
Interpretive Sovereignty: A Research Agenda

Author(s): Kristen A. Carpenter

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INTERPRETIVE SOVEREIGNTY: A RESEARCH AGENDA

*Kristen A. Carpenter**

Abstract

In federal Indian law, the treaty operates as our foundational legal text. Reflecting centuries-old historical political arrangements between Indian nations and the United States, treaties remain vital legal instruments that decide dozens of legal cases each year. Yet, these treaties—originally drafted in English by the federal government, following negotiations with tribal representatives who usually spoke their own languages—present a number of ambiguities for contemporary courts. The dominant model of treaty interpretation is one in which judges interpret treaties in a manner they believe to reflect Indians' understanding of treaty terms and, more generally, to promote the interests of Indian nations. While this liberal approach to treaty interpretation has secured a number of important Indian rights in the courts, it does not necessarily reflect the ways in which Indians actually perceived treaty terms in their own languages and cultures.

Deeper investigation of treaty law reveals that Indians have long been interpreting treaties for themselves. From their earliest encounters on the negotiating field to recent advocacy in the courts, Indians have, out of necessity or strategy, articulated what treaty provisions mean to them. Here I identify this much overlooked practice as “interpretive sovereignty” and define it as the interpretation of treaties through the lens of tribal cultures and, more particularly, through tribal languages. The practice of interpretive sovereignty has particularly great potential today as a tribal language revitalization movement sweeps Indian Country. Interpretive sovereignty may have the power to transform historical understandings of treaties and help tribes forge contemporary legal approaches that reflect tribal norms and values. Beyond federal Indian law, attention to the role of language differences can inspire

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* J.D., Harvard Law School; A.B., Dartmouth College. Associate Professor of Law, University of Denver. This project was supported by University of Denver PROF Grant. With thanks to Richard Allen, Mathew Barkhausen, Bethany Berger, Erik Bluemel, Kirsten Carlson, Richard Collins, Diane Burkhardt, Matthew Fletcher, Phil Frickey, Sarah Krakoff, Harry Oosahwee, Paul Spruhan, Angela Riley, Ezra Rosser, Judy Royster, Alex Skibine, Gloria Valencia-Weber, and Thatcher Wine and participants at the MSU Conference on Law and Literature (2007) and the DU-CU American Indian Law Works-in-Progress Symposium (2008).

reflection on the interpretation of other legal texts. For these reasons, this essay calls for research into the role of tribal languages in treaty interpretation and begins to contemplate some of the challenges associated with such work.

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I. Introduction

In this essay, I raise the question of what it might mean to interpret Indian treaties through the lens of tribal languages. Each of the hundreds of treaties executed between the United States and Indian nations from 1778-1871¹ was drafted in English.² Yet in many, if not most, instances the Indian tribes were

1. These treaties are reprinted in INDIAN TREATIES: 1778-1883 (Charles J. Kappler ed., 1972) (facsimile reprint of 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904)). For general background on the American Indian treaty tradition, see generally FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600-1800 (1999); VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974).

2. See Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 WASH. L. REV. 627, 652 n.157 (1981) (noting that the United States did not follow the international practice of multilingual treaty drafting in its dealings with Indian tribes). In this regard, the treaty process in the United States differed significantly from that in New Zealand where there has long been an official Maori version of the Treaty of Waitangi, for example. See, e.g., RICHARD DAWSON, THE TREATY OF WAITANGI AND THE CONTROL OF LANGUAGE (2001). This alternative model suggests fertile ground for a comparative work examining treaty interpretation issues growing out of multilingual versus monolingual treaties. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (1969); Dinah Shelton,

represented by leaders speaking tribal languages who worked through translators to negotiate terms with federal agents.³ As a result of linguistic and cultural differences, compounded by political and military disparities, treaty terms may not have been translated perfectly between tribal languages and English.⁴ From the earliest treaty meetings, tribal people may have understood treaties differently than did their federal counterparts.⁵ Unsurprisingly then, in the years following treaty negotiations, tribal people have also used their own languages to advance tribal understandings of treaty provisions in federal litigation, tribal courts, and other settings.⁶

My initial research suggests that while tribes have long used tribal languages in the treaty negotiation and interpretation process, their efforts in this regard remain somewhat overlooked by courts and scholars.⁷ We have not examined in any detail how key treaty concepts may have been, and continue to be, expressed differently in tribal languages than in English. This essay thus offers a modest step toward articulating a research agenda around the role of tribal language in treaty interpretation. Part II describes some of the challenges of the federal common law approach to treaty interpretation, calling particular attention to the “Indian canons of construction” that require courts to interpret treaties “as the Indians would have understood” them. Without attempting to propose a new rule of federal treaty construction, this part nevertheless raises the possibility that judicial understandings of treaty terms might be enhanced by reference to the unique ways in which certain legal concepts are expressed in tribal languages. Part III identifies several instances where tribes have used tribal languages in treaty interpretation, pointing to examples where such acts of interpretive sovereignty have, to varying extents, influenced federal and tribal court decisions. Part III also comments briefly on issues of available

Reconcilable Differences? The Interpretation of Multilingual Treaties, 20 HASTINGS INT'L & COMP. L. REV. 611, 612 (1997) (identifying “problem of interpreting multilingual treaties where mistaken or deliberate mistranslations result in conflicting versions of the treaty text”).

3. See, e.g., JILL ST. GERMAIN, INDIAN TREATY-MAKING IN THE UNITED STATES AND CANADA: 1867-1877, at 60-79 (2001).

4. See *infra* Parts II-IV.

5. See, e.g., NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992, at 117-44 (Peter Nabokov ed., 1991) (documenting American Indian attitudes toward treaties).

6. See *infra* Part III.

7. Although U.S. scholars have not focused on the role of indigenous languages in treaty interpretation, this is a question of great interest in New Zealand where the Treaty of Waitangi (1840) was drafted with English and Maori language versions, leading to numerous questions of interpretation. See, e.g., DAWSON, *supra* note 2; MICHAEL BELGRAVE ET AL., WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI (2d ed. 2005).

source material, including written records and oral traditions; acknowledges that the challenges may differ when a federal versus tribal institution is undertaking the treaty interpretation process; and contrasts the projects of ascertaining historic versus contemporary Indian understandings of treaty terms. Part IV attempts to situate these varied acts of interpretive sovereignty against a scholarly backdrop, drawing from legal, literary, and linguistic theory to propose several lines of future inquiry. Part V concludes with some thoughts about interpretive sovereignty in light of the language revitalization movement currently alive in Indian Country, attempting to link some of the judicial and scholarly questions with issues actually faced by Indian communities today.

II. Problems of Language in Interpretation

Words matter in our foundational legal texts.⁸ When faced with our nation's most pressing legal questions, for example, Americans parse the Constitution carefully for answers. Whether they advocate strict fidelity to the black letter text or a more dynamic method of interpretation,⁹ citizens and courts demonstrate remarkable belief in the transcendent power of constitutional language drafted nearly two hundred fifty years ago to govern our nation today.¹⁰ Like constitutional law, federal Indian law often rests on the application of historic words to contemporary circumstances. Here the

8. We might even describe Indian treaties as “sacred texts” having a transcendent importance in law and politics. See, e.g., Frederick Schauer, *First Amendment Opportunism*, in LEE C. BOLLINGER AND R. STONE, EDS., *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 176 (2001) (characterizing the First Amendment role as a “sacred text,” in its function as an “an argumentative showstopper” that can subsume broad “political, social, cultural, ideological, economic, and moral claims.”). For some tribal people treaties are “sacred texts” with both legal and spiritual dimensions. See WILLIAMS, *supra* note 1, at 47-49. In this regard, Indian treaties might provide an interesting basis for comparison with sacred texts such as the Torah or Koran. See, e.g., Susan W. Tiefenbrun, *The Semiotics of Women’s Human Rights in Iran*, 23 CONN. J. INT’L. L. 1 & n. 680 (2007) (on textual sources and interpretive ambiguity in Islamic traditions).

9. For a small sampling of the many works on methods of Constitutional interpretation, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997). For a discussion of approaches to legislative interpretation, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* (2d ed. 2006).

10. Compare Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1752-53 (2000) (calling the Constitution a sacred text) with Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 363 n.25 (2008) (critiquing the same idea).

foundational legal text is the treaty—or, more precisely, hundreds of treaties that were executed between the United States and Indian nations from 1778–1871.¹¹ Each is a political compact between a tribe and the United States, setting forth power-sharing arrangements between the national and tribal governments.¹² Like other venerable legal instruments, treaties remain vital despite their age, operating as the “supreme law of the land.”¹³

As a practical matter, a treaty is sometimes *the* critical legal document in contemporary Indian law cases.¹⁴ Thus, it is still true that in 2008, treaties affect issues of taxation, jurisdiction, civil rights, and hunting and fishing that affect American Indians and other U.S. citizens.¹⁵ Treaty interpretation is, however, challenging. Courts often confront questions familiar from constitutional law, including how to ascertain the drafters’ original intent in choosing particular legal terms and how to apply such archaic terms to contemporary circumstances.¹⁶ Additionally, treaties raise special problems of language, culture, and power. The treaties were executed in English—but the Indian parties did not always speak English. Indeed, they spoke hundreds of languages as unrelated to each other, and to English, as Hebrew and Mandarin. As linguistic anthropology has revealed, people who speak different languages may see the world differently or at least talk about it differently.¹⁷ Certain concepts may not translate perfectly between cultural groups.¹⁸ Such differences in ways of seeing and naming the world may offer a partial explanation for dozens of “misunderstandings” between European or American and Indian treaty parties.¹⁹

Oren Lyons has, for example, attributed what is perhaps the most notorious treaty misunderstanding of all time to such differences:

11. *See supra* note 1.

12. For a view of treaties as “quasi-constitutional” instruments that set forth the “structural framework and linkages between the United States and the tribe for what promised to be a longstanding, if not eternal, sovereign-to-sovereign relationship,” see generally Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993) [hereinafter Frickey, *Marshalling*].

13. U.S. CONST. art. VI.

14. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

15. *See* cases cited *infra* Parts III–IV; *see infra* note 175.

16. *See supra* note 9.

17. HARRIET JOSEPH OTTENHEIMER, THE ANTHROPOLOGY OF LANGUAGE: AN INTRODUCTION TO LINGUISTIC ANTHROPOLOGY 29 (2008).

18. *Id.*

19. *See* KEITH H. BASSO, PORTRAITS OF THE WHITEMAN (1979) (discussing American Indian perspectives on Anglo-American speech patterns).

When [the Dutch] asked if they could buy Manhattan, well, of course, how could you talk a concept of “buy and sell” with a people who didn’t have that concept. All of the Native people understood that this was a neutral ground and a ground where people shared. The idea of our white brothers coming across the sea would be welcome here. And if they chose to give a small gift for that, that was fine, that was nice and we were in appreciation.

And we still hear about that today. There is a lot of laughter involved . . . you sold Manhattan for twenty-four guilders. And we say . . . well, we don’t understand that. Nevertheless we think at the time what was struck was an agreement to share something. When the Indians arrived next year, they found fences. The [Indians] said, “What is this? We’re coming back to fish and hunt.” They said, “Well, you sold it.” “What do you mean we sold it”?²⁰

While genuine problems of language and cultural differences may have explained some treaty misunderstandings, these problems were certainly compounded by other factors. After 1800, the United States began to approach tribes as diminished sovereigns whose military and social strength no longer threatened the nation.²¹ Even as the tribes continued to negotiate in good faith, the United States made promises that it intended to break shortly thereafter.²² The government employed duress, such as military force and the withholding of rations, to induce tribal compliance.²³ And it sometimes manipulated language differences to its advantage.²⁴ To the extent that tribes had access to

20. *The Native Americans: The Nations of the Northeast: Interview of Oren Lyons* (Turner Broadcasting Systems television broadcast 1994).

