

---

---

*Ysleta del Sur and Alabama and Coushatta Indian Tribes  
of Texas Restoration Act — Federal Indian Law —  
Statutory Interpretation — Ysleta del Sur Pueblo v. Texas*

It is hornbook law that “standard principles of statutory interpretation do not have their usual force in cases involving Indian law.”<sup>1</sup> The Indian canons of construction counsel liberal interpretation of statutes and treaties in favor of Native nations.<sup>2</sup> But no matter what the hornbooks say, the Supreme Court relies on the canons only sporadically when interpreting statutes.<sup>3</sup> Recently, in *Ysleta del Sur Pueblo v. Texas*,<sup>4</sup> the Supreme Court engaged in now-familiar textualist practices to find that the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act<sup>5</sup> (“Restoration Act”) did not federalize Texas gaming law on the lands of two Native nations, over a dissent relying on similarly textualist methodology. The opinions largely did not engage with the Indian canons. At oral argument, however, several Justices asked questions seeming to cast doubt on the Indian canons’ provenance in statutory interpretation cases.<sup>6</sup> This Comment responds to these questions, outlining the canons’ justifications and demonstrating that use of the Indian canons is plausibly consistent with textualist use of other substantive canons.

In 1968, Congress established a trust relationship between the Ysleta del Sur Pueblo tribe and the State of Texas.<sup>7</sup> In 1983, however, Texas Attorney General Jim Mattox terminated that trust relationship, concluding it violated the state’s constitution.<sup>8</sup> The tribe, along with the Alabama-Coushatta tribe, turned to the U.S. Congress to seek a federal

---

<sup>1</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2017) (quoting *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985)).

<sup>2</sup> There is some scholarly disagreement as to whether there are multiple Indian canons that apply to specific situations or one Indian canon that applies across multiple texts. Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1104 (2013). This Comment refers to “canons,” plural, throughout, including when describing a source that refers to a single canon.

<sup>3</sup> The canons have been used more consistently in treaty litigation. See *Developments in the Law — Climate Change*, 135 HARV. L. REV. 1524, 1570–71 (2022).

<sup>4</sup> 142 S. Ct. 1929 (2022).

<sup>5</sup> Pub. L. No. 100-89, 101 Stat. 666 (1987).

<sup>6</sup> See, e.g., Transcript of Oral Argument at 55, *Ysleta* (No. 20-493) (statement of Alito, J.), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-493\\_con2.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-493_con2.pdf) [<https://perma.cc/TXY9-Z9E4>] (“Some of [the canons] . . . have a long history. What do you think is the basis for this Indian canon?”); *id.* at 63 (statement of Kavanaugh, J.) (asking what “constitutional or quasi-constitutional value” underlies the Indian canons); *id.* at 65 (statement of Barrett, J.) (asking whether the canons as applied to statutes are “like a sub-Indian canon”).

<sup>7</sup> *Ysleta*, 142 S. Ct. at 1934. When Congress enacts legislation establishing the terms of a trust relationship with a tribe, it “accept[s] a fiduciary duty” and has a legal obligation to act accordingly for activities within the scope of that relationship — for instance, property and resource management. Seth Davis, Essay, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1777 (2017) (quoting *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015)).

<sup>8</sup> *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179, 2019 WL 639971, at \*1 (W.D. Tex. Feb. 14, 2019).

trust relationship.<sup>9</sup> After several years of negotiations between the tribes and the state (with a sticking point being gambling on tribal land), Congress brokered a compromise in 1987 in the form of the Restoration Act, which established a federal trust relationship.<sup>10</sup> Section 107 of the Act provides that: (a) “[a]ll gaming activities which are prohibited by the laws of the State of Texas” are prohibited on tribal lands; (b) “[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction” to Texas; and (c) federal courts have “exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe.”<sup>11</sup> This compromise proved to be uneasy, quickly resulting in litigation.<sup>12</sup> In 1994, the Fifth Circuit in *Ysleta del Sur Pueblo v. Texas* (*Ysleta I*)<sup>13</sup> interpreted the Restoration Act to mean that all Texas gaming laws and regulations “operate as surrogate federal law on the Tribe’s reservation,” as opposed to the structure established by the federal Indian Gaming Regulatory Act<sup>14</sup> (IGRA).<sup>15</sup>

