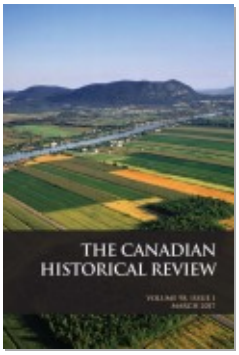
Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism



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Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism

Abstract: *The Supreme Court of Canada has created a narrow framework for recognizing Aboriginal and treaty rights in Canada's Constitution by reference to historic moments of contact, assertions of sovereignty, and negotiated agreements. This approach has placed historical inquiries that search for "original" understandings at the centre of the court's jurisprudence. This article argues that law should not be equated with history in this way. It has severely disadvantaged Indigenous peoples. As a "living tree," Canadian constitutional law should regard the "past" as a grab bag of possibilities for present reasoning, rather than as a constraint on present developments, because they do not have analogues in a bygone era.*

Keywords: Indigenous peoples, law, colonialism, treaty, Aboriginal rights

Résumé : *La Cour suprême du Canada a créé un cadre étroit pour la reconnaissance des droits des Autochtones et des droits issus de traités dans la Constitution canadienne en s'appuyant sur les moments historiques de contact, les assertions de souveraineté et les ententes négociées. Cette façon de voir a placé les enquêtes historiques visant à trouver des accords « originels » au cœur de la jurisprudence de la Cour. Le présent article soutient que le droit ne devrait pas être assimilé à l'histoire de cette façon, car cette assimilation a gravement désavantagé les Autochtones. Le droit constitutionnel canadien est un « arbre vivant » et, à ce titre, il devrait envisager le « passé » comme un mélange hétéroclite de possibilités pouvant alimenter le raisonnement actuel, et non comme un carcan empêchant l'évolution actuelle des événements parce qu'ils n'ont pas d'équivalent dans une époque révolue.*

Mots clés : peuples autochtones, droit, colonialisme, traité, droits issus de traités

This short article explores the history of "the idea" of Aboriginal and treaty rights in Canada's Constitution over the past fifty years, as developed in the courts. Unlike other contributions in this issue, my article does not focus on schools of thought among particular historians. Instead, this article considers how the idea of history itself is deployed to serve the court's own conceptual understanding of Aboriginal rights.

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The court's idea of history reinforces a particularly narrow framework. Aboriginal and treaty rights are defined by reference to historic moments of contact, assertions of sovereignty, and negotiated agreements. This approach has placed historical inquiries that search for "original" understandings at the centre of the court's jurisprudence. If an Aboriginal or treaty right does not have a connection to a pre-European practice, it will not receive constitutional protection.

The turn to history to define Aboriginal and treaty rights is not inevitable. As the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) makes clear, Indigenous rights need not be rooted in historic claims.[1] Within the UNDRIP's framework, Indigenous rights are inherent human rights; this is also largely the case within United States jurisprudence.[2] Indigenous rights exist by virtue of the current corporeality of Indigenous peoples as political communities; they are part of Canada's living Constitution.[3] Aboriginal constitutional claims would be more broadly conceived if they were framed as human rights – as opposed to historic rights. This is how rights to religion, association, mobility, life, liberty, security, equality, and so on are framed within the Canadian Charter of Rights and Freedoms.[4] Charter rights are not dependent on their historical exercise and, thus, are more broadly conceived. Unfortunately, Canadian courts have not generally accredited the present political expressions, needs, and aspirations of Indigenous communities when articulating rights. Courts have ruled that they cannot recognize contemporary Aboriginal claims if such claims do not have analogies to historic practices, customs, and traditions that existed before European contact or sovereign assertions. Treaty rights must also be grounded in historic moments (the courts have resisted the notion that rights not explicitly transferred by treaties to the Crown remain vested with Indigenous peoples).[5] Under

1 United Nations Declaration on the Rights of Indigenous Peoples, 9 December 2007, UN Doc. A/61/L.67/Annex (2007).

2 John Borrows, "Legislation and Indigenous Rights," in *Section 35 @ 25*, edited by Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016), 475–505.

3 This thought was developed more fully in my work in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

4 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

5 The "reserved rights" view of Aboriginal rights is best articulated in the US context in *United States v Winans* (1905), 198 US 371 at 381, 25 S Ct 662. The Supreme Court of the United States stated: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted."

these formulations, colonialism becomes the "all or nothing moment for establishing Aboriginal rights."[6]

By making history the touchstone for Aboriginal and treaty rights, Aboriginal communities, lawyers, and historians have been conscripted into the Supreme Court of Canada's search for origins. In the process, "the idea" of history, rather than the concept of inherent human rights, has dominated the field. Historical inquiries into colonialism's genesis have become an obstacle for Aboriginal peoples making their claims. Indigenous peoples have not been able to prove contemporary rights to self-government, child welfare, education, economic regulation, and so on because the courts have found such claims do not have strong historical analogues at the moment of European encounter.

Historians' work is thus being used to reinforce the court's structural limits on Aboriginal claims. I do not make this point to disparage historians' scholarship in the legal field, as there have been excellent histories produced in the courts relating to Aboriginal and treaty rights.[7] I am merely making the point that academic histories are being funnelled into the court's own narrow conception of Aboriginal peoples' constitutional status. The academic history may be generally sound, but the framework in which it is received is not. It builds on the Crown and the courts' narrow foundations. It reinforces a search for past examples of Aboriginal practices, rather than empowering present-day Indigenous claims (such claims may be unprecedented in past eras, but they are vital to Aboriginal health and welfare under present circumstances).

