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Source: *Harvard Law Review*, Vol. 126, No. 4 (FEBRUARY 2013), pp. 1100-1121

Published by: The Harvard Law Review Association

Stable URL: <https://www.jstor.org/stable/23414793>

Accessed: 24-11-2018 22:26 UTC

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INDIAN CANON ORIGINALISM

Indian treaties are “quasi-constitutional” documents.¹ So why not read them like constitutions? In fact, scholars of Indian law have urged federal judges to interpret Indian treaties “in the same manner as [they do] constitutional provisions.”² But no scholar has ever explained *how* the principles of constitutional interpretation would actually apply to an Indian treaty — and whether those principles might change in that new environment. This Note attempts to do just that.

In constitutional interpretation, there is a “long history” of debate over the appropriate role for the “original meaning” of the text.³ Originalists believe that the “discoverable meaning of the Constitution at the time of its initial adoption [should be] authoritative for purposes of constitutional interpretation in the present,”⁴ while nonoriginalists would also consider the document’s contemporary meaning, judicial precedent, morality, fundamental social values, civic interests, and so on.⁵ Surprisingly, however, this stormy dispute has yet to reach the shores of federal Indian law.

The most likely reason for the tranquility is that the federal courts long ago established a special method for interpreting Indian treaties: the Indian canon of construction,⁶ first announced by the Supreme Court in 1832.⁷ The Indian canon instructs judges to abandon the

¹ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 (1993). Like the Constitution, Indian treaties are “fundamental, constitutive document[s]” that affirm the sovereignty of their signatory tribes. *Id.*; see also CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 104 (1987). And just as the U.S. Constitution “functions in part as a ‘treaty’ among formerly sovereign states that structures the relations of the national government,” an Indian treaty is understood to link a tribe to the United States as “two sets of ‘We the People’” under the same government framework. Frickey, *supra*, at 408–09. Finally, alongside the Constitution, treaties between the United States and Indian tribes are among the oldest binding laws regularly enforced in federal courts today — several even predate the federal government itself. See, e.g., Treaty with the Delaware Nation, U.S.-Delaware, Sept. 17, 1778, 7 Stat. 13. For a survey of Supreme Court citations to Indian treaties over the past two centuries, see Charles D. Bernholz, *American Indian Treaties and the Supreme Court: A Guide to Treaty Citations from Opinions of the United States Supreme Court*, 30 J. GOV’T INFO. 318 (2004).

² WILKINSON, *supra* note 1, at 104; see also Frickey, *supra* note 1, at 408–11.

³ Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599, 610 (2004).

⁴ *Id.* at 599.

⁵ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853–54 (1989).

⁶ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 119 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN’S HANDBOOK].

⁷ Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

usual rules of statutory construction in Indian law matters.⁸ “The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”⁹ Because judges applying the Indian canon interpret treaty language based on the *tribe’s* perspective, rather than that of “a reasonable speaker of English . . . at the time the . . . provision was adopted,”¹⁰ this fundamental principle of Indian law may have simply seemed incompatible with originalist methodology.

This Note is an attempt to rebut that assumption. It will demonstrate that, far from being incompatible with the Indian canon, originalist theory actually *justifies* it: a treaty should be read as the tribe would have understood it because this method reflects the most faithful application of the original meaning of the treaty text.¹¹ First, Part I presents background on the Indian canon. Next, Part II draws a framework for comparison between the Indian canon and originalist methodology by tracing the two dimensions across which Indian treaty interpretation takes place: the dimension of time and the dimension of culture. Part III then demonstrates that the Indian canon, just like originalism, traverses the temporal dimension of interpretation by assigning authoritative significance to the understanding of the treaty text at the time of its enactment. However, Part IV acknowledges that the Indian canon departs from originalist methodology in regard to the cultural dimension — the canon favors the tribe’s understanding of the treaty while originalism looks to the public meaning of the Constitution’s text. Nevertheless, this Part argues that the principles of originalist theory, as applied in the unique context of an Indian treaty, justify the Indian canon’s deviation from traditional originalist methodology. Finally, the Note concludes with the suggestion that recognizing “Indian canon

⁸ See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); see also Frickey, *supra* note 1, at 402 (explaining that the Indian canon instructs judges to “interpret[] words to denote something other than their ordinary meanings”).

⁹ *Worcester*, 31 U.S. (6 Pet.) at 582 (McLean, J., concurring). While this quotation comes from Justice McLean’s concurrence, rather than from the Chief Justice Marshall majority opinion that truly created the Indian canon, it is the language that has generally been quoted by subsequent cases. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 151 (2010).

¹⁰ Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

¹¹ This Note does not argue for a qualitatively different application of the Indian canon — it merely provides a firmer, originalist justification for it. In that sense, its argument is analogous to the one recently put forward by Professor Steven Calabresi and Julia Rickert, which argues, contra *United States v. Virginia*, 518 U.S. 515 (1996), that the original public meaning of the Fourteenth Amendment bans gender-based discrimination. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

originalism” as a form of ordinary originalism would provide stronger theoretical footing for a revitalized Indian canon.

I. THE INDIAN CANON OF CONSTRUCTION

Chief Justice Marshall announced the Indian canon of construction in his landmark 1832 opinion in *Worcester v. Georgia*.¹² The case required the Court to interpret the Cherokee Nation’s treaties with the federal government, particularly the Treaty of Hopewell of 1785,¹³ in order to determine if the tribe had surrendered its inherent sovereignty and power of self-government to the United States.¹⁴ In his majority opinion, Chief Justice Marshall emphasized that the Indian signatories could neither read nor write English, and that the English-language treaty had been interpreted to them.¹⁵ Because “the Cherokee chiefs were not very critical judges of the [treaty] language,”¹⁶ the Chief Justice chose to read the text as “this unlettered people”¹⁷ would have understood it.

For instance, the Treaty of Hopewell defined the boundaries of Cherokee territory, describing the land as “hunting ground” that had been “allotted” to the tribe.¹⁸ This wording might have suggested that all the Cherokee land actually belonged to the United States, and that the federal government had simply allowed the tribe to use some of it for hunting. But the Chief Justice rejected this construction. Although the word “allotted” carried special significance in American legal discourse, Marshall explained that the Cherokee “might not [have] underst[oo]d the term employed, as indicating that, instead of granting, they were receiving lands.”¹⁹ Therefore, he read the term from the tribe’s perspective, as merely establishing a “dividing line between the two nations.”²⁰ So too with the phrase “hunting grounds.” Marshall recounted that “[h]unting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other.”²¹ The Cherokee would have believed that reserving territory as “hunting grounds” implied full ownership of the land, and so Marshall read the text accordingly.

¹² 31 U.S. (6 Pet.) 515.

¹³ Treaty with the Cherokees, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

¹⁴ See Frickey, *supra* note 1, at 393–94, 399.

¹⁵ See *Worcester*, 31 U.S. (6 Pet.) at 551.

¹⁶ *Id.*

¹⁷ *Id.* at 582 (McLean, J., concurring).

