provide the historical and theoretical background necessary to understand the Canons and their traditional application. Part B will assess the recent application of the Canons in the following cases: *United States v. Washington* (*Culverts*),[6] *Wash. State Dep't of Licensing v. Cougar Den*,[7] *Herrera v. Wyoming*,[8] and *McGirt v. Oklahoma*.[9] A review of these opinions will demonstrate the Court's reestablishment of the Canons' importance and the intent to provide a framework to be applied consistently in the lower courts. Finally, Part C will limit the scope of this analysis.

II. DISCUSSION

A. The Canons Are Central To Federal Indian Law And Find Their Origins in 1832; However, Their Application Has Not Been Consistent

Justice McLean's concurring opinion in *Worcester v. Georgia*[10] forms the basis for the Canons of Construction in federal Indian law:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favour conferred, rather than a right acknowledged, would . . . do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.[11]

Although this language is found in the concurrence rather than the majority opinion, these Canons have been applied, though inconsistently, in federal Indian law cases ever since.

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[5] *See* Andrew Rader, *Analyzing the Implications of the Supreme Court's Holding in Herrera v. Wyoming*, 44 AM. INDIAN L. REV. 403, 421 (2020).
[6] Culverts, 827 F.3d 836 (9th Cir. 2016) (This analysis considers the Ninth Circuit case rather than the Supreme Court case because Washington v. United States, 138 S. Ct 1832 (2018), simply affirms the judgment of the Ninth Circuit opinion by an equally divided Court. Therefore, the relevant opinion in this case is that penned by the Ninth Circuit).
[7] 139 S. Ct. 1000 (2019).
[8] 139 S. Ct. 1686 (2019).
[9] 140 S. Ct. 2452 (2020).
[10] *Worcester*, 31 U.S. at 528 (1832) (McLean, J., concurring).
[11] *Id.*; *see also* United States v. Winans, 198 U.S. 371, 381 (1905) (treaties are "not a grant of rights to the Indians, but a grant of right from them, - a reservation of those not granted").

Early application of the Canons appeared to denote recognition and acceptance of their importance. In *Tulee v. Washington*, the Court reasserted the first Canon in stating: "it is our responsibility to see that the terms of the treaty are carried out . . . in accordance with the meaning they were understood to have by the tribal representatives at the council . . . "[12] Likewise, the Court has explained that to ascertain the critical meaning of the words of the treaty, as understood by tribal parties, courts must "look beyond the written words to frame the larger context of the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties."[13] Early cases indicate the Court's intention to establish a clear and mandatory framework for an application of the Canons. Nevertheless, there has been a trend of judicial avoidance of the Canons of Construction.[14] Because the canonical analysis will only begin upon a finding of textual ambiguity, an avenue exists for judges to avoid their application with a finding that the text of the treaty or statute at issue is clear on its face or otherwise unambiguous.[15]

B. Recent Trends In The Canons' Application Suggest The Supreme Court's Desire To Establish A Clear Framework By Which Lower Courts Should Consistently Interpret Treaties With The Tribes

With *Culverts*, *Cougar Den*, *Herrera*, and *McGirt*, the Supreme Court has revived the applications of the traditional Canons of Construction with a strong textualist approach. The Court's consistent application of this textual analysis demonstrates its renewed commitment to the Canons and an intent that they are applied faithfully by the lower courts.

1. The Recent Cases Depict A Supreme Court Entering An Era Of Greater Tribal Protections Through Textualism And Application Of The Canons

a. Culverts

In *Washington v. United States*, the Supreme Court affirmed the Ninth Circuit's opinion by an equally divided Court.[16] This was the first step taken by the Court in its shift towards reapplying the Canons. In that instance, half of the Supreme Court accepted the Ninth Circuit's

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[12] 315 U.S. 681, 684 (1942); *see also* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (holding that a treaty between the United States and Indian Nation must be interpreted as the Indians would have understood it at the time the treaty was signed).

[13] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)) (internal quotations omitted).

[14] *See e.g.,* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (holding that the Commission's eminent domain powers applied to tribal land because "a general statute in terms applying to all persons includes Indians and their property interests" and thereby avoided applying the Canons); San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (the court avoided what it saw as a conflict between the third Canon and Tuscarora by holding that the National Labor Relations Act did not significantly impair tribal sovereignty).