Far from settling the tribe’s dispute with Texas, the Fifth Circuit’s decision kicked off “[a] quarter century of confusion and litigation” about the tribe’s gaming activities, which led to the facts of *Ysleta*.<sup>16</sup> Gaming is a \$160 million industry for the tribe, employing over one thousand people.<sup>17</sup> On May 17, 2017, Texas officials inspected the tribe’s bingo activities at Speaking Rock Entertainment Center for compliance with Texas’s Bingo Enabling Act.<sup>18</sup> At Speaking Rock, the tribe primarily operates two kinds of bingo. First, the tribe offers “One-Touch” machines, which use software to assign players cards from historic bingo draws and run a nearly instantaneous game of bingo.<sup>19</sup> The tribe also offers more traditional live-called bingo — but players may use machines that allow them to play dozens of cards at a time.<sup>20</sup> Texas sought a permanent injunction in the U.S. District Court for the Western

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*2.

<sup>11</sup> *Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act*, Pub. L. No. 100-89, 101 Stat. 666, 668–69 (1987). Section 107 is specific to the *Ysleta del Sur Pueblo* tribe, but the Act’s provisions regulating gaming on Alabama-Coushatta lands employ the same language. *See id.* at 672.

<sup>12</sup> *See Ysleta*, 142 S. Ct. at 1936.

<sup>13</sup> 36 F.3d 1325 (5th Cir. 1994).

<sup>14</sup> 25 U.S.C. §§ 2701–2721 (2020).

<sup>15</sup> *Ysleta I*, 36 F.3d at 1334.

<sup>16</sup> *Ysleta*, 142 S. Ct. at 1936.

<sup>17</sup> *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179, 2019 WL 5589051, at \*2 (W.D. Tex. Mar. 28, 2019) (figures from 2017).

<sup>18</sup> *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179, 2019 WL 639971, at \*5, \*9 (W.D. Tex. Feb. 14, 2019).

<sup>19</sup> *Id.* at \*5–6. According to the district court, these machines “look similar to a traditional ‘slot machine,’” with “decorative outer wrapping” and names like “Big Texas Payday.” *Id.* at \*5.

<sup>20</sup> *Id.* at \*6.

District of Texas against the tribe's operations at Speaking Rock, alleging that both offerings of bingo violated Texas law.<sup>21</sup>

On summary judgment, Judge Martinez granted the injunction.<sup>22</sup> The court followed *Ysleta I* to determine that Texas's gaming laws and regulations act as surrogate federal law on tribal lands.<sup>23</sup> Applying Texas law, the court found that the tribe's bingo activities violated Texas's Bingo Enabling Act.<sup>24</sup> Next, the court concluded that the four requirements for a permanent injunction — success on the merits, irreparable injury, the balance of equities, and the public interest — were met, and accordingly granted the injunction.<sup>25</sup>

The Fifth Circuit unanimously affirmed.<sup>26</sup> Writing for the panel, Judge Willett<sup>27</sup> found that the district court correctly concluded both that the Restoration Act, not IGRA, applies to *Ysleta* gaming activities in light of *Ysleta I* and that the Restoration Act applies Texas law as surrogate federal law on *Ysleta* land.<sup>28</sup> The Fifth Circuit also agreed that the district court correctly applied the balance of equities prong for injunctive relief.<sup>29</sup> Finally, the court found that the Restoration Act provides the Texas Attorney General with authority to sue to enjoin tribal gaming activity.<sup>30</sup>

The Supreme Court vacated and remanded.<sup>31</sup> Writing for the Court, Justice Gorsuch<sup>32</sup> held that the Restoration Act did not establish Texas law as surrogate federal law on *Ysleta* land.<sup>33</sup> The Court found that the Restoration Act incorporated its prior decision in *California v. Cabazon Band of Mission Indians*<sup>34</sup> to establish a regime where gaming activities

<sup>21</sup> See *id.* at \*6.

<sup>22</sup> See *id.* at \*15. The district court had previously denied Texas's motion for a preliminary injunction. See *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179, 2018 WL 1566866, at \*15 (W.D. Tex. Mar. 29, 2018). The tribe also levied several counterclaims against Texas Attorney General Ken Paxton, which the district court quashed at summary judgment. See *Texas v. Ysleta del Sur Pueblo*, 367 F. Supp. 3d 596, 613 (W.D. Tex. 2019).

<sup>23</sup> See *Ysleta*, 2019 WL 639971, at \*8.