¹⁸ *Id.* at 552 (majority opinion) (quoting Treaty with the Cherokees, *supra* note 13, art. IV) (internal quotation marks omitted).

¹⁹ *Id.* at 553.

²⁰ *Id.* at 552.

²¹ *Id.* at 553.

In a later section, the Treaty of Hopewell gave American officials the right to “manage[] all [Cherokee] affairs, as they think proper.”²² But Chief Justice Marshall again cabined the authority conferred on the United States through this language, emphasizing that the provision was principally addressed to trade.²³ He believed that the Cherokee could not “have supposed themselves . . . to have divested themselves of the right of self-government on subjects not connected with trade” and so he limited the scope of the federal government’s power to regulating commerce with the tribe.²⁴ The Chief Justice also noted that the treaty addressed the Cherokee as a sovereign nation with an independent political existence, and that this “spirit” weighed against abrogating the tribe’s autonomy unless such an intent was “openly avowed.”²⁵

Chief Justice Marshall’s method of Indian treaty interpretation has since developed into a fundamental principle of federal Indian law. Through the rest of the nineteenth century, the Supreme Court applied the canon to Indian treaties,²⁶ and in the early 1900s, the Court extended the rule to statutes affecting Indians.²⁷ While the Court did not explain — or even acknowledge — this expansion of the canon’s applicability, it was likely a response to the federal government’s decision in 1871 to begin using the legislative process, rather than the treaty-making process, to make Indian policy.²⁸ Federal courts continue to use the Indian canon today,²⁹ although some commentators worry that it has “degraded” from a strong preference in favor of the tribe into “a weak end-of-the-game tiebreaker.”³⁰ Indeed, the Supreme Court recently suggested that the Indian canon is not a “mandatory rule[,]” but is instead merely a “guide[] that ‘need not be conclusive.’”³¹ Although the canon remains settled law, the Court sometimes seems to “disregard[]” it.³²

²² Treaty with the Cherokees, *supra* note 13, art. IX.

²³ *Worcester*, 31 U.S. (6 Pet.) at 553–54.

²⁴ *Id.* at 554.

²⁵ *Id.*

²⁶ See, e.g., *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Choctaw Nation v. United States*, 119 U.S. 1, 27–28 (1886); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866).

²⁷ See *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

²⁸ See *Conway v. United States*, 149 F. 261, 265–66 (C.C.D. Neb. 1907); see also ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW* 90–92 (2d ed. 2010) (describing the end of Indian treaty making).

²⁹ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999); *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

³⁰ Frickey, *supra* note 1, at 423; see also *id.* at 418–423.

³¹ *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

³² *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting in part).

Surprisingly, almost two hundred years after *Worcester*, the precise content of the Indian canon of construction remains unclear. Professor Felix Cohen's *Handbook of Indian Law* counts four "Indian law canons of construction."³³ Judges should: (1) interpret Indian treaties "as the Indians would have understood them," (2) construe them "liberally . . . in favor of the Indians," (3) resolve all ambiguities in the Indians' favor, and (4) preserve tribal property rights and sovereignty unless a contrary intent is clearly stated.³⁴ But Supreme Court cases very often conflate the first rule — that treaties should be read from the tribe's perspective — with the other three canons, switching from one to another without recognizing any principled distinction between them.³⁵

In practice, the apparent multiplicity of "Indian canons" is ultimately reducible to the single rule of construction, often emphasized by the Supreme Court, that Indian treaties should be interpreted from the perspective of the signatory tribe. Because the vast cultural differences between federal judges and the Indians of the treaty era make it difficult, if not impossible,³⁶ for judges to determine the tribe's understanding of the text, the latter three canons of construction serve as interpretive assumptions that help judges divine how the Indians would have read these documents. For instance, because the tribes presumably would have attempted to obtain the most favorable treaty terms possible, judges construe textual ambiguities liberally and in their favor in order to approximate their intent.³⁷ Similarly, tribal sovereignty and tribal land were central to the Indians' well-being,³⁸ and so judges presume that tribes would not have surrendered these assets without saying so explicitly as another way to deduce their understandings of the treaties.³⁹

³³ COHEN'S HANDBOOK, *supra* note 6, § 2.02(1), at 119–20.

³⁴ *Id.*

³⁵ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938).

³⁶ See *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961).

³⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832) (construing a protection provision in an Indian treaty in favor of the tribe on the ground that "[t]he Indians perceived in this protection only what was beneficial to themselves"). The fact that the Indians might not have expected that the treaty would be interpreted in their favor is not inconsistent with the assumption that they would have tried to obtain the most favorable terms possible for themselves. In other words, the tribe's understanding of the *meaning* of the treaty provisions can be distinguished from how they might have expected that an unsympathetic American court would *apply* those provisions. Cf. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–97 (2007) (distinguishing between the "original meaning" and the "original expected application" of a legal text).

³⁸ See, e.g., Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 604–06 (1975).

³⁹ *Worcester*, 31 U.S. (6 Pet.) at 554 ("Is it credible, that [*the Indians*] should have considered themselves as surrendering to the United States the right to dictate their future cessions . . . ? It is

The Supreme Court describes the Indian canon as “rooted in the unique trust relationship between the United States and the Indians.”⁴⁰ It has justified the canon’s continued application on two distinct grounds. First, it has held that the canon protects “the weak and defenseless [Indians] who are the wards of the nation, dependent upon its protection and good faith.”⁴¹ From this perspective, the Indian canon is only “the most conspicuous example” of the more “general idea” that courts should “resolve interpretive doubts in favor of disadvantaged groups” in order to compensate for the “stereotypes,” “prejudices,” and “[d]ifficulties of organization and mobilization” that often hinder them.⁴² Second, the Supreme Court has suggested that the Indian canon protects the quasi-constitutional, structural principle of tribal “sovereignty and . . . independence.”⁴³ Professor Philip Frickey compares this theory of the canon to the application of clear statement rules in disputes over federalism: just as courts read statutes to disfavor erosion of the Constitution’s federalist structure, so too do judges use the Indian canon to protect the principle of tribal sovereignty reflected in Indian treaties.⁴⁴ “Both techniques [are] justified by the centrality to these disputes of a constitutive document of sovereignty — an Indian treaty . . . and the American Constitution”⁴⁵

Unfortunately, there are significant problems with each of these justifications for the Indian canon. Some contemporary jurists reject the characterization of Indians as a disadvantaged minority requiring government protection, considering it either “outmoded”⁴⁶ or counterproductively “normative.”⁴⁷ This approach to the canon “is not [one] . . . that Native American leaders would likely embrace” and is so “value-laden” that it is “easily trumped by federalism principles.”⁴⁸ Conditioning judicial acceptance of the canon on this rationale also undermines its relevance for judges less sympathetic to “fuzzy, liberal” reasoning.⁴⁹ But the tribal sovereignty justification for the Indian canon is also imperfect. Frickey, a supporter of the structural justifica-

equally inconceivable that they *could have supposed themselves* . . . to have divested themselves of the right of self-government *Had such a result been intended*, it would have been openly avowed.” (emphases added).