[15] *See, e.g.,* Confederated Tribes & Bands of the Yakama Nation v. Yakima City, 963 F.3d 982, 992 (9th Cir. 2020) ("Because there is only one plausible interpretation of the Proclamation, we need not apply the canon of construction that ambiguities be resolved 'for the benefit of an Indian tribe'" (quoting Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 729 (9th Cir. 2003))).

[16] 138 S. Ct. 1832 (2018).

opinion as correct.[17] In *Culverts*, the Ninth Circuit looked to the Stevens Treaties and the long history surrounding fishing conflicts in Washington between tribal and state fishermen to conclude that the fishing clauses in the treaties were valid and remained in full force, guaranteeing to tribal fishermen 50 percent of the available harvest and that there must be an available harvest (meaning, the state could not decimate the fish population by blocking salmon-bearing streams).[18] This analysis considered the text, promises made, and historical context of the Stevens Treaties:

> Under the Stevens Treaties . . . at issue in this case, the tribes relinquished large swaths of land west of the Cascade Mountains and north of the Columbia River drainage area . . . In exchange for their land, the tribes were guaranteed a right to off-reservation fishing, in a clause that used essentially identical language in each treaty. The "fishing clause" guaranteed "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[19]

Next, the court discussed the Canons of Construction explaining in detail how "[t]he State misconstrue[d] the Treaties."[20] Specifically, the court cited to *Worcester* and reiterated that "[w]e have long construed treaties between the United States and Indian tribes in favor of the Indians."[21] The court continued by considering the context surrounding the signing of the Treaties,[22] explaining that it must look to this context to ascertain the practical construction adopted by the parties.[23] In particular, the court identified, via treaty minutes, statements made by both negotiating parties regarding the importance of fishing to the tribal nations.[24] In light of the promises made by Governor Stevens during negotiations, and the text of the Stevens Treaties themselves, the court found that the state's affirmative actions "to build and maintain barrier culverts under its roads" resulted in salmon no longer reaching harvestable levels "sufficient to provide a moderate living to the Tribes."[25] As a result, the court held "that in building and maintaining barrier culverts within

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[17] *Id*.
[18] 827 F.3d 836 (9th Cir. 2016).
[19] *Id*. at 841, 849 ("'The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish [sic] from any beds staked or cultivated by citizens.'" (quoting *Passenger Fishing Vessel Ass'n*, 443 U.S. at 674)).
[20] *Id*. at 850.
[21] *Id*.
[22] *Id*. ("Negotiations for the Stevens Treaties were conducted in the Chinook language, a trading jargon of only about 300 words… The Treaties were written in English, a language the Indians could neither read nor write. Because treaty negotiations with Indians were conducted by 'representatives skilled in diplomacy,' because negotiators representing the United States were 'assisted by … interpreter[s] employed by themselves,' because the treaties were 'drawn up by [the negotiators] and in their own language,' and because the 'only knowledge of the terms in which the treaty is framed is that imparted to [the Indians] by the interpreter employed by the United States,' a 'treaty must … be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians'" (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899))).
[23] *Id*. at 851 (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196).
[24] *Id*.
[25] *Id*. at 853 (internal quotations omitted).

the Case Area, Washington ha[d] violated, and [was] continuing to violate, its obligations to the Tribes under the Treaties."[26]

b. Cougar Den

The Supreme Court's opinion in *Cougar Den*, in many ways, mirrors the roadmap used in the Ninth Circuit's *Culverts* opinion.[27] Again, the Court began by explaining what the tribe ceded in exchange for its reservation and retained with treaty-protected rights.[28] The Court quoted the treaty directly to conclude that it reserved rights included "'the right, in common with citizens of the United States, to travel upon all public highways.'"[29] The Court then explained that the state's fuel tax, a tax on travel, was directly at issue with the tribe's treaty right to travel free from state encumbrance.[30] The Court explained, that regardless of the state's intentions behind the tax, the tax operated on the tribe as a tax on the treaty right itself:

> When the Yakamas bargained in the treaty to protect their right to travel, they could only have cared about preventing the State from burdening their exercise of that right. To the Yakamas, it is thus irrelevant whether the State's tax might apply to other activities beyond transportation. The only relevant question is whether the tax "act[ed] upon the Indians as a charge of exercising the very right their ancestors intended to reserve." And the state's tax here acted upon Cougar Den in exactly that way.[31]