21. VINE DELORIA JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 110 (1974).

22. THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 331-32 (Bruce Elliot Johansen ed., 1998).

23. See, e.g., NELL JESSUP NEWTON, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 823 n.411 (1992) (describing that in events leading up to the Sioux people’s signing of the Treaty of Ft. Laramie of 1868, the Government attached a “sell-or-starve” rider to the treaty during the winter when the Government prevented the tribe from hunting, moved most of the members into stockades, and threatened to withhold rations if they did not agree to the treaty).

24. NELL JESSUP NEWTON, *Compensation, Reparations, & Restitution: Indian Property Claims in The United States*, 28 GA. L. REV. 453, 459 n.20 (1994) (noting the challenge for treaty translators to describe concepts of individually held fee simple title to Indians with their own traditions of common ownership and use rights—but observing that “sloppy and dishonest translations” also clouded negotiation process).

translators, these were often provided by the government, which also drafted the instruments and presented them to Congress.²⁵ As a result, the Indian parties sometimes complained that the terms ultimately ratified in a treaty were different from the terms they had negotiated in the field.²⁶

These historical problems raise pressing questions about interpretation. How should courts approach such documents whose very origins were clouded by differences of language, culture, and power? Fortunately, federal common law provides some guidance. The Supreme Court has long held that treaties must be liberally interpreted in favor of Indian tribes, consistent with the so-called “Indian canons of construction”.²⁷ Under the canons, the courts should not hold an “unlettered people” to the strict meaning of legal terms written in a language that they did not speak.²⁸ Instead, the courts should resolve any textual ambiguities in favor of the Indians and interpret the treaties “as the Indians would have understood them.”²⁹

In their application of the canons, federal courts have long attempted just that—to read treaties consistent with Indian intent. Many judges try to evaluate what treaty terms would mean in specific tribal cultural and historical contexts. Indeed, Chief Justice Marshall’s 1832 opinion that gave rise to the Indian canons was based, in part, on his realization that Cherokees may have

25. Compare *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (“[T]he Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.”) with Julia E. Sullivan, *Legal Analysis of the Treaty Violations that Resulted in the Nez Perce War Of 1877*, 40 IDAHO L. REV. 657, 685 n.92 (2004) (noting that while federal agents promised that the written treaty of 1855 would comport with oral representations made to Nez Perce negotiators, Nez Perce did not demand to have the final treaty reviewed by their own translators). But see ST. GERMAIN, *supra* note 3, at 60-79 (offering a more optimistic view of tribes that were well-served in treaty negotiations by skilled translators, often including tribal members).

26. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556-57 (1903) (Supreme Court admitted that the form of the treaty presented to, and ratified by, Congress “did not exactly conform to the agreement as signed by the Indians”). Professor Porter goes further, arguing that in some instances, language problems caused Indians to “consent” to treaties that “could never have been agreed to in accordance with tribal law.” See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 20 COLUM. HUM. RTS. L. REV. 235, 265 (1997).

27. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

28. *United States v. Winans*, 198 U.S. 371, 380 (1905) (“[W]e will construe a treaty with the Indians as ‘that unlettered people’ understood it.”).

29. *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

understood two key treaties differently than did the federal government.³⁰ He thus proceeded to interpret the treaty language as he believed the Cherokees would have understood it, construing ambiguous language in their favor, consistent with the overall spirit of the negotiations and the relationship between the United States and the tribe.³¹

The Cherokees thus retained inherent authority over their land base even though the treaty was not crystal clear on that point. Article Four set forth the “boundary allotted to the Cherokees for their hunting ground.”³² Article Nine granted Congress exclusive authority to regulate trade with the Cherokees and to “manag[e] all their affairs.”³³ Marshall construed these articles to mean that the Cherokee Nation reserved inherent authority over its lands, and the United States promised to protect such autonomy, to the exclusion of state law.³⁴ Even those who agree with the substantive outcome might marvel at the legal and linguistic leap. How did he get from terms that were, at best, ambiguous with respect to the Indians’ situation, into a relatively broad reservation of Indian rights?

First, Marshall suggested that it was not “reasonable” to assume that “Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language” would be able to differentiate between the verb “allotted” (suggesting a federal power to grant property) and a term such as “marked out” (more neutrally suggesting the establishment of a boundary between equal sovereigns).³⁵ The neutral reading would be more consistent with the nature of the negotiation in which the Cherokees “were ceding lands to the United States, and describing the extent of their cession” and not, in fact, “receiving” any lands.³⁶

The same went, Marshall said, for construction of the term “hunting grounds.” He wrote that because “[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,” the Cherokees would not have had “any intention . . . of restricting the full use of the lands they reserved.”³⁷ Moreover, such intent was

30. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553-54 (1832). For a broader view of this period of Cherokee treaty history and removal, see Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

31. See *Worcester*, 31 U.S. at 554.

32. Treaty of Hopewell art. IV, U.S.-Cherokee Nation, Nov. 28, 1785, 7 Stat. 18.

33. *Id.* at art. IX.

34. See *Worcester*, 31 U.S. at 521.

35. *Id.* at 552.

36. *Id.* at 553.

37. *Id.*

reconcilable with the interests of the United States for which “it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.”³⁸

Indeed, Marshall seems to suggest that the contested terms may not have even been precisely selected for the Treaties of Hopewell and Holston. In a passage almost evoking our contemporary notions of “boilerplate” drafting language, Marshall observed that “[t]hese terms had been used in their treaties with Great Britain, and had never been misunderstood.”³⁹ In their historic usage, such terms “had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal [tribal] government.”⁴⁰

In this way Marshall found, in treaty language setting the boundaries of a tribal hunting ground, a Cherokee reservation of territorial possession and sovereignty and not (as Anglo-Americans might have read it) as “at most an exclusive license to hunt.”⁴¹ And in the treaty provision of a congressional right to manage the Indians’ affairs, Marshall found a federal obligation to protect the Cherokee Nation from the incursions of aggressive states.⁴² Yet, for all of its protection of Indian interests, the opinion never seriously or specifically probed Cherokee intent. It never addressed the question of how the Cherokees *actually* understood key treaty terms. How did the Cherokees actually understand the Article Four language on the boundary allotted to them as a hunting ground or the Article Nine language granting Congress regulation of trade and other affairs? The opinion does not say.

Thus, despite his sympathetic orientation, it seems possible that Marshall may have substituted his own “understanding” of the treaties for that of the Cherokees. And while he intended to set forth a legal rule protecting the Cherokees from incursions of Georgia citizens and the national removal movement, the *Worcester* opinion could not quell political tensions on the ground. A mere six years after *Worcester*, the Executive Branch ordered the Cherokees to be relocated to Indian Territory, in part through a forced march that came to be known as the “Trail of Tears.”⁴³ The Cherokees ultimately lost

38. *Id.*

39. *Id.*

40. *Id.*

41. See Frickey, *Marshalling*, *supra* note 12, at 400.

42. *Worcester*, 31 U.S. at 521, 554.

43. The Trail of Tears is documented in numerous sources. See, e.g., ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY (2005). Yet, one documentary is particularly notable for capturing this history through narrative in the Cherokee language. See THE TRAIL OF TEARS:

their traditional eastern land base—including individual homes, fields, religious sites, and personal property—as well as thousands of Cherokee lives and collective tribal lifeways.

The immediate aftermath of *Worcester* reflected many circumstances beyond Marshall's purview as a justice, and this essay does not mean to make unsupportable contentions about his approach to treaty interpretation and the fate of the Cherokees. Yet, *Worcester* did set forth a particular method of treaty interpretation in which judges enjoy a considerable amount of latitude in deciding how the Indians "would have" understood treaties and that their exercise of this power has consequences for Indian people. Of course many judicial opinions are informed by the Indian parties' own arguments outlining the tribal perspective on treaty interpretation.⁴⁴ However, the reality is that judges remain free to impose their own view of what treaty construction would, in the court's mind, benefit the tribe—or to ignore the Indian canons altogether as the Supreme Court sometimes does.⁴⁵ Even if a court has the best intentions, limitations of history, culture, and language make it difficult to set forth an interpretation that reflects the Indians' actual understanding of treaties.⁴⁶ As a result, the treaty interpretations appearing in federal case law may fail to reflect Indian understandings and, perhaps relatedly, fail to set forth rules that actually work for Indians in Indian Country.⁴⁷

CHEROKEE LEGACY (Rich-Heape Films Inc. 2006).

44. A point for future investigation is whether the Cherokee Nation made any language-interpretation issues in its *Worcester* briefs that may be available in the archives of the *Cherokee Phoenix* newspaper. See Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 8 (2004). At this point in my research I have examined limited portions of the appellate record and these do not seem to raise issues of language or translation. See Samuel E. Worcester, Plaintiff in Error Versus the State of Georgia, Supreme Court of the United States, No. 98, Wm. Thos. Carroll, Clerk of the Supreme Court of the United States (on file with author).

45. See, e.g., Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73 (1999) (criticizing Supreme Court's failure to apply Indian canons).

46. See Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 100 HARV. L. REV. 1754, 1778 (1997) [hereinafter Frickey, *Adjudication*] (describing the tendency of federal courts to ignore Indian viewpoints on law).

47. Compare with Frickey, *Marshalling*, *supra* note 12, at 409 (considering Marshall's view of "a constitution as the constitutive document of a complex government in an ever-evolving society; if the document that provides the undergirding and framework for that government cannot serve functional ends over time, the society will founder").

III. Interpretive Sovereignty

In part II, I argued that the dominant model of treaty interpretation is one in which non-Indian judges and other legal practitioners promulgate a treaty interpretation that they believe to reflect Indians' understanding of treaty terms and, more broadly, to reflect Indians' best interests. There is, however, another tradition of treaty interpretation, one in which Indians articulate for themselves the ways in which they historically understood, and continue to understand, treaty language. In this essay, I identify this largely overlooked tradition as "interpretive sovereignty" and define it as the practice of interpreting treaties through the lense of tribal cultures and, more particularly, through tribal languages.

Tribes have, of course, been engaged in acts of interpretive sovereignty for centuries. In the contemporary era of tribal language revitalization, indigenous peoples are likely to engage in such practices with renewed vigor. Their interpretations may reveal new ways of understanding key treaty terms. For these reasons, and others described below, I believe that the practice of interpretive sovereignty, in its historical and contemporary forms, merits greater attention from scholars and advocates.

This Part discusses several types of sources that may shed light on historical uses of tribal language in treaty interpretation. It then discusses federal and tribal court cases in which the courts recognized language issues in treaty interpretation. This Part acknowledges that the challenges may differ when a federal versus tribal institution is undertaking the treaty interpretation process—and contrasts the projects of ascertaining historic versus contemporary Indian understandings of treaty terms.

A. A Few Words on Sources

The first acts of interpretive sovereignty occurred on the negotiating field. Indians spoke through translators to their European and American treaty partners and conferred among themselves as treaties were negotiated.⁴⁸ Yet, it is difficult to unearth such contemporaneous tribal translations. One potentially valuable resource is treaty records, commonly called "treaty minutes."⁴⁹ Going

48. See, e.g., BENJAMIN FRANKLIN, PENNSYLVANIA, AND THE FIRST NATIONS: THE TREATIES OF 1736-62, at ix-xiv (Susan Kalter ed., 2006) [hereinafter KALTER] (discussing language issues in early treaties); see also *id.* at 377 (quoting Oneida speaker at a 1762 treaty conference as saying, "I am sorry we cannot speak to one another any faster, because we cannot understand one another without so many Interpreters").