<sup>24</sup> See *id.* at \*11. The tribe's activities, among other things, include operating bingo machines that receive and dispense tokens and money, allow participants to play more cards at once than is allowed by state regulation, and operate 24/7 in violation of state time restrictions. *Id.* at \*9–11.

<sup>25</sup> The court stayed its injunction, finding that a "higher court" may come to a different interpretation of the Restoration Act and acknowledging gaming's economic significance for the tribe. *Texas v. Ysleta Del Sur Pueblo*, No. EP-17-CV-179, 2019 WL 5589051, at \*1–2 (W.D. Tex. Mar. 28, 2019).

<sup>26</sup> *Texas v. Ysleta del Sur Pueblo*, 955 F.3d 408, 410 (5th Cir. 2020).

<sup>27</sup> Judge Willett was joined by Judges Dennis and Graves.

<sup>28</sup> *Ysleta*, 955 F.3d at 413–14. The court had reaffirmed *Ysleta I* in a case decided the previous year involving the Alabama-Coushatta tribe. *Id.* at 414 (citing *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 442 (5th Cir. 2019)).

<sup>29</sup> *Id.* at 415–16.

<sup>30</sup> *Id.* at 416–17.

<sup>31</sup> *Ysleta*, 142 S. Ct. at 1944.

<sup>32</sup> Justice Gorsuch was joined by Justices Breyer, Sotomayor, Kagan, and Barrett.

<sup>33</sup> *Ysleta*, 142 S. Ct. at 1944.

<sup>34</sup> 480 U.S. 202 (1987).

fully prohibited by Texas are banned on Ysleta land, but gaming activities that are legal (but regulated) in Texas are allowed on Ysleta land.<sup>35</sup> Accordingly, *Ysleta I* was wrong, and the Court, at the urging of the tribe and the U.S. Solicitor General, corrected it.<sup>36</sup>

The Court began with the plain meaning of the Restoration Act. According to the majority, the Act establishes a “striking . . . dichotomy between prohibition and regulation.”<sup>37</sup> Section 107(a) prohibits on tribal land gaming activities that state law prohibits, and the ordinary meaning of prohibit is to “‘forbid,’ ‘prevent,’ or ‘effectively stop’ . . . or ‘make . . . impossible’” an action.<sup>38</sup> Section 107(b), on the other hand, states that the Act does not confer regulatory jurisdiction over the tribe’s gaming activities on the State of Texas<sup>39</sup> — to regulate is to “‘fix the time, amount, degree, or rate’ of an activity.”<sup>40</sup> Texas law does not “prohibit” bingo, but allows it subject to “time, place, and manner” restrictions.<sup>41</sup> Zooming out to view the statute as a whole, the majority noted that its reading provides “a set of simple and coherent commands”: section 107(a) federalizes Texas law completely banning a gaming activity on tribal lands; section 107(b) makes clear that Texas gaming regulations do not apply on tribal lands; and section 107(c) grants federal courts jurisdiction to enforce 107(a).<sup>42</sup> In contrast, the majority noted, Texas’s reading of section 107(a) would collapse prohibitions and regulations into one, thus violating several semantic canons of construction,<sup>43</sup> rendering the law incoherent,<sup>44</sup> and turning superfluous one of the “simple and coherent” commands drawn out by the majority.<sup>45</sup>

Moving past ordinary meaning, the Court turned to context to resolve any latent ambiguity in the statute. Six months before Congress passed the Restoration Act, the Court decided *Cabazon*, which held that only “prohibitory” gaming laws, not “regulatory” gaming laws, applied on tribal lands subject to Public Law 280.<sup>46</sup> While Public Law 280 does not cover the Restoration Act tribes, the Court assumes that Congress

<sup>35</sup> *Ysleta*, 142 S. Ct. at 1940.

<sup>36</sup> *Id.* at 1937.

<sup>37</sup> *Id.* at 1938.

<sup>38</sup> *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1986)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 38, at 1913).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1939–40.

<sup>43</sup> The majority cites *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), which discussed the sentence-level presumption against surplusage; *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017), which stated that “differences in language . . . convey differences in meaning”; and the presumption against surplusage as all posing problems for the dissent and Texas’s reading. *Ysleta*, 142 S. Ct. at 1939.