Importantly, the Court unambiguously stated that "[a]lthough a State 'generally is free to amend its law to shift the tax's legal incidence,' it may not burden a treaty-protected right in the process."[32] The Court relied on three key considerations to conclude that the state's fuel tax on a corporation owned by tribal members was preempted by the treaty-reserved right to travel.[33] First, the Court looked to previous instances in which it had interpreted the same treaty language.[34] In that portion of its analysis, the Court reasserted, as it had in numerous prior cases, that to interpret a treaty between the Federal Government and an Indian Nation, "courts must focus upon the

[26] *Id.*
[27] *Id.*
[28] Washington State Dept. of Licensing v. Cougar Den, 139 S. Ct. 1000, 1007 (2019).
[29] *Id.* (quoting Treaty Between the United States and the Yakama Nation of Indians, Art. III, 12 Stat. 951, 953 (June 9, 1855)).
[30] *Id.* at 1008.
[31] *Id.* at 10110 (quoting *Tulee* 315 U.S. at 685 (1942)).
[32] *Id.* at 1011 (quoting Okla. Tax. Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995)).
[33] *Id.*
[34] *Id.* (citing *Winans*, 198 U.S. at 380-81; Seufert Brothers Co. v. United States, 249 U.S. 194, 196-98 (1919); *Tulee*, 315 U.S. at 683-85; *Wash. State Passenger Fishing Vessel Ass'n*, 443 U.S. at 677-78).

historical context in which it was written and signed."[35] Accordingly, the next step of the analysis considered the historical record in its entirety, focusing on facts that favored tribal understandings:

> *When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade*. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. The Yakamas traveled to the nearby plains regions to hunt buffalo. They traveled to the mountains to gather berries and roots. The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. *The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. They repeatedly assured the Yakamas that under the treaty [they] would be able to travel outside their reservation on the roads that the United States built*.[36]

The Court noted that Governor Stevens specifically promised that under the treaty the tribe would "be allowed to go on the roads, to take [their] things to market" and, in persuading the tribe to agree to the proposed reservation boundaries, he highlighted the "close proximity to public highways that would facilitate trade."[37] These points were significant because they supported the conclusion that such promises "would have led the Yakamas to understand that the treaty's protection of the right to travel on public highways included the right to travel with goods for purposes of trade."[38] Lastly, the Court expanded upon prior precedent stating, "[i]f the cost of a fishing license interferes with the right to fish, so [too does] a tax imposed on travel with goods … interfere with the right to travel."[39] As such, the Court held that the state gasoline tax was preempted by the treaty, which constitutes federal law.[40]

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[35] *Id*. at 1012 (citing *Winans*, 198 U.S. at 381); *c.f.* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) (to ascertain the meaning of ambiguous treaty language, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" (quoting *Choctaw Nation of Indians*, 318 U.S. at 431)).
[36] *Id*. at 1012-1013 (emphasis added) (internal citations omitted).
[37] *Id*. at 1013.
[38] *Id*.
[39] *Id*. (referencing *Tulee*, 315 U.S. at 685 (holding that requiring tribal fishermen to comply with state fishing licensing requirements "as a prerequisite to the enjoyment of" a treaty-reserved right "cannot be reconciled with a fair construction of the treaty")).
[40] *Id*; *but see Id.* at 1014 (However, the Court cabins its holding by stating that this does not "deprive[] the State of the power to regulate … when necessary for conservation" or "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights.").

c. Herrera

The *Herrera* decision began with an explanation that the Crow Tribe ceded certain rights to a large territory in Montana and Wyoming in exchange for federal promises that the Crows "'shall have the right to hunt 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.'"[41] The Court then stressed that during treaty negotiations Nathanial G. Taylor, the Commissioner of Indian Affairs, told tribal leaders "that the United States wished to 'set apart a tract of [Crow Tribe] country as a home' for the Tribe 'forever' and . . . emphasized that the Tribe would have 'the right to hunt upon' the land it ceded to the Federal Government 'as long as the game lasts.'"[42] Additionally, the Court noted that "[a]t the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions."[43] What followed was the signing of the 1868 Treaty, Article IV of which memorialized a promise stating "[t]he Indians … shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."[44] The issue over the continued existence of the reservations lands arose thereafter, once Wyoming joined the Union and President Grover Cleveland set aside lands for Bighorn National Forest.