An awareness of the courts' insistence on "contact" history as the measure of Aboriginal rights is an important consideration for historians. It could help inform the profession's involvement in court processes, seeing how their participation supports a particular "idea" of Aboriginal rights that frustrates other alternatives. Understanding the courts' originalism might also help historians recognize and further analyze how their work is being used in Aboriginal cases. It facilitates a political dynamic that sustains the Crown's domination of Aboriginal

6 *R. v Van der Peet*, [1996] 2 SCR 507 at para. 247 [*Van der Peet*].

7 S.E. Patterson, "Indian-White Relations in Nova Scotia, 1749–61: A Study in Political Interaction," *Acadiensis* 23 (1993): 23–59; Stephen Patterson, "Historians and the Courts," *Acadiensis* 28 (1998): 18–22; William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002); Arthur Ray, "Native History on Trial: Confessions of an Expert Witness," *Canadian Historical Review* 84 (2003): 253–74; Arthur Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal and Kingston: McGill-Queen's University Press, 2011).

peoples in the present day.[8] While historians may generally produce even-handed scholarship for the courts' consumption,[9] the context in which such work is received is anything but impartial. The courts' ideology advances a point of view that often generates negative consequences for Aboriginal peoples. While the courts' search for origin stories makes historians relevant in the Canadian courtroom, the profession may want to more fully interrogate the structures into which their work is poured. Some may even choose to discuss the limits of contact histories; they may generate observations within their own work that problematize this approach. Such interventions may help the courts to see the implications of their framework. In the process, they may also reinvigorate historians' own sense of how their work is conscripted by others to structure Canada's constitutional narratives.

A NEW ERA

The rooting of Aboriginal rights in historical inquiry was evident in the early 1960s. Approximately fifty years have passed since the Supreme Court of Canada affirmed Clifford White and David Bob's hunting rights pursuant to the Douglas treaties on Vancouver Island.[10] The year was 1965. The two men had been charged with hunting out of season under section 18 of the BC Game Act.[11] Members of the Nanaimo Indian Band had long been under state surveillance for hunting contrary to provincial law. In fact, there were sophisticated sting operations designed to ensnare Indian hunters. The two friends were sick of the harassment. They decided to do something about it. With community support and assistance from the Native Brotherhood of British

8 A fine example of this type of scholarship is found in J.R. Miller, "History, the Courts and Treaty Policy: Lessons from Marshall and Nisga'a," in *Aboriginal Policy Research*, Vol. 1: *Setting the Agenda for Change*, edited by Jerry P. White, Paul Maxim and Dan Beavon, 29–45 (Toronto: Thompson Educational Publishing, 2004).

9 In making this point, I am of course aware that historical research is always coloured by the time in which it is produced and by the author's own explicit and subconscious choices and views. I analyzed this point in greater detail in John Borrows, "Listening for a Change: The Courts and Oral Tradition," *Osgoode Hall Law Journal* 39 (2001): 1–38.

10 *R. v White and Bob*, (1964) 50 DLR (2d) 613 (BCCA), affd (1965) 52 DLR (2d) 481 [*White and Bob*].

11 Game Act, RSBC 1960, c. 160. The oral history of this case was recited at a conference on 14 November 2005, http://snuneymuxw.blogspot.ca/2005/11/40th-anniversary-celebrations-of-r-v.html (accessed 4 January 2017).

Columbia, they resolved to defend themselves. They hired newly minted lawyer Thomas Berger. After broad client consultation, Berger decided to mount a treaty rights defence to the provincial charge.[12] He relied on an 1854 agreement between the Nanaimo Nation and James Douglas, a Hudson's Bay chief factor (and later governor of Vancouver Island and British Columbia). Section 87 of the Indian Act stated that treaties were paramount to provincial laws of general application, such as the BC Game Act.[13]

In their defence against the claim, the provincial government did not acknowledge Governor James Douglas's 1854 agreement as the kind of treaty protected by the Indian Act. The Crown argued that Douglas's actions could not be paramount to provincial legislation. This presented the problem in stark relief. Berger had to prove the Nanaimo people possessed a valid treaty to successfully defend his clients. At this point, the idea of "originalist" history entered the courtroom. To test the document's status, the court said that "regard ought to be paid to the history of our country: its original occupation and settlement; the fact that the Hudson's Bay Co. was the proprietor, and to use a feudal term contained in its charters, the Lord of the lands in the Northwest Territories and Vancouver Island; and, the part that company played in the settlement and development of this country."[14] The historical provision at issue was signed approximately 110 years earlier, in 1854, in response to the Indian's willingness to share lands with the settlers.[15] The treaty stated:

> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.[16]

After a cursory historical review, the British Columbia Court of Appeal accepted that the document was a treaty. It applied section 87

12 Berger's description of the case and his involvement is found at Thomas Berger, *One Man's Justice: A Life in the Law* (Vancouver: UBC Press, 2002) at 87–106.
13 Indian Act, RSC 1985, c. I-5.
14 *White and Bob*, 634.
15 The history of the "Douglas Treaties" is explored in Wilson Duff, "The Fort Victoria Treaties," *BC Studies* 3 (1969): 3–57.
16 *White and Bob*, 615.

of the Indian Act and held that the agreement was paramount to provincial law. White and Bob were therefore "at liberty to hunt over unoccupied lands." They were acquitted of the provincial charge. The Supreme Court of Canada affirmed the Court of Appeal's decision.