<sup>44</sup> See *Ysleta*, 142 S. Ct. at 1939 (“[I]t is a construction that renders state gaming regulations simultaneously both (permissible) prohibitions and (impermissible) regulations.”).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1940 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987)).

is “aware of . . . relevant precedents” when it passes a statute.<sup>47</sup> Therefore, the Court in *Ysleta* read the Restoration Act’s dichotomy between prohibition and regulation as importing the *Cabazon* framework.<sup>48</sup> Moreover, the majority recognized that, contemporaneously with the Restoration Act, Congress passed other laws federalizing state gaming laws and regulations on tribal lands — but did not do so in the Restoration Act.<sup>49</sup> The Court noted in a footnote that it reached its decision without relying on the substantive canon “long established by [Court] precedents . . . that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”<sup>50</sup>

The Court also dismissed the state’s and dissent’s argument that a tribal resolution named in the statutory text suggested that the statute banned gaming.<sup>51</sup> In that resolution, the tribe announced its intention to ban gaming, including bingo, on tribal lands and authorized its negotiators in Congress to accept a legislative compromise providing as much.<sup>52</sup> However, on the majority’s read, the tribe’s “request” was not to ban gaming, but to receive federal recognition and avoid the application of Texas gaming law on tribal lands.<sup>53</sup> Finally, the Court dismissed Texas’s arguments that the distinction between prohibition and regulation is “unworkable,” noting, among other things, that Texas already applies a similar distinction to the Kickapoo Traditional Tribe of Texas under IGRA.<sup>54</sup>

Chief Justice Roberts dissented.<sup>55</sup> The dissent read the statute’s plain text, banning “[a]ll” gaming activities prohibited by Texas on tribal lands, to mean that all of Texas’s gaming rules apply on tribal lands.<sup>56</sup> The dissent, like the majority, then moved from plain text to context. According to the dissent, the statutory language in section 107 does not follow the *Cabazon* framework as neatly as the majority suggested.<sup>57</sup> And the majority’s reading also created a surplusage issue of its own, as section 105(f) of the Restoration Act already incorporates the *Cabazon* framework for tribal lands; therefore, section 107 would be mere sur-

---

<sup>47</sup> *Id.* (citing *Ryan v. Valencia Gonzales*, 568 U.S. 57, 77 (2013)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1941 (discussing two congressional statutes involving the Wampanoag and Catawba tribes, respectively).

<sup>50</sup> *Id.* at 1941 n.3 (quoting *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985)).

<sup>51</sup> *Id.* at 1942 (citing *Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act*, Pub. L. No. 100-89, 101 Stat. 666, 668–69 (1987)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1942–43. The majority also noted that Congress did not give the resolution the force of law. *Id.* at 1942.

<sup>54</sup> *Id.* at 1944.

<sup>55</sup> The Chief Justice was joined by Justices Thomas, Alito, and Kavanaugh.

<sup>56</sup> *Ysleta*, 142 S. Ct. at 1948 (Roberts, C.J., dissenting).

<sup>57</sup> *Id.* at 1950.

plusage if all that it did was adopt that framework specifically for gambling.<sup>58</sup> The dissent then contextualized the Restoration Act as part of the negotiations between the tribe and the government. Arguing that “the Tribe wanted — and needed — federal trust status[] more than gambling,” the dissent found that the tribal resolution incorporated by the Restoration Act shows that the Act bans gaming on tribal lands.<sup>59</sup> Finally, the dissent responded to the majority’s surplusage argument, asserting that its reading of the statute is coherent: section 107(a) applies Texas law to tribal lands; section 107(b) clarifies that Texas may not exercise direct regulatory authority over the tribe; and section 107(c) states that, in order to enforce violations of section 107(a), the state must take the tribe to federal court.<sup>60</sup>

Both of the Court’s dueling opinions followed formally textualist practice to reach divergent readings of a statute that both claimed to be unambiguous,<sup>61</sup> sidestepping analysis of the Indian canons of construction. This neglect is in line with the Court’s historically sporadic application of the canons in statutory interpretation cases. Substantive canons, and the Indian canons in particular, pose theoretical difficulty for textualists — but in practice, textualists use substantive canons, whether justifying them as background linguistic assumptions or safeguards of structural or constitutional values. The Indian canons’ justifications plausibly fit with either of these accounts. Thus, next time the Court faces the Indian canons, it need not ask what the canons’ justifications are — it should engage with the canons on the same terms it would other substantive canons of construction.