⁴⁰ *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

⁴¹ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)) (internal quotation mark omitted).

⁴² Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 483–84 (1989).

⁴³ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

⁴⁴ See Frickey, *supra* note 1, at 413–17.

⁴⁵ *Id.* at 417.

⁴⁶ See COHEN’S HANDBOOK, *supra* note 6, § 2.02(2), at 122.

⁴⁷ Frickey, *supra* note 1, at 424.

⁴⁸ *Id.*

⁴⁹ *Id.*

tion, claims that it protects “values rooted in the spirit of Indian treaties,” but he never identifies any explicit source for the canon in constitutional or treaty text.⁵⁰ Therefore, that approach to the canon may render it vulnerable to the same kind of critiques launched against the federalism jurisprudence to which it has been compared, as a kind of “‘strong purposivism’ . . . that goes well beyond [the] carefully drawn text” of the treaty.⁵¹

II. THE TWO DIMENSIONS OF TREATY INTERPRETATION

At first glance, the Indian canon and originalism could not appear more different as methods of interpretation. But a closer examination reveals that these two interpretive methods are essentially the same: the Indian canon is simply originalist methodology applied in the unique context of an Indian treaty. To begin, one must clarify the relationship between these two approaches by identifying the two dimensions across which constitutional and Indian treaty interpretation occur. First, Indian treaties, like the Constitution, must be read across the dimension of *time*. Second, Indian treaties, unlike the Constitution, must be read across the dimension of *culture*.

Unraveling these two interpretive dimensions clarifies how the Indian canon fits alongside the principles of originalist methodology. In the first, temporal axis of interpretation, both originalism and the Indian canon assign authoritative significance to the “original meaning” of the text over its “contemporary meaning.” In Part III, this Note demonstrates that just as originalism values the original meaning of the Constitution, so too does the Indian canon privilege the original meaning of an Indian treaty. However, the second, cultural axis presents a more complicated case — the Indian canon considers only the “tribal meaning” of the treaty text, but originalists search for the “public meaning” of the Constitution. Nevertheless, Part IV demonstrates that this apparent difference is actually perfectly faithful to the principles of originalism when they are applied in the unique context of an Indian treaty.

III. THE TEMPORAL DIMENSION: ORIGINAL VERSUS CONTEMPORARY MEANING

Legal documents as old as nineteenth-century Indian treaties must be read across the dimension of time, due to the “long temporal dis-

⁵⁰ *Id.* at 417.

⁵¹ John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666 (2004) (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3, 7 (2001)).

tance between ratification and interpretation of [the] text.”⁵² Although the text remains the same, the intervening years often will have changed the meaning conveyed by that text, so that the contemporary meaning of the words on the page differs dramatically from the original meaning of those words when the document was written and approved centuries earlier.⁵³ This temporal axis of interpretation is the one with which originalist methodology is traditionally associated. In the Constitution, for instance, the Fourteenth Amendment’s guarantee of the “equal protection of the laws”⁵⁴ would likely mean something different to a twenty-first-century judge than it did when those words were added to the Constitution in 1868. An originalist would argue that the meaning of the Equal Protection Clause in 1868 should bind a judge two centuries later. Given their antiquity, most Indian treaties have become similarly “time-warped,” such that the meaning of their words may have strayed in the time since their adoption.⁵⁵ To take just one example, the Wolf River Treaty of 1854⁵⁶ guaranteed to the Menominee Tribe a tract of land “to be held as Indian lands are held”⁵⁷ — a phrase that may have meant something quite different in the nineteenth-century American West than it does 150 years later.⁵⁸ Applying originalist interpretation to an Indian treaty requires that one take the nineteenth-century meaning as authoritative in the contemporary era.

Originalist constitutional interpretation and the Indian canon of construction each adopt the same approach to the temporal axis of interpretation. Both methods instruct judges to interpret text based on its *original* meaning, rather than its *contemporary* meaning. Of course, Chief Justice Marshall announced the Indian canon in 1832, contemporaneously with the signing of many Indian treaties, and so he did not need to address the temporal dimension of interpretation. But subsequent cases have made clear that the tribe’s understanding of the treaty *at the time of its enactment* should control.⁵⁹

⁵² Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295, 1297 (2008).

⁵³ See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 614–15 (2008).

⁵⁴ See U.S. CONST. amend. XIV, § 1.

⁵⁵ WILKINSON, *supra* note 1, at 13.

⁵⁶ Treaty with the Menomonee Tribe, U.S.-Menominee, May 12, 1854, 10 Stat. 1064.

⁵⁷ *Id.* art 2.

⁵⁸ Compare Stephen J. Herzberg, *The Menominee Indians: From Treaty to Termination*, 60 WIS. MAG. HIST. 267, 268–79 (1977) (describing early nineteenth-century Menominee Indian society as led by tribal chiefs and primarily based around hunting, fishing, logging, and small-scale farming), with Stephen J. Herzberg, *The Menominee Indians: From Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 158–59 (1978) (describing mid-twentieth-century Menominee Indian society as organized around a written constitution with an elected legislative council and based on communal ownership of “a lumber mill, power plants, schools, and medical facilities”).

⁵⁹ See Or. Dep’t of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) (explaining that courts applying the Indian canon should interpret treaty language “in historical context”);

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*⁶⁰ vividly illustrates this approach. The case asked whether an 1856 treaty guaranteeing a tribe's right to fish "in common with all citizens of the Territory"⁶¹ meant that the Indians were merely guaranteed *access* to the fishing sites alongside non-Indian fishermen, or whether they were promised the broader privilege to harvest a *minimum share* of the available fish.⁶² The Supreme Court observed that when the treaty negotiations took place, the inhabitants of the territory were mostly Indian, the tribes depended on fish for subsistence and commerce, and the Indian negotiators were eager to protect their right to fish.⁶³ Because the fish were abundant and the population was sparse, sharing the shores with non-Indians "was not understood as a significant limitation on [the tribe's] right to take fish."⁶⁴ And since the mere right to fish alongside "thousands of newly arrived individual settlers . . . would hardly have been sufficient to compensate [the Indians] for the millions of acres they ceded to the Territory," it was "inconceivable" that the original Indian signatories would have "deliberately agreed to authorize future settlers to crowd [them] out of any meaningful use of their accustomed places to fish."⁶⁵ "[A]t the time of the treaties the [fish were] necessary to the Indians' welfare," so the Court concluded that the treaty protected the tribe's ability to obtain some minimum quantity of fish.⁶⁶

IV. THE CULTURAL DIMENSION: PUBLIC VERSUS TRIBAL MEANING

Reading a document negotiated with a foreign civilization also requires an interpreter to consider how differences in culture can create differences in understanding of the same legal text. Words that mean one thing to one culture sometimes signify something quite different to another. Indian treaties present an especially difficult challenge.⁶⁷

see also, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195–98 (1999); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405–06, 406 n.2 (1968); *United States v. Winans*, 198 U.S. 371, 371–72 (1905).