The first conclusion of the Court was that the Crow Tribe's treaty reserved off-reservation hunting rights were not extinguished and did not expire upon Wyoming's statehood.[45] To reach this conclusion, the Court distinguished between *Ward v. Race Horse* [46] and *Minnesota v. Mille Lacs Band of Chippewa Indians*.[47] The Court explained that *Race Horse* relied on two pillars to come to the conclusion that Wyoming statehood extinguished the Shoshone-Bannock treaty reserved right to hunt.[48] The first pillar was the equal footing doctrine.[49] The second pillar was that there was "no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in 'perpetuity.'"[50] The Court then explained how *Mille Lacs* dismantled both pillars with a two-step approach: "[t]he Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood."[51] While this approach did not expressly overturn *Race Horse*, "it methodically

[41] Herrera v. Wyoming, 139 S. Ct. at 1691 (quoting the Treaty Between the United States of American and the Crow Tribe of Indians, Art. IV, 15 Stat. 650, (May 7, 1868)).
[42] *Id*. at 1692.
[43] *Id*.
[44] Treaty Between the United States of America and the Crow Tribe of Indians, Art. IV, 15 Stat. 649 (May 7, 1868).
[45] *Herrera*, 139 S. Ct at 1694.
[46] 163 U.S. 504, 505 (1896) (holding that Wyoming's admission to the U.S. in 1890 extinguished the Shoshone-Bannock Treaty hunting right).
[47] 526 U.S. at 202 (1999) (clarifying that the crucial inquiry for treaty extinguishment analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right).
[48] *Herrera*, 139 S. Ct. at 1694.
[49] *Id*.
[50] *Id*. at 1695 (quoting *Race Horse*, 163 U.S. at 509, 514).
[51] *Id*.

repudiated that decision's logic."[52] Indeed, "*Mille Lacs* framed *Race Horse* as inquiring into whether [Congress] 'intended the rights secured by the . . . Treaty to survive statehood.'"[53] In the process of upending the two pillars of *Race Horse*, the *Herrera* decision opined that *Mille Lacs* "established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied."[54] This description of the rule includes a textualist approach and touches on the third Canon of Construction that abrogation must be unambiguously expressed by Congress.

To reach its second conclusion, the Court conducted an analysis similar to that which it employed in *Mille Lacs* to hold that "the Wyoming Statehood Act [did] not show that Congress intended to end the 1868 Treaty hunting right."[55] The Court compared the Wyoming Act to the Act discussed in *Mille Lacs*, which likewise made "no mention of Indian treaty rights" and provided "no clue that Congress considered the reserved rights of the [Tribe] and decided to abrogate those rights when it passed the [Minnesota] Statehood Act."[56] In addition to looking to the statutory and treaty texts, the Court considered the historical record which "likewise [did] not support the State's position."[57] Rather, the historical context showed the following:

> Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations . . . Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River–Nebraska, Nevada, Kansas, Oregon, and Minnesota–had been admitted to the Union in just the preceding decade. Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.[58]

Furthermore, the Court explained that statehood did not render all the lands within the state's borders "occupied."[59] Indeed, the Court emphasized that to accept such an assertion would subvert the clear holding in *Mille Lacs*.[60]

Next, the Court considered whether the treaty hunting right covered hunting in Bighorn National Forest based on the underlying question of whether national forest status rendered land "occupied."[61] Here again, the Court analyzed the treaty's text and construed all terms as "they

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[52] *Id*.
[53] *Id*. at 1696 (quoting *Mille Lacs*, 526 U.S. at 207).
[54] *Id*. (citing *Mille Lacs*, 526 U.S. at 207).
[55] *Id*. at 1698.
[56] *Mille Lacs*, 526 U.S. at 203.
[57] *Herrera*, 139 S. Ct. at 1699.
[58] *Id*. at 1699-1700 (internal citations omitted).
[59] *Id*.
[60] *Id*.
[61] *Id*.

would naturally be understood by the Indians."[62] The Court explained that "[h]ere it is clear that the Crow Tribe would have understood the word 'unoccupied' to denote an area free of resistance or settlement by non-Indians."[63] In that analysis, the Court specifically turned to Article IV of the treaty which "made the hunting right contingent on peace 'among the whites and Indians on the borders of the hunting districts,' thus contrasting the unoccupied hunting districts with areas of white settlement."[64] Likewise, the Court noted that:

> The treaty elsewhere used the word 'occupation' to refer to the Tribe's residence inside the reservation boundaries, and referred to the Tribe members as 'settlers' on the new reservation. Arts. II, VI . . . [and highlighting that the] treaty also juxtaposed occupation and settlement by stating that the Tribe was to make 'no permanent settlement' other than on the new reservation, but could hunt on the 'unoccupied lands' of the United States. Art. IV . . . Contemporaneous definitions further support a link between occupation and settlement.[65]

The Court then looked to the historical context, focusing on the promises made by Commissioner Taylor to ascertain the tribal understanding at the time of signing:

> At the treaty negotiations, Commissioner Taylor commented that 'settlements ha[d] been made upon [Crow Tribe] lands' and that 'white people [were] rapidly increasing and . . . occupying all the valuable lands.' It was against this backdrop of white settlement that the United States proposed to buy 'the right to use and settle' the ceded lands, retaining for the Tribe the right to hunt [thereon.] . . . Given the tie between the term 'unoccupied' and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not 'occupy' that area within the treaty's meaning. To the contrary, the President 'reserved' the lands 'from entry or settlement.' . . . [T]he treaty's text and the historical record suggests that the phrase 'unoccupied lands' had a specific meaning to the Crow Tribe: lack of settlement.[66]

Therefore, the Court relied on a similar treaty analysis to conclude that "Bighorn National Forest did not become categorically 'occupied' within the meaning of the 1868 treaty when the national forest was created."[67] As such, neither statehood nor the creation of the national forest abrogated the treaty right to hunt in the case area.[68]

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[62] *Wash. State Passenger Fishing Vessel Ass'n*, 443 U.S. at 676).
[63] *Herrera*, 139 S. Ct. at 1701.
[64] *Id*. at 1700-1701 (quoting the Treaty Between the United States of America and the Crow Tribe of Indians art. 4, May 7, 1868, 15 Stat. 649).
[65] *Id*. at 1701-1702.
[66] *Id*. at 1702.
[67] *Id*. at 1700-1701.
[68] *Id*.

d. McGirt

The Court's opinion in *McGirt* solidified the analytical framework used in the previous three cases. The opinion opened with a poetic explanation of the treaty context and the promises made by federal representatives during treaty negotiations.[69] The Court began by clarifying that Congress established the Creek Reservation through a series of treaty agreements.[70] Justice Gorsuch then proclaimed that:

> The government's promises [in the relevant treaty and treaty negotiations] were not made gratuitously. Rather, the 1832 Treaty acknowledged that '[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi,' and, in service of that goal, required the Creeks to cede all lands in the East. Nor were the government's promises meant to be delusory. Congress twice assured the Creeks that '[t]he Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States.' Both treaties were duly ratified and enacted as law.[71]

Specifically, the Court highlighted the fact that the 1866 Treaty included the Congressional promise that:

> "No portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property.[72]

Next, the Court concluded that the Creek Reservation survived allotment. The starting point in this analysis was the statutory text.[73] The Court wrote that, concerning allotment, the Creek Nation clearly and expressly communicated to Congress that the tribe "would not, under any circumstances, agree to cede any portion of their lands."[74] The Allotment Commission and Congress relied on that representation from the tribe, and pursued allotment, rather than land cession.[75] Based on the statutory text and historical context, the Court concluded that "because there exists no equivalent law terminating what remained, the Creek Reservation survived

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[69] *McGirt* 140 S. Ct. at 2459.
[70] *Id*. at 2460.
[71] *Id*. (internal citations omitted); *see also* similar language in the Indian Removal Act of 1830, § 3, 4 Stat. 412 (authorizing the President "to assure the tribe … that the United States will forever secure and guaranty to them … the country so exchanged with them … and if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same; *Provided always*, that such lands shall revert to the United States, the Indians before extinct, or abandon the same").
[72] *Id*. (internal citations omitted).
[73] *Id*. at 2462; *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 566-568 (1903); Solem v. Bartlett, 465 U.S. 463, 470 (1984).
[74] *Id*. at 2463.
[75] *Id*. (internal citations omitted).

allotment."[76] Likewise, the Court held that the reservation survived other breaches of federal promises.[77]

Finally, the Court clarified that when applying the diminishment test, extratextual information will be consulted only if the text is ambiguous.[78] Unequivocally, the Court explained:

> When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. This is the only 'step' proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead* of the laws Congress passed.[79]

This clarification follows the Court's familiar framework: textual analysis followed by consideration of prior case law.