The majority and dissent agreed that the Restoration Act is unambiguous and followed similar, formally textualist paths to arrive at that conclusion. Both opinions began with plain text,<sup>62</sup> then moved to interpretive context.<sup>63</sup> The majority leveraged semantic canons and presumptions in its favor.<sup>64</sup> The dissent dutifully dueled the majority with canons and presumptions of its own.<sup>65</sup> But, read at face value, the legion of interpretive tools each opinion leveraged seems to call into question the “interpretive priority” of the Indian canons in cases of statutory

---

<sup>58</sup> *Id.* at 1951.

<sup>59</sup> *Id.* at 1952.

<sup>60</sup> *Id.* at 1952–53.

<sup>61</sup> *Cf.* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 912 (2016) (analyzing when judges use the same canons to reach divergent outcomes in the same case).

<sup>62</sup> *Compare Ysleta*, 142 S. Ct. at 1938 (“[W]e start with a careful look at the statute’s terms standing on their own.”), *with id.* at 1948 (Roberts, C.J., dissenting) (“I begin with the statute’s plain text.”).

<sup>63</sup> *See* John F. Manning, *What Divides Textualists from Purposivists?*, 160 COLUM. L. REV. 70, 75 (2006) (describing textualism as focusing on understanding “statutory text in context”).

<sup>64</sup> *See Ysleta*, 142 S. Ct. at 1939.

<sup>65</sup> *Id.* at 1951 (Roberts, C.J., dissenting) (surplusage with section 105(f)); *id.* at 1950 (differences in language convey differences in meaning); *id.* (“There is little reason to think that Congress would have [incorporated the *Cabazon* framework] . . . with nothing more than a wink and a nudge.”).

interpretation.<sup>66</sup> The majority purported to resolve any ambiguity that would trigger the Indian canons; the dissent, for its part, did not acknowledge the canons' existence.

It is not news that “the Court invokes the sympathetic canons selectively, and . . . occasionally even ignores them,”<sup>67</sup> and recent decades are no exception. In a case interpreting IGRA, the Court privileged semantic canons, legislative history, and the substantive canon that “[w]hen Congress enacts a tax exemption, it ordinarily does so explicitly” over the Indian canons to find that tribes were not exempt from paying gambling-related taxes.<sup>68</sup> Similarly, in *Carciere v. Salazar*,<sup>69</sup> the Court interpreted the Indian Reorganization Act against a tribe, in a reading the dissent called “cramped”<sup>70</sup> — indeed, despite the Court’s 8–1 ruling against the tribe, four Justices found that the plain text of the statute was at least ambiguous.<sup>71</sup> Accordingly, despite prominent recent use,<sup>72</sup> application of the Indian canons to statutes has remained sporadic.

Given this backdrop, it is maybe unsurprising that several Justices seemed to question the canons' legitimacy at oral argument in *Ysleta*. Indeed, substantive canons of construction pose theoretical difficulty for textualists,<sup>73</sup> and textualism dominates the Court.<sup>74</sup> Justice Scalia argued that rules that systematically favor a given outcome “are a lot of trouble” for textualists,<sup>75</sup> explicitly naming the Indian canons of construction.<sup>76</sup> And in Justice Barrett’s seminal article on substantive canons, she acknowledged the Indian canons’ force in treaty cases

<sup>66</sup> See Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 172–73 (2018) (book review) (defining “interpretive priority” to mean the issue of which canon controls when two canons are in conflict).

<sup>67</sup> See Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1208 (1989) (book review).

<sup>68</sup> See *Chickasaw Nation v. United States*, 534 U.S. 84, 89–93 (2001). The dissent faulted the majority for invoking the taxation canon over the Indian ambiguity canon against the weight of the Court’s precedent, *id.* at 100 (O’Connor, J., dissenting), but the majority replied that the Court’s cases were too “individualized . . . to warrant any such assessment about the two canons’ relative strength,” *id.* at 95 (majority opinion) (collecting cases).

<sup>69</sup> 555 U.S. 379 (2009).

<sup>70</sup> *Id.* at 413 (Stevens, J., dissenting).

<sup>71</sup> See *id.* at 396 (Breyer, J., concurring) (“I cannot say that the statute’s language by itself is determinative.”); *id.* at 400 (Souter, J., concurring in part and dissenting in part).

<sup>72</sup> See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (noting that the Court will not “lightly infer” that Congress has disestablished a reservation).

<sup>73</sup> See *supra* pp. 450–59 for a more robust treatment of this issue.

<sup>74</sup> See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 69 (2014).