⁶⁰ 443 U.S. 658 (1979).

⁶¹ Treaty with the Nisqually and Other Tribes, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1132.

⁶² See *Washington*, 443 U.S. at 675.

⁶³ *Id.* at 664–66.

⁶⁴ *Id.* at 668.

⁶⁵ *Id.* at 676–77.

⁶⁶ *Id.* at 685 (emphasis added).

⁶⁷ See David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 406–07 (1994); see also Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 114–38 (2008) (discussing the role of American Indian languages and cultures in treaty interpretation).

American Indian and Anglo-American civilizations developed independently for thousands of years and rested upon fundamentally different assumptions about society, governance, and intercultural exchange.⁶⁸ “A great and unbridgeable void existed between the language and culture of the two races.”⁶⁹ At the time most treaties were signed, the Indian tribes were unfamiliar with English — the only language in which Indian treaties were written.⁷⁰ Treaty terms were sometimes “imposed upon” the tribes by federal officials rather than explained to them.⁷¹ Accordingly, tribes likely understood various treaty provisions very differently from how Anglo-Americans might have construed them. Certainly, the Indians would not have appreciated the legal significance of technical terms that would have been apparent to American lawyers, such as when a treaty “allotted” rather than “marked out” a boundary.⁷² At the same time, the tribes may have attached special importance to other words, such as “hunting grounds,” which their American counterparts would not have understood.⁷³ Because Indian treaties were the products of agreement between two very different civilizations, interpreters of the documents must navigate the unique cultural divide between the “public meaning” and the “tribal meaning” of the treaty text.

The Indian canon and originalist methodology appear to diverge in their approaches to the cultural dimension of interpretation. Originalist methodology rejects the semiotic effects of culture: prominent originalists claim to seek the “public,” “objective” meaning of the Constitution.⁷⁴ But the Indian canon instructs judges to assign meaning to a treaty based only on the *tribe’s* understanding. Nevertheless, this Part argues that originalist theory should actually lead judges to interpret the text based on its original “tribal” meaning.⁷⁵ First, it performs an originalist analysis of the “protection provisions” included in many Indian treaties, which, at the time that they were enacted, instructed judges to interpret the treaty texts based on how the tribes would have

⁶⁸ See generally JAMES WILSON, *THE EARTH SHALL WEEP* 43–289 (1998).

⁶⁹ *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961); see also WILKINSON, *supra* note 1, at 15.

⁷⁰ See Wilkinson & Volkman, *supra* note 38, at 610–11.

⁷¹ *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630–31 (1970).

⁷² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552–53 (1832).

⁷³ *Id.* at 553.

⁷⁴ E.g., Barnett, *supra* note 10, at 105.

⁷⁵ The fact that the Indian canon reflects a search for “tribal,” as opposed to “public,” meaning also justifies, from an originalist perspective, why it instructs judges to read treaties in accordance with the “spirit” of the document. See Frickey, *supra* note 1, at 403–04. This approach seems to contradict originalists’ focus on individual words and rejection of broader, purposivist readings of the Constitution. However, because the tribes were not “critical judges of the language” in the treaties they signed, *Worcester*, 31 U.S. (6 Pet.) at 551, interpreting the text at a higher level of generality likely comes closer to capturing their understanding of the document.

understood them. Second, it demonstrates how the justifications for originalism — when adjusted to the unique contours of an Indian treaty — actually counsel in favor of looking to tribal, rather than public, meaning.

*A. The Original Public Meaning of Indian
Treaty Protection Provisions*

Nearly every Indian treaty establishing a relationship between a tribe and the federal government contains language in which the signatory tribe places itself under the “protection” of the United States and the United States agrees to extend its “protection” to the tribe.⁷⁶ But no scholar has ever examined the significance of this recurring language. In fact, the original public meaning of these provisions was to create a “protectorate” relationship between the tribe and the federal government, with a corresponding obligation on the federal government to interpret the agreement from the tribe’s perspective. Therefore, the original “public meaning” of these Indian treaties should be understood to include an instruction to judges to read their words in accordance with their “tribal meaning.”

The legal concept of a “protectorate,” or a “dependent state,” is “one of the oldest features of international relations.”⁷⁷ The arrangement dates back at least to the seventeenth century, when renowned jurists such as Hugo Grotius and Emmerich de Vattel described the phenomenon of “unequal alliances” in which a “weaker” state acknowledged its “inferiority” before a “superior[]” neighbor, and submitted to a set of “burdensome” conditions in return for the “protection or assistance” of the “more powerful” party.⁷⁸ The widely read American legal scholar Henry Wheaton⁷⁹ explained in 1836 how “[t]reaties of unequal alliance, guarantee, mediation, and protection” served to “limit[] and qualify[]” the “sovereignty of the inferior ally.”⁸⁰ In the nineteenth century, a protectorate was generally formed through a bilateral treaty between the two states involved in the relationship, “under which the

⁷⁶ See Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 497 (1979); COHEN’S HANDBOOK, *supra* note 6, § 1.03(1), at 28.

⁷⁷ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 286 (2d ed. 2006).

⁷⁸ 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS* ch. XII, § 175, at 200–01 (Joseph Chitty ed. & trans., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758); see also 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* ch. XVI, § XIV, at 159–60 (A.C. Campbell ed. & trans., Pontefract, B. Boothroyd 1814) (1625).

⁷⁹ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 9 & n.18 (1999).

⁸⁰ HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* ch. II, § 2, at 51 (Philadelphia, Carey, Lea & Blanchard 1836).

stronger Power . . . grant[ed] its protection to the weaker State.”⁸¹ International legal jurists writing at the time made clear that “treaties of protection” were a subcategory of the “unequal alliances” described by Grotius and Vattel.⁸² In return for the protection of the stronger party, the weaker state “surrendered . . . the conduct of its foreign relations . . . together with various rights of internal intervention . . . without being annexed or formally incorporated into the territory of the [stronger state].”⁸³

The “superior” or “protector” state had a special set of responsibilities — not only the obligations spelled out in the treaty, but also under customary international law. When the protector state interpreted a protectorate treaty, the settled rule by the early nineteenth century was to read the text in favor of the *protected party’s* interest and understanding. Grotius suggested that constraints on the rights of the weaker party in an unequal alliance should be “limited to [their] proper signification[s], lest the treaty should operate as too great a restraint upon the liberty of that power.”⁸⁴ According to Grotius, when a party surrenders a right via treaty, “though he expresses himself in the most general terms, his words are usually restricted to that meaning, which it is probable he intended.”⁸⁵ Indeed, Grotius even suggested stretching the language in such treaties so far that one could abandon the words’ plain meanings and consider interpretations based on “figurative expression.”⁸⁶ Vattel confirmed that treaties establishing unequal alliances should be construed to the benefit of the protected party: “In unequal treaties, and especially in unequal alliances, all the clauses of inequality, and principally those that [burden] the inferior ally are odious. . . . [W]e ought in case of doubt to extend what leads to equality, and restrict what destroys it”⁸⁷

Scholarship on the original understanding of the federal government’s legal relationship with the Indians remains thin, but it has been convincingly demonstrated that the Founding Fathers regarded the

⁸¹ I TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE* § 26, at 27 (Oxford, Oxford Univ. Press 1861).