2. The Language Used To Discuss The Canons Is Consistent Throughout The Highlighted Supreme Court Cases

The use of consistent language by the Court throughout this line of cases reveals the Court's adherence to the canonical language to encourage uniform application in the lower courts. The first Canon requires that treaty language, or more broadly, the language in any treaty, agreement, or statute relating to Indian tribes, be construed as the Indians would have understood it. This Canon is "rooted in the unique trust relationship between the United States and the Indians."[80] Moreover, this rule supports the Court's recognition of the perceived inequality in bargaining power between the Indians and the federal government.[81] As such, the Supreme Court has explained that federal Indian law texts should be understood in combination with the unequivocal promises made by the federal government's representatives during treaty negotiations.[82]

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[76] *Id*. at 2464 (internal citations omitted). The Court further reminded [readers] that the principle that Indian Country survives allotment is nothing new. *See* 18 § U.S.C. 1151(a); Mattz v. Arnett, 412 U.S. 481 (1973).
[77] *Id*. at 2462 ("[i]t's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so. History shows that Congress knows how to withdraw a reservation when it can muster the will").
[78] *Id*. at 2468.
[79] *Id*. (internal citations omitted; emphasis in original).
[80] Oneida Cty. v. Oneida Indian Nation, 470 U.S. 226, 257 (1985).
[81] *See Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 at 675-76. ("The United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded…"); but *cf. Winans*, 198 U.S. at 380. ("[w]e will construe a treaty with the Indians as [they] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which loos only to the substance of the right, without regard to technical rules").
[82] *Passenger Fishing Vessel Ass'n*, 443 U.S. at 676-78; *McGirt*, 140 S. Ct. at 2459.

The recent Supreme Court federal Indian law cases use the same language explaining and interpreting the first Canon and cite to the same precedent. First, in *Culverts*, the court explicitly states that "a 'treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'"[83] This is the exact language used by the Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[84] which is cited in both *Herrera*[85] and *Cougar Den*.[86]

The second Canon mandates that the courts liberally construe treaty language and ambiguities in favor of the Indians.[87] As with the previous Canon, we see this interpretive rule restated by the court in *Culverts*: "we have long construed treaties between the United States and Indian tribes in favor of the Indians."[88] Furthermore, this Canon is closely related to the first Canon and is often discussed in connection therewith. For example, in *Herrera* the Court discussed the two Canons in combination: "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.'"[89] Again, here we see the Court citing to the same cases, namely *Worcester*,[90] *Mille Lacs*,[91] and *Passenger Fishing Vessel Ass'n*.[92]

The third and final Canon of Construction provides that abrogation of tribal sovereignty or tribal property rights must be clearly and unambiguously expressed by Congress.[93] This requires a text-based analysis that was reaffirmed in *Herrera*, which cited to the familiar *Mille Lacs* case.[94] Shortly thereafter, in *McGirt*, the Court reasserted this Canon by looking to the text of the Crow Nation's treaty to find express language articulating the tribe's non-consent to cede their land.[95] This reveals that the third Canon works in two ways: (1) where there is a clear textual basis demonstrating a lack of intent to abrogate immunity or cede tribal lands, there has been no

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[83] *Culverts*, 827 F.3d at 850-51 (quoting *Jones*, 175 U.S. at 11).
[84] *Passenger Fishing Vessel Ass'n*, 443 U.S. at 676 (construing Article III as reserving rights as they were understood "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by [tribal representatives]").
[85] 139 S. Ct. at 1701.
[86] 139 S. Ct. at 1011.
[87] *See Worcester*, 31 U.S. at 582 ("The language used in treaties with Indians should never be construed to their prejudice").
[88] *Id*. at 850.
[89] *Herrera*, 139 S. Ct. at 1699 (2019) (citing *Mille Lacs*, 526 U.S. at 206 and *Passenger Fishing Vessel Ass'n*, 443 U.S. at 676).
[90] 31 U.S. 515 (1832) (McLean, J., concurring).
[91] *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 172.
[92] *Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658.
[93] 1 Cohen's Handbook of Federal Indian Law § 2.02 (2019).
[94] *Culverts*, 827 F.3d at 1696 (explaining that *Mille Lacs* "established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty").
[95] *McGirt*, 140 S. Ct. at 2463.

abrogation or cession; and (2) otherwise, there must be clear and express congressional language abrogating tribal sovereignty or diminishing or extinguishing tribal lands.