<sup>75</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 27–28 (Amy Gutmann ed., 1997).

<sup>76</sup> See *id.* at 28 (“[H]ow ambiguous does ambiguity have to be before the . . . rule in favor of Indians applies?”).

but seemed to question their legitimacy in textualist statutory interpretation.<sup>77</sup>

However, textualists do have justifications for canon usage. At its most basic level, textualism is the philosophy that jurists fulfill their duty as faithful agents of Congress by focusing on enacted statutory text as the principal and perhaps dispositive marker of legislative intent.<sup>78</sup> But even most textualists do not contend that statutory language gives rise to legal meaning without attention to context.<sup>79</sup> The play in textualism's joints is in how far "context" stretches outside of statutory language.<sup>80</sup> At its most basic, context is strictly linguistic — for example, semantic canons of construction.<sup>81</sup> Other times, context may include other statutory provisions, relevant judicial decisions, and even social and political sentiments.<sup>82</sup> Substantive canons are often justified in this framework as protecting constitutional, or at least structural, values.<sup>83</sup> However, others argue that tools like substantive canons are valid insofar as they act as "background conventions" against which Congress legislates.<sup>84</sup> These scholars are divided on whether these conventions actually approximate legislative intent or allow jurists to build a "legal fiction" of legislative intent — but on either view, canons act like linguistic tools.<sup>85</sup> No matter whether a judge adopts the presumption that

---

<sup>77</sup> See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 151–52 (2010) (arguing that the Indian canon was historically applied only to treaties, not statutes, but noting that "[t]hat is not to say that federal courts have been wrong to apply the Indian canon to statutes," *id.* at 152).

<sup>78</sup> See Manning, *supra* note 63, at 74–75. Others have questioned whether linguistic interpretation of a text alone can produce legal meaning. See, e.g., Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1239 (2015) (questioning whether legal materials can have a "uniquely correct meaning[] that exist[s] as a matter of prelegal, linguistic fact").

<sup>79</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2396 (2005) ("[C]ontemporary theories of textual interpretation . . . build on Wittgenstein's premise that language is intelligible by virtue of a community's shared conventions for understanding words in context.").

<sup>80</sup> Cf. Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 281 (2020) ("[T]extualists have not always been precise in their use of the term 'context.'").

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 286 (describing the use of these contexts as "flexible textualism").

<sup>83</sup> Justice Scalia argued that these kinds of canons may be justified as normative values that can acceptably displace text. Scalia, *supra* note 75, at 28. Justice Barrett argues that substantive canons are legitimate insofar as they protect constitutional values. See Barrett, *supra* note 77, at 163–64. But see John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404 (2010) (arguing that constitutional values should be enforced only by enforcement mechanisms in the text of the Constitution).

<sup>84</sup> See, e.g., Manning, *supra* note 79, at 2467.

<sup>85</sup> See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1117 (2017). Professors William Baude and Stephen Sachs describe the former presumption as the "standard picture" of statutory interpretation. *Id.* at 1082. They argue that the "standard view" is insufficient, instead asserting that the "law of interpretation," including canons, fills in the gaps left



canons are valid insofar as they predict legislative intent or takes a more structural view, the fact is that judges applying textualist methodology use substantive canons some of the time as valid interpretive context.<sup>86</sup>

The Indian canons, which were recognized as early as *Worcester v. Georgia*,<sup>87</sup> plausibly act as both structural protections and presumptions as to legislative intent. Through treaties, tribes granted certain rights to the federal government without ceding their sovereignty, instead entering a “government-to-government relationship with the United States.”<sup>88</sup> The canons act in concert with Congress’s “plenary power” authority over tribal affairs<sup>89</sup> and fiduciary obligations to tribes to implement this relationship.<sup>90</sup> Critically, the canons were “not established to promote equality or to combat political powerlessness” — they are “essentially structural” ways of preserving tribal sovereignty.<sup>91</sup> Accordingly, the canons reflect the treaty relationship given the persistence of tribal sovereignty.<sup>92</sup> They naturally extend from the federal government’s fiduciary duty,<sup>93</sup> with the practical effect of “recogniz[ing] the imbalance of power” between tribes and the federal government<sup>94</sup> and “ameliorat[ing] some of the harshness of the plenary power doctrine.”<sup>95</sup>

Given these justifications, the case for Indian canon use for a textualist relying on structural or constitutional values is relatively straightforward. Just as the state sovereign immunity canon relies on

---

by a strictly linguistic analysis. *Id.* Justice Barrett, for her part, argues that efforts to classify substantive canons as linguistic (under what Baude and Sachs describe as the “standard view”) have been “largely rejected.” See Barrett, *supra* note 77, at 120 (collecting sources).