Treaty rights were given priority over provincial law, thus ushering in a new era of Aboriginal rights law in Canada. As such, the *White and Bob* case marked a turning point in Canadian history. Aboriginal peoples built on this base through the 1960s and 1970s. They fought to secure greater recognition of their rights in the courts, on the streets, and in the media.[17] In 1969, they defeated a proposed White Paper policy to terminate treaties and other distinct rights.[18] In 1973, the Nisga'a proved Aboriginal title was a justiciable interest in the Supreme Court of Canada. In 1975, the James Bay Cree and Inuit in Quebec signed a treaty with the Crown.[19] Over the next few years, Aboriginal groups across Canada worked to alternatively resist and promote constitutional reform to secure their own unique interests.

ENTRENCHING ABORIGINAL RIGHTS

Finally, in 1982, another milestone marked the development of Aboriginal rights law. Section 35(1) of the Constitution Act 1982 was proclaimed.[20] It said that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada is hereby recognized and affirmed." This provision bolstered protection for rights like those at issue in the *White and Bob* case. After a series of constitutional conferences failed to define the scope and content of Aboriginal rights, the 1990 *Sparrow* case kick-started judicial inquiries into the same issue.[21] The *Sparrow* case protected Musqueam rights to fish for food and for social and ceremonial purposes. It constrained Crown sovereignty. It prohibited

17 A prominent book from the era used in these struggles was Peter Cumming and Neil Mickenburg, *Native Rights in Canada*, 2nd edition (Toronto: Indian-Eskimo Association, 1972).

18 Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981).

19 Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001).

20 The history of section 35(1)'s development is recounted in Doug Sanders, "The Indian Lobby," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon, 301–32 (Toronto: Metheun, 1983), 301. Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

21 *R. v Sparrow*, 1 SCR 1075.

the unilateral extinguishment of Aboriginal rights after 1982. It required the government to justify any attempt to infringe section 35(1) rights. In the moment, the constitution appeared to present a path to genuine reform. Then the idea of originalist history re-emerged and became the touchstone for proving Aboriginal rights. The Supreme Court of Canada created a framework that would make colonial engagement the measure of Aboriginal peoples' constitutional rights.

In 1996, the court held that Aboriginal rights only protected those practices, customs, and traditions that were "integral to the distinctive culture" of particular groups prior to European contact. This was the *Vanderpeet* case.[22] It turned judges and lawyers into amateur historians. Courts focused their attention on what was, once upon a time, of central significance to "Indians." They did not consider what was important to Aboriginal peoples when the constitution was patriated in 1982 and beyond. As such, Indigenous peoples could not claim any rights that owed their origins to European influence.[23] Historians were called to provide evidence of what was central to Aboriginal culture prior to European arrival.[24] The search for "original" understandings of Aboriginal life drove the courts' inquiries. It produced a few victories for Aboriginal peoples. It also further entrenched a view that Aboriginal nations were past-tense peoples. Retrospectivity was entrenched because the courts will only protect what once was integral to Aboriginal cultures, not necessarily what is significant to them today.[25]

From *Vanderpeet* onward, section 35(1) has generally been very disappointing for most groups. It has been narrowly interpreted. On the

22 *Van der Peet*.

23 *Van der Peet*, para. 73: "[W]here the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right."

24 For a critique of this framework, see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*," *McGill Law Journal* 42 (1997): 1011–44; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review* 22 (1997): 37–64; Russell Barsh and Sakej Henderson, "The Supreme Court's Vanderpeet Trilogy: Native Imperialism and Ropes of Sand," *McGill Law Journal* 42 (1997): 993–1010.

25 *Vanderpeet*, at para. 5: "To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly *made the society what it was*" [emphasis in original].

positive side, section 35(1) has protected rights to fish for food and social and ceremonial purposes as well as an occasional commercial right to fish. The greatest victory came from a strong declaration of Aboriginal title in 2014. This was the *Tsilhqot'in* case.[26] It tilted the legal landscape in British Columbia in the favour of First Nations. It was a strong case and should not be diminished. However, for the most part, section 35(1) has further embedded Aboriginal peoples in colonial relationships. They have not secured recognition of what is integral to the distinctive cultures in contemporary terms.

Particularly troubling is the Supreme Court of Canada's and Parliament's failure to recognize rights to meaningful self-government. Decision-making authority for most Indian, Inuit, and Métis peoples is constricted. What little powers they possess are supervised, scrutinized, and openly critiqued by Ottawa. Indian bands' poor decisions under Indian Act governance regimes are cynically manipulated to deny their withdrawal from federal control. The Indian Act's dysfunctional system, created by Ottawa in 1876 to assimilate Indians, is appallingly deployed and entrenches further dysfunction. Ottawa created this problem when it designed the framework for Indian band governance as an assimilative measure to dismantle traditional structures. It now blames consequent governance problems on those who administer the federal government's paternalistic, outdated law. It is a very troubling "bait-and-switch" regime; bands get blamed for poor governance even though Ottawa set the framework for their operation. All the while life gets worse for most Indigenous people. In day-to-day terms, Canada's Constitution has little relevance for improving the health, welfare, and security of most Aboriginal peoples.[27] In fact, the Constitution seems to stand in the way of such reform.