Throughout these cases, we see the Court using the same phraseology to explain the Canons of Construction. Likewise, the Court repeatedly cites the same select federal Indian law cases which applied the Canons, rather than those in which Canons were judicially avoided. First, this demonstrates the firm resolution of the Court to articulate the Canons consistently. Second, by continuously referring to the early case law applying the Canons and ignoring those cases that did not, the Court appears to be championing consistent adherence to the Canons.

3. In Applying The Canons, Each Of The Highlighted Cases Follows A Careful Structure

Not only is the language used in explaining the Canons of Construction similar, if not the same throughout these cases, so too is the analytical structure of their application. In applying the Canons, each of the highlighted cases follows an analogous structure. The opinions begin with a description of the relevant treaty or statute.[96] First, the Court looks to the specific language of the treaty, focusing primarily on the first Canon.[97] Then, the Court will consider how it has previously interpreted similar language. For example, the *Herrera* Court distinguished between *Race Horse*[98] and *Mille Lacs*.[99] Likewise, the *Cougar Den* court looked to the four previous times the Court interpreted similar treaty language.[100] Similarly, the *McGirt* Court specifically clarified the *Solem v. Bartlett* test.[101] Finally, the *Culverts* opinion discussed previous cases such as *United States v. Winans*[102] and *Tulee v. Washington*.[103] If, however, the Court determines that the relevant language of the text of the treaty or statute is ambiguous, the next step of the analysis requires a hard look at the history and context surrounding the negotiation or enactment of the text. This is where the Canons are most applied.[104] In this portion of its analysis, the Court will consider the entire historical record, prioritizing facts that help the Court ascertain what the tribe(s) would have understood.[105]

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[96] *Herrera*, 139 S. Ct. at 1691-93; *Cougar Den*, 139 S. Ct. at 1007; *McGirt*, 140 S. Ct. at 2459; *Culverts*, 827 F.3d at 841.
[97] *Herrera*, 139 S. Ct. at 1692-93, 1701-02; *Cougar Den*, 139 S. Ct. at 1007; *McGirt*, 140 S. Ct. at 2459-61; *Culverts*, 827 F.3d at 841, 849.
[98] 163 U.S. at 505 (holding that Wyoming's admission to the U.S. in 1890 extinguished the Shoshone-Bannock Treaty hunting right).
[99] 526 U.S. 172, 202 (1999) (clarifying that the crucial inquiry for treaty extinguishment analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right).
[100] *Cougar Den*, 139 S. Ct. 1000 (looking to *Winans*, 198 U.S. at 379; *Seufert Brothers*, 249 U.S. at 198-199; *Tulee*, 315 U.S. at 684; *Passenger Fishing Vessel Ass'n*, 443 U.S. at 679, 684-685).
[101] *McGirt*, 140 S. Ct. at 2468; *Solem*, 465 U.S. at 470.
[102] 198 U.S. 371 (1905).
[103] 315 U.S. 681 (1942).
[104] *Herrera*, 139 S. Ct. at 1699-1702; *Cougar Den*, 139 S. Ct. at 1012-1013; *McGirt*, 140 S. Ct. at 2463; *Culverts*, 827 F.3d at 851.
[105] *Id*.

By using the same analysis in each of the relevant cases without deviation, the Court is clearly establishing a precise framework by which it and the lower courts will apply the Canons going forward.

4. The Consistent Application Of The Canons In These Cases Further Elicits A Strong Textualist Approach

Each of the highlighted cases begins with the text and only ventures outside of the text in the instance of ambiguity. This was made clear in *McGirt* where Justice Gorsuch wrote that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."[106] While that statement was made regarding diminishment framework specifically, it arguably applies to the canonical analysis broadly. Indeed, Matthew Fletcher explained that even when the Court looks to historical context, it nevertheless focuses primarily on the text itself. [107]

This approach "significantly narrow[s] the scope of evidence available to interpret the text, in some cases to almost nothing but the bare words of the statute."[108] Additionally, and importantly, this "shift prioritizing … textualism … situates the Court as interpreter of the law rather than the maker of the law."[109] Put another way, this approach represents the Court's recognition that Congress has the tools at its disposal to draft, enact, and correct statutory language: courts have no right to infringe upon that congressional authority.[110]