⁸² See *id.* § 229, at 363–64; WHEATON, *supra* note 80, ch. II, § 2, at 63.

⁸³ CRAWFORD, *supra* note 77, at 287.

⁸⁴ GROTIUS, *supra* note 78, ch. XVI, § XIV, at 160. Grotius provides two specific examples of this approach by suggesting the correct interpretations of provisions in an ancient treaty between the Romans and the Carthaginians. See *id.* ch. XVI, §§ XIV–XV, at 160–61.

⁸⁵ *Id.* ch. XVI, § XII, at 155 (emphases omitted).

⁸⁶ *Id.*

⁸⁷ VATTEL, *supra* note 78, ch. XVII, § 301, at 264. Like Grotius, see *supra* note 84, Vattel illustrates this interpretive technique by applying it to a treaty between the Romans and the Carthaginians. See VATTEL, *supra* note 78, ch. XVII, § 309, at 268–69.

tribes as political, not racial, entities.⁸⁸ And legal practice at the time made clear that American treaties with these indigenous nations sounded in international law. The United States government gave Indian treaties “the same legal status as treaties with foreign nations,” and enacted them pursuant to the Constitution’s Treaty Clause, requiring the advice and consent of two-thirds of the Senate.⁸⁹ Chief Justice Marshall explained: “The words ‘treaty’ and ‘nation’ are words of our own language, selected . . . by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”⁹⁰

In the Treaty of Hopewell — along with nearly every other treaty establishing an official relationship between the United States and an Indian tribe — the signatory tribe acknowledged that it was “under the protection of the United States of America,” and the Americans agreed to “receive them into the favor and protection of the United States of America.”⁹¹ According to the background nineteenth-century

⁸⁸ See generally Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153 (2008).

⁸⁹ ANDERSON ET AL., *supra* note 28, at 45; see also U.S. CONST. art. II, § 2, cl. 2.

⁹⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832); see also COHEN’S HANDBOOK, *supra* note 6, § 1.03(1), at 27–28.

⁹¹ Treaty with the Cherokees, *supra* note 13, pmbl., art. 3; see also Treaty with the Navajo Tribe, U.S.-Navajo, art. I, Sept. 9, 1849, 9 Stat. 974; Treaty with the Stockbridge Tribe, U.S.-Stockbridge, art. I, Nov. 24, 1848, 9 Stat. 955; Treaty with the Comanches and Other Tribes, U.S.-Comanche, art. I, May 15, 1846, 9 Stat. 844; Treaty with the Menomonee Nation, U.S.-Menominee, art. I, art. 6, Feb. 8, 1831, 7 Stat. 342; Treaty with the Crow Tribe, U.S.-Crow, arts. 1–2, Aug. 4, 1825, 7 Stat. 266; Treaty with the Mandan Tribe, U.S.-Mandan, arts. 2–3, July 30, 1825, 7 Stat. 264; Treaty with the Ricara Tribe, U.S.-Arikara, arts. 2–3, July 18, 1825, 7 Stat. 259; Treaty with the Chayenne Tribe, U.S.-Cheyenne, arts. 1–2, July 6, 1825, 7 Stat. 255; Treaty with the Peoria and Other Tribes, U.S.-Peoria, art. 3, Sept. 25, 1818, 7 Stat. 181; Treaty with the Quapaw Tribe, U.S.-Quapaw, art. I, Aug. 24, 1818, 7 Stat. 176; Treaty with the Pawnee Republic, U.S.-Pawnee, art. 3, June 20, 1818, 7 Stat. 174; Treaty with the Poncarar Tribe, U.S.-Ponca, art. 3, June 25, 1817, 7 Stat. 155; Treaty with the Ottoes Tribe, U.S.-Otoe, art. 3, June 24, 1817, 7 Stat. 154; Treaty with the Winnebago Tribe, U.S.-Winnebago, art. 3, June 3, 1816, 7 Stat. 144; Treaty with the Siouxs, U.S.-Sioux, art. 4, June 1, 1816, 7 Stat. 143; Treaty with the Kansas Tribe, U.S.-Kansa, art. 3, Oct. 28, 1815, 7 Stat. 137; Treaty with the Teeton Tribe, U.S.-Teton, art. 3, July 19, 1815, 7 Stat. 125; Treaty with the Chippewa and Other Nations, U.S.-Chippewa, art. V, Nov. 25, 1808, 7 Stat. 112; Treaty with the Great and Little Osage Nations, U.S.-Osage, art. 10, Nov. 10, 1808, 7 Stat. 107; Treaty with the Ottaway and Other Nations, U.S.-Ottawa, art. VII, Nov. 17, 1807, 7 Stat. 105; Treaty with the Piankishaw Tribe, U.S.-Piankashaw, art. II, Dec. 30, 1805, 7 Stat. 100; Treaty with the United Tribes of Sac and Fox Indians, U.S.-Sauk and Fox, art. I, Nov. 3, 1804, 7 Stat. 84; Treaty with the Kaskaskia Tribe, U.S.-Kaskaskia, art. 2, Aug. 13, 1803, 7 Stat. 78; Treaty with the Creek Nation, U.S.-Creek, art. II, Aug. 7, 1790, 7 Stat. 35; Treaty with the Shawanoe Nation, U.S.-Shawnee, art. V, Jan. 31, 1786, 7 Stat. 26; Treaty with the Chickasaw Nation, U.S.-Chickasaw, pmbl., art. II, Jan. 10, 1786, 7 Stat. 24; Treaty with the Choctaw Nation, U.S.-Choctaw, pmbl., art. II, Jan. 3, 1786, 7 Stat. 21; Treaty with the Wiandot and Other Nations, U.S.-Wyandot, art. II, Jan. 21, 1785, 7 Stat. 16; Treaty with the Six Nations, U.S.-Six Nations, pmbl., Oct. 22, 1784, 7 Stat. 15.

legal principles against which these treaties were written and enacted, the protection provisions created a protectorate relationship between the tribe and the federal government.⁹² In 1823, New York's highest court, citing Vattel, interpreted the language of protection in an Oneida Nation Indian treaty accordingly: "Vattel says, that a weak state, which has bound itself by unequal alliance to a more powerful one, under whose protection it has placed itself for safety, does not, therefore, cease to be a sovereign state These Indian tribes or nations have formed such unequal alliances with our government."⁹³ Less than a decade later, in *Worcester*, the United States Supreme Court confirmed this understanding, explicitly analogizing the effect of "the articles so often repeated in Indian treaties; extending to them . . . the protection of . . . the United States" to Vattel's description of protectorate agreements in the Old World.⁹⁴ The Court explained: "[T]he settled doctrine of the law of nations is, that . . . [a] weak state . . . may place itself under the protection of one more powerful Examples of this kind are not wanting in Europe."⁹⁵ Wheaton made the parallel overt just a few years after *Worcester*, when he explained that "[t]he political relation of the Indian nations on this continent towards the United States is that of semi-sovereign States, under the exclusive protectorate of another Power."⁹⁶ At the outbreak of the Civil War, the Choctaw and Chickasaw Nations abandoned their treaty relationship with the United States and gave their allegiance to the seceded Confederate States in a treaty that explicitly recognized the relationship between the language of "protection" and the tribe's status as a protectorate: "The Choctaw and Chickasaw Nations of Indians acknowledge themselves to be under the protection of the Confederate States of America . . . and the said Confederate States do hereby assume and accept the said protectorate"⁹⁷