<sup>86</sup> See Grove, *supra* note 80, at 287–88 (citing Justice Thomas’s majority opinion in *Sossamon v. Texas*, 563 U.S. 277 (2011), which applied the clear statement rule against waiver of state sovereign immunity).

<sup>87</sup> 31 U.S. (6 Pet.) 515 (1832); see Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 579 (2022).

<sup>88</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 2.02[2].

<sup>89</sup> See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1139 (1990). For a critique of the plenary power doctrine, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1796–97 (2019).

<sup>90</sup> See Davis, *supra* note 7, at 1776.

<sup>91</sup> Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 425 (1993); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 2.02. For a treatment of other ways the Court structurally protects tribal sovereignty, see *supra* pp. 350–59.

<sup>92</sup> See Davis et al., *supra* note 87, at 579 (arguing that the Indian canons arose out of the law of nations understanding that treaty-making parties would not sacrifice sovereignty without a clear statement); see also Note, *Indian Canon Originalism*, *supra* note 2, at 1104 (arguing that the canons as applied to statutes arise out of the treaty canon).

<sup>93</sup> See Ray Martin, Note, *Justice Scalia and Tonto Fistfight in Heaven*, 5 AM. INDIAN L.J. 697, 708 (2017) (arguing that the canons reflect “the moral obligation that the trust relationship imposes upon Congress[] to act in the best interests of Indian tribes”).

<sup>94</sup> See Blackhawk, *supra* note 89, at 1825.

<sup>95</sup> See Frickey, *supra* note 89, at 1141.

background assumptions about sovereignty,<sup>96</sup> so do the Indian canons of interpretation. As for a constitutional basis, scholars have found the canons to be based in the law of nations<sup>97</sup> and in the Article I Commerce Clause.<sup>98</sup> Of course, a judge may eventually dismiss these justifications on the merits, but they at least demand engagement.

The case for an intentionalist canon user's adoption of the Indian canons may seem more complex — but the Indian canons look like the kind of interpretive presumptions that empower a judge to build a legal fiction of congressional intent. The canons act as a presumption that Congress acts in line with its fiduciary duties. It is not a priori clear why semantic canons, which are at best unreliable proxies for legislative intent,<sup>99</sup> should take interpretive priority over this presumption.<sup>100</sup>

For the Ysleta del Sur Pueblo and Alabama-Coushatta tribes, this question of interpretive priority may well be academic. And as a matter of strategy, reliance on the canons could have been misplaced given that Justice Barrett, who joined the bare majority, had previously questioned their application to statutes.<sup>101</sup> Additionally, it is possible that the canons surreptitiously did work even in *Ysleta* — the majority relied on *Cabazon*, which relied on *Bryan v. Itasca County*,<sup>102</sup> which relied on the canons to support a tribe's reading of an ambiguous statute.<sup>103</sup> But in a future case, the stakes may be different, and the Court may face head-on the Indian canons' legitimacy in statutory interpretation. When it does so, it should recognize that the Indian canons' justifications comport with textualist justifications for other substantive canons.

---

<sup>96</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 2.02; Barrett, *supra* note 77, at 147–48.

<sup>97</sup> See Davis et al., *supra* note 87, at 579.

<sup>98</sup> See Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 297 (2022) (quoting Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 179 n.54 (1991)).

<sup>99</sup> See Krishnakumar, *supra* note 61, at 914 (arguing that semantic canons do not constrain judges); see also Baude & Sachs, *supra* note 85, at 1089 & n.39 (collecting sources).

<sup>100</sup> In the mine run of cases, it is no answer that the canons paradoxically interpret congressional intent as cutting against Congress — in many cases, including *Ysleta*, ambiguities do not affect the balance of power between tribes and Congress, but rather between tribes and states.

<sup>101</sup> See Barrett, *supra* note 77, at 151–52. The tribe, perhaps reading that writing on the wall, spent only one paragraph on the canons in its merits brief. Brief of Petitioners at 37, *Ysleta*, 142 S. Ct. 1929 (No. 20-493).

<sup>102</sup> 426 U.S. 373 (1976).

<sup>103</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987); *Bryan*, 426 U.S. at 392.