C. Limitations

There are several potential limits to this textualist approach. First, for example, Matthew Fletcher argues that the *McGirt* opinion "is instructive of the lure and limitations of textualism."[111] In particular, he notes that "[t]he Court was deeply split on which text controlled, the treaty establishing the reservation or the allotment laws."[112] Moreover, the Supreme Court often holds Indian texts dispositive or "too frequently . . . declines to engage with a relevant text or downplays the significance of the text in favor of a common-law-style analysis."[113] Specifically, Fletcher explains that there are three areas of Indian law each of which the Supreme Court has treated differently: (1) reservation boundary cases for which the Court typically engages with the text; (2) tribal power cases in which the courts often decline to engage with the text; and (3) cases involving federal statutes of general applicability where textual silence has led to an unresolved area of

[106] 140 S. Ct. at 2469.
[107] *Cf.* Fletcher, *supra* note 4, at 53 ("The *McGirt* Court applied these rules faithfully and held that Congress never terminated the reservation. The majority did so over dozens of pages of historical evidence, inferences based on legislative text, and the multitude of policy claims by the state and others. But the core focus of its analysis was on the legislative text").
[108] Fletcher, Matthew L.M., *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 112 (2020).
[109] Fletcher, *supra* note 4 at 59.
[110] *Id.* at 76-77 ("textualism respects Congress' role in driving national policy on Indian affairs").
[111] Fletcher, *supra* note 106, at 112.
[112] *Id*. at 113.
[113] *Id*. at 119.

law.[114] These three areas, with different treatments, demonstrates the inherent inconsistency in the application of the textualist approach.[115] Additionally, because the Canons are discretionary, the courts retain the ability to ignore this approach.[116] Despite these concerns, in the wake of *McGirt* we have seen some courts honor the approach set forth by the Supreme Court.[117]

Another key criticism of this textualist approach is that "[i]mproper biases dominating at the time of a text's enactment will be an overt part of the Court's decision-making."[118] Importantly, tribes are often not a party to the text's interpretation. Indeed, Fletcher writes that "[t]he only way the judiciary will take into consideration the understanding of Indians and tribes is if Indians and tribes make their understanding known," even where the case involves Indian-related texts such as treaties.[119]

Finally, with the changing makeup of the Supreme Court, there exists uncertainty as to how this new Court will continue applying the Canons and the textualist approach. Specifically, there is a question as to how newly appointed Justice Coney Barrett will approach federal Indian law and apply the Canons. Prior to her appointment, Justice Coney Barrett stated:

> Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute. Textualists cannot justify the application of substantive canons on the ground that they represent what Congress would have wanted . . . A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one.[120]

However, Justice Coney Barrett has voiced her opinion that canons derived from the United States Constitution should be acceptable to textualists.[121] Either way, her recent addition to the Supreme Court potentially throws into question how the Court will decide future cases involving federal Indian law and application of the Indian Canons of Construction.

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[114] *Id*. at 120.
[115] *Id*. at 128.
[116] *Id*. at 138 ("The reality is that when it comes to interpreting Indian affairs statutes, the judiciary too often treats these canons as voluntary… [and] some judges refuse to respect the canons at all"); *cf.* Frickey, Philip P., *Marshalling past and President: Colonialism, Constitutionalism, and Interpretation of Federal Indian Law*, 107 HARV. L. REV. 381, 428 (1993) ("Canons are mere formulations. Standing alone, a canon cannot be expected to control judicial outcome…").
[117] *See e.g.*, State of Oklahoma v. Brester, (Ottawa Co. Dist. Ct. March 2, 2021).
[118] Fletcher, *supra* note 106, at 116.
[119] *Id*. at 139 ("The evidence most favored by the courts includes the statements of the House or Senate committees that passed the bill in the first place. To use that evidence alone in interpreting Indian affairs statutes and ignoring the understanding of tribal interests… is simply a poor practice. But that is the practice, unfortunately").
[120] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123-24 (2010).
[121] *Id*. at 111-12.

III. CONCLUSION

Ultimately, this resurgence of a strong textualist approach in the interpretation of the treaties indicates that the Court's emerging direction favors tribal deference. Despite the ever-present possibility of judicial avoidance and the potential impact of recent changes to the Supreme Court, together *Culverts*, *Cougar Den*, *Herrera*, and *McGirt* should be read as providing a reliable framework for the application of the Indian Canons of Construction and a growing body of precedent that supports the conclusion that they should be applied consistently in future cases.