Fidelity to the original public meaning of an Indian treaty therefore requires judges to interpret the text from the perspective of the tribe. Originalists may give technical effect to legal terms of art that carried a specialized meaning at the time they were enacted — such as, for ex-

⁹² *Accord* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 3, § 3.B.1, at 41 (1942) (noting that, in addition to the Treaty of Hopewell with the Cherokee, "[t]reaties with many of the other tribes left no doubt of the protectorate of the United States over them").

⁹³ *Goodell v. Jackson*, 20 Johns. 693, 695–96 (N.Y. 1823) (emphases omitted) (citation omitted).

⁹⁴ *Worcester*, 31 U.S. (6 Pet.) at 560–61.

⁹⁵ *Id.*; *see also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting); Collins, *supra* note 76, at 497.

⁹⁶ HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW ch. II, § 15, at 73 (Philadelphia, Lea & Blanchard 3d ed. 1846).

⁹⁷ Treaty with the Choctaw and Chickasaw Nations, C.S.A.—Choctaw and Chickasaw, art. II, July 12, 1861, *reprinted in* THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 311 (James M. Matthews ed., Richmond, R.M. Smith 1864).

ample, the Due Process Clause.⁹⁸ At the time that the federal government and the tribes ratified Indian treaties containing protection provisions, one legal consequence of that language was that each treaty had to be read in the protected party's — the tribe's — favor. In *Worcester*, Chief Justice Marshall explained that a protection provision in an Indian treaty "bound the [tribe] . . . as a dependent ally, claiming the protection of a powerful friend and neighbour, and *receiving the advantages of that protection*."⁹⁹ One of those advantages was the Indian canon. The Supreme Court drew the connection between the tribes' protected status and the Indian canon in an Indian law case just a few decades after *Worcester*:

The recognized relation between the parties to this controversy . . . is that between a superior and inferior, whereby the latter is placed under the care and control of the former, and which . . . recognizes . . . such an interpretation of [the United States's] acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.¹⁰⁰

This understanding of the obligation imposed by the protection provisions might also help to explain the extension of the canon from Indian treaties to statutes affecting Indians — the federal government's duty to protect a tribe could be understood to require favorable constructions of *all* the legal texts that govern the relationship between protector and protected.

Of course, it is unlikely that the American negotiators, or the senators who voted for the treaties, would have intended or even considered that judges would read their agreements with the Indians in this way.¹⁰¹ However, according to "public meaning" originalism, the subjective intentions of the ratifiers of a legal text are irrelevant — only the public meaning conveyed by the language of protection they included in the Indian treaties became enforceable law.¹⁰² Furthermore, originalists such as Professor Jack Balkin have distinguished between the "original meaning" and the "original expected application" of the constitutional text.¹⁰³ Only the *words* of the constitutional text are binding law, not the Founding generation's *expectations* about how that text would apply.¹⁰⁴ According to this theory, the legal principles

⁹⁸ See Balkin, *supra* note 37, at 304.

⁹⁹ *Worcester*, 31 U.S. (6 Pet.) at 552 (emphasis added).

¹⁰⁰ *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886).

¹⁰¹ Indeed, if the government ever actually intended to keep its treaty promises to the Indians, see VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 32 (1969), it often failed to do so, and federal policy toward the Indians alternated between forcible assimilation and violent removal throughout the nineteenth century. See ANDERSON ET AL., *supra* note 28, at 44–130.

¹⁰² See Barnett, *supra* note 10, at 105–08.

¹⁰³ Balkin, *supra* note 37, at 295–97.

¹⁰⁴ *Id.* at 295.

associated with the protectorate relationship control, regardless of how government officials at the time anticipated that they would be implemented.

*B. The Application of Originalist Theory in
the Context of an Indian Treaty*

The original public meaning of the Indian treaty “protection provisions” provides a powerful originalist argument for applying the Indian canon to the treaties that actually contain language of protection. Moreover, because *Worcester* established a background interpretive principle against which subsequent Indian treaties were drafted and ratified, an originalist would also apply the canon to treaties enacted after 1832.¹⁰⁵ However, not every treaty establishing a relationship between the federal government and an Indian tribe before 1832 contained a protection provision.¹⁰⁶ Federal judges therefore would not have the same interpretive obligation to those tribes under this analysis. Nevertheless, there are still good originalist arguments for interpreting Indian treaties based on their original tribal meanings. Even for treaties that do not contain protection provisions, the *justifications* for originalism, when applied in the context of an Indian treaty, actually support looking to the tribe’s perspective on the document.

1. The Lack of Treaty Amendment Procedures. — Indian treaties, unlike the United States Constitution, are not amendable via an ordinary democratic process. While the federal government may unilaterally abrogate its treaty obligations to the Indian tribes, and often has, the tribes are effectively bound by their agreements unless they can obtain the government’s consent to amend them. In the context of this procedural imbalance, originalists concerned with the democratic legitimacy of the judiciary should use the Indian canon in order to ensure that the treaty terms accurately reflect the popular will.

Justices Rehnquist and Scalia, as well as Judge Bork, argue that originalism is the method of constitutional interpretation “more compatible with the nature and purpose of a Constitution in a democratic system.”¹⁰⁷ In American constitutional democracy, “[t]he people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original

¹⁰⁵ Cf. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–99 (1979) (finding that Title IX of the Education Amendments of 1972 included an implied right of action, because Title VI of the Civil Rights Act of 1964, on which Title IX had been modeled, had previously been construed to create a private remedy, and “[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law,” *id.* at 696–97).

¹⁰⁶ See, e.g., *Treaty with the Delaware Nation*, *supra* note 1.

¹⁰⁷ Scalia, *supra* note 5, at 862.