History and Constitutional Interpretation: Originalism and Living Constitutionalism

This unacceptable state of affairs can be traced to the trickster-like role historical interpretation plays in Aboriginal rights cases.[28] The agency

26 *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256.

27 Mildred Poplar, "We Were Fighting For Nationhood, Not Section 35," in *Box of Treasures or Empty Box: Twenty Years of Section 35*, edited in Ardith Walkem and Halie Bruce, 23–8 (Penticton, BC: Theytus Books, 2003), 23.

28 Indigenous tricksters and constitutional reform are discussed in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 57.

of Aboriginal communities is disciplined by deeper structural forces that call on history to patrol the borders of our legal imagination. Aboriginal rights have been simultaneously enriched and constrained by a powerful quasi-historical approach to legal interpretation. Originalism privileges "frozen-in-time" moments of a problematic past in defining contemporary constitutional protections. Originalism's alternative – living constitutionalism – is pushed aside. Attempts to organically incorporate rolling insights about law's relationship to history are generally not a part of Aboriginal rights jurisprudence.

Originalism as a method of interpreting constitutional law became prominent in the United States in the 1970s.[29] This movement was championed by conservative lawyers and politicians who railed against the so-called liberal decisions of the Burger Court of that era.[30] Conservatives felt the court was inventing new protections for African Americans, impoverished citizens, and the criminally accused who were not explicitly enumerated by the "founding fathers" in the 1787 Constitution. Rights to desegregation, abortion, privacy, fair housing entitlements, and so on were cause for concern among originalists. They did not feel the founders "intended" such "liberal" interpretations of the Constitution's provisions. Conservatives therefore called for a focus on the Constitution's original historic intent or publicly accepted meaning at the time it was drafted and debated.[31] Their intent was to limit what they regarded as unchecked judicial discretion in constitutional interpretation. This call was eventually heeded by President Ronald Reagan and consolidated by father and son Presidents George H.W. and George W. Bush. They appointed influential conservative jurists who more or less successfully applied originalist methodologies to the court's docket. This resulted in a dramatic retrenchment of civil rights protections. The idea of original history became conflated with contemporary constitutional law. The Supreme Court of the United States has generally tilted in a conservative direction ever since.[32]

In the same period, the Supreme Court of Canada largely eschewed originalist approaches to constitutional interpretation.[33] The Canadian

29 Robert Bork, *The Tempting of America* (New York: Free Press, 1990).

30 Randy E. Barnett, "An Originalism for Non-originalists," *Loyola Law Review* 45 (1999): 611–54.

31 Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* (Washington, DC: Regnery, 2007).

32 See generally Robert W. Bennett and Lawrence B. Solum, *Constitutional Originalism: A Debate* (Cornell, NY: Cornell University Press, 2011).

33 Ian Binnie, "Constitutional Interpretation and Original Intent," in *Constitutionalism in the Charter Era*, edited by Grant Huscroft and Ian Brodie, 345–82 (Markham, ON: LexisNexis Canada, 2004), 348.

court did not generally feel bound by the so-called historic intentions or public meaning of constitutional provisions at the moment of their adoption. Canada does not have an original founding moment. It has a series of them; in fact, our constitution is still developing. Canada's constitutional tradition is similar in principle to Great Britain's. It is broadly based on unwritten traditions and accreted conventions. In addition to the two most prominent Constitution Acts in 1867 and 1982, there are numerous other Constitution Acts. These acts have admitted different provinces into the union, vested natural resources in the Prairie provinces, granted the Canadian Parliament independence from Great Britain (Statute of Westminster), and dealt with territorial Senate representation, denominational schools, and so on. There is no one founding moment, as some argue is the case in the United States.[34]

As a result of Canada's "work-in-progress" constitutional tradition, the court has followed a Judicial Committee of the Privy Council (JCPC) decision from the 1930s, which characterized Canada's Constitution as a living tree. In a decision now called "The Person's case," Canadian women were found to be qualified to be seated as senators in the Canadian Parliament.[35] This result was obtained despite the fact that "original" understandings of women's place in public life would have regarded them as being ineligible to serve in public political offices. When the Constitution Act, 1867 (British North American Act) was passed in 1867, women could not sit in Parliament.[36] The JCPC chose to downplay historical understandings of women's rights and, thus, allowed them to serve as senators despite past prohibitions. Justice Sankey, writing on behalf of the Privy Council, declared:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the constitution was to grant a constitution to Canada. "Like all constitutions it has been subject to development through usage and convention." ... Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house.[37]

34 This theme is developed extensively in Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015).
35 *Edwards v. Canada (Attorney General)* [1930] AC 124 [*Edwards*].
36 Constitution Act, 1867, 30 and 31 Vict., c. 3.
37 *Edwards*, 136.

This approach, now called living tree jurisprudence, stands in contrast to originalism. "Living tree" reasoning is the dominant strand of constitutional interpretation in Canada.[38] It requires judges to understand the law's historical context but then interpret the law in light of present-day understandings – related to the Constitution's structure, text, values, and subsequent judicial interpretations.

Living constitutionalism is anathema to originalists. Originalists strive to expunge presentist interpretations of historical texts. This may be an appropriate approach for a historian to take, in understanding the past, but it is a very troubling approach for judges to adopt. This approach largely eschews an interpretation that incorporates understandings generated subsequent to a constitution's debate and enactment. Originalism is a generally conservative judicial philosophy. It marshals a type of historical understanding of law to limit present-day rights and freedoms. Originalists do not generally believe that constitutions were meant to be updated with the times. If updates are required, they feel the matter should be democratically addressed through an explicit constitutional amendment. Originalism privileges what judges and politicians considered law to be in an historic, usually less progressive (and even colonial) era. Proponents of originalism generally believe that historical intentions can be discerned. They have confidence that clear guidance about present action can emerge from a historical reading of the law's drafting and publicly debated acceptance.

This approach is problematic. A judge's task should be distinct from a historian's craft. Yet originalist judges and contact history lawyers broadly seek to explain the past without importing present-day concerns. But law and history have different disciplinary touchstones.[39] Historians search for evidence of past events without adding to these interpretations the subsequent "down-stream" understandings that have developed through the passage of time.[40] This approach makes excellent history

38 For a critique, see Bradley Miller, "Origin Myth: The Persons Case, The Living Tree, and the New Originalism," in *The Challenge of Originalism: Theories of Constitutional Interpretation*, edited by Grant Huscroft and Bradley Miller, 120–46 (Cambridge: Cambridge University Press, 2011) at 120.

39 However, it is important to note the challenge in creating too sharp a distinction between the disciplines of history and law. See Alan Carr, *What Is History?* 2nd edition (New York: Penguin Books, 1987), 30: History "is a continuous process of interaction between the historian and his facts, an unending dialogue between the past and the present."

40 The challenge of understanding history without reference to an historian's own social positioning is discussed in Daniel Woolf, *The Social Circulation of the Past* (Oxford: Oxford University Press, 2003).

but poor law: "Historians and judges are not just people with different titles; they are people with different jobs."[41] Historians must produce work that explains the past, but judges must explicitly make the past speak to the present to guide future decision making. This is consistent with F.W. Maitland's observations: "What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better."[42] The need to distinguish law from history is something that must occur more fully in both the legal and historical realm. Law should not be equated with history, particularly when Canada's Constitution is similar to Britain's and is not calibrated to all-or-nothing historic moments. Canada's Constitution and its legal framework must be more transparent about the distinctions between law and history. Law must continue to regard the "past" as a grab-bag of possibilities for present reasoning rather than as a constraint on present developments because they do not have analogues in a bygone era.

Living tree jurisprudence would be a better method for courts to follow when considering Aboriginal rights. This is the approach taken in all other constitutional fields. This approach favours contemporary interpretations when engaging with the past. As we have seen, historic laws and events are read in light of present-day understandings. This attenuates the racial, sexual, or other human rights biases of prior eras. While history is relevant in deploying "living tree" reasoning, historical understandings are thought to be a "floor" for interpretation rather than a "ceiling" for understanding rights. Historical intent provides an entry point for interpreting the law. but it does not represent its end point. Layers of meaning can affix themselves to a historic understanding when practising living tree methodologies. These continually dynamic meanings become relevant when interpreting an old law in the light of accumulated experience. By contrast, originalism broadly insists that the law must strictly accord with its meaning when it is crystallized or enacted, even if that meaning is now offensive or archaic.

41 Helen Irving, "Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning," *Fordham Law Review* 84 (2015): 957–68, 958: "History and judging operate in different fields; they belong to different disciplines. Historians and judges are not just people with different titles; they are people with different jobs."

42 F.W. Maitland, *Why the History of English Law Is Not Written: An Inaugural Lecture 14 (Oct. 13, 1888)* (Cambridge: Cambridge University Press, 1888).

originalism and (ab)originalism: trickster methodologies

How does this somewhat rarified legal/historical debate relate to Aboriginal peoples? The "idea" of history as a touchstone for Aboriginal rights is obstructing Aboriginal peoples' development as a contemporary political force in Canada. They have struggled to take care of their own health and welfare because of the Supreme Court of Canada's originalist approach.[43] Originalism in (Ab)original cases have usually generated narrow opinions. Canadian judges do not interpret constitutional provisions in the light of present-day views about the law held by most Indigenous peoples. Despite a potential public perception that sees Aboriginal rights as progressively expansive, the courts generally apply the narrowest methodology to this field in the trenches of constitutional interpretation.[44] Originalism applies to Aboriginal peoples even as the Supreme Court of Canada continues to expand its living tree jurisprudence in all other areas of constitutional law.

The application of two distinct constitutional methods is inequality on a grand scale. The Supreme Court of Canada applies originalism for Aboriginal peoples and living tree jurisprudence for everyone else. Under these conditions, the idea of history in Aboriginal rights jurisprudence regenerates colonialism with each originalist decision. Aboriginal peoples should not be subject to a more conservative deployment of history when interpreting their rights. This does not happen when other parts of the Constitution are given meaning. This is discriminatory. Originalism is a severe structural limit on Aboriginal rights jurisprudence. It powerfully constrains the field. Originalism often eclipses the active agency exercised by Aboriginal litigants, communities, lawyers, and their experts. Historians are profoundly implicated in this story. Their work is being used to reinforce a colonial framework. Aboriginal litigants are subject to a deep underlying discipline of historic thought and practice that structures what can be protected as Aboriginal rights today.

And, yet, I have made the point that originalism is trickster like. Its application both recognizes and denies Aboriginal rights. Tricksters simultaneously facilitated and frustrated Aboriginal life as they wandered

43 John Borrows, "(Ab)originalism and Aboriginal Rights," *Supreme Court Law Review* 58 (2d) (2012): 352–98.

44 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535, para. 51: "While courts have recognized that Aboriginal rights must be allowed to evolve within limits, such limits are both quantitative and qualitative. A 'pre-sovereignty aboriginal practice cannot be transformed into a different modern right' (*Marshall* (2005), at para. 50)."

the earth in "the time before time." Originalism's presence is a little like those shape-shifting forces. Originalism can help and hinder Aboriginal life today. When Raven selfishly stole his grandfather's box of treasures, and the sun, moon, and stars were accidently released, Aboriginal peoples benefited. Raven Coyote, Wesakechak, Nanabush, Old Man, Crow, and Glooscap gave First Peoples many gifts, even as their actions also made life miserable. A new trickster, dressed in originalism's old garb, also sometimes imparts valuable gifts. Another kind of creation is upon us that simultaneously unleashes chaos for many Aboriginal peoples. Two areas of section 35(1)'s jurisprudence illustrate originalism's helpful and harmful edges: the jurisprudence related to Aboriginal title and Aboriginal rights.

YOU WIN SOME . . . : ORIGINALISM AND ABORIGINAL TITLE

In 2014, the Supreme Court of Canada found that the Tsilhqot'in Nation of central British Columbia was entitled to a declaration of Aboriginal title in their traditional territories. This case was made possible because of the efforts of the Nisga'a First Nation some forty years prior to the Tsilhqot'in victory. The *Calder* case was brought by the Nisga'a and decided by the Supreme Court of Canada in 1973.[45]. Thomas Berger was once again hired as the lawyer for the Indians.[46] This time, he was joined by provincial politician and Nisga'a hereditary chief Frank Calder who put forward the view that Nisga'a title not only existed in British Columbia but that it was never extinguished. While the court declined to grant a declaration of title due to a technicality, six members of the court concluded that Aboriginal title was a "historic" right protected by their "original" occupation of land prior to European arrival (they split three to three on the question of whether such title had been extinguished).

In recognizing title as a legal interest, the court drew on the expertise of Wilson Duff who wrote a book called *The Indian History of British Columbia*.[47] Duff was an anthropologist. He led a long line of experts who gave historical opinions in court but who have not been

45 *Calder v A.G.B.C.*, [1973] SCR 313.

46 An analysis of this case, including Berger's role more generally, is found in Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Aboriginal Rights* (Vancouver: UBC Press, 2007).

47 Reprinted as Wilson Duff, *The Indian History of British Columbia: The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1997).

trained as historians.[48] In accepting his evidence, the court found that Aboriginal title derived from "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[49] Here is one of the roots of originalism within contemporary Canadian-Aboriginal rights law. Proof of Aboriginal title must be calibrated to protect what the Indians were doing "when the settlers came" – an originalist moment to be sure. The court protects those activities that were taking place at the precise moment of contact.

The next case dealing with Aboriginal title was *Delgamuukw v. Attorney General of British Columbia* in 1997.[50] The court once again looked to a particular moment in time to generate hypothetical protections for Aboriginal land rights. Unfortunately, as with the *Calder* case, the "Indians" once again lost their case for technical reasons. This time, their lawyers did not properly draft their pleadings when describing Aboriginal peoples' historic political organization. The court said this prejudiced the Crown's defence of the Gitksan and Wet'suwet'en claim. However, the court did go on to identify key principles for proving Aboriginal title in future cases. Chief Justice Antonio Lamer wrote that "[i]n order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title."[51] The date that "British sovereignty over British Columbia was conclusively established [was] by the Oregon Boundary Treaty of 1846."[52] Originalism reappeared. Once again, we have a specific moment in time to find or impute an intention for protecting Aboriginal title. Law will require

48 Bruce Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011); Robin Riddington, "Fieldwork in Courtroom 53: A Witness to Delgamuukw v. BC," *BC Studies* 95 (1992): 12–24; Michael Asch, "Errors in Delgamuukw: an Anthropological Perspective," in *Aboriginal Title in British Columbia: Delgamuukw v. the Queen*," edited by Frank Cassidy, 221–42 (Lantzville, BC: Montreal: Oolichan Books and the Institute for the Research on Public Policy, 1992); Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiff* (Vancouver: UBC Press, 2005); Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Feasts and Land Claims* (Vancouver: UBC Press, 1994); Antonia Mills, *Hang on to These Words': Johnny David's Delgamuukw Evidence*, (Toronto: University of Toronto Press, 2005).

49 *Calder v Attorney-General of British Columbia*, [1973] SCR 313, 328.

50 *Delgamuukw v Attorney-General of British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

51 Ibid., para. 144.

52 Ibid., para. 145.

proof of the fact that prior Aboriginal possession of land be correlated to the precise historical moment to secure recognition in a contemporary setting.

As noted earlier, the case that finally succeeded in proving title was *Tsilhqot'in Nation v. British Columbia*. The Supreme Court of Canada applied the *Delgamuukw* test and found that "Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty."[53] As a result, the Tsilhqot'in were recognized as holding "ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[54] The provincial Crown's title was ousted from Tsilhqot'in land, and the Tsilhqot'in people now have the control over lands they possessed when the Crown asserted its sovereignty over their territory in 1846.

This is a seemingly good result for the Tsilhqot'in people. Originalism results in wide-ranging protections for Aboriginal peoples. It protects land rights in "Indian" territories despite subsequent displacement and dispossession (even if this protection rests on legal fictions).[55] Ensuing colonial developments that denied Aboriginal land rights are considered to be irrelevant. Aboriginal peoples' mistreatment after the period of contact does not erode original Indian title. It does not endorse the Crown's wrongful appropriation of Aboriginal peoples' beneficial title. The court protects the group's "original" entitlement. Rights to land are safeguarded in accordance with an imputed Crown intention as evidenced by the Royal Proclamation of 1763, which is also embedded in broader common law principles.[56] The proclamation and the common law reserves original land holdings to Indians until such time as they are surrendered to the Crown through treaties. There is a public meaning imputed at the moment the Crown asserts sovereignty that reserves lands for Indians.

53 *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256, para. 66.

54 Ibid., at para. 73.

55 For a discussion of the role of legal fiction that enables the court to remain in the familiar archive of its own historiography while claiming to listen to the Elders oral history, see Lorraine Weir, "Oral Tradition as Legal Fiction: The Challenge of Dechen Ts'edilht in *Tsilhqot'in Nation v. British Columbia*," *International Journal for the Semiotics of Law* 29 (2016): 159–89.

56 John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch, 155–72 (Vancouver: UBC Press, 1997).

This is all good news for Aboriginal peoples. Freezing history at the moment when the Crown asserted sovereignty turns back the clock for Aboriginal peoples and allows them to claim the land rights they possessed at that time. It has the potential to allow them to "take back" large swathes of land in British Columbia. In this story, originalism might be considered Aboriginal peoples' greatest hope.

... and then you lose some: self-government and originalism

But then the trickster re-appears. The *Tsilhqot'in* decision's originalism has a double edge. Aboriginal peoples' economic, social, and political rights do not fare as well under originalist analysis. The flaw in originalism's fabric is evident when applied to Aboriginal rights that are not related to land – rights like hunting, fishing, trading, education, economic development, caring for their children, providing for their health, and general welfare – in short, rights to self-government. In this realm, the Supreme Court of Canada finds the magic moment for vesting rights is the moment of contact and not at the later moment of the Crown's assertion of sovereignty. This is when rights gain protection under Canada's Constitution if they are not extinguished before 1982. The court comes to this conclusion through another originalist justification. It finds that "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[57] Again, this is not a bad conclusion.

Unfortunately, a significant problem manifests itself when the court holds that the "the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans."[58] This test requires proof of what was integral to distinctive Aboriginal societies upon contact. If a practice developed after contact it cannot be protected as an Aboriginal right within Canada's Constitution.

57 *Van der Peet*, para. 30.
58 Ibid., at para. 44.

The flaw in originalism's design is perhaps most apparent in the case of *R. v. Pamajewon*.[59] The *Pamajewon* case, like the *White and Bob* case before it, once again tested the relationship between provincial law and an Aboriginal asserted right. No treaty was involved this time, however. Members of the Shawanaga and Eagle Lake First Nations were charged with operating a common gaming house contrary to section 201 of the Criminal Code.[60] They defended this charge by asserting that they were exercising an existing right to self-government under section 35(1) of the Constitution Act, 1982. They had passed laws and created the infrastructure to financially support their communities through high-stake gambling. Similar rights had been recognized by the Supreme Court for the United States for Indian Nations south of the border. The Shawanaga and Eagle Lake Nations could be said to have a right to govern themselves that was integral to their distinctive cultures prior to the arrival of Europeans. They said this right was unextinguished and, therefore, recognized and affirmed in contemporary law.

The court did not accept the communities' arguments. The Supreme Court of Canada applied an originalist framework to deny the Shawanaga and Eagle Lake First Nation's claim. Despite finding that the Anishinaabe people historically gambled, the court found that there was "no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations' historic cultures and traditions, or an aspect of their use of their land."[61] The Supreme Court of Canada accepted the opinion of the lower court, which held: "[C]ommercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized."[62]

The court's recharacterization of the communities' claims from governance to gambling would have been more difficult to manipulate if living tree jurisprudence had been applied. Originalism disciplined the field of inquiry for the courts and community. The court was looking for what was integral to the distinctive culture of the Anishinaabe people prior to contact. The claim to governance was disallowed because it did not accord with the "specific history and culture of the aboriginal group claiming the right." The Anishinaabe people did not

59 *R. v. Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*].
60 Criminal Act, RSC, 1985, c. C-46, s. 201(1).
61 Ibid., para. 18.
62 Ibid., para. 29.

gamble on a twentieth-century scale in the 1600s. Therefore, the court held they could not claim rights to govern activities that did not correlate with first-contact activities. The court wrote that "to characterize the appellants' claim [as self-governance] would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case."[63]

Apparently, looking at Aboriginal rights in accordance with the specific circumstances of each case sends the courts back in time. This demonstrates originalism's flaws; the Supreme Court of Canada's "idea" of history tightly disciplines Canada's Constitution within a colonial framework. The UNDRIP and US jurisprudence would recognize the inherent nature of rights to self-government without resorting to historical analogies. Another alternative would be to argue, in line with the *Person's* case (to slightly paraphrase):

> The Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the constitution was to grant a constitution to Canada. "Like all constitutions it has been subject to development through usage and convention . . ." Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Aboriginal peoples to a great extent, but within certain fixed limits, may be mistress in their own house.[64]

Unfortunately, for Aboriginal peoples, this is a path not taken. The court's fetishization of history is facilitated by a framework that seemingly requires the parties to discuss the origin of rights in the past tense. We do not test freedom of religion for Catholics, Muslims, or Jewish people by what happened in the past when they were subject to greater persecution. We do not judge the rights of gay people to marry by whether such practices, customs, and traditions were integral to a "once-upon-a-time" Imperial or Canadian culture, when constitutions were patriated. We would certainly not deny unions the right to assemble and strike, or the rights of visible minorities to be free of discrimination, based on whether such rights were recognized at the time Europeans contacted Aboriginal peoples or asserted sovereignty

63 *Pamajewon*, para. 27.
64 *Edwards*, 136.

over them. Yet Aboriginal peoples suffer from historicism; their constitutional status is inextricably linked to the very acts designed to diminish their land-holdings and government: contact,[65] the assertion of sovereignty,[66] and treaties.[67] It is my hope that Canadian historians will more fully examine the idea of history as used by the courts as part of their scholarship in the field.[68] There are significant insights to be gleaned from an analysis of the Supreme Court of Canada's philosophy of history, which is revealed in the patterns of thought recorded in their jurisprudence.

CONCLUDING THOUGHTS

A focus on history in constitutional cases has largely frustrated Aboriginal peoples' attempts to overcome colonialism in Canada.

65 *R. v Sparrow*, [1990] 1 SCR 1075, 1103: "[T]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown." For a discussion of the historical justifications for taking Indigenous lands, see Christopher Tomlins, "The Legalities of English Colonizing Discourses of European Intrusion upon the Americas, c. 1490–1830," in *Law and Politics in British Colonial Thought*, edited by Shaunnagh Dorsett and Ian Hunter, 51–70 (New York: Palgrave MacMillan, 2010).

66 *Delgamuukw*, para. 145: "Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted." For a critique of this approach, see Robert J. Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Lindsay G. Robertson, *Conquest by Law How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

67 *R. v Sioui*, [1990] 1 SCR 1025: "Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British. This gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources, in the event that Canada remained under British suzerainty." For a comparative legal history on the use of treaties to dispossess Indigenous peoples, see Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005).

68 In the comparative and international realm historian Laurie Benton has discussed the history of legal frameworks in a revealing way, see Laurie Benton and Richard Ross, eds., *Legal Pluralism and Empires, 1500–1850* (New York: New York University Press, 2013); *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010); Laurie Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

Originalism has concealed more expansive interpretive alternatives. Nevertheless, the power of history as an idea for defining Aboriginal rights has produced a few victories. Aboriginal peoples can claim broad rights to use, own, and manage lands in British Columbia in ways that are not limited by the Crown's subsequent treatment. Unfortunately, the conflation of history and law has prevented Aboriginal peoples from exercising constitutional powers that do not have historic analogies. This has prevented them from effectively governing their lands and communities on a twenty-first-century scale. Colonialism's continued regeneration is nourished by the courts' deference to contact histories.

Historians could play an important role in questioning these developments by interrogating how the idea of history came to dominate Canada's constitutional framework. Human agency is diminished when historical forces are invoked to deny innovative possibilities in present-day adjudication. There is a need to question the originalists' premise that "the moment of European contact [or the assertion of British sovereignty w]as the definitive all-or-nothing time for establishing an aboriginal right."[69] The freezing of Aboriginal rights by reference to colonial events (con)fuses law with history. It privileges non-Aboriginal legal and political development and subordinates Indigenous forms of social organization. The making of stronger distinctions between the disciplines of law and history could help the courts see problems in their approach. Further scholarship aimed at exploring the similarities and the differences between the two fields could aid in remedying some of the difficulties described in this article.

The academic production of Aboriginal/Crown histories should not result in the broadening or restricting of constitutional rights in the present day. Historians must research and write about history through their own disciplinary and interdisciplinary lenses. Likewise, judges, lawyers, and law professors must apply legal principles with an awareness of their limits. While they draw insight from this history, they should not regard the idea of history as determinative for settling present-day constitutional challenges. History is very relevant to legal analysis, but, at the same time, it should not invariably be the first and last word in creating Aboriginal rights resolutions, as largely occurs under current court processes. Indigenous peoples bear the mostly negative consequences of this approach. We should never neglect how political, cultural, social, and economic factors influence the production of history. We should not ignore how these factors can be

69 *Van der Peet*, para. 247.

invisibly passed along to the courts for their unmediated application. This article is written to generate a greater awareness of how the law's fusion with history in the field of Aboriginal and treaty rights requires scholarly interventions to contest this melding. Historians could join others to critique the courts' use of originalism and help shed light on why the idea of history is not always the best guide when resolving our ongoing constitutional disputes.

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