49. See Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary*

back to the seventeenth century, clerks or other witnesses kept contemporaneous records of treaty negotiations. These documents contain valuable accounts of Indian speeches given during treaty negotiations. As one commentator writes, “[I]n no other source did ethnocentric Euro-Americans preserve with less distortion a memoir of Indian thoughts, concerns, and interpretations of events.”⁵⁰ However, “[treaty minutes] are fraught with problems: interpreters’ linguistic skills are suspect; clerks frequently tired of long Indian ‘harangues’ and noted only what they considered to be the high points; and deliberate falsification sometimes occurred.”⁵¹ Of course treaty minutes are typically recorded in English or other European languages. Thus while they may reveal much about Indian perspectives on treaty negotiations, they may be only a partial window into tribal language issues. For example, in the *Washington* fishing cases, described below, treaty records show that language issues were problematic but generally do not record the words actually used by Indian parties or their translators.⁵²

By contrast, many tribes retain in their own oral traditions detailed information about treaty terms, in their own voices and often in their own languages. Such stories have been passed down from the original ancestors who witnessed or heard about treaty negotiations and many of these contain important substantive information about the tribal perspectives.⁵³ These stories have the potential to serve as counter-narratives, or perhaps complementary-narratives, to federal treaty interpretations.

Analysis, 50 U. KAN. L. REV. 473, 498 n.166 (2002) (“Treaty literature, including the treaty minutes, accounts of interactions by traders, and other anthropologic and historical accounts should be examined to add to the understanding of the traditional essence of Choctaw jurisprudence.”).

50. Daniel K. Richter, *Rediscovered Links in the Covenant Chain: Previously Unpublished Transcripts of New York Indian Treaty Minutes, 1677-1691*, 92 PROC. OF THE AM. ANTIQUARIAN SOC’Y 45, 47-48 (1982).

51. *Id.* at 47. The federal courts have taken note of these problems in some cases. See, e.g., United States v. Bouchard, 464 F. Supp. 1316, 1323 (W.D. Wis. 1978) (“The accounts of what was said [by Indians and government representatives in treaty negotiations], of course, are only of what was understood by the white men. [Secretary of the Treaty Council] Van Antwerp commented after one particularly clumsy passage in his notes: ‘This of course is nonsense but is given literally as rendered by the Intrepeters (sic) who are unfit to act in that capacity. I presume it to mean . . . ’”).

52. See *infra* notes 66-68.

53. See, e.g., Andrew H. Fisher, “*This I Know from the Old People*”: *Yakama Indian Treaty Rights as Oral Tradition*, MONTANA: MAG. OF W. HIST., Spring 1999, at 49 [hereinafter Fisher, *This I Know*].

Historian Andrew Fisher, whose work is described in further detail below, notes the role of the oral tradition in several important respects. Rather than reading the treaties or written accounts of them, tribal people often “absorbed . . . verbal explanations” of treaty provisions given by their own leaders, interpreters, and government agents.⁵⁴ Such accounts carried great weight in cultures where the oral transmission of knowledge was legitimate and effective.⁵⁵ While oral histories raise some evidentiary challenges in litigation, tribal litigants have sometimes presented such evidence effectively, working closely with expert witnesses from the fields of anthropology, ethnology, and linguistics.⁵⁶

In addition to the oral tradition, some tribes have created their own written records of treaty matters. These include tribal leaders’ letters and speeches, historical works, and other sources. There are some particularly unique sources illuminating language issues. For example, the Ojibwe prepared an 1864 document titled “Statement by the Indians: A Bilingual Petition” detailing their understanding of the 1837, 1842, and 1854 treaties.⁵⁷ In 1850, the Cherokee Nation commissioned the translation, from English into the Cherokee syllabary, of a substantial body of federal law affecting the Cherokee Nation.⁵⁸ This

54. Andrew H. Fisher, *Tangled Nets: Treaty Rights and Tribal Identities at Celilo Falls*, 105 OR. HIST. Q. 179, ¶9 (2004), <http://www.historycooperative.org/journals/ohq/105.2/fisher.html#REF10> [hereinafter Fisher, *Tangled Nets*].

55. Ojibwe scholar Patty Loew provides an interesting account of the role of oral tradition in treaty negotiations, noting that the Ojibwe felt they had been misled by the 1837 and 1842 treaties. This was because Ojibwe had committed those treaties to memory and “[t]heir memorized version differed from the written version.” As Chief Na-gon-ab explained in 1854: “You go to your black marks and say this is what those men put down; this is what they said when they made the treaty. The men we talk with don’t come back; they do not come and you tell us they did not tell us so.” PATTY LOEW, INDIAN NATIONS OF WISCONSIN: HISTORIES OF ENDURANCE AND RENEWAL 62-63 (2001).

56. One famous legal decision incorporating indigenous oral traditions is the Canadian Supreme Court’s decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1067, 1071. U.S. courts may remain somewhat skeptical of such evidence as suggested in scholarship criticizing the marginalization of oral histories in the Mashpee land claims. See, e.g., Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, DUKE L.J. 625, 628-30, 658 (1990); James Clifford, *Identity in Mashpee*, in READINGS IN AMERICAN INDIAN LAW 19-26 (Jo Carillo ed., 1998).

57. See LOEW, *supra* note 55, at 133-34 n.6. The Ojibwe petition “was published in 1988 by the University of Western Ontario as part of its series Studies in the Interpretation of Canadian Native American Languages and Cultures. [It] is in the Wisconsin Historical Society Archives, Madison.” *Id.*

58. See RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 115 (1975) [hereinafter STRICKLAND, FIRE AND THE SPIRITS].

project included the Treaties of Hopewell and Holston famously interpreted by Chief Justice Marshall in the pre-Removal cases described above. Funding for this project became available in 1870, at which point the Cherokee printing press at Park Hill, Oklahoma, published the documents.⁵⁹

Such examples of interpretive sovereignty provide fertile ground for studying tribal perspectives on treaties. They raise a number of questions. What can tribes learn by examining such treaty interpretations undertaken by their ancestors during the treaty era? Do tribal translations materially depart from the English-language version of treaties? Is it strategically wise for tribes to raise such arguments in litigation over treaty rights?⁶⁰ Does the historical interpretation of treaties by tribal ancestors have a role to play in the contemporary regulation of treaty rights by the tribe and other governments?⁶¹ How might contemporary tribal members reconcile competing or ambiguous treaty interpretations handed down through the generations?

From a judicial perspective, how *should* the courts try to ascertain the tribes' treaty intent in light of the problems of language described above? As the *Washington* case suggests the treaty records will almost always be in English and they will more accurately and completely reflect the intent of the federal, versus Indian, parties. Can a court meaningfully carry out the canons, and defer to the Indian treaty interpretation, if the evidence largely reflects the federal treaty interpretation? To what extent can courts turn to oral tradition and linguistic evidence, in conjunction with ethnographic, anthropological, and historical testimony, in order to obtain a more complete record than the treaty minutes might provide? And, in what ways might judicial treaty interpretations be limited if they cannot account for issues of language and culture in their decisions?

B. Federal Judicial Opinions

Some federal courts have recognized problems of language in treaty interpretation, perhaps most famously in the 1970s *Washington* fishing cases.

59. The Cherokee syllabary version of the treaties, printed in 1870, is somewhat scarce today. I located it in two institutions: the University of Oklahoma, Norman, and the Newberry Library in Chicago (from which I was actually able to obtain copies).

60. One area of inquiry for a future project is the extent to which treaty interpretation arguments were made in the Indian Claims Commission, a special tribunal created by Congress to adjudicate "ancient claims" against the United States. *See* Indian Claims Commission Act of 1946, Pub. L. No. 79-426, ch. 959, 60 Stat. 1049.

61. *See* Columbia River Inter-tribal Fish Comm'n, The Importance of Salmon to the Tribes, <http://www.critfc.org/text/salmcult.html> (last visited Jan. 1, 2009) (describing role of "salmon culture" in contemporary exercise of treaty rights).

There the issue was the scope of off-reservation fishing rights under twelve treaties negotiated in 1854-55.⁶² The court observed that the Columbia River Indian tribes⁶³ would have been translating treaty terms through several languages:

There is no record of English having been spoken at the treaty councils, but it is probable that there were Indians at each council who would have spoken or understood some English. One Snohomish Indian who understood English helped translate the Point Elliott treaty. Since, however, the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted by Colonel Shaw to the Indians in the Chinook jargon and then translated into native languages by Indian interpreters. Chinook jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained. Many of those present, however, did not understand Chinook jargon.⁶⁴

The question before the court in *Washington*, more than one hundred years after the treaties were negotiated, was how the Indians understood the following treaty provisions:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all

62. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

63. In this article I refer collectively (and somewhat imprecisely) to the "Columbia River Tribes" or "Washington Indians" to refer to those involved in the *Washington* case, which included the Hoh; Lower Elwha Band of Clallam Indians; Lummi; Makah; Muckleshoot; Nisqually; Nooksack; Port Gamble Band of Clallam Indians; Puyallup; Quileute; Quinault; Sauk-Suiattle; Skokomish; Squaxin Island; Stillaguamish; Suquamish; Swinomish; and Tulalip. The contemporary federally recognized tribes that exercise such treaty rights today are the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Indian Nation. See Columbia River Inter-tribal Fish Commission, Columbia River Treaty Tribes, <http://www.critfc.org/text/tribes.html> (last visited Jan. 1, 2009). For an excellent book featuring community perspectives and documentary on the treaties and related issues, see JOSEPH C. DUPRIS, KATHLEEN S. HILL & WILLIAM H. RODGERS, JR., *THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER* (2006).

64. *Washington*, 384 F. Supp. at 355-56.

citizens of the territory, and of erecting temporary houses for the purpose of curing them, together with the privileges of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.⁶⁵

Such language, the court noted, had to be construed “not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”⁶⁶ Yet, ascertaining the Indians’ understanding was not an easy task:

There is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.” A dictionary of the Chinook jargon, prepared by George Gibbs, indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish.

The treaty language “in common with all citizens of the Territory” was probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens. There is no discussion of the phrase in the minutes of the treaty councils, in the instructions to Stevens or to the treaty negotiators, or in Stevens’ letters of transmittal of the treaties. There appears to be no phrase in the Chinook jargon that would interpret the term in any exact legal sense.⁶⁷

The court thus concluded there was “no evidence of the precise understanding the Indians had of the treaty language.”⁶⁸ Having given up on establishing the Indians’ exact intent, the court consulted the 1828 and 1862 editions of Webster’s American Dictionary of the English Language to determine the meaning that federal negotiators’ would have ascribed to the key terms, including the notion of “common ownership”.⁶⁹ Trying to reconcile the

65. *Id.* at 331.

66. *Id.*

67. *Id.* at 356.

68. *Id.*

69. *See id.* (citing 1828 and 1862 editions of Webster’s American Dictionary of the English Language) (“accustomed: Being familiar by use; habituated; inured . . . usual; often practiced. common: Belonging equally to more than one, or to many indefinitely . . . belonging to the public; having no separate owner . . . general; serving for the use of all. usual: Customary;

plain English meaning with what he knew of Chinook, Judge Boldt decided that the Indians' negotiators "probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon."⁷⁰ In a similar vein, the phrase "'usual and accustomed' . . . was all-inclusive and intended by all parties to the treaty to include reservation and off-reservation areas" but probably did not "intend[] to include areas where use was occasional or incidental."⁷¹ Moreover, the court noted, the treaty council records gave no indication that the Indians had been instructed of any limits on "their existing fishing activities or tribal control over them."⁷² From the context, however, they may have understood that non-Indians would also be allowed to take fish alongside the Indians.⁷³ Significantly, the court suggests that one of the main factors inducing the Indians to enter into treaty negotiations, "sell their land for a moderate sum of money," and "to accept . . . reservations" was the promise of off-reservation fishing rights.⁷⁴

Perhaps because of the difficulty of reconstructing the contemporaneous Indian translations, Judge Boldt next turned to anthropological experts to assess the role of fishing in Columbia River Indian cultures at the time of the treaties.⁷⁵ He determined that tribes relied on fishing for subsistence, conducted religious rites associated with the fish, distributed fishing rights at various locations among kinship groups, regulated fishing consistent with tribal custom prohibiting waste, and engaged in trade with other tribes.⁷⁶

Such analysis seemed to represent the court's attempt to comply with the Indian canon which, as Judge Boldt described it, required that "treaties with

common; frequent; such as occurs in ordinary practice or in the ordinary course of events.").

70. *Id.* Compare with CHARLES F. WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 11 (2000) ("Like pidgin English, the Chinook jargon was a rudimentary device for trade, a patchwork of English, French and various tribal languages. How could it possibly speak to sovereignty, land ownership, fishing rights, assimilation, freedom, or the futures of societies.").

71. *Washington*, 384 F. Supp. at 356.

72. *Id.* at 357.

73. *Id.*

74. *Id.* The court further noted:

While there is no record of any specific privileges discussed during these contacts [meetings preceding the treaty negotiations], the treaty commission's prior awareness of the importance the Indians attached to fishing makes it probable that the continuance of the right to take fish was one that Shaw had in mind or discussed.

Id.

75. *Id.* at 351-53.

76. *Id.*

Indian tribes must be construed liberally in accordance with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.⁷⁷ Accordingly, the court held that the treaties reserved distinct rights to the Indians including the right to fish in “areas where the Indians fished during treaty times,” to take a volume of fish sufficient for the Indians “fair needs,” and to regulate off-reservation fishing by members, subject only to non-Indians’ rights to take their own fair share and the state’s right to regulate for conservation purposes.⁷⁸

By all accounts, the *Washington* decision was revolutionary in its generous interpretation of off-reservation fishing, particularly in a political climate hostile to such rights.⁷⁹ Yet, according to Judge Boldt’s own description, he wrote the decision with “no evidence of the precise understanding the Indians had of the treaty language.”⁸⁰ Thus, we can observe the pathbreaking quality of the *Washington* decision and its tremendous benefit for Indian sovereignty, but still ask whether the decision might omit certain perspectives informed by, or expressed in, tribal languages.

Consider, for example, how information available in tribal oral traditions may further inform issues in the *Washington* case. As an example, Fisher points to critical language in the 1854-55 Washington treaties described above reserving to Indians the right to fish at their “usual and accustomed places” “in common with the whites.” He writes that Indians likely understood this language to mean that they would maintain control over their fishing practices, consistent with customary law and kinship relations.⁸¹ This view, while not explicit in the treaty, was confirmed by the information related orally to the Indians by the powerful Indian agent and treaty negotiator Joel Palmer—and then passed down among the generations of Indians. As John Skannowa, a descendant of the Wasco treaty-signer Koshkeelah explained:

The way we understood, the white man wouldn’t have any use for salmon, the berries and the roots. The white man wouldn’t eat that and didn’t know what that food was Joel Palmer indicated that there would be no interference with the Indians’ fishing rights at all; that the white men just weren’t interested in fishing.⁸²

77. *Id.* at 401-02.

78. *Id.*

79. See generally WILKINSON, *supra* note 70.

80. *Washington*, 384 F. Supp. at 356.

81. Fisher, *Tangled Nets*, *supra* note 54, ¶¶ 5-9

82. *Id.* at 9.

Beyond these observations about the role of orality in treaty interpretations, Fisher articulates the ways in which tribal languages also likely influenced Indian treaty interpretations. For example, some Indians believed the treaty “gave them license to avoid the reservation entirely.”⁸³ This belief may have reflected the manner in which the treaty was interpreted to the Indians at treaty councils, where it was “difficult [to obtain] accurate translation[s].”⁸⁴

More specifically:

The fishing clause allowed Indians to erect “temporary buildings” or “suitable houses” for curing salmon [T]hese words probably translated into the Sahaptin language as “house” (*niit*) or “dwelling” (*nišáykt*) rather than as “fish drying shed” (*tyáwtaaš*). Since families often hung fish in their homes, the distinction between the two structures seems blurry indeed.⁸⁵

As a result of such ambiguities, “the treaties were not understood [by some Indians] as prohibiting continued residence at or adjacent to [the] Columbia River fisheries,”⁸⁶ a reading which may have surprised the non-Indian individuals who later acquired title to such properties.⁸⁷

Of course the question of off-reservation residential rights was not even before the court in the *Washington* litigation. Indeed, the treaties were consistently interpreted consistent with the intent of the government’s lead negotiator, Governor Stevens.⁸⁸ As the Supreme Court noted in its review of the case:

[Governor Stevens’] statement at the signing of the Treaty of Point Elliott on Monday, January 22, 1855, was characteristic: “We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries.”⁸⁹

83. *Id.* at 11.

84. *Id.*

85. *Id.*

86. *Id.*

87. See *United States v. Winans*, 198 U.S. 371, 379 (1905) (reviewing Indian claims to continued fishing rights on ceded lands where title was held by non-Indians, pursuant to grants by the United States and State of Washington).

88. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 667 n.9 (1979).

89. *Id.*

Stevens' statement is cited by the court for its ostensibly clear expression of federal policy: Indians would live on the reservation while having the right to fish off of it. Yet, one might note certain ambiguities in this paragraph: nowhere does Stevens say that these homes would be confined to reservation locations or that the government's desire to place Indians in homes would cancel Indians' own desire to reside elsewhere. Moreover, Stevens' simultaneous acknowledgment of agriculture and subsistence as food sources might lead some Indians to believe that they could exercise a choice between the two lifestyles. If they chose to continue fishing, Indians might reasonably believe that they could also live at their usual and accustomed fishing areas off the reservation. Or, as one individual learned from his ancestors:

We never moved because when the treaties were signed by Chief Slockish at Walla Walla we reserved the right to live at our usual and accustomed sites along the river. These sites were reserved because they hold all of our religious sacred sites, cemeteries, gathering sites, fishing sites and where we have always maintained our livelihood.⁹⁰

While lawyers and academics often "debate the value and veracity of . . . [Indian] oral traditions,"⁹¹ they hold great sway among tribal peoples. As Fisher acknowledges, "[A]mong contemporary Columbia River Indians . . . what the 'old people' said still informs their understanding of the treaties."⁹²

Ultimately, of course, the important thing is that tribal people are able to exercise treaty rights consistent with tribal understandings. In some cases, it may not be necessary, or even desirable, for federal judges to go into extensive detail on the meaning of tribal customary terms in the tribal language. In the *Washington* case, for example, Judge Boldt recognized tribal interests in regulating off-reservation fishing rights, along with the very limited state role in that regard. He acknowledged traditional means of fishing regulation. Perhaps his opinion could have been enhanced by tribal language terminology describing fishing regulation.⁹³ Yet, it may be that Judge Boldt's opinion

90. Fisher, *Tangled Nets*, *supra* note 54, ¶ 11.

91. *Id.*

92. *Id.*

93. See *id.* ¶ 15 ("Traditionally, the waters of the Columbia united rather than divided human populations, and mutual dependence forged a common human bond to *nch'i-wána* ('the big river') that belied its later use as a boundary between tribes, between territories, and between states . . . Those who lived closest to the Columbia were known in the Sahaptin language as *wanapam* or *wanaláma*, 'people of the river,' a name that denotes a spiritual connection as well

created enough legal space for the Washington tribes to engage in interpretive sovereignty in their actual exercise of treaty rights. Today, tribes can exercise these treaty rights consistent with tribal language, law, and culture—at least to the extent that the courts construe narrowly the rule allowing states to regulate where necessary for conservation.⁹⁴ For the Columbia River tribes, this means that they can maintain spiritual, kinship, and community values in fishing practices, at least to a certain extent.⁹⁵

C. Tribal Court Jurisprudence

In the above subsection, I discussed federal judicial decisions that, to a limited extent, took into account the role of tribal language in historic treaty interpretations. In this subsection, the essay turns to cases where tribal courts use tribal language in their re-examinations of treaties today.⁹⁶ This may be a particularly important, if not yet widespread, practice in tribal legal institutions, many of which are actively and purposefully engaged in legal reform—with an eye toward making tribal law more reflective of tribal norms and values.⁹⁷

as a spatial relationship To them, fishing rights remain more than just a means of subsistence; they are an integral part of cultural and religious practices that define what it means to be Indian. Before the treaties, kinship structured access to the prime fisheries of the Middle Columbia. Although each village claimed its own fishing grounds, specific sites belonged to individuals and families who knew them by names such as *šwáycaš* (long pole) and *qiyakawas* (gaffing place.”).

94. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999) (“[T]he 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.”).

95. See *Columbia River Inter-tribal Fish Comm'n, The Importance of Salmon to the Tribes*, <http://www.critfc.org/text/salmcult.html> (last visited Jan. 14, 2009) (describing role of “salmon culture” in contemporary exercise of treaty rights). Another interpretive issue concerns the extent to which tribes have treaty rights to commercial fishing—or fishing for trade purposes—versus a more limited right to subsistence fishing. See DUPRIS ET AL., *supra* note 63, at 259-82.

96. See generally Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 59-60 (2007) (on role of tribal language in tribal customary law).

97. The leading scholar in this regard is Robert Porter whose many articles illuminate some of the goals and challenges associated with decolonizing tribal governments through the use of

Consider, for example, the jurisprudence of the Navajo Supreme Court, which is often called on to construe the terms of the 1868 treaty between the United States and Navajo Nation. Like other courts, it is bound to construe the treaty “as the Indians understood it.” The Navajo Supreme Court has expressly commented: “We understand this canon to mean that we have the authority to interpret the treaty as Navajos understand it today. That includes the knowledge passed on to us by our ancestors through oral traditions.”⁹⁸

Additionally, the Navajo Supreme Court, like some other tribal courts, has expressed a jurisprudential preference for applying Navajo Common Law over federal and state sources of law.⁹⁹ Given that Navajo Common Law is deeply informed by concepts that are uniquely expressed in the Navajo language, the Court often uses the Navajo language to describe legal concepts. In some of these cases, the Court uses tribal language to amplify treaty concepts. These cases do not represent a direct translation of treaty terms. Yet they serve as an example of a tribal legal institution using tribal language to interpret and apply legal concepts established in treaties—in cases that happen to implicate some of the most prominent questions in the field of federal Indian law.

In the case of *Means v. The District Court of the Chinle Judicial District*, an Oglala Sioux activist challenged charges filed against him in the Navajo courts for the alleged battery of his father-in-law and another individual in an incident occurring on the Navajo Reservation.¹⁰⁰ Means moved to dismiss on grounds that the Navajo Nation lacked jurisdiction over non-member Indians and that tribal jurisdiction would violate the Equal Protection Clause of the U.S.

tribal law and tradition in contemporary governance issues. See, e.g., Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123 (2002); Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL’Y 97 (1999); Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL’Y 82 (1997).

98. *Means v. District Court of the Chinle Judicial District*, No. SC-CV-61-98, at 23 n.12 (Supreme Court of the Navajo Nation, May 19, 1999), available at <http://www.tribal-institute.org/cases/navajo/means.htm>.

99. See, e.g., *In re Validation of Marriage of Francisco*, 16 Indian L. Rep. (Am. Indian Law Training Program) 6113, 6115 (Navajo 1989) (deciding tribal marriage case pursuant to Navajo custom and instructing the Tribal Council to amend the tribal code accordingly, so as not to “allow outside law to govern domestic relations within Navajo jurisdiction”); see also Sarah Krakoff, *Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1138 (2004) (explaining customary law in the Navajo courts).

100. See *Means*, No. SC-CV-61-98, at 3.

Constitution.¹⁰¹ In an opinion relying on both treaty and Navajo common law, the Navajo Supreme Court held that the district court did indeed have jurisdiction over Means.¹⁰² It held the tribe has criminal jurisdiction over all Indians entering the reservation under Article II of the United States-Navajo Nation Treaty of 1868, pointing to the treaty clauses setting apart the reservation for the use and occupation of “Indians” (versus just Navajos) and Article I providing for the punishment of “bad men among the whites or other people subject to the jurisdiction of the United States.”¹⁰³

To some extent, each of these articles is ambiguous with respect to the scope of criminal jurisdiction over non-member Indians, requiring judicial construction. Construing the treaty as the Indians would have understood it, the Court invoked written histories of treaty negotiations, tribal oral tradition, and tribal custom.¹⁰⁴ Such evidence included numerous instances where the Navajos informed the federal government, during treaty negotiations and shortly thereafter, that they would punish or drive out non-Navajo wrongdoers and the government explicitly agreed that the tribe has this power.¹⁰⁵ As a result, the Court had long held that the treaty supported concurrent tribal and U.S. jurisdiction over crimes committed by non-members on the reservation.¹⁰⁶

Secondly, the Court noted that the Navajo Nation quite clearly had jurisdiction over its “members” as a matter of treaty and federal common law.¹⁰⁷ While Means pointed out that he was an Oglala Sioux tribal member and not enrolled in the Navajo Nation, the Court cited to its previous decisions finding jurisdiction over individuals who either “consented” or “assumed tribal relations.”¹⁰⁸ To apply these concepts in the present case, the Court turned to Navajo common law—and Navajo language terminology:

While there is a formal process to obtain membership as a Navajo, see 1 N.N.C. Sec. 751-759 (1995), that is not the only kind of “membership” under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are

101. *See id.* at 1-3.

102. *See id.* at 14.

103. *Id.* at 10-14 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667).

104. *See id.* at 11-19.

105. *See id.* at 13-14.

106. *See id.* at 13.

107. *Id.* at 15-17.

108. *Id.* at 16-19.

based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the “foreign nation” clans include the “Flat Foot-Pima clan,” the “Ute people clan,” the “Zuni clan,” the “Mexican clan,” and the “Mescalero Apache clan.” See, *Saad Ahaah Sinil: Dual Language Navajo-English Dictionary*, 3-4 (1986). The list of clans based upon other peoples is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).¹⁰⁹

Thus the court held that Means, “by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane*, consents to Navajo Nation criminal jurisdiction. This is not done by ‘adoption’ in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.”¹¹⁰

When the Ninth Circuit later heard Means’ case, it upheld tribal court jurisdiction but based it primarily on the Indian Civil Rights Act, Major Crimes Act, and previous decisions of the Supreme Court—holding that these statutes implicitly allowed for tribes to exercise criminal jurisdiction over non-member Indians and that, under the Supreme Court’s longstanding treatment of Indian status as “political,” these were not race-based in violation of the Equal Protection Clause.¹¹¹ Conveniently, the Supreme Court had just decided these issues in *United States v. Lara*, upholding the so-called “Duro Fix,” a federal statute recognizing “the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.”¹¹² Yet, the Navajo Supreme Court’s opinion is hardly irrelevant; rather it establishes that the tribe’s assertion of criminal law over non-members is not beholden to the evolving nature of federal statutory or common law. Rather, it is grounded in a treaty and the tribe’s own interpretation of that treaty.

109. *Means*, No. SC-CV-61-98, at 17-18.

110. *Id.* at 18.

111. See *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

112. See *United States v. Lara*, 541 U.S. 193 (2004) (upholding 25 U.S.C. § 1301(2)).

There is a less well-known case where the Navajo Nation Supreme Court took a somewhat similar approach to civil jurisdiction. In *Thinn v. Navajo Generating Station*,¹¹³ the Court addressed the issue of whether the Navajo Nation Council waived its power to regulate employment when it entered a lease for the operation of the Navajo Generating Station. In some respects, the case was narrow in its factual posture, turning on the question of whether the language of the lease “unmistakably” waived employment regulation by the tribe with respect to two particular places of employment.¹¹⁴ As a threshold matter, however, *Thinn* addressed one of the most pressing questions in Indian law today—that is, the scope of tribal jurisdiction over non-Indians. The Court framed that question again in terms of the Treaty of 1868, noting that it provides jurisdiction over non-members.¹¹⁵

The Navajo Supreme Court’s approach thus departed somewhat from the U.S. Supreme Court’s tendency to decide tribal court jurisdiction under principles of federal Indian common law. Under the *Montana* rule, tribes only retain jurisdiction over non-Indians on non-Indian fee land if they have entered into consensual relations with the tribe or the matter affects tribal health, safety, and welfare.¹¹⁶ Each time the U.S. Supreme Court reviews a tribal jurisdiction case, however, it expands *Montana*’s applicability to an ever-growing set of on-reservation property, people, and disputes, such that tribal jurisdiction over non-Indians is now the exception rather than the rule.¹¹⁷

By appealing to treaty-based jurisprudence, the Navajo Supreme Court recalled that, under *Montana*, a tribal court may retain jurisdiction over non-Indians pursuant to a treaty.¹¹⁸ The “exceptions”—which have recently dominated federal court jurisprudence—only apply in the absence of a reserved treaty or other jurisdictional right. Thus, instead of accepting the tribe’s “inherent divestiture” of authority over non-members as a matter of federal common law, the Navajo Court found jurisdiction over non-Indians as a general matter, pursuant to the Treaty of 1868, and applied Navajo common law to

113. See *Thinn v. Navajo Generating Station*, No. SC-CV-25-06 (Supreme Court of the Navajo Nation Oct. 19, 2007), available at <http://www.tribal-institute.org/opinions/2007.NANN.0000006.htm>. With thanks to Paul Spruhan, Navajo Nation Law Clerk, for alerting me to this case.

114. *Id.* ¶ 23.

115. *Id.* ¶¶ 10, 22.

116. See *Montana v. United States*, 450 U.S. 544 (1981).

117. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008).

118. See *Thinn*, No. SC-CV-25-06, ¶ 22.

decide whether it existed in the present case. It did so in a portion of the opinion relying significantly on tribal custom and language:

The federal and state governments have their legal principles that a sovereign's police powers, an essential attribute of sovereignty, cannot be surrendered *by contract*. This principle is akin to the Navajo principle expressed herein that the Council cannot delegate its responsibility to protect the people to another entity.¹¹⁹

The trust placed with the Council to protect employment relationships through laws and regulations cannot be handed over wholesale to a non-Navajo entity; that would be a betrayal of the trust.

Under Fundamental Law, the leaders do not ever lay down this trust and the laws because a leader is taught that they must find the solution, for it is always available. *Naat'aanii inliigo ei t'aa nantl'a doo t'aa nahontl'ala, haala lahgoo t'aa nistl'a dahwiizt'i' akondi, Dine Bibeehaz'aanii doo hane' binahji' baantsahakeeso ei choo'iil doo hasih ntsahakesigii beego ei t'aa bik'ee'aan hodeezt'i' doo ch'idahwiizt'i', doo inda bikaa haadahwiizt'i'. Diyin Dine'e Ts'aa' hadeiidiilaagii ei t'aa akot'eigo yil hadadeiidiilaala; yah'ahoot'i', alheehonit'i' doo ch'eehonit'i', doo ei t'oo dadesst'l'oo da. Binahji' ei t'aa hat'eigi shii hanahat'a' bee nistl'ajiyaago, hanahat'a' bee hazhdinoodzii' doo ajisiihgoda ei doo hanahat'a' doo habeehaz'aanii doo t'oo ni' nizhdooleelda, hatsodizin doo haane' ei bee bikaa' haazhdoodaal doo bee nistl'ahazt'i'ee bee hozhoogo bik'idiyaa nizhdooleel doo bi'aazh doo gaal.*¹²⁰

As explained above, and as demonstrated in the design of the sacred wedding basket, a leader through adherence to the laws, the analysis of the stories of the Dine journey, and a positive approach will find a solution (*bi'a'iidza*) around, through, or over that which confronts the people.¹²¹

As a matter of fundamental Navajo Law, then, the Court held: “[T]here is no unmistakable waiver in the lease, as such waiver is inconsistent with Navajo

119. *Id.* ¶ 40.

120. *Id.* ¶¶ 29-30. Some conventions of Navajo orthography used in the Navajo Nation Supreme Court's original opinion may not be reproduced here.

121. *Id.*

principles of leadership responsibility to the people.”¹²² Moreover, the Court attempted to bolster the holding against future challenges. The Court acknowledged, for example, that in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (1996), the Ninth Circuit had held the Navajo Nation lacked power to regulate a different employment operation under a “virtually identical lease provision.”¹²³ Yet, the Court noted that the Ninth Circuit had failed to consider the reserved powers doctrine or Navajo law under which “the Council’s power to waive laws and to delegate legislative authority is not absolute.”¹²⁴ The Court concluded emphatically, “[T]he Circuit Court is without authority to alter that interpretation. Like interpretations of state law by the highest court of a state, federal courts must defer to this Court’s interpretation of Navajo law.”¹²⁵

The *Means* and *Thinn* cases, along with other Navajo judicial opinions interpreting the Treaty of 1868, are acts of interpretive sovereignty. As the Navajo court has clearly realized, treaties may be instruments of federal law, yet they play a significant role in determining the scope of tribal jurisdiction. Thus, treaties, like legislation promulgated by the tribe, must be infused with tribal law and culture if they are to play a role in decisions that promote and resolve contemporary conflicts in Indian Country with internal legitimacy. The Navajo opinions suggest that such treaty interpretation will rely, in part, on certain concepts uniquely expressed in Navajo.

Contemporary acts of interpretive sovereignty that rely on tribal language raise a number of questions. Were the non-Navajo parties in *Means* and *Thinn* disadvantaged because they were unlikely to have a working knowledge of Navajo language concepts?¹²⁶ Such questions extend beyond the issue of non-members. Indeed, as Matthew Fletcher has posited, the entire project of applying customary law may depend on the extent to which the tribal community has retained its language.¹²⁷ While the Navajo Nation has a relatively high level of Navajo language fluency, even it shows diminishing numbers in younger generations.¹²⁸ Does the practice of interpretive sovereignty

122. *Id.* ¶ 31.

123. *Id.* ¶ 15, 34. Paragraph 34 also raises, but does not decide, the question of whether holdings of the Ninth Circuit are binding on the Navajo Supreme Court.

124. *Id.* at ¶ 35.

125. *Id.*

126. Compare with Bethany Berger, *Justice and the Outsider: Jurisdiction over Non-Members in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005) (study of non-members’ experiences in Navajo Nation court system).

127. See Fletcher, *supra* note 96, at 59–60.

128. See Krakoff, *supra* note 99, at 1143–44; see also ETHNOLOGUE: LANGUAGES OF THE WORLD (Raymond G. Gordon ed., 2005) (listing “living languages” around the world and

require judges who are fluent in the tribal language?¹²⁹ What about parties and advocates? Such questions may be particularly pressing “in tribal communities that are (for lack of a better word) assimilated, where the few members are surrounded and outnumbered by nonmembers, and where the tribal language is all but dead, customary law is extremely difficult to discover, understand, and apply.”¹³⁰ The utility of tribal language in treaty interpretation,¹³¹ and other tribal lawmaking, thus raises questions that can only be addressed by each tribe, with attention to its degree of language fluency and its larger goals with respect to legal reform.

IV. Scholarly Antecedents

A. Law

Although this essay argues for increased attention to the role of tribal languages in treaty interpretation, it is not contemplating these issues on a blank slate. I draw from a rich tradition of scholarship contemplating treaty interpretation issues that analyzes the Marshall model of interpretation. For the most part, such scholarship has not called for the use of tribal language in treaty interpretation.¹³² My aim is not to indicate a preference among these scholarly approaches; instead I offer a brief description of each approach as a basis for later consideration of the ways in which its analysis might be further informed by attention to tribal language issues.

providing statistics including numbers of speakers for many indigenous languages).

129. See Fletcher, *supra* note 96, at 90 (“Navajo judges, for example, must be fluent in the language of the Navajo people. A clear understanding of the language, with all its nuances and complexities, is essential to finding tribal customs and traditions. For many tribal communities, the law is encoded right into the language--and the stories generated from the language. A mere translation of the stories into English may leave out fundamental fine distinctions, subtle nuances, and even correct meaning. A native speaker would be able to use the language as a means for discovering the law. But, as the realities of tribal communities dictate, there are few tribal judges who are native speakers. This source, while having the potential of being the finest source available, does not solve the problem for most tribal courts.”).

130. See *id.* at 59-60.

131. Joyce Tekahnawiaiks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 CORNELL J.L. & PUB. POL’Y 449, 466 (2007) (describing process of developing Haudenosaunee Position Paper on the Great Lakes, in which treaties and natural law, both informed by tribal language concepts, are cited as support for “Haudenosaunee’s inherent sovereignty over the waters, . . . a jurisdictional right to control our own Haudenosaunee territories and the water within them, . . . [and responsibility to act] as a voice for the water.”).

132. See *supra* note 7 and accompanying text.

In two of the most influential articles on the topic of treaty interpretation, scholars focus on the “clear statement rule” under which courts require a clear statement of congressional intent to abrogate a treaty right (which is otherwise reserved to the tribe).¹³³ This rule operates in conjunction with the other Indian canons of construction calling for judges to construe treaties liberally in favor of Indians (and against the government), interpreting terms as the Indians would have understood them.

While the scholars agree on the importance and utility of these basic rules of treaty interpretation, they arrive at this view via differing conceptions of treaties themselves. Charles Wilkinson and John Volkman argue that, as agreements representing bilateral negotiations, treaties are akin to “contracts.”¹³⁴ Indians are entitled to treaty rights because they “fought hard, bargained extensively, and made major concessions in return for such rights.”¹³⁵ Therefore, the resulting agreements, concerning property, sovereignty, and cultural interests, are legally-binding contracts of a “high order.”¹³⁶ But because Indian treaties did not usually reflect arms-length transactions between equals, they are akin to contracts of adhesion.¹³⁷ The federal government often wielded the upper hand (as a result of its political power, willingness to employ dishonorable tactics, and control of the drafting language).¹³⁸ These historical circumstances, along with the federal government’s ongoing trust obligations to tribes, have “led to the development of canons of construction designed to rectify the inequality.”¹³⁹ It is for these reasons, according to Wilkinson and Volkman, that courts should apply to Indian treaties the rule that construes contract language against the drafter and in favor of the weaker party.¹⁴⁰ Under this rule, treaty rights should only be abrogated by an “express” congressional statement – and not by ambiguous language or actions.¹⁴¹

Philip Frickey, by contrast, characterizes treaties as “constitutional” instruments structuring the political relationship between Indian nations and the

133. See 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 CAL. L. REV. 601 (1975); Frickey, *Marshalling*, *supra* note 12.

134. See Wilkinson & Volkman, *supra* note 133, at 617-18.

135. See *id.* at 603.

136. *Id.* at 603, 604-06.

137. See *id.* at 617.

138. See *id.* at 610-12.

139. *Id.* at 617.

140. See *id.* at 617-18.

141. *Id.* at 645.

United States.¹⁴² Treaties, like constitutions, appropriately place limits on lawmakers while giving them flexibility to govern in a functional manner.¹⁴³ The clear statement rule places some limits on the federal government's colonial mission while still giving it the power to legislate.¹⁴⁴ The rule, along with the other canons, also reflect the "spirit" of treaty negotiations in which two sovereigns were negotiating the structure and substance of their ongoing political relationship.¹⁴⁵ Under this vision, Frickey firmly rejects the notions that the Indian canons are meant to "protect disadvantaged minorities," "promote equality," or "combat political powerlessness."¹⁴⁶ Instead the treaty abrogation doctrine "protects against all but clear repeals of values rooted in the spirit of Indian treaties" as a matter of structural and institutional preference for the ongoing constitutional arrangement between sovereigns.¹⁴⁷

While Frickey departs from Wilkinson and Volkman in some critical respects, these scholars' common focus on the clear statement rule offers mutual reinforcement to Marshall's treaty interpretation methodology. That is, when reviewing courts construe treaties, their task is to apply a general preference for the Indian position, either as a structural or remedial matter. The admonition to interpret treaty language "as the Indians would have understood it" may not be a literal command to delve into the Indians' *specific* intent, either at the time of the treaty or of the litigation.¹⁴⁸ This approach may reflect a common view of treaties, whether contractual or constitutional, as instruments that were largely prepared by the government and signed by the Indian parties—rather than instruments truly emerging from the mutual intent of two negotiating partners.¹⁴⁹ Or perhaps it reflects that, in the adversarial world of

142. See generally Frickey, *Marshalling*, *supra* note 12.

143. See *id.* 409-10.

144. See *id.* at 412-18.

145. See *id.* at 410-18.

146. See *id.* at 425.

147. *Id.* at 417; see also *United States v. Winans*, 198 U.S. 371, 380-81 (1905) ("[W]e have said we will construe a treaty with the Indians as that unlettered people understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules.") (internal citations and quotations omitted).

148. Compare with Frickey, *Marshalling*, *supra* note 12, at 418 n.158 (stating that the canons are "designed . . . to promote broad interpretations of provisions that benefit Indians") (emphasis added).

149. See RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 104 (1997) ("I cannot be a consensus historian and willingly pretend that 'the Colombian Exchange' was a consensual experience. I am by training a legal historian, and

treaty litigation, there are often only two positions: the Indian's and government's (whether federal or state). The commentators' (and Marshall's) goal may be to interpret the treaty broadly enough to afford the Indians latitude to exercise their specific intent on their own terms, in practice. Thus it is appropriate to construe treaties strictly against the government, either because it is the political entity bearing the structural burden of the federal-Indian trust relationship (in Frickey's view) or because it is the contractual entity wielding the upper hand in federal-Indian transactions (in Wilkinson and Volkman's view).

Robert A. Williams, Jr., offers a third vision of treaties and interpretation, reading them as unique instruments of intercultural diplomacy, revealing both Indian and European traditions of "law and peace."¹⁵⁰ He focuses on a time period (1600-1800) when treaty partners encountered each other on relatively equal footing and each side had sufficient power to meaningfully direct negotiations.¹⁵¹ Secondly, Williams is interested in critiquing a view of federal Indian law "either expressed or implied, that the legal rules and principles adhered to in the course of this country's historical dealings with Indian peoples are the exclusive by-products of the Western legal tradition brought to America from the Old World."¹⁵² Evident in Chief Justice Marshall's opinions, this perspective tends to see the law (and Indians' legal "salvation" from the crushing powers of colonization) as non-Indian creations. By contrast, Williams argues that Indians, despite power inequities, maintained their own legal traditions and engaged European and American negotiators on these terms.

In his review of Iroquois, Cherokee, Choctaw, Powhatan, and other tribes' treaty encounters with Europeans, Williams focuses on specific cultural contexts. He argues that each tribe or confederacy had its own legal tradition

I object to the concept of discovery and western settlement as a mutual or equitable exchange. In my view, Indians gave--Europeans took."). To the extent that the United States "imposed" treaty terms, tribal intent may be less discernable. Yet, Frickey has recognized that "the canons call upon the judge to become sensitized to the Indian interests in the case," Frickey, *Marshalling*, *supra* note 12, at 418 n.158, and Wilkinson describes the Chippewa as savvy negotiators who insisted on certain specific provisions in their negotiations over hunting and fishing rights, *see* Charles F. Wilkinson, *To Feed Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 385-86 [hereinafter Wilkinson, *Summer*]. Still these scholars seem to focus on the importance of judicial treaty constructions that favor Indian interests in a broad (versus specific) sense.

150. WILLIAMS, *supra* note 1, at 10.

151. Many agree that circumstances changed by the 1800s when the United States used its military power and other forms of duress to dictate, rather than negotiate, treaty terms.

152. WILLIAMS, *supra* note 1, at 6.

that must be examined to understand both treaty negotiations and the resulting terms. The Iroquois brought a tradition of confederacy, wampum, and kinship to their treaty encounters, whereas Cherokees had a strong sense of clan obligations in their customary law.¹⁵³ Many tribes solemnized treaty agreements with rituals including gift-giving, smoking a sacred pipe, historical orations, and naming ceremonies.¹⁵⁴ To some extent, Williams argues, treaties executed with the Cherokees, Haudenosaunee, Wyandots, Delawares, and others reflected these traditions. Evidence of indigenous legal traditions is documented both in records of the negotiating processes (showing that treaty partners conducted certain rituals) and the treaties' substantive terms (reflecting mutual obligations and a sense of kinship between peoples).¹⁵⁵

As these examples suggest, Williams' project is to re-examine treaties for evidence of "the legal visions of American Indian peoples."¹⁵⁶ His methodology is more complicated than application of the "clear statement rule" to construe treaties narrowly in favor of the Indian position and against the government's position. Indeed, he seems to reject the notion that treaties could be reduced to dichotomous choices. Instead he starts with the plain language of treaties and then acts as somewhat of a legal anthropologist, considering treaty terms in the context of cultural and historical information. While his intent is not to articulate a rule of interpretation, Williams' implication is that today's federal Indian law should reflect the intercultural spirit and substance of those early treaties.¹⁵⁷ In this regard his approach is consistent with that of Frickey and Wilkinson,¹⁵⁸ but more insistent on interpreting treaties in light of specific tribal legal and cultural traditions.

My own interest in treaty interpretation is deeply informed by the scholarly antecedents described above. It takes from Wilkinson and Volkman the notion that the Indian canons are justifiable as a matter of historical equity and from Frickey that they are deeply embedded in the structural and institutional framework of federal Indian law. From Williams, I am inspired to take

153. *Id.* at 51-61, 63-66 (describing Iroquois practices); *id.* at 66-68 (describing Cherokee practices).

154. *Id.* at 75-82.

155. *Id.* at 98-123.

156. *Id.* at 7.

157. *Id.* at 122-23.

158. Notably, in a later article, Wilkinson devotes close attention to issues of culture and language in the interpretation of Chippewa treaties. Wilkinson, *Summer*, *supra* note 149, at 384-89. Both Wilkinson and Frickey ultimately call for treaties to inform an intercultural, negotiated approach to contemporary Indian law, much in the best spirit of the treaties themselves. See *id.* at 404; Frickey, *Adjudication*, *supra* note 46, at 1779-84.

seriously the possibility that, if examined in their cultural context, many treaties will reveal Indian as well as European and American legal traditions. My goal is to propose a next step in this rich tradition of treaty interpretation scholarship. The question is what might we learn by using tribal languages as an interpretive device? Here I argue that this inquiry is informed by developments in the fields of literature and linguistics, which in turn resonate with important trends in Indian Country.

B. Literature

There is, in the field of American Indian literature, a movement that identifies Indian writing as an act of political self-determination in which Indian voices should be prioritized.¹⁵⁹ As one scholar writes: “Native literature, and Native literary criticism, written by Native authors is part of sovereignty: Indian people exercising the right to present images of themselves and to discuss those images.”¹⁶⁰ While “there is no one pure or authoritative act that constitutes Native literary criticism,” the assertion of a tribal voice affirms Indians as “active agents in history, innovators of new ways, of Indian ways, of thinking and being and speaking and authoring in this world created by colonial contact.”¹⁶¹ This approach echoes, to some extent, Williams’ work on treaties, suggesting that scholars should look closely at Indian roles in creating texts, whether literary or legal. But literary criticism is particularly focused on the expressive quality of Indian voices, a focus that can inspire a sharper look at issues of language in treaty interpretation.¹⁶²

159. Scott Richard Lyons, *Rhetorical Sovereignty: What Do American Indians Want from Writing?*, 51 C. COMPOSITION & COMM. 447 (2000).

160. CRAIG WOMACK, RED ON RED: NATIVE AMERICAN LITERARY SEPARATISM 14 (1999). For a new work, see SEAN KICUMMAH TEUTON, RED LAND, RED POWER: GROUNDING KNOWLEDGE IN THE AMERICAN INDIAN NOVEL (2008) (advancing a “tribal realist” approach to literary criticism).

161. See WOMACK, *supra* note 160, at 6.

162. Susan Kalter argues for a “complete reconsideration of the place of treaties in both general and intellectual history” in light of developments in history, linguistics, Native American Studies, and literary theory. KALTER, *supra* note 48, at x. Similar to my claims here, Kalter suggests that contemporary Native American literary theory should inform the project of treaty interpretation, in particular by shedding light on issues of oral tradition, language, and relationships among peoples. *Id.* at ix-xiv (“It is my hope that this edition will help connect eighteenth-century centers of Native American thought and intellectual exchange to those more contemporary exercises of political and intellectual sovereignty.”) (citing the works of Jace Weaver, Robert Warrior, and Gerald Vizenor).

Beyond general insistence on Indian participation in interpretation,¹⁶³ a group of “literary nationalists” further emphasize the distinctiveness of particular tribal worldviews and experiences.¹⁶⁴ Craig Womack, for example, imagines a critic who is “not satisfied with explicating Creek texts if he has never tried his hand at creating anything Creek himself.”¹⁶⁵ Womack then analyzes the work of several Creek authors, situating their work in Creek ceremonial life, resistance movements, oral tradition, and experiences with statehood. His goal in these discussions is to “open[] up a dialogue among Creek people, specifically, and Native people, more generally, regarding what constitutes meaningful literary efforts.”¹⁶⁶ Through such work, Womack attempts to meet what he describes as “responsibility as a Creek-Cherokee critic to try to include Creek perspectives in approaches to Native literature, especially given the wealth of Creek wisdom on the subject.”¹⁶⁷

In a somewhat similar vein, the Cherokee critic Daniel Heath Justice analyzes Cherokee-authored literary works in what he sees as two strands of Cherokee experience—the Chickamauga consciousness of resistance and Beloved Path of engagement—describing his work as “tribal-centered scholarship.”¹⁶⁸ Osage scholar Robert Warrior engages in a comparative work, juxtaposing the writings of Osage author John Joseph Matthews with those of the Standing Rock Sioux writer Vine Deloria, with the goal of uncovering tribal-specific intellectual traditions.¹⁶⁹

163. Thus some Indian literary critics depart from the view that Indian identity is irrelevant to the production and criticism of Indian literature. For proponents of the so-called “anti-essentialist” view, see generally ELVIRA PULITANO, TOWARD A NATIVE AMERICAN CRITICAL THEORY (2003) (criticizing the “failed logic, internal contradictions, and linguistic inconsistencies” that she finds in certain literary works by American Indians and describing these as pandering to activist nostalgia separatism and essentialist conceptions of Native American identity). See also ARNOLD KRUPAT, THE TURN TO THE NATIVE: STUDIES IN CRITICISM & CULTURE (1996); DAVID TREUER, NATIVE AMERICAN FICTION: A USER GUIDE 195 (2006) (“Native American fiction does not exist.”).

164. See JACE WEAVER, CRAIG S. WOMACK & ROBERT WARRIOR, AMERICAN INDIAN LITERARY NATIONALISM (2005); Daniel Heath Justice, Indigenous Literary Nationalism, <http://www.danielheathjustice.com/scholarship.html> (last visited Jan. 14, 2008).

165. WOMACK, *supra* note 160, at 20.

166. *Id.* at 1.

167. *Id.*

168. DANIEL HEATH JUSTICE, OUR FIRE SURVIVES THE STORY: A CHEROKEE LITERARY HISTORY (2006).

169. See ROBERT WARRIOR, TRIBAL SECRETS: RECOVERING AMERICAN INDIAN INTELLECTUAL TRADITIONS (1994).

In all of their efforts, the literary nationalists express the hope that “tribes, and tribal members, will have an increasingly important role in evaluating tribal literatures.”¹⁷⁰ My hope is that tribes and tribal members will have a similarly important role in treaty interpretation. The assertion of tribal voices in *treaty* interpretation, like the assertion of tribal *literary* interpretation, allows Indians to “author their own destinies as distinct peoples with discrete political status in this world.”¹⁷¹ This practice is critical in the re-examination of treaties that dictate tribes’ legal status today.

C. Linguistics

If we can agree with the Indian literary nationalists that Indian voices play an important role in the interpretation of tribal-specific texts, the remaining question is whether Indian voices may be uniquely expressed in tribal languages. Among linguists, it has become an unremarkable proposition that cultural groups express concepts differently through language.¹⁷² One linguistic anthropologist offers a simple illustration of this phenomenon, explaining: “Russian has a single word, *ruka*, for a part of the body that English divides into two words, *hand* and *arm*, suggest[ing] that the speakers of Russian and English attach different degrees of importance to naming those body parts.”¹⁷³ While this notion of “linguistic relativity” is well-accepted, scholars debate the question of “linguistic determination,” that is, whether language “organize[s] the world for us or just expresses how our culture has taught us to organize the world.”¹⁷⁴

Some of these issues extend beyond the scope of the present essay.¹⁷⁵ Yet, recent work in linguistic anthropology reflects that, at least in some communities, tribal people believe that certain concepts are uniquely expressed

170. See WOMACK, *supra* note 160, at 1.

171. See WEAVER ET AL., *supra* note 164, at xiv.

172. OTTENHEIMER, *supra* note 17, at 1-29.

173. *Id.* at 16; see also *id.* at 29 (“[E]thnosemantics provides an important and useful technique for learning another language and culture through its system of categorizations.”)

174. *Id.* at 29.

175. My review of the literature from linguistics, linguistic anthropology, and related disciplines is, at this point, somewhat limited. For several sources on indigenous language and linguistic issues, see KEITH H. BASSO, WESTERN APACHE LANGUAGE AND CULTURE: ESSAYS IN LINGUISTIC ANTHROPOLOGY (1990); KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996); DELL HYMES, FOUNDATIONS IN SOCIOLINGUISTICS: AN ETHNOGRAPHIC APPROACH (1974); DELL HYMES, “IN VAIN I TRIED TO TELL YOU”: ESSAYS IN NATIVE AMERICAN ETHNOPOETICS (1981); and numerous sources cited in JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 169-78 (2008).

in tribal languages. Justin Richland's study on language used in the Hopi tribal court system, while not focused on treaty interpretations, offers several rich examples of the function of tribal language in legal proceedings.¹⁷⁶ He recounts proceedings in which litigants, advocates, and judges alike express a preference for speaking in Hopi, even if they are fluent in English.¹⁷⁷

Richland specifically examines cases pertaining to property and inheritance in which Hopi custom was often key to resolving the dispute. In one case, for example, a Hopi lay advocate prompted his client to "clearly explain [her position] in Hopi," a request which Richland reads as "suggest[ing] a belief that the proper sense of this claim is communicable only in Hopi – that this claim is an expression not of the daughter's sole possessory interests but of Hopi traditions of matrilineal inheritance."¹⁷⁸ As another advocate explained about a concept expressed in English: "It's said different in Hopi, it doesn't have as much effect because I can't use my language."¹⁷⁹ This is because, when it comes to sensitive issues of property and kinship, "You can't separate Hopi and religion and land, language, court, constitution. It's all tied up into one."¹⁸⁰

Hopi cases of inheritance implicate not only familiar Anglo-American concepts of "testamentary intent" and "capacity", but also particular Hopi questions of who is entitled to inherit property. Relevant factors may include how often a person who no longer resides in the village must return in order to retain possessory interests in land; whether an individual is fulfilling clan relationships; and if a property claimant is able, as a matter of gender and social roles, to maintain property used for ceremonial purposes.¹⁸¹ From the parties and advocates' perspectives, these Hopi traditions are uniquely reflected in the Hopi language. One advocate went so far as to say that she *had* to speak Hopi "in order to adequately represent my client" on issues of "land and tradition."¹⁸² She felt so strongly that she lapsed into Hopi to emphasize the importance of the subject matter before the judge even ruled on the request.¹⁸³

Richland's work indicates, moreover, that some of the Hopi parties choose to speak in Hopi not only out of a need to be precisely understood, but also as a matter of political self-determination. One advocate, for example, challenged the opposing lawyer's objection to the use of Hopi language saying:

176. See RICHLAND, *supra* note 175, at 97-105.

177. *Id.* at 98.

178. *Id.* at 99.

179. *Id.* at 106.

180. *Id.*

181. *Id.* at 56-57, 69, 98-99.

182. *Id.* at 102.

183. *Id.* ("*I hapi yep-yep pu'himu . . .*" "This truly here – here now is something [we] . . .").

I think the [opposing lawyer] is being ignorant to the fact that we are Hopi and this is a Hopi court of law. [T]he reasons why . . . things were developed the Constitution, the Hopi Court, was for the benefit of the Hopi people, not for the benefit of the people who can't understand English . . . I think we should be honoring that opportunity to express [ourselves in Hopi].¹⁸⁴

In Richland's view such advocacy "link[s] the witness's right to use Hopi to the tribe's contemporary legal institutions and the self-governance it instantiates . . . and to the distinctive pragmatic and affective capacities that Hopi affords the witness, which an English translation might not adequately capture ('and maybe the best way for her to communicate her feelings')."¹⁸⁵

Richland's ultimate project is broader than the above excerpts would imply; indeed he is concerned with the many ways in which Hopi ideas of tradition are shaped in the judicial process. Yet, Richland's work is useful in conceptualizing the role of language in treaty interpretation. In particular, it suggests Chief Justice Marshall's method of treaty interpretation may (1) fail to capture legal concepts as they are uniquely expressed in tribal languages and traditions and (2) suppress opportunities for tribal people to realize the political self-determination that comes from use of tribal languages in legal processes.

D. More Questions

When we return to the legal opinions giving rise to the Indian canons, we might reflect on such lessons from literary and linguistic theory. To some extent, Marshall realized that a "hunting ground" might not be a "hunting ground" to all peoples. Yet, he never went that step further and asked what a "hunting ground" actually meant to the Cherokees during the treaty negotiations. Inspired by both the literary nationalists and linguist anthropologists, then, we could pose some additional questions about treaty interpretation.

When, for example, translators explained to the Cherokees the various "land" articles in the Treaty of Hopewell, which words did they use?¹⁸⁶ And which words did the Cherokee leaders use? With respect to Article Four allotting land

184. *Id.* at 104.

185. *Id.* at 99.

186. For a sampling of Cherokee dictionaries and glossaries, see DURBIN FEELING, CHEROKEE-ENGLISH DICTIONARY (William Pulte ed., 1975); PRENTICE ROBINSON, EASY CHEROKEE DICTIONARY (1996); Cherokee Nation, Dikaneisdi (Word List), <http://www.cherokee.org/Culture/Lexicon/Default.aspx> (last visited Jan. 14, 2009).

for hunting grounds, did they employ a phrase that would literally translate as hunting ground or something broader such as land, nation, or territory?¹⁸⁷ What did they understand to be the nature of the land rights described in the treaty?¹⁸⁸ Was it fee title ownership and territorial dominion—or a mere hunting ground—as any of these terms might have been defined in the European sense? Did the Cherokees have a distinct conception of a “hunting ground” in the Cherokee language and was that perceptive operative in their understanding of Article Four? How did they construe the federal government’s authority to “manage[] their affairs” as set forth in Article Nine? Did the Cherokees conceive the treaty as reflective of Cherokee, European, or an emergent form of property and governance norms?¹⁸⁹

Studying Cherokee treaty interpretations is a substantial undertaking. Fortunately there is a rich body of historical and legal materials on the Cherokee treaty era.¹⁹⁰ There are also a number of works analyzing the

187. See, e.g., AJALAGI NUSDV NVGOHV ELOHI: CHEROKEE VISION OF ELOHI (Virginia M. Sobral & Howard L. Meredith eds., Wesley Proctor trans., 1997) (book-length bilingual treatment of the Cherokee concept of “elohi”, which is sometimes translated as land, earth, culture, religion, and law).

188. Another source on Cherokee land traditions might be available in traditional stories that often describe land use for hunting, agricultural, residential, ceremonial, and other purposes. See, e.g., JAMES MOONEY, MYTHS OF THE CHEROKEES AND SACRED FORMULAS OF THE CHEROKEES (2007) (combined reprint of two previous Mooney books); JACK FREDERICK KILPATRICK & ANNA GRITTS KILPATRICK, FRIENDS OF THUNDER: FOLKTALES OF THE OKLAHOMA CHEROKEES (1995); BARBARA R. DUNCAN, LIVING STORIES OF THE CHEROKEE (1998). Compare with JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW (2002) (describing how law of First Nations peoples, including that expressed in traditional stories, influences Canadian law).

189. For a contemporary view of some Cherokee property law and norms, see Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10-SPG KAN. J.L. & PUB. POL’Y 491 (2001).

190. A sampling of the many sources on Cherokee history preceding and during the Removal era includes THE LIFE AND TIMES OF HON. WM. P. ROSS OF THE CHEROKEE NATION (Mrs. William P. Ross ed., 1893); EMMET STARR, HISTORY OF THE CHEROKEE INDIANS AND THEIR LEGENDS AND FOLK LORE (1921); GRANT FOREMAN, INDIAN REMOVAL (1932); ALTHEA BASS, CHEROKEE MESSENGER (1936); ELIAS BOUDINOT: CHEROKEE AND HIS AMERICA (1941); MARION L. STARKEY, THE CHEROKEE NATION (1946); THE REMOVAL OF THE CHEROKEE NATION: MANIFEST DESTINY OR NATIONAL DISHONOR (Louis Filler & Allen Guttman eds., 1962); GRACE STEELE WOODWARD, THE CHEROKEES (1963); JACK GREGORY & RENNARD STRICKLAND, SAM HOUSTON WITH THE CHEROKEES: 1829-1833 (1967); JOHN PHILIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION (1970); THURMAN WILKINSON, CHEROKEE TRAGEDY: THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE (1970); STRICKLAND, FIRE AND THE SPIRITS, *supra* note 58; DUANE KING, THE CHEROKEE INDIAN NATION: A TROUBLED HISTORY (1979); GARY E. MOULTON, JOHN ROSS: CHEROKEE CHIEF

Cherokee language in non-legal settings.¹⁹¹ Yet, there has been relatively little scholarship considering the specific role of Cherokee tribal language in treaty interpretation. If undertaken, study should be informed by careful work with primary documents, contemporary linguists, and tribal members and leaders to consider various possible Cherokee interpretations of the treaties and ramifications of such interpretations.¹⁹² What might it mean if these sources suggest Cherokee treaty interpretations that depart from Marshall's view? What if Cherokee conceptions are broader, narrower, or altogether different from the judicial version? At this late date, 170 years after the Trail of Tears, could Cherokee perspectives have any bearing on the tribe's legal relationship with the United States?¹⁹³ How would evidence about specific Cherokee or other tribal viewpoints on treaties influence courts' and scholars' approaches to treaty

(1978); *THE PAPERS OF CHIEF JOHN ROSS 1807-1839, 1840-1866* (Gary Moulton ed., 1985); *CHEROKEE REMOVAL: BEFORE AND AFTER* (William L. Anderson ed., 1991); *WILMA P. MANKILLER, A CHIEF AND HER PEOPLE* (1993); *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* (Theda Purdue & Michael D. Green eds., 1995); *THE BRAINERD JOURNAL: A MISSION TO THE CHEROKEES, 1817-1823* (Joyce B. Phillips & Paul Gary Phillips eds., 1998); *TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2002); *JILL NORRIS, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY* (2004); *CHARLES C. ROYCE, THE CHEROKEE NATION OF INDIANS* (Kessinger Publ'g 2007) (1887); *THEDA PURDUE & MICHAEL D. GREEN, THE CHEROKEE NATION AND THE TRAIL OF TEARS* (2007).

191. See, e.g., *THE SHADOW OF SEQUOYAH: SOCIAL DOCUMENTS OF THE CHEROKEES: 1862-1964* (Jack Frederick Kilpatrick & Anna Gritts Kilpatrick eds., 1976); MARGARET BENDER, *SIGNS OF CHEROKEE CULTURE: SEQUOYAH'S SYLLABARY IN EASTERN CHEROKEE LIFE* (2002).

192. Although it was not a treaty case, a recent controversy referenced tribal language terminology in determining contemporary marriage rights under tribal law. See *Cherokee Court Dismisses Gay Marriage Suit*, BOSTON GLOBE, Aug. 4, 2005, available at http://www.boston.com/news/nation/articles/2005/08/04/cherokee_court_dismisses_gay_marriage_suit (noting that same-sex marriage case before tribal supreme court included testimony on the Cherokee language meanings of terminology designating spouses as "cooker" and "companion" under traditional law).

193. A "live" treaty issue exists, for example, in tribal and federal litigation over the enrollment status of Cherokee "freedmen." See, e.g., *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) (reviewing claims of descendants of former slaves claiming citizenship in the Cherokee Nation based on the Treaty of 1866). The Cherokee Nation of Oklahoma has also litigated and settled treaty rights to the Arkansas River in the recent past. *United States v. Cherokee Nation*, 480 U.S. 700 (1987) (holding that the Cherokee Nation is not entitled to just compensation for damage to treaty guaranteed riverbed interests caused by the federal government's exercise of navigational servitude). For other contemporary Cherokee treaty issues, see Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91 (2005) (analyzing the unresolved question, under the Treaty of New Echota of 1835, of a Cherokee right to representation in Congress).

interpretation? Will such information have any role in tribal lawmaking or be treated as legal history with limited utility in contemporary affairs?

Beyond specific tribal contexts, studying tribal languages in treaty interpretation could raise various theoretical and practical questions for scholars. Whether we view the treaty endeavor as contractual-remedial, constitutional-structural, or intercultural-diplomatic, what would it mean to apply the treaties as the Indians “actually” understood them and as they understand them today? In the contracts realm, additional evidence about the parties’ original and contemporary understandings might deepen analysis on the “mistake,” “duress,” “fraud,” “changed circumstances,” and “adhesion contract” questions sometimes asked about the deals struck by treaty parties. In examining treaties as constitutional documents, language studies could be useful information to various schools of thought, including original intent and dynamic interpretation, and perhaps give more meaningful content to the political relationship between the United States and tribes. As a matter of intercultural diplomacy, a deeper understanding of treaty terms could enhance the functionality of treaties as constantly-renewing instruments of trust and cooperation. In an ideal world, Indians and non-Indian treaty partners would be able to meet, much like their ancestors did, to affirm the core of their promises to one another—while also discussing the ways that the evolving cultural and linguistic traditions of each party should inform contemporary challenges. Of course, these are largely abstract ideas that, as a practical matter, would need to be evaluated in light of whatever information is actually revealed by language studies and with attention to the evidentiary, procedural, and substantive requirements of various legal claims and forums.

V. Conclusion

In the Native American Languages Act of 1990, Congress recognized “the rights and freedom of Native Americans to use, practice, and develop Native American languages,” including specific protections for Indian language rights in education and public expression.¹⁹⁴ Subsequent legislation has made modest funding available for language immersion programs in furtherance of these goals.¹⁹⁵ Tribes, in turn, are using their often scarce resources to create language immersion programs, train fluent speakers as instructors, and publish teaching

194. Native American Languages Act of 1990, Pub. L. No. 101-477, 104 Stat. 1152 (codified as amended at 25 U.S.C. §§ 2901-2906).

195. Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2006); Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, 120 Stat. 2705.

materials.¹⁹⁶ Like other minorities, however, American Indians face political and legal challenges to their efforts to secure language rights.¹⁹⁷ In one particularly poignant moment, the principal chief of the Cherokee Nation was denied the right to speak—in English—when the Oklahoma Legislature convened to discuss an “English Only” measure before it.¹⁹⁸

In this era of self-determination, however, Indian people will not be silenced by oppressive legal institutions. Indeed, the revitalization of tribal languages plays an active role in decolonizing tribal governing institutions, transforming them from agents of state and federal law to tools of culturally-meaningful tribal nation building. This phenomenon is particularly apparent in the contemporary use of tribal customary law. As the Navajo and Hopi examples suggest, tribal customary or common law may rely significantly on traditional community values uniquely expressed in tribal languages. It is possible that tribal language also has a role to play in treaty interpretation beyond Indian Country—that is, in negotiated settlements with other governments and even in federal litigation.

This essay has attempted to make the general claim that tribal languages have an important role to play in treaty interpretation, and to raise questions for further research. Future research could be undertaken to re-examine certain texts through the lens of tribal language and ultimately develop a theory articulating the role of tribal language in treaty interpretation. Such work has the potential to make stronger connections between tribal efforts to revitalize language and law.

Perhaps most aspirationally, my work will engage with a broader nationwide debate about the role of language differences in the interpretation of other legal texts. Scholars, judges, and citizens alike argue for competing approaches to interpretation—textualism, originalism, and dynamism—to name a few.¹⁹⁹

196. See, e.g., JANINE JA'N'O BOWEN, THE OJIBWE LANGUAGE PROGRAM: TEACHING MILLE LACS BAND YOUTH THE OJIBWE LANGUAGE TO FOSTER A STRONGER SENSE OF CULTURAL IDENTITY AND SOVEREIGNTY (Harvard Project on American Indian Economic Development 2004), available at http://www.hks.harvard.edu/hpaied/pubs/pub_157.htm.

197. See generally Allison M. Dussias, *Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999); Allison M. Dussias, *Indigenous Languages Under Siege: The Native American Experience*, 3 INTERCULTURAL HUM. RTS. L. REV. 5 (2008). For an international perspective, see Julie Chi-hye Suk, *Economic Opportunities and the Protection of Minority Languages*, 1 LAW & ETHICS OF HUM. RTS. 1 (2007).

198. *Official English Legislation Passes House Committee Following Tense Hearing*, NEWSOK.COM, Apr. 2, 2008, <http://newsok.com/article/3224542/1207180909> (last visited Jan. 9, 2009).

199. See, e.g., Paul Campos, *That Obscure Object Of Desire: Hermeneutics And The*

These questions of interpretation often arise in contemporary cases of abortion rights, affirmative action, same-sex marriage, and other issues that may seem far from the Indian treaty context. Yet treaty interpretation raises broader questions: How are various segments of our multilingual, multicultural society affected by constitutional and statutory interpretation? Do such constituents have a voice when it comes to interpreting legal texts that affect them? How do we reconcile power disparities among parties to political compacts, domestic and international? How does the law address changing societal values and the changing nature of language itself? In illuminating these questions, the project of interpretive sovereignty may have ramifications in Indian Country and beyond.

Autonomous Legal Text, 77 MINN. L. REV. 1065, 1069-71 (1993) (discussing textualism, intentionalism, and “pragmatic” interpretation).