Constitution and by later amending it."¹⁰⁸ Because "judges derive [their] authority from the Constitution, and the Constitution derives [its own] authority from the majority vote of the ratifiers, . . . the role of the judge is to carry out the will of the ratifiers."¹⁰⁹

Nonoriginalist constitutional interpretation shades into policy-making that permits the judiciary to "displace executives and legislators as our governors," a role that betrays "[t]he orthodoxy of our civil religion, which the Constitution has aptly been called, [which] holds that we govern ourselves democratically."¹¹⁰ When it does come time to alter the Constitution's text, the Article V amendment procedure gives that power only to representative institutions, not to unelected judges.¹¹¹ Rather than the judiciary, the appropriate "instrumentality of [constitutional] change" is the democratic amendment process prescribed by the document itself.¹¹²

But Indian treaties do not have an amendment process comparable to Article V of the United States Constitution. Instead, there are two ways to alter an Indian treaty. First, the parties can renegotiate their agreement.¹¹³ Many Indian tribes have signed several rounds of treaties with the federal government, each of which amends and updates their previous agreements.¹¹⁴ Of course, amendment through renegotiation requires the consent of both parties. Second, either party may abrogate its commitments under the treaty. Courts regard the federal government's compliance with Indian treaties as they do its obligations under international treaties.¹¹⁵ Just like a treaty with a foreign state, the federal government may unilaterally rescind its Indian treaty commitments so long as it is willing to bear the political fallout of such

¹⁰⁸ William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976).

¹⁰⁹ DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 386 (1990).

¹¹⁰ ROBERT H. BORK, THE TEMPTING OF AMERICA 153 (1990).

¹¹¹ U.S. CONST. art. V.

¹¹² ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (Amy Gutmann ed., 1997).

¹¹³ Some Indian treaties contain provisions providing that changes to the treaty — almost always specified as further land cessions by the tribe — may be made only with the consent of a certain proportion of tribal members. See, e.g., Treaty with the Crow Tribe, U.S.-Crow, May 7, 1868, art. XI, 15 Stat. 649; Treaty with the Kiowa and Comanche Tribes, U.S.-Kiowa and Comanche, Oct. 21, 1867, art. XII, 15 Stat. 581. Notably, these provisions do *not* specify a process by which the Indians could *gain* greater power against the federal government — for instance, by securing more rights of sovereignty or more land.

¹¹⁴ See, e.g., Treaty with the Kansas Tribe, U.S.-Kansa, Mar. 16, 1862, 12 Stat. 1221; Treaty with the Kansas Tribe, U.S.-Kansa, Oct. 5, 1859, 12 Stat. 1111; Treaty with Kansas Indians, U.S.-Kansa, Jan. 14, 1846, 9 Stat. 842; Treaty with the Kansas Tribe, U.S.-Kansa, Aug. 16, 1825, 7 Stat. 270; Treaty with the Kansas Nation, U.S.-Kansa, June 3, 1825, 7 Stat. 244; Treaty with the Kansas Tribe, U.S.-Kansa, Oct. 28, 1815, 7 Stat. 137.

¹¹⁵ See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 583-87 (1995).

a decision,¹¹⁶ which in the international realm would mean controversy or even war.¹¹⁷

There is almost no scholarship on the mechanics of tribal withdrawal from a treaty, perhaps because it is effectively impossible for a tribe to take such an action. In the nineteenth century, the government violently crushed tribes that rejected their treaty commitments,¹¹⁸ and in the twenty-first it has responded to organized Indian resistance by threatening to cut off millions of dollars of federal funds from the recalcitrant tribes.¹¹⁹ Any attempt by a tribe to withdraw from or abrogate its treaty commitments would be a disaster; in reality, a tribe *must* obtain the federal government's consent in order to change the terms of its relationship with the United States. By contrast, the federal government has not hesitated to exercise its power to abrogate its treaty commitments to the Indian tribes.¹²⁰ To abrogate a treaty commitment to the Indians, the federal government must make its intent to do so clear¹²¹ and it must pay just compensation to the tribe for the resulting loss,¹²² but its ultimate ability to redefine its relationship with a tribe far surpasses the tribe's own power to do the same.

This democratic imbalance between the United States and the tribes means that pro-democracy originalism actually requires reading an Indian treaty in accordance with its "tribal" meaning. When a judge interprets an Indian treaty, it is not so easy to suggest, as Justice Scalia has with regard to the Constitution, that if the tribe does not like the original meaning of the text it can simply amend it. The tribe is bound by the judge's interpretation of the treaty unless it can convince the United States to allow it to renegotiate. Conversely, the United States is effectively free to abrogate its treaty commitments whenever it makes the judgment that the terms no longer suit its policy preferences. If a judge applies treaty text according to its "public" meaning, the signatory tribe could fairly object that it is being bound by terms that it no longer accepts but that it lacks the ability to change. But interpreting the text based on its "tribal" meaning still permits the United States Congress to unilaterally abrogate — or push the tribe to renegotiate — any terms that it does not like.

¹¹⁶ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

¹¹⁷ See David E. Wilkins, *The Reinvigoration of the Doctrine of 'Implied Repeals: A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1, 4 (1999).

¹¹⁸ See *id.* at 20.

¹¹⁹ See Rob Capriccioso, *HUD Denies Cherokee Funding over Freedmen Issue*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 8, 2011), <http://indiancountrytodaymedia.network.com/2011/09/08/hud-denies-chokeee-funding-over-freedmen-issue-52650>.

¹²⁰ See ANDERSON ET AL., *supra* note 28, at 113–121; Wilkins, *supra* note 117, at 20–21.

¹²¹ See *United States v. Dion*, 476 U.S. 734, 738–39 (1986).

¹²² See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 422 (1980).

For originalists who believe that judges should simply “carry out the will of the ratifiers,”¹²³ the Indian canon ensures that the treaties most accurately reflect the will of their signatories by assigning meaning in favor of the tribes, who are the parties least able to amend the texts. At the same time, because judges applying the canon still hew to the treaties’ original meanings, this approach still ensures that the judiciary does not become an “instrumentality of change.”¹²⁴ The Indian canon therefore shifts the responsibility to alter the treaty to the one representative branch with the power to change the text: the United States Congress.

2. *The “Englishness” of Indian Treaties.* — The fact that Indian treaties were written in English, a language unfamiliar to the tribes, gave the United States significant leverage when negotiating treaty terms. If read according to its plain meaning, the resulting text would often give the federal government an overwhelming advantage in its relationship with the signatory tribe. Therefore, judges who favor originalism as a constraint on lawmakers must interpret Indian treaties from the perspective of the tribal signatory in order to ensure that the documents can effectively restrain the federal government’s powers over the Indians.

Professor Randy Barnett argues that originalist methodology “follows naturally . . . from the commitment to a written text.”¹²⁵ Barnett identifies several reasons for putting a constitution in writing, the most important of which is that a written constitution “better constrain[s] the political actors it empowers to accomplish various ends.”¹²⁶ Writing down the Constitution provided evidence of the original plan for the federal government, thereby “lock[ing] in” the powers and limits of the new state so that the authorities who governed under its mandate could not claim new, or greater, powers in the future.¹²⁷ As Justice Scalia has explained, “[the Constitution’s] whole purpose is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away.”¹²⁸

From this perspective, the “writtleness” of the Constitution is “just another structural feature of our constitutional order along with separation of powers and federalism.”¹²⁹ A written, fixed constitution ensures “the functional separation of lawmaking and constituent powers” — a tradition with deep roots in Anglo-American political

¹²³ FARBER & SHERRY, *supra* note 109, at 386.

¹²⁴ SCALIA, *supra* note 112, at 47.

¹²⁵ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 100 (2004).

¹²⁶ *Id.* at 103.

¹²⁷ *Id.*

¹²⁸ SCALIA, *supra* note 112, at 40.

¹²⁹ BARNETT, *supra* note 125, at 107.

culture.¹³⁰ But writing down the constitution only constrains future lawmakers if the meaning of its words remain fixed from the date of enactment — meaning cannot be “locked in’ and governors checked and restrained if the written words mean only what legislatures or judges want them to mean today.”¹³¹ Barnett argues that “[w]rittenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.”¹³² Therefore, the nation’s written Constitution instructs adherence to its original meaning.

It is a fundamental principle of federal Indian law that Indian tribes enjoy the right of self-governance based on their inherent sovereignty — an Indian treaty serves as “a grant of rights *from* a tribe *to* the United States,” with all rights not granted reserved to the tribe.¹³³ So, much like the Constitution enumerates and restricts the powers of the federal government over the nation, an Indian treaty also serves as “a fundamental framework within which [federal] governmental power [over the tribe] is structured and limited.”¹³⁴ In both cases, a written charter provides an independent source of governing authority that separates the lawmaking and constituent powers so that government officials cannot “make the laws by which they make law.”¹³⁵

But Indian treaties were not just written down — they were written down *in English*,¹³⁶ a language whose subtleties were easy for American negotiators but were hardly apparent to nineteenth-century Indian tribes. The Supreme Court has emphasized the advantage that the United States enjoyed as a result, explaining that while the American negotiators were “masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; [and] the treaty [was] drawn up by them and in their own language,” the Indians had “no written language and [were] wholly unfamiliar with all the forms of legal expression, and [their] only knowledge of the terms in which the treaty [was] framed [was] that imparted to them by the interpreter employed by the United States.”¹³⁷ Even when federal officials attempted to conduct negotiations in a language that they believed the Indians would understand, they were often mistaken.¹³⁸

¹³⁰ *Id.* at 104.

¹³¹ *Id.* at 104–05.

¹³² *Id.* at 106.

¹³³ Frickey, *supra* note 1, at 402 (emphases added).

¹³⁴ *Id.* at 410.

¹³⁵ BARNETT, *supra* note 125, at 103.

¹³⁶ See Jones v. Meehan, 175 U.S. 1, 11 (1899).

¹³⁷ *Id.*

¹³⁸ Wilkinson & Volkman, *supra* note 38, at 610.

Because the “Englishness” of the Indian treaties created a power imbalance between the two sides, an interpretation of the treaties based on the “public” meaning of their words would undermine the all-important separation between the lawmaking and constituent powers. First, the federal officials whom the treaty was written to constrain could use their superior bargaining ability to effectively dictate terms to the signatory tribe. Second, the federal officials could conceal the legal implications of treaty provisions by using terms of art unfamiliar to the tribe and by interpreting the language inaccurately. Construing the treaty language based on its public meaning, rather than its tribal meaning, facilitates this kind of constitutional self-dealing, allowing the federal government to “make the law by which [it] make[s] law” over the Indian tribes.¹³⁹ It would be as if the Founding Fathers had written and published the original Constitution in ancient Greek; the general public’s inability to decipher the text would have allowed their future leaders to greatly empower themselves at the expense of the people.

Early Supreme Court concurrences, in which individual Justices unsuccessfully advocated for a public meaning interpretation of Indian treaties, illustrate the degree to which such a reading would have undermined the treaties’ written constraints on the federal government. Justice Johnson interpreted the Treaty of Hopewell based on how “the commissioners of the United States express[ed] themselves”¹⁴⁰ and concluded that “every provision of [the] treaty operates to strip [the tribe] of its sovereign attributes.”¹⁴¹ Justice Baldwin similarly construed the treaty as “it was understood by [C]ongress,” and found that a provision empowering the federal government to manage a tribe’s affairs constituted a complete surrender of tribal self-government.¹⁴² The limitless federal power that would have been unleashed by these interpretations demonstrates that in order for a written treaty to serve its restraining purpose, interpreters must account for how its “Englishness” undermines those restraints. Only by interpreting the English treaty language based on its tribal meaning can judges restore a true separation between the federal government’s lawmaking powers over the Indians and the constituent powers reflected in the treaty text.

¹³⁹ BARNETT, *supra* note 125, at 103.

¹⁴⁰ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831) (Johnson, J., concurring).

¹⁴¹ *Id.* at 25; *see also id.* at 22–25.

¹⁴² *Id.* at 38 (Baldwin, J., concurring).

CONCLUSION

Scholars of Indian law describe Indian treaties as “quasi-constitutional” documents¹⁴³ and argue that they should be interpreted like constitutions.¹⁴⁴ Debates over constitutional interpretation are currently dominated by the theory of originalism, which asserts that the Constitution’s meaning remains fixed at the date of its enactment. But the federal courts have long applied a special method for interpreting Indian treaties — the Indian canon of construction, which instructs judges to interpret treaties as the Indian signatories would have understood them. This approach to treaty interpretation initially appears to contradict originalist methodology, but a closer examination reveals that the Indian canon is actually ordinary originalism adjusted to the unique contours of Indian treaties.

Because some Supreme Court Justices have recently expressed skepticism toward the Indian canon,¹⁴⁵ scholars have emphasized the two justifications for the continued relevance of this approach to treaty interpretation. Professor Charles F. Wilkinson argues that the judiciary must protect American Indians as a discrete and insular minority,¹⁴⁶ but this approach seems unlikely to convert any judges not already sympathetic to the Indian tribes. Alternatively, Professor Philip Frickey has called for a “revival” of the canon by emphasizing the structural value of tribal sovereignty reflected in the spirit of each Indian treaty.¹⁴⁷ But judges wary of this kind of atextual, purposivist approach to legal interpretation are almost certain to remain unpersuaded by Frickey’s argument.

Grounding the Indian canon in the principles of originalism would provide a more effective justification for a revitalized Indian canon. Originalism offers an especially promising way to renew the judiciary’s commitment to the Indian canon given that the recent skepticism toward the canon coincided with the advent of the more originalist Rehnquist Court.¹⁴⁸ The Indian canon rests on far more secure foundations than liberal values or structural inferences — it reflects judicial fidelity to the original meaning of the Indian treaties themselves.

¹⁴³ Frickey, *supra* note 1, at 408.

¹⁴⁴ See WILKINSON, *supra* note 1, at 104–05; Frickey, *supra* note 1, at 408–11.

¹⁴⁵ See, e.g., Frickey, *supra* note 1, at 418–37.

¹⁴⁶ See Robert A. Williams, Jr., *The Hermeneutics of Indian Law*, 85 MICH. L. REV. 1012, 1017–18 (1987) (book review).

¹⁴⁷ See Frickey, *supra* note 1, at 413–17, 437–39.

¹⁴⁸ See *id.* at 